

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2016] NZERA Wellington 91  
5583043

BETWEEN            LEE BROWN  
                                 Applicant  
  
AND                    ADVANCE INTERNATIONAL  
                                 CLEANING SYSTEMS (NZ)  
                                 LIMITED  
                                 Respondent

Member of Authority:    M B Loftus  
  
Representatives:        Gary Tayler, Advocate for Applicant  
                                 Jiwa Nadan on behalf of Respondent  
  
Investigation Meeting:    3 May 2016 at Napier  
  
Submissions Received:    At the investigation meeting  
  
Determination:            29 July 2016

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**DETERMINATION OF  
THE EMPLOYMENT RELATIONS AUTHORITY**

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**Employment relationship problem**

[1]    The applicant, Lee Brown, claims he was unjustifiably dismissed by the respondent, Advanced International Cleaning Systems (NZ) Limited (AICS) on 17 August 2015.

[2]    AICS accepts it dismissed Mr Brown but claims it was justified in doing so by reason of medical incapacity.

## Background

[3] AICS is in the business of providing cleaning products to its clientele. Mr Brown was engaged as an Account Manager and responsible for looking after existing customers and cold calling to generate new custom.

[4] Mr Brown was party to an individual employment agreement which, relevant to this claim, contains a clause, 14.6, entitled *Termination on Medical Grounds*. It reads:

*The Employer may terminate this agreement by giving such notice to the Employee as the Employer deems appropriate in the circumstances if, as a result of mental or physical illness or accident, the Employee is rendered incapable of the full ongoing performance of their duties under this agreement.*

[5] On 13 July 2015 Mr Brown had a heart attack. It was followed by open heart surgery.

[6] Mr Brown says he had a telephone conversation with Spencer Day, the Regional Sales Manager to whom he was responsible, on 4 August. Mr Brown says Mr Day proposed that when he was capable of returning a newly appointed Account Manager take responsibility for the territory then covered by Mr Brown's colleague, Stephen. Stephen would take over Mr Brown's territory and he (Brown) would work in AICS's Hawkes Bay premises.

[7] Mr Brown says he had no qualms about this as he thought the new account manager a temporary appointee engaged to cover his rehabilitation. He did not, therefore, question the proposal but nor did he ask whether his understanding the appointee was temporary was correct.

[8] Mr Day, in oral evidence, states he has no recollection of the conversations detail but accepts one occurred around the time Mr Brown claims. Mr Day also accepts Mr Brown's claim that soon thereafter there was a further discussion in which he passed a message Jiwa Nadan, AICS's Managing Director, was of the view Mr Brown only be allowed to return when capable of performing full-time duties.

[9] The following day, 5 August, there was a three-way telephone conversation between Messrs Brown, Nadan and Spencer. Mr Brown says the conversation primarily concentrated on Mr Nadan's view someone in his situation was unlikely to

return to full duties for some six to twelve months. Mr Brown says he challenged this view but was incapable of pushing his belief a return could be sooner as Mr Nadan only appeared interested in offering reasons why he would be incapable of doing so.

[10] Mr Nadan disagrees. He says he was simply trying to ascertain Mr Brown's situation and his rehabilitation prognosis. Mr Nadan says it was Mr Brown who made the comment about a six to twelve month rehabilitation period before adding *Lee sounded very frustrated and emotional during the discussion. I had to cut the meeting short based on the general over tones. We elected to wait and hear of his progress after his doctor's review.*

[11] Mr Nadan's subsequent email to Mr Brown (dated 7 August) refers to the conversation in the following way:

*My phone call to you with Spencer (conference call) was to understand your current recovery programme and also to let you know that your full recovery should be your No.1 priority. In addition, to also understand the communications between you, Spencer and recently with Stephanie. It is good to know the surgery went well and you are progressing well. We appreciate this was a major surgery and it will take several weeks/months to be back to normal physical and emotional health.*

*As suggested, your physician will know best over time and how to take the steps forward to full recovery.*

[12] Mr Day, when first asked about who raised the six to twelve month prognosis, said it was Mr Nadan. He then tried to resile by saying he could not recall as his main focus was Mr Brown's rehabilitation. When asked about Mr Brown's view the company was attempting to impede his return, Mr Day said Mr Brown was only asked how he could manage. The reply was Mr Brown envisaged light duties but it would be up to his doctor.

[13] The parties agree the conversation got terse and did not end pleasantly.

[14] The reference to recent communications with Stephanie (an administrative employee) pertain to Mr Brown's request she fill in various forms for WINZ and his view she was tardy in doing so. This was the subject of email communication between the two with Stephanie questioning whether the forms were appropriate.

[15] On 10 August Mr Brown advised AICS he had been reviewed by his doctor; that he would remain off work until 1 September at which point the situation would be reviewed and he would be incapable of driving till the end of September.

[16] Mr Nadan says he considered this information and it, along with other factors such as Stephen's resignation and what he perceived as Mr Brown's odd behaviour since his heart attack, gave him cause to question whether Mr Brown's employment could continue.

