IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2018] NZEmpC 9
EMPC 85/2017

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	LYTTELTON PORT COMPANY LIMITED Plaintiff
AND	CHRIS ARTHURS Defendant

Hearing:	11-13 December 2017 (Heard at Christchurch)
Appearances:	T Mackenzie and J Stringer, counsel for plaintiff D Beck and A Oberndorfer, counsel for defendant
Judgment:	1 March 2018

JUDGMENT OF JUDGE J C HOLDEN

Introduction, issues and outcome

[1] The plaintiff, Lyttelton Port Company Ltd (LPC), challenges a determination of the Employment Relations Authority (the Authority) that found that LPC's dismissal of Mr Chris Arthurs, the defendant, was unjustifiable.[1] Mr Arthurs was dismissed for incapacity in December 2015. At the time of his dismissal he had been absent from work for 12 months.[2]

[2] As noted by Mr Beck, counsel for Mr Arthurs, incapacity dismissals are challenging, and involve a balancing act between the parties' interests.

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1 *Arthurs v Lyttelton Port Co Ltd* [2017] NZERA Christchurch 53.
2 Mr Arthurs was on ACC for most, if not all of this time.

[3] In this case, Mr Arthurs claims that the termination of his employment was an unjustifiable dismissal, essentially on five grounds:

(a) it was premature;

(b) reasonable alternatives to dismissal were disregarded;

(c) the medical evidence was wrongly interpreted;

(d) there was an unjustifiable disparity in treatment between Mr Arthurs and other employees of LPC in comparable situations;

(e) Mr Monk, who is the operations manager at LPC and was the decision-maker in the termination of Mr Arthurs' employment, lacked objectivity.

[4] Mr Mackenzie, counsel for LPC, submitted that the termination was justified in the circumstances before Mr Monk in December 2015. In particular, he says that the reason for the incapacity was a non-work related injury, Mr Arthurs was unable to attempt to return to work at the time his employment was terminated, and many more months were expected before he could return to work.

[5] Mr Arthurs succeeded in the Authority but, in a challenge, the Court must make its own decision on the matters before it and, once the Court has made a decision, the determination of the Authority is set aside and the decision of the Court stands in its place.[3] The Court makes its decision on the basis of the evidence before it.

[6] For the reasons set out in this judgment I have concluded that it was open to LPC to terminate Mr Arthurs' employment when it did and therefore the dismissal was justifiable.

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[3] Employment Relations Act 2000, s 183.

Background

[7] Mr Arthurs was employed by LPC in October 2000 in a permanent job as a cargo handler. Prior to this he was on a roster and worked for LPC casually. He had been working for LPC and another stevedoring company at the port since 1992. He comes from a family of waterside workers, his father worked for LPC, and his brother, Glen Arthurs, is currently employed by LPC. Mr Arthurs' parents and brother have been very supportive and protective of him throughout this difficult period; much of the relevant correspondence has been sent from the "Arthurs whanau". That correspondence has been prepared in consultation with Mr Arthurs, and with his agreement, but sent by his brother and parents.

[8] In June 2008 Mr Arthurs witnessed a fatal workplace accident. The accident understandably had a significant impact on him but he returned to work within two weeks, initially on a graduated basis.

[9] In September 2011, LPC arranged individual meetings with staff who had been involved in lost-time injury accidents, to try to identify how LPC could prevent such injuries. Mr Arthurs was one staff member who was invited to such a meeting. At that meeting LPC's container terminal manager raised that Mr Arthurs had five lost-time injuries and had used the maximum amount of his available sick leave over the past several years. LPC wished to understand the reasons for this but Mr Arthurs was not prepared to discuss these at the meeting as he had not been aware that the issue would be raised. LPC initially tried to set up a further meeting to discuss Mr Arthurs' high level of sick leave usage and lost-time injuries but that meeting did not eventuate for various reasons. Mr Arthurs' sick leave levels subsequently improved and the matter was not pursued by LPC. However, it seems that the approach in 2011 left Mr Arthurs feeling that he was being "harassed by management".

[10] By letter dated 25 March 2013 Mr Arthurs' general practitioner provided an opinion that Mr Arthurs had ongoing psychological issues from the trauma relating to the death he witnessed of his workmate. Mr Arthurs says this letter was provided to LPC. However, it did not make its way to Mr Arthurs' manager or to the human resources advisors at LPC and they were unaware of it at the time.

[11] Then, in August 2014, a friend and colleague of Mr Arthurs was killed in another accident at LPC. Mr Arthurs was not at work at the time of the accident but nevertheless, and again understandably, the accident had a significant effect on him. It compounded the distress he had already experienced from witnessing the 2008 accident.

[12] In September 2014 Mr Arthurs' general practitioner assessed Mr Arthurs and diagnosed very severe post-traumatic stress disorder (PTSD) caused by witnessing the death of his co-worker at LPC in 2008 and reactivated by the recent death at the port. The general practitioner wrote to LPC and sought the company's tolerance to Mr Arthurs' situation in terms of the need for time off work for relevant appointments and occasional sick leave, and LPC's support in caring for Mr Arthurs. LPC promptly responded to the general practitioner advising him of the sick leave taken by Mr Arthurs and available to him. The letter went on to ask the general practitioner for some more details around the duration and cost of counselling and said the company would welcome a meeting with the general practitioner and Mr Arthurs to discuss this in person. LPC says it did not get a response to that letter. Mr Arthurs gave evidence that he understood that the doctor had attempted to contact LPC without success.

[13] The next significant matter was that in November 2014 LPC amended its Drug and Alcohol Impairment Free Workplace Policy (drug policy) to include random drug-testing of employees. The drug policy provided that a failed result meant the employee would have to undertake a rehabilitation programme. It also provided that if an employee refused to undertake the testing, then that too would mean the employee would have to undertake a rehabilitation programme.

[14] Mr Arthurs was selected for testing. Although the testing was said to be random, Mr Arthurs believed that he was being targeted. He also was not prepared to sign the consent form that the agency that carried out the testing required, meaning that it did not carry out the test. Mr Arthurs' refusal to sign the consent form for the testing was treated by LPC as a refusal to undertake the random test. This meant that LPC required Mr Arthurs to undertake a rehabilitation programme as outlined in the drug policy. By letter dated 1 December 2014 Mr Arthurs also was

advised that a refusal to undertake a random test was deemed serious misconduct under the drug policy and he was invited to a meeting on 2 December 2014 to provide his explanation for the allegation of serious misconduct. He was advised that the outcomes available may be up to and including termination of his employment.

[15] Mr Arthurs' father called LPC on 2 December 2014 to advise that Mr Arthurs would not be attending the scheduled meeting. Mr Arthurs went to see his general practitioner that day and the general practitioner certified that Mr Arthurs was medically unfit from 2 December but that he should be fit to resume work on 12 January 2015.

[16] On 10 December 2014 LPC wrote to Mr Arthurs to advise him that it was not going to continue with the disciplinary process for alleged serious misconduct regarding his refusal to undertake a random drug test. Rather, LPC wished to commence the rehabilitation policy, as outlined in the drug policy. LPC requested a meeting with Mr Arthurs and one took place on 19 December 2014. At that meeting Mr Glen Arthurs, who attended with his brother and spoke for him, advised that Mr Arthurs had consented to take the drug test but was not prepared to sign the written permission. The file note of the meeting on 19 December 2014 also records that Mr Glen Arthurs advised that his brother would be happy to look at a rehabilitation agreement and to discuss it with his own doctor, but that as he had a medical certificate until 12 January 2015, nothing would be agreed until closer to that date.

[17] In the event Mr Arthurs did not return to work in January 2015 and further medical certificates were provided by his doctor from 5 January 2015 through until 27 November 2015, each recording that Mr Arthurs was medically unfit but that he should be fit to resume work on a date recorded by the doctor, generally four weeks from the date of the certificate but with variations. In total, there were twelve such medical certificates, essentially following the same format and providing no detail of Mr Arthurs' health issues.

[18] Initially the reason for Mr Arthurs' ill health was his PTSD. Then, in March 2015, he fell heavily from a wet deck, injuring his right shoulder and elbow. At the

time, he did not think that the accident had caused any serious damage but when it was properly assessed in May 2015 it was found that it was more extensive than he had thought.

