

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 35
5297386

BETWEEN SURINDER KUMAR
 SHARMA
 Applicant

AND STEEL & TUBE HOLDINGS
 LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
 Parvez Akbar for Respondent

Investigation Meeting: 19 October 2010

Determination: 25 January 2011

DETERMINATION OF THE AUTHORITY

- A. Surinder Sharma cannot now proceed with a personal grievance application for unjustified dismissal because he had agreed with his employer in November 2009 on the terms by which his employment would end at that time.**
- B. Mr Sharma's personal grievance application is declined.**

Employment Relationship Problem

[1] This matter concerned whether Surinder Sharma agreed to end his employment on 5 November 2009 or was unfairly pressured by Steel & Tube Holdings Limited (STHL) to do so.

[2] STHL said Mr Sharma had serious health issues through 2008 and 2009 which affected his ability to work. As allowed under an applicable company STHL required

Mr Sharma to undergo medical assessments in October and November 2009. STHL said agreement was then made in a meeting on 5 November, where Mr Sharma was assisted by a union organiser, for his employment to end. STHL said the “*accord and satisfaction*” of that agreement meant Mr Sharma could not now pursue a personal grievance.

The investigation

[3] Written witness statements were provided by Mr Sharma; Engineering, Printing and Manufacturing Union (EPMU) organiser Fiona McQueen and STHL Hamilton Branch manager Rob Williams. At the investigation meeting each witness, under oath or affirmation, confirmed their written evidence and answered questions from the Authority. Mr Sharma was assisted in giving his evidence by an interpreter of Hindi. The parties’ representatives had an opportunity to ask additional questions of the witnesses and make oral closing submissions.

[4] In preparing this determination I have considered the witnesses’ written and oral evidence, the parties’ closing submissions, and relevant background documents provided. As allowed for under s174 of the Act, I have not recorded here all evidence and submissions received but state findings of facts and issues of law and express conclusions on the issues for determination.

Mr Sharma’s employment and health

[5] Mr Sharma began work as a steel bender for STHL in 2004.

[6] Through 2008 and 2009 Mr Sharma had a number of health problems which became of increasing concern to his manager Mr Williams. Mr Sharma, then aged 53, was on sick leave for parts of April and May 2009 and suffered a heart attack in early June. He had a surgical procedure to insert a stent and he returned to work on light duties in late June. On 23 September 2009 he suffered a further heart attack and had another stent inserted.

[7] Although he was cleared to return to work in early October, he was examined

by STHL's company doctor Leo Revell because Mr Williams was concerned that Mr Sharma could not safely work with machinery. In a letter to Mr Sharma's GP Nishkala Pasupati, Dr Revell observed that the right hand side of Mr Sharma's face appeared "*droopy*" and wondered whether he had suffered "*a t.i.a.*" (or in lay terms, a 'mini-stroke'). Dr Revell also said Mr Sharma "*certainly looks to have psychomotor retardation*" and needed to see Dr Pasupati very soon as "*he needs some time off because mentally he really needs to get his depression much better*".

[8] Mr Williams took Mr Sharma to see Dr Pasupati the next day. In a letter written to Mr Williams that day Dr Pasupati said her examination of Mr Sharma found no neurological condition or signs of stroke. While Mr Sharma still had some chest pain, Dr Pasupati considered him physically fit for light duties. However she noted Mr Sharma "*had multiple emotional issues that may be triggering a flare of his depression*". She suggested an occupational health assessment should be arranged or for the company "*to consult a private psychiatrist to confirm the fitness for him in view of his depression/emotional issues*".

[9] In the following week Mr Williams sought to arrange an assessment of Mr Sharma through an agency engaged by STHL to provide case management of employees' injury and health concerns and rehabilitation. However Mr Sharma refused to sign the necessary authorisation for the agency to collect information about him, including dealing with his health care providers.

[10] Mr Williams then sought Mr Sharma's agreement to cooperate in getting a further medical opinion from Dr Revell. Mr Sharma did not agree and Mr Williams scheduled a formal meeting with Mr Sharma. Arrangements were made for Ms McQueen of the EPMU to attend the meeting as Mr Sharma's representative.

[11] The day before that meeting Dr Pasupati provided Mr Sharma with a letter which said he had requested leave until 18 January to improve "*his ongoing mental and physical health*". Dr Pasupati said she supported the leave request.

