

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 15/08  
5111246

BETWEEN

GLEN BRYAN GEORGE  
Applicant

AND

CARTER HOLT HARVEY  
WOOD PRODUCTS  
Respondent

Member of Authority: Philip Cheyne

Representatives: Nicole Ironside, Counsel for Applicant  
Rob Towner, Counsel for Respondent

Investigation Meeting: 8 February 2008 by telephone

Determination: 18 February 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Glen George worked for Carter Holt Harvey Wood Products Nelson (CHH) at its Eves Valley Nelson plant as planning manager. He worked for about 30 years in various roles at that business for CHH and its previous owners.

[2] In November 2006, Mr George had a hang gliding accident which caused him a serious head injury and he was hospitalised for about a month. About May 2007, he returned to CHH doing some administrative and clerical work for a few hours each week. By November 2007, Mr George having not returned to his pre-accident role, CHH decided it could not keep open the position any longer and gave him notice of dismissal. Mr George says that the dismissal is unjustified, that CHH has breached its good faith obligations and has unjustifiably disadvantaged him in its handling of his rehabilitation to work.

[3] One of Mr George's claims is for interim reinstatement. He lodged a supporting affidavit with his statement of problem. During a telephone conference, dates were agreed for CHH to lodge and serve a statement in reply and affidavits. An investigation meeting was scheduled to consider interim reinstatement.

[4] Before the first mentioned date, Mr George lodged and served a supplementary affidavit. There was no objection taken to this step. CHH then lodged and served documents in accordance with the agreed timetable. Mr George next sought to lodge an affidavit in reply. When I became aware of the affidavit in reply, I deferred reading it pending discussion about that at the investigation meeting scheduled for the next day in Nelson.

[5] I was unable to travel to Nelson on Friday, 8 February 2008 because Christchurch airport was closed that morning. Counsel were both in Nelson. They helpfully agreed to my suggestion to fax their written submissions to Christchurch and we conducted the investigation meeting by telephone conference.

[6] The first issue discussed was whether Mr George's affidavit in reply should be read. Counsel for Mr George argued that it was necessary to read the affidavit because Mr George had not previously known of or been able to respond to various concerns contained in CHH's affidavits relating to its decision to dismiss him. CHH opposed the affidavit being read. Responding to one of CHH's objections, counsel accepted that CHH should have an opportunity to instruct Mr Towner and file supplementary submissions. Having heard from counsel, I decided not to read the affidavit in reply for the following reasons.

[7] During the initial telephone conference, counsel for Mr George sought to include provision in the timetable for an affidavit in reply. In interim reinstatement proceedings, both parties have an obligation to put before the Authority all relevant material whether it is helpful or unhelpful to their case. Mr George had plenty of time to assemble his case in the first place since he was given notice of the dismissal on 16 November 2007 and the application was lodged on 24 December 2007. That application was quite extensive. Mr George is entitled to the assumption that he can prove facts as alleged subject to any better analysis that is apparent from the material before the Authority. Given that, it was not necessary for Mr George to be able to respond to every detail of CHH's case of justification for dismissal. Interim reinstatement proceedings also usually involve tight timeframes that do not easily

accommodate a reply. Accordingly, I decided against including provision in the timetable for an affidavit in reply.

[8] The argument advanced on 8 February 2008 in support of reading the reply affidavit notwithstanding the earlier ruling took the matter no further. As will be explained, Mr George has an arguable case as the respondent conceded. Interim reinstatement will turn on consideration of the balance of convenience and overall justice. Mr George had plenty of opportunity to assemble and present the facts relevant to those issues.

[9] Having decided not to read the affidavit in reply, I should explain what will be done to resolve the application for interim reinstatement. I will set out in more detail what happened after Mr George's initial return to work in about May 2007 leading up to when he was given notice of dismissal on 16 November 2007. That must necessarily be limited to the main events. Then it is necessary to assess the strength of his case for reinstatement as can be discerned at this point. However, the findings expressed in this determination are solely for the purpose of resolving the claim for interim reinstatement. Final findings of fact will have to await a full investigation meeting and the opportunity to properly test the evidence. Once the strength of Mr George's arguable case for reinstatement has been assessed, I will consider where lies the balance of convenience and overall justice.

#### **After May 2007**

[10] Although he attended work for a few hours each week from about May 2007, Mr George was not given tasks within his planning manager position.

[11] To guide ACC with supporting Mr George's rehabilitation, he was referred for a neuropsychological assessment. Mr George was seen on 20 July 2007 and the report provided to ACC in early August 2007. Mr George gave a copy of the report to his manager (Robert Boddington). The report recommended a graduated return to work programme in conjunction with some cognitive rehabilitation with the programme supervised and structured by an occupational therapist.

