

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 300
5407988

BETWEEN

DWAYNE McCALL
Applicant

A N D

HEIGHT-WORX LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Applicant in Person
Barry Eddleston, Director of Respondent

Investigation Meeting: 9 July 2013 at Auckland

Date of Determination: 15 July 2013

DETERMINATION OF THE AUTHORITY

A. Mr McCall abandoned his employment, he was not constructively dismissed.

B. No order as to costs.

Employment relationship problem

[1] Height-Worx Limited (Height-Worx) hires scaffold equipment to clients. It is located in Rosebank Road, Avondale. Mr Barry Eddleston is the sole director of Height-Worx.

[2] Mr Dwayne McCall was employed by Height-Worx as a labourer/scaffolder in February 2012.

[3] In late December 2012, there were two heated discussions between Mr McCall and Mr Steve Sharrock, the site supervisor, about Mr McCall's attendance at work. Mr McCall says during the second heated discussion, he was assaulted by

Mr Sharrock. Mr McCall says, after the assault, he no longer felt safe in the workplace and did not return. Mr McCall claims he was constructively dismissed and his dismissal was unjustified.

[4] Height-Worx agrees there were two heated discussions but disputes Mr McCall was assaulted. Height-Worx claims, during the second heated argument, Mr McCall and Mr Sharrock unintentionally knocked into each other. Mr McCall stormed out, and despite requests from Mr Eddleston to discuss matters, refused. Mr McCall never returned to work. Height-Worx says Mr McCall abandoned his employment; he was not constructively dismissed.

Issues

[5] The Authority must determine the following issues:

- (a) Was Mr McCall constructively dismissed;
- (b) If Mr McCall was constructively dismissed was it unjustified.

First Issue

Was Mr McCall constructively dismissed?

[6] Mr McCall claims he was constructively dismissed and refers to two incidents which occurred on 24 and 27 December 2012 which he says made it unsafe for him to remain at work. Mr McCall did not return to work after the second incident on 27 December.

[7] The Court of Appeal considered the correct approach to constructive dismissal cases as follows¹:

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing; in other words,

¹ *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW* [1994] 1 ERNZ 168 at p.172

whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[8] Mr McCall was employed by Height-Worx on 29 February 2012 as a labourer/scaffolder. He was provided with an individual employment agreement but this was never signed by him. During his 10 month period of employment, Mr McCall was frequently spoken to about his lateness to work by both Mr Sharrock and Mr Eddleston.

[9] From approximately July 2012 until late November/early December 2012, Mr McCall was off work on ACC. On 10 December 2012, Mr McCall returned to work on light duties.

[10] On 24 December, Mr McCall was due to start work at 7.30am but did not arrive until after 8am. Mr McCall says when he went to discuss his work for the day with Mr Sharrock, Mr Sharrock became abusive and said to him:

Why don't you do us all a favour and not come back, you're practically fired anyway, I will make it my personal goal to make sure I fire you, I will dig up stuff on you and make sure you don't last your two months here.

[11] Mr McCall went home for the day and was told to report to work after Christmas on 27 December.

[12] Mr Sharrock disputes Mr McCall's version of the conversation on 24 December and says that Mr McCall did not come to work at 7.30am which was when he was due to start. Mr Sharrock said it was Christmas Eve, very busy and he was arranging the day's work between 7 and 7.30am. When Mr McCall did not arrive, he rearranged the schedule of work without him. Mr Sharrock says that because of the heavy workload, he could not wait for Mr McCall to arrive at work before distributing the work.

[13] Following rescheduling of the workload, Mr Ethan Irving, a leading hand at Height-Worx asked Mr Sharrock if Mr McCall was coming in to work because he had left a Christmas present for his father in Mr McCall's car. Mr Sharrock said he did not know if Mr McCall was coming in to work. Mr Irving telephoned Mr McCall who subsequently arrived at work. Mr Sharrock says it was only after Mr Irving contacted Mr McCall that Mr McCall came to work, which was unsatisfactory.

[14] Mr Sharrock says when McCall asked for work and was told it had been distributed and he could go home for the day, Mr McCall became extremely angry and abusive and yelled "*I don't want the fucking job*". Mr Sharrock said he shouted after Mr McCall that if he was so unhappy with his job he could always quit.

[15] Mr McCall was not a credible witness in my view. After hearing the evidence of Mr Sharrock at the Investigation Meeting, Mr McCall accepted that Mr Irving had telephoned him on the morning of 24 December to see whether he was coming into work. Up until that time, Mr McCall made out that he had come to work a little late, had been told to go home without any reason and had been abused by Mr Sharrock. This was not correct.

[16] I accept Mr Sharrock's version of what occurred on 24 December as being correct.

[17] Mr McCall returned to work on 27 December and says he went upstairs to ask Mr Sharrock if they were busy. Mr McCall says that if they had been busy he would not have gone ahead and asked the next question which was why Mr Sharrock had threatened to fire him on 24 December. Mr McCall says a heated argument developed very quickly. Mr McCall says Mr Sharrock told him he was arrogant and "*a pussy who had to take six months off work for a sprained finger*" which triggered a heated reaction from Mr McCall. Mr McCall yelled something along the lines of "*fuck this shit I'm out of here, goodbye*".

