

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 366
5446046

BETWEEN FAYE STEVENSON
Applicant

A N D PJ BROUGHAN FAMILY TRUST
Respondent

Member of Authority: T G Tetitaha

Representatives: J Walpole, Advocate for the Applicant
C Connor, Representative for the Respondent

Investigation Meeting: 2 September 2014 at Auckland

Submissions Received: 29 August and 2 September 2014 from the Applicant
2 September 2014 from the Respondent

Date of Determination: 2 September 2014

ORAL DETERMINATION OF THE AUTHORITY

- A. Ms Stevenson was incapacitated in terms of clause 14.3.3 and a fair and reasonable employer could have considered her dismissal due to incapacity in the circumstances.**
- B. The process leading to dismissal for incapacity was not what a fair and reasonable employer could have done in all the circumstances. Ms Stevenson was unjustifiably dismissed.**
- C. There is an order that the PJ Broughan Family Trust pay compensation of \$1,000 to Faye Stevenson pursuant to s.123(c)(i) of the Act.**
- D. There is an order that PJ Broughan Family Trust pay costs of \$633 plus GST to Faye Stevenson.**

Employment relationship problem

[1] The applicant, Faye Stevenson, was employed by the PJ Broughan Family Trust (the respondent) as a Wharf Supervisor. Following an accident in June 2013,

she was dismissed for incapacity on or about 7 October 2013. She alleges she was not incapacitated but was unjustifiably dismissed.

Preliminary matter – respondent employer

[2] The original application named Auto Movements (NZ) Limited as the respondent employer. Both parties now accept Ms Stevenson's employer was the PJ Broughan Family Trust. Auto Movements (NZ) Limited acted as the respondent's duly authorised agent in dealing with their employees, including the applicant. There are no remedies or orders being sought against Auto Movements (NZ) Limited. Accordingly by consent, Auto Movements (NZ) Limited shall be struck out as a party and the PJ Broughan Family Trust shall be added as the named respondent.

Facts leading to dismissal

[3] Ms Stevenson was employed on or about 7 February 2008. She signed an individual employment agreement naming PJ Broughan Family Trust as her employer. Her day-to-day employment matters were dealt with by Auto Movements (NZ) Limited.

[4] On 10 June 2013 Ms Stevenson broke her ankle at home requiring two plates to pin her injuries. During this period she was in discussions with Chris Connor, National Group Manager for Auto Movements Limited. These discussions included her concerns about her job being kept open. Mr Connor told her it was dependent upon her rehabilitation. At that time Ms Stevenson was receiving ACC accident compensation.

[5] Between July and September 2013 Ms Steven provided various medical certificates about her fitness to work.

[6] A medical certificate dated 27 July 2013 stated Ms Stevenson was unfit to work until 7 August 2013. The medical certificate noted she was "*in a cast, unable to [bear] weight*".

[7] A medical certificate dated 6 September 2013 for the period 6 to 19 September 2013 stated "*would be fit for sedentary work at this stage*". There were restrictions on the types of work she could do including no driving, prolonged sitting, walking and standing.

[8] A medical certificate dated 18 September 2013 stated she was “*unable to walk/mobilise*”. It also noted she was suitable for “*desk job/sitting job 3 hours per day*”.

[9] On 7 October 2013 Ms Stevenson contacted Mr Connor to discuss her return to work to do light duties. It was during this discussion Mr Connor confirmed she was being sent a letter terminating her employment and that she was to receive it today by courier. The applicant was upset.

[10] On 15 October 2013 Ms Stevenson raised a personal grievance by way of an email.

[11] On 23 October 2013 Ms Stevenson received a further medical certificate for the period 23 October 2013 to 11 December 2013. The medical certificate included a notation “*would be suitable for sedentary (sitting) work only at this stage*”. The restrictions included no prolonged sitting, walking and standing.

[12] On 31 October 2013 Ms Stevenson received a further medical certificate for the period 31 October 2013 to 15 January 2014. The certificate noted “*sedentary duties only. Unable to walk*”. The restrictions included no prolonged sitting, walking and standing.

[13] On 15 January 2014 Ms Stevenson received another medical certificate dated 15 January 2014 and included the notation “*fit to work 3 hours per day 5 days per week from 15 January 2014 until 2 March 2014. No prolonged walking and standing. Gradual improvement expected over next six weeks*”.

[14] On 23 January 2014 Ms Stevenson filed her statement of problem and the matter is now before me for determination.

Issues

[15] At the previous teleconference for this matter the following issues were raised:

- (a) Was Ms Stevenson incapacitated as contemplated by clause 14.3.3 of her employment agreement?

- (b) Was the process leading to her dismissal for incapacity under clause 14.3.3 what a fair and reasonable employer could have done in all the circumstances?

Was Ms Stevenson incapacitated as contemplated by clause 14.3.3 of her employment agreement?

[16] The applicant accepted the majority of her wharf supervisor's job (up to 80%) involved driving and walking. However, she believed she was still able to undertake the remaining 20% of her job involving administrative work or light duties. Accordingly she disputes she was incapacitated to the extent contemplated under clause 14.3.3 of her employment agreement.

[17] The respondent denies that there were light duties available for her to carry out. The administrative work fluctuated and comprised at most 2 to 3 hours per week. There was insufficient work to provide 2 to 3 hours light duties per day and in particular, the respondent submits that most of Ms Stevenson's job was physically demanding requiring a fit person at all times.

