

Attention is drawn to the order prohibiting publication of certain information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 186
3003853

BETWEEN KELLY GILLAN
Applicant

A N D AMCOR FLEXIBLES (NEW
ZEALAND) LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Simon Meikle, Counsel for Applicant
Richard Harrison, Counsel for Respondent

Investigation Meeting: 3 August 2017 at Christchurch

Submissions Received: On the day

Date of Determination: 3 November 2017

DETERMINATION OF THE AUTHORITY

- A Kelly Gillan was unjustifiably dismissed from his employment with Amcor Flexibles (New Zealand) Limited.**
- B Amcor Flexibles (New Zealand) Limited is ordered to pay to Kelly Gillan:**
- (a) Reimbursement of lost wages under s 123(1)(b) of the Employment Relations Act 2000 in the sum of \$24,199.11 gross less notice paid.**

(b) Payment of compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 in the sum of \$20,000 without deduction.

C Costs are reserved and failing agreement a timetables has been set.

Prohibition from publication

[1] The Authority asked Counsel at the investigation meeting whether there were any applications under clause 10 of the second schedule to the Employment Relations Act 2000 (the Act) to prohibit from publication evidence or names. There were no applications.

[2] I have decided to prohibit from publication under clause 10 of schedule 2 to the Act the name of the specialist Doctor who undertook independent workplace assessments. The applicant says that some emails disclosed between the Doctor and Amcor's Human Resources Director support an attempt to influence the Doctor. That is denied. I did not hear evidence from the Doctor although her reports were provided as part of the information for the Authority investigation. I shall refer to her as Dr Z an initial that bears no resemblance to her own. The order extends to any part of the evidence given or documents provided that name her.

Employment relationship problem

[3] Kelly Gillan worked for Amcor Flexibles (New Zealand) Limited ("Amcor") and its predecessors as an apprentice printer and then a senior printer for about twenty years. At the material time in March 2016 his employment was covered by a collective agreement between Amcor and E Tu Incorporated (E Tu) for the period 2 November 2015 to 4 November 2018. Mr Gillan worked at the Carmen Road factory in Christchurch which Amcor purchased in January 2012. The Carmen Road factory is a packaging operation which produces packaging of various formats consisting of blown film extrusion, printing and conversion.

[4] Mr Gillan has a medical condition called arteriovenous malformation (AVM). He has epilepsy as a result. Although he has had the AVM condition since birth Mr Gillan was not diagnosed until he was 15 years of age. He commenced working for a predecessor of Amcor when he was 16 as an apprentice printer.

[5] Mr Gillan had a seizure at work in June 2015. Dr Z was engaged to undertake an independent medical assessment as a specialist in occupational and environmental medicine after the first event in June 2015. Dr Z was provided with relevant medical information about Mr Gillan and provided a number of reports with the first dated 21 July 2015. Following the June seizure some recommendations were made including that Mr Gillan was restricted to day shifts only for a period of six weeks to then be reviewed. When reviewed in two subsequent reports Dr Z's recommendation was that Mr Gillan was able to perform his usual occupational tasks and hours as long as certain matters were adhered to.

[6] On 11 October 2015 Mr Gillan said that he felt unusual at work about twenty minutes before his finish time. He had a feeling like a hot flush and he went firstly to the first aid room and then outside where it was cooler. There was no progression onto a convulsion as there had been in June 2015. There were reports from other employees that Mr Gillan did not look "right" and that his appearance and mannerisms were similar to those observed following other seizures. Mr Gillan said the three staff members had not worked with him all of his shift and an employee who had was not questioned. After a cool drink in the cafeteria the reports reflect that he seemed to come right but was a little vague and disoriented.

[7] After the 11 October 2015 event Dr Z provided two further reports and a specialist neurological opinion was obtained in January 2016. A report from Mr Gillan's neurosurgeon was also provided.

[8] Following the receipt of that medical information Mr Gillan was asked to attend a meeting in a letter dated 24 February 2016. He was advised in that letter that if Amcor was not satisfied he was able to make a return to the full duties of his role within a reasonable time his employment may be terminated on the grounds of medical incapacity. A meeting was held on 10 March 2016, a later date than 2 March 2016 which was proposed in the letter. The meeting on 10 March was about 20 minutes in duration at the end of which there was a short adjournment and then Mr Gillan was advised his employment was to be terminated. The termination of employment was confirmed in a letter dated 11 March 2016 on the grounds of medical incapacity and Mr Gillan was paid two weeks' notice in lieu. Mr Gillan says that his dismissal was unjustified.

[9] Mr Gillan initially wanted to be reinstated to his role. Following a telephone conference with the Authority and counsel, Mr Meikle confirmed that remedy was no longer claimed. Mr Gillan seeks lost wages together with interest in the sum of \$43,393.50 gross.

This is calculated on the basis of four weeks with no income until 19 April 2016. Mr Gillan was then successful in obtaining employment but at a lower hourly rate and he seeks the difference for 46 weeks until 10 March 2017. Mr Gillan also seeks compensation and costs.

