

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 418
3110852

BETWEEN	BLAIR WILSON Applicant
AND	B & L CONTRACTING (2006) LIMITED First Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Michael Kim, counsel for the Applicant Simon Greening, counsel for the Respondent
Investigation Meeting:	17 August 2022
Submissions and/or further evidence	17 August 2022 from the Applicant and from the Respondent
Determination:	26 August 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Blair Wilson, claims that he was unjustifiably dismissed by the Respondent, B & L Contracting (2006) Limited (BNL) on 3 April 2020.

[2] BNL denies that Mr Wilson was unjustifiably dismissed and claims he was justifiably dismissed as a result of medical incapacity.

The Authority's investigation

[3] Mr Wilson provided written evidence and gave oral evidence at the Investigation Meeting. Dr Samuel Fuimaono provided written evidence for the Applicant, which was accepted by the Member and the Respondent.

[4] The Respondent witnesses, Mr Corrin Webb, Director of BNL and Mr Mark Dickson, Transport Manager for Reclaim Limited, provided written evidence and gave oral evidence at the Investigation Meeting.

[5] I also received submissions from counsel for the Applicant and for the Respondent.

[6] 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.

Issues

[7] The issue requiring investigation is whether or not Mr Wilson was unjustifiably dismissed by BNL.

Background

[8] Mr Corrin Webb is the sole director of BNL. BNL owns two trucks, which it contracts out, virtually exclusively to Reclaim Limited (Reclaim) a major recycling business which Mr Webb said provides most of the income for BNL.

[9] One of the BNL trucks is a front loading truck; the other is a Hiab truck, which is a truck with a crane that picks up recycle bins from a curb side. The Hiab was the only vehicle of its type that Reclaim had in its fleet. Mr Wilson drove the Hiab Truck for BNL between May 2018 to 3 April 2020.

[10] Mr Webb had a heavy goods licence and worked as an employee for Reclaim. This meant he could take leave when required to provide cover when the drivers of his two trucks took leave or were otherwise unable to work. In particular, the Hiab was an essential vehicle for Reclaim and he explained that someone had to be on standby to drive it.

[11] Mr Dickson said Mr Webb could not work long-term providing cover for one of the drivers of his own trucks because if he was not available to work for Reclaim driving a specialised vehicle, that work would be given to another employee and Mr Webb might not be re-employed by Reclaim in the future.

[12] Equally, if BNL was unable to make the Hiab available to Reclaim, Reclaim would give the contract to another company and in that situation, it was unlikely that BNL would regain it at some future point.

[13] In 2020 Covid-19 arrived in New Zealand. Both BNL and Reclaim were identified as essential services and required to continue operating throughout the Covid alert levels.

[14] Mr Wilson has an autoimmune disorder which makes him particularly vulnerable to severe symptomatic progressions of Covid-19.

[15] Mr Wilson made Mr Webb aware of his medical condition when he started employment with BNL, and it had not been an issue during his employment until the events in March 2020.

[16] On Saturday 21 March 2020 a nationwide alert level was set at level 2. Mr Webb said he had told spoken to Mr Wilson and told him that BNL and Reclaim were classified as essential services. Mr Wilson said he would need to stay at home and so Mr Webb explained what being an essential service meant in terms of operation for BNL and for Reclaim. Mr Wilson then attended work on Monday 23 and Tuesday 24 March 2020.

[17] Mr Wilson said that on the evening of 24 March 2020 he started to notice that he had a sore throat and a slight fever.

[18] On Wednesday 25 March 2020 New Zealand moved to an alert level 4 setting and went into a nationwide lockdown.

[19] Mr Wilson telephoned the Despatcher at Reclaim and told her he could not attend for work because of his symptoms. He did not call Mr Webb, his employer.

[20] The Reclaim Despatcher told him to get a Covid test as soon as possible. Mr Wilson said he called Healthline but was told he did not meet the criteria for a Covid test.