[19] LPC was not immediately advised of Mr Arthurs' accident or injury. It knew that Mr Arthurs had made a claim for PTSD in January 2015 and was advised by letter dated 8 June 2015 that ACC had accepted that claim. LPC then received an ACC medical certificate dated 17 June 2015 that confirmed that Mr Arthurs had slipped on a wet deck, landing heavily on his right shoulder and elbow, and that he would be unable to resume any duties at work from 22 May 2015 for 90 days.

The enquiry into Mr Arthurs' absences for ill-health commenced

[20] Mr Monk became involved in relation to Mr Arthurs' absence on sick leave in mid-2015. Mr Monk's letter dated 29 July 2015 marked the start of the enquiry process about Mr Arthurs' current health status, prognosis and ability to return to his role. Mr Monk advised that the only information LPC had was a series of non-specific medical certificates and confirmation that ACC had accepted Mr Arthurs' claim. Mr Monk advised "we also have emails from your family which make mention of PTSD however we are unsure if that is the reason for your prolonged absence". Mr Monk asked for further information from Mr Arthurs to enable LPC to make any decisions. He advised Mr Arthurs that, although LPC was in an information-gathering stage, Mr Arthurs needed to be aware that the end result of this enquiry may be the termination of his employment for incapacity. Mr Monk advised Mr Arthurs to seek advice and/or representation and asked him to meet with the company. As it transpired, no meeting ever occurred. However, Mr Arthurs did agree to attend an appointment with an LPC-appointed specialist.

[21] To assist the specialist, LPC requested a medical report from Mr Arthurs' general practitioner and this was provided by letter dated 24 September 2015. The general practitioner also enclosed other material that was on Mr Arthurs' medical file, including the letter of 25 March 2013 that the human resources manager at LPC had not previously received. This bundle of material then was provided to Dr Hartshorn, who was the specialist occupational physician engaged by LPC to

undertake the medical examination. Dr Hartshorn has a background in the field of occupational medicine and has extensive experience in injury assessment and rehabilitation.

[22] That medical examination occurred in mid-November 2015 and Dr Hartshorn provided his report by letter to LPC dated 19 November 2015.

[23] In his report Dr Hartshorn noted the medical issues impacting upon Mr Arthurs' work capacity as PTSD relating to his involvement in workplace deaths in 2008 and 2014, and right shoulder and right elbow pain and associated functional limitation following a fall in March 2015.

[24] Dr Hartshorn notes that Mr Arthurs described the onset of a range of symptoms suggestive of PTSD subsequent to the death in 2008 and that he described deterioration in his symptoms after a further workplace death in August 2014. Dr Hartshorn also records that Mr Arthurs described a degree of elevated anxiety, hypervigilance and increased startle while driving on the straddles at the port. Having said that, Dr Hartshorn goes on to say that it did not appear that Mr Arthurs' PTSD was currently such that it would prevent a return to the work environment. Dr Hartshorn then describes the muscular-skeletal issues around the right shoulder and right elbow and concludes that Mr Arthurs may take several more months before he experiences improvement consistent with a return to work activity. In summary Dr Hartshorn advises that:

> ... Mr Arthurs is not currently fit to return to his usual range of work activity. This is primarily on the basis of his right shoulder difficulties with some additional limitation relating to the right elbow and less significant limitation relating to the PTSD.

[25] He goes on to say:

> Mr Arthurs would be regarded as fit for light or alternative duties which do not involve elevation of the right upper limb and did not involve any forceful loading through the right common extensor origin or right shoulder. Timeframes for a return to normal work activity are likely to be measured in months rather than days or weeks given the nature of the pathology at the right elbow and right shoulder which both tend to have a tendency towards chronicity.

[26] Having received the medical reports from the general practitioner and from Dr Hartshorn, Mr Monk wrote to Mr Arthurs on 25 November 2015. That letter attached copies of the reports LPC had received from the medical practitioners and notes particular things Mr Monk took from the letters. These include points noted by Dr Hartshorn in relation to Mr Arthurs' mental health and in relation to Mr Arthurs' physical health. Mr Monk summarised Dr Hartshorn's prognosis:

> …it may be several months before [Mr Arthurs'] situation may improve. No certainty is provided that it will actually improve however and particularly whether this will be to a point where you are safely able to return to work.

