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Hand v Hayson AA 243/07 (Auckland) [2007] NZERA 610 (13 August 2007)

Last Updated: 17 November 2021

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 243/07 5079644

BETWEEN MARCUS HAND

Applicant

AND BRETT HAYSON

Respondent

Member of Authority: Yvonne Oldfield Representatives: James Roots for Applicant

No appearance for Respondent Investigation Meeting: 10 August 2007

Determination: 13 August 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Hand worked in Mr Hayson's cleaning business from July 2006 to 15 November 2006. He says that on 14 November his supervisor physically assaulted him while he was at work at his duties (night cleaning at a supermarket). He left work and telephoned Mr Hayson to tell him that he had been assaulted and had removed himself from the workplace. Mr Hayson suggested he come in to see him at his office the next day. Mr Hand did so and said that he could not work with that supervisor any more. Mr Hayson acknowledged that the supervisor was a "dickhead." He said he might have a few hours labouring work available for Mr Hand although he was not definite about this. Mr Hand wanted more hours (he had been cleaning full time) and so declined the offer. Mr Hayson then paid Mr Hand his outstanding wages and Mr Hand left.

[2] Mr Hand alleges that all this amounted to an "unjustifiable action which led me to resign." When he raised his grievance, within weeks of his employment ending, he sought one months pay in total to remedy it. In the time since then, Mr Hayson has refused to meet with him or to attempt to resolve the matter, and has threatened Mr

Hand with further violence. Mr Hand also says that since his employment ended he has again been assaulted by the supervisor, and has laid a complaint with the police. As result of these factors, Mr Hand has increased his claim for remedies to \$16,000.00 for "extreme stress and humiliation" and costs.

[3] The issues for determination are whether Mr Hand has suffered a personal grievance of disadvantage and/or constructive dismissal and if so, what remedies are appropriate.

[4] Unfortunately, Mr Hayson has not provided a statement in reply nor did he attend my investigation meeting. The Authority has had no communication at all from him and has not succeeded in contacting him directly.

However I have on file an affidavit from a Baycorp process server who has confirmed service of the notice of the investigation meeting on a person whom Mr Hand identified at the time as being Mr Hayson. I accept this as proof that service was effected and that Mr Hayson was on notice of this matter. I proceed therefore to a determination by default.

Was there a constructive dismissal?

[5] Mr Hand was never given a written employment agreement. He told me that he started work for Mr Hayson in July 2006, initially on a casual basis and later becoming full time. He was paid \$20.00 per hour. Apart from when he was first employed, he usually saw Mr Hayson only once a week when he was paid (by cash cheque.) On a day to day basis he reported to his supervisor.

[6] Mr Hand told me that the supervisor routinely swore and was abusive to the staff. This abuse extended to expressions such as *"I'll smack your head in."* Mr Hand told me that on 14 November the supervisor instructed him to clean a different section to the one he was usually responsible for. Later on that night he was approached by the supervisor and asked why he had not cleaned his usual area. When Mr Hand responded that he was doing as the supervisor had himself told him, the supervisor began swearing at him again. Mr Hand asked him not to talk to him like that. The supervisor dismounted from his cleaning machine, grabbed Mr Hand by the throat and pushed him backwards for 3-4 seconds. As soon as he was released Mr Hand left. He was standing outside the building waiting for his parents to come and pick him up when the supervisor approached him and asked him to come back in and work. When

Mr Hand declined the supervisor said that if it were not for the security cameras, he would assault him again. His final words to Mr Hand were: *"if I ever see you again I'll kill you."*

[7] I am satisfied that the conduct of the supervisor amounted to a serious breach of the respondent's obligations to provide a safe workplace. Once Mr Hand told him what had taken place, Mr Hayson was obliged to take steps to ensure that there was no further risk to Mr Hand. Because he failed to do so the resignation did indeed amount to a constructive dismissal.

Remedies

[8] Mr Hand had left school, part way through his sixth form year, approximately a year before he went to work for Mr Hayson. Mr Hand told me that after he left Mr Hayson, from 15 November until Christmas 2006, he worked selling Christmas trees from which he earned a total of \$700.00. In the New Year he attempted to obtain a plumbing apprenticeship (completing several work trials with plumbers) and applied for a job with a pizza place. None of these attempts were successful and it was not until May 2006 that he found other permanent work full time work.

[9] Given the chronic labour shortage in late 2006 I am not satisfied that Mr Hand made any real effort to mitigate his loss. I make no award of lost earnings.

[10] However I do consider that Mr Hand is entitled to a substantial award of compensation pursuant to s.123 of the Employment Relations Act. The treatment he received at the hands of his supervisor, and the respondent's failure to address it, were completely unacceptable. At the time of the assault Mr Hand was only 18 and as we have seen, relatively new to the workforce. I am satisfied that by his account, it was a distressing and frightening experience for him, compounded by his employer's failure to take steps to address it.

[11] The respondent, Brett Hayson is therefore ordered to pay to Mr Hand the sum of \$10,000.00.

[12] Mr Hand also seeks costs. I was not told the actual costs incurred. Applying the Authority's usual tariff-based approach and given that the investigation meeting took just one hour, I consider the sum of \$500.00 to be an appropriate contribution to costs.

[13] The respondent is therefore ordered to pay to the applicant a further \$500.00 as a contribution to his costs.

Yvonne Oldfield

