



EMPLOYMENT TRIBUNALS

Claimant: Mr Nowlan

Respondent: Kawasaki Precision Machinery (UK) Ltd

Heard at: Exeter

On: 9 January 2019

Before: Employment Judge Fowell

Representation:

Claimant: In person

Respondent: Mr P Howarth of Foot Anstey LLP Solicitors

RESERVED JUDGMENT

The claimant was not unfairly dismissed.

REASONS

Background

1. Mr Nowlan had worked for the respondent (Kawasaki) at their Plymouth factory for over ten years of time of his resignation on 8 September 2018. He worked in their Sodium Plant, which essentially involved taking castings which had become rusty and placing in them in a large chemical bath to clean them up. Some of these items were heavy and they were moved around the factory by forklift truck, by the use of hoists, or simply carried. Some had to be twisted round or pushed into place, so despite these aids some heavy manual work was involved.
2. By way of brief background, Mr Nowlan was off work during 2017 with hip pain but returned in the summer. In February 2018 he was off sick again, for the same reason, and that continued until his resignation. There were various occupational health appointments but there was little change as Mr Nowlan was waiting to have a hip replacement. From the end of May 2018 Mr Nowlan's company sick pay came to an end and he became increasingly anxious to return to work. In August 2018 he told the company that his GP had said it was okay for him to return and that he had posted this sick note to the

HR Department. They did not receive it. That led to a meeting on 5 September 2018 to discuss the position and he resigned three days later. The only issue to be decided at this hearing is whether or not he was entitled to resign and bring this claim of constructive dismissal.

3. The test for constructive dismissal derives from the wording of section 95 of the Employment Rights Act 1996:
 - (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) ... only if) – ...
 - (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."
4. According to the House of Lords in the well-known case of **Malik v BCCI [1997] UKHL 23** a fundamental breach occurs where an employer conducts itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence.
5. There was no suggestion at this hearing that if there was a fundamental breach of contract, either at the meeting on 5 September or previously, that Mr Nowlan waived it and accepted the position.
6. In assessing that issue I heard evidence from Mr Nowlan himself and, on the part of the company, from Mr Michael Homer, their Human Resources and Training Manager; and from Mr Andrew Gotham, the Senior Team Leader for Manufacturing. I was also assisted by a bundle of a little over hundred pages. Having considered that evidence I make the following findings.

Findings of fact

7. It is not necessary to go through in any great detail the absence in 2017 save to say that in July that year there was a discussion with Mr Homer about a phased return to work. This followed occupational health advice to the effect that he could carry out lighter duties, using the cranes or hoists available to eliminate heavy lifting. At the time there was a factory shutdown and the sodium bath was not operating normally. He returned on these lighter duties – using the hoists but not the fork lift truck - and this arrangement continued until December 2017 until a further occupational health assessment said that he could use the forklift as long as he was careful getting in and out and when twisting around to see better.
8. That assessment, and others, were carried out by the occupational health service at Derriford Hospital in Plymouth, which the company used and where they had a regular appointment for members of staff every two weeks.
9. In February 2018 Mr Nowlan was signed off sick again, for the same reason as before. He had had a steroid injection which involved some surgery and was painful. It took time for him to recover. Occupational health appointments were recommenced and he was reviewed approximately once a month from then on. On 23 April he saw his consultant and was told that he needed to have a hip

replacement. It was a degenerative condition and so the view taken from then on was that the only way to cure it was through surgery. In point of fact, he has not had any surgery and that view has now changed, but it was the expectation for the rest of his employment.

