IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 178/09
5146866

	BETWEEN	Hayden Kirkwood Applicant
	AND	DAS Transport Limited Respondent
Member of Authority:	Denis Asher	
Representatives:	Leo Watson for Mr Kirkwood No appearance by or for the Company	
Investigation Meeting	Wellington, 12 November 2009	
Submissions Received	11 & 12 November 2009	
Determination:	13 November 2009	

DETERMINATION OF THE AUTHORITY

The Problem

[1] Was Mr Kirkwood unjustifiably constructively dismissed?

[2] Is he owed holiday pay?

The Investigation

[3] In his statement of problem filed on 17 December 2008 Mr Kirkwood said the Company failed to provide him with a healthy and safe working environment, that he was subjected to abusive language and physical assaults, including spitting, by another employee, Brandyn Stewart. The employer, in the form of David and Tania Stewart, Company co-directors, and the parents of Mr Stewart junior, were aware of these matters but took no action in respect of them, and as a result forced the applicant to resign.

[4] In its statement in reply received on 15 January 2009 the Company denied the allegations and said it was not aware of the alleged abuse and assaults, and that it was making arrangements to pay Mr Kirkwood's outstanding holiday pay.

[5] Mediation was arranged for 23 March but did not proceed as the respondent did not attend. Mediation was then arranged for 3 June but did not proceed for the same reason.

[6] By fax received on 3 June counsel for the applicant, Mr Watson asked for a directions conference as a matter of urgency on various grounds including an allegation the Company was not engaging in good faith in the mediation process.

[7] The application was then put to one side as the parties agreed to, and underwent, mediation on 23 June. The matter did not settle.

[8] By email received on 19 August the respondent's then-counsel, Mr Mike Gould, advised he was no longer acting for the Company.

[9] Authority support staff were subsequently advised by Mr Gould he did not have authority to release his ex-client's contact telephone numbers and that their address had changed. The respondent took no steps to contact the Authority or communicate these details to it.

[10] By letter sent to the respondent's address for service, the Company was advised of a telephone conference scheduled for 9.00 a.m. on 3 September 2009: it

was invited to provide a number so that it could be a party to the conference: no response was received from the respondent. The Authority's 'track & trace' record confirmed signed receipt of the advice at the Company's registered office.

Preliminary Conference and Direction to Investigation

[11] By way of the 3 September preliminary conference, and amongst other things, I directed this problem to an investigation meeting on Thursday 12 November and that the Company was to provide its witness statements by 29 October.

[12] A copy of the record of conference and directions and notice of the investigation was sent to the Company's address for service.

[13] No acknowledgement was received from the respondent and no witness statements were provided.

Application for Adjournment, Further Mediation Proposal

[14] By way of a notice of change of representation and memoranda received on 10 and 11 November, counsel for the Company, Mr John Gwilliam, advised amongst other things that he had only just been instructed in relation to this matter (but also confirmed he had been instructed a month ago), he was unable to attend the investigation set down for the 12th because of involvement in a criminal trial that day, that his client was unaware of the preliminary conference on 3 September and likewise any further documentation or witness statements by the applicant had not been received by the Company and if sent to its address for service had not been passed on to its directors, and as counsel had not yet seen the applicant's witness statements and his clients needed to file their own, an adjournment of the investigation was sought. The Company was willing to undertake further mediation.

[15] The application was opposed by the applicant, as was the proposed further mediation.

