

Lyttelton Port Company Ltd v Chris Arthurs [2018] NZEmpC 9

This was a challenge to an Authority decision that found Lyttelton Port Company's (LPC) dismissal of Mr Arthurs was unjustifiable. Mr Arthurs was dismissed for incapacity in December 2015. At the time of his dismissal he had been absent from work for 12 months.

Mr Arthurs was employed by LPC in October 2000 as a cargo handler. Prior to this permanent role, he had been employed by LPC as a casual employee. He had been working at the Port for LPC and another stevedoring company since 1992 and his family were also waterside workers.

In June 2008, Mr Arthurs witnessed a fatal workplace accident, which had a significant impact on him. However, he returned to work within two weeks initially on a graduated basis.

In September 2011, LPC held individual meetings with staff who had been involved in lost time injury accidents to try to identify how they could prevent such injuries. Mr Arthurs was one of the staff spoken to and in his meeting, his manager raised with him the fact that he had five lost time injuries and had used the maximum amount of his available sick leave over the past several years. LPC wanted to understand the reasons for this but Mr Arthurs was not prepared to discuss this. Despite LPC attempting to set up a further meeting to discuss this, for various reasons no further meeting was held. The Court noted that it appeared to Mr Arthurs that this approach left him feeling that he was being "harassed by management".

In a letter dated 25 March 2013, Mr Arthurs' GP provided an opinion that he had ongoing psychological issues arising from the trauma relating to the death he had witnessed of his workmate. Mr Arthurs' said this letter was provided to LPC, however his manager and the HR advisors at LPC were unaware of it.

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 but understandably this has a significant effect on him. It compounded the distress he had already experienced from witnessing the 2008 accident.

In September 2014, Mr Arthurs' GP diagnosed him with severe post-traumatic stress disorder, ("PTSD"), caused by witnessing the first accident and reactivated by the recent death at the Port. The GP sought the support of LPC to assist Mr Arthurs' recovery with time off work for relevant appointments. LPC promptly responded advising of Mr Arthurs' sick leave entitlements and asking the GP for additional details of the counselling and associated costs. They also sought a meeting with the GP and Mr Arthurs to discuss the situation. LPC says it did not get a response to that letter.

In November 2014, LPC introduced random drug testing as part of its drug and alcohol policy. A failed result meant that the employee would have to undertake a rehabilitation programme. It also provided that if the employee refused to take a test, that too would mean they had to undertake a rehabilitation programme.

Mr Arthurs was selected for testing. He did not accept he was selected 'randomly' and felt that he was being targeted. Mr Arthurs also was not prepared to sign the consent form to test, so the test was not undertaken. As a result of this, LPC considered Mr Arthurs had refused to take the test and was required to undertake a rehabilitation programme as provided for in policy. In a letter to Mr Arthurs dated 1 December 2014, he was also advised that this refusal was deemed serious misconduct and he was invited to a meeting to discuss this.

Mr Arthurs' father advised LPC he would not be attending the meeting and Mr Arthurs' GP provided a medical certificate stating that he was medically unfit from 2 December, and should be fit to return to work on 12 January 2015.

On 10 December LPC wrote to Mr Arthurs advising him that it was not continuing with the disciplinary process but would like to continue with the rehabilitation process. This meeting occurred on 19 December, where Mr Arthurs, who attended with his brother, stated that he had not refused the drug test but was not prepared to sign the consent form. His brother advised that while he was happy to look at a rehabilitation agreement and to discuss it with his own doctor, as he had a current medical certificate until 12 January 2015, nothing would be agreed until closer to that date.

Mr Arthurs did not return to work in January 2015 and twelve further medical certificates were provided through until November 2015 each stating he was unfit for work with no details of his health issues. Initially Mr Arthurs' absence was due to PTSD, however in March 2015 he fell heavily from a wet deck injuring his elbow and shoulder. This was a non-work related injury which LPC learned of when it received a letter from ACC in June stating Mr Arthurs would be unfit for work for 90 days from 22 May 2015.

Mr Monk from LPC then became involved in relation to Mr Arthurs' absence from work. He wrote to Mr Arthur on 20 July 2015 about his current health status, prognosis and ability to return to his role. Mr Monk noted the limited information LPC had and sought more details from Mr Arthurs regarding his health. He advised although LPC was in an information gathering stage, he should be aware that the end result could be termination of employment for incapacity. Mr Arthurs' was advised to seek advice and asked to meet with LPC. No meeting ever occurred however, Mr Arthurs' agreed to attend an appointment with a LPC appointed specialist.

