

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Michael Joseph McGovern (Applicant)
AND Tachikawa Forest Products (NZ) Limited (Respondent)
REPRESENTATIVES Gregory Lloyd for Applicant
Glenys Steele for Respondent
MEMBER OF AUTHORITY Alastair Dumbleton
INVESTIGATION MEETING 14 June and 2 July 2006
SUBMISSIONS RECEIVED 17, 28 and 31 July 2006
DATE OF DETERMINATION 21 August 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] On 28 October 2005 the applicant Mr Michael McGovern was advised by his employer, the respondent Tachikawa Forest Products (NZ) Limited (Tachikawa), that the company had decided to end his employment. He was given four weeks' notice of termination.

[2] The medical ground notified by Tachikawa to Mr McGovern as the reason for dismissal was his continuing inability to recover sufficiently from a shoulder injury. Mr McGovern had injured his shoulder while at work, as a saw doctor at Tachikawa's Rotorua mill, and for nearly two years he had remained unable to resume full performance of that job.

[3] Mr McGovern raised a grievance with Tachikawa straight after receiving notice of his dismissal. With the assistance of the National Distribution Union, he took part in discussions with Tachikawa, including mediation, with a view to resolving his grievance. When that was not able to be achieved, in March 2006 he applied to the Authority for an order of interim reinstatement, pending the final determination of his grievance by the Authority. A decision on the interim application was not however required, as instead the Authority was able to conduct a full investigation and reach a final determination.

[4] The Authority has been greatly assisted by the eight witnesses, Mr McGovern included, who gave material evidence over two days of the investigation meeting.

[5] At the end of the first day of that meeting, after six of the eight witnesses had given evidence, as I advised the parties the Authority considered that there were two issues central to the resolution of the employment relationship problem.

Site manager's requirements

[6] The first of these was whether Tachikawa's Site Manager, Mr Russell Black, imposed any restriction on the length of time Tachikawa would continue to allow Mr McGovern to work in the particular position that had been created to make allowance for the injuries he was trying to recover from. The features of that particular position were that Mr McGovern was required to work 42.5 hours per week instead of 48 usually worked by saw doctors, and there was also a dispensation given to him from performing certain tasks of a saw doctor that required heavy lifting or the extension of his arm above a certain height.

[7] It is accepted by Mr McGovern that the job he was doing immediately before dismissal is not the same as the one he was employed in immediately before he suffered his injury in December 2003. He also accepted that he was, at the time of the investigation meeting, still unable to perform the job he was doing before he suffered that injury.

[8] The significance of this first issue is that although he was the site manager, Mr Black was not the person who made the decision to terminate the employment of Mr McGovern. That decision was made by Ms Casey Ranclaud, the Human Resources Manager for Tachikawa.

[9] If Mr Black had imposed a time limit, especially a short one, on the continuing duration of the limited duties position being performed by Mr McGovern, such a decision would have made dismissal inevitable. In that case a further issue would arise as to whether Mr Black had been sufficiently informed of all the relevant circumstances relating to Mr McGovern, his rehabilitation, the availability of alternative positions and other matters, that a fair and reasonable employer would have taken into account, before making any decision that had a determinative effect on the employment.

[10] The evidence of Ms Ranclaud, which I accept, was that she had kept Mr Black abreast of developments in relation to Mr McGovern and his progress with rehabilitation from his injury. However, it was Ms Ranclaud and not Mr Black who had been primarily responsible for inquiring into these matters and who was in the best position to make any decision on behalf of the employer about the future of Mr McGovern's employment.

Mr Black's role in the decision-making

[11] I am satisfied in relation to this first issue that Mr Black was not a part of the decision-making to any extent where he needed to have had a much closer involvement than he did have in reviewing Mr McGovern's situation. I am satisfied from his evidence that he imposed no time limit on the continuation of Mr McGovern's employment, as being performed immediately prior to the decision to dismiss. I accept the evidence of Mr Black that he did not give a timeframe in which a decision had to be made about the continuation of Mr McGovern's employment. Mr Black also told the Authority that Ms Ranclaud had the discretion to make any such decision and that he would not have had a problem if she had allowed another two or three months to see whether Mr McGovern's rehabilitation could be successfully completed. I accept that all Mr Black said to Ms Ranclaud was that Tachikawa could not continue employing Mr McGovern in his limited duties role forever.

The "can and can not do" list of jobs

[12] The second determinative issue was the extent to which Ms Ranclaud gave consideration on behalf of Tachikawa to the particular information supplied by the Union on behalf of Mr McGovern. That information was recorded on a single sheet of paper under the heading *Jobs Mike McGovern can and can not do*. The list had been compiled by the head saw doctor, Mr David Roberts, in conjunction with Mr McGovern. Ms Ranclaud had not requested the list but she

received it from the Union on 21 October 2005. It is clear from Ms Ranclaud's evidence that she reviewed the list of tasks and compared them with assessments by an occupational therapist and also by a specialist in workplace injury, Dr David Prestage. I am satisfied that although the list of jobs was unsolicited information, Tachikawa nevertheless placed considerable reliance on it and drew conclusions from it in the course of making a decision to dismiss Mr McGovern.

Employer's consideration of the list of jobs

[13] There are several reasons why I must conclude that the consideration given by the employer to the "can and can not do" list was unsatisfactory and ultimately not fair to Mr McGovern. There is no dispute that the contents of the list had a significant bearing on the decision made by Ms Ranclaud on behalf of Tachikawa. The reasons why I find her consideration of it was unfair to Mr McGovern are as follows. Although perhaps a matter of lesser importance, the consideration given to the list seems cursory. Ms Ranclaud had had the list since 21 October 2005, but did not review the information contained in it until after the meeting held with Mr McGovern on 26 October. There is no dispute that the decision to dismiss had been made before the meeting held with Mr McGovern on 28 October, probably the previous day. Although the company had for many months previously shown considerable forbearance towards Mr McGovern and had not rushed into making a decision about the long term prospects of recovery and therefore his employment, immediately prior to making the decision to dismiss Tachikawa seems to have started to act hastily in October.

[14] I accept that although not herself a saw doctor, Ms Ranclaud has had considerable experience of working in and around sawmills and that she is therefore knowledgeable of the requirements of the trade, particularly in the Tachikawa mill at Rotorua. Nevertheless, I consider Ms Ranclaud should not have simply accepted the list at face value and according to whatever interpretation she could place on the terminology in it, but should have consulted with the head saw doctor, Mr Roberts, or at least with Mr McGovern himself about what was said in the list before making any decisions based on it.

[15] Ms Ranclaud seemed to acknowledge that ordinarily she would have consulted with the head saw doctor, but gave as a reason in this case for not doing so her feeling that Mr Roberts might have had an adverse view of Mr McGovern, or at least not be neutral or unbiased in relation to his interests. I accept that Ms Ranclaud had a particular reason for thinking this of Mr Roberts, because he had signed a declaration saying that he had heard Mr McGovern make a statement relevant to the question of the origins of Mr McGovern's medical condition, whether from workplace injury or pre-existing condition.

[16] If that was the view Ms Ranclaud had taken of Mr Robert's partiality, then it seems to me she ought to have had all the more reason for consulting with either Mr McGovern or some other practising saw doctor to ensure that the compilation of the list itself had not become tainted by any adverse views Mr Roberts may have had of Mr McGovern.

[17] As it emerged in evidence, there was room for misconstruing the words or terminology that had been used by the compilers of the "can and can not do" list. I find that a reasonable employer would have ensured, by checking with the authors of the list, that the employer fully understood the information contained in that list.

[18] Further, I find that the information contained in the "can and can not do" list and the employer's consideration of it, fell within the good faith provisions at s.4 of the Employment Relations Act 2000, in particular s.4(1A). The list was information relevant to the continuation of Mr McGovern's employment and he was therefore required to be given an opportunity to comment on that information before the decision was made.

[19] While the information in the jobs list had emanated from Mr McGovern, or from his agent the NDU, he should have been given an opportunity to comment on the conclusions Ms Ranclaud made about the list and the particular bearing those conclusions were likely to have on the decision to terminate his employment.

[20] The failure to give Mr McGovern that opportunity amounted to a breach of a good faith obligation under the Act and was therefore an action contrary to the way that a fair and reasonable employer would have acted in the circumstances.

[21] For that reason, I must find that the dismissal of Mr McGovern was unjustified within the meaning of s.103A of the Act.

Remedies

[22] Reinstatement, the primary remedy under the Act, has been sought for Mr McGovern. I find that reinstatement to Mr McGovern's pre-injury position of saw doctor is impracticable in the circumstances. Mr McGovern has acknowledged that he is unable to fully perform the job of saw doctor in the way he was required to prior to his injury.

[23] I also do not consider it is open to reinstate Mr McGovern to the position he was performing immediately before his dismissal. This was a position that Tachikawa had created for Mr McGovern as a way of maintaining him in employment and giving him an opportunity to fully recover from his injury. Mr Black stated the obvious, that the position could not be held open indefinitely; it was a position that the employer would have been entitled at some point to withdraw from Mr McGovern. If the Authority reinstated Mr McGovern to that position, it would still be open to Tachikawa to review the position's continuation at some point. It would remain open to Tachikawa to conclude, providing it did so fairly and reasonably, that the temporary position could not be held open any longer.