[18] Mr McCall left his energy drink on Mr Sharrock's desk and says Mr Sharrock yelled after him to come and get the drink and not to "*leave shit*" on his desk. Mr McCall responded with "*no, get fucked*" and proceeded to continue down the hallway. Mr McCall says he was followed by Mr Sharrock who grabbed him and violently turned him around, threw him against the wall and physically forced him back to get his drink, all the while abusing him. Mr McCall then went downstairs and hurled his can of energy drink against the window of the lunchroom before storming out. This was witnessed by other staff eating breakfast in the lunch room. Mr McCall rang the Police and complained about the alleged assault but informed Police he did not want to take the matter further. Mr McCall said he made the complaint so he had a record if the matter came before the Authority.

[19] Mr Sharrock's version differs. Mr Sharrock says when Mr McCall arrived at work he asked him how busy they were and Mr Sharrock asked him why he wanted to know. Mr McCall's response was that he was not feeling too well and would like to have the day off. Mr Sharrock says Mr McCall did not look sick and was drinking an energy drink. Mr Sharrock asked Mr McCall what was wrong with him. Mr McCall said he had eaten some "*bad chicken*". Mr Sharrock told Mr McCall he would need to give him a medical certificate. At this point, Mr McCall stormed out, leaving his can of energy drink on Mr Sharrock's desk. Mr Sharrock yelled after him to come and get his "*f'ing mother energy drink*" and Mr McCall stormed back down the hallway to get the drink and as he was passing Mr Sharrock their shoulders knocked unintentionally. Mr Sharrock denies physically grabbing or pushing Mr McCall. None of the staff in the lunchroom downstairs heard any pushing or shoving as alleged by Mr McCall.

[20] I prefer Mr Sharrock's version of events.

[21] Mr McCall says he immediately rang Mr Eddleston and complained that he had been physically assaulted. Mr Eddleston gives the following account of part of Mr McCall's phone call to him:

I'm ringing to let you know I've left work because of that fat little wanker. I hate the job and I don't want to be there but I have to until February because I need the money for my course. I am really sick, I am not lying and Steve had said I have to have a medical certificate. I was going downstairs when Steve yelled that I had to come back as I had left my can of Mother on the desk in the office and he pushed me as I went past him."

[22] Mrs Kim Eddleston over heard this being said by Mr McCall and Mr McCall accepts he said this to Mr Eddleston.

[23] Mr Eddleston says he asked Mr McCall to meet him back at the office at 10 o'clock to have a meeting so that the matter could be sorted out and that Mr Sharrock would not be at the meeting, it would be just between themselves. Mr Eddleston says Mr McCall became extremely angry at the suggestion and told him he was not going to "*fucking go all the way to work when you live just up the road from me*". Mr Eddleston told Mr McCall that he was not going to have a meeting at his own home where his children were and asked again for Mr McCall to come in to

the office which was refused. Mr Eddleston asked Mr McCall for a medical certificate if he was going to take sick leave in respect of the food poisoning.

[24] On 3 January Mr Eddleston wrote to Mr McCall about his ongoing absence from work and asked him to make contact or he would have no option but to assume he had “abandoned” his employment. The letter contained a letter of 27 December which referred to issues of concern about Mr McCall’s repeated lateness. Both letters were sent to Mr McCall on the same day.

[25] On 3 January Mr McCall rang Mr Eddleston and recorded the phone call. During the phone call Mr McCall agreed to provide a medical certificate in respect of the food poisoning. Mr McCall also raised the “assault”. Mr McCall says he decided after this phone call not to return to work because Mr Eddleston had done nothing about Mr Sharrock.

[26] On 11 January Mr Eddleston sent Mr McCall a letter which concluded as follows:

If you fail to respond to this letter, Height Worx Ltd has no alternative but to assume that you do not intend to return to work and have in fact abandoned your employment. I urge you to contact me to discuss the situation.

[27] Mr McCall did not return. It is my finding that Mr McCall was not constructively dismissed by Height- Worx, he abandoned his employment. Mr McCall was not assaulted, he had an angry argument with Mr Sharrock when Mr Sharrock asked him to produce a medical certificate. Mr McCall stormed off and did not return. Mr McCall did not resign because he needed the job and he confirmed this to Mr Eddleston when he rang him on 27 December.

[28] Mr Eddleston attempted to set up meetings with Mr McCall to resolve the matter but Mr McCall refused to attend any meetings. There was no resignation by Mr McCall. Mr McCall did not return to work and in my view abandoned his employment. Mr McCall was not constructively dismissed.

Second Issue

If Mr McCall was constructively dismissed was it unjustified.

[29] I have found Mr McCall was not constructively dismissed. Therefore, there is not a second issue for consideration by the Authority. Mr McCall has no employment relationship problem.

Costs

[30] Neither party was represented and so there is no order as to costs.

Anna Fitzgibbon
Member of the Employment Relations Authority