To assist the specialist, LPC requested a medical report from Mr Arthurs GP and this was provided on 24 September 2015 along with other information from Mr Arthurs' medical file. This included the letter from Mr Arthurs GP to LPC dated 25 March 2013, which the HR advisors had not seen. This information was also provided to the specialist who undertook the medical examination of Mr Arthurs in mid-November 2015. His report was provided to LPC by letter dated 19 November 2015.

The specialist noted Mr Arthurs' PTSD issues and also his injury from the fall in March 2015. The specialist concluded Mr Arthurs was not currently fit to return to work primarily on the basis of his shoulder and elbow injuries with less significant limitation relating to the PTSD. He went on to say that Mr Arthurs would be fit for light or alternative duties with limited use of his upper limb. It was noted that a "timeframe for a return to normal duties should be measured in months rather than days or weeks".

LPC, through Mr Monk, wrote to Mr Arthurs on 25 November 2015 with copies of the reports from the specialist and GP. Mr Monk noted things he had taken from the reports and summarised the specialist prognosis that it may be several months before he could return, with no certainty that he would be able to safely return at all. Mr Monk advised that as Mr Arthurs had been on sick leave for approximately a year and as the prognosis was uncertain, LPC was considering ending his employment because of medical incapacity. Mr Monk invited a response by 4 December 2015.

By email of 4 December, Mr Arthurs' whanau responded that he should have been left to make a full recovery from his injuries before the assessments were undertaken. The email alleged LPC had sought the assessments to enable it to end Mr Arthurs' employment. The family stated Mr Arthurs would fully recover and that he should be given more time to do so. A further medical certificate was provided, without details stating Mr Arthurs was unfit until 1 February 2016.

Mr Monk wrote to Mr Arthurs on 8 December 2015 with his decision, which was to terminate his employment for incapacity. The Court noted that Mr Arthurs' incapacity continued until at least October 2016 when he was clear to commence light work on a gradual return to work basis.

Mr Arthurs argued that the decision was premature, there had been disparity of treatment with other staff, and that a gradual return to work ought to have been considered and consulted on. He also said the medical evidence was wrongly interpreted and that Mr Monk lacked objectivity in assessing Mr Arthurs' situation.

The Court considered that it was reasonable for LPC to commence its enquiry process when it did and noted other employers have started sooner. By the time the enquiry started Mr Arthurs had been absent for seven months and LPC had limited detail as to his health issue. LPC referred to differences in other incapacity cases and the Court accepted these differences and that they were adequately explained by LPC.

As regarding his argument that a gradual return to work should have been explored, the Court noted Mr Arthurs' role of cargo handler was inherently physical. The information LPC had relied upon in making a decision supported that he would not be able to return to his usual range of duties even on a limited basis. For this reason there was no basis for discussion with ACC of a graduated return to work programme. Mr Arthurs suggested to the Court that he could have done office work. However the Court noted that in reality LPC had limited administration roles so opportunities were limited. In addition, the Court stated that as such roles bear no resemblance to Mr Arthurs' substantive role, it was not unreasonable for LPC to not have considered those roles for him.

The Court considered that LPC had properly considered the medical information available to them. Given the detailed specialist report it had, it was not unreasonable for LPC to put aside the further medical certificate from the GP, which stated Mr Arthurs would be fit to return to work in February 2016. Mr Monks' letter terminating Mr Arthurs' employment reflected the specialists' prognosis regarding his return to work. The Court accepted his evidence that it was the physical injury from March 2015, which was the primary reason for his decision.

Mr Arthur pointed to his perceived injustice around his two co-workers deaths and with LPC's fixation that he attend a drug rehabilitation programme as a condition of a return to work. Employers are expected to advise employees of requirements and potential outcomes and attendance in the rehabilitation programme was still an expectation. The Court therefore rejected that this supported a finding Mr Monk lacked objectivity in reaching his decision.

LPC as a large employer was not materially prejudiced by having Mr Arthurs away from work. However that did not mean it must keep medically unfit people on its books indefinitely. The timeframes were not unreasonable and the process followed was fair.

The Court considered that the decision by LPC to terminate for medical incapacity was one a fair and reasonable employer could have reached in all of the circumstances.