IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2021] NZERA 71
3084552

	BETWEEN	LOGAN COURTNEY Applicant
	AND	MAJOR MOTORS LIMITED Respondent

Member of Authority:	Philip Cheyne
Representatives:	Carol Grant, advocate for the Applicant Paul Brown, advocate for the Respondent
Investigation Meeting:	15 December 2020 at Christchurch
Date of Determination:	25 February 2021

DETERMINATION OF THE AUTHORITY

A. Major Motors Limited is to pay Logan Courtney compensation of $3,000.00 pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

B. I reserve costs, subject to the timetable set for submissions.

Employment relationship problem

[1] Major Motors Limited operates a car sales business in Christchurch. It employed Logan Courtney as a sales person from February or March 2018 until August 2018. Mr Courtney had injured his foot in a non-work accident and was off work on ACC from 17 April until his dismissal in August 2018.

[2] There was a meeting on 13 August between Major Motors and Mr Courtney.

Mr Courtney says he was dismissed during the meeting. He then received an email on 15 August advising that the company was terminating his employment. Mr Courtney sent an email to Major Motors on 29 October 2018 saying that he had been unfairly dismissed from his employment.

[3] In his statement of problem lodged on 13 December 2019, Mr Courtney says he was unjustifiably disadvantaged and unjustifiably dismissed. He says that he was discriminated against on health grounds. Mr Courtney also says that Major Motors' actions were not consistent with statutory good faith obligations. As remedies, Mr Courtney claims lost remuneration, compensation of $35,000.00, penalties for breaches of good faith and penalties for breaching the employment agreement.

[4] Major Motors in reply says that it justifiably dismissed Mr Courtney on the grounds of "medical frustration" on 15 August 2018, when he was unable to confirm when he would be cleared as fit for work. It says it did not discriminate against Mr Courtney on health grounds.

[5] The following issues arise:

(a) What terms of employment were agreed?

(b) Was a penalty claim available?

(c) Was a grievance raised within time concerning Major Motors' decision that it had no light duties to support a graduated return to work programme?

(d) If yes, was Mr Courtney's employment affected to his disadvantage by an unjustified action by Major Motors?

(e) Did Major Motors justifiably dismiss Mr Courtney?

(f) Did Major Motors discriminate against Mr Courtney?

(g) If Mr Courtney has a personal grievance, what remedies should be ordered?

What terms of employment were agreed?

[6] Two versions of a proposed written employment agreement have been produced in

evidence.

[7] Mr Courtney's evidence is that he started on 3 February 2018, but did not receive an agreement until a month after he started. However, the statement of problem states that he was employed from 5 March 2018. Anastasia Eliseeva is a director of Major Motors and runs the day to day business operations. Ms Eliseeva's evidence is that Mr Courtney commenced work on 5 March 2018 and that she gave him a proposed agreement that day.

[8] Printed payroll information[1] supports Ms Eliseeva's evidence. Both versions of the proposed agreement have early March 2018 dates printed in them. There is no documentary evidence to support Mr Courtney's assertion. I prefer Ms Eliseeva's evidence that Mr Courtney started work on 5 March 2018.

[9] Mr Courtney did not sign the "Yard Hand" version he was first given. He returned that version to Ms Eliseeva with a number of hand-written notes about various issues, including the role. Ms Eliseeva amended some provisions in the proposed agreement and gave the "Sales Person" version to Mr Courtney to sign and return. Mr Courtney never signed the proposed agreement. However, for current purposes, Mr Courtney can be treated as having agreed by conduct to the second version. It included clause 13.5 Termination on Medical Grounds as follows:

> In the event the Employee has been absent from work for 10 weeks which should represent an extended break from employment because of illness, the Employer shall be entitled to require the Employee to undergo a medical examination by a registered medical practitioner nominated by the Employer, at the Employer's cost. In assessing the Employee's fitness for work, the Employer shall take into account any report provided as a result of that examination, and any other medical report provided by the Employee within a reasonable time-frame. If, in the reasonable opinion of the Employer, the Employee is incapable of the proper performance of their duties by reason of illness, the Employer may terminate this agreement by the provision of at least four weeks' notice.

Was a penalty claim available?

[10] A claim for a penalty under the Act must be commenced within 12 months after the cause of action first became known to the claimant, or within 12 months of the date when the cause of action should reasonably have become known to the claimant, whichever is

[1] Mr Courtney explains the first payment date on 9 March by claiming he had "trials and stuff like that" for a month before he was paid. However, Mr Courtney's income information shows him being paid by a different entity in February and the start of March.

earlier.

[11] The statutory good faith obligations owed by Major Motors to Mr Courtney came to an end at the same time as the contractual obligations under the employment relationship. This was in August 2018.

[12] If Major Motors breached good faith and contractual obligations to Mr Courtney, those causes of action must have arisen during the employment, so by August 2018 at the latest. The claim for penalties was commenced on 13 December 2019, more than a year after the causes of action could have arisen.

[13] When I first raised the point before the investigation meeting, it was suggested that the cause of action was first known to Mr Courtney when he got legal advice. However, the time limitation for a cause of action starts from actual or constructive knowledge of the facts, not from receipt of advice about the potential legal consequences of those facts. The claims for penalties could not succeed because proceedings were not commenced within time.

[14] Mr Courtney's representative withdrew the penalty claims during a second case management conference. The withdrawal was a response to me raising the issue. I have set out the basis for my views expressed in the case management conferences. If the claims had not been withdrawn, I would have dismissed them.

Was a grievance raised within time concerning Major Motors' decision that it had no light duties to support a graduated return to work programme?

[15] Mr Courtney was certified fully unfit for work from 17 April until 13 June 2018. On 31 May Mr Courtney was certified fit for some work (normal hours) from 14 June until 14 July, subject to physical restrictions regarding prolonged walking and heavy physical work. On 11 July Mr Courtney was again certified as fit for some work (normal hours), subject to physical restrictions regarding prolonged walking and heavy physical work. On 25 July Courtney was certified fit for some work (4 hours per day 5 days per week) with physical restrictions such as lifting, prolonged walking and standing. Light duties and desk work was specified. This certificate covered until 27 August 2018.

[16] ACC referred Mr Courtney to Mr Steve Muir for a Stay at Work programme, on or

about 2 July. An email of that date by Mr Muir says that he had left a message for Mr Courtney's employer to contact him. Ms Eliseeva's evidence is that she spoke to Mr Muir on 4 July and said that light duties such as office work were not available. There is no reason to doubt that evidence. On 24 July Major Motors sent Mr Muir a list of work activities, concluding "…to undertake the above mentioned jobs in a timely & effective manner, our vehicle consultants need to be 100% fit in order to perform their employment responsibilities".

[17] Mr Muir recorded in the Stay at Work plan a target date of 27 August 2018 for a return to work, noting that he was unable to coordinate a graduated return to work process due to "a lack of employer engagement, lengthy recovery expected, slow to wean out of boot and mobilise".

[18] Mr Courtney also saw his physiotherapist over this time. The physiotherapist noted on 23 July that Mr Courtney felt frustrated as work was not replying to messages. Mr Courtney's evidence, which I accept, is that he quickly realised that he was not going to be able to get back to work on a part-time basis as Major Motors "ignored ACC & their return to work programme" for him. It was clear to Mr Courtney on 23 July 2018 that Major Motors was not going to participate in a graduated return to work programme for him.

[19] After the dismissal, Mr Courtney sent Major Motors an email on 29 October raising his personal grievance. It reads:

> I am writing to you as I believe I have been unfairly dismissed from my position as a salesman with your company. I have been advised that under the circumstances, the dismissal was unjustified and has a lack of substantive justification. I am hoping we can discuss this further and that I can resume my role as a salesman shortly.
>
> On 15th August 2018, I received an email from Anastasia Eliseeva regarding the termination of my employment contract due to medical reasons. As stated in the email, the contract termination was due to the length of my recovery of an injury I sustained on 17th April 2018. As I am nearing the end of my recovery, this has left me in a tough situation where once I am cleared to return to full time work, I will have no job to return to. This leaves me with no income to pay my rent, power, food & other bills, which I find unfair as the injury was sustained via an accident.
>
> I have been advised to lodge a personal grievance with Major Motors Ltd to determine if I will be able to return to my position as a salesman, thank you and I

look forward to hearing from you soon.

[20] The email clearly raises Mr Courtney's personal grievance claim concerning the dismissal. The email does not raise any grievance about Major Motors not working with ACC and Mr Muir on a graduated return to work programme. There is no evidence of further steps to raise a grievance concerning the return to work programme until the statement of problem was lodged with the Authority in December 2019.