[16] For the reasons set out in my memorandum to Mr Gwilliam on 11 November, and as elaborated on in a telephone conference call that morning, and as confirmed by

me yesterday, I declined the request for adjournment and proposal of further mediation and proceeded to investigate this matter. My reasons were:

a. The respondent's address for service is set out in the record of the Company held by the NZ Companies Office. Advice of the impending telephone conference was sent to that address, as was the record of that conference and directions. Notice of yesterday's investigation was properly and fairly served on the respondent in the same manner, as early as 4 September 2009 (date-stamped copy on Authority file).

b. No notice of an alternate address for service and/or telephone number was ever offered by the Company despite the respondent specifically instructing its previous counsel not to release its telephone number, and confirming to him that that instruction extended to the Authority (advice to Authority support staff at the time of Mr Gould's withdrawal).

c. The applicant and the Authority were fairly and reasonably able to rely on the Company's address for service.

d. I was satisfied further mediation was inappropriate because of the respondent previously breaking commitments to undertake mediation on two separate occasions at the last moment with no explanation as to their sudden unavailability. An offer to settle by the applicant has never been responded to and the applicant was therefore reasonably apprehensive further mediation would stall this longstanding matter while being unlikely to succeed: s. 159 of the Act applied.

e. While notice of the extension of time (from 22 to 28 October) for the applicant to provide the Authority and the respondent with copies of his witnesses statements was not provided to the Company there is no evidence, and I did not accept, that the resulting one-week delay unfairly and reasonably disadvantaged the respondent and its ability to respond to today's proceedings. That is because the thrust of the applicant's employment relationship problem was clearly set out in his

statement of problem filed on 17 December 2008 and that, as demonstrated by Mr Watson tabling yesterday a copy of his letter of 28 October 2009 to the Company's registered office enclosing the applicant's witness statements, it still had a sufficient, albeit shortened, time to respond, and because – for reasons set out below – the respondent clearly knew of yesterday's investigation.

f. In the telephone conference on 11 November, Mr Gwilliam advised he had been instructed a month ago. That is evidence the Company knew before then of yesterday's investigation: no explanation has been provided as to why it delayed seeking representation up until a month ago or of any prompt attempts then to obtain other counsel who could have appeared yesterday, when advised of Mr Gwilliam's unavailability.

g. No explanation other than (by implication) that it is the respondent's wish to be represented by counsel, has been provided as to why Ms Tania Stewart, the Company's second director and co-owner with her husband, David Stewart, or their son, Brandyn Stewart, another employee of the Company and who is central to Mr Kirkwood's allegations, could not attend yesterday's investigation.

h. Mr Stewart's explanation for being unavailable is that he is in Australia: no explanation as to why he is in Australia and when he might be expected to return has been provided.

i. Mr Gwilliam's objection to the 3 September record of preliminary conference and direction's reference to *"agreed"* (par 8) is based on a misunderstanding: the term refers only to the Authority's agreement to the directions sought by Mr Watson and do not suggest an agreement by the respondent, who of course did not participate in that conference.

[17] In the same telephone conference on 11 November, and in light of the Company's conduct, I also drew to Mr Gwilliam's attention its risks per s. 181 of the Act in the event of a challenge to the Authority's determination.

[18] Having regard to the above I was satisfied, pursuant to clause 12, Schedule 2 of the Act that, without good cause having been shown, it was appropriate for the Authority to act fully as if the party had attended or been represented, i.e. I proceeded to hear the matter.

Background

[19] Mr Kirkwood was employed by the Company as a driver/driver assistant by way of an individual employment agreement, from 30 October 2007 until his resignation effective 13 May 2008.

[20] Mr Kirkwood's mother and father are or were family friends of Tania and David Stewart.

Applicant's Position Summarised

[21] Mr Kirkwood says his problems with Brandyn Stewart commenced shortly after January 2008 when he was required to work on David Stewart's truck, with Brandyn Stewart.

[22] Brandyn Stewart began harassing Mr Kirkwood, by verbally abusing him, making derogatory comments about his girlfriend and family, swearing at him and assaulting him.

[23] Mr Kirkwood says he initially dealt with this behaviour by ignoring Brandyn Stewart but the latter's behaviour got worse and worse. Appeals to Mr Stewart senior were ignored.

