

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2021] NZERA 64
3107059

BETWEEN	DEBRA MORTON Applicant
AND	THE FARMERS' TRADING COMPANY LIMITED Respondent

Member of Authority:	Marija Urlich
Representatives:	Emma Moss, counsel for the Applicant Matthew McGoldrick, counsel for the Respondent
Investigation Meeting:	1 December 2020
Submissions received:	1 December 2020 from Applicant 1 December from the Respondent
Determination:	22 February 2021

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ms Morton was employed as store manager of the Lynn Mall Stevens from 23 October 2018 until her dismissed for medical incapacity effective 4 January 2020. At the date of her dismissal Ms Morton's employer was Stevens Homewares Limited (Stevens) which at all relevant times, along with The Farmers' Trading Company Limited (Farmers), was a separate entity within the James Pascoe Limited group of companies. Subsequent to Ms Morton's employment ending Stevens amalgamated with Farmers. Farmers is the correct respondent but for ease of reference the body of this determination will refer to the respondent as Stevens.

[2] Ms Morton's dismissal followed a period of time off work following an injury to her right wrist which she sustained during the course of normal duties. She says the actions of Stevens disadvantaged her in her employment and its decision to dismiss her was unjustified. Stevens does not accept Ms Morton's claims.

The Authority's investigation

[3] The Authority heard evidence from Ms Morton, Tracy Thomas, a friend of Ms Morton's who attended relevant meetings as a support person, Gwen Stege, who was then employed as Stevens regional manager, was Ms Morton's manager and the decision maker and Joanna McMahon, Farmers regional human resource manager, who provided advice to Ms Stege during the process leading up to and including Ms Morton's dismissal.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received. In determining this matter the Authority has carefully considered all the material before it, including all information and evidence of the parties and the submissions.

The issues

[5] The issues identified for investigation and determination are:

- (i) Was Ms Morton unjustifiably disadvantaged in relation to her employment?
- (ii) Was Ms Morton unjustifiably dismissed by Stevens?
- (iii) If so, what remedies, if any, should be awarded?
- (iv) If any remedies are awarded, should they be reduced (under s 124 of the Act) for blameworthy conduct by Ms Morton which contributed to the situation giving rise to the personal grievance?
- (v) Should either party contribute to the costs of representation of the other party?

Background

[6] On 11 April 2019, during the course of her duties Ms Morton suffered an injury to her non-dominant hand while lifting a cast iron grill. She expected the injury to resolve itself in time and did not immediately seek treatment. Nevertheless and appropriately she reported the injury through the work place accident reporting system.

[7] As the weeks passed and Ms Morton's wrist injury did not improve she went to her general practitioner who referred her to a physiotherapist. The first physiotherapy appointment Ms Morton attended was 16 May 2019.

[8] On 5 June Ms Morton told the Stevens' health and safety manager she was receiving treatment for her wrist and the following day emailed him copying in her manager Ms Stege. The Authority is satisfied up to this point Ms Morton and Ms Stege had regularly discussed her wrist injury and Ms Stege was aware of how Ms Morton was managing at work and the treatment she was receiving.

[9] Ms Morton's treatment progressed from physiotherapy to a splint, to a soft cast, to then having a MRI and referral to an orthopaedic surgeon. The surgeon advised Ms Morton the cartilage in her wrist was torn and surgery would likely be required. Before surgery the surgeon recommended a steroid injection which was administered on 28 August. Ms Morton took the following week off work to assist the healing process. This was the first time off work Ms Morton had taken in respect of the injury; up to then she had continued to work her normal hours and perform her usual duties.

[10] Unfortunately, the steroid injection resulted in increased pain and reduced mobility in Ms Morton's wrist. She was certified unfit to work from 10 September 2019 for a month and received weekly compensation from ACC. Stevens topped up the ACC payments to Ms Morton's usual take home pay. On 13 September Ms Morton's surgeon requested ACC approval for the surgery and Ms Morton advised Stevens of the surgeon's estimated recovery timeframe.

[11] On 20 September Stevens contacted Ms Morton to set up an occupational therapist assessment of her work capacity including her ability to perform light duties. Ms Morton said this request seemed to come out of nowhere and she was unclear where the request for the assessment fitted into her situation.

[12] The occupational therapist assessed Ms Morton's work capacity at 10% of her store manager role being the administrative functions. Through this period Ms Morton continued to perform those duties working a few hours per week. The duties including checking in on her team, recruiting and employing two Christmas casuals, completing the rosters for September through January and meeting with Ms Stege to discuss the store.

[13] On 7 October Ms Morton was certified unfit for work until 17 November. On 18 October ACC declined the surgery request. Ms Morton's surgeon immediately lodged a review, the success of which was advised to Ms Morton on 13 December and the surgery was then booked for 10 February 2020. In the period before the review outcome ACC declared the cause of Ms Morton's injury was degenerative and discontinued her accident related weekly compensation payments. On 18 November another medical certificate was issued to Ms Morton certifying her off work until 12 January 2020.

[14] Ms Morton says about this time Stevens' attitude towards her changed; that when ACC no longer considered the injury work related and she had completed all the administrative tasks required for the busy Christmas period Stevens set on a path to end her employment.

[15] Ms Morton has formed this view because shortly after advising Ms Stege all the Christmas casual recruitment was complete, along with the end of year rosters to January, including coverage of her hours, on 12 November Stevens wrote to her inviting her to attend a meeting on 15 November to discuss "*your medical condition and your situation and our concerns about your ability to return to work in the near future.*" Ms Morton was invited to bring a support person and encouraged her to take independent advice. The letter includes:

While we have a great deal of sympathy for your situation, we are concerned about your inability to attend work for such an extended period and, if you are able to return to work, in what capacity you will be able to return. We need to have certainty around your availability to fulfil your contractual obligations to us, and, if you are unable to do so, we will need to consider whether your employment can continue or whether we will need to terminate it.

We ask that you bring any medical reports regarding your medical condition with you to the meeting.

[16] Ms Stege resisted the notion that from this point Stevens' attitude was one determined to dismiss Ms Morton. She said in her evidence given Ms Morton was certified fully unfit until 12 January and with no certainty about her ACC position Ms Stege felt Ms Morton's situation needed to be dealt with more formally.

[17] The meeting proceeded on 20 November, which allowed Ms Morton more time to arrange a support person to attend with her and was held at a different venue than originally proposed and which was more convenient for Ms Morton. The notes of the meeting have been made available to the Authority.

[18] On 25 November Ms Stege wrote to Ms Morton summarising matters discussed at the meeting and setting out a preliminary view that her employment should end on the grounds "*...it is not reasonable to expect the company to continue to employ you due to the seriousness of your medical condition and the fact that there is no indication of when you would be able to recommence your role as outlined in your employment contract with Stevens*". Under the heading "Other Options" the letter included that a loss prevention role Ms Morton was interested in with Farmers was not considered a suitable option given the health and safety risks involved and offered to arrange an interview for a full time customer service role with Farmers. Ms Morton was required to provide a full medical clearance. Ms Morton identified possible roles to apply for and actively engaged with the process.

[19] The next meeting was held on 27 November to discuss possible roles within Farmers. Ms Morton said it was clear to her by this meeting there were no roles in Stevens. On 2 December Ms Morton provided a medical certificate certifying her fit to perform office duties up to 25 hours per week. On 3 December the parties met for a third time to discuss and as matters transpired, for Stevens to confirm the preliminary view to dismiss.

[20] By letter dated 4 December Stevens confirmed its decision to end Ms Morton's employment on notice. The letter recorded the further information Ms Morton had provided in the 3 December meeting including the details of the medical certificate, which ruled out the full time role as suitable, and a part-time office support role with Farmers, which the parties agreed Ms Morton would apply and be interviewed for. Also recorded was Ms Morton's advice ACC's decline decision was being reviewed and that the timeframes for the review and its outcome were unclear.