[12] At the meeting, on 4 November, Mr Williams explained that the company had given Mr Sharma "*quite a bit of time off*" in the hope his health would improve but it

had not. He said the company did not agree with the proposal for a further two months' leave however Mr Sharma believed he had two months annual leave owing. Ms McQueen then spent some time with him reviewing the leave records and confirmed he was not owed leave. Her evidence was that Mr Sharma then wanted to arrange for leave without pay and Ms McQueen explained that was a matter of discretion for the employer.

[13] The meeting adjourned after Mr Sharma agreed he would undergo a further medical assessment with Dr Revell and signed an authority for the report to be given to STHL and the EPMU.

[14] Mr Williams and Ms McQueen accompanied Mr Sharma to Dr Revell's clinic. Ms McQueen sat in the doctor's office while he assessed Mr Sharma.

[15] A written report from Dr Revell was available to the parties when they met again on 5 November. He stated Mr Sharma still had psychomotor retardation, should not attend work and should see a psychiatrist in the very near future. It concluded:

There is no question that he needs at least two months off work at this time. If he has appropriate treatment he should return to complete good health. The treatment would be care by a psychiatrist and involve medication. Treatment when he is stabilised should not affect his work performance at all and he should be back to full performance in time with appropriate treatment. He cannot be present at work in the short term.

[16] At the 5 November meeting Mr Williams described Mr Sharma as unfit for work and said the company could not hold his job open for an unlimited time. He said the only option was to give Mr Sharma his final pay but he would personally look after Mr Sharma, including taking him to the WINZ offices if he wanted.

[17] In the ensuing discussion Mr Sharma made it clear he was unhappy with that proposal and wanted two months leave.

[18] Ms McQueen's meeting notes record Mr Sharma asking for the two month break and a letter stating that when he was well and there was a vacancy, he could get

a job back. She also recorded requesting four weeks' additional paid leave for Mr Sharma and that Mr Williams "*came back with 2 weeks*".

[19] She noted that Mr Sharma kept repeating the same sentence – "*I need to take two months leave*" – but was adamant that he would return to work in two months. Her notes also stated: "*Letter of termination to include position available if well in 2 months*".

[20] In an email to STHL's human resources advisor after the meeting Mr Williams said he had agreed to Mr Sharma's employment ending with an additional two weeks' pay in lieu of notice and "*that if the company has a position available when [Mr Sharma] wants to return to work, that we would consider him for the position*". He noted that the agreement was to be put in writing and arranged for the advisor to draft a letter.

[21] The letter, dated 10 November, referred to Mr Williams proposing that Mr Sharma's employment be terminated under STHL's Fit for Work Policy and Mr Sharma accepting the proposal. It continued:

We also agreed that if you obtained full clearance from a medical practitioner and wanted to return to work at Steel and Tube, we would consider you for a position.

[22] Mr Sharma said he did not get the copy of this letter posted to him. He had left the country by 10 November on a visit to India for the marriage ceremony of his daughter.

[23] After returning to New Zealand in January Mr Sharma contacted the company and then the EPMU. He said that this was when he found out that his employment had ended. He said that he did not see a copy of Mr Williams' letter of 10 November 2009 until he was sent a further copy on 27 January 2010. He said that he understood he was given two months off work and was to contact Mr Williams about when to start back at work. He then began the steps that led to the Authority's investigation of his personal grievance application.

The existence of agreement

[24] This is not a matter where the Authority was simply investigating whether an employer has done enough in the support and management of an ill or injured worker to be able to say that the employment could fairly be terminated. Rather, the central issue was whether, in the circumstances of Mr Sharma's ill-health and the medical information available to Mr Williams in early November, the parties had agreed that the employment would be terminated.

[25] In considering the existence and integrity of what STHL says was such an agreement, there were two issues of concern – firstly, Mr Sharma's capacity to make an agreement on a binding basis at the time, and secondly, Mr Sharma's reasons for seeking leave at the time.

Mr Sharma's capacity

[26] I am satisfied from the evidence of Mr Williams and Ms McQueen that care was taken to ensure Mr Sharma understood what was being proposed, Mr Sharma did understand, and Mr Sharma was not placed under undue pressure to enter an agreement on the terms on which his employment was to end with STHL.