[17] The following day (11 August) Mr Nadan wrote to Mr Brown. Contained therein is the following:

*We have also been reviewing our branch business in Hastings as a result of this absence from the business and the likely impact on it for an extended period.*

*The management is of the view that it is unlikely the business can manage nor sustain the current work demands within the scope of works without an additional Sales Rep/Account manager.*

*For this reason we are consulting with you as per the clause 14.6 of your employment agreement with the company...*

*This sales role was essential to the success/sustainability of the branch in the immediate future and we are of the opinion that you will not be capable to resume full ongoing performance of the duties for several weeks/months.*

*In this regard, we have considered the following aspects:*

- 1. The agreement with you, the nature of the employment role and what is required of it.*
- 2. The nature of surgery and its prognosis. The likely health and safety issues are likely to impact on ongoing recovery inherent in the role.*
- 3. The likely duration for recovery to normal health to be able to carry out duties AND alternate options that may be available for partial return to work after the initial prognosis end of September 2015?*

*Proposal:*

- 1. Your role as sales rep/Account Manager cannot be fulfilled in the short term due to medical incapacity and we feel that it may be best that you stand down from the role.*

*We ask that you consider this and also seek independent advice in this regard.*

*We will consider what other options may be available for you within the business in the future and to the extent a rehabilitation back to work scheme if this was practical.*

*I am happy to discuss any aspect of this with you if you wish, please let me know.*

[18] Mr Day says several days later he received a phone call from a client who initially did not identify himself but said he knew Mr Brown. The client is said to have advised Mr Brown had said AICS was going to get rid of him because of the heart attack. Mr Day says the conversation was unpleasant with the client expressing adverse views of AICS in robust terms. He says the client asked for Mr Nadan's phone number so he could take the issue up with him. Mr Day gave the client the phone number and then phoned Mr Nadan to warn him what might be coming. The client did not, however, ring Mr Nadan.

[19] Mr Nadan considered this latest event and decided to dismiss. He conveyed his decision in an email sent at 3.46pm that day. The email opens by stating it is further to the letter of 11 August and there had been no response from Mr Brown. It mentions the client's telephone call and that he *asked us about you no longer being employed in the Hastings branch and that Stephen had also resigned from his role?*

[20] The email goes on to say:

*He seemed to know a whole lot about what happens in our business and particularly to the confidential internal communications. This is concerning.*

*We will leave this matter where it lies.*

*Lee, it is an unfortunate situation for all concerned with your medical situation and it is necessary that we all manage this as best we can under the circumstances. As suggested, you will need to get your health, recovery and fitness back to normal and the company needs to address its immediate business needs.*

*As such we now advise that we exercise clause 14.6 of the employment agreement and per letter of 11 August 2015.*

[21] The email then advises AICS would prepare Mr Brown's final pay and asked he assist with an orderly handover.

[22] That e-mail appears to have crossed paths with one Mr Tayler sent on Mr Brown's behalf at 3.44pm. It voiced concern about the hiring of the new account manager but went on to say if this had led to an overstaffing situation Mr Brown was

willing to discuss an exit package. It also advised any attempt to simply stand him down would be strenuously resisted.

[23] Mr Tayler followed with formal notification of Mr Brown's grievance the following day, 18 August. Mr Nadan responded on 20 August with his letter giving some insight into his thoughts. Amidst other things it says:

*Lee is unable to carry out his duties and is under medical care for an extended period. Lee also advised per his doctors that it would take further several months before he would be 100% fit to resume normal duties.*

*We needed to make an informed business decision to preserve what is already a marginal business situation in Hastings. Lee is aware of the status of the business, personal and work flow challenges in the branch at this point in time. The phone call from Mr Jones triggered the need to preserve any further damage to the business, time being of the essence.*

*The business was already compromised in the ordinary course.*

...

*We did not expect Lee to share confidential information to the market and amounted to Lee already having made the decision.*

...

*Due respect to Lee's personal situation, we did what we considered was essential damage control and justifiable under the circumstances.*

## **Determination**

[24] Mr Brown claims he was unjustifiably dismissed. AICS accepts it dismissed Mr Brown and in doing accepts it is required to justify the dismissal.

[25] Section 103A of 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.*

[26] In applying the test the Authority must consider whether, having regard to the resources available to the employer, it sufficiently investigated the allegations. A sufficient investigation requires, as a bare minimum, that the employer put the issues, allow an opportunity to respond and consider the response with an open mind.