10. He reported to occupational health at his next appointment on 1 May, at which time he was in a lot of pain and had difficulty in standing or walking for any distance. The nurse concluded that unless some light duties such as office-based work were available he should not return. Even this suggestion was only on the basis that his symptoms settled down. The big unknown therefore was when he would be able to have this hip operation.
11. When his company sick pay ran out at the end of May he was reduced to statutory sick pay. He was living on his savings and increasingly anxious to return to full employment. He continued to supply his sick notes as before, stating that he was not well enough to return to work. On 19 June the occupational health advisor recorded that he was on the waiting list for the operation and there was no change in his condition.
12. According to Mr Nowlan he saw his GP on 7 August 2018 and was told it was okay for him to return to work. He then rang Mr Homer on 9 August to tell him this. That discussion is recorded in Mr Homer's letter of that date at page 101. Mr Homer was perplexed by this. As the letter explained, he had understood that he would not be fit to work until he had had a hip replacement. He therefore arranged for a further occupational health meeting to take place on 21 August 2018.
13. That was a significant meeting as it was the last occupational health assessment before his resignation. The advice recorded that Mr Nowlan was still waiting for his operation and the consultant did not know how long that would be, his pain had been more manageable of late, that he was driving for short distances and was keeping mobile. However, the recommendations went no further than suggesting that he may be able to undertake some office-based work if that was available, that he should avoid any manual handling, excessive standing or sitting and in any event should not return to work without a forklift truck medical assessment.
14. Mr Nowlan was unhappy with this and felt he should have been allowed to work. He wrote on 28 August to say as much, mentioning again that he had been signed as fit to return by his doctor. A member of the HR team responded promptly on 30 August to say that there was no record of this fit note, that she would arrange an appointment for him with occupational health again on 4 September and invited him to the meeting with Mr Gotham and Mr Homer on 5 September.
15. I have not seen any further occupational health assessment but he duly attended the meeting on the 5th. Mr Homer made some handwritten notes which confirmed that they discussed the fact that there was no office work available and Mr Nowlan's preference in any event was to return to his old job. They had not received the promised fit note and needed to resolve this before they could move forward.

16. His letter to Mr Nowlan that day made all this clear. It confirmed that they wanted him to see occupational health again to give an informed consent to the disclosure of his medical records and they would need to do a full workstation assessment before he could return to his duties. This related particularly to the use of the fork lift truck.
17. This timescale did not meet Mr Nowlan's approval although he did not make any particular objection at the time of the meeting. He had been accompanied at this meeting and his companion did not make any particular protest either although between them they did suggest that the occupational health nurse come to see him at work to see they could not manage his role in his present condition. That suggestion, understandably in my view, did not find favour with Mr Homer or Mr Gotham, given that the central puzzling fact was the difference between the occupational health advice, apparently based on advice from Mr Nowlan's consultant about the need for a hip operation, and this apparent change on the part of his GP. The essential step was to work out what, if anything, had changed medically, i.e. to clarify the advice rather than find a way around it.
18. I have to conclude that there was no such fit note from Mr Nowlan's GP. Not only is it difficult to reconcile that advice with the previous position, but he was unable to supply it at any stage, even at the time of this hearing, and he accepts that during the meeting on 5 September 2018 he refused to give permission to occupational health consulting his medical records. There is therefore no evidence to support his account on this point, which could easily have been obtained, and that failure has to be regarded as damaging to his credibility.
19. It may indeed be that it was being pressed about this issue which led to his resignation shortly after that meeting. Both of the respondent's witnesses gave evidence that they thought it was a positive meeting and they had a pathway for return to work, and so both were very surprised to see his resignation shortly afterwards.
20. Applying those facts to the relevant legal test, although I accept that Mr Nowlan very much wanted to return to work and felt that it was unfair that he should not be able to resume for so long, there is nothing to criticise in the steps taken by the company. They had taken advice from occupational health and followed it. It is no answer to suggest that simply because the absence might continue for a long time they should ignore it and allow him to come back to work sooner. I accept too that with the sodium plant back in full operation, even without Mr Nowlan using the forklift, there would inevitably be a certain amount of manual handling which might well have exacerbated his hip condition. It has to be remembered that at the time of his resignation he was only able to drive for short periods and was unable to stand for very long, which makes it difficult to understand how he could have carried out a shift in this active role when he was mostly on his feet.
21. The question is not however whether this was the correct approach by the company, or even whether or not it was a reasonable approach, the question is whether or not it was calculated or likely – paraphrasing the test above – to

destroy the working relationship. That is a difficult test to meet. In the present case, however Mr Nowlan saw the matter, I am satisfied that the company felt that they were acting appropriately and in his best interests and were genuinely surprised by his resignation. It follows that there is no basis to conclude that Mr Nowlan was entitled to resign in the circumstances and so the claim must be dismissed.

Employment Judge Fowell

Date 18 January 2019