[12] There was a meeting at the workplace on 22 August 2007 involving Mr George, Mrs George, Mr Boddington, a health and safety representative, a neuropsychologist and an occupational therapist. It is not clear who initiated this meeting. Mr George says that he asked to recommence doing some of his normal

work but Mr Boddington offered some computer work not related to his planning manager role. He also says that there was no discussion about a graduated return to work, despite that recommendation in the report.

[13] Dawn Cooper is a human resources operations manager for CHH. She deposes about discussions she had in mid-September 2007 with Mr George. There was discussion between her and Mr George over what was happening about his role as planning manager. Ms Cooper referred to an earlier discussion between Mr George and Mr Boddington to the effect that CHH could not keep open his job indefinitely. There was also discussion about CHH's thinking about another role for Mr George. Mr George said he was having difficulty getting ACC to prepare a rehabilitation plan and Ms Cooper offered to speak to Mr George's ACC case manager about this. There is nothing in Mr George's affidavits about this discussion.

[14] Mr George, Mrs George and his ACC case manager met on 2 October 2007. Mr George was told that some more assessments needed to be done before he could start a graduated return to work programme. Mr George was also told that a graduated return to work programme would commence in November 2007 for six to 12 weeks, during which his hours of work would increase. The end of weekly compensation was also foreshadowed. These things were said by ACC.

[15] There was a second meeting on 2 October 2007 involving Mr Boddington and Ms Cooper. Mr George's evidence is that he was told (for the first time) of the possibility of a new job in the event that he would be unable to perform the planning manager role. Ms Cooper says that she made notes during this meeting. The notes indicate some discussion about the need for various ACC reports before any further progress could be made.

[16] Three reports were produced later in October. The workplace assessment report notes that Mr George had been certified as fit for work six hours per day on two days per week for the period of 60 days from 21 September 2007. It recommends that:

*Pending the outcome of the Initial Medical Assessment, and when deemed appropriate by Glen's GP, Glen is likely to benefit from engaging in a graduated return to work programme to support him in making a successful transition back to fulltime work. I would be happy to monitor Glen's return to work programme and I will await your approval in this regard.*

[17] Several other recommendations about furniture and equipment were also made.

[18] The initial occupational assessment report identified a number of work-type options that Mr George was suited for, apart from his pre-injury role. The initial medical assessment report confirms that Mr George should be able to perform these roles subject to some uncertainty about fatigue issues. The report writer understood that Mr George's previous work role had been reassigned but a new role requiring less multi-tasking had been created. A gradual return to work activity was recommended.

[19] By early November Ms Cooper, having not received a copy of the initial medical assessment report, sought an update from Mr George's case manager. CHH received a copy of the medical report and arrangements were made for a meeting between Mr George, his ACC case manager and Ms Cooper to be followed by a meeting between Mr George, Ms Cooper and Mr Boddington. Mrs George also attended at both meetings. Ms Cooper's evidence is she arranged with Mrs George to be in attendance. Ms Cooper's evidence does not go as far as saying that she advised Mrs George that CHH was considering terminating Mr George's employment in light of the reports recommending a graduated return to work.

[20] The first meeting on 16 November 2007 started at about 8.30am between Mr and Mrs George and ACC staff. Ms Cooper joined the meeting a little later. Mr George's evidence is that Ms Cooper said that CHH was in danger of losing the employee who had been temporarily reassigned to the planning manager role as he was being head hunted. There was some discussion about Mr George's accumulated holiday pay and how payment of that might affect ACC entitlements. Ms Cooper also mentioned the new position not having yet received head office approval. Ms Cooper's notes indicate that there was some discussion about Mr George initially working fewer hours each day, but more days per week as part of a graduated return to work.

[21] Mr George's evidence about the second meeting on 16 November is that, soon after its commencement Ms Cooper told him that CHH could no longer keep open his position as planning manager and he was being given one month's notice of termination. He was also told that the proposed new job was still not approved and if it was, it would be at a lower salary. On Ms Cooper's account, there was more preamble to the announcement about CHH terminating Mr George's employment as

planning manager including specific advice to him that this was being contemplated. For present purposes, I should accept that Mr George will be able to prove his assertions.

[22] On 3 December 2007 Mr George received a letter from CHH confirming notice of termination of employment due to his *ongoing inability to perform the role of Planning Manager*. The letter says that the recent assessment suggested that it could be a minimum of 12 weeks before Mr George would be able to return to work full-time but with the possibility of it taking longer due to the uncertainty about the effects of fatigue.

[23] Mr George continued working at CHH on limited hours until near the end of December 2007.

[24] Although CHH apparently did not know it at the time, on 13 November 2007 Mr George's GP certified him fit to return to normal work for 6 hours per day 2 days per week for 13 weeks on the basis of gradually increased hours of work and responsibility with OT supervision subject to the need to manage fatigue. There have been subsequent medical reports which are referred to below.

### **Arguable case**

[25] CHH accepts that there is an arguable case of unjustified dismissal. The parties differ about the strengths of the respective cases.

[26] It is common ground that Mr George's role as planning manager was a complex and demanding one. After his accident, the despatch manager part of his role was devolved temporarily to another person. There is a disagreement about whether the associated tasks amounted to 20% of Mr George's work (his position) or a lesser amount (CHH's position). For present purposes, I accept Mr George's evidence may be right, even though he apparently told the author of a workplace assessment report that the despatch manager work comprised approximately 10% of his role. The planning manager part of his role was assigned to one of Mr George's reports, also on a temporary basis. That person describes that role as being ... *very full on. It is a flat out job which is quite stressful and has a lot of pressure involved*. Other evidence for CHH describes the importance of the planning manager work for the profitable operation of what is a substantial business.

[27] Counsel for CHH referred me to a number of the cases that deal with dismissal for incapacity. It is not necessary to refer to them all. One could hardly express the relevant principle better than did the former Chief Judge in *Hoskin v Coastal Fish Supplies Ltd* [1985] 124 that *There can come a point at which an employer ...can fairly cry halt*. The cases show that the individual circumstances control when that point is reached. Whether the employer has fairly and fully inquired into the employee's capacity to return to their job is also an important component. All that fits comfortably with the statutory test for justification now included in the Employment Relations Act 2000.

[28] In the present case it is distinctly arguable that CHH did not fairly inquire into Mr George's capacity to return to his previous role. On Mr George's evidence he did not know that he risked dismissal until he was given notice during the second meeting on 16 November 2007. On Ms Cooper's evidence, the prospect of dismissal seems to have been under active consideration between her and Mr Boddington for some while, presumably brought sharply into focus by the possibility of the temporary replacement resigning and their perceived need to secure his continued employment in the role. However, even CHH's evidence does not take it as far as a clear communication to Mr George before the 16 November 2007 meeting that a decision would be made at that point about dismissal. These problems give rise to a strongly arguable grievance but they do not create a strongly arguable case for permanent reinstatement.

[29] One of CHH's policies is that *Any decision to terminate employment on the grounds of sickness or disablement should be supported by medical assessment, including a full assessment of the employee's work related capabilities*. As at 16 November 2007, CHH had the July 2007 neuropsychological report that *So long as pacing and fatigue management principles are adopted [Mr George] should be able to make a return to productive work and avoid patterns of boom and bust*. A gradual and supported return to work programme was recommended. A graduated return to work was supported by the workplace assessment report. These reports both seem to be predicated on Mr George returning to his pre-accident role. The initial medical assessment report took a different tack, assessing Mr George's medical capacity for other roles as identified by the initial occupational assessment report. It is unclear why the initial medical report did not directly assess Mr George's capacity to return to his pre-injury role rather than the different roles identified in the initial occupational assessment report. In general the reports refer to some vision and memory problems

being experienced by Mr George and the possibility that a return to more challenging work could cause fatigue. They indicate a 12 week return to work time frame as appropriate but the initial medical assessment report in particular leaves open the possibility that this may need to be increased.

[30] The argument for CHH will be that it did *fairly cry halt* having obtained appropriate assessments. However it is strongly arguable that the assessments do not support the conclusion that Mr George was not fit to return to his pre-injury role. The October reports support the recommendation from July 2007 about a graduated return to work. The initial medical assessment report says that *there does not appear to be any indication that cognitive impairment will be a major impediment to a return to work activity*. The report goes on to recommend the graduated return to work with the 12 week starting point in order to gauge whether fatigue will be a problem. It may be that the appropriate conclusion from the assessments is that Mr George was fit to return to his pre injury role with some support. If that is the correct interpretation of the various assessments, it is strongly arguable that a fair and reasonable employer would not have terminated the employment. This gives rise to a strongly arguable case for permanent reinstatement.

[31] There are criticisms of CHH for not acting earlier to return Mr George to his pre-injury role once it received the neuropsychological report in early August 2007. There is also some criticism about the low grade work given to Mr George even before that report. CHH's position is that further assessments were required, the need for those and their timing being controlled by ACC. It says that the work arrangements were agreed with ACC and Mr George. CHH also points to its support for Mr George over many months after what was a non-work accident to counter claims of lack of good faith and unjustifiably disadvantageous actions on its part. While it may be arguable that there was some failing by CHH in respect of these matters, the present material does not disclose a strongly arguable case. It may be that the better view is of a large corporate supporting a long serving employee in conjunction with ACC at least until November 2007.

[32] It is submitted that CHH pre-determined Mr George's dismissal. The argument is that CHH wanted to permanently appoint the temporarily assigned employee to Mr George's role when the possibility of him being head hunted emerged. That is given as the reason for CHH not acting on the graduated return to

work recommendation. The connection (if any) between the risk of the temporarily assigned employee being head hunted and Mr George's dismissal needs to be explored further but at this point there is an arguable element of predetermination.

### **Balance of convenience**

[33] It is submitted that the time that will elapse before this matter can be finally resolved means that Mr George will miss out on an important part of his post-injury rehabilitation being the graduated return to normal work activity. A later award of damages could not compensate Mr George for having missed this opportunity. However, it is apparent from the medical assessment dated 24 January 2008 that Mr George has improved rather than deteriorated since October when the initial medical assessment report was done. So the potential loss for Mr George not compensable by damages is the fuller or quicker return to pre-injury functioning that might be occasioned by commencing now on the graduated return to normal work. The evidence currently before the Authority does not directly address that issue. The potential for this loss is too uncertain to be a compelling factor at present.

[34] An argument is made about the possibility that ACC weekly compensation will end in light of Mr George's fitness for work. Mr George has a mortgage and no doubt other financial commitments related to his pre-injury income. There is evidence to the effect that Mr George is not likely to find other employment at this level of income especially in light of the graduated return to work stipulation. However, there is no evidence from ACC about its position regarding the future of weekly compensation so I am asked to speculate about the risk that it will end soon. In addition, Mr George has a substantial sum of holiday pay payable to him in the event that a termination of his employment is upheld. I conclude that the potential financial consequence of not ordering interim reinstatement pending a substantive determination is not a compelling factor.

[35] The most telling point supporting a form of interim reinstatement is the desirability of maintaining the employment relationship in the meantime in the event that permanent reinstatement to Mr George's former position is eventually ordered. That leaves open whether interim reinstatement, if ordered, should be to Mr George's former position.

[36] The various reports mandate a graduated return to work by Mr George. The evidence about the complexity of the planning manager role indicates some potential difficulty with sharing responsibility for the role as would be necessary if there was a graduated return to the pre-injury position by Mr George. As noted above, the position has a significant influence over the profitable operation of the mill. While Mr George has lodged an undertaking as to damages with this application, there is no evidence to indicate that he could meet a substantial award of damages if it was shown that CHH could enforce the undertaking. The evidence about his financial position tends to suggest that Mr George might not be able to do so.

[37] It must also be said that there is an element of uncertainty reading the reports as to Mr George's capacity to perform his pre-injury role. This may be because of the purpose of the initial occupational assessment and initial medical assessment reports. The January 2008 medical report is more positive but it is not clear that the doctor understood the complexity of the pre-injury role.

[38] In these circumstances, while the balance of convenience supports a form of interim reinstatement, it should not be on the basis that CHH is required to allow Mr George to embark on a graduated return to his pre-injury role.

### **Overall justice**

[39] A feature of this problem is that CHH and its management supported Mr George over a lengthy period recognising his service to the business. From the material before the Authority there appears to be little sustainable ground for any complaint about CHH up to the point that concern arose about the possibility that the person temporarily covering as planning manager might be head hunted, nearly a year after the accident. The evidence indicates that Mr George acknowledged and appreciated this support. The good personal relationships persisted up to the end of the employment and there is nothing to suggest any change in that state of affairs. In this circumstance it is appropriate to limit the effect of any injunctive intervention.

### **Interim reinstatement**

[40] Effective immediately, Mr George is reinstated to his employment with CHH on a garden leave basis, subject to his undertaking as to damages and pending further order of the Authority. This order is subject to the following condition.

[41] CHH at its discretion may call on Mr George to perform his pre-injury work or other work of the sort performed by him since May 2007 as part of a graduated return to work programme as recommended by Mr George's medical advisors.

[42] Costs are reserved.

[43] The Authority will convene a further phone conference shortly to make arrangements for an investigation meeting.

Philip Cheyne  
Member of the Employment Relations Authority