[27] In this instance AICS relies on medical incapacity to justify its decision to dismiss Mr Brown.<sup>1</sup> That requirements similar to the s 103A test apply when an employer contemplates dismissal by reason of medical incapacity has been confirmed by various cases. *Motor Machinists Ltd v Craig*<sup>2</sup> is an example with the Court observing:

*(1) frustration of contract can occur where illness prevents the performance of an employment contract. However, an employment contract is not frustrated simply because an employee is ill or has been in the past. The contract is not frustrated where there is no medical evidence that the employee is permanently incapacitated or it cannot be said that the incapacity has been such that it destroyed the root of the contract. Under the doctrine of frustration there is no requirement of fairness as the contract terminates by operation of law, rather than by the decision of one of the parties. (p 591, line 24; p 592, line 1)*

*(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.*

[28] Given this test AICS will have problems justifying the dismissal. As the above chronology makes clear AICS commenced the process but failed to complete it. AICS never questioned the lack of response from Mr Brown or put him on notice that failure to provide information could be detrimental. These failures have, I conclude, greater significance when it is considered there were indications Mr Brown was within a fortnight of possibly returning, even if only part time.

[29] Instead AICS reacted to the clients approach ([18] above) and this was confirmed by Mr Nadan when he was asked why he dismissed Mr Brown. He initially said medical incapacity was the 'prime' reason. When asked what he meant by *prime* he advised he considered a number of things including Stephen's resignation and Mr Brown's behaviour since the surgery. In particular he mentioned the clients approach and said it was on hearing about that he decided to dismiss.

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<sup>1</sup> Statement in Reply at [1]

<sup>2</sup> [1996] 2 ERNZ 585

[30] The conclusion this influenced the decision becomes inescapable yet there was no discussion about it with Mr Brown and no compliance with the requirements of s 103A in respect to this issue.

[31] For the above reasons the dismissal must be unjustified.

[32] That raises the fact AICS is a relatively small employer and whether its resources (or lack thereof) excuse the deficiencies. The answer is no and in reaching that answer I note the Court's conclusions in *The Salad Bowl Ltd v Howe-Thornley*.<sup>3</sup> At paragraphs [94] and [95] the Court noted such all-encompassing failures were neither excusable nor minor (s.103A(5)).

[33] The conclusion the dismissal is unjustified leads to a consideration of remedies. Mr Brown seeks lost wages and compensation of \$6,000.

[34] Section 128(2) of the Act provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. Additional amounts may be awarded on a discretionary basis.

[35] Soon after his dismissal Mr Brown approached a competitor about employment. His approach was successful and he was paid from about 31 August but at a lower weekly rate. He seeks payment for the two weeks he was without income and the difference between what he would have received from AICS and his new employer from commencement to the date of investigation.

[36] Section 128(2) of the Act provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration.

[37] The total sought (\$10,384.66) is less than three months ordinary time earnings. Applying the principles for calculating reimbursement under s 128(2) of the Act taken from the application of ss 40 and 41 of the Employment Contracts Act 1991 in *Trotter v Telecom Corporation of New Zealand Limited*<sup>4</sup> and the application of s 128(2) of the Act by Judge Ford in *Alapiti v Chief Executive of the Department of Corrections*<sup>5</sup> I conclude, with one possible exception, the amount is payable in full.

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<sup>3</sup> [2013] NZEmpC 152

<sup>4</sup> [1993] 2ERNZ 659

<sup>5</sup> [2015] NZEmpC 7



[38] The exception which might lead to a conclusion a lesser amount owes relates to mitigation. The basic principle of mitigation is not that reimbursement should be reduced if an applicant has not mitigated his or her loss but rather a failure to mitigate breaks the causal link between the unjustified action and loss.

[39] That raises a possible argument Mr Brown's loss is the result of his failure to take proper steps to secure a job paying the same as he earned with AICS. I think not. Mr Brown needed a source of income quickly given financial pressures which might have seen him soon lose his home. The quickest way to source replacement employment was to seek a reasonably paying job in an industry with which he was familiar. That he did and I conclude his efforts to mitigate were reasonable.

[40] Turning to compensation. Mr Brown seeks \$6,000. He supported his claim with evidence of the hurt generated by a sense of bewilderment about what he had possibly done wrong. He spoke of humiliation and emotional pain, along with issues emanating from the financial pressure he found himself under.

[41] Mr Brown's evidence would, in the normal course of events, justify an award of the magnitude he seeks. He should not be penalised for being reasonable and seeking a realistic sum. His claim shall be met in full.

[42] The conclusion remedies accrue means I must, in accordance with s 124 of the Act, address whether or not Mr Brown contributed to his dismissal in a significant way. The answer is no. Medical incapacity simply cannot constitute contribution in the way envisaged by s 124 and justify a reduction in remedies.

### **Conclusion and orders**

[43] For the above reasons I conclude Mr Brown has a personal grievance in that he was unjustifiably dismissed.

[44] As a result I order the respondent, Advanced International Cleaning Systems (NZ) Limited, make the following payments to the applicant, Lee Brown:

- i. \$10,384.66 (ten thousand, three hundred and eighty four dollars and sixty six cents) gross as recompense for wages lost as a result of the dismissal; and

- ii. A further \$6,000.00 (six thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act; and

[45] Costs are reserved.

**M B Loftus**  
**Member of the Employment Relations Authority**