[21] Mr Webb said Mr Dickson called him to let him know that Mr Wilson had reported to Reclaim he had flu-like symptoms and would not be at work to drive the Hiab track. Mr Dickson said as a result of Mr Wilson's news, Reclaim had to send home five people who had worked with Mr Wilson the previous day to await the outcome of Mr Wilson's Covid test.

[22] Mr Dickson asked Mr Webb to tell Mr Wilson to get a Covid test. Mr Webb telephoned Mr Wilson and asked him to get a Covid test, however he said Mr Wilson refused to do so.

[23] Accordingly, he and Mr Dickson both spoke to Mr Wilson and Mr Dickson said he had explained the situation of Reclaim of having had to send home five drivers to await the outcome of Mr Wilson's Covid test.

[24] Mr Wilson said he called Healthline again but without success, being told again that he did not fit the criteria for a Covid test.

[25] He called his GP on the afternoon of 26 March 2020, told him about his sore throat and confirmed he did not have a temperature over 38°C.

[26] His GP advised him that he did not have symptoms indicative of a Covid infection, but which were akin to influenza symptoms, and advised him not to return to work because of his pre-existing medical condition. Mr Wilson was issued with a medical certificate. The medical certificate stated:

This patient was consulted by me on 26/03/2020 and in my opinion is medically unfit to attend from 26/03/2020 until further notice. He DOES NOT fit the criteria for Corona virus infection.

[27] Mr Wilson said he had telephoned the Reclaim Despatcher and told her he could not return to work during the lockdown period.

[28] Mr Webb said that Mr Wilson telephoned him and told him he would only be able to work when New Zealand returned to an alert level 1 setting. Mr Wilson said he did not recall telling Mr Webb this.

[29] Mr Webb said he was concerned about the situation. He knew that if BNL was not able to operate the Hiab truck, Reclaim would give the contract to another company and BNL might not regain the contract. Mr Dickson had told him this. He was not able to drive the Hiab himself on a long term basis because he was needed by Reclaim to drive the specialised trucks.

[30] He could not hire a casual or short-term employee to drive the Hiab in Mr Wilson's absence because it was a condition of his contract with Reclaim that it would only accept a permanent employee as a driver.

[31] On 31 March 2020 Mr Webb said he telephoned Mr Wilson to explain the situation, and seek to resolve it. He offered Mr Wilson \$4,000.00 to resign. He said Mr Wilson had told him: "you do what you have got to do, and I will do what I've got to do".

[32] Mr Wilson said that the conversation with Mr Webb was amicable and he told him he would let him know his decision after taking some legal advice. He denied that Mr Webb had discussed with him his medical condition and the impact of his prolonged absence on BNL.

[33] Mr Wilson said he telephoned Mr Webb the following day, 1 April 2020, and told him he did not want to resign. He said Mr Webb became abusive and swore at him.

[34] Mr Webb said he had written a termination letter dated 2 April 2020 to Mr Wilson. He had visited Mr Wilson's residence to discuss the matter but when Mr Wilson swore at him, he had put the letter in Mr Wilson's post box and left.

[35] The letter was headed: “Termination of your employment by dismissal on notice due to Medical Incapacity”. It stated:

This letter confirms that you are dismissed on notice.

In our telephone conversation on 1st April we discussed details of your medical condition and how it will impact on my business.

You told me that your doctor has advised you that you are no longer able to work until the country is back at level 1 from the Covid 19 virus which at this stage could be up to 12 months.

As my business is classed as an essential business, I took your feedback into account and reached the preliminary view that it was appropriate to terminate your employment on notice on the basis [of] medical incapacity. You were offered a lump sum payout of \$4000.00 so that you could find work in another suitable occupation, but you refused this option immediately.

I have considered your response to my preliminary view and confirm that my final decision is to dismiss you on notice. ...

Was Mr Wilson unjustifiably dismissed by BNL?

[36] Mr Wilson was dismissed from his employment at BNL by letter dated 3 April 2020 on the basis of medical incapacity.

[37] Justification for dismissal is stated in the Employment Relations Act 2000 (the Act), which at s 103A sets out the Test of Justification as being:

S103A Test of Justification

- 1) For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
- 2) The test is whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[38] Other factors to be considered by the Authority as set out in s 103A(3) of the Act include at s 103A(3)(a) the resources of the employer.

[39] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. An employer must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

Substantive Justification

[40] The law is clear that an employer is not bound to hold a job open indefinitely in the case of an employee who is no longer able to perform the duties for which they were employed. In *Hoskin v Coastal Fish Supplies Ltd*. Judge Horn made the statement: “There can come a point at which an employer ... can fairly cry halt” which has been regularly cited since that time. ¹

[41] Similarly in *Canterbury Clerical Workers IUW v Andrews & Beaven Ltd* Judge Castle stated:

... it is well established law that an employer is not bound to hold open a job for an employee who is sick or prevented from carrying out his duties for an indefinite period ...²

[42] The relevant circumstances at the time the decision is made to dismiss will also include the size and operation of the employer. The Chief Judge stated in *Lal v The Warehouse Limited*:

An employer is entitled to have regard to its business needs in deciding an appropriate response to the situation and any applicable timeframes. An employer is not obliged to keep a job open indefinitely, no matter how long an employee has been employed or how large the organisation is. ³

[43] BNL is a small business with three employees, Mr Webb and the two drivers. Its business relied almost exclusively on Reclaim.

[44] By 25 March 2020 New Zealand was at an alert level 4 setting and had entered a lockdown situation. Although the Government was to review the situation, and New Zealand returned to Level 1 on 8 June 2020, in March and early April 2020 there was no definite indication of how long it would be before a return to Level 1.

[45] Mr Wilson had an ongoing autoimmune disorder which made him particularly vulnerable to severe symptomatic progressions of Covid-19 and had been signed off work by his doctor as medically unfit to work: “until further notice”.

[46] Mr Webb’s evidence was that Mr Wilson had told him he would not be returning to work until New Zealand returned to a Level 1 setting.

[47] In that situation, and with no clear idea when an alert Level 1 setting would take place, Mr Webb faced a situation in which he was unable to determine when Mr Wilson would be able to resume his duties. Further that without Mr Wilson working, the contract for the Hiab truck with Reclaim would be at serious risk, and with it the future viability of BNL itself.

¹ *Hoskin v Coastal Fish Supplies Ltd* [1985] ACJ 124 at [127]

² *Canterbury Clerical Workers IUW v Andrews & Beaven Ltd* [1983] ACJ 875 at 877

³ *Lal v The Warehouse Limited* [2017] NZEmpC 66 at [30]

[48] The evidence was that BNL was not able to fill Mr Wilson's position with a short-term employee on a temporary basis because this was not an option open to him due to the terms of the contract with Reclaim.

[49] Mr Dickson's evidence highlighted that Mr Webb driving the Hiab on a longer term basis than to provide cover for a short absence period was not an option because Reclaim, whose employee Mr Webb was, required him to drive its specialised vehicles.

[50] Although terminations for medical incapacity are more usual in the situation in which an employee has been absent for a lengthy period of time, I observe that the situation with Covid-19 was a novel one and on 25 March 2020 there was little information available as to a prospective date when Mr Wilson might be able to resume work driving the Hiab.

[51] BNL is a small employer and at risk of losing its contract with Reclaim on which it was dependent without a permanent driver for the Hiab truck. It had no definite information on a likely date for Mr Wilson to be able to resume his employment.

[52] In these circumstances I find that dismissal was an option open to the fair and reasonable employer with the limited resources and options of BNL.

Procedural Fairness

[53] In *Lal* the Court noted the steps an employer ought to take prior to dismissing an employee for medical incapacity.⁴

[54] These include the employer providing the employee with a reasonable opportunity to manage the illness and seeking more information on the prognosis for a return to work.

[55] These steps equally require the employee to be responsive and communicative.

[56] There is no evidence to support Mr Wilson discussing the proposed resignation with Mr Webb and trying to help resolve the situation offering to engage further with his GP to obtain more information on what 'until further notice' might mean.

[57] Mr Webb was limited in his information on the subject to the statement on the medical certificate and Mr Wilson's comment that he would not be returning to BNL until such time as New Zealand reached an alert Level 1 setting.

[58] Both employer and employee were in a difficult situation for which neither was to blame, and whilst there was an onus on BNL and Mr Webb to act in a procedurally fair manner,

⁴ Above n3 at [33] – [35]

there was also a requirement on Mr Wilson to be responsive and communicative. However, there is no evidence that he tried to engage in a productive dialogue to reach a compromise.

[59] Having said that, I find that the procedure followed by BNL failed to be one that it could have followed as a fair and reasonable employer in all the circumstances. I note that the offer of \$4,000.00 to Mr Wilson in return for a resignation was pre-emptive and belied the assertion that there was any alternative for Mr Wilson to consider other than resignation.

[60] I find that the procedure carried out by BNL was not that of a fair and reasonable employer.

[61] I determine that Mr Wilson was unjustifiably dismissed by BNL.

Remedies

Notice Period

[62] Mr Wilson is claiming three weeks payment in lieu of notice.

[63] There is no employment agreement between the parties. In the letter dated 3 April 2020 Mr Webb states: “Your notice period is one week”. There is no evidence refuting this was the case, on the contrary Mr Wilson was paid on a weekly basis rather than a fortnightly or monthly basis.

[64] I consider on that basis, in the absence of an agreement between the parties, a one week notice period applied.

[65] Mr Wilson was paid one week in lieu of notice and I award no further sum by way of notice.

Lost wages

[66] Mr Wilson said he was cleared for work after 10 weeks. He is still without work having decided to take a course through Work and Income to retrain.

[67] Had BNL adopted a more robust procedure I consider Mr Wilson may have retained his employment for a slightly longer period whilst the parties discussed the matter and Mr Wilson obtained an opinion from his GP as to a more definite prognosis of a return to work.

[68] However, I consider this would have occupied only a limited period of time before the conclusion was reached that Mr Wilson’s employment needed to be terminated due to his medical condition which affected his ability to work at Level 4 setting.

[69] **I order BNL to pay Mr Wilson four weeks wages pursuant to s 28(3) of the Act.** I would anticipate that the parties can resolve the amount. If not, leave is reserved to return to the Authority.

Compensation

[70] Mr Wilson is also entitled to compensation for humiliation and distress. I accept that he experienced distress at the loss of his employment with BNL.

[71] **I order BNL to pay Mr Wilson the sum of \$7,000.00 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1) (c) (i) of the Act.**

Contribution

[72] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[73] I observe that the duty of good faith in s 4 of the Act lays a reciprocal duty on employer and employee to be responsive and communicative. I find that Mr Wilson was not as communicative as he could have been in the situation in which circumstances outside for their control had placed the parties.

[74] Mr Wilson informed the Despatcher at Reclaim that he would not be attending work on 25 March 2020 rather than Mr Webb, his employer. This resulted in Mr Webb receiving the news from Mr Dickson who by that stage had sent five Reclaim employees home as a result of the information from Mr Wilson.

[75] I consider this placed Mr Webb in a difficulty situation with Reclaim, a company which made up the entirety of BNL's business. Prior warning by Mr Wilson who have given him some time to consider the information and possible options before discussing the matter with Reclaim.

[76] In addition, Mr Wilson failed to be active and communicative in engaging with BNL about his medical prognosis and offering to obtain more information to assist Mr Webb with the necessary decision-making considerations.

[77] **I find contribution on the part of Mr Wilson and reduce the amount awarded as compensation by 15%.**

Costs

[78] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[79] If they are not able to do so and an Authority determination on costs is needed the Applicant may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the Respondent would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[80] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[81] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁵

Eleanor Robinson
Member of the Employment Relations Authority

⁵ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].