

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 145

File Number: 5137879

BETWEEN

JOSEPHINE WRIGHT

Applicant

AND

STRAIT SHIPPING LIMITED

Respondent

Member of Authority: Denis Asher

Representatives: Ian Hard for Ms Wright
Ian Reid for the Company

Investigation Meetings Wellington, 9 February 2010 & 15 March 2011

Submissions Received By 13 July 2011

Determination: 16 September 2011

DETERMINATION OF THE AUTHORITY

The Problem

[1] This employment relationship problem has evolved since the first statement of problem was filed on 26 September 2008. At that time Ms Wright alleged she was injured during the course of her employment and, as a result, claimed \$10,000 payment for medical incapacity in terms of clause 15.3 of her employment agreement and the balance of her ordinary wages, over and above her ACC payments. The basis

of her claim was an allegation that her accident was due to a gross breach by the respondent of acceptable health and safety procedures.

[2] In an amended statement of problem on 11 August 2009 Ms Wright also alleged she had been unjustifiably dismissed. The Company's position is that no grievance was ever raised and it does not consent to it being brought outside of the statutory 90-day period.

A Protracted Investigation

[3] In a telephone conference call on 31 August 2009 the parties agreed to undertake mediation and, in the event it did not settle, a one-day investigation in Wellington on 3 December 2009. It did not settle and court commitments by counsel for the applicant, Mr Ian Hard, meant proposed investigations dates of 3 December and 27 July 2010 had to be vacated. Another investigation date, 17 November 2010, was abandoned by the parties.

[4] In the meanwhile a further amended statement of problem was filed on 16 June 2010.

[5] An investigation date of 15 March 2011 was eventually agreed and adhered to by the parties. However, the investigation was adjourned following the Company's offer, and Ms Wright's acceptance, of a medical examination as to the applicant's fitness for sea service according to the Maritime New Zealand guidelines, Maritime Rules, past 34.

[6] By agreement, the Authority's investigation resumed and concluded on 14 June 2011. The parties agreed a timetable for the filing of final submissions.

Background

[7] The Company operates passenger ferries and freight vessels primarily between Picton and Wellington, and on other coastal routes.

[8] Ms Wright was employed by the Company as a catering attendant. A significant aspect of her work was to ensure passenger safety in the event of an accident or incident. To that end, as a member of the crew safety muster, and before she could commence work, her employer required Ms Wright to be certified as having completed safety training and medically certified as fit and able.

[9] During her employment Ms Wright injured her back. As a result of her accident Ms Wright, and from on or about 27 July 2005, spent a prolonged period away from work.

[10] I understand that, arising out of the accident and up until the Authority's final investigation (14 June 2011), Ms Wright was (and in all likelihood remains) in receipt of ACC payments.

[11] On 1 December 2006, and without returning to any duties, Ms Wright's employment was terminated because, as the respondent saw it, of her inability to work as a result of her injury. Ms Wright says the termination was unjustified as the accident was a result of negligent action on her employer's part, i.e. unknowingly to her, it removed a step which resulted in her accident.

[12] By way of a letter dated 18 October 2007 from Ms Wright's then legal representatives put forward a claim for \$10,000 per clause 15.3 of the Strait Shipping Limited and Maritime Union of New Zealand 2005-2007 collective employment agreement. No reference was made to a personal grievance.

[13] Clause 15.3 provides for the following:

15.1 Maritime Rule Part 34 requires all seafarers to hold a current "Certificate of Medical Fitness. This certificate must be carried by the seafarer at all times and be available for presentation ... on demand.

15.2 The company requires that all seagoing staff maintain a current "Certificate of Medical Fitness". The initial medical examination for employees was completed at the company's expense... . Further re-validations are to be completed at the company's expense by a MNZ (Maritime New Zealand) approved medical practitioner of their choice.

In circumstances where an employee becomes unable to pass a medical examination to the necessary standard to obtain a "Certificate of Medical Fitness", the employer, the employee and the union will discuss the appropriate course of action for the employee. In the event an employee is permanently unfit, and whose employment is then terminated as being medically unfit a taxable allowance of \$10,000.00 will be paid, offset against any extended sick leave already taken ...

[14] Ms Wright says, amongst other claims, she should be paid this allowance as she is no longer medically fit to perform her job: the Company denies the claim on the ground that an approved medical practitioner has not declared her unfit to be medically certificated.

Applicant's Position Summarised

[15] Ms Wright says she experienced her injury because a step had been removed from immediately outside a door, which she stepped through to unhook. It was dark and, with the swell, she fell forward and tried to grab the deck rail: that is how she injured her neck.

[16] Ms Wright was dismissed approximately 18 months after the accident, on 1 December 2006.

[17] The Company has made payment to other employees in circumstances similar to the applicant's.

[18] Ms Wright says she was dismissed because she did not have a prognosis as to recovery at the time she was asked.

[19] The applicant alleges she was treated by the Company in a discriminatory way, including trying to have the ACC investigate her, and disadvantaged.

[20] Ms Wright says the accident, which has left her unable to work in full-time employment, was caused as a direct result of the respondent failing to observe reasonable standards of health and safety. She says it made no attempt to identify, minimise or remove the very clear hazard created by the removal of a step in those circumstances.

[21] The applicant says her union “*very clearly raised a personal grievance with the company early on in the dispute ... at meetings between the parties. I attended some of these discussions and as a result have no doubt that a personal grievance was raised on my behalf at a very early stage. The union was clearly arguing prior to my dismissal that the time-frame was too small for me to obtain a specialist’s report. After my dismissal they clearly informed the company that my dismissal in these circumstances was unjustified*” (par 19 of her second statement).

Respondent’s Position Summarised

[22] The Company says clause 15.3 only comes into effect when a seafarer loses their ability to remain at sea “*and must surrender their chosen profession because they are certified by a Maritime New Zealand (MNZ) approved medical practitioner as being unfit ... for seagoing employment*” (par 2.1 of Mr Clive Glover’s witness statement).

[23] Pursuant to ss. 36 (o) of the Maritime Transport Act 1994, MNZ published a set of rules referred to as Part 34 Medical Standards. These Standards prescribe a set of rules determining whether a seafarer is fit to work in the seagoing industry. The rules require certificates to be issued at various times or following defined events. A prolonged health-related absence exceeding one month is an event requiring re-certification.

[24] The MNZ has appointed and gazetted the names of practitioners in New Zealand who are authorised to examine seafarers.

[25] Aside from a two yearly examination, a seafarer who has been absent from work on account of a health/disability issue for more than 30 days must be re-examined and obtain fresh certification prior to rejoining a ship and working at sea (Rule 32.9 (2) refers).

[26] Various categories of fitness are available to an examining doctor, including the categories unrestricted, restricted, indefinitely unfit but able to be re-examined after a specified interval and permanently unfit (Rule 34.8 (2) refers).

[27] The last category brings to an end a seafarer's maritime career and usually brings their employment to an end.

[28] Ms Wright was absent on account of her incapacity for in excess of 15 months.

[29] There was discussion with Ms Wright around her incapacity. There is nothing on Ms Wright's prescribed form certifying that she was permanently unfit.

[30] At no time did she produce an MNZ approved doctor's certificate that she was permanently unfit for work.

[31] As at December 2006 Ms Wright's certificate of medical fitness had lapsed.

[32] At the time the Company looked at Ms Wright's incapacity there was no justification to seek a fresh maritime medical examination because her doctor was not saying a resumption of work was imminent. At the same time there was nothing to suggest a full recovery would not occur in the fullness of time.

[33] A dismissal for medical incapacity is not the required standard for payment per clause 15.3.

[34] The only time a payment would be due in terms of clause 15.3 is when an MNZ approved doctor declared a seafarer to be permanently unfit.

[35] The report of a medical examination by an MNZ approved doctor dated 29 March 2011 (copy on Authority file) records his finding that Ms Wright was "*indefinitely unfit for sea service, medical category D*" but not that she was permanently unfit for sea service (category E): she therefore does not qualify for payment of the disputed allowance.

[36] The Company says injury did not occur due to negligence on its part: Ms Wright claimed to have slipped when stepping over a storm sill which is an essential part of any marine doorway which is exposed to weather/waste.

[37] No personal grievance in respect of this new claim was ever raised within the statutory 90-day period and the Company does not consent to Ms Wright raising these matters outside of that time frame. Ms Wright's letter of 2 December 2006 to the Company makes no mention of a grievance. Two emails from a union representative dated 8 and 26 February 2007 sought a meeting in respect of the applicant but made no mention of a grievance; no meeting ever took place.

[38] Ms Wright was justifiably dismissed for medical incapacity, following a long absence from work. It denies unjustifiably disadvantaging her or breaching its statutory or contractual duties to the applicant.

[39] At the time the Company undertook a review of Ms Wright's absence so as to know whether a return to work could be expected in the foreseeable future Ms Wright's medical certificates did not suggest she would be permanently unfit. The applicant subsequently was unable to provide a clear prognosis as to when she would be fit to return and the Company determined to dismiss her.

Discussion and Findings

Raising of a personal grievance

[40] Notwithstanding his uncertainty as to the date of the encounter, the uncontroverted evidence provided by Peter Cranney, lawyer, and Mike Clark, union representative, during the Authority's investigation on 14 June 2011 is clear that a grievance in respect of an alleged unjustified dismissal and claim for the medical incapacity payment was verbally raised within the 90-day statutory period on Ms Wright's behalf by her union representatives at a meeting with the Company.

[41] Supporting evidence of the same can be found in the reference to a grievance set out in the applicant's then legal-representative's letter of 15 January 2008 (attachment C to the statement of the Company's witness, Mr Clive Glover).

[42] I therefore accept Ms Wright's position that a grievance alleging unjustified dismissal was raised in the required period.

Unjustified Dismissal

[43] Was Ms Wright unjustifiably dismissed? I do not think so, for the following reasons.

[44] Ms Wright was not fit to undertake her employment at sea. That was the situation from the time of her accident in July 2005, and remains the case today as measured by the doctor's medical examination of March this year, and the fact Ms Wright remains on ACC.

[45] Following a fair and reasonable period of time, and based on medical evidence that has been vindicated by subsequent re-examination, and because of her unfitness, the Company 'fairly cried halt' and terminated the applicant's employment. In a nutshell, Ms Wright was and remains unfit to undertake her duties as a catering attendant.

[46] There is no evidence to support Ms Wright's claim that her accident occurred because of negligence or a foreseeable failure on the part of her employer, namely that it removed a step.

Claim for Medical Unfitness Allowance.

[47] Ms Wright is ineligible for the payment of this allowance because the provisions of her employment agreement are clear: payment is made only in instances where there is a diagnosis of "*permanently unfit*" (clause 15.3).

[48] Bizarrely, Ms Wright was diagnosed as recently as 29 March 2011 as only "*indefinitely unfit*" (attachment to Company's email to the Authority of 30 March 2011).

[49] I say bizarrely as the diagnosis also includes the observation that, "*Having had this problem now for six years since the injury, with no improvement in her condition and no further treatment being offered, it would seem unlikely that she will ever be fit to return to sea. I don't believe there is anything further that can be done from a medical point of view to rehabilitate her*" (above).

[50] The Company is therefore compliant with the clause in refusing to make payment to the applicant.

[51] However, clause 15.3 requires the parties “*to discuss the appropriate course of action for the employee*” who is unable to pass a medical examination to the necessary standard to obtain a fitness certificate. This is clearly an ongoing situation and further medical examinations will be required, in the future. It therefore behoves the Company, as a good employer and for reasons of common sense and practicality, to appropriately address the reality that Ms Wright should now be considered as never being able to return to sea. How many more medical examinations are required before the inevitable permanently medically unfit diagnosis is provided? This is a situation that calls out in the clearest possible terms for the respondent to ‘do the right thing’ even if this Authority cannot.

[52] No evidence was produced to support Ms Wright’s claim of payment to others in similar circumstances.

Determination

[53] Ms Wright’s claims are dismissed.

[54] Costs are reserved.

Denis Asher

Member of the Employment Relations Authority

