

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 484
5327635

BETWEEN JOHN NOEL CATTON
 Applicant

AND CANAM INTERIORS
 LIMITED
 Respondent

Member of Authority: Dzintra King

Representatives: Garry Pollak, Counsel for Applicant
 Carl Blake, Counsel for Respondent

Investigation Meeting: 29 June 2011 at Auckland

Submissions received: 29 June 2011 from Applicant
 29 June 2011 from Respondent

Determination: 10 November 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr John Catton, says he has been constructively dismissed by the respondent, Canam Interiors Limited (“Canam” or “the company”) on 11 November 2011. He seeks compensation of \$20,000 and lost remuneration. The respondent denies that Mr Catton’s resignation constitutes a constructive dismissal.

Background and Mr Catton’s Recollection of Events

[2] Mr Catton was employed as Site Manager on 18 January 2010. He says that during his employment there were a number of incidents which culminated in a deterioration of his physical and mental health and which could have been stopped by Canam.

[3] Mr Catton says that on 13 October 2010 Mr Neil Toland, the Carpentry Foreman, swore at him. Mr Catton spoke to Mr Andrew Whatling, the Contracts Manager, that afternoon and offered his resignation as he felt he should not be subjected to abuse. Mr Whatling talked Mr Catton out of resigning and said he would review matters in two weeks' time.

[4] A meeting was held the following day in the morning. Present were Mr Whatling, Mr Toland, Mr Toland's Manager, Mr Trevor Simms, and Mr Catton.

[5] Mr Catton says Mr Toland denied making some of the alleged comments and lunged aggressively across the table telling Mr. Catton he was "*a fucking liar*". Neither Mr Whatling nor Mr Simms intervened. The outcome of the meeting was that Mr Whatling told Mr Catton that they had to put up with that sort of behaviour and that Mr Catton would just have to tolerate Mr Toland.

[6] The following day Mr Toland approached Mr Catton and screamed abuse at him. Mr Catton visited his doctor and was referred to a specialist.

[7] On 19 October Mr Catton asked Mr Toland to provide men to assist in the carrying of two steel beams. Mr Toland told him to "*fuck off*" and that the structural steel company should be there to do it.

[8] On 27 October Mr Catton met with Mr Whatling and gave him a medical certificate which gave him the rest of the week off. Mr Catton told Mr Whatling he disliked going to Selwyn College and that he was still the subject of extreme abuse by Mr Toland.

[9] Mr Catton asked if he could concentrate on an interior office fit out at Birkenhead and someone else could take over the Selwyn College project. Mr Catton suggested taking a salary cut in conjunction with reduced hours.

[10] Mr Whatling told him he would have the Birkenhead project taken off him and he had to go back to Selwyn College. Mr Whatling told him he would not have to communicate with Mr Toland as Mr Andrew Walker, the Project Manager, would be on site daily.

[11] However, that did not happen and when Mr Catton returned to the site there was continued abuse. On 2 November Mr Toland screamed abuse at him, after saying he had tried to contact him.

[12] On or about 3 November Mr Catton reported this incident to Mr Whatling who took no steps to deal with it, said Mr Catton would have to put up with it and it would be Christmas soon.

[13] On 4 November Mr Catton met with Mr Whatling for a performance review. He told him the abuse was continuing. Mr Catton said nothing was done.

[14] Mr Catton resigned on 11 November 2010. His resignation letter reads as follows:

I John Catton wish to advise you Andrew Whatling that I am tendering my resignation from Canam Interiors, taking effect as of today being Thursday 11th November 2010.

Under the circumstances that I am expected to work on site, I am unable to continue with my employment at Canam Interiors.

The situation has arisen from a conflict of professional conduct between myself and the Building Foreman. I have draw [sic] your attention to this matter on three occasions with no improvement by the named party and his conduct.

The unwarranted abuse, on regular occasions, I find having to deal with has put me under enormous stress and I have been advised by medical professionals to remove myself from the present situation for my own health.

At present I am unable to be at work as I have a throat and chest infection, I have a Doctors certificate until (and including Friday 12th Nov.)

I am prepared to discuss my resignation with you.

...

[15] Mr Whatling replied by email the following day, attaching a response to the resignation. The key paragraph of the letter is as follows:

Although we do not agree with or accept your reasons listed in your email for your resignation as we believe that Canam Interiors Ltd has provided you with a professional level of support and assistance in all instances during your employment, we are regretfully accepting your resignation from 11th November 2010 as you requested and your pay will be finalised accordingly.

[16] On the afternoon of Sunday 14 November 2010 Mr Catton went to the Selwyn College with his wife to remove some personal property. When they arrived, they saw some graffiti with a sexual content referring to Mr Catton. They returned and took photographs.

[17] Unfortunately, in response to Mr Catton raising a personal grievance, Mr Loukas Petrou, the managing Director of The Canam Group Limited, suggested that Mr Catton had himself drawn the obscene pictures and that he had designed a plot to extract money from Canam.

[18] Mr Petrou has since retracted the allegation that Mr Catton was responsible for the drawings. Canam's position is that they were done by school children.

[19] It is not possible to ascertain who did the graffiti. However, I find the company's position that it was not one of their workers but schoolchildren, highly improbable. The content of the graffiti is very personal and it is more likely than not that it was done by someone who knew Mr Canam.

The Company's View of Events

[20] Mr Petrou commented that there had been complaints about Mr Catton's behaviour and referred specifically to two emails sent to staff and a subcontractor. I agree with Mr Petrou that the tone of these emails was unacceptable. They contain the comments "*So get your arse into gear and get on with it*", "*And stop pissing me off*" and "*Don't let me down you haven't seen the other side of me yet.*"

[21] Mr Whatling says that the first complaint he had from Mr Catton was in October 2010 and he immediately arranged a meeting to try to resolve the matter. When Mr Catton approached him and suggested resigning, Mr Whatling told him he did not want him to resign and that he would address any concerns Mr Catton had regarding Mr Toland. Mr Whatling produced notes of his meeting on 13 October with Mr Catton which referred to the frustrations Mr Catton was experiencing as reasons for his raising the issue of resignation.

[22] At the meeting on 14 October Mr Toland and Mr Catton discussed their concerns. Mr Whatling and Mr Sims deny that Mr Toland called Mr Catton “*a fucking liar*” or that he lunged at him across the table. At the end of the meeting the two shook hands and agreed to make more of an effort to respect each other’s views and to put the past behind them. He denies telling Mr Catton that he would just have to put up with Mr Toland’s behaviour.

[23] The next time Mr Whatling heard from Mr Catton was on 21 October when Mr Catton called and said he had to go to Middlemore Hospital to see his father. On 25 October he received an email saying Mr Catton needed the week off and would contact him later that week to discuss it in more detail. Mr Whatling granted the leave sought.

[24] On 27 October Mr Catton saw Mr Whatling and produced a medical certificate for a week off and said he was still having problems with Mr Toland. He agrees that Mr Catton raised working only for the Birkenhead project. They discussed it and agreed it would not solve the conflict. Mr Catton suggested that he would start looking at himself as a possible cause of problems and agreed he would return to the Selwyn College site. Mr Catton was keen to continue working on his relationship with Mr Toland. Mr Whatling made notes of this meeting.

[25] Mr Whatling does not agree that Mr Catton reported an incident with Mr Toland on 3 November.

[26] On 4 November they had a performance meeting and Mr Catton told him that the general atmosphere on the site had improved and that he was enjoying coming to work again. Mr Catton agreed to focus on running his sites more efficiently, to focus on computer training and his overall communication skills. Mr Catton said nothing about another incident with Mr Toland.

[27] On 10 November Mr Whatling sent Mr Catton an email regarding his approach to subcontractors and commenting on the tone of an email sent by Mr Catton to a subcontractor.

[28] On 10 November he received a call from the site asking where Mr Catton was. Mr Whatling endeavoured to contact him, unsuccessfully. Later in the day he ascertained that Mr Catton had told the electrical sub contractor that he would not be on site the following day. On 11 November he emailed Mr Catton expressing his concern and disappointment that he had not heard from him. Mr Catton indicated he would come back to Mr Whatling after he had seen his doctor.

[29] Mr Whatling then received an email, which was Mr Catton's resignation. He tried to contact Mr Catton but he did not answer his phone. He then spoke with Mr Loukas and they decided to accept the resignation as they needed a Site Manager for the final five weeks of the project.

[30] On Friday 12 November Mr Whatling met with Mr Simms, Mr Walker and some of the sub contractors and told them Mr Catton had left and Mr Walker would be taking over as Site Manager.

[31] Mr Catton was subsequently offered a position in New Guinea by Canam but felt he could not take it due to family reasons.

[32] Mr Toland did not deny that relations between him and Mr Catton had been strained and the two of them had had arguments when both used abusive language.

[33] Mr Toland admitted he had told Mr Catton to "*fuck off*" on 19 October. He said he had become very irritated by Mr Catton's disorganization. Mr Toland assisted members of his carpentry team to lift the steel beams.

[34] In early November Mr Catton asked Mr Toland to help with placing some reinforcing. He told Mr Catton that was not part of his job and he should have arranged with the sub contractors to do the work.

[35] There was a further incident in November regarding some demolition work. Mr Toland tried to contact Mr Catton to discuss the demolition teams smashing out asbestos on the site he was responsible for. He was unable to contact Mr Catton before he arrived at work.

[36] The following day Mr Toland told Mr Catton in no uncertain terms about his concerns regarding the asbestos. He said he probably did swear at Mr Catton, who said he did not care and probably would not do anything about the asbestos problem and that he “*knew he was a useless prick incapable of doing his job*”.

[37] Mr Catton denied there had been problem with asbestos but the evidence satisfies me that there was an issue.

Was Mr Catton Constructively Dismissed?

[38] The claim is that the employer has breached its duty to Mr Catton and that that breach has caused his resignation. In *Auckland Electric Power Board v Auckland Provincial Local Authorities’ Officers IUOW Inc* [1994] 1 ERNZ 168 the Court of Appeal stated at p 172 that the employee must show that the resignation was caused by a breach of duty and that the breach was sufficiently serious to make it reasonably foreseeable that the employee would resign.

[39] Canam did not coerce Mr Catton to resign. Had Canam acted as Mr Catton asserts there would have been a breach of duty.

[40] When I consider the events as set out in the evidence I find that when Mr Catton raised his concerns about Mr Toland’s behaviour with Mr Whatling the matter was dealt with very promptly by a meeting the following day. I accept the respondent’s witnesses’ evidence of what happened at that meeting.

[41] I prefer Mr Whatling’s account of what took place on 27 October and on 4 November.

[42] This is not to say that relations between Mr Toland and Mr Whatling were good. Clearly they were not.

[43] However, Mr Catton had an obligation to raise his continuing concerns with his employer and, as I have indicated, I find that either he did not do so; or that when he did, matters were dealt with satisfactorily. There was no breach of duty.

[44] Mr Catton was not constructively dismissed and does not have a personal grievance.

Costs

[45] If the parties are unable to resolve the issue of costs the respondent is to file a memorandum within 28 days of the date of this determination. The applicant is to file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King

Member of the Employment Relations Authority