[27] Mr Monk advised that LPC's concern was that Mr Arthurs had been on sick leave for approximately one year and the prognosis was uncertain for his future recovery and any safe return to work. Mr Monk noted that, based on the information received, LPC was considering whether to bring Mr Arthurs employment to an end because of medical incapacity. Mr Monk invited a response by 4 December 2015.

[28] The Arthurs whanau responded by email on 4 December 2015. The email was sent from Mr Arthurs' parents' email address but was written collaboratively and with the agreement of Mr Arthurs. In the email the Arthurs whanau says that it considers that Mr Arthurs should have been left to make a full recovery from his injuries before an assessment was undertaken, that the assessment by Dr Hartshorn was premature and that it aggravated Mr Arthurs' injury. The email says that Mr Arthurs was being victimised and intimates that the objective of LPC in having the assessment done was to enable it to end Mr Arthurs' employment due to incapacity. The family's position was that Mr Arthurs would fully recover and that he should be given more time away from work to do so.

[29] Mr Monk also received a further medical certificate dated 27 November 2015 from the general practitioner in the same non-specific form as the others previously received stating that Mr Arthurs was unfit from 1 December 2015 until 1 February 2016 when he should be fit to resume work.

Mr Arthurs' employment is terminated

[30] Mr Monk reviewed the medical reports he had received and the email from the Arthurs whanau dated 4 December 2015. He concluded that LPC would terminate Mr Arthurs' employment for medical incapacity. On 8 December 2015 he wrote to Mr Arthurs to advise him of that decision, saying:

> The reality is you have been absent for over one year, and there is no certainty regarding any return to work. The latest medical certificate states you are still unfit for work and should be fit for work on 1 February 2016. The numerous medical certificates we have received over the past year have all been similarly non specific about a return to work date.
>
> I have therefore decided to terminate your employment for medical incapacity. You are normally entitled to 2 weeks' notice however given you cannot return in that period and are not being paid, there seems no point in extending things out by 2 weeks. Therefore your employment is terminated effective immediately.

[31] In any event Mr Arthurs' incapacity continued until at least October 2016 at which time he was cleared to commence light work on a gradual return to work basis.

Principles applying to dismissals for incapacity

[32] While the justifiability of dismissals for incapacity will depend on the particular circumstances surrounding the dismissal, there are general principles that apply. The starting point is s 103A of the Act, with the approach to be taken under that section to medical incapacity recently having been considered by the Employment Court in *Lal v The Warehouse Ltd.*[4] There Judge Inglis (as she then was) noted that s 103A(3) sets out a number of factors that the Court must consider when assessing the justifiability threshold, but that "[t]hose factors do not sit altogether comfortably with a no-fault dismissal, such as dismissal for... medical incapacity". Judge Inglis then set out a broad framework within which she approached the issue in that case.

[33] In another recent case, *Idea Services Ltd v Crozier*[5] Judge Corkill endorsed the comments of then Judge Colgan that in considering dismissals for incapacity:[6]

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4 *Lal v The Warehouse Ltd* [2017] NZEmpC 66 at [30]-[36].
5 *Idea Services Ltd v Crozier* [2017] NZEmpC 77 at [113]-[118].

> ... The interests of both parties, employer and employee, must be balanced ... The law is that after a fair investigation, an employer may dismiss an employee justifiably where its reasonable needs cannot be met by an employee who is not fit and able to perform the work required and is not in a position to be able to do so within a reasonable time in all the circumstances.

[34] Mr Mackenzie, in his opening submissions also helpfully identified principles he took from the authorities.

[35] It has long been accepted that there can come a point at which an employer "can fairly cry halt".[7] In the context of this case, other key principles are:

i. The employer must give the employee a reasonable time (in the circumstances) to recover.[8]

ii. The employer is required to carry out a fair enquiry and then to make its decision about whether to dismiss the employee, balancing fairness to the employee and the reasonable dictates of its practical business requirements.[9]

iii. Fair and reasonable procedure will include notification of the possibility of dismissal and a fair enquiry enabling an informed decision, including seeking input from the employee.[10]

iv. The terms of the employment agreement and any relevant policy, the nature of the position held by the employee and the length of time the employee has been employed with the employer are factors that are likely to inform an assessment of what is reasonable in the particular circumstances.[11]

v. Where the actions of the employer caused an employee's condition, the employer may have an ongoing responsibility to take reasonable steps to rehabilitate the employee.[12]

vi. Even in a large organisation, an employer is not obliged to keep a job open indefinitely.[13]

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6 At [114]; citing *Barnett v Northern Regional Trust Board of the Order of St John* [2003] 2 ERNZ 730 (EmpC) at [35].

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

8 *Lal*, above n 4, at [33].

9 *Barry v Wilson Parking New Zealand* [*1992] Ltd* [1998] 1 ERNZ 545 (EmpC) at 549.

10 Employment Relations Act 2000, s 4.

11 *Lal*, above n 4, at [33].

12 *Jack v Attorney-General* [2004] 1 ERNZ 316 at [125].

13 *Dunn v Waitemata Health Board* [2014] NZEmpC 201, [2014] ERNZ 524 at [27]; *Lal* above n 4, at [35].

vii. The relationship is a "two-way street". A lack of positive engagement from an absent employee may count against any later complaint.[14]

[36] The key issues that have been raised in this case are whether:

(a) in the circumstances of the case, the decision was premature;

(b) there was unjustifiable disparity of treatment;

(c) a gradual return to work ought to have been considered and consulted upon;

(d) the medical evidence was wrongly interpreted;

(e) Mr Monk (as the decision maker) lacked objectivity in assessing Mr Arthurs' situation at the time of the dismissal.

Reasonable to commence enquiry when LPC did so

[37] It was open to LPC to have commenced its enquiry process when it did so. Other employers have started such an enquiry sooner.[15] By the time Mr Monk initiated the enquiry process about Mr Arthurs' prognosis and ability to return to his role, Mr Arthurs had been absent from work for more than seven months. At that stage, LPC had very limited information about the reasons for Mr Arthurs' incapacity. It was aware that he had been suffering from PTSD but was unsure whether that was the reason for his ongoing absence.

[38] The letter of 29 July 2015 reasonably sought information from Mr Arthurs to assist LPC to gain more understanding as to his future capacity to return to work, and to enable LPC to make decisions with that knowledge. Its actions were consistent with the requirement that the employer be active in making enquiries of the employee rather than waiting on updates or relying on stale information.

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14 *Dunn* at [43]; *Lal* at [36].

15 See, for example *Barry*, above n 8: enquiry started after 6 weeks, dismissal after a further 6 weeks; *Dunn*, above n 12: enquiry started after 8 weeks, dismissal after 8.5 months.

Any disparity between Mr Arthurs' treatment and others was explainable

[39] In considering the question of disparity of treatment, there is a three-step test. Those steps are:[16]

(a) Is there disparity of treatment?

(b) If so, is there an adequate explanation for the disparity?

(c) If not, is the dismissal justified, notwithstanding the disparity for which there is no adequate explanation?

[40] Disparity of treatment in dismissals for incapacity is seldom argued. This is understandable as many variables are involved, which makes it difficult to identify other situations where the relevant circumstances and context are sufficiently similar.

[41] Mr Monk gave evidence that, while each case of absence for health reasons was different, LPC aimed to take a consistent approach to its process. This meant that LPC did not act precipitously but waited a generous amount of time before commencing its enquiry process. He said that before making any decisions LPC generally obtained as much information as possible about the particular individual and his or her prognosis and likelihood of being able to come back to the employee's role.

[42] In its evidence LPC identified several previous circumstances involving employees with lengthy sick leave, with varying outcomes. Mr Arthurs' situation does not stand out as out of line when compared with other LPC employees.

[43] The case that Mr Arthurs points to as most closely aligned to his, and which he says indicates that he was not treated consistently with other employees, is that of a cargo handler who suffered two injuries in close succession (Employee F). In total, Employee F was not in his full-time position for a period of just over 17 months. However, there were differences between his situation and that of Mr Arthurs. After being off work for his first injury the employee commenced a gradual return to work before he unfortunately had another accident and was off work for a further period.

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[16] *Chief Executive of the Department of Inland Revenue v Buchanan* [2005] ERNZ 767 (CA) at [45]; the grounds proposed at [45] were confirmed and applied by the CA later in the judgment.

