

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 156
5446588

BETWEEN TANIA MARIE WATSON
 Applicant

A N D TRAINOR ELECTRICAL LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Paul Ellicott, Counsel for Applicant
 Kelvin Trainor and Anne Trainor on behalf of
 Respondent

Investigation Meeting: 10 September 2014 at Dunedin

Submissions Received: At the investigation meeting

Date of Determination: 7 October 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Tania Watson, claims she was unjustifiably dismissed by the respondent, Trainor Electrical Limited (Trainor), on or before 2 December 2013.

[2] Trainor accepts it dismissed Ms Watson but claims it was justified in doing so given her inability to perform her normal duties in the foreseeable future.

Background

[3] Ms Watson is an electrician. She commenced with Trainor on 3 June 2004. Trainor is a small owner company with two directors and shareholders, Anne and Daryl Trainor.

[4] On 1 April 2013 Ms Watson sustained a non-work related injury. It was initially diagnosed as a strain and led to what was essentially five weeks' absence from work. I say essentially as a couple of part days were worked during that period.

[5] On 6 May 2013 Ms Watson returned to work. She stayed for approximately six weeks.

[6] On the morning of 29 June she awoke to severe pain which saw two visits to her doctor followed by hospital admission. During the subsequent six day stay her initial injury was re-diagnosed and surgery was ordered.

[7] She subsequently spoke to Mr Trainor and advised surgery was required. The actual timing of the conversation is unclear. There was a subsequent email which advised it would take approximately four weeks to find out whether ACC would cover the surgery which would be followed with a recovery period of some eight weeks.

[8] On 23 July Trainor wrote to Ms Watson. Amidst other things the letter states:

The nature of our business is such that we are under considerable strain as a result of your absence and must advise that we can't keep your position within the company open indefinitely. We therefore ask that you confer with your doctor or have your ACC advisor contact us with your doctor or have your ACC advisor contact us with your Doctor and or Specialist opinions regarding the date on which we can reasonably expect you to return and or resume full and normal duties.

[9] Ms Watson responded the following day. She sent a copy of her hospital discharge papers and advised she was seeking a medical certificate. That led to the discovery of an administrative error. Her application had not been forwarded to ACC. That was eventually done on 30 July and introduced further delay.

[10] Ms Watson advised Trainor of the situation by email on 2 August 2013. She also reiterated ACC would take another three to five weeks to assess her claim and the surgery would be followed by a six to eight week recovery.

[11] She attached a copy of a doctor's certificate before closing with:

I am guessing ACC case worker will contact you as this doctors cert says I can do sedantary and light duties which I know you dont have any.

[12] On 21 August 2013 an ACC case manager, David O'Connor, spoke to Mr Trainor. Mr O'Connor says Mr Trainor said Ms Watson's position was no longer available. Mr Trainor denies the allegation. He says he advised there were no light duties and Ms Watson would know that given her knowledge of the company.

[13] Mr O'Connor subsequently indicated, in writing, that he may well have misunderstood Mr Trainor's comments. He was not called as a witness.

[14] On 27 August ACC accepted the claim and Ms Watson had her operation on 2 September. Other than that, little occurred until 9 October.

[15] On that day there was a meeting attended by Ms Watson, her aunt (Bernise Ord), Mr and Mrs Trainor. Both Ms Watson and Ms Ord say there was no mention the job would not be held open but there was talk of a reduction in hours given an inability to tender for work as a result of Ms Watson's absence. Ms Watson states she advised her condition was improving but as she was yet to have her post-operative appointment (approximately six weeks after surgery) she was unsure as to when she would return to work.

[16] The post-operative appointment occurred on 15 October. Ms Watson's recovery had been slower than expected and she was advised she needed a work rehabilitation programme and a further six weeks to fully recover. Trainor was advised of this by email on 17 October. In another email (13 November 2013) Ms Watson asked that Trainor keep her in mind if there was any *low impact* work available a few hours a day.

[17] On 25 November Ms Watson gave Trainor another update by email. Included therein was advice her physiotherapist had asked ACC to extend the rehabilitation programme by a further six weeks as it was now thought *it will take that much longer for me to be ready to be back at work properly due to physical nature of the job*. Another medical certificate was attached. It advised Ms Watson could now work fulltime hours but the following physical restrictions would apply until 6 February 2014:

No Lifting or forceful movements, No Heavy physical work, No Prolonged sitting, No Prolonged walking, No Prolonged standing, cannot heavy lift, crouch, walk or stand for too long.

[18] Mr and Mrs Trainor considered this and concluded a full recovery was still a considerable way off. They were of the view the uncertainty regarding staff

availability was unsustainable from a planning perspective and decided to terminate Ms Watson's employment. The decision was advised by letter dated 2 December 2013. Amidst other things it advises:

It is with regret that we inform you we are unable to hold your position at Trainor Electrical Ltd open any longer. As you are aware the original expected date for you to return to work was 11 November, your recovery is clearly going to be an ongoing process and we are unable to run our business in this way.

[19] The letter had a covering note which advised its decision relied, to some extent, on earlier advice tendered at the meeting of 9 October that Trainor was incapable of offering light duties.

[20] Notwithstanding the content of the last medical certificate Ms Watson was working fulltime with a new employer in January 2014. Her new employer did not, however, require a medical clearance and that was only recently obtained.

Determination

[21] Trainor accepts it dismissed Ms Watson and is therefore required to justify the decision. It says it dismissed as incapacity precluded Ms Watson from performing a full range of duties and it was incapable of offering alternates she was capable of performing.

[22] Section 103A of the Employment Relations Act 2000 (the Act), states the question of whether a dismissal is justifiable:

... must be determined, on an objective basis, [by considering] whether the employer's actions, and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal ... occurred.

[23] In applying the test the Authority must consider whether, having regard to the resources available to the employer, the employer's enquiry was sufficient. This means the employer should raise its concerns, allow a response and genuinely consider the response.

[24] Similar obligations exist in respect of termination due to medical incapacity. As was said in *Motor Machinists Ltd v Craig* [1996] 2 ERNZ 585:

(2) Where illness or injury occurs which prevents an employee from returning to work the employer is not necessarily bound to hold that employee's job open indefinitely. However, if the employer chooses to dismiss the employee, its action must be justified at the time in accordance with the established jurisprudence. The employer must have substantive reasons for the dismissal and must show that the procedure it followed in carrying out the dismissal was fair. This ensures that the employee is not dismissed without the opportunity to provide information, such as medical reports, to prevent the employer taking such action, while at the same time allowing the employer to end the contract without needing to establish that the contract was frustrated.

[25] In this instance there was no discussion at the time of dismissal – only a reaction to Ms Watson's medical certificate of 25 November.

[26] Similarly there was no contemporaneous notice Trainor was contemplating dismissal to which Ms Watson could respond with further information. In this respect Trainor relies on the meeting of 9 October as having raised the spectre of possible dismissal. That fails to convince me for two reasons.

[27] First, Mrs Trainor relies on advice the meeting was *serious* (or words to that effect) but accepts Ms Watson was never told dismissal was being contemplated. Furthermore Mrs Trainor accepts the prospect of return was discussed with Ms Watson being told it would not be an issue if she was to remain on ACC till Christmas as there was not much work available.

[28] Secondly, and even if the prospect of dismissal had been notified on 9 October it is inappropriate to rely on such advice given well in advance of the actual decision (*Paykel Ltd v Morton* [1994] 1 ERNZ 875) especially where the employer had indicated a willingness to allow the absence to continue past the eventual date of termination.

[29] There is then the question of whether the deficiencies made a difference or dismissal would have occurred in any event. I do not know.

[30] Though there is no certification she was capable of doing so Ms Watson was working in a full capacity for her new employer before 6 February and may have been able to do so at a time acceptable to Trainor (ie: after Christmas as per [27] above). The complete failure to enquire into Ms Watson's circumstances as required by both the Act and case law means I am unable to say whether or not consultation may have altered the outcome.

[31] Finally I must consider the resources available to the employer. While small Trainor initially obtained advice. To that I add the fact the deficiencies were significant and had they not occurred the result may have differed. In such circumstances I conclude size and resources do not excuse the omissions and the dismissal is therefore unjustified.

[32] Another key argument as to why the dismissal was unjustified was the decision was predetermined. Ms Watson suggested it may have been made as early as August. For two reasons I take this no further. First, I have already found the dismissal unjustified and, second, the claim relied on the evidence of Mr O'Connor and Ms Farrell, an Occupational Therapist. As already said Mr O'Connor resiled from his earlier assertions [13 above] and Ms Farrell's evidence was, at least initially, contradictory.

[33] Ms Watson seeks \$15,000 compensation (s.123(1)(c)(i)) plus a reference. She was told during the investigation that for various reasons there would be no reference even if her claim was to succeed.

[34] There is no wage claim due to two factors. The first is Ms Watson's return to work without clearance and earlier than forecast in the medical certificate. The second was Mr Ellicott's oft repeated statement the challenge was purely procedural. The substantive decision was not questioned.

[35] Ms Watson's claim for what she herself concedes is a higher than normal compensatory award is based, amidst other things, on the fact Trainor's failure to advise her employment might be in jeopardy meant she missed an alternate employment opportunity in October and her escalating legal costs.

[36] I consider neither argument has merit with respect to compensation. Ms Watson's evidence makes it clear the alternate opportunity was not one in which she was overly interested as it failed to meet immediate career goals. Costs are addressed separately and normally the subject of further submission.

[37] That leaves the balance of the evidence tendered in support of the claim. It was weak and based on an assertion Ms Watson felt uncomfortable when dealing with suppliers once she commenced with her new employer. Aside from my conclusion it as it was weak, I note Ms Watson struggled to attribute the alleged reactions to Trainor's actions.

[38] Having considered the evidence, and accepting some hurt must emanate from an unjustified and unheralded dismissal, I conclude the sum of \$2,000 to be appropriate.

[39] The conclusion remedies accrue means I must, in accordance with s.124 of the Act, consider whether or not Ms Watson contributed to her dismissal in a way that warrants a reduction in the remedies. The underlying cause of the situation, an accident, means the answer must be no.

Conclusion and Orders

[40] For the above reasons I conclude Ms Watson has a personal grievance in that she was unjustifiably dismissed.

[41] As a result the respondent, Trainor Electrical Limited, is ordered to pay the applicant, Tania Watson, \$2,000 (two thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[42] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority