

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**[2018] NZEmpC 147
EMPC 336/2017**

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

BETWEEN AMCOR FLEXIBLES (NEW ZEALAND)
 LIMITED
 Plaintiff

AND KELLY GILLAN
 Defendant

Hearing: 11 – 12 June 2018
 (Heard at Christchurch)

Appearances: R Harrison, counsel for plaintiff
 S Meikle, counsel for defendant

Judgment: 10 December 2018

JUDGMENT OF JUDGE K G SMITH

[1] On 11 March 2016 Kelly Gillan was dismissed from his employment as a tradesman printer with Amcor Flexibles (New Zealand) Ltd. The reason for his dismissal was medical incapacity arising from his epilepsy and seizures at work.

[2] Mr Gillan considered he had been unjustifiably dismissed and raised a personal grievance. The Employment Relations Authority agreed and ordered Amcor to reimburse Mr Gillan for lost wages and pay him compensation.¹

[3] Amcor challenged that determination and sought to have it set aside. The catalyst for Amcor’s decision to dismiss Mr Gillan was a seizure he suffered at work on 18 June 2015.

¹ *Gillan v Amcor Flexibles (New Zealand) Ltd* [2017] NZERA Christchurch 186.

Mr Gillan's employment

[4] Mr Gillan is a highly skilled flexographic printer. At the time of his dismissal he had been employed by Amcor for approximately 22 years. He was a senior tradesperson in charge of a 16S printer which he operated with a printers' assistant.

[5] The 16S printer is a large machine used for significant printing jobs, running anything from one to five jobs per shift. When in production the printer operates very quickly, at speeds of about 240 metres per minute, or approximately 14.4 kilometres per hour. Mr Gillan's main tasks on the printer were to ensure the supply of inks were maintained, that he and his assistant changed rolls on the printer as needed, cleaned the printing plates, and generally ensured its proper operation. These tasks required working at height, from a ladder, and as necessary reaching into the machine when it was switched off to undertake cleaning and other work.

[6] The 16S printer operates 24 hours per day, seven days per week, so it is constantly staffed by teams of two; a tradesman printer and an assistant, working on 12 hour shifts.

[7] For several years before his dismissal, therefore, Mr Gillan held down a highly-skilled shift-work job operating a fast moving and complex printing machine.

18 June 2015 incident

[8] During a shift on 18 June 2015 Mr Gillan was found by a co-worker outside the ink room at Amcor's factory. He was reported as being unstable on his feet and having incoherent speech. An ambulance was called but he did not need to be hospitalised and, after an examination, was able to go home. Later he was stood down by Amcor from the balance of his shift rotation to allow an investigation to be undertaken into what had happened.

[9] A few days later, on 22 June 2015, there was a meeting between Mr Gillan, his wife, and Ignatius Wong, who was at that time Amcor's Operations Manager, and other Amcor representatives. At this meeting Mr Gillan described his condition and the

medication prescribed to him to help control it. He explained getting advance warning of a seizure enabling him to take steps to remove himself from potential harm. He told the company that before the incident in June 2015 his last known seizure occurred in March 2015.

[10] Amcor asked Mr Gillan to provide further medical information about his epilepsy so that it could understand any ongoing risk to him, or to others in the workplace. Its reason for asking for this information was to assist it in creating a return to work plan. A further meeting took place on 14 July 2015 where Mr Gillan was represented by his union. An agreement was reached for him to participate in an independent medical assessment and to be stood down from work on full pay until it was completed.

First medical report

[11] Amcor instructed Dr Mary Obele to undertake the independent medical assessment. Dr Obele is a specialist in occupational and environmental medicine. Her specialist area of practice is in fitness for work, workplace risks and hazards, illness and injury rehabilitation.

[12] Dr Obele produced several reports about Mr Gillan's fitness for work some of which were the foundation for a return to work plan. Initially she recommended a staged return to work before supporting a full return including being able to work overtime. Unfortunately, while the return to work plan was being implemented, a further incident occurred at work which, on investigation, appeared to Dr Obele to be a seizure of a different type from the one Mr Gillan experienced in June 2015. This further incident resulted in a medical assessment that, ultimately, led to Amcor's decision to dismiss Mr Gillan.

[13] Dr Obele's first report was provided to Amcor on 21 July 2015. Her report relied, at least partly, on information supplied by Amcor and Mr Gillan. Mr Gillan informed Dr Obele about the diagnosis of his epilepsy and how he was initially treated with medication for "absence seizures".

[14] Mr Gillan told Dr Obele he had experienced his first whole body convulsion in 2002. This type of seizure is known as a tonic clonic seizure. He advised Dr Obele that there was always a reason for his seizures. Usually they were caused by tiredness, or being unwell. He told her that he had not had one at work previously. He reported the frequency of his seizures as being about six-monthly, or being related to tiredness and stress. What was significant to Dr Obele's advice was that he told her he invariably got a ten to fifteen minute warning of a seizure characterised by reactions such as a hot flush, disturbance to his vision and repetitive actions such as touching his face. After a seizure he would go home and rest and he would be fine the following day.

[15] A work site assessment was performed, during which Mr Gillan showed Dr Obele around his workplace, explained the safety procedures of the 16S printer, and generally described his work to her. She considered the printing machine where Mr Gillan worked had a greater degree of risk than office work, because the printer is large and has fast moving parts, not all of which can be completely guarded, and it required working at height. The possibility of an accident, by falling into the machine, she described as remote but not "zero".

[16] Dr Obele reported that there was no convincing clinical evidence to stop Mr Gillan working 12 hour shifts but she supported day shift work only for six weeks. She was satisfied Mr Gillan had managed his seizures and demonstrated a good understanding of them. Her opinion was that he should return to work with no restrictions but she did make recommendations for Amcor to consider.

Return to work plan

[17] Relying on Dr Obele's report, and its recommendations, Amcor and Mr Gillan signed a return to work plan on 28 July 2015. It was to be implemented over the following six weeks after which there would be a further medical assessment in early September 2015.

[18] The return to work plan involved Mr Gillan working day shifts only, up to 12 hours per shift, on a four day on/four day off roster. The plan provided that he was to

undertake his usual duties at work, but was not to be left alone around the printing machines including during breaks. It contained an instruction to him not to climb stairs leading to a platform above the 16S printer and proposed that procedures would be developed and finalised to address the company's response to the seizures.

[19] The plan required Mr Gillan to inform a co-worker when he had a warning of a seizure. He was then to be taken to the first aid room, to be checked, and for transport home to be arranged.

[20] The plan identified fatigue as a risk. It required Mr Gillan to report possible fatigue to his supervisors, who were also to ask him about it at ten hours, and eleven hours, into his shift. Any suggestion of fatigue was to be responded to by him going home to rest. The plan reminded Mr Gillan of the prohibition on driving a vehicle on public roads for twelve months following a seizure.

[21] He returned to work on 28 July 2015.

Second and third medical reports: September 2015

[22] A follow up report was prepared by Dr Obele, on 4 September 2015. She reported that, according to both Amcor and Mr Gillan, things had gone well since July; there had been no further seizures, no accidents, or near miss events and no significant absences.

[23] Dr Obele had no medical concerns about Mr Gillan's return to work and she said he could return to his usual occupational tasks and hours. She recommended that he work either day shifts or night shifts for four consecutive days or nights followed by four days off.

[24] By the end of September 2015 Amcor asked Dr Obele for a further opinion, this time about Mr Gillan's fitness to work overtime. After reviewing the situation, and discussing matters with Mr Gillan, she informed Amcor that he was able to work overtime. She recommended he must not work more than five consecutive day shifts

or night shifts and was able to work up to two consecutive five-day weeks before having a break from overtime.

Further incident: 11 October 2015

[25] Unfortunately, there was a further incident on 11 October 2015 and subsequent disagreement about what happened and why. Dr Obele concluded Mr Gillan had suffered a seizure but he maintained that was not what happened.

[26] Mr Gillan was working on the night shift when concerns were raised about him, which were drawn to Amcor's attention by his co-workers. The tenor of these concerns was that Mr Gillan was not behaving normally, being described in subsequent statements as vague, confused, disorientated and "out of sorts". Physical symptoms were also described with Mr Gillan being said to have been walking around with his head in his hands, pacing outside the factory and to have had trouble opening a gate he was familiar with. Mr Gillan disputed the accounts of what happened in these statements by denying they described the symptoms of a seizure.

[27] Copies of the statements from Mr Gillan's co-workers were sent to his union, together with a request for a meeting to discuss the incident. The union was advised that he would be stood down from work on full pay in the meantime and that a further medical assessment would be required.

Fourth medical report: November 2015

[28] Amcor asked Dr Obele for a further report which Mr Gillan consented to her providing. He also telephoned Dr Obele and told her what had happened. He was worried about losing his job and said that to her.

[29] To complete her report Dr Obele obtained a history of what happened which she did by talking to Amcor's representatives, Mr Gillan and the co-workers who had made statements. Her inquiries into what happened meant she obtained further information not in the statements supplied to Amcor. She was advised by one of Mr Gillan's co-workers that he had been turning a blower fan on and off for no apparent

reason and, when spoken to, did not seem to respond even when the co-worker put a hand on his shoulder and shook him.

[30] Dr Obele subsequently spoke to Mr Gillan about what had happened. There was a disagreement between them about whether he was interviewed in person or by telephone. I prefer Dr Obele's evidence that she met Mr Gillan, in person, in a private room at Amcor's premises. In the end little turns on whether there was a meeting, because there is no disagreement that Mr Gillan had an opportunity to explain what happened.

[31] They discussed what Dr Obele had obtained as a history of this event including, for example, the repetitive action attributed to Mr Gillan when he was said to be turning a blower fan on and off. He said the machine had malfunctioned and what he was doing was to allow the problem to be diagnosed and the machine reset. However, he did not recall his co-worker speaking to him or attempting to shake him.

[32] Importantly, Mr Gillan told Dr Obele that he had suffered from similar episodes, around monthly, for many years. He described them as "dizzy spells". These spells, she was told, did not usually lead to a full-blown convulsion and he felt better afterwards. As described to her, those dizzy spells meant that Mr Gillan was unresponsive, and engaged in repetitive movements such as patting himself, pacing and looking restless.

[33] Based on this history Dr Obele provided her report on 5 November 2015. There was some controversy about it, because of an exchange of emails she had with a member of Amcor's human resources team, in which an attempt was made to restrict its length. In the end nothing turns on that exchange, because Dr Obele insisted she would write a detailed report and did so.

[34] In this report Dr Obele stated the need for a specialist neurological opinion because, without one, it would not be possible to draw conclusions about Mr Gillan's capacity for work. She reported agreeing to help him get an urgent specialist's appointment.

[35] On 24 November 2015, an agreement was reached with Mr Gillan that he would return to work on limited duties and hours. For the time being he would not be involved in operating printing machinery or be working on shifts. The reason for this arrangement was an attempt to remove potential risks to safety while the specialist's opinion was being obtained. The tasks assigned to Mr Gillan were created for him. He performed light cleaning around the printing department, administrative work, and painting. Mr Wong explained that this arrangement was not sustainable and was only ever interim.

Fifth and sixth medical reports

[36] Mr Gillan was seen by a neurologist who provided his report on 19 January 2016. The neurologist provided an opinion about the seizures and made observations about the dizzy spells. Whereas, previously, Mr Gillan's epilepsy was thought to manifest itself as a tonic clonic seizure, the specialist's opinion described the dizzy spells as a different type of seizure known as a brief complex partial seizure. The specialist's advice was that these seizures did not follow a pattern and the frequency of them was described as "less than one a month". All previous assessments had been based on him experiencing only one type of seizure.

[37] The neurologist's advice was that it would not be appropriate for Mr Gillan to be working with heavy machinery where, if he was to become unconscious, he could injure himself or someone else. He observed that, if Mr Gillan had sufficient warning to remove himself from the workplace, every single time, it would not be unreasonable for him to continue with his work. That advice was based on an assumption that someone else would be alerted when Mr Gillan was feeling unwell and that he did, in fact, remove himself from the immediate work environment. The neurologist declined to answer Dr Obele's questions about workplace restrictions, limitations or modifications because those subjects were beyond his specialist area of work.

[38] Separately, Mr Gillan had been seen by a neurosurgeon on 20 January 2016 and a letter, signed by the neurosurgeon and a neurosurgical registrar, was supplied to Amcor. This letter was brief, stating Mr Gillan's treatment undertaken in 2009 and included confirmation of a recommendation to him for a further medical procedure to attempt to deal with his epilepsy. Previously several medical procedures had been

performed to attempt to address his epilepsy. The significance of this letter was in one sentence, which recorded that, because he had not had a seizure and was well controlled on a medication, the neurosurgeon and neurosurgical registrar were happy for him to resume his normal work activities. This letter assumed some significance later, because it was the only medical advice available to Amcor saying he could return to work without restrictions or conditions.

Seventh medical report: January 2016

[39] Dr Obele wrote to Amcor on 30 January 2016 after receiving the neurologist's advice. In her report she stated her dissatisfaction with the quality of the information previously obtained by her from Mr Gillan, saying he did not initially reveal symptoms of his complex partial seizures before admitting he had suffered from them for several years. That remark was not well received by Mr Gillan, who maintained that he had completely described his symptoms the first time they met. He drew attention to a comment, in the July 2015 report, about the symptoms which should have been understood as describing complex partial seizures. Mr Gillan's point was that he did not know his dizzy spells were seizures, but he had not hidden his symptoms. While this disagreement generated some ill-feeling between them a resolution of it is not necessary because Amcor's decision did not turn on the quality, or nature, of Mr Gillan's disclosures to Dr Obele.

[40] Dr Obele relied on the neurologist's report and concluded that Mr Gillan must not do any "safety critical" work until further notice. She was prepared to review that advice when Mr Gillan's condition had stabilised and/or been resolved, but cautioned that might take several months. She advised Amcor that Mr Gillan must only work three consecutive eight-hour day shifts as a printer followed by, at least, a 24 hour rest. She went on to say he was not to be left alone in the factory, was not to climb stairs, work at heights or reach into the printing machine. She recommended he was not to do night shift work or overtime for any reason until further notice.

24 February 2016 letter

[41] Amcor's response to this latest report was to write to Mr Gillan on 24 February 2016 about the possibility of terminating his employment on the grounds of medical

incapacity. This letter was the first occasion on which this possibility had been mentioned to him by Amcor.

[42] Amcor's letter informed Mr Gillan about the medical information it had received and enclosed copies of the reports. It said that this information suggested he was able to safely undertake some types of work but that it would not be safe for him to resume his full duties and there was "no firm timeframe" within which he would make a return to those duties. This letter referred to Dr Obele's opinion that it would be unsafe for Mr Gillan to undertake key parts of his job including any "safety critical" work, referring particularly to working at height or reaching into machinery.

[43] The letter commented on the neurologist's report, noting what it said about the circumstances where it would be inappropriate for Mr Gillan to work with heavy machinery. The company's letter also referred to the neurosurgeon's and registrar's letter of 22 January 2016, a copy of which was enclosed. Picking up on the comment in it about working, Amcor's letter said that remark did not comment specifically on the nature of his duties or the risks associated with them.

[44] The letter expressed concern that Amcor may breach its health and safety obligations if it allowed Mr Gillan to return to his full duties. The letter commented about alternative, or restricted, duties which had been undertaken previously and made the following statement:

Regrettably, things have now reached the stage where we need to consider the likelihood of you being able to make a return to the full duties of your role within a reasonable time, and in a way that is safe and sustainable. If we are not satisfied that you will be able to make such a return, your employment may be terminated on the grounds of medical incapacity.

[45] Mr Gillan was informed that a decision on the proposed termination of his employment would be made at a meeting proposed for a few days later, on 2 March 2016. Amcor's letter ended with an invitation to Mr Gillan to supply to it any further medical information he felt it should know.

March 2016 meeting

[46] The proposed meeting did not take place until 10 March 2016. Mr Wong represented Amcor and was assisted by the company's Manufacturing Manager and

its National Human Resources Manager. Mr Gillan was accompanied by members of his family and his union representative. When the meeting began Mr Gillan confirmed he had received the medical reports and information sent to him. There was a brief discussion of those reports and he was asked if there was any further medical information he wished to supply. He did not have any but his union put forward propositions for the company to consider which were that:

- (a) there was a low risk of seizure;
- (b) his ability to know when a seizure was coming reduced and/or eliminated the risk;
- (c) the company's actions discriminated against those with epilepsy;
- (d) he had worked for many years for the company with this condition; and
- (e) he should be given more time.

[47] The significance of the last point, about being given more time, was because of the medical procedure recommended by the neurosurgeon and neurosurgical registrar. When the meeting occurred that procedure was anticipated to be performed in June 2016 and, together with changed medication, could have led to the condition being stabilized.

[48] This meeting was short, lasting about 30 minutes including the time taken by Amcor's representatives to have a private discussion.

Termination of employment

[49] Amcor wrote to Mr Gillan on 11 March 2016 informing him of his dismissal on the grounds of medical incapacity. The company based its decision on the medical information which led it to conclude:

- (a) it would not be safe for him to undertake the full duties of his role in the company's work environment; and

- (b) there was no firm timeframe within which he would make a return to full duties where there would be no increased risk of injury to himself or others.

[50] Mr Gillan was given notice, paid in lieu, and his employment ended. He raised a personal grievance with the company for unjustified dismissal the grounds of which concentrated on the company's decision being made prematurely given the length of his service, its knowledge of his condition over a long period of time, and that it had an obligation to work with him until at least the stage where his new medication had a chance to work and a further assessment could be undertaken. A claim about alleged discrimination was not pursued.

[51] The personal grievance was raised in a letter of 16 May 2016 by which time Mr Gillan had obtained employment elsewhere but at a lower income.

Legal principles

[52] Both counsel relied on *Lal v The Warehouse Ltd*, with support from *Lyttelton Port Co Ltd v Arthurs* for the principles to apply.² In *Lal*, the Court stated the well-established principle that an employer is not bound to hold a job open indefinitely for an employee who is unable to return to work.³ It follows that an employer will be justified in dismissing an employee for a long-term absence where it can be shown that the decision was substantively and procedurally justified.⁴

[53] *Lal* noted that s 103A of the Act does not sit comfortably with a no-fault based dismissal such as for medical incapacity.⁵ The case also held that:

- (a) The employer must give the employee a reasonable opportunity to recover.⁶ The terms of the employment agreement, any relevant policy,

² *Lal v The Warehouse Ltd* [2017] NZEmpC 66; and *Lyttelton Port Co Ltd v Arthurs* [2018] NZEmpC 9, (2018) 15 NZELR 624.

³ *Lal v The Warehouse Ltd* [2017] NZEmpC 66 at [30], relying on *Canterbury Clerical Workers IUOW v Andrews and Bevan Ltd* [1983] ACJ 875 at 877.

⁴ At [30] relying on *Motor Machinists Ltd v Craig* [1996] 2 ERNZ 585 (EmpC); and *Dunn v Waitemata District Health Board* [2014] NZEmpC 201, [2014] ERNZ 524 at [25].

⁵ At [32].

⁶ At [33].

the position held by the employee, and the length of employment are factors which are likely to inform an assessment of what is reasonable in the circumstances.

- (b) The employer must undertake a fair and reasonable inquiry into the prognosis for a return to work. Necessarily this inquiry means engaging appropriately with the employee.⁷ That involves seeking and considering relevant medical information. The Court held that would involve explaining the reasons for the inquiry, the possible outcome of it, and providing the employee with an opportunity for input and comment.
- (c) What the employee has to say before terminating the employment relationship must be fairly considered.⁸
- (d) In the case of medical incapacity and a reduced ability to undertake certain tasks, a level of engagement with attempts to facilitate a return to work may reasonably be expected.⁹

[54] In *Lal* the Court held that an employer is entitled to have regard to business needs in deciding an appropriate response, and is not obliged to keep a job open indefinitely, on the basis that “fairness cuts both ways” given the mutual obligations which exist in employment relationships.¹⁰

A reasonable opportunity to recover?

[55] The medical incapacity relied on was on-going uncertainty over Mr Gillan’s epilepsy coupled with workplace health and safety concerns. The difficulty presented by this case is that Mr Gillan worked for Amcor for 22 years before his seizures became a problem in the workplace. In those circumstances describing the test as a reasonable opportunity “to recover” does not adequately capture what is required. The

⁷ At [34].

⁸ At [35].

⁹ At [36].

¹⁰ At [36].

issue is whether the company gave Mr Gillan a reasonable opportunity to adequately manage his epilepsy so it could properly assess if he was able to safely return to his usual duties.

[56] Both parties accepted that working on the 16S printer is a skilled job which could present health and safety risks, although Mr Gillan thought those risks were overstated by Amcor because he had worked with the printer for a long time, without incident, and it was well guarded against accidents. His argument was that his epilepsy had been managed by medication and was able to be adequately managed in future. In fact, the June 2015 seizure may have been caused, or contributed to, by a change in medication but was under control.

[57] When the meeting took place in March 2016 Mr Gillan expected to undergo a further medical procedure in June 2016. From his perspective, a successful outcome may have meant an end to the tonic clonic seizures. As it transpired, he did not undergo that procedure until October 2016. He went on to say that, since then, he had not experienced any tonic clonic seizures. However, he acknowledged occasionally having complex partial seizures but said that the frequency of them had reduced to about one every six months.

[58] When Amcor made the decision to dismiss Mr Gillan it had given him a reasonable opportunity to take steps to attempt to manage his epilepsy so he could resume work in a safety critical environment. By that time about eight months had elapsed, since the seizure in June 2015, during which there had been a comprehensive review of his medical condition, which had progressively been identified as being more complex than it was originally thought to be. By March 2016 there was no clear medical management able to satisfy Amcor's health and safety concerns, nor was there an end in sight to these uncertainties. Information about Mr Gillan's epilepsy was evolving, but what remained a constant problem was that he was not able to return to safety sensitive work and there was no medical information available to say that he could do so within a reasonable time.

[59] Mr Gillan relied heavily on the letter from his neurosurgeon, and neurosurgical registrar, commenting about his ability to return to normal work activities as evidence

that Amcor should not have dismissed him. That statement was in stark contrast to Dr Obele's final report, and the caution urged by the neurologist whose advice was relied on by her. Amcor considered all of the medical evidence available to it in the lead up to the meeting in March 2016. It was entitled to place more weight on Dr Obele's report, because she was the only medical practitioner who had assessed Mr Gillan, understood his work, and knew about the hazards in Amcor's workplace. Furthermore, Mr Gillan knew before the March meeting that Amcor was unlikely to place much weight, if any, on the neurosurgeon's and registrar's letter, because of what was said about it in the company's letter to him. The company noted that the letter did not comment specifically on the nature of Mr Gillan's duties or risks associated with them.

[60] While Mr Gillan and his union were optimistic about the anticipated medical procedure there was no medical information available to the company to indicate that, if successful, it would enable a return to full-time duties within a reasonable time. The procedure was not performed until October 2016 and even now, Mr Gillan continues to experience partial complex seizures although infrequently.

[61] The time and effort taken to investigate Mr Gillan's condition, including preparing return to work plans, was sufficient to satisfy Amcor's duties in light of his length of service and the senior position he held. Amcor gave Mr Gillan a reasonable opportunity to adequately manage his epilepsy to consider a possible safe return to his usual work.

Fair and reasonable inquiry?

[62] Amcor's inquiry into Mr Gillan's ability to return to his usual work was fair and reasonable. At all times it sought professional advice and, when it was received, passed on that information to Mr Gillan. He was kept informed by Amcor, even to the extent of being invited to comment about whether it should retain Dr Obele or, instead, appoint someone else. Amcor commissioned reports which comprehensively reviewed the medical condition as it was known as at June 2015 and January 2016.

[63] Initially, Dr Obele was satisfied Mr Gillan's epilepsy could be managed adequately to allow him to work in a safety-sensitive area. Amcor accepted that advice and planned his return to work. Expectations for Mr Gillan to resume work were dealt a blow, from which they never recovered, because of what happened on 11 October 2015. This new information changed the advice, which became more conservative. The emergence of this uncertainty was because the complex partial seizures were not accompanied by a warning and were thought to be more frequent than the tonic clonic seizures. In those circumstances the health and safety considerations presented by the risk of a seizure, even if relatively low, became understandably determinative.

[64] By the time Amcor dismissed Mr Gillan it had been attempting, for about eight months, to understand the medical condition from which he suffered and to plan to deal with it, while cooperating with him for a resumption of his usual work. To an extent the return to work plans were successful because, temporarily, he resumed work. Until Dr Obele received the neurologist's report in January 2016 there was no indication that Mr Gillan's suffered from another type of seizure. This advice changed Amcor's approach because it indicated that stabilising the seizures might take some time, measured in several months, with an uncertain outcome.

[65] At the dismissal meeting the union advanced several propositions, including one asking for further time. The proposals were considered and rejected as unworkable. By that stage it was apparent that Mr Gillan's medical condition was more complex than it was first thought to be and the company could not accommodate what was suggested.

[66] Mr Meikle submitted that alternatives had not been adequately investigated by considering:

- (a) providing work interspersed with recommended rest, through a mixture of allowing accrued leave to be taken together with reduced or different working hours;
- (b) moving Mr Gillan to work on a different printing machine called the 34DF printer; or

(c) by considering a combination of (a) and (b).

[67] At the time of his dismissal Mr Gillan had a significant credit balance of untaken long service leave and annual leave. Part of this criticism was that the company did not take into account how that combined leave, together with an altered work pattern, might have been used to extend Mr Gillan's employment. The point was that, if Mr Gillan was able to remain employed on this basis, his medication may have had a chance to stabilise his condition and/or he may have had the procedure he hoped would assist him.

[68] Mr Wong explained that the company did consider alternatives such as different hours, but that possibility, even in combination with using up available leave, did not provide an adequate solution because it failed to take into account other, wider, staffing problems. While it is likely Mr Gillan would have been able to work for a little longer, if alternative arrangements of this sort had been made, the decision by Amcor not to rearrange its work does not suggest his dismissal was premature. To accommodate altered working hours Amcor needed to organise another employee (or employees) to fill in for the balance of the shift days on the 16S printer and on each day when Mr Gillan would have worked reduced hours. Mr Wong explained short term cover could be provided, because the company had done so previously during times of sickness or holidays, but these arrangements were not sustainable over the longer term. This problem, of providing work cover, was investigated by Amcor and discussed, although briefly, at the March meeting.

[69] Another possibility Mr Wong was asked about at the hearing, was for Mr Gillan to be moved from the 16S printer to another printer, called the 34DF, which might involve fewer hours of work per day. The 34DF printer worked an eight-hour shift. Mr Wong explained that such an arrangement would not address difficulties over staffing the 34DF, because of the time required for Mr Gillan to rest between shifts. Mr Wong described these problems as being one of the dilemmas the company had to consider. Changing Mr Gillan to the 34DF could only be achieved if he worked a reduced number of hours and Amcor covered the remainder of the work time. To operate the 34DF in this alternative way Amcor would need to have other employees available to work for the balance of each shift, and shift rotation, that Mr Gillan could

not work. Another staff member would need to work extended hours. The company decided that proposal was not sustainable.

[70] Mr Wong explained that there were other considerations aside from dealing with potentially reduced hours of work. Dr Obele's January report required Mr Gillan to be restricted so he did not do any safety critical work. In the print shop that meant he was not able to work at height or with fast-moving machinery placing unsustainable limits on him aside from restricted hours of work.

[71] Amcor's investigation into Mr Gillan's ability to resume full-time work as a printer was fair and reasonable in the circumstances. Before Amcor dismissed Mr Gillan it had commissioned or received medical reports which it considered, it had kept him on full pay while investigating, kept him informed throughout the process and worked on a return to work plan with him that only failed because his epilepsy intervened.

Section 103A test?

[72] Amcor's actions, and how it acted, were what a fair and reasonable employer could have done in the circumstances at the time the dismissal occurred. When it dismissed Mr Gillan the medical information available confirmed his epilepsy and was not able to provide any realistic timeframe within which he might be able to return to safely undertaking the tasks required of a tradesman printer.

[73] The company made strenuous efforts attempting to find a solution to the difficulties presented to it and to Mr Gillan and considered possible alternatives before acting. While the meeting in March 2016 was brief, it is difficult to see what could have been gained by a longer discussion given the detailed inquiries that had already been made and the realities of the situation faced by the company and him.

[74] In Amcor's safety-sensitive workplace, even though the risk of harm might be low, it was not eliminated and could not be. Mr Gillan's medical condition added an unfortunate complexity to that risk.

[75] The decision to dismiss Mr Gillan based on his medical condition and uncertainty over his ability to work safely in Amcor's factory satisfied s 103A(2) of the Act.

Conclusion

[76] Amcor's challenge to the determination is successful. The Authority determination is set aside and this judgment stands in its place.

[77] Costs are reserved. Costs were given a preliminary assessment of Category 2 Band B which is now confirmed. In the absence of agreement if a party seeks costs a memorandum may be filed within 20 working days of the date of this judgment. The other party is to have a further 20 working days to respond. Any reply is to be provided within a further 10 working days.

K G Smith
Judge

Judgment signed at 9.50 am on 10 December 2018