

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**[2014] NZEmpC 201  
ARC 12/13**

IN THE MATTER OF challenge to a determination of the  
Employment Relations Authority

BETWEEN BARRY DUNN  
Plaintiff

AND WAITEMATA DISTRICT HEALTH  
BOARD  
Defendant

Hearing: 10 and 11 September 2014, and by way of further written  
submissions dated 13 and 21 October 2014

Appearances: J Sutton and P Siliva, counsel for plaintiff  
A Russell, counsel for defendant

Judgment: 5 November 2014

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**JUDGMENT OF JUDGE CHRISTINA INGLIS**

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**Introduction**

[1] Mr Dunn was employed as a mental health nurse with the defendant health board (the WDHB). He was dismissed following a lengthy period off work on sick leave. Mr Dunn contends that his dismissal was unjustified. The claim was heard in this Court at first instance, following a successful challenge to a determination of the Employment Relations Authority (the Authority)<sup>1</sup> finding that Mr Dunn's grievance had not been brought within the statutory timeframe.<sup>2</sup>

[2] The claim raises a number of issues relating to the extent of an employer's obligations when dealing with an employee who is medically unfit for work. While

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<sup>1</sup> *Dunn v Waitemata District Health Board* [2012] NZERA Auckland 464.

<sup>2</sup> *Dunn v Waitemata District Health Board* [2013] NZEmpC 246.

the guiding principles are well established, and not in dispute, it is the application of those principles to the particular factual context that is pivotal.

### **The facts**

[3] Mr Dunn was employed by the WDHB in 2002. It is apparent that the employment relationship did not run smoothly, at least from 2005, when a number of issues arose. In 2007 Mr Dunn received a verbal warning. This ultimately led to the raising of a personal grievance on 4 October 2007. Mr Dunn was undergoing supervision and coaching around this time. It is clear that Mr Dunn had strong views about the competency of his Team Leader and some of his colleagues, as expressed in contemporaneous email communications.

[4] The WDHB took steps to engage with Mr Dunn over his employment issues, including by way of a meeting that occurred on 17 January 2008. During the course of the meeting the possibility of alternative positions was discussed. Mr Dunn rebuffed these suggestions, indicating that he was interested in a severance payment. This was not an option that found favour with the WDHB.

[5] On 14 March 2008 Mr Dunn went on sick leave. He provided a certificate from his doctor dated 20 March 2008 confirming that he was medically unfit for work. The parties subsequently attended mediation, on 31 March 2008 and again on 30 April 2008. The details of the mediations are not before the Court, for obvious reasons.<sup>3</sup>

[6] On 5 May 2008 the WDHB wrote to Mr Dunn through his then lawyer, detailing his sick leave entitlements, advising that issues relating to his ongoing employment might need to be reconsidered if he was unable to return to work in a timely manner, confirming that Mr Dunn had been referred to occupational health within the WDHB for an assessment and return to work programme, requesting a copy of a medical report that Mr Dunn had obtained, and advising that a further letter would be sent relating to performance issues that would need to be addressed on his return to work.

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<sup>3</sup> Refer s 148 of the Employment Relations Act 2000.

[7] No response was received to this letter and a follow-up enquiry was sent on 14 May 2008, again requesting a copy of the report from Mr Dunn's doctor.

[8] On 18 June 2008 the WDHB sent a letter to Mr Dunn directly setting out a number of areas of concern relating to his performance. The letter advised that:

We note that you are currently on unpaid sick leave. There is a process currently being undertaken in association with occupational health to facilitate your return to work. In the meantime, it is appropriate that WDHB made you aware of some concerns it has about your performance.

It is noted that you will be given an opportunity to respond to these concerns and for your response to be considered before WDHB consider any disciplinary action and/or performance plans for you.

[9] There was no response to this letter. Nor were any concerns raised by or on Mr Dunn's behalf in respect of its contents, its mode of delivery or its timing. The letter was a focus of complaint by the plaintiff at hearing. I return to it later.

[10] The plaintiff responded to the WDHB's earlier letter of 5 May on 26 June 2008. The medical report that had been requested was not provided. A request was made for the WDHB's Return to Work and Rehabilitation policy. This was provided by the WDHB by way of correspondence the same day.

