IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2015] NZERA Christchurch 2
5447842

	BETWEEN	LYNDON FREDERICKS Applicant
	A N D	VIP FRAMES & TRUSSES LIMITED Respondent

Member of Authority:	M B Loftus
Representatives:	David Beck, Counsel for Applicant John Shingleton, Counsel for Respondent
Investigation Meeting:	20 and 21 August 2014 at Christchurch
Submissions Received:	At the investigation meeting
Date of Determination:	9 January 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Lyndon Fredericks, claims he was unjustifiably dismissed (albeit constructively) by the respondent, VIP Frames & Trusses Limited (VIP), on 12 March 2014.

[2] Mr Fredericks also has a number of unjustified disadvantage claims though these are the same issues that collectively led to his decision to resign. He says:

(a) VIP failed to provide a safe workplace;

(b) There was a breach of privacy which led to abuse and harassment by Mr Fredericks co-workers;

(c) VIP failed to recognise its obligations under the Health and Safety in Employment Act 1992 in that it failed to report a serious harm accident to Worksafe New Zealand (Worksafe); and

(d) VIP subjected Mr Fredericks to an unlawful lockout.

[3] VIP denies the claims have validity.

Background

[4] Mr Fredericks was employed by VIP as a truss and frame fabricator. He was engaged as a temporary worker in August 2012 though he had previously worked for VIP. He became a permanent employee in February 2013.

[5] In January 2014, VIP recruited a new temporary employee, Richard Sim.

[6] Mr Fredericks states that after he returned from morning tea on 29 January 2014 the factory manager, Chris McIntosh, approached. He was accompanied by Mr Sim and is alleged to have simply told Mr Fredericks *to keep an eye on him*. The work being performed involved nail guns and Mr Fredericks says despite Mr Sim's claims of experience with the equipment *the moment that Richard picked up the nail gun, I knew that he had minimal experience*.

[7] Mr Fredericks says he therefore approached a colleague, Blair Tamihana, who was working in the same area and advised Mr Sim *was not up to the job*. He says they both then spoke to Mr Sim, took the gun off him and showed him how to hold it.

[8] Mr Fredericks goes on to say Mr Sim would say he understood the instructions and he or Mr Tamihana would then return to their work stations. He says they would later look and again see Mr Sim operating the gun improperly. The process would then repeat and Mr Fredericks says he showed Mr Sim how to hold the gun at least twice. He also voiced concerns to his supervisor, Gregory Harmon, and claims Mr Harmon simply told him to carry on working.

[9] After lunch Mr Tamihana was assigned to other tasks and Messrs Fredericks and Sim continued nailing. Mr Fredericks goes on to say that after about an hour:

> *I … was just about to put my gun down when I felt something hit me. I looked down and realised there was a 90mm nail in my chest.*

[10] He approached Mr Harmon who led him to the office. After a quick examination Mr Harmon (who claims to have significant first aid knowledge) decided Mr Fredericks should be taken to hospital with alacrity. He decided the quickest way of doing so was to take him by car. He drove and got an office employee to accompany them.

[11] Upon arrival, Mr Fredericks was taken to A&E. He says Doctors advised he had significant injuries with the nail piercing a fluid sac around the heart and puncturing a lung. The true extent of his injuries was to become a source of disagreement and undoubtedly contributed to later events. Sometime thereafter, Mr Fredericks' partner, Sioux Ashley, arrived along with her sister, Chaisley Hughes.

[12] Mr Fredericks was operated on and discharged the following day (30 January). He says before going he was again advised he had had a very close call and was told there was a high risk of subsequent infection.

[13] By then, and at VIP's request, a Mr Leigh Tobeck of Health & Safety Systems Limited had commenced an investigation into the incident. He concluded the incident and the extent of Mr Fredericks' injuries were an aberration caused by unusual circumstances that nullified the guns safety functions. Mr Tobeck also considered whether or not the incident had to be reported to Worksafe New Zealand. He concluded the answer was no and advised VIP accordingly.