[21] There is a submission that the applicant did not understand the need to raise a grievance about the return to work programme as well as about the dismissal. However, it is acknowledged that Mr Courtney had some limited advice when he raised his dismissal grievance. That is apparent from the text of the email. While Mr Courtney may have sought or received limited advice prior to his October email, that does not circumvent the statutory requirement to raise any grievance within time.

[22] There is a submission that Major Motors did not object to an unjustified disadvantage grievance being raised out of time in its statement of reply. Apart from this statement, an argument that Major Motors impliedly consented to the unjustified disadvantage being raised out of time was not developed. There is no evidence about Major Motors engaging with Mr Courtney to resolve his concern about it not facilitating a return to work or light duties, when the concerns were first raised in the statement of problem. There is no evidential basis to support a finding that Major Motors impliedly consented to Mr Courtney raising his unjustified disadvantage grievance out of time.

[23] I noted during a case management conference that the investigation would consider whether a grievance claim concerning the graduated return to work programme had been raised within time. I find that no personal grievance concerning the employer's (in)action over a graduated return to work programme was raised before the December 2019 statement of problem, more than a year outside the time within which a grievance must be raised.

[24] There is no application for leave to raise this personal grievance out of time due to exceptional circumstances.

[25] This part of the claim must be dismissed so it is not necessary to consider

justification for Major Motors' view.

Did Major Motors justifiably dismiss Mr Courtney?

[26] Major Motors dismissed Mr Courtney. He raised a personal grievance about the dismissal and later commenced this action. Major Motors must be able to show its actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time.

[27] Ms Eliseeva says that she had a meeting on or about 22 July with Mr Courtney. Her evidence is that she explained to Mr Courtney that she did not have any suitable alternative duties, the point having been raised with her by Mr Muir. Ms Eliseeva's evidence is that she asked Mr Courtney when he could return to work and told him that she would not be able to keep the position open forever. In response to my questions, Mr Courtney said "We definitely met June or July a few times to discuss things". He was not able to give an exact date. Mr Courtney told me the meeting was to discuss his injury and how he was proceeding. He says that Ms Eliseeva asked "when I would be back?" He also says "I can't recall what else was discussed" but disputes that Ms Eliseeva told him that there were no suitable alternative or light duties. However, Mr Courtney also told me that Ms Eliseeva said that they could not hold the position forever and they needed a specific return to work date. Mr Courtney confirmed he did not keep a diary or note of these events.

[28] Given Mr Courtney's responses to me, I accept the evidence of Ms Eliseeva regarding the meeting on or about 22 July. To summarise, Ms Eliseeva explained about the lack of suitable alternative duties, she asked Mr Courtney about when he could return to work and said that they could not keep the position open forever.

[29] On 7 August, Ms Eliseeva sent Mr Courtney an email as follows:

> Good Morning Logan
>
> We wish to hold a meeting with you regarding your injury and ACC leave. If you could please confirm if you are able to attend at 10.00am Monday 13th of August 2018 at 379 Brougham Street, Sydenham. Please feel free to bring a support person.
>
> If you could please confirm that this time is acceptable to you.

Kind regards

Anastasia

[30] There was an email exchange over the meeting time, but it was not changed.

[31] Mr Courtney's evidence is that he attended, not really knowing what was going to happen. He says that he then lost his job, even though he pleaded for a couple of more days to get some more information from his surgeon and physio. Mr Courtney's evidence is that the meeting did not last long and that he was told they could no longer hold open his job and that things were taking too long. Mr Courtney says that he told them they could ring his Physio or ACC but they refused. He said that if they were firing him he needed that in writing.

[32] Ms Eliseeva's evidence is that Mr Courtney gave them a further medical certificate, they told him they did not have any part-time positions or light duties for him and they asked him about a return to work date. As Mr Courtney could not give them a date for his return to full capacity, they discussed termination of the employment but did not dismiss him at that point. Ms Eliseeva says that Mr Courtney did not ask them to wait for him to obtain further information. Ms Eliseeva's evidence is that she sent Mr Courtney the 15 August email terminating the employment, having heard nothing further from Mr Courtney.

[33] I do not accept Mr Courtney's evidence that he attended the meeting "not really knowing what was going to happen". The proposed meeting was "regarding his injury and ACC leave" and he knew from Ms Eliseeva's comments several weeks earlier that Major Motors would not keep the job open for him indefinitely. Mr Courtney was offered the opportunity to be supported at the meeting. It would have been apparent to Mr Courtney that the proposed meeting was a follow up from the 22 July discussion. Major Motors had said enough for Mr Courtney to decide whether to be supported or represented at the meeting.

[34] I note that when raising the grievance by his 29 October email, Mr Courtney does not claim that he was dismissed during the 13 August meeting. The email states that Mr Courtney received a 15 August email from Ms Eliseeva "regarding the termination of my contract". If Mr Courtney had been dismissed on 13 August during the meeting, one

would expect that to have been mentioned in the October email. That, along with caution about Mr Courtney's evidence more generally, causes me to prefer Ms Eliseeva's evidence that they did not dismiss Mr Courtney during the meeting.

[35] Mr Courtney also told me that on 13 August Ms Eliseeva said that they needed a specific date for his return to work and that they could not hold the position open forever. That evidence given in response to my questions is consistent with Ms Eliseeva's evidence about the meeting. I prefer Ms Eliseeva's account of the 13 August meeting to the extent it differs from Mr Courtney's evidence. To summarise, Mr Courtney gave them a further medical certificate, there was mention that Major Motors could not provide light duties, they asked him about a return to work date, Mr Courtney could not give them a date for his return to full capacity and there was mention that his employment might be terminated. I also accept Ms Eliseeva's evidence that Mr Courtney did not ask them to wait for him to obtain further information. The meeting ended with Mr Courtney knowing that his dismissal was under consideration.

[36] Mr Courtney did not obtain any further medical information or contact Major Motors after the meeting.

[37] On 15 August Ms Eliseeva dismissed Mr Courtney by sending him the following email:

> Dear Logan
>
> It is with regret that I advise that we are terminating your employment contract.
>
> Due to your non workplace injury and the length of recovery time to date, we are unable to leave your position open any longer.
>
> If you wish to discuss this further please call me and we can set up a meeting.
>
> Best regards
>
> Anastasia

[38] I find that Major Motors sufficiently investigated its concern about Mr Courtney's ongoing work incapacity. Major Motors did not have access to any of Mr Courtney's medical information, except with his consent.[2] At the July and 13 August meetings, Major

[2] Ms Eliseeva had phoned ACC on 24 July for a current medical certificate, but was told to discuss it with Mr Courtney.

Motors investigated to the extent possible by asking Mr Courtney about his fitness for work.

[39] I find that Major Motors raised its concerns with Mr Courtney in the July and 13 August meetings. Any information deficit for Major Motors' decision arose from Mr Courtney choosing not to provide further information.

[40] ACC records now produced by Mr Courtney show he saw his physiotherapist on 13 August. It appears from the ACC records produced in evidence that a further operation to remove the screws had earlier been anticipated for mid-August. Mr Courtney was seen by a hospital specialist on 9 August. By then, an application had made for the operation in 1–2 months. There is no evidence that Mr Courtney advised Major Motors about these dates at either meeting or prior to the 15 August email. I find that Mr Courtney had a reasonable opportunity to respond to the concerns at these two meetings and after 13 August. Mr Courtney did not take up the opportunity to respond to the concerns or provide details about future treatment and the prognosis for his recovery time.

[41] As foreshadowed on 9 August, Mr Courtney had further surgery in early October 2018 to remove the screws in his leg. He remained on full ACC earnings related compensation from August until the end of December 2018. Mr Courtney told me that the surgery could have waited up to two years and he would have delayed it until when it would have suited Major Motors. I do not accept Mr Courtney's evidence that he would have delayed it to suit Major Motors. If that had been his intention, he would have mentioned that to Ms Eliseeva in July or August.

[42] From April until August 2018, Major Motors took no action in respect of Mr Courtney's employment, despite his continuing incapacity, after a very short period of employment. When the company raised its concerns that it could not hold open the position indefinitely, Mr Courtney did not offer any information for the company to take into account.

[43] There is a submission that Major Motors failed to comply with clause 13.5 of the agreement because it did not seek any medical reports. The provision permits the employer to require the employee to undergo a medical examination after 10 weeks' absence, but does not compel the employer to do so. There was nothing to cause the employer to

question the assessment by Mr Courtney's medical advisor that he was not fully fit for work. He was certified until 27 August for part-time light duties work, subject to physical restrictions such as no prolonged standing or walking. Mr Courtney did not say he expected to be or had been advised he would be fully fit by 27 August. I am mindful that he expected further surgery to remove the screws.

[44] I find that to the extent Mr Courtney provided any response, Major Motors genuinely considered it.

[45] There is a submission based on the employer's duty to take all practicable steps to assist Mr Courtney with vocational rehabilitation, under s 71(2) of the Accident Compensation Act 2001. The submission is directed at the unjustified disadvantage claim. However, I deal with the point to the extent it might also be directed at the unjustified dismissal claim. The duty is expressed as arising if the Corporation has given a written notice to the employer.[3] There is no evidence in this case of the Corporation doing that. It is not necessary to consider the Authority's jurisdiction or the relevance of that statutory duty to an assessment of the actions of a fair and reasonable employer.[4]

[46] There is a submission that the dismissal was unjustified because Major Motors did not give at least four weeks' notice, contrary to clause 13.5 of the proffered written agreements. The email by which Mr Courtney was dismissed made no reference to the period of notice. It must be read as having immediate effect, so that Mr Courtney was summarily dismissed. The employment agreement limited summary dismissal to circumstances of established serious misconduct. I find that no fair and reasonable employer could have summarily dismissed Mr Courtney. It follows, for that reason alone, that Mr Courtney has established his personal grievance claim of unjustified dismissal.

Did Major Motors discriminate against Mr Courtney?

[47] The claim of discrimination was first raised in the statement of problem as one of the problems or matters Mr Courtney wished the Authority to resolve.

[48] It must be dismissed for the same reason given above for the unjustified

---

[3] Accident Compensation Act 2001, s 71(1)(b).
[4] *Fredericks v VIP Frames and Trusses Limited* [2015] NZEmpC 203.

disadvantage grievance claim.

What remedies should be ordered?

[49] There are claims for reimbursement of lost wages and compensation of $35,000.00 for distress.

[50] Mr Courtney lost no wages or other income as a result of the established personal grievance. I was not provided with ACC medical certificates for the period after 27 August. However, Mr Courtney continued to receive full earnings related compensation to October when he had the additional surgery and beyond to December 2018. I take from that information that Mr Courtney was not certified fully fit for work until following December. As Mr Courtney has not established any lost income attributable to his personal grievance, I am not able to order any sum in reimbursement.

[51] The evidence in support of Mr Courtney's claim for compensation is limited to his own evidence. He says he was left in a "tough situation" of having no job to return to and no income for essential and other costs of living, a situation he says was unfair. As above, Mr Courtney received ACC earnings related compensation until the end of December. If Major Motors had given Mr Courtney notice of dismissal, his financial situation would have been the same.

[52] Mr Courtney says that it was unfair that he never had a chance to attempt a return to work programme. However, Mr Courtney has not established a grievance in relation to that so I am not able to assess compensation for any claimed harm.

[53] Mr Courtney says that he saw Major Motors advertising a new sales job after his position was lost. He says this made him "take a turn for the worst mentally" when he realised he had been "fucked over", they "didn't care about me" and "it seemed they were just sick of paying my ACC levy" so he "almost gave up" on his rehabilitation programme. The breach of duty by Major Motors solely was a failure to give notice, which Mr Courtney would not have worked given his limited fitness for any work. Even if I accepted Mr Courtney's evidence about these effects, none of them are attributable to the proven breach.

[54] Mr Courtney says that he was "so nervous" and "so embarrassed" to apply for jobs

giving Major Motors as a reference because he was looking to take "legal action". That did not arise until the end of October 2018. Mr Courtney's sense of being nervous is not directly attributable to the established personal grievance.

[55] Mr Courtney says that losing his job changed his life "quite a bit", he was "rather depressed with no energy", "not sleeping" and no longer enjoyed training or doing the things he normally did. These effects, if accepted, were not caused by the established personal grievance.

[56] The sole effect that Mr Courtney can establish as having been caused by his personal grievance is ending his wish that Major Motors would hold his position "open a bit longer". Mr Courtney was entitled to proper notice of termination of the employment, leaving him an opportunity to invite Major Motors to reconsider its decision during the notice period or to discuss support such as through a reference. A low level of loss is attributable to the established personal grievance. I fix compensation of $3,000.00 as a proper measure of the proven loss.

[57] There was no blame worthy conduct by Mr Courtney that contributed to his personal grievance. There will be an order for compensation in the sun of $3,000.00.

Costs

[58] Given the limited measure of success achieved by Mr Courtney, I leave open an opportunity for the parties to make submissions on costs. Any claim for costs should be made by lodging and serving supporting submissions within 14 days and the other party may lodge and serve a reply within a further 14 days. I will then determine costs based on those submissions.

Philip Cheyne
Member of the Employment Relations Authority