[11] The WDHB had sought a report from a specialist occupational physician, Dr Kenny, and this was provided on 21 July 2008 (the Kenny Report). The report contained a pessimistic view of the likelihood of a return to work for Mr Dunn. This was in part informed by a psychiatric report that had been obtained. The report stated that it was unlikely that the relationship between Mr Dunn and his employer would be reparable and that it would be unwise for Mr Dunn to return to his previous place of work "as it currently stands with his current views on standards of practice, and the conflict that exists between his managers and himself." Dr Kenny advised that Mr Dunn remained medically unfit for work and that his incapacity for work was primarily the result of a depressive illness. The report went on to note:

**What is the expected time of incapacity, either full incapacity (time off work) or relative incapacity (on restricted or alternative duties)?**

This depends to a large extent on resolution of the performance and other employment issues which have contributed to Mr Dunn's recent health

problems. It is difficult to see, following the events which have occurred over the last few months, how the employment relationship between Mr Dunn and his work team could be restored to the point of allowing trust between all parties and Mr Dunn returning to full duties, responsibilities and level of competence.

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**Is this employee likely to be able to resume their full duties in the foreseeable future?**

This is unlikely, in my opinion, but depends upon the willingness of all parties to resolve the various performance and other employment issues underlying this situation.

...

**Are there other factors contributing to this employee's incapacity or acting as a barrier to successful occupational rehabilitation?**

Yes. The major barrier is the current proceedings resulting from the Personal Grievance and consequent employment mediation.

[12] Dr Kenny subsequently had a follow-up conversation with Mr Dunn. Dr Kenny raised the possibility of a transfer to another position but took it from Mr Dunn's response that he was firmly opposed to any such move and that what he was seeking was an exit package from the WDHB. Because of its potential relevance to rehabilitation, Dr Kenny reported this conversation to the manager of Human Resources, Mr Nugent. Mr Nugent wrote to Mr Dunn on 19 August 2008 asking for confirmation as to whether he was interested in a return to the WDHB in his current, or another role. A reply was requested by 5 September 2008. Mr Dunn accepted in evidence that he knew that he was being asked about whether he was wishing to return to work and that a response was required. Despite this no response was forthcoming.

[13] On 9 September 2008 Mr Nugent sent a further letter to Mr Dunn, again asking whether he intended to return to work with the WDHB. He advised that if no clarity around his intentions had been provided by 19 September 2008 the WDHB would assume that he did not intend to return to work and would terminate his employment.

[14] A response was provided on 11 September 2008, through Mr Dunn's lawyer. Mr Dunn did not take issue with the contents of the Kenny report, and appeared to

accept the conclusions contained within it. It was stated that although a return to work was “possible” this was conditional upon the WDHB removing “the barriers” outlined in Dr Kenny’s report. The WDHB was unclear what barriers were being referred to in the report and promptly sought clarification of this issue. There was no response to this request.

[15] A follow-up query was sent on 13 October 2008, asking for an explicit statement of what Mr Dunn was asking the WDHB to do to facilitate his return to work. The letter put Mr Dunn squarely on notice that if the requested information was not provided by 20 October 2008 the WDHB would proceed to terminate his employment on notice. The letter could not have been clearer in its terms. No response was received within the stipulated timeframe.

[16] On 23 October 2008 the WDHB sent a letter to Mr Dunn advising that it was unable to keep his position open indefinitely, that it had not received the information requested, and that his employment was accordingly being terminated on notice. The last day of employment was to be 28 November 2008. The letter went on to advise that:

You are welcome to provide the requested information within the notice period and if it is received, it will be considered by WDHB before your termination date and WDHB may review its decision in regards to such.

[17] Mr Dunn responded through his lawyer on 30 October 2008, advising that he considered the decision to terminate was premature and unjustified. The letter went on to state that the barriers preventing a return to work had previously been outlined to the WDHB and that if the WDHB failed to identify the practical steps that it was going to put in place to enable a return to work an additional employment relationship problem would be pursued.

[18] The WDHB wrote again noting that no proposal or basis had previously been put forward, that previous attempts to deal with the employment relationship issues had not proved successful and nor had its attempts to engage with Mr Dunn over a possible return to work. The WDHB made it clear that it was prepared to consider suggestions for resolution but recorded that it was not assisted by a generic request that it solve the employment relationship problem itself. The WDHB indicated that

it was prepared to meet to discuss matters and that this should occur prior to the expiration of the notice period. Alternatively, Mr Dunn was offered the option of providing submissions or comments in writing. Contact was requested to arrange a meeting or provide written comments no later than 21 November 2008, failing which termination would occur.

[19] The only response to this letter was a brief letter requesting reasons for Mr Dunn's dismissal pursuant to s 120 of the Employment Relations Act 2000 (the Act).

[20] These reasons were provided on 12 November, and can be summarised as follows. Mr Dunn had been off work on sick leave since 20 March 2008. The WDHB required a staff member to perform the role he occupied, as the position he held could not be replaced until it became vacant. The operational requirements of the WDHB necessitated a replacement, particularly given the upcoming Christmas period and the difficulties associated with 'back-filling' and taking resources from elsewhere within the organisation. Mr Dunn was unable to perform the role and there appeared to be little prospect that he would be able to return in the near future. While the WDHB had attempted to facilitate a return to work this had not been possible.

[21] No further communications were received from Mr Dunn until a statement of problem was filed with the Authority on 18 December 2009, over 12 months later. Almost five years on the matter is now before the Court for first instance determination.

## **Analysis**

[22] The plaintiff's claim is that he was unjustifiably dismissed. No claim of unjustified disadvantage has been pursued. That means that the focus of the Court's inquiry is limited. The dismissal occurred in 2008, prior to the most recent amendments to s 103A of the Act. At the time s 103A provided that:

For the purposes of s 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by

considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[23] As the Court observed in *Air New Zealand Ltd v V*,<sup>4</sup> s 103A requires the Court to determine the question of justification on an objective basis and in all the circumstances at the relevant time, and that:<sup>5</sup>

By reverting to the use of the word "would" s 103A imposes on the Authority or Court an obligation to judge the actions of the employer against the objective standard of a fair and reasonable employer. It is not the standards that the Authority or the Court might apply had they been in the employer's position but rather what these bodies conclude a fair and reasonable employer in the circumstances of the actual employer would have decided and how those decisions would have been made.

[24] The plaintiff's claim reduced to two key propositions. First, that the WDHB was in receipt of Dr Kenny's report, knew of the barriers to Mr Dunn's return to work, was aware that Mr Dunn was prepared to return to work but took no steps to facilitate his return to work. This failure, it is said, undermined the substantive justification for the dismissal. Second, it is alleged that the WDHB failed to act in accordance with its staff rehabilitation policy, in that it failed to define and support a rehabilitation programme, identify an alternative position within the WDHB, and failed to assist Mr Dunn in seeking a new position outside the WDHB.<sup>6</sup>

[25] It is well established that an employer is not required to keep a job open indefinitely where an employee is suffering from a prolonged illness.<sup>7</sup> Much will depend on the circumstances, including the employer's needs and what can and cannot reasonably be accommodated, and the anticipated timeframe for any return. A fair process must be followed. The employee must be provided with an opportunity to provide relevant information and input. The interests of both parties must be balanced.

[26] There is no dispute that Mr Dunn was suffering from depression and was medically unfit for work during the period he was away from the workplace until his

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<sup>4</sup> *Air New Zealand Ltd v V* [2009] ERNZ 185, at [29].

<sup>5</sup> At [33].

<sup>6</sup> As set out in the plaintiff's amended statement of claim.

<sup>7</sup> *Barnett v Northern Regional Trust Board of the Order of St John* [2003] 2 ERNZ 730 (EmpC) at [35].

dismissal on 28 November 2008. That amounted to a period of around eight and a half months. It is also clear that, at the time the decision to dismiss was made, the prospects of a return to work in the foreseeable future were low. Indeed the evidence before the Court established that Mr Dunn remained incapacitated and unfit for work for a further year following his dismissal.

[27] The WDHB was becoming increasingly concerned about the situation and its operational requirements, particularly as the busy Christmas period approached. Those concerns were genuinely held and were reasonable. While the WDHB had covered Mr Dunn's position for a number of months by juggling resources, this was becoming problematic because it meant that resources had to be diverted from elsewhere by way of 'back-filling'. It was not possible to make an additional appointment because Mr Dunn's position was not vacant. The situation was becoming increasingly difficult. While it is true that the WDHB is a large organisation, it does not follow that it is obliged to hold positions open for significant periods of time or indefinitely. Like most employers, it has limited resources, operational requirements, and obligations to its other staff and clients for service delivery.

[28] The WDHB took a number of steps to investigate a return to work for Mr Dunn. It sought the Kenny report, asking a number of specific questions about a possible return to work and how this might be achieved, and it attempted to engage with Mr Dunn on these issues.

[29] The plaintiff complains that the WDHB did nothing to remove "the barrier" for a return to work that had been alluded to in Dr Kenny's report. While Dr Kenny identified concerns that the plaintiff had about the workplace, and his (Mr Dunn's) perception that his unresolved grievances presented a barrier to reintegration, no specifics were provided in this regard. That is not surprising given the primary focus of the report.

[30] The plaintiff's complaint must also be viewed in a wider context. It is clear that the WDHB had sought to engage with Mr Dunn over his employment issues a number of times prior to his departure on indefinite sick leave, including by

attending two mediations and having a meeting with him and his representative to discuss matters. It is apparent that the concerns remained unresolved. It is also apparent that Mr Dunn's concerns began to burgeon over time. Following receipt of the Kenny report, the WDHB took further steps to engage with Mr Dunn and made it plain that it required clarification of the barriers to a return to work from Mr Dunn's perspective. This was never forthcoming. The WDHB was confronted with delays in responses and the responses that it did receive were unhelpful. They failed to provide a constructive basis for moving forward. Nor did they articulate, with any degree of particularity, the perceived impediments to a return to work and how they might be addressed.

[31] The WDHB's rehabilitation policy provides for situations where an employee is unable to return to their previous employment because of injury or ill-health. It is primarily referred to in circumstances involving injuries at work but is also applied in other situations, including where an employee is suffering from mental health issues. The policy provides that employees who are unable to return to their original position due to illness, injury, or other circumstances will, wherever possible, be rehabilitated to an alternative position in the organisation and where no alternative position is available, the WDHB will, insofar as is reasonable, assist the individual in seeking a new position outside the WDHB.

[32] As Ms Wood (General Manager of Mental Health Services within the WDHB) observed, there was a lack of substantive engagement by Mr Dunn with the WDHB following the Kenny report. This undermined any ability to progress to the stage of formulating, or implementing, a rehabilitation programme for Mr Dunn. Engagement is the obvious precursor, and this was singularly lacking. In the circumstances it cannot be said that WDHB failed to comply with the policy.

[33] It is apparent that the WDHB did turn its mind to other alternatives but that Mr Dunn made it clear that he was not interested. Dr Kenny asked him whether he might consider a move to another position and Mr Dunn confirmed that he would not. The WDHB followed up the issue in correspondence with Mr Dunn following the Kenny report, but this was met with little response.

[34] In any event, there was no indication as to when (or if) the plaintiff would be medically fit to return to work, in any capacity. Dr Kenny's report identified that Mr Dunn was medically unfit to return to work and Dr Kenny was unable to express any confidence as to when Mr Dunn might be able to return to his role, noting that he might never be able to do so. Dr Kenny had made it clear that he considered that it would not be safe for Mr Dunn to return to work, and that this would present risks for Mr Dunn, other staff and clients of the WDHB.

[35] It was submitted that the WDHB ought not to have written to Mr Dunn raising performance concerns while he was on sick leave. Mr Dunn said that he felt shocked and upset by receipt of the 18 June 2008 letter, and considered it to be evidence of more bullying behaviour. I pause to note that the letter has limited relevance to the claim of unjustified dismissal. However, as a general principle an employer is obliged to raise performance concerns in a timely manner to enable them to be addressed. There is no suggestion that the WDHB was requiring an immediate response to the concerns that it had articulated. Rather it was putting Mr Dunn on notice that there were some issues that would need to be addressed. An employer in this sort of situation is in a difficult position. If the employer leaves raising its concerns until a return to work, at some unidentified time in the future, there is a risk that it will be accused of pursuing a stale complaint. In the event no concerns, including in relation to the fact that the letter was sent to the plaintiff personally by way of private and confidential correspondence, were raised at the time. In the circumstances, and having regard to the way in which the letter was crafted, I do not accept the plaintiff's criticisms.

[36] It was submitted that the WDHB ought to have done more, but the detail of the alleged omissions remained unclear. The WDHB was placed in a difficult position and reasonably concluded that it needed to take steps to progress matters before the busy Christmas period. It repeatedly sought to engage with Mr Dunn but these attempts fell on barren ground. Even when it gave notice of termination it provided a further opportunity for Mr Dunn to engage during the course of the notice period, making it clear that it would consider input from him. Mr Dunn was unwell and unfit for work during the period at issue but he was represented by counsel throughout. There is no evidence before the Court that any concerns were raised by

or on Mr Dunn's behalf about Mr Dunn's capacity to deal with his employer, or the nature or mode of the communications between the parties. The WDHB made it clear that it was happy to hear from Mr Dunn in person or in writing, and extended numerous offers to meet. None of these offers was taken up.

[37] Mr Dunn had issues with his employment which appear to have stemmed from a verbal warning (expired by the time he went on indefinite sick leave) and other issues. Counsel for Mr Dunn referred to *McKean v The Board of Trustees of Wakaaranga School*<sup>8</sup> in support of the proposition that if an employee's incapacity has been caused or contributed to unlawfully by his employer's wrongful acts or omissions, it would not be open to the employer to say that it dismissed him justifiably because he was incapable of resuming work.<sup>9</sup> That obiter proposition may be attractive as a matter of general principle but it has no application in the present case. The lawfulness of the earlier warning, the veracity of the allegations relating to Mr Dunn's manager and the adequacy or otherwise of the WDHB's actions in dealing with Mr Dunn's earlier concerns, were not before the Court for determination.

[38] Counsel also referred to *Clear v Waikato District Health Board*.<sup>10</sup> There the Court found that the employee's long term illness was a direct result of her perception of her working conditions and the frustrations of inadequate responses to her complaints by the employer, leading to sustained stress over several years. The employer knew the employee was ill and required psychiatric treatment but presented the employee with an ultimatum of either returning to work or being dismissed. Given the long standing history to the matter, the Court found that this could only have resulted in the employee's refusal to return to work. The Court concluded that this stark choice was neither fair nor reasonable and the dismissal was accordingly unjustifiable. The present situation differs. The WDHB did not present Mr Dunn with an ultimatum or otherwise seek to press him into a corner. Rather, it sought to engage with him to find a constructive way forward.

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<sup>8</sup> *McKean v The Board of Trustees of Wakaaranga School* [2007] ERNZ 1 (EmpC).

<sup>9</sup> At [78].

<sup>10</sup> *Clear v Waikato District Health Board* [2008] ERNZ 646 (EmpC).

[39] It is clear that Mr Dunn perceived that the warning that he had received, and treatment by his manager and colleagues, was unfair and that this sense of grievance presented an impediment to a return to work. The WDHB was not obliged to resolve those issues to Mr Dunn's satisfaction before considering termination. That would impose an illogical burden on employers and potentially lead to years on sick leave without resolution.

[40] As the Court observed in *McKean v Board of Trustees of Wakaaranga School*:<sup>11</sup>

If an employee is unable to return to work or provide a positive prognosis for return, an employer cannot be expected to continue the employment relationship to enable other dissatisfactions to be dealt with on their merits at some indefinite future time.

[41] The WDHB was obliged to treat Mr Dunn fairly and to engage with him prior to terminating his employment. It attempted to do so. It did not act precipitously. Mr Dunn had been on sick leave for a considerable period of time. The WDHB had requested a medical report from the plaintiff, which was not forthcoming. It then arranged a specialist medical report which was informed by a psychiatric report into the plaintiff's medical condition. The report made it clear that he was currently medically unfit to return to work and would likely remain in that position for the foreseeable future. The report also made it clear that he would likely pose a risk to himself (by way of relapse), his colleagues and the WDHB's clients if he returned to work.

[42] Much was made of the WDHB's alleged failures to proactively identify ways in which the plaintiff might reintegrate into the workplace. Those criticisms must be viewed in the context that he was plainly medically unfit to return to work and, as it transpired, was assessed as medically unfit for work by his doctor for a further 12 months following his termination. Nor do the criticisms sit comfortably with the stance adopted by the plaintiff during the relevant period.

[43] Employment relationships involve a two-way street. Both parties have an obligation to be responsive and communicative and to deal with each other in good

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<sup>11</sup> At [87].

faith. It ill-behoves an employee to complain about a failure to adequately progress a rehabilitative process when they themselves fail to engage in constructive dialogue in a genuine attempt to resolve issues. Mr Dunn said that he was, to large measure, reliant on his then representative. However, the WDHB was entitled to assume that his representative was acting under instructions at all material times.

## **Conclusion**

[44] I am satisfied that the WDHB's decision to dismiss Mr Dunn for medical incapacity (and the process that it followed) was what a fair and reasonable employer would have done in the circumstances.

[45] The plaintiff's claim is accordingly dismissed.

[46] It may be that the parties can agree costs without further recourse to the Court. If that does not prove possible the defendant is to file any memoranda together with supporting material within 30 days of the date of this judgment with the plaintiff filing and serving within a further 20 days.

Christina Inglis  
Judge

Judgment signed at 10.15 am on 5 November 2014