[14] Also on 30 January Ms Ashley went to VIP's premises to collect Mr Fredericks' property. She claims she saw Mr Sim operating a nail gun. She says she asked Mr Tamihana *what is he still doing here and why is he still using a nail gun?* She says Mr Tamihana replied *apparently he's getting trained now* and rolled his eyes.

[15] That riled Ms Ashley who prepared a note which was handed to Mr McIntosh when he visited Mr Fredericks on Friday 3 February. It appears Mr Fredericks was not aware of the note which aired various concerns about the incident, how it had occurred and implied Mr Sim should be dismissed.

[16] Mr Fredericks says that while Mr McIntosh was there he (Fredericks) asked if he needed to complete any documents for Worksafe. He says the reply was *no* as VIP would not be reporting the incident due to the fact that it did not lead to 48 hours' hospitalisation.

[17] It appears another factor in the decision not to report was Mr Tobeck's understanding Mr Fredericks injuries were such they need not be reported.

[18] Mr McIntosh does not remember discussing the reporting issue and believes the discussion focused on Mr Fredericks health and a return to work around 10 February. I conclude non–reporting was discussed as Mr Fredericks relayed the rationale to Ms Ashley when she came home. That added to her displeasure and she sought a meeting with VIP.

[19] Ms Ashley, accompanied by Ms Hughes, met Messrs Caldwell and McIntosh on 3 February. Various issues were discussed including Mr Sim's continued presence and whether or not the incident need be reported. The meeting appears to have become heated and was inconclusive. Ms Ashley subsequently reported the incident to Worksafe and that led to a series of interactions between Worksafe and VIP over the appropriateness or not of reporting the incident.

[20] Further tension arose as a result of two other factors. The first was VIP's reaction to a statement Ms Ashley made during the meeting that Mr Fredericks was *not quite right in the head at the moment*. VIP considered this observation meant they should require an assurance he was both physically, and mentally, capable of returning. The second emanated from an event that is said to have occurred that evening (3 February). Ms Hughes says she was approached by her son-in-law who is also an employee of VIP. It is said he told her Mr Harmon had made various negative comments about the meeting with herself and Ms Ashley and suggested their visit was an attempt at blackmail.

[21] A second meeting occurred on 4 February 2014. Mr Tobeck also attended to explain his advice and the reasons for it. Again the meeting became heated with allegations of inappropriate behaviour by Ms Ashley which almost led to a walkout by Mr Caldwell.

[22] A series of increasingly fraught exchanges followed and there is an allegation another of Ms Ashley's relatives abused Mr Fredericks over Worksafe's involvement and his view it might adversely affect employment prospects. Whether it occurred or not it is clear Ms Ashley felt she and her family was being threatened and that is reflected in a text message she sent to Mr McIntosh. It reads:

> *Chris you may want to inform your employees that if I receive one more threatening text or phone call or if Greg continues to run his mouth to my family, which he still is, I will contact the Police. Thanks.*

[23] On 5 February Ms Ashley asked that the parties attend mediation but VIP's view of the tenor of her correspondence led to a direction future contact be via the company's solicitors.

[24] It was through that means VIP continued to ask that Mr Fredericks provide confirmation of his ability to return to work from a medical practitioner. These failed to elicit an acceptable response until 19 February 2014. That led to an email to Ms Ashley on 20 February advising Mr Fredericks was now welcome back at work.

[25] Further problems then arose as Mr Fredericks asked for work away from the nail gun but VIP advised there were no available alternates and, at the time, Ms Ashley was continuing to ask that VIP attend mediation. VIP responded that it was incapable of understanding why it should do so in the absence of a clear indication from Mr Fredericks to which Ms Ashley advised Mr Fredericks felt victimised and was concerned VIP appeared to have withdrawn rehabilitative support it was previously providing.

[26] The response was a reiteration Mr Fredericks was welcome back along with advice VIP were happy to meet. The letter goes on to ask why rehabilitation was necessary given the full clearance.