[24] On 23 April 2008, while delivering product, Brandyn Stewart began abusing the applicant and shoved him into shelving. The shop manager required Mr Stewart junior to leave the premises: as was confirmed by Mr Stewart senior, she also complained to the Company's client and banned his son, with the result Mr Kirkwood was required to make the deliveries to that shop.

[25] Mr Stewart junior's bad behaviour continued that day: at a later delivery he told a shop manager the applicant was a thief: Mr Kirkwood complained to David Stewart, who replied to the effect 'grow up, get over it'.

[26] Later again on the same day Mr Stewart junior said to Mr Kirkwood he was going to smash his car and damage his house (i.e. his parents' home, where the applicant lived). Mr Kirkwood was increasingly concerned as he began receiving text messages from Brandyn Stewart containing the same threats: he and his parents intended to be away from their home that long, ANZAC weekend. Mr Kirkwood showed the texts to his mother, Wendy, who in turn spoke to Tania Stewart. Ms Kirkwood's evidence was that Ms Stewart inspected her son's mobile phone and saw the text threats. Brandyn Stewart shortly afterwards telephoned Mr Kirkwood's father, Tony: he apologised and said it was a joke that got out of hand. The Kirkwoods remained concerned as they had read in the local paper some weeks earlier that Brandyn Stewart faced charges as a minor, with two others, arising out of attack on a car in Otaki with baseball bats, and that he was being forced to make a non-genuine apology.

[27] Mr Kirkwood says Mr Stewart junior confirmed his father subsequently took his mobile phone and drove over it with his truck.

[28] Mr Kirkwood says the hassling resumed on his return to work: 6 May was a particularly bad day as Brandyn Stewart said his *"job of the week is to wind you up so that you hand your notice in, because we want Nick* (Mr Stewart senior's brother) *to have your job"* (par 12, applicant's statement). Later that day Mr Stewart junior spat into the applicant's face: Mr Kirkwood immediately went to David Stewart and showed him the spit on his face and asked, what was he going to do about it? Mr Stewart senior replied, *"Wipe it off and get on with it"* (par 13, above). Later on Mr Stewart senior advised, *"If you don't like it you know what to do … get a new job"* (par 14, above).

[29] A second spitting incident occurred on 8 May: Mr Stewart senior saw the incident. He told his son he no longer had a job and to find his own way home: after finishing that job Brandyn Stewart simply got back into the truck. Despite his earlier advice, his father took no action. Mr Stewart junior resumed shoving and abusing the

applicant. Mr Stewart senior continued to take no action about his son's ongoing behaviour.

[30] Mr Kirkwood says that, because of the stress generated by the bullying and Mr Stewart's senior obvious siding with his son, he began experiencing severe headaches and eczema. He saw his doctor on 14 May, who subsequently wrote out a prescription for an anti-depressant as well as a medical certificate confirming he was unwell for work from 13 to 28 May 2008 (document HK4 in the applicant's bundle).

[31] Mr Kirkwood determined that, because of Mr Stewart junior's treatment of him and Mr Stewart senior's failure to act, that he could not handle the situation any more and had to resign from his job. On 13 May he sent a letter giving both notice of his resignation effective from that day unless he could work out the required two weeks' notice with an assurance he would not be required to work with or be in contact with Brandyn Stewart, and his personal grievance (attachment to statement of problem). He asked that a full copy of his personal file be sent to his counsel.

[32] There is no evidence of any written response to that advice, other than the statement in reply.

[33] By letter dated 10 November 2008 to the respondent's then counsel, Mr Watson enclosed a draft statement of problem as well as the message that a mediated solution was sought. Another request for Mr Kirkwood's employment file was made. By email dated 28 November Mr Gould advised *"I'm afraid I can't say when I will have instructions"* (attachment to statement of problem). The communication from the Company since that date has been even less helpful.

