

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 218/10  
5296024

BETWEEN            PETER NELSON  
                                 Applicant  
  
A N D                 DION MORRELL SHEARING  
                                 LIMITED  
                                 Respondent

Member of Authority:       Philip Cheyne  
  
Representatives:            Peter Nelson, Applicant in person  
                                 Don Rhodes, Advocate for Respondent  
  
Investigation Meeting:     24 November 2010 at Alexandra  
  
Date of Determination:    30 November 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Peter Nelson worked for Dion Morrell Shearing Limited for several seasons until he resigned following an incident between him and Dion Morrell on 7 October 2009. At least informally it is accepted by the company that the circumstances of Mr Nelson's resignation are such as to give rise to an unjustified constructive dismissal so this is principally a dispute about what remedies are appropriate. That depends to an extent about precisely what happened and Mr Nelson's contribution to the situation, those matters being hotly contested.

[2] To resolve the problem I will set out my findings about what happened before assessing remedies and Mr Nelson's contribution to the situation. First it is convenient to set out a little background.

### **Some background**

[3] Dion Morrell and Gabriela Morrell are the principals of the company although Mr Morrell mostly manages the company's shearing contractor business.

[4] Mr Nelson and his former partner (Shirley) both worked for Dion Morrell Shearing Limited. Over the period of their employment the company had several concerns but did not deal with them formally and some were not even mentioned to Mr Nelson and Shirley. One concern (which had been mentioned) was what Mr Morrell calls *theft of time*, meaning allegedly exaggerated claims for time worked. Because the end of the season was drawing near Mr Morrell had decided not to make a formal issue out of this or his other concerns, preferring perhaps not to re-engage Mr Nelson and Shirley next season if they sought work.

[5] However, a further problem arose on the 7<sup>th</sup> of October 2009.

### **Events of the 7<sup>th</sup> of October**

[6] Mrs Morrell, a friend (Sabina Juilland) and their respective children were walking up to Alexandra's clock that day. Mrs Morrell noticed one of the company vans driving along at about 4.20pm. She knew that a gang including Mr Nelson and Shirley were using that vehicle so she paid attention to the time, given the *theft of time* concern. Mrs Morrell's party finished their walk and returned home.

[7] Some time later, Mr Morrell came home after having been at the shearing quarters in town. There is a key dispute in the evidence about the sequence of events and the times. I prefer the evidence of Mr Morrell, Mrs Morrell and Ms Juilland to that of Mr Nelson on these points. That is partly because Mr Nelson (for reasons that will become apparent) is clearly motivated by a desire for retribution and partly because the others impressed as reliable witnesses.

[8] When Mrs Morrell, Ms Juilland and the children were about to have tea or perhaps just after they had finished but were still at the table Mr Morrell or Mrs Morrell on his phone received a text message from Shirley saying that the boys had worked until 5pm and *cut out*. Mr Morrell and Mrs Morrell took that to include Mr Nelson and Shirley and because she knew those two at least were back in town by 4.20pm she replied by text saying that the time was not right because she had seen the van in town. Shirley then rang and told Mrs Morrell that she meant the pressers had

worked until 5pm. Mrs Morrell's evidence is that during the call she heard Mr Nelson say in the background *Tell the fucking bitch to get the fucking story right*. Mr Nelson's evidence is that these words were said but by another passenger (Brodie). The call ended and Mrs Morrell told Mr Morrell what had been said and who had said it. Mr Morrell decided to go to the shearing quarters to speak to Mr Nelson about his abusive words.

[9] Both Mr Morrell and Mr Nelson agree that they had been together at the quarters that afternoon after work without Mr Morrell saying anything about the hours of work concern or the abuse. Mr Nelson's evidence is that they were there together after the phone call between Shirley and Mrs Morrell and he is critical of Mr Morrell for not raising those issues there and then. Mr Morrell's evidence is that he did not know about the working hours and the abusive comment because the texts and phone call occurred after he got home from the quarters at around tea time. Mr Morrell pointed out that he would have said something to Mr Nelson while they were at the quarters together if the texts and call had already happened. I find that Mr Morrell would not have held off dealing with the issues so it follows that the texts and call occurred after Mr Morrell had left the quarters. Mr Nelson is wrong about the sequence.

[10] Having been told by Mrs Morrell about the texts and phone call, Mr Morrell drove straight back to the quarters but Mr Nelson and Shirley were not there. When he came back outside he saw them driving past and flagged them down, they having given another worker a lift home. Shirley was driving and Mr Nelson was in the passenger seat. Mr Morrell opened the driver's door and *confronted them saying not to swear at his wife, who [did] he [think] he was, to remember who signs the cheques and that we have a right to question the hours as the employer* (per the statement in reply). Mr Nelson's evidence is that Mr Morrell also swore at him and I accept that he probably did. Mr Morrell then walked back across to the other side of the road. At that point Mr Nelson got out of the car. There is a dispute about what he said. Mr Nelson's evidence is that he said *Dion we need to talk about this* wanting an opportunity to explain that he had not been the one to say the abusive words heard by Mrs Morrell. Mr Morrell's evidence is that *Peter got out of his car and called [me] back saying "come here" pointing to the ground as if calling a dog*.

[11] There is no dispute about what happened next. Mr Morrell came straight back across the road and punched Mr Nelson once hitting him in the left eye. Mr Nelson fell to the ground. Mr Morrell crossed the road again and drove off.

[12] Some time later Shirley sent a text saying that *You're fucked – we're going to the cops*. Mr Morrell replied *Sweet* or something similar. In evidence Mr Nelson sought to distance himself from this and a subsequent text but it is unlikely, I find, that Shirley would have sent these texts without Mr Nelson's knowledge and at least tacit approval. In the subsequent text Shirley confirmed that she would work as arranged the next day to finish the season. Mr Nelson did not work for the company again, effectively resigning.