[27] Ms Ashley's response was rehabilitation remained an issue due to *the psychological side of his injury that is impacting his abilities and he has his first psychological assessment via counselling on Monday.*

[28] There was also correspondence with ACC advising:

> *The only gap that ACC is filling is to deal with the trauma which is still present following the injury and its really as a transitional measure to ensure he is ok getting back to the nail gun area.*
>
> *He is keen to get back to work and that's a positive thing so we can see what Monday brings.*

[29] This lead to a change of stance by VIP. On 21 February its lawyer sent Ms Ashley an e-mail reading:

> *Unfortunately, your statement "that it is the psychological side of Lyndon's injury that is impacting his abilities" has now given my client reasonable grounds to be concerned with the health and safety of Lyndon and other employees.*
>
> *Initially, our client was led to believe Lyndon was fit to return to normal duties on 17/02/2014. Refer Medical Certificate by Dr Frost.*
>
> *Now, your email is indicating this may not be the case and that Lyndon's abilities have been impacted.*
>
> *As you know, Lyndon's duties require him to work in a safety sensitive area and to operate potentially harmful tools.*
>
> *For these reasons, our client has no option but to lock Lyndon out of the workplace on grounds of health and safety until it is satisfied the health and safety grounds no longer exist. Please take notice that this email constitutes a Lock out Notice pursuant to section 84 of the Employment Relations Act 2000. …*

[30] That led to further exchanges and the outcome was Mr Fredericks never returned despite obtaining a psychological assessment he was capable of doing so on 26 February.

[31] VIP was not aware of the medical clearance till 12 March which was also the day upon which the parties attended mediation. VIP immediately advised Mr Fredericks was free to return.

[32] The response came in a lawyers letter which advised:

> *As outlined in our letter of 28 February 2014 our client considered he had lost trust and confidence in his employer's ability to provide a safe workplace for him and to resolve concerns he has attempted to enter dialogue on regarding your client not preserving his privacy and subjecting him to co-worker abuse and harassment after he made a legitimate complaint to Worksafe NZ regarding your client's abject failure to recognise a legal responsibility to report a serious harm incident.*
>
> *Today's mediation has not persuaded our client that this above view is misplaced and whilst he acknowledges that your client has lifted his lockout notice today (that we considered to be unlawful and a breach of contract), he has asked us to communicate his decision to resign and pursue a personal grievance …*

[33] The letter of 28 February referred to above included a statement which indicated Mr Fredericks was of the view he already had grounds to claim he had been constructively dismissed.

Determination

[34] Mr Fredericks claims he was constructively dismissed.

[35] In *Wellington etc Clerical Workers etc IUOW v Greenwich*[1] the Court stated that for a dismissal to be constructive:

> *It is not enough that the employer's conduct is inconsiderate and causes some unhappiness to the employee. It must be dismissive or repudiatory conduct.*

[36] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd*[2] the Court of Appeal held that constructive dismissal includes, but is not limited to, cases where:

a. An employer gives an employee a choice between resigning or being dismissed;

b. An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.

c. A breach of duty by the employer causes an employee to resign.

[37] There must also be a causal link between the employers conduct and the tendering of the resignation[3].

[38] Here Mr Fredericks is relying on the third of the *Woolworths* scenarios and alleging he was forced to resign as he could no longer trust VIP due to the four breaches described in paragraph [2] above.

[39] By way of analysis, and given each of the grounds cited as collectively giving rise to the constructive dismissal was also cited as constituting an unjustified action, I will view each separately.

[40] The first is VIP's alleged failure to provide a safe workplace. There are three parts to this claim. The first is VIP allowed an unsafe situation to arise in the first place. The second relates to the manner in which Mr Fredericks was transferred to

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[1] (1983) ERNZ Sel Cas 95; [1983] ACJ 965
[2] (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA)
[3] *Z v A* [1993] 2 ERNZ 469

hospital and the third, which was frequently referred to during the investigation, is dissatisfaction with Mr Sim's retention and the fact he continued to operate a nail gun.

[41] It is common ground that an incident occurred and notwithstanding some disagreement about the exact nature or description of the resulting injuries VIP accepts Mr Fredericks was seriously hurt.