[27] Mr Williams had been concerned about Mr Sharma's health for more than a year and had taken steps to assist him. Mr Williams accepted, in answer to the Authority's inquiry, that it was "*a fair question*" to ask whether Mr Sharma was capable on 5 November of making an agreement about his future if he was so unwell. However I accept Mr Williams' evidence that, on that particular day, the course of the conversation showed that Mr Sharma was able to talk and disagree with what was being put to him. This was different from other days where he accepted Mr Sharma could not have properly attended or taken part in such a meeting. He referred to a number of other days when Mr Williams or another staff member would drive Mr Sharma and his car home because Mr Sharma appeared too unwell to work.

[28] Ms McQueen's written evidence said she was concerned Mr Sharma had sat with his head down during the meetings and just repeated the same sentence about

needing two months leave. However her oral evidence referred not only to the meetings with Mr Williams on 4 and 5 November but also her observations from her pre-meeting interview with Mr Sharma, in adjournments of those meetings and during his appointment with Dr Revell on 5 November. In that evidence she confirmed she was confident Mr Sharma was able to give her clear instructions during those adjournments – particularly on pursuing a two month leave period – and that he appeared able to understand and clearly answer questions from Dr Revell. These were not the first times that she had met Mr Sharma as she had dealings with him earlier in 2009 about pay and leave issues. She was, I accept, familiar with Mr Sharma and considered he had agreed to the proposal provided Ms McQueen ensured the arrangements would be recorded in writing.

Mr Sharma's motives

[29] I was not satisfied with Mr Sharma's evidence that he had not agreed to the agreement recorded in Mr Williams' letter of 10 November or was not capable of doing so at the time.

[30] That is a conclusion that I have come to on the balance of probabilities, that is based on what is more likely than not.

[31] Ms McQueen's evidence mentioned that Mr Sharma kept repeating during the 4 and 5 November meetings that he needed two months leave. However there was no evidence that – at that time – he explained or even mentioned a major reason for that request and which only became apparent during the Authority's investigation. Around June 2009 Mr Sharma had made airline bookings for him, his wife and his son to attend the marriage ceremony of his daughter in India during early December 2009. To participate in those important family festivities he needed to arrive in India during November and in fact had left to do so by 10 November.

[32] The period of leave – at least two months – that he had asked his GP to endorse and recommend to his employer coincided with the period for which he had booked to be away in India.

[33] Mr Sharma asserted Mr Williams was “*fully aware*” that he would be overseas by 10 November but Mr Williams denied knowing Mr Sharma’s daughter was getting married or that Mr Sharma was going overseas. There was no evidence to corroborate Mr Sharma’s assertion that Mr Williams did know.

[34] I consider Mr Sharma’s desire to leave for his daughter’s wedding was a factor in the likelihood that he did, as the evidence of Mr Williams and Ms McQueen suggests, agree to the terms on which his employment would end at that time. How it might then resume was a matter he left to deal with after his return from India.

Determination

[35] For the reasons given I find Mr Sharma did make an agreement on 5 November 2009 for his employment to end and he was capable of making such an agreement. The prospect that he was forced to make such an agreement against his will and against his interests is unlikely given that he was represented at the crucial time by a professional union representative.

[36] There was, I find, accord and satisfaction on the terms under which Mr Sharma’s employment with STHL ended from 5 November. There was a genuine dispute about whether STHL could continue to keep open Mr Sharma’s job or whether he was too unwell to continue. Following Dr Revell’s assessment and further discussion, there was a meeting of minds on the proposal for the employment to end for which consideration was given by STHL’s promises (to pay Mr Sharma’s entitlements promptly and consider him for future work on certain conditions) and Mr Sharma’s acceptance of those terms provided they were confirmed in writing.

[37] Importantly Mr Williams confirmed in his evidence that STHL would still honour that agreement – if Mr Sharma were fit to work and had a suitable medical clearance, STHL would consider him for any vacant position.

[38] However, if I were wrong on the question of whether Mr Sharma had agreed to those terms, I accept, in the alternative, that STHL was entitled to rely on the representations made to it by Ms McQueen that Mr Sharma did accept his

employment ending on those terms. STHL was not aware at that time that Mr Sharma may not have agreed to the terms. Mr Sharma is bound by the representations made by Ms McQueen on his behalf.

Costs

[39] Costs are reserved. The parties are encouraged to resolve any question of costs between themselves. If they are not able to do so and the Authority's determination of costs if required, STHL may lodge and serve a memorandum as to costs within 28 days of the date of this determination. Mr Sharma would then have 14 days from service of STHL's memorandum to lodge and serve a reply. No application for costs will be considered outside this timeframe without prior leave.

Robin Arthur
Member of the Employment Relations Authority