[24] In considering reinstatement to this position, I have also taken into account the expressed views of Mr McGovern's fellow saw doctors who stated in writing, although only after he had been dismissed, that they had had no problem with him performing lighter duties while they had covered the heavier work for him. The employer was under no duty or obligation to survey Mr McGovern's work mates about these matters before it made a decision to dismiss, and there are risks in conducting a survey of that nature. The information obtained will have limited value and ultimately the decision whether to justifiably terminate employment lies in the hands of management.

[25] The overall consideration for the Authority must be that, on the information the employer had, there was not a strong likelihood of Mr McGovern being able to return to his pre-injury job. Allowing him to continue on the pre-dismissal position had an impact on other arrangements that had been made to maintain the numbers of staff working as saw doctors, and on the employer's requirement to organise its operations efficiently and economically. Reinstatement is declined therefore.

[26] There is no claim for lost wages.

[27] Mr McGovern has sought compensation of \$10,000 for the hurt, humiliation and injury to feelings suffered by him. I consider that he is entitled to a remedy under this head.

[28] While Mr McGovern presented his evidence with some stoicism, I find that he experienced some upset and deep disappointment when told of Tachikawa's decision to dismiss him in October 2005. I must take into account, however, that he was not totally unprepared for such a decision and that it was the timing of it that upset him most. He said that he had not been expecting the determination right there and then but it seems from his evidence that he would not have been so

surprised if the decision had been delivered after Christmas, which he said would have been a better time. Mr McGovern explained why he felt “gutted” by his dismissal; the prospects of suitable employment for someone of his age he regards as bleak and his loss of the job will have an effect on planning activities for future enjoyment of his family.

[29] In assessing compensation I take the approach approved of by the Court of Appeal in *Telecom New Zealand Limited v Nutter* [2004] 1 ERNZ 315, at para [81] in particular, and in *Waitakere City Council v Ioane* unreported, CA 21/03 [9 September 2004], at para [24] and [26] in particular. It is relevant to consider whether, despite the unfairness and unreasonableness in the way Tachikawa reached its decision to dismiss, if it had not breached the requirements of good faith, it might still have come to the same or similar decision.

[30] What Mr McGovern may be compensated for is the loss of the chance to have full input into the decision-making, particularly in respect of the contents of the “can and can not do” list.

[31] I find that input from Mr McGovern, or indeed from Mr Roberts, is unlikely to have led Ms Ranclaud to decide to continue Mr McGovern’s employment indefinitely. Ms Ranclaud had access to compelling medical information contained in the report of Dr Prestage. While there were positive and negative aspects to that report insofar as Mr McGovern was concerned, I consider that an employer could fairly have concluded from the report that the chances of Mr McGovern fully recovering from his injury were not strong. Consultation with Mr McGovern could have only yielded the same information he gave to the Authority, which was that he considered himself incapable of resuming his old role, or pre-injury job, although he remained hopeful of eventually being able to do so.

[32] I consider that if Mr McGovern or his representatives had been consulted before the final decision to dismiss was made, that decision may have been delayed, at least until after Christmas.

[33] I therefore find that the chance lost by Mr McGovern because of his employer’s unfair actions towards him, was at the most a chance of remaining in employment for another two or three months after the date of dismissal on 28 October 2005. He should therefore be compensated for his upset and disappointment in not being given that particular chance, but not for the longer term loss of his career until the age of retirement. Tachikawa has no responsibility, I find, for any loss to Mr McGovern to that extent.

[34] Taking the above matters into account and also the evidence of Mr McGovern as to his personal feelings about the way in which the decision to dismiss was made, I find that \$3,000 is an appropriate award to compensate him under s.123(1)(a)(i) of the Act.

[35] Evidence was given about the way the decision to dismiss was communicated to Mr McGovern on 28 October 2005. Initially at least, Mr McGovern was not told directly by his employer of the decision but heard about it second-hand through his Union organiser. I do not, however, consider that either the employer or the Union should fully bear the blame for what happened. It was in the hands of both the employer and the Union to see that Mr McGovern was given the decision directly, face-to-face, if that is what he wanted. Fault was on both sides equally, I find.

Determination

[36] For the above reasons, I find that the dismissal of Mr McGovern on 28 October 2005 was unjustified. As to remedies, I decline to order reinstatement but award Mr McGovern \$3,000 as compensation, payable under s.123(1)(c)(i) of the Act.

Costs

[37] The parties' representatives are to confer and see if agreement can be reached between them to resolve any issue of costs. If there remains a question after that, memoranda can be forwarded to the Authority for it to consider in the usual way and fix an award of costs.

A Dumbleton

Member of Employment Relations Authority