[21] By email dated 5 December Ms Morton queried her final day of employment and asked for copies of 'the minutes for all 3 meetings'. Ms Stege replied on 11 December the records of the meetings were notes not minutes and the letters were a true and accurate reflection of the discussion. The meeting notes were provided on 16 December.

[22] Also on 16 December Ms Morton advised Ms Stege the ACC review had been successful and a date of 16 February 2020 had been set for the operation. Ms Morton asked Ms Stege whether this new information made a difference to the decision to end her employment. Ms Stege responded:

If we take into account the time lines as put down by the specialist...healing time is 3 – 5 months after surgery and after that time period you may not be signed off for a role at Stevens. We would not be able to keep SM [store manager] role in Lynmall open for another 5 to 7 months and unfortunately we have no other options in terms of covering that position.

[23] On 24 December Ms Stege arranged for a farewell card and gift vouchers to be couriered to Ms Morton. This was advised to Ms Morton in an email which also advised her final pay would be manually processed on 30 December. Ms Morton acknowledged the gift with thanks.

[24] Also in late December Ms Stege started the recruitment process for the Stevens New Lynn store manager role. In January 2020 recruitment was frozen necessitating a justification process which was duly approved and the role was advertised on 28 January with the person starting at the end of February.

[25] In mid-May 2020 Ms Morton began looking for work after her surgery and rehabilitation. She continued to receive earnings related compensation until August 2020.

Relevant law

[26] It is well established that an employer is not bound to hold a job open indefinitely for an employee who is unable to attend work¹. Where there is a dismissal in such circumstances the employer will be required to show the decision to dismiss

¹ *Lal v The Warehouse Limited* [2017] NZEmpC 66 at [30].

was substantively and procedurally justified assessed against the test set out in section 103A of the Act².

[27] In *Lal* Chief Judge Inglis identified a broad framework in which dismissals for medical incapacity should be assessed:

- (i) was the employee was given a reasonable opportunity to recover, taking into account the employment agreement, any relevant policy, the nature of the position held by the employee and the period of employment?
- (ii) did the employer undertake a fair and reasonable inquiry into the return to work prognosis engaging appropriately with the employee. Such an inquiry is likely to involve seeking and considering relevant medical information?
- (iii) were any comments of the employees fairly considered before the decision to dismiss was made³?

[28] Ms Lal's dismissal was held to be substantively justified because there was no real prospect of her returning to work for some time at the date the decision to terminate was made and the passage of time proved this assessment to be correct⁴. The process the employer undertook was found to be within the permitted range in the particular circumstances of the case which included protracted interactions between the parties concerning Ms Lal's injury including a possible gradual return to work and Ms Lal's failure to engage with that process. The Court found Ms Lal was on notice what the employer was considering doing and how that might impact on her.

Discussion

[29] Following the guidance provided in *Lal* the following questions are to be considered in determining whether Stevens' actions were those a fair and reasonable employer could have taken in all the circumstances:

² *Ibid* [30] and [31].

³ *Ibid* [33] – [35].

⁴ *Ibid* [39].

Was Ms Morton given a fair opportunity to recover?

[30] Ms Morton says her employer moved too quickly to dismiss her and there was no need for Stevens to move to dismiss when it did because the store could have managed without her in the role for longer. This is not supported by the evidence and is not accepted. At the date Ms Morton was notified of her dismissal her work capacity assessment for her role was 10%, the latest medical certificate certified her fully unfit for duties until 12 January and this was likely to continue given she was required to have surgery with an estimated recovery time of three to five months. Also at that date Ms Stege had looked without success for roles within Stevens to which Ms Morton could transfer, tried without success to fill the store manager role on a short term basis from within the existing staff and on a three month fixed term basis, involved both herself and Stevens visual merchandiser more regularly in the store and had observed the store without a full time manager since late August 2019. Ms Stege's assessment was these temporary measures were not sustainable and that without a store manager the store 'was just scraping through and someone was needed there to manage and drive the store forward'. Ms Stege's assessment is accepted.

[31] Ms Morton says Stevens were not sufficiently engaged with her injury recovery and treatment process particularly in the period prior to her going on ACC. There is insufficient evidence any action of Stevens delayed Ms Morton's recovery or any failure of Stevens impeded Ms Morton's access to treatment or other support. It is not accepted that Stevens failed to engage with her in the early stages of her recovery or beyond.

[32] This is not a situation like *Lal* where the worker did not engage with the employer's proposals to return to work. Ms Morton cannot be faulted for her engagement and communication with Stevens and her ready provision of relevant information. These actions on her part are consistent with the evidence of her commitment to her job and that she was a valued employee. However, at the date of dismissal there was no prospect of Ms Morton returning to work at that date or in the foreseeable future. Ms Morton was given a fair opportunity to recover.

Did Stevens undertake a fair and reasonable assessment of Ms Morton's return to work prognosis?

[33] Ms Morton accepted there was no information relevant to Stevens' assessment which it did not take into account. There is no dispute Stevens had all relevant information before when the decision to dismiss Ms Morton was made and that it considered that information; this is clear from Ms Stege's letters dated 25 November setting out the preliminary view and 4 December confirming the decision to dismiss.

[34] The 16 December email recorded Ms Stege's consideration of and response to the further information Ms Morton provided. Though the surgery date was now clear this did not alter the timeframe or address the concerns Stevens had about the timeframe or Ms Morton's ability to return to work.

[35] The Authority is satisfied alternative roles for Ms Morton were looked at within the structure, as it was then, and that this did not entitle Ms Morton to transfer from Stevens to Farmers without an offer of employment from the later. Ms Morton submits this barrier should have been removed and is critical of Farmers' interview process. It is not a requirement of fairness and reasonableness for an employer to take steps to bind another entity in the circumstances outlined.

[36] Consideration has been given to whether the dual focus of the meetings on whether Ms Morton's employment should continue and finding suitable alternative positions for her to apply for introduced confusion into the process which amounted to a disadvantage. As recorded in the notes of the meetings and Ms Stege's letters recording the discussions and outcome thereof, the process, information under consideration and outcome are clear. There was no flaw in the process or outcome which would give grounds to an actionable disadvantage.

[37] Consideration has also been given to whether the 2 December medical certificate changed matters. It did not. This medical certificate was in response to the Farmers office role for which Ms Morton had applied. It did not change the assessment of Ms Morton's work capacity to perform her store manager role which remained unchanged.

Were Ms Morton's comments fairly considered?

[38] The preliminary decision letter and dismissal letter record Ms Morton's comments and Stevens' consideration of those comments.

[39] There was some criticism that the proposed time and location of meetings disadvantaged Ms Morton. It is accepted that Ms Morton having to initiate a change in the meetings would have contributed to her stress. However, I am not satisfied the issue around the timing and location of the meeting was so serious as to render the process unjustified. When Ms Morton asked for the meetings to be rescheduled and relocated this promptly occurred.

[40] The concern expressed that the meeting was rushed or the outcome already decided arises in part from the preliminary decision. This decision followed a meeting with Ms Morton where all the relevant information was before the decision maker and Ms Morton had an opportunity to comment. An employer is entitled to form a preliminary view, which in itself is not sufficient to establish the outcome was predetermined.

Outcome

[41] Ms Morton's claims for unjustifiable disadvantage and dismissal are not successful. Taking into account all the relevant factors the decision to dismiss at the time it was made, was one a fair and reasonable employer could make in all the circumstances of this employment relationship problem.

Costs

[42] Costs are reserved. The parties are encouraged to attempt to resolve the issue of costs themselves. If this is not possible and The Farmers' Trading Company Limited seeks a contribution to costs, it should file and serve a costs memorandum within 14 days of the date of this determination. Ms Morton should file any reply memorandum within 7 days of receipt of such.

Marija Urlich

Member of the Employment Relations Authority