

[3] Mr Siegel exchanged a couple of calls and text messages with a colleague in the service team about being away from work due to the accident. However he did not have any communications with anyone in a management role. Advance says it could not contact Mr Siegel and because it had not directly heard anything from him about the nature of and prognosis for his injury it wrote to him on 24 May. This letter was incorrectly sent to a neighbour's address but it did eventually get to Mr Siegel.

[4] Advance's letter said it had been unable to contact Mr Siegel and it pointed out his absence was straining the service department and causing the business to suffer. Advance instructed Mr Siegel within two working days to give it proof he had been medically cleared to resume his normal duties immediately and it warned him that failure to do so would result in termination of his employment.

[5] Mr Siegel met with the managing director, Mr Jiwa Nadan, the finance and administration manager, Neel Kamal, and his colleague Sanjiv Krishna, on 25 May 2012. The parties discussed Mr Siegel's injury, his ability to return to work and the problems that his absence were causing his colleagues and the business.

[6] The meeting was adjourned to allow Mr Siegel to provide Advance with the outcome of his specialist appointment on 29 May which he hoped would clear him to return to work. Although Mr Siegel saw his specialist he was not cleared to return to work and he failed to pass any information about his specialist appointment to Advance, as agreed. This caused Advance to send Mr Siegel a second letter dated 1 June (also sent to the incorrect address).

[7] The 1 June letter recorded Advance's understanding that Mr Siegel had texted a colleague asking to come and pick up his tools which it said indicated Mr Siegel did not wish to continue his employment. Advance also pointed out that Mr Siegel had not provided medical clearance to resume his normal duties and again emphasised that his continued absence had been straining the service department and causing problems for the two remaining service technicians and the business. Advance said it would terminate Mr Siegel's employment on 7 June if it did not hear from him. Mr Siegel was told he had until 7 June to raise any matter he wanted considered before Advance made a final decision about his ongoing employment.

[8] Mr Siegel acknowledges he was not medically cleared to return to his normal full duties by 7 June and that he was not cleared to return to work until 22 September 2012, almost five and a half months after his initial injury.

[9] Mr Siegel says he did not see the 1 June letter until he collected a copy of it from Advance when he went in to collect his tools on 5 June. Mr Siegel says he arranged to collect his tools after seeing what he believes was his job advertised on Trade Me. I accept Mr Nadan's evidence the Trade Me advert was not for Mr Siegel's job but was to replace one of the other three service technicians who had resigned since Mr Siegel's injury.

[10] Mr Siegel wrote to Advance on 6 June in response to its 1 June letter. Mr Siegel said:

- a. he wanted to return to work
- b. he believed there were light duties he could do
- c. he was seeing a specialist on 13 June to assess his long term prognosis and would give Advance a copy of the specialist's report
- d. he wanted Advance to work with ACC's occupational therapist to assist the parties with a return to work plan
- e. he believed he was able to perform the majority of his normal day-to-day work functions as well as other light duties in other parts of the business
- f. he wanted the opportunity to discuss the matter further with Advance.

[11] On 13 June Mr Siegel sent Advance his latest ACC medical certificate which said he could return to light duties provided he avoided lifting items heavier than 15kg. Mr Siegel believes the majority of his normal duties involved lifting less than 15kg but Mr Nadan strongly disputed that given the size and nature of the commercial cleaning equipment he repaired and maintained. I consider on the balance of probabilities Mr Siegel was overly optimistic about the amount of work that could possibly have been available to him had he not lifted items heavier than 15kg because he was so keen to return to work and was anxious not to lose his job.

[12] When Mr Nadan received the ACC report dated 13 June he called Mr Siegel and told him Advance could not continue to keep his job open because he had still not been cleared to return to his normal duties. Mr Nadan terminated Mr Siegel's employment with effect from 14 June. Mr Nadan also told Mr Siegel that once he had received clearance to resume normal duties then Advance would consider re-employing him. At that point the parties had agreed it was likely to be several more weeks before Mr Siegel would be 100% fit to return to work.

Issues

[13] The issues to be determined include:

- (i) Was Mr Siegel's dismissal justified?
- (ii) If not, what remedies should be awarded?

Was Mr Siegel's dismissal justified?

[14] Justification must be determined in light of the s.103A justification test in the Employment Relations Act 2000 (the Act). This requires the Authority to determine whether Advance, and how it acted, were what a fair and reasonable employer could have done in all of the circumstances at the time Mr Siegel was dismissed.¹

[15] I find Advance had a genuine and good reason for ending Mr Siegel's employment on the grounds of medical incapacity. Advance had kept Mr Siegel's job open for two months which had created real and serious pressure for the business. Mr Siegel was one of only three technicians so in his absence the other two technicians had to cover his workload.

[16] Mr Siegel agreed his absence would have put the other two serious technicians under considerable pressure. I accept Mr Nadan's evidence that the business had to turn down work from its customers because it did not have enough technicians available to do the work. Mr Siegel had only been working for the company for about six months and he had received considerable training.

[17] I find Advance could not reasonably have been expected to have engaged a temporary worker or a fixed term employee to cover Mr Siegel's position until he was

¹ Section 103A ERA.

fit to return to work because the training that would be required for his replacement made that impractical.

[18] There is always a balance that must be found in medical incapacity terminations. An employee is entitled to have their position held open for a reasonable period but an employer cannot be expected to do so indefinitely particularly when the absence is having an ongoing adverse impact the business or other employees/customers/clients.

[19] I consider a fair and reasonable employer in Advance's position could reasonably have concluded after Mr Siegel had been away from work for two months that termination was an appropriate outcome in all the circumstances because there was no end point in sight as to when Mr Siegel would be fit to return to his normal duties.

[20] Although Advance had a good reason for ending Mr Siegel's employment, I find that the way it went about doing so was not what a fair and reasonable employer could have done in all the circumstances. I therefore find that Mr Siegel's dismissal was procedurally unjustified because Advance failed to follow a fair and proper process before it terminated Mr Siegel's employment.

[21] These procedural problems were not minor and did result in unfairness to Mr Siegel, so I am not precluded by s103A(5) of the Act from determining that Mr Siegel's dismissal was unjustified.

[22] Advance sent both its 24 May and 1 June letters to the incorrect address. This deprived Mr Siegel of adequate time to prepare for the 25 May meeting. He was also not advised of the right to take advice or have a support person or representative accompany him to the 25 May meeting.

[23] Advance also failed to take adequate steps to follow-up Mr Siegel when he did not provide the updated medical report following his 29 May specialist appointment. This omission meant that the only medical information Advance had when it decided to terminate Mr Siegel's employment was the ACC form dated 13 June.

[24] I consider that was deficient because a fair and reasonable employer would have ensured it had that latest medical information available before it dismissed an employee. Advance was not just reliant on Mr Siegel voluntarily proving his medical

information because it had a contractual right to have him medically assessed had it wished to do so.

[25] Advance failed to engage with the ACC occupational therapist who had been attempting to contact Mr Nadan to arrange an onsite meeting to assess Mr Siegel's workplace and duties with a view to implementing a gradual return to work programme. That is a basic step that should have occurred but did not as a result of Advance's failure to arrange the required meeting.

[26] It was also unfair of Advance not to arrange a subsequent meeting with Mr Siegel to discuss the medical evidence in his 13 April ACC certificate which recorded he could return to light duties provided he did not lift more than 15kgs. Advance also failed to engage with Mr Siegel about the light duties he considered were available for him to do which I consider was unfair and unreasonable. A fair and reasonable employer would not have terminated Mr Siegel's employment over the phone particularly where he had requested a further meeting to discuss his situation.

[27] I therefore find that how Advance acted in relation to the termination of Mr Siegel's employment was not what a fair and reasonable employer could have done in all the circumstances. Accordingly, Mr Siegel's dismissal is procedurally unjustified.

What remedies should be awarded?

Lost remuneration

[28] Because Mr Siegel's dismissal was substantively justified he is not entitled to claim lost remuneration because a fair and proper process would have resulted in his dismissal being justified. However, even if Mr Siegel's dismissal had been substantively unjustified he would still not be entitled to lost remuneration because he was not fit to return to work for more than three months after his dismissal and he received his ACC payment until 22 September 2012.² Mr Siegel therefore cannot be said to have lost remuneration as a result of his dismissal.

² The date he was fully medically cleared to return to work.

Distress compensation

[29] Mr Siegel seeks \$8,000 distress compensation but the evidence does not support an award at that high level. The evidence in support of Mr Siegel's claim for distress compensation was minimal. He merely says his dismissal put him under considerable financial pressure and that he felt humiliated because it was the first time he had been dismissed from a job. I consider that an award of \$2,000 is appropriate to compensate Mr Siegel for his distress.

[30] Advance is ordered to pay Mr Siegel \$2,000 under s.123(1)(c)(i) of the Act for the humiliation, loss of dignity and injury to feelings he has suffered as a result of his unjustified dismissal.

Contribution

[31] Section 124 of the Act requires me to consider whether Mr Siegel has contributed to the situation which gave rise to his grievance and, if so, to reduce remedies accordingly.

[32] I find Mr Siegel did engage in blameworthy conduct which requires a reduction in remedies because he did not properly communicate with his employer about his absence and in particular about his prognosis. Mr Siegel's minimal casual contact with a colleague was insufficient to meet his obligations to his employer. Mr Siegel also failed to provide Advance with medical information that he said he would and that directly led to Advance's letter of 1 June which ultimately resulted in Mr Siegel's employment being terminated.

[33] Mr Siegel's distress compensation should be reduced by 25% to reflect his contribution to the situation which gave rise to his dismissal grievance.

Costs

[34] Mr Siegel as the successful party is entitled to a contribution towards his actual legal costs. Any claim for costs must be supported by proof that he has actually incurred the costs claimed.

[35] The parties are encouraged to resolve costs by agreement. If that is not possible then Mr Siegel has 14 days from the date of this determination to submit a costs memorandum and Advance has 14 days within which to respond.

[36] In order to assist the parties to resolve costs by agreement, I can indicate the Authority will adopt its usual notional daily tariff based approach to costs, with the current notional daily tariff being \$3,500. The tariff will then be adjusted to reflect the particular circumstances of this case so the parties are encouraged to identify any factors they say should result in an adjustment to the notional daily tariff.

Rachel Larmer
Member of the Employment Relations Authority