Amcor's reply

[10] Amcor says that its decision to terminate Mr Gillan's employment on medical grounds was justified and that it acted in good faith towards him.

The issues

[11] The Authority is required to apply the test for justification in s 103A of the Act to objectively determine whether Amcor's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[12] Both counsel referred the Authority to the judgment of Judge Inglis as Chief Judge Inglis was then in *Meena Lal v The Warehouse Limited*¹ which concerned a dismissal on medical grounds. Judge Inglis in approaching the issue of termination for medical incapacity recognised that the factors in s 103A (3) do not sit altogether comfortably with a no fault dismissal. The Judge approached consideration of termination within a broad framework. I set out below the issues for the Authority which includes an assessment within the broad framework referred to in that judgment.

- What does Mr Gillan's role involve?
- After the two medical events that gave rise to concerns what was the nature of the medical information?
- Was Amcor's decision to dismiss Mr Gillan justified substantively and procedurally?
- This includes consideration about:
 - (i) Amcor's business needs and health and safety concerns.

¹ *Lal v The Warehouse Limited* [2017] NZEmpC 66.

- (ii) Whether Mr Gillan was given a reasonable opportunity to return to full duties or be otherwise accommodated considered against the terms of his employment agreement, nature of position held and length of service?
 - (iii) Whether there was a fair and reasonable enquiry into the prognosis for a return to work, appropriate engagement with Mr Gillan and seeking and considering relevant medical information?
 - (iv) Were there elements of pre-determination?
- If Mr Gillan was unjustifiably dismissed what remedies is he entitled to and are there issues of contribution and mitigation?

What did Mr Gillan's role involve?

[13] Mr Gillan operated a printing machine at Amcor. The machine is approximately 6 metres long and around 3.5 to 4 metres high (almost ceiling height). It is common ground it is a very fast moving machine.

[14] Mr Gillan's operation of the machine includes looking at the computer which enables a view of the paper rolls, colour and speed. He also walks around the machine to do a visual check holding onto the handle. He told Dr Z when she undertook a work site assessment that he does not go near the moving parts and stands about half a metre away. With another worker he changes the rolls and shafts but only when the machine is turned off. Likewise machine maintenance is only undertaken when the machine is turned off although does involve an element of working at height and moving outer parts of the machine.

[15] The printing machine has sizeable fast moving parts and although some of the machine is caged some parts are not because there needs to be access for changing rolls and shafts. The machines do have an automatic cut -off for some aspects but Dr Z said in her first report that accidents are still possible and the chance is remote but not zero. Mr Gillan also collects pails of ink from the ink room and puts them on a trolley bringing them back to the printing machine. He places them in the machine, in the ink area and connects hoses.

After the two medical events that gave rise to concerns what was the nature of the medical information?

There were three reports from Dr Z after the 18 June event but before the 11 October event

[16] When Mr Gillan had a seizure on 18 June 2015 he was found outside the ink room and stood down from the balance of his shifts. There were subsequent meetings with Amcor management. Mr Gillan agreed to provide further medical information about the treatment of his condition and details about the medication he was taking. Mr Gillan provided the name of his neurosurgeon and his general practitioner and gave permission for management from Amcor to speak to them and obtain medical information.

[17] It was agreed at a further meeting on 14 July 2015 that Mr Gillan would undergo an independent medical assessment with Dr Z and until that was complete he would continue to be stood down from work on full pay. Dr Z was duly engaged to undertake an independent medical assessment and a report was provided dated 21 July 2015.

21 July 2015 report

[18] Dr Z's report sets out that Mr Gillan advised he works on his machines with one other person. On night shifts there are two others and a supervisor with more people around on day shifts. Mr Gillan says that he is driven to and from work and does not drive himself. He stated his current work hours are 12 hour shifts, 4 days on and 4 days off, two weeks of day shifts and two weeks of night shifts.

[19] Dr Z wrote in her report that she had reviewed various reports from Mr Gillan's neurosurgeon Mr Ron Boet and others and she traversed Mr Gillan's medical history and clinical information. Having undertaken a work site assessment Dr Z considered the possibility of a worker falling into a machine when the parts are moving or falling off the ladder during maintenance. She noted in her report that the machines do have an automatic cut off for some aspects but accidents are still possible so the chance is remote but not zero.

[20] Balanced with that Dr Z considered, based on Mr Gillan's history that he always invariably gets a warning of his seizures, the risk of him having one at the machine and having an accident appears to be low. Dr Z sets out that this low risk has to be assessed against the potential consequences of an accident which could be catastrophic.

[21] It was her specialist opinion that Mr Gillan was currently able to perform his usual occupational duties without restriction on day shifts only up to 12 hours per day 4 days on and 4 days off over the next six weeks after which she would review his progress on 1 September 2015. She made a number of recommendations including that he must always tell someone if he is about to have a seizure and that person would take him to the first aid room (to be left unlocked) and check on him and arrange transport home. There was also to be a finalised written plan for the procedures around Mr Gillan's seizures and worker education with Mr Gillan present to explain the situation. Fatigue was noted in the report to be a risk factor and Mr Gillan was never to be left alone when working around the printing machines. He was not to climb the stairs or go to the section above the machine and machine was not be repaired or cleaned whilst it was running.