### **Personal grievance**

[13] It is hard to imagine a clearer case of constructive dismissal. Mr Nelson has a personal grievance.

### **Remedies**

[14] I am required by s.124 of the Employment Relations Act 2000 to assess the extent to which Mr Nelson contributed in a blameworthy way to the situation giving rise to the grievance and reduce remedies accordingly.

[15] Mr Morrell had decided not to act on his concerns including those about *theft of time*, preferring to let time run its course. Those are not matters that should now be held against Mr Nelson even if it was established that there was any fault on his part.

[16] It was the abusive comment over the phone to Mrs Morrell attributed to Mr Nelson that propelled Mr Morrell into action. For the following reasons I do not accept Mr Nelson's evidence that the comment was made by another passenger. I note Mr Nelson did not make this assertion in his statement in reply. It only emerged late in the piece and Mr Nelson was reluctant to identify the person. That meant there was no opportunity to have that person attend and give evidence. Further, it is probable that Mrs Morrell would recognise Mr Nelson's voice. It is also probable that Mr Nelson would have immediately distanced himself from the comment when Mr Morrell confronted him if he had not made it. I find that Mr Nelson made the comment expecting that it would be heard by others in the car but not by Mrs Morrell.

[17] Mr Nelson also contributed to the escalation of the incident into an assault. I do not accept that Mr Nelson responded to being confronted by simply saying to Mr Morrell that they needed to speak. I prefer Mr Morrell's evidence about Mr Nelson's words and demeanour and find that Mr Nelson aggravated the situation.

[18] Having said that, Mr Morrell should not have punched Mr Nelson. It was not a case of use of reasonable force in defence of himself or another. Mr Morrell must accept most of the responsibility for the grievance. I assess the relative contributions as being in the order of 10% by Mr Nelson and 90% by Mr Morrell.

[19] Mr Nelson is seeking compensation for *humiliation, pain and suffering, loss of dignity, and stress and medical costs*. There is only a little evidence of any of this including an invoice for Mr Nelson's medical consultation where he was required to pay a part-charge for an ACC consultation. Mr Nelson also told me that Mr Morrell abused his rights as an employee and as a person.

[20] Mr Nelson suffered personal injury covered by the Accident Compensation Act 2001 by reason of being punched by Mr Morrell. That Act provides:

*317(1) No person may bring proceedings independently of this Act, ..., in any court in New Zealand, for damages arising directly or indirectly out of –*

*a. personal injury covered by this Act; or*

*b. ...*

*317(2) Subsection (1) does not prevent any person bringing proceedings relating to, or arising from, –*

*...*

*c. The unjustifiable dismissal of any person ...*

*317(3) However, no court, tribunal, or other body may award compensation in any proceedings referred to in subsection (2) for personal injury of the kinds described in subsection (1).*

[21] These provisions prevent the Authority making any order for compensation for medical costs or pain and suffering from the punch because those costs are damages arising directly from the personal injury (the assault) suffered by Mr Nelson. More must be said about the claim for compensation for humiliation, loss of dignity and stress.

[22] In *McGrory v Ansett New Zealand Ltd* [1999] 2 NZLR 328 the Court of Appeal thought that where a personal grievance involves personal injury it may be possible to rely on the personal grievance exception (now expressed in s.317(2)) to the bar on legal proceedings as not being a claim for compensation for personal injury covered by the Accident Compensation Act; or argue that the monetary remedies under the personal grievance scheme are not *damages* caught by s.317(1) in any event. The Court was speculating about a grievance such as an assault by a manager on an aggrieved employee causing personal injury, almost exactly the present situation. In *Smith v Blue Mountain Lumber Ltd* [2004] 2 ERNZ 364 the Employment Court accepted as *clearly right* the proposition that in personal grievance proceedings a successful grievant cannot be compensated monetarily for the consequences of personal injury by accident but described as *apparently remarkable* a submission that the accident compensation bar disqualifies a successful grievant from any award of compensation where there is any element of personal injury by accident. The point did not need to be decided in that case.

[23] The present circumstances demonstrate how wrong the submission just mentioned must be. The only benefit to Mr Nelson from the ACC system was part payment of his medical treatment costs. His non-pecuniary loss (humiliation, injured feelings and loss of dignity) falls well below the level required for a mental injury to be covered by ACC. He received no earnings related compensation because it was classified as a non-work accident and he was unfit for work for only a few days. If it was not possible to order compensation for a person in Mr Nelson's circumstances, there would be no purpose in permitting personal grievance proceedings as s.317(2) expressly does. I conclude that it is permissible to compensate Mr Nelson for the proven emotional distress arising from the unjustifiable dismissal to the extent that such effects can be separated from *damages arising directly or indirectly out of personal injury*.

[24] In a case such as this it is important to remember that awards of compensation for an established personal grievance are to compensate a grievant for proven loss suffered by them rather than a punishment for wrong behaviour by the employer. I have already noted that Mr Nelson's desire for retribution or vengeance influenced some of his evidence. That desire for retribution is the manifestation of his humiliation, injured feelings and lost dignity. There is really no other evidence of

loss. I assess the appropriate sum of compensation as \$2,500.00 which reduces to \$2,250.00 as a result of Mr Nelson's contribution.

### **Orders**

[25] Dion Morrell Shearing Limited must pay Mr Nelson compensation of \$2,250.00 pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000.

[26] Mr Nelson was not legally represented so an order for costs is unlikely except for the \$70.00 lodgement fee but just in case I will reserve costs. Any claim for costs must be made by lodging and serving a memorandum within 28 days. The other party may lodge and serve a memorandum in reply within a further 14 days.

Philip Cheyne  
Member of the Employment Relations Authority