Respondent's Position Summarised

[34] The only information before the Authority from the respondent is that set out in its statement in reply. The Company denies Mr Kirkwood's allegations except to accept Brandyn Stewart admitting to sending text threats but claimed they were in response to a text threat from the applicant, that Mr Kirkwood was going to arrange for the Company's trucks *"to be ripped off"* (par 2 i.). The Stewarts instructed their

son to ring the applicant's home and apologise: David Stewart was present and heard the apology and the acceptance of it by Mr Kirkwood senior.

[35] Mr Stewart senior approached the applicant the following day and reminded him to raise any problems he had at work: Mr Kirkwood agreed to do so.

[36] Mr Stewart senior agrees the applicant subsequently complained about Brandyn spitting at him but, believing it to be a continuation of the bickering he had observed between the two, he advised the applicant to continue with his work.

[37] Following Mr Kirkwood's resignation he was assured that, while working out his notice, he would not be required to work with or in the presence of Mr Stewart junior.

Discussion and Findings

[38] In breach of s. 4 of the Act, the Company has not been active and constructive in establishing and maintaining a productive employment relationship, and has failed to be responsive and communicative.

[39] Evidence in support of these conclusions lies in the fact that, despite inviting Mr Kirkwood to raise any concerns he had, Mr Stewart senior – by his own admission and shortly after requiring his son to apologise in respect of serious text threats – dismissed the applicant's latest allegation despite undertaking no investigation into it (pars 2 l., m. & o. of the statement in reply).

[40] Despite giving clear notice of his concerns in his letter of resignation and notice of grievance, there is no evidence of any responsiveness by the Company to that advice. Despite the assurances recorded by the respondent in its statement of reply that it would look into his complaints, there is no record of the respondent investigating Mr Kirkwood's complaint as set out in his resignation notice, seeking clarification of the same or of endeavouring to resolve it; indeed, there is no record of any response at all.

[41] The parties' employment agreement (HK2 in the applicant's bundle) expressly required the applicant to take all practical steps to ensure his safety (page 5). It also set out steps for resolving employment relationship problems (above). It is reasonable to assume the Company knew of its contracted obligations and to expect that it would be pro-active in meeting them, but it was not.

[42] I have no reason to doubt Mr Kirkwood's allegations of sustained bullying, of being verbally abused, physically assaulted and spat at, and that – despite raising them with his employer – it did nothing about his concerns.

[43] The applicant's evidence to that effect is credible, as disclosed by my close questioning of him. It was also supported by the equally credible evidence of his parents, contemporaneous text messages sent by his then girl-friend and retained by Mr Kirkwood's mother (refer WK 1 in the applicant's bundle) and effectively acknowledged (while categorised as *"bickering"*) in the Company's statement in reply.

[44] Under these circumstances, I accept Mr Kirkwood's assessment at the time that, because of blood being thicker than water, and in breach of its contracted and implied responsibilities and by action and words, his employer had made it clear it would not take sufficient steps to protect him and his family and, in fact, was urging him to resign.

[45] I agree with his counsel's submissions that, under these circumstances, his client's resignation was entirely foreseeable, and that by its actions and words the Company set out to deliberately force Mr Kirkwood's resignation. I am satisfied the facts of this termination fall into the second and third categories identified by the Court of Appeal in *Auckland etc Shop Employees etc IUOW* v *Woolworths (NZ) Ltd* (1985) ERNZ Sel Cas 136 where, at par 43, it 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; and/or*

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

Remedies

Interest on Holiday Pay

[46] Mr Kirkwood no longer seeks to recover outstanding holiday pay as that was paid to him in June this year ($736). He does seek the payment of interest on that money.

[47] As no explanation has been offered by the respondent for the unlawful delay in paying monies owed to Mr Kirkwood I accept his claim that interest should be calculated on that sum from the date it was first payable to the applicant, from 25 May 2008 i.e. 14 days after the time he gave notice.

Lost Wages

[48] Mr Kirkwood claims 2 months lost wages (@ $35,000 p.a.) for the period his employment came to an end with the Company and when he received income for his current, self-employed courier position, on 13 July 2008, i.e. $5,833.33.

[49] His evidence to the Authority was that he used the two-month period to undertake unpaid training so that he might commence work as a courier driver.

[50] I accept this was a proper effort by Mr Kirkwood to mitigate his loss and order the respondent to compensate him for those lost wages.

Compensation for Humiliation, etc

[51] Mr Kirkwood seeks compensation for humiliation at a level greater than the average but otherwise leaves to the Authority the amount to be awarded.

[52] I accept this was an unusual situation in that Mr Kirkwood was employed by family friends and was victimised by their son, and that these factors generated acute stress for the applicant.

[53] Furthermore, having raised his concerns with his employer and been told they would be addressed, Mr Kirkwood was understandably appalled to discover the assurances were meaningless.

[54] Mr Kirkwood's evidence as to the extent of the distress he experienced is compelling, extending as it does to medical evidence as well as strong, subjective accounts of his own feelings of frustration and depression, supported as they were by the evidence of his parents.

[55] I am satisfied those feelings were worsened by the respondent's cynical adjournment of mediation dates at short notice, without explanation, and by Ms Stewart's subsequent (but fortunately for her and the applicant) unsuccessful negative reference check advice (HK3 in the applicant's bundle).

[56] In all the circumstances, including having regard to Mr Kirkwood's medical expenses which I accept in this case resulted from his employer's treatment of him, I am satisfied an award of $10,000 is appropriate, particularly given Tania Stewart's strongly derogatory reference check advice, following Mr Kirkwood's termination, that jeopardised but, fortunately, did not prevent his present self-employment: there is no evidence provided by the respondent, whether on Mr Kirkwood's employment file or elsewhere in support of her gratuitous claims.

Other Claims

[57] Mr Kirkwood also claims medical costs of $80 and wages lost as a result of the mediations, aborted and actual and today's investigation, i.e. $672.00.

[58] Under the circumstances set out above, and my findings that the Company has not acted in good faith in that it has failed to be active and constructive in establishing and maintaining a productive employment relationship, and has failed to be responsive and communicative, I am satisfied that, on this occasion, it is appropriate to order the reimbursement of those sums.

Contributory Fault

[59] There is no evidence of any actions by the applicant that contributed toward the situation that gave rise to the personal grievance. No claim to this effect is set out in the statement in reply.

Tax Evidence

[60] I note that the IRD tax record (WK2 in the applicant's bundle) indicates the Company deducting ACC and PAYE deductions in respect of Mr Kirkwood only for the period 1 October to 30 November 2007 even though the applicant continued working for the respondent until 13 May 2008.

Determination

[61] I find that Mr Kirkwood was unjustifiably constructively dismissed by the Company and it is to pay to him the following sums:

a. Interest of 6% on $736 since 27 May 2008 until the date of payment; and

b. Compensation of two months' lost remuneration, i.e. $5,833.33 (five thousand, eight hundred and thirty three dollars and thirty three cents) and

c. Medical costs of $80.00 (eighty dollars) and

d. Wages lost in respect of the mediations and this investigation of $672.00 (six hundred and seventy two dollars) and

e. Compensation for humiliation, etc of $10,000 (ten thousand dollars).

[62] While costs are reserved I note the following: costs typically follow the event and, subject to submissions from the respondent, I can see no reason why costs should not be awarded Mr Kirkwood in this instance.

[63] A greater contribution to his fair and reasonable costs is likely because of the respondent's less than co-operative approach to the investigation of this problem, resulting in Mr Watson having to undertake greater work than normal, including responding to a late and unsuccessful application for an adjournment.

[64] While running to only half a day, I can indicate the likely award of $3,000 as a contribution to Mr Kirkwood's costs which have been advised to me today as over $8,000.

Denis Asher
Member of the Employment Relations Authority