[22] A return to work plan for Mr Gillan was prepared based on the recommendations made by Dr Z. It was signed by Mr Gillan and the Operations Manager of Amcor Christchurch Ignatius Wong. Mr Gillan returned to work in accordance with the recommendations of Dr Z and the plan.

4 September 2015 report

[23] There was a further review of Mr Gillan undertaken. Dr Z spoke to Amcor management and Mr Gillan. Both reported that things had gone well. Dr Z recommended that Mr Gillan could now return to his usual occupational tasks and hours with no restrictions, limitations, adaptation or modifications. There was however Dr Z noted a risk of Mr Gillan having a seizure at work and the consequences of such could be very serious.

30 September 2015 report

[24] In a further report dated 30 September 2015 Amcor requested a review of Mr Gillan's fitness for duty about undertaking overtime. With some restrictions Mr Gillan was able to from that report work up to two consecutive five day weeks up to 60 hours before having a break from overtime.

11 October 2015 event

[25] On 11 October 2015 there was a further event. Mr Gillan said that he felt a bit unusual and had a feeling like a hot flush and went to the first aid room as Dr Z had

recommended. He found that the first aid room was hotter than the factory and went outside to cool off.

[26] There was an issue as to whether what had occurred was a seizure. Mr Gillan said that he was not aware that he had suffered a seizure until he went to see neurologist Mr Anderson when he understood that what he had experienced was a complex partial seizure. Mr Gillan said that had never talked to a medical professional about such events previously.

[27] When I asked Mr Gillan about the two events he said with the June event there was a convulsion and he lost consciousness. It was a seizure. With the October event Mr Gillan said that he had a hot flush and came right after five to ten minutes with no convulsion and no loss of consciousness. There is evidence to support that from this point on there was some concern about Mr Gillan's straightforwardness about his condition but Mr Gillan said that during the process he was not made aware of these concerns. I accept that in all likelihood.

[28] Mr Anderson in his report dated 19 January 2016 confirmed that Mr Gillan had occasional complex partial seizures with some degree of alteration of awareness but still retaining the ability to walk about. He wrote that Mr Gillan tends to pace or be restless with these partial seizures and often will go and sit in a different place.

Leading to the next report from Dr Z dated 5 November 2015

Dr Z advised of 11 October event

[29] Bridget Marsh was the then Risk Management Coordinator at Amcor. She contacted Dr Z about the event on 11 October 2015. Mr Gillan said that he also telephoned Dr Z himself on 11 or 12 October 2015 and told her what had happened. I did not hear from Dr Z and could not therefore discuss that with her.

New recommendations in email dated 13 October 2015

[30] There is an email from Dr Z on 13 October 2015 to Ms Marsh and Mr Wong stating amongst other matters that it is now clinically evident that Mr Gillan is at risk of further seizures at work. She recommended day shifts only, no night shifts or overtime and 8 hour not 12 hour shifts. There was also to be strict adherence to the seizure plan especially reporting and managing all fatigue. Dr Z said that she would review the recommendations after six months if Mr Gillan remained seizure free.

Email from Mr Wong dated 13 October 2015

[31] Mr Wong oversees the manufacturing operations at the Branston and Carmen Road sites. He has been employed by Amcor and its predecessors for approximately 37 years and had been involved in various meetings with Mr Gillan and his union representatives and family members from the event in June 2015.

[32] Mr Wong stated in an email to Ms Marsh and Dr Z that it still had to be established that Mr Gillan had suffered a seizure on the day of the incident. He also wrote that he believed his medication was changed and it was not clear if that had resulted in the strange behaviour on [11 October 2015]. He wrote that ...”I am clear in my mind that once again we are dealing with a lack of honesty. This is enough to prevent us from acting as responsible employers.”

[33] I asked Mr Wong what he meant by that statement in his email. Mr Wong said that it related to the seizure procedure in place after the June event because Mr Gillan did not, in accordance with the procedure, when he felt like he was about to have a seizure report it to someone straight away. Further he said there was a witness account that Mr Gillan drove home. These concerns were not I find directly raised with Mr Gillan before his dismissal.

Stood down on full pay from 15 October 2015

[34] Mr Gillan was stood down on full pay from 15 October 2015 and Amcor wanted an independent assessment carried out by Dr Z before Mr Gillan returned to work.

Round table discussions proposed

[35] Dr Z and Ms Marsh discussed in a series of emails the possibility of a round table discussion after Dr Z’s assessment of Mr Gillan but before the report was released. Ms Marsh was agreeable to this. The manufacturing manager Jacqueline Maihi did not from the emails appear to have any objection nor did Mr Wong. Dr Z in an email to Mr Wong and Ms Marsh dated 31 October 2015 said that she had spoken to Mr Gillan about a round table discussion and that both Mr Gillan and his wife Corrine Gillan were available on 5 November at 5pm for that discussion.

Emails between Dr Z and Scott Mundy Human Resource Director of Amcor

[36] Scott Munday is the Human Resources Director for Amcor and oversees the human resources function for Amcor based at its head office in Auckland. Mr Munday gave affirmed evidence to the Authority by telephone to answer questions about some of the content of his emails in response to what Mr Gillan has said in his statement of evidence. I do not intend to set these emails out in full but have summarised these below.

3 November exchange

[37] What is clear from the emails sent on this date between Mr Munday and Dr Z is that Mr Munday was not opposed to the referral to a neurologist but concerned there was little benefit in a round table discussion. His preference was for Dr Z to assess Mr Gillan based on her clinical assessment and his recent behaviour observations. He also wrote “..that perhaps as part of that assessment you then recommend that he be referred to a Neurologist based on the ‘more recent inconsistencies in information’.” Mr Munday explained in his evidence he was wanting accurate and objective advice rather than what he believed to be recent inconsistent and subjective information – Mr Gillan’s self-assessment and Amcor’s interpretation of the event on 11 October.

[38] Dr Z although very keen on achieving a resolution with a round table discussion with which she has had success in the past said in an email that she understood Mr Munday’s preference for a specialist occupational medicine assessment and report only.

4 November 2015

[39] Emails continued between Mr Munday and Dr Z on 4 November about the type of report to be written. In one email Mr Munday says that a one page report summarising the history, workplace controls, and new concerns that require a neurological assessment whether Mr Gillan is fit to return to normal duties would be appropriate.

[40] Dr Z in an email said that it was not possible to accommodate that request in one page with such a complex case. She wrote that she was aware the report is instrumental for the company decisions and that she needs to write a report she is comfortable with. She noted that she may need to stand up in court with a report and suggests another provider be found who can do a brief report.

[41] The emails then supports that Dr Z agreed with Mr Munday's request. I will return to issues as to whether before she wrote her report Dr Z met with Mr Gillan. His evidence is that she did not but the report when read clearly refers to such a meeting.

Emails sent by Mr Munday about the report content between 9 and 16 November

[42] Mr Munday was sent a copy of the proposed report by Dr Z by email dated 8 November 2015. He responded on 9 November to Dr Z with some concerns. The first was about the reference to a "brief one-page report" that he wrote implies support for Mr Gillan's perception that Amcor is attempting to exit him from the business which he says is not the case. He referred to the same concern about what appeared to be a passage to the effect that Dr Z was instructed to generate a brief one page report. He stated in his email that Dr Z was never "instructed" to do that. Finally Mr Munday asks a question of Dr Z whether it is to be taken from the report that Mr Gillan is able to return if the controls suggested are in place. He wrote that he is confident that is how Mr Gillan and his representative will take that notwithstanding Amcor's "heightened concern about his safety."

[43] There is a further email on 16 November 2015 from Ms Marsh to Mr Munday with the subject "Fw: Kelly Gillan report as amended as requested, thanks Dr Z." Ms Marsh said in her email that she was sending the report to Mr Gillan that day.

[44] Mr Munday in an email to Ms Marsh later in the day on 16 November 2015 noted that the report still suggested that Mr Gillan is able to return to work provided the necessary controls are in place. He asked in his email whether the business was prepared to allow this based on current concerns. He noted that he was not comfortable with this and would encourage Dr Z "(based on her appeal for commonsense) take a stand and recommend that he remain away until such a time that our concerns are validated by a neurologist."

5 November 2015 report from Dr Z

[45] I find it likely that Mr Gillan received a copy of this report on 16 November 2015. The report sets out discussions with Mr Gillan, family and support people but Mr Gillan said that he never met with Dr Z for assessment before the report was written. He did not for example accept as written on page 3 of the report that there was a discussion with Dr Z in which he said that he felt the seizures were not related to fatigue. There are other parts of the report that support some discussion took place. For present purposes I will accept that the

conversations set out in the report as taking place with Mr Gillan and his supporters did in fact take place although I cannot conclude with any accuracy when that was.

[46] Mr Gillan additionally did not accept as set out in the last page of the report on page 4 that the contents of the report were discussed with him and agreed after the report was issued. I am unable to conclude with any confidence how that occurred and when because I did not hear from Dr Z. What I do find is that Mr Gillan only saw the report after some changes had been requested to it by Mr Munday.

[47] The report does not in sharp contrast to the clarity of earlier reports and the 13 October 2015 email state that Mr Gillan is able to continue to work as a printer at least prior to the neurology review. There is a statement that Mr Gillan should not do any safety critical work alone including working around machinery with fast moving parts or climbing up, on or in machines or up narrow stairs alone. Dr Z refers in her report to “a common sense approach is best, prior to the neurology review” and “It is entirely possible that Mr Gillan be medically able to work as a printer after the neurology review, once his medical management has been optimised by the neurology specialist, with possible appropriate modifications to his work tasks and/or environment.”

[48] Both Mr Gillan and Amcor took from the report that Mr Gillan was not able to work as a printer until after the neurology review. It is clear from the report that Mr Gillan wanted at that time to return to working his day shifts as a printer.

[49] The return to work plan following the report was for alternative duties such as light cleaning work and administrative tasks with a return to normal duties and hours dependent on neurologist recommendations.

[50] Mr Gillan undertook some light duties not associated with printing in the period leading up to Christmas doing maintenance on the factory floor and painting the Amcor offices. Continuation of the light duties was not Mr Wong said sustainable long term.

[51] Mr Gillan had an appointment with Mr Anderson on 21 December 2015. I will set out some of the elements from Mr Anderson’s report.

Report from Tim Anderson Consultant Neurologist 19 January 2016

Diagnosis

Generalised seizures

[52] Mr Anderson said in his report that since the introduction of medication in June 2015 Mr Gillan's convulsions at least over the last six months have been successfully averted. He noted that the convulsion in June 2015 may have been a withdrawal seizure as Mr Gillan had changed medication.

Complex partial seizures

[53] Mr Anderson said in his report, as I have set out earlier, it was apparent that Mr Gillan had occasional complex partial seizures the frequency of which were difficult to ascertain.

Medication

[54] Mr Anderson suggested increasing Mr Gillan's current medication forthwith and coming off another medication over a couple of weeks. He also set out some other medication if his seizures continue. Mr Anderson noted that Mr Gillan was under the auspices of the neurosurgeons for ongoing care.

Questions from Dr Z

[55] Mr Anderson records questions asked of him by Dr Z in his report. One was that Dr Z wanted him to answer if it was appropriate for Mr Gillan "to be working with heavy, big, fast machinery with exposed moving parts, climbing in and out of machines, going up and down stairs and ladders." Mr Anderson wrote that "it wouldn't be appropriate for him to be working with heavy machinery where, if he was to become unconscious he could injure himself or someone else." He then wrote:

It does seem to be true that he has sufficient warning to remove himself from the workplace and if that is the case every single time (and I cannot verify this but this may be verified at the workplace) then it would not be unreasonable for him to continue with his present situation assuming that he does alert someone that he is feeling unwell and does remove himself away from the immediate work environs.

Report from Ron Boet Neurosurgeon 22 January 2016

[56] The neurosurgeon's report provided that Mr Gillan does not have any neurological deficits and has not had any further generalised seizures since June 2016. It recorded he is on Keppra and since he has started in Keppra he had not had any seizures and was able to drive after June 2016 if he had no further seizures. From a work point of view it was noted, as he has not had a seizure and is well controlled on Keppra "we are happy for him to be resumed on his normal work activities in full capacity." It was noted that he was recently seen by the neurologists for his seizure management as well and that Mr Gillan would be put on the waiting list for embolisations of his left parietal AVM. At the time of the investigation meeting Mr Gillan had had that operation in October 2016. His evidence was that he had not had another generalised seizure.

Final report from Dr Z 30 January 2016

[57] Dr Z was asked by Ms Marsh to review the report from Mr Anderson and she did this in her report dated 30 January 2016. I am satisfied in all likelihood that Mr Gillan did not have a copy of her report until it was attached to the letter dated 24 February 2016 to Mr Gillan proposing termination on ground of medical incapacity. I note this because Dr Z makes two comments in her report that I am not satisfied Mr Gillan had an opportunity to comment about before the report issued. The first is that despite multiple requests a complete set of clinical documentation has not been provided. Mr Gillan said that he did not know what she meant. Objectively assessed I remain unclear about that matter as well.

[58] The second is that Mr Gillan despite questions during initial assessment did not recall and denied symptoms of his complex partial seizures. Dr Z stated that Mr Gillan and his wife later noted that he had been having the symptoms of complex partial seizures for a number of years. Mr Gillan did not accept in his evidence that he had been other than honest with Dr Z about that matter.

[59] Dr Z made a number of recommendations including:

- (a) Given Mr Gillan is changing his medication which lowers the seizure threshold and requires neurosurgical management he should not do any safety critical work until further notice. This is to be reviewed when issues have stabilised and/or resolved which may take a number of months.

- (b) Mr Gillan must only work three consecutive 8-hour day shifts after which he must have 24 hours rest to prevent fatigue and should not be alone on the factory floor. He is not to do any night shifts or any overtime until further notice.
- (c) Mr Gillan must not climb any stairs or do work at height including reaching into machines even when turned off. This is because of the risk from alteration of awareness or a seizure and the damage that can be caused by a fall from a height.
- (d) Mr Gillan is to stop all sedating medications unless prescribed by the doctor.
- (e) Mr Gillan is to manage his nutrition, hydration and sleep and report any fatigue issues.
- (f) Mr Gillan must not drive any motor vehicle under any circumstances for any reason.

[60] Dr Z stated in her report to Amcor that “the risks of a seizure may be considered to be low. However, the consequences of falling into rapidly moving heavy machinery, or putting other worker’s health and safety at risk, could be very dangerous or even fatal.”

[61] Set out above is the nature of the medical information that Amcor had when it made the decision to dismiss.

Was Amcor’s decision to dismiss justified?

Substantive justification

Proposed termination of employment on grounds of medical incapacity letter 24 February 2016

[62] Amcor in its letter of 24 February to Mr Gillan set out that from the medical information Mr Gillan was able to safely undertake some types of work but it would not be safe for him to undertake the full duties of his role and there is no firm timeframe within which he could make a return to full duties. The letter provided Amcor was concerned that it may be in breach of its health and safety obligations if Mr Gillan was allowed to return to full duties. It stated that it was four months since he had last been able to fulfil the full duties of

his role as a qualified senior tradesman printer. The letter provided that matters had got to a stage where Amcor needed to consider the likelihood of Mr Gillan being able to make a return to the full duties of his role within a reasonable time and in a way that is safe and sustainable. If Amcor was not satisfied of that then his employment may be terminated.

Letter confirming termination of employment 11 March 2016

[63] The letter of 11 March confirming the decision to dismiss on notice set out a conclusion that having met with Mr Gillan it would not be safe for him to undertake the full duties of his role and there is no firm timeframe to return to full duties where there would be no increased risk of injury to himself or others. Given that information Amcor believed it would breach its health and safety obligations to allow Mr Gillan to return to full duties and there is no alternative work that would be an acceptable risk to safety concerns.

[64] Amcor did have health and safety obligations to Mr Gillan and its other employees. It was understandably concerned following Mr Gillan's June 2015 seizure. It took steps to have an independent medical assessment undertaken at that time. It adopted the recommendations of Dr Z and prepared a return to work plan for Mr Gillan on day shifts only and then that plan was subsequently reviewed. Mr Gillan was cleared to work day and night shifts in September and then overtime with some provisos. Amcor's actions at that time were those of a fair and reasonable employer. There was then the 11 October event and medical information gathered after that time.

[65] It is well established that an employer is not bound to hold a job open for an employee who is unwell or prevented from carrying out duties for an indefinite period and there can come a point at which an employer can fairly cry halt.² There have not been many reported cases in the employment area about epileptic seizures. Mr Harrison referred me to one from the Employment Tribunal, the predecessor Tribunal to the Authority *Wilson v Sleepyhead Manufacturing Co Limited*.³ He refers to that decision to support that concern about safety arising from epileptic seizures is justified in work environments where there is machinery and dismissal with notice is within the range of justifiable actions.

[66] I accept there are safety concerns with seizures in some work environments particularly around machines and heights. The neurologist who gave evidence in the

² *Canterbury Clerical Workers IUOW v Andrews and Beaven Ltd* [1983] ACJ 875 and *Hoskin v Coastal Fish Supplies Ltd* [1985] ACJ 124 and 127

³ *Wilson v Sleepyhead* [1992] 3 ERNZ 614

Sleepyhead case is recorded as saying "...no blanket ban should prevent people who have had epileptic seizures from working in particular occupations and a careful assessment has to be made in each case, taking the individuals "triggering factors" and frequency of attack into account." That case was decided some time ago and there are different health and safety considerations now but a careful assessment of each case is still required today.

[67] I find in this matter that whether there was substantive justification will turn mainly on whether there was a fair and reasonable enquiry into the prognosis Mr Gillan could return to his full duties or be otherwise satisfactorily accommodated if necessary with modifications to his work tasks or environment. I will turn to that now and return after doing so to whether the decision to dismiss in this matter was justifiable in all the circumstances.

Procedural fairness

[68] Mr Harrison submits that this was not a knee jerk reaction by Amcor following a seizure. He says that over eight months there was the engagement of Dr Z and preparation of return to work plans. There was also a seizure plan and training for staff and an independent neurological report obtained. The neurological report and Dr Z's assessments and reports were paid for by Amcor.

[69] I accept the above steps were taken and that there was a cost to Amcor. Amcor has business needs and requirements and a need for some certainty.

10 March 2016

[70] I heard evidence from Mr Gillan and the three decision makers from Amcor about what was discussed at the meeting on 10 March 2016. The names of those making the decision whether or not to terminate Mr Gillan's employment were set out in the letter of 24 February 2016. They were Ms Maihi, Mr Wong and National Human Resources Manager Mark Fisk. They all attended the meeting together with Mr Gillan, his wife and mother and Ms McLean his union representative. As set out earlier the meeting was about 20 minutes in duration and at the end a decision was made to terminate Mr Gillan's employment following a brief adjournment.

Ancor's concerns

[71] Mr Fisk said that there was a review and discussion about the medical reports at the meeting. Mr Fisk said that aspects of the medical information that concerned Ancor were discussed including Dr Z saying with her knowledge of the work site that Mr Gillan's condition gave rise to a potential health and safety risk. Further that while the risk of a seizure may be low the consequences if it occurred could cause serious harm or fatality.

What was said on behalf of Mr Gillan

[72] Ms McLean emphasised the low health and safety risk referred to by Dr Z and awareness (warning) Mr Gillan had before the occurrence of a seizure. A suggestion of discrimination was raised but was not pursued in the Authority. It was said on Mr Gillan's behalf that Ancor was acting prematurely and should wait until June 2016, a further three months, to give the change in medication a chance to take effect and see whether that made a difference to the seizures.

[73] Mr Fisk said that this was considered but the reports did not give any certainty whether the medication would address the seizures and that it would be safe for Mr Gillan to return to full duties. He said that the situation had been managed since June 2015 and it was not viable from an operational or financial perspective to continue to a further three months when there was no greater certainty of Mr Gillan being able to return to duties.

[74] Mr Wong said in his evidence that it was not possible to accommodate Mr Gillan for three consecutive 8 hour day shifts without night or overtime shifts as Dr Z had recommended. Further that Mr Gillan could not do aspects of his role such as climbing ladders for changeover. I could not be satisfied that there was discussion and certainly not detailed discussion about how Dr Z's recommendations could or would be implemented at the meeting. That was I find because the meeting as set out in the 24 February letter was to discuss the return to full duties within a reasonable time and in a way that is safe and sustainable rather than a focus on whether Mr Gillan could be accommodated.

Was there a fair and reasonable inquiry?

[75] The conclusion reached by the decision makers was that the reports did not give certainty whether medication would address the seizures with no increased risk of injury to Mr Gillan or others even with further time. I accept that there had been a period of about five

months from when Mr Gillan had been stood down or on restricted duties on full pay from 15 October 2015. Amcor had obtained medical reports and worked with Mr Gillan since June 2015.

[76] There are some circumstances in this case that in my view necessitated further consideration about the prognosis for a satisfactory and safe return to duties.

[77] Firstly it was raised at the 10 March meeting that Mr Gillan had sufficient warning of a seizure and could remove himself from the workplace. That was a factor on which Mr Anderson placed weight in his report to conclude, if that could be verified, it was not unreasonable for Mr Gillan to continue with his present situation. Dr Z's first report of 21 July 2015 confirmed that based on Mr Gillan's history he invariably gets a warning and the risk of him having a seizure at the machine and an accident appears to be low. The warning is an important factor in Mr Gillan's case. I note that in the *Sleepyhead*⁴ case Mr Wilson got no warning of his seizures and they occurred without warning, instantly. Mr Wilson was a welder who worked on ladders and around machinery.

[78] Secondly there was to be a change to medication and although that change is a risk factor that needs to be managed the medication, after a period of time, could reduce or stop further seizures. There were elements of the unknown about that. Thirdly there was the proposed embolisation that could stop a future risk of a generalised seizure. That is the sort of seizure where there is a loss of consciousness.

[79] I find before "calling halt" to a relationship of 20 years there should have been further enquiries made about these matters. Not only because Mr Gillan had been a long serving employee but because of the nature of the medical information particularly from Mr Anderson and Mr Boet. The decision to dismiss in the absence of further enquiry was premature and that created unfairness and not simply in a minor way.

[80] There was no significant discussion at the 10 March meeting, about the recommendations from Dr Z in her January report that Mr Gillan work as a printer for 3 shifts each week of 8 hour duration. There was no detailed discussion about Mr Gillan's work, what aspects he undertook that could cause concern and the extent if any to which some tasks could be undertaken by others, for example, his assistant. Instead the meeting concentrated on Mr Gillan needing to be able to do full duties rather than considering and discussing

⁴ *Wilson v Sleepyhead* above n3 at 616

whether there could be some accommodation for him in the meantime and into the future to address concerns such as working at height.

[81] Objectively the above matters support a pre-determined view that there was no option other than dismissal because of the risk associated with Mr Gillan's seizures. Mr Munday's exchanges with Dr Z about the proposed 5 November report to the effect that he would encourage her to take a stand and recommend that Mr Gillan remain away until concerns are "validated by a neurologist" suggest a pre-determined view. It is reasonably clear that Mr Munday was not happy for Mr Gillan to return to work as a printer before Mr Anderson's report was received which report objectively assessed did not necessarily validate Amcor's concerns and Mr Boet in his report was happy for Mr Gillan to be resumed on his normal work activities in full capacity. Amcor did not accept that Mr Boet and Mr Anderson understood the work site in the way that Dr Z did.

[82] There was concern that Mr Munday had attempted to influence Dr Z. Mr Munday denied that completely. Objectively assessed there is also an email from Mr Gillan's mother to Dr Z following the October event putting matters forward in support of Mr Gillan. These exchanges happen in such circumstances without necessarily elevating the concerns to that of interference. Dr Z would be able to professionally manage the different views and pressures that arise in these types of cases when she undertook her assessments and report writing.

[83] The main disquiet that I have about the exchanges from Mr Munday to Dr Z is that he did not want Mr Gillan to return to the workplace as a printer after the 11 October event. That had some bearing on the period of time Mr Gillan was not able to undertake his role. Initially on hearing about the 11 October incident Dr Z's email of 13 October 2015 to Amcor recommended he undertake 8 hour day shifts only with strict adherence to the seizure plan and a review after six months. I cannot be certain however that Dr Z changed her subsequent 5 November report as a result of Mr Munday's concerns. I have not been provided with proposed reports, only the finalised 5 November report.

[84] Another concern I have about fairness is that concerns on the part of Mr Wong and Mr Munday that Mr Gillan had not been straightforward were not put to him. I cannot rule out that conclusions reached did not have an adverse effect on the continuation of his employment. The failure to raise those concerns with Mr Gillan as I find a breach of good faith. There may have been quite clear explanations to the concerns and if not there could

have been some other action by Amcor. In short however they should have been clearly put to give Mr Gillan an opportunity to explain.

[85] I accept that this was a very difficult matter for both parties. Amcor in a fair and reasonable manner did obtain medical information and made accommodations for Mr Gillan over a period of time. It recognised quite properly that the risk of a seizure was low but if it were to occur then there could be serious consequences. The termination of Mr Gillan's employment was premature and the lack of enquiry and discussion of whether there could be some accommodation of Mr Gillan as recommended by Dr Z did, objectively assessed, support an element of pre-determination and lack of an open minded approach.

[86] I find in conclusion that there was procedural unfairness that impacted on and is unable to be separated from the substantive justification for the dismissal of Mr Gillan. A fair and reasonable employer could not have reached the decision to dismiss on 10 March 2016 in all the circumstances.

[87] Mr Gillan has made out his personal grievance that he was unjustifiably dismissed and is entitled to an assessment of remedies.

Lost wages

[88] Mr Gillan asks that the Authority exercise its discretion and order Amcor to pay to him under s 128 of the Act a sum greater than that in s 128 (2). He has asked for almost a year's lost remuneration taking into account subsequent earnings. Section 128 (2) states the Authority must whether it provides or not for other remedies, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.

[89] There is an element of the unknown in this matter and I am not minded to exercise my discretion and order payment for compensation for remuneration of a sum greater than 3 months' ordinary time remuneration.

[90] Under s 128 (2) I intend to make an order for 3 months' ordinary time remuneration which is less than lost remuneration. In doing so I need to be satisfied that employment if the process had been fair and open minded would have lasted about six months. I am so satisfied. Subject to any issues of contribution Mr Gillan should be paid lost wages for a period of

13 weeks which multiplied by his ordinary time remuneration of \$1861.47 is \$24,199.11 gross. Notice paid in lieu since 10 March should be deducted.

Interest

[91] I am not minded to exercise my discretion and make an award of interest. Once lodged with the Authority the matter proceeded without delay to investigation.

Compensation

[92] I heard from Mr Gillan and his wife Corrine. It was clear as they gave their evidence that the impact on the dismissal on Mr Gilan was severe. One matter that they found was particularly distressing was the impact the dismissal had had on Mr Gillan's brother who also worked at Amcor and brought the letter proposing termination to Mr Gillan at home. I accept that his brother's distress when he found out what the letter said was difficult for Mr Gillan. I could not be satisfied that was the only reason Mr Gillan's brother then left Amcor and his subsequent medical issues. I have put that matter, whilst acknowledging the distress it caused, to one side in my assessment.

[93] The dismissal had a significant financial impact on Mr Gillan and he had to borrow money from his mother and family activities with his children such as motorbike trials were no longer possible. Mr Gillan has a small holding with horses and chickens and there was a real risk that he could have lost the farm. A mortgage holiday was obtained and Mrs Gillan had to increase her working hours so that the family could pay bills.

[94] Mr Gillan said he became quite overwhelmed after his dismissal and was prescribed medication to deal with the stress. His father would pick him up and take him for drives to take his mind off matters. Mr Gillan would isolate himself from the family to prevent tension and arguments. Mr Gillan said that his confidence has been seriously shaken but is slowly coming back. Mrs Gillan described the days after the dismissal finding Mr Gillan "huddled on the couch crying." She said that Mr Gillan's relationship with their teenage children was not the same after dismissal as he was upset and emotional with them.

[95] Mr Gillan did attempt to find another role and secured a new printing role commencing on 19 April 2016 which Mr Gillan enjoys very much. The pay is at a much lower rate.

[96] Weighing all matters including that Mr Gillan commenced a new role within a period of about five weeks from dismissal I am of the view that a suitable award subject to any contribution is the sum of \$20,000.

Contribution

[97] This was a no fault dismissal and I do not find that issues of contribution arise.

Orders made

[98] I order Amcor Flexibles (New Zealand) Limited to pay to Kelly Gillan the following:

[99] Reimbursement of lost wages under s 123 (1)(b) of the Employment Relations Act 2000 in the sum of \$24,199.11 gross less notice paid.

[100] Payment of compensation under s 123 (1)(c)(i) of the Employment Relations Act 2000 in the sum of \$20,000 without deduction.

Costs

[101] I reserve the issue of costs. The parties may be able to reach agreement failing which Mr Meikle has until 17 November 2017 to lodge and serve submissions as to costs and Mr Harrison has a further two weeks until 30 November 2017 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority