

- [2] In its amended statement in reply filed on 22 May the Company denied a contractual dispute existed between the parties and that, amongst other things, it justifiably terminated Mr Smith's employment on medical grounds.
- [3] This problem was not resolved at mediation.
- [4] The parties agreed to an investigation on Thursday 29 May. They usefully provided witness statements and an agreed bundle of documents in advance of the investigation. Efforts by the parties during the investigation to settle the problem on their own terms were not successful.

Background

- [5] Key events are largely not in dispute and can be summarised as follows.
- [6] The Company's key business is manufacturing a plastic barrier wrap or film used in the meat industry.
- [7] Mr Smith commenced employment as a printer with the Company in December 2000.
- [8] At the time of his termination Mr Smith's terms and conditions of employment were set out in a collective employment agreement (pages 3-45 inclusive of the agreed bundle).
- [9] Mr Smith's employment agreement specifies that, "*Shifts may be worked as or when required by the employer ...*" (clause 2.2, page 31 of the agreed bundle).
- [10] In the area of the applicant's employment, the Company operates a 3 by 8 shift roster covering Sunday night to Friday afternoon.
- [11] During 2006 Mr Smith was offered the opportunity to accept voluntary redundancy. The parties dispute the outcome: the Company says the applicant declined the offer, and that it was no longer available in 2007 when he changed his stance. Mr Smith agrees he did not uplift the 2006 offer but says that was because the Company assured him he would be able to take redundancy a year later.

- [12] From about 2001, and for various reasons, Mr Smith was not required to undertake nightshifts.
- [13] However, in April 2007 Mr Smith was required to resume the full, rotating shift cycle, including working nightshifts consistent with the roster cycle he shared with 5 other employees (and for which he receives additional annual leave, etc).
- [14] The Company say that Mr Smith was then frequently absent from his nightshift rosters. The applicant attributed his absence to health problems arising out of nightshift work. Because of his ongoing absences, in June 2007, the Company requested he undertake a medical examination. The resulting Company's medical practitioner's *"professional opinion (was) that it would be beneficial to Mr Smith's overall health if he could work mostly morning and afternoon/evening shifts and as little nightshifts as possible"* (page 46).
- [15] A second diagnosis dated 25 October 2007 was *"in full agreement"* (page 47) with the first assessment and that, as a result of his rolling shift work, Mr Smith was having difficulty sleeping, *"and this results in stress related symptoms that are not uncommon among shift workers ... Mr Smith's problems are genuine and he has made every effort to resolve them ... there is no obvious solution to this problem as Mr Smith is unable to work nightshifts and you have no other alternative to offer him (and) in the short term Mr Smith should be allowed to avoid nightshift work as much as possible for health reasons"* (above).
- [16] According to the Company, by November 2007 Mr Smith's absences were having a significant impact on its staffing resources and its ability to meet customer demand. By letter dated 13 November it set out its concerns to the applicant (pages 48-50). They included a calculation that, of the 49 nightshifts Mr Smith was rostered to work in 2007, he had worked only 27 of these. The letter also summarised the Company's – and the applicant's – efforts in the past 6-months in respect of Mr Smith's health issues with working nightshifts, including referral to the respondent's doctor and an occupational therapist and being given details of the respondent's employee assistance programme.

- [17] Because of the prognosis that Mr Smith's health issues were unlikely to improve, and in the face of the Company's expectation that he meet his contracted obligation to work nightshifts, and in the absence of alternative roles within its organisation, the respondent sought a meeting on 21 November to discuss Mr Smith's options in respect of ongoing employment. The possible termination of his employment was identified. The applicant was invited to attend with a representative.
- [18] Mr Smith's response included a letter dated 18 November (pages 51-52). In it he talked of his request to be accommodated as others had been and of management denying his request, that he was being "*bullied (and) being forced to resign*" (above).
- [19] In a reply dated 20 November (page 53) the Company sought more information about other staff being accommodated. It set out its understanding of how Mr Smith refused an offer in 2006 of voluntary redundancy, and of him being told in 2007 – when he sought voluntary redundancy – the timeframe had ended; his confirmation of the company's understanding was sought. The letter also recorded Mr Smith's agreement, in meetings, that nightshift was part of his contractual obligation, and the Company's belief it was doing everything possible to assist him to work nightshifts. The applicant did not respond in writing to the Company's letter of 20 November.
- [20] A medical report was provided by Mr Smith's doctor, dated 28 November 2007 (page 54). It concluded with a recommendation "*that serious consideration be given to accommodating (Mr Smith's) need to avoid middle of the nightshift work*".
- [21] In a letter dated 6 December (page 55) the applicant's advocate, Mr Graeme Ogilvie, raised a health and safety issue with the Company. By letter from Mr Ogilvie dated 24 January 2008 (page 56) that issue matured into a formal dispute.
- [22] A further medical assessment was obtained from the Company's doctor on 12 February (page 60), with similar observations: Mr Smith was experiencing continuing difficulties with shift work, that he was experiencing physical and psychological difficulties and the stress he was experiencing might develop into a depressive reaction. The Company then sought a further meeting with Mr Smith.

- [23] By letter dated 14 February 2008 (page 63) Mr Ogilvie expressed his view that a meeting was inappropriate as *“we are filing the dispute application with the Authority today and the Company should allow for the matter to be resolved through that process”* (above).
- [24] In reply the Company’s representative, Mr Darren Mitchell, said that progress was required because of the recent medical report indicating it was in the applicant’s interest that progress was made on the matter of his incapacity; it required a meeting with Mr Smith.
- [25] A meeting took place on 28 February, at the conclusion of which Mr Smith’s employment was terminated.
- [26] In a letter dated 29 February (pages 70-71) the Company referred to the medical evidence that the applicant’s health issues were unlikely to improve, that there were no alternative positions without a nightshift component, and because of operational constraints and the need for the printing business to remain competitive it was not possible to alter the rosters so as to accommodate Mr Smith’s illness, it was terminating his employment on medical grounds.
- [27] Consistent with his employment agreement, one-week’s wages in lieu of notice was paid into his bank account.
- [28] By letter dated 6 April Mr Smith raised a personal grievance (page 72). By letter dated 16 April the Company was advised Mr Smith was seeking (amongst other remedies) reinstatement.
- [29] The parties’ problem was not resolved at mediation on 8 May 2008.
- [30] In evidence presented during the investigation the Company advised Mr Smith’s position had not been filled pending the resolution of this employment relationship problem.

Parties' Positions

Applicant's Submissions

[31] Amongst other things, Mr Smith says this is a health and safety issue and the Company therefore had an obligation to eliminate the cause of his health problem, by allowing him to work shifts he could manage (i.e. not work nightshifts) rather than dismissing him.

[32] Because there was a health and safety dispute in train, and the employer failed to allow that process to reach a conclusion before terminating the applicant, the dismissal is unjustified: see *Sky Network Television Ltd v Duncan* [1998] 3 ERNZ 917. The existence of the dispute precludes the option of dismissal. Consistent with s. 103A of the Employment Relations Act 2000 a fair and reasonable employer would complete the dispute process before dismissing a worker.

[33] The other ground for the claim of unjustifiable dismissal is that the Company could have resolved Mr Smith's health and safety issue by making other arrangements, rather than by sacking him. These options included accommodating Mr Smith's needs as it had other employees by not requiring him to work nightshifts and by advertising internally or externally for someone else to cover nightshifts. The Company had no need to replace Mr Smith as it has covered his position in the meantime with other staff: it could have done the same while keeping Mr Smith on to work other shifts.

[34] There is a difference where shift work exists to meet essential public services (e.g. Police and Prison officers) or to maximise commercial profits.

Respondent's Position

[35] Because of my findings in favour of the Company there is no need for me to summarise any of its submissions.

Discussion and Findings

[36] The facts are sadly plain: Mr Smith was a shift worker who, because of well documented serious health issues, was increasingly unable to undertake

nightshifts. Those issues resulted in attendance problems (see par 16 above). Recourse to medical and other treatment over an 8-month period did not alleviate those health issues.

- [37] Equally well documented was the Company's growing concern about the impact of Mr Smith's incapacity, that it raised those matters in a timely and proactive manner through correspondence and meetings and attempted to address them in various ways including by referring Mr Smith to its doctors and its employee assistance programme, providing leave to recover from his illness, flexibility with regard to absences and start and finish times and a temporary cessation from nightshift duties in 2007.
- [38] In the lead up to his dismissal, and during the Authority's investigation, Mr Smith did not dispute that other staff were required to cover for him, and that his absence had implications for the Company's production capacity and its competitiveness.
- [39] I am satisfied there is no evidence of the Company treating Mr Smith no less favourably in attempting to accommodate his difficulties. I am similarly satisfied that there were no alternative, non-nightshift positions he could be placed in.
- [40] I do not accept as supporting Mr Smith's claim of unfair treatment the one example raised during the Authority's investigation, of another employee enjoying light duties and non-shift work: that example is not relevant as the worker remains on ACC and the Company is co-operating with ACC in attempting to return him to the workforce. Mr Smith was not, and never has been, on ACC because of his health problems.
- [41] I do not accept that Mr Smith's problem is comparable to the circumstances or issues pertaining in *Duncan* (above). While a dispute had been raised (and, unlike *Duncan*, had been the subject of mediation) it was properly subsumed by the Company's investigation of Mr Smith's unfitness to undertake nightshift and the alternatives available to it and the applicant. In that sense there was no dispute, particularly as it was a term and condition of Mr Smith's employment that he work nightshifts. There has any way been no specific breach of Mr Smith's terms and conditions of employment.

- [42] In this instance the Company's obligation to Mr Smith under the Health and Safety in Employment Act 1992 was not to "eliminate" the cause of his health problem, i. e. stop its shift work pattern or remove him from it (it being unreasonable to expect the Company to give up its contractual requirement that Mr Smith do shift work, with the rest of his printing team). Instead – consistent with the Health and Safety legislation – the Company's obligation to Mr Smith was to "minimise" the impact of shift work on him.
- [43] As it made clear above (par 41 above), the 'dispute' was instead correctly subsumed by the employer in its application of the requirements of s. 103A of the Act. It properly asked itself: Objectively measured, what would a fair and reasonable employer do in all of the circumstances? The process resulting in Mr Smith's dismissal, in particular the assessment of alternatives and the opportunity given to the applicant to recover, was measured and genuine: it was thoughtful and prolonged. All options were fairly considered. It was, I find, a fair and reasonable process.
- [44] There are many instances of the Authority and Employment Court finding in favour of employer's decisions to terminate employees for incapacity: see for example *McKean v The Board of Trustees of Wakaaranga School* [2007] ERNZ 1.
- [45] It follows that there is no basis to the claim that the Company unjustifiably dismissed Mr Smith for incapacity: he clearly was unable to do his contracted duty without the well documented risk of him developing worsening stress levels and a reactive depression (see page 60).
- [46] The Company can now proceed to replace the vacancy created by its decision to terminate Mr Smith's employment. In the unlikely event that it does not fill the vacancy created by the termination of Mr Smith's employment then I reserve the question of any redundancy compensation entitlement.
- [47] Finally, I am satisfied from the evidence available to the Authority that no contractual undertaking was effectively advanced by the Company to postpone Mr Smith's opportunity to uplift voluntary redundancy from 2006 to a later date: I do not accept that Mr Smith declined an opportunity in that year to take voluntary redundancy on the ground he would have an opportunity, if he wished, to accept the same in 2007.

Determination

[48] Mr Smith's claims against the Company are dismissed.

[49] As agreed, costs are reserved.

Denis Asher

Member of the Employment Relations Authority