[18] Ms Stevenson's employment agreement provided her "*employment may be terminated forthwith by the Employer if the Employee shall at any time ... Become incapacitated or of unsound mind and unable to perform his/her duties and have exceeded sick or accident leave entitlements or insurance provisions*" (clause 14.3.3).

[19] There were medical certificates before this employer at the time the decision to dismiss was made. These certificates confirmed Ms Stevenson was incapacitated. In particular, there are medical certificates confirming she could not drive, walk or stand.

[20] I accept the majority of Ms Stevenson's job involved walking and driving. Given the fluctuating need for paper work, there might not have been light duties available at the time for her in October 2013 or any previous period. In the circumstances, Ms Stevenson was incapacitated in terms of clause 14.3.3 and a fair and reasonable employer could have considered her dismissal due to incapacity in the circumstances.

Was the process leading to her dismissal for incapacity under clause 14.3.3 what a fair and reasonable employer could have done in all the circumstances?

[21] The applicant submits no process was followed as required by her employment contract and s.103A of the Employment Relations Act 2000 (the Act) prior to the decision for her dismissal.

[22] The respondent says Ms Stevenson raised possible job loss in June 2013 and was told it was dependent upon her rehabilitation. It says there were continuing conversations about her fitness to return to work including the exclusion of light duties. By October 2013 extra help was required to cover Ms Stevenson's position and the respondent could no longer hold it open. In particular the respondent points to the fact that Ms Stevenson was incapacitated at the time of the decision and had been since June 2013. It was not until February 2014 that Ms Stevenson had any prospect of a return to work.

[23] Clause 14.3 of the employment agreement provides where employment is to be terminated by an Employer under clause 14.3.3:

...
In any such case the Employer shall send or deliver to the Employee a notice specifying details of the matter or matters giving rise to rights of termination hereunder and may, after hearing the Employee in response to such notice, decide to dismiss the Employee and terminate this Agreement forthwith in any case to which clause 14.3.2 applies but otherwise by giving one (1) week's notice (or by making payment of one (1) week's salary and allowances in lieu thereof).

[24] The employment agreement sets out a process it must follow prior to termination occurring under clause 14.3.3. This includes sending her notice of the matter giving rise to her termination and affording her an opportunity to respond. These are similar to the legal requirements to be met prior to an employer's decision to dismiss in s.103A of the Employment Relations Act 2000. Section 103A requires the employer's concerns to be raised, an opportunity for the employee to respond, and genuine consideration of an employee's responses prior to making the decision to dismiss.

[25] The facts here show that neither the contractual nor statutory process was followed. These defects were not minor and did result in unfairness to Ms Stevenson. The process leading to dismissal for incapacity was not what a fair and reasonable employer could have done in all the circumstances. Ms Stevenson was unjustifiably dismissed.

Remedies

[26] The applicant seeks lost wages under s.123(b) and s.128 of the Act. The respondent denies that there were any losses because Ms Stevenson received ACC compensation and was incapacitated at the time.

[27] The onus is upon an applicant to show they have mitigated any lost remuneration claimed under s.123(b) of the Act by finding alternative work. If Ms Stevenson was incapacitated she could not have worked at all, she could not have lost remuneration under s.123(b) of the Act.

[28] I decline to order any lost remuneration pursuant to s.123(b) because Ms Stevenson was incapacitated and receiving ACC compensation at the time of her dismissal.

[29] The applicant also seeks \$8,000 compensation for distress under s.123(c)(i) of the Act. The respondent submits there should be no award or a substantially less award because Ms Stevenson was aware she may be terminated for incapacity and was incapacitated at the time of dismissal. It says any award must be limited to distress at the defective process and should be modest.

[30] Given my above findings, any compensation must be limited to Ms Stevenson's distress arising from the defective process only.

[31] The applicant's evidence suggests her distress was temporary and appeared to be more akin to frustration and anger at the lost opportunity to sit down and discuss the possibility of light duties and a return to work at a future date.

[32] This is not a case where a large award of compensation is appropriate. An award of \$1,000 is appropriate to compensate for Ms Stevenson's distress in these circumstances.

[33] There is an order that the PJ Broughan Family Trust pay compensation of \$1,000 to Faye Stevenson pursuant to s.123(c)(i) of the Act.

Costs

[34] The parties have asked me to determine costs. They both accept that the Authority's daily notional rate of \$3,500 should apply.

[35] The applicant has been successful. She is entitled to an award of costs.

[36] This hearing took half a day. Accordingly, the appropriate starting point for costs would be \$1,750.

[37] I am told Ms Stevenson's actual costs will be \$300 plus one-third of whatever she recovers today. She has been awarded \$1,000, a third of which is \$333. Her total of costs would be \$633 plus GST. This appears more than reasonable in the circumstances of preparation and appearance at a half day hearing.

[38] There are no matters that require increasing or decreasing the daily notional tariff. An applicant cannot receive a costs award greater than the actual costs incurred. Ms Stevenson's actual costs were approximately \$633 plus GST and that is the award I make.

[39] There is an order that PJ Broughan Family Trust pay costs of \$633 plus GST to Faye Stevenson.

T G Tetitaha
Member of the Employment Relations Authority