During his incapacity, he worked with LPC, his orthopaedic surgeon and his physiotherapist to get back to work. He was engaged and positive about returning to work and kept LPC up-to-date with his medical progress. While LPC's approach with respect to Employee F's absence was generous, it was understandable in the circumstances. In contrast, there was a general lack of positive and constructive engagement from Mr Arthurs throughout, including in the months immediately preceding the termination of Mr Arthurs' employment, after his PTSD had subsided so that it no longer prevented his return to work.

[44] I accept that, while there may at first appear to be a disparity in treatment between the two situations, the difference is adequately explained such that there is no need to attempt the third enquiry.

Gradual return to work was not a genuine option for Mr Arthurs

[45] One of Mr Arthurs' key arguments, and one that found favour in the Authority, is that LPC ought to have considered alternatives to dismissal, including a gradual return-to-work programme, and that LPC ought to have consulted with Mr Arthurs about that.

[46] Mr Arthurs was employed as a cargo handler. That position is inherently physical. The information that Mr Monk had in December 2015, including the report from Dr Hartshorn as well as the comments from the Arthurs whanau, demonstrated that Mr Arthurs was not able to return to his usual range of work activity, even on a limited basis. With there being no suggestion or realistic prospect of Mr Arthurs returning to his cargo handling role, even in a limited way, there also was no basis for discussion with ACC of a graduated return to work programme.

[47] In his argument Mr Arthurs relies on Dr Hartshorn's advice that Mr Arthurs would be regarded as fit for light or alternative duties not involving elevation of the right upper limb or involve any forceful loading through the right extensor origin or right shoulder. When asked in evidence what work he thought he might have been able to do, Mr Arthurs pointed to office work and referred to the job of a tally clerk writing up documents. The reality is that LPC has limited administrative roles and

accordingly there would have been little scope for Mr Arthurs to be redeployed into those roles. Further, such roles bear no relation to his substantive role. It was not unreasonable for LPC not to have considered those roles for Mr Arthurs.[17]

[48] Mr Arthurs also points to a document entitled an "LPC Safe Return to Work Programme – Procedures" (the Procedures) that he says ought to have been complied with but was not. The Procedures were designed as an internal administrative guide or checklist for managers to assist them in dealing with employees on sick leave who were returning to work. LPC says the Procedures did not constitute a formal policy and had not been promulgated to staff. It also says that they were not applicable to Mr Arthurs as a return to work programme was never able to be advanced with him. I agree that the Procedures do not appear to apply to Mr Arthurs' circumstances but also note that, even if they covered Mr Arthurs' situation, the Procedures were not promulgated to staff and Mr Arthurs was not aware of them at the time, so that the document itself created no legal obligation.

LPC properly considered the medical information it had

[49] By early December 2015 the overall picture that Mr Monk had, from Dr Hartshorn's report in particular, was that Mr Arthurs had been suffering from PTSD but that, while this condition remained a background issue, what was preventing him from returning to work was the non-work accident in March 2015 that damaged his right shoulder and elbow. The prognosis for an improvement consistent with a return to Mr Arthurs' usual range of work activities was that this would not be for some time; it would be "measured in months rather than days or weeks". While Mr Monk had received the medical certificate of 27 November 2015, which said that Mr Arthurs should be fit to resume work on 1 February 2016, it was not unreasonable for Mr Monk to have put that to one side and relied on the detailed and expert opinion of Dr Hartshorn, particularly as the medical certificate of 27 November 2015 was in the same form as the eleven previous medical certificates received from Mr Arthurs' general practitioner. While Mr Monk's decision must be judged as at December 2015, it transpired that Mr Arthurs was not fit to resume work on 1 February 2016 or for a considerable time thereafter.

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17 See *Jack*, above n 12, at [174].

[50] Looking at the letter of 8 December 2015 that Mr Monk sent terminating Mr Arthurs' employment, his words reflect those of Dr Hartshorn in assessing the physical injury that Mr Arthurs had suffered, namely that the prognosis was uncertain and that months, at least, would be required for Mr Arthurs' condition to improve. There is nothing in that letter that suggests that Mr Monk paid undue regard to the PTSD that had previously prevented Mr Arthurs returning to work. Mr Monk says that he accepted that it was the injury that Mr Arthurs suffered in March 2015 that was the dominant reason for his inability to return to work. I accept his evidence that, given the presence of the physical injury, he focussed primarily on determining capacity on that basis.

Evidence does not suggest Mr Monk lacked objectivity

[51] Mr Arthurs claims that Mr Monk's motivation for proceeding to dismissal included Mr Monk's concern about Mr Arthurs' continued advocacy over what he genuinely perceived to be an injustice around two co-worker's deaths, together with LPC's fixation that he attend a drug rehabilitation programme as a condition of any return to work.

[52] I do not accept that the evidence bears out the claim that Mr Monk was motivated to dismiss Mr Arthurs because of his (and his families') continued advocacy around the two workplace deaths. It seems to me that Mr Monk put to one side those matters, as well as the Arthurs whanau's quite strongly expressed criticisms of LPC and its managers throughout the correspondence, and focussed legitimately on the comments, in the 4 December 2015 email in particular, around Mr Arthurs' current health and his potential for a return to work.

[53] In support of his claim that LPC was fixated on Mr Arthurs attending a drug rehabilitation programme as a condition of a return to work, Mr Arthurs points to the many letters that advise him that a return to work would be subject to his engaging in the rehabilitation programme.

[54] While it is true that the requirement that Mr Arthurs engage in the rehabilitation programme is noted throughout the correspondence, this was not

articulated in a threatening or aggressive way. Employers are expected to advise employees of requirements and potential outcomes. The approach LPC took to ensuring Mr Arthurs remained aware that engaging in the rehabilitation programme was still required is consistent with this expectation. As noted by Mr Mackenzie, LPC could have been criticised if it started to omit this from its correspondence then later sought to have Mr Arthurs undertake the rehabilitation programme.

LPC was not materially prejudiced by having Mr Arthurs away from work

[55] LPC is a large employer. It acknowledges that there is little prejudice to it in the absence of Mr Arthurs, as there might be for a smaller employer. However, that does not mean it must keep medically unfit employees on its books indefinitely.[18] While more may be expected of a large, well-resourced employer such as LPC, it did in fact wait several months before it commenced its process, and then conducted a full enquiry, including obtaining independent expert medical advice and feedback from Mr Arthurs and his family. The timeframes were not unreasonable in the circumstances and the process followed was fair.

Termination for incapacity justifiable

[56] For the reasons set out, I consider that LPC's decision in December 2015 to terminate Mr Arthurs' employment for medical incapacity was a decision that a fair and reasonable employer could have reached in the circumstances. Therefore, it was justifiable.

Remedies not considered

[57] The hearing commencing on 11 December 2017 dealt only with the issue of whether LPC's termination of Mr Arthurs' employment was an unjustifiable dismissal. If I had found that it was an unjustifiable dismissal, there would have been a separate remedies hearing.

[58] A stay of proceedings of the determination of the Authority was previously granted on the basis that Mr Arthurs was returned to LPC's payroll until the outcome

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[18] *Dunn*, above n 13, at [42] - [43].

of the challenge, and that LPC paid the $20,000 compensation award into the Court's trust account.[19]

[59] The outcome of the case means LPC no longer is required to keep Mr Arthurs on its payroll and is entitled to the return of the $20,000, together with accrued interest. I direct the Registrar to disburse those monies to LPC.

Costs not sought

[60] In the normal course LPC would be entitled to costs, including costs in the Authority. However, LPC has advised that, in the event it was successful in its challenge it would not seek costs. Accordingly, costs will lie where they fall. As the issue of costs in the Authority were removed to the Court,[20] this applies to those costs as well.

Final comments

[61] I appreciate that this decision will be a disappointment to Mr Arthurs and his family. They should not see it as a criticism of them, but rather a recognition that, in the difficult position it was in, it was not unreasonable for LPC to have made the decision it did. I wish Mr Arthurs well.

J C Holden
Judge

Judgment signed at 9.30 am on 1 March 2018

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19 *Lyttelton Port Company Ltd v Arthurs* [2017] NZEmpC 44.
20 *Arthurs v The Lyttelton Port Company Ltd* [2017] NZERA Christchurch 109.