[42] It is well established that injuries resulting from an accident occasioned by an employer's failure to take adequate steps to ensure a safe workplace can constitute an unjustified disadvantage (see *Northern Distribution Union v Sherildee Holdings Ltd*[4] where the employee was injured after airing safety concerns which were ignored by the employer). Similarly a failure to be proactive in respect to health and safety training led to a finding of unjustified action in *Jennings v University of Otago*[5] (albeit in a setting where there was a contractual obligation requiring the provision of such training).

[43] Here there is a similar situation in that VIP does not deny Mr Fredericks raised concerns about Mr Sim's capabilities. It simply says it has no memory of such an approach and there is definitely no evidence of any remedial action being taken until after the incident. In such circumstances I accept Mr Fredericks claim he aired his concerns, they were not acted upon and as a result he suffered a disadvantage. There has been no attempt to justify VIP's response, or lack there-of, so given *Sherildee* I conclude he has suffered an unjustified disadvantage.

[44] Additionally I note there is no evidence VIP attempted to confirm whether or not Mr Sim was proficient in the use of the nail gun prior to assigning him to such work. If the instruction that Mr Fredericks keep an eye on him (which, again, is not denied but not remembered) was deemed to constitute such a check it is inadequate. Again, and given *Jennings*, I conclude there were omissions and as a result VIP unreasonably failed to provide a safe workplace.

[45] There is then the issue of Mr Fredericks transport to hospital. Mr Harmon says he has paramedical qualifications similar to those of an ambulance officer and this claim remained undisturbed. He made an assessment of Mr Fredericks' injuries and concluded speed of delivery to medical care was paramount. He acted

[4] [1991] 2 ERNZ 675
[5] [1995] 1 ERNZ 229

accordingly. First there is nothing to suggest his appraisal was unjustified and second there is no evidence of a disadvantage that emanated from the decision. This aspect of the claim will not, therefore, succeed.

[46] Finally there is the issue of Mr Sim's retention and the fact Ms Ashley saw him operating a nail gun on 30 January. Concerns in this respect were largely aired by Ms Ashley and I take them no further. It is for an employer to evaluate the situation and then act appropriately. The evidence is Mr Sim was, on 30 January, operating a nail gun as part of remedial training in an area isolated from that used for normal production. To institute remedial training in circumstances such as these is, in my view, an appropriate response. Ms Ashley's evidence leads me to conclude she sought Mr Sim's dismissal as retribution for the injuries inflicted on her partner. That is not her role.

[47] Turning to the claim VIP breached Mr Fredericks privacy by airing news of its discussion with Ms Ashley and that led to abuse and harassment by Mr Fredericks co-workers.

[48] While I accept from the evidence there were some inappropriate communications from members of Mr Fredericks wider family and Ms Ashley was of the view they were a reaction to events which followed Mr Fredericks being injured this claim will, for the following reasons, fail.

[49] Assuming the communication about which Mr Fredericks and Ms Ashley complain constitute a disadvantage they must, in the context of a personal grievance claim, be attributable to an act of the employer. Here there is no evidence of such a link.

[50] VIP deny it has done anything that may have led to inappropriate approaches to Ms Ashley by members of its staff and her family. Their denials withstood questioning during the investigation and Mr Fredericks failed to offer any evidence to support the claim. Indeed the e-mails produced as evidence during the investigation do not mention Mr Fredericks injury or otherwise establish a link to it or any subsequent act by VIP or one of its representatives.

[51] The third alleged disadvantage relates to VIP's failure to report the incident to Worksafe.

[52] Again I conclude there is no breach of duty. First, and while Ms Ashley especially took exception to this decision, there is no evidence it adversely affected or otherwise disadvantaged Mr Fredericks. Second it remains the subject of discussion between VIP and Worksafe and there is not yet an outcome in respect of whether or not it was an incorrect decision. Third is the fact VIP cannot be criticised for the way in which it took this decision. It quickly initiated an investigation of the incident and as part thereof sought advice regarding its obligations in respect of reporting. It is reasonable for an employer to then rely on the professional advice it receives and act accordingly. Finally there is the fact the reasoning was explained to Ms Ashley. She disagreed and rectified what she saw as a deficiency by reporting the incident herself. It is again difficult to see where a resulting disadvantage arose.

[53] The last alleged breach was VIP's alleged lockout. This is also not a claim which will succeed. VIP is, as Mr Fredericks claims, under an obligation to provide a safe work environment for both he and his colleagues. In doing so it is required to enquire into any potential hazards and if one exists remove, isolate or minimise it.

[54] It was Ms Ashley who raised the spectre of a potential hazard. VIP was then obliged to investigate further and ascertain whether or not the hazard was real. It did and I conclude its enquiries were not only reasonable but required. It was Mr Fredericks' failure to respond that forced VIP's reaction.

[55] Turning now to the constructive dismissal claim. As already said Mr Fredericks claims he resigned on the back of a loss of trust emanating from the weight of multiple breaches of duty by VIP. For the above reasons I have concluded there as only one breach. That was the failure to provide a safe workplace prior to the incident occurring.

[56] That single breach does not does justify Mr Fredericks' decision to resign. As already said this failure was quickly addressed and Mr Fredericks undermines its importance by continuing to repeat for some time after the incident, and notwithstanding it and its consequences, he sought a return to work.

[57] Finally there is the influence and actions of Ms Ashley. The evidence strongly suggests it was she who was making decisions on behalf of Mr Fredericks. Indeed she commented during questioning that Mr Fredericks was not capable of doing much

thinking, or making decisions, during the time of these events and it was she who was acting on his behalf.

[58] While her support of her partner was admirable it may have been better had she not been so involved. It is clear Ms Ashley's view and actions were strongly influenced by her dissatisfaction with Mr Sims retention and VIP's failure to report the incident to Worksafe. For reasons already enunciated I conclude neither concern was valid and could not form the foundation for a constructive dismissal claim but they clearly influenced the way Ms Ashley approached VIP and contributed significantly to a growing tension which ultimately led to the resignation.

[59] While I have concluded Mr Fredericks was not constructively dismissed I have found he has a personal grievance in that he was unjustifiably disadvantaged by virtue of the failure to provide a safe workplace. That raises the issue of remedies.

[60] Mr Fredericks seeks wages lost as a result of his grievance and $15,000 compensation.

[61] Section 128(2) of the Act provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration.

[62] The failure to provide a safe workplace could only have resulted in lost wages for the period Mr Fredericks injuries dictated absence. That period ended when he obtained a clearance to return on 26 February 2014. His failure to advise VIP of the clearance until 12 March is something he must bear the consequences of. I do not take heed of the lockout notice as the potential psychological hazard VIP was investigating was a direct result of the failure that has given rise to the grievance.

[63] The evidence leaves me unsure of whether or not Mr Fredericks was paid for the period of absence. Suffice to say if he hasn't been paid till 26 February he now should. Additionally if he was paid but a corresponding deduction made to his annual leave balance that should now be reimbursed.

[64] Turning to compensation. Mr Fredericks claimed $15,000 but this was a global sum which presumed success with the constructive dismissal claim and a finding all the alleged breaches occurred. That, however, has not been the outcome

and it is difficult to separate elements of the claim and the level of hurt which emanated from specific alleged breaches.

[65] That said, having considered the evidence and the way it was presented, it is clear hurt resulted from the incident which was, in turn, occasioned by VIP's breach with confirmation coming from Ms Ashley's comments about Mr Fredericks inability to adequately address issues after the incident. I conclude an award of $6,000 to be appropriate.

[66] The conclusion remedies accrue means I must, in accordance with the provisions of s.124 of the Act, address whether or not Mr Fredericks contributed to the situation which gave rise to the grievance. There is nothing to suggest he did.

Conclusion and Orders

[67] For the above reasons I conclude Mr Fredericks has a personal grievance as he was unjustifiably disadvantaged by VIP's failure to provide a safe workplace.

[68] As a result the respondent, VIP Frames & Trusses Limited, is ordered to pay the applicant, Lyndon Fredericks, the following:

i. Wages for the period 29 January 2014 to 26 February 2014 (both inclusive) if it has not already done so; and

ii. A further $6,000.00 (six thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[69] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority