

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Lance Nicholls (Applicant)
AND Fox Manufacturing Limited (Respondent)
REPRESENTATIVES Robert Thompson, Advocate for Applicant
No appearance for Respondent
MEMBER OF AUTHORITY James Crichton
INVESTIGATION MEETING 12 July 2006
DATE OF DETERMINATION 18 July 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] By statement of problem filed on 20 October 2005, the applicant (Mr Nicholls) alleges both an unjustifiable action of his employer to his disadvantage and an unjustifiable dismissal.

[2] By statement in reply filed with the Authority on 9 November 2005, the respondent Fox Manufacturing Limited (FML) resist both those claims.

History

[3] On 18 May 2006 I held the first of a number of telephone conferences on this matter, after the matter came on to my list. In that initial telephone conference, both parties were represented by their advocates and the matter was set down for an investigation meeting on 12 July 2006. A timetable was agreed between the representatives and this was explicitly set out in the notice of direction which was issued immediately after the telephone conference. The following day the Senior Support Officer issued a notice of investigation meeting which was forwarded to the representatives.

[4] By letter dated 19 June 2006, the Authority received a letter from FML's representative advising that FML had sold its assets and business, that that representative no longer had instructions and that in consequence of the foregoing, it would seem "pointless" for the investigation meeting to proceed. That letter attached an announcement to creditors of FML, providing information about the position.

[5] The Authority then sought a further telephone conference with the parties and that was arranged for 29 June 2006. However, before that telephone conference could take place, FML had

written to Mr Nicholls' representative directly (not through their representative) and a copy of that letter was furnished to the Authority. This letter repeats material previously provided to the Authority by FML's representative but adds an additional item which reads as follows:

I suggest that you refer this matter to the Liquidator and in the meantime you will not receive any further information from FML or its officers.

[6] With that background, the Authority convened its telephone conference on 29 June 2006 and there was discussion about the disposition of the instant case. Notwithstanding that the representative for FML did not have current instructions, he kindly agreed to participate in the telephone conference to assist the Authority.

[7] Because it seemed likely that on the basis of the discussion at the directions conference (and the observation just referred to from FML's letter of 26 June 2006), that FML would not participate in the investigation meeting, the Authority was motivated to bring the investigation meeting forward such that the matter could be heard before the High Court considered the liquidation petition of FML which was set down for 10 July.

[8] Accordingly, on the application of Mr Nicholls' representative, I determined that the investigation meeting be brought forward to 7 July and undertook to try and give the matter urgency such that a decision could be made available prior to the High Court hearing the matter on 10 July.

[9] FML's former representative undertook to apprise FML of the outcome of this telephone conference.

[10] That he did that faithfully is confirmed by receipt of a facsimile from FML, also dated 29 June 2006, which sets out FML's *total dissatisfaction* with the Authority's process in relation to the directions conference and complains about the re-scheduling of the investigation meeting on the basis that the Director of FML would be overseas on a short business trip.

[11] After duly considering FML's 29 June facsimile, I directed the Senior Support Officer to advise FML that its criticism of the Authority was misplaced and rejected, noted that FML had been engaged with the claim brought by Mr Nicholls since October of the previous year and been properly advised, but concluded by indicating that given the request by the Director of FML to be present at the investigation meeting, the date of the meeting was restored to the original hearing date of 12 July 2006. That decision was, of course, communicated to Mr Nicholls' representative as well.

[12] On 10 July 2006, an email was received from the Managing Director of FML advising that he had only just seen the Authority's letter of 30 June indicating that the matter was now restored to its original hearing date of 12 July. FML sought an adjournment of *at least one month* to enable them to prepare for the investigation meeting on this matter.

[13] On 11 July I directed an email response to FML which indicated that the Authority's provisional conclusion was that the requested adjournment not be granted, but that the Authority would hear argument on that matter at the commencement of the proceedings the following day.

[14] Notwithstanding that communication and the Authority's previous attempts to meet FML's requirements (consistent with the Authority's obligations to be fair and even handed to Mr Nicholls as well) FML were not represented at the investigation meeting and so no evidence was available from them save for the written evidence that was put in as part of the statement in reply.

[15] At the commencement of the investigation meeting, I deferred the start of proceedings by some 10 minutes to ensure that FML had every opportunity to be present.

[16] That being the position, and given the history of the matter which I have just recited, I considered that FML had had ample opportunity to deal with the matter properly and it failed to do so. Accordingly I determined to proceed with the investigation meeting despite the absence of the respondent or any representative of the respondent: Employment Relationship 2000 Schedule 2 clause 12 applied.

The evidence from Mr Nicholls

[17] Mr Nicholls was employed by FML on and from 5 January 2005. He was employed in the position of Machinist/Processor subject to an individual employment agreement which amongst other things referred to a job description for that role which Mr Nicholls' evidence was he had never seen.

[18] Mr Nicholls told me that he had been working as a tradesman in Australia and had done the sort of work that he was recruited for by FML, for nine years.

[19] In particular, Mr Nicholls said that he had worked for a number of years for a firm called Claytons Kitchens in Australia, which he said was the biggest kitchen maker in the world, producing 220 kitchens a week.

[20] Mr Nicholls returned to New Zealand with his partner and simply rang firms in the Yellow Pages seeking work. He says that he is a trade qualified wood machinist but is also an experienced cabinet maker and joiner, so he was well versed in the industry.

[21] When he contacted FML (as one of a number of potential employers) he was told almost immediately that they were interested in having his services and he says that the then General Manager of FML told him that he would be employed to run the beam saw.

[22] Mr Nicholls told me that the beam saw was a computerised saw which he programmed to produce the cuts of timber to the right size. Once Mr Nicholls had done his part of the process, the timber that had been cut to shape by the beam saw was placed on another computerised machine which correctly placed the holes in the right place so that the various pieces of timber could be appropriately joined together to be fabricated as kitchens.

[23] Once the holes had been placed in the sized timber, a final machine called an edge bander was deployed to put an edging on the then finished product.

[24] Mr Nicholls said that he was better qualified and more experienced than any of the other employees in his immediate workplace.

[25] Notwithstanding that, the evidence of both Mr Nicholls and his partner, Ms Atwill, was that the group of employees at FML had some social contact together and got on well at least until events on 22 June 2005.

[26] On that day, there were two incidents which are highly relevant to the matters in contention.

[27] The first of these took place at about 7.40am on the morning of Wednesday 22 June 2005 when one of the apprentices, Luke Rossiter, asked Mr Nicholls to cut a board for him on the panel saw. The panel saw is a manual saw located in the cabinetmaker's shop which adjoins the area in which Mr Rossiter and Mr Nicholls worked.

[28] Mr Nicholls' evidence is that he had been asked by FML management to train Mr Rossiter on the use of the panel saw and that he had done so. When Mr Rossiter asked Mr Nicholls to cut the

board for him, Mr Nicholls responded by saying to Mr Rossiter that he could cut the board for himself. Mr Nicholls' evidence is that Mr Rossiter *blew a fuse* and used abusive language to Mr Nicholls. Mr Nicholls said that he told Mr Rossiter to go away, but he did not shout back at him and that he simply went back to work.

[29] Mr Nicholls' evidence is that the rest of his work colleagues talked about him, laughed at him, called him names and amongst other things said that he was *gay*.

[30] At about 1.00pm on the same day, Mr Nicholls sought help from his immediate supervisor to get someone to help him lift the board off the stack that he had to cut on his machine. Mr Nicholls acknowledges that he asked his supervisor for permission to ask a particular work mate to help him and this would become significant later on.

[31] Mr Nicholls' supervisor said to Mr Nicholls that he would *have to ask management as I (Mr Nicholls) needed permission to use someone else's back*.

[32] Mr Nicholls described himself as *blown away* by this very odd remark of his supervisor. I asked Mr Nicholls whether he had had occasion to ask for help of this sort before. He said that it was a reasonably regular occurrence. He told me that, normally, the boards that he had to cut on his machine were placed in the appropriate position and height by a fork hoist truck but that, from time to time, the fork hoist was not available or was busy doing something else and then, on those occasions, he would ask for assistance from a work mate and there had *never been a problem* in the past.

[33] The sheets in question are 2400mm x 1200mm and each sheet weighs 40 kgs. The stack of this product stands about a metre high.

[34] Mr Nicholls said that he did as he was asked and sought management advice on the need to use someone else's back. None of the management personnel were available. Mr Nicholls told me in the investigation meeting that he thought that his supervisor would have known that when he sent him off on what turned out to be near enough to be a wild goose chase.

[35] However, Mr Nicholls said that he eventually found the Factory Manager who actually worked in the adjoining cabinetmaker's shop. The Factory Manager attended and required Mr Nicholls' co-workers to assist him. The Factory Manager referred to Mr Nicholls' co-workers working as a team and directed that the worker that Mr Nicholls had specifically sought assistance from did in fact assist him.

[36] That is what happened, but of course the problem repeated itself as soon as Mr Nicholls had finished processing the first board as he was unable to lift the second board by himself. Again he sought assistance. This time he asked each of his co-workers in turn to assist him. They all either ignored him or refused or walked away.

[37] Mr Nicholls told me that he felt unsupported, harassed and bullied and he regarded it as a health and safety issue. So he left the workplace. He thinks this would have been around 2.00pm on that day.

[38] At around the time he left or shortly afterwards (but certainly within the working afternoon) Mr Nicholls received two text messages on his cellular phone. On this particular day his partner, Ms Atwill, had his cellular phone. The first message received came from Mr Rossiter's phone and was identified as such, and it was simply the word *shame!* The second message which was not sourced to any particular phone, but which Mr Nicholls believes also came from Mr Rossiter's phone, was as follows: *Everyone laughed behind your back when you left. Don't come back!*

[39] Ms Atwill works as a call centre operator and of course, that being her position, she was not able to ring out.

[40] Her evidence was that when she went home that night she found her partner sitting hunched in a chair and *very despondent*.

[41] Mr Nicholls did not attend at work the following day, 23 June 2005, because he told me that he rang the workplace and found that none of the management team were going to be present that day and would not be back until Friday. Mr Nicholls returned to work on the Friday, 24 June 2005, and eventually was able to speak to the then General Manager. Mr Nicholls said he described the events of 22 June 2006.

[42] Mr Nicholls' evidence is that the General Manager was hardly sympathetic, and in effect accused Mr Nicholls of bringing the whole event on to himself. Amongst other things, Mr Nicholls says that he was called *bipolar* by the General Manager and was told that he would operate the edge bander until *we say so*.

[43] However, because one of the young apprentices was operating Mr Nicholls' machine and was, on Mr Nicholls' evidence, completely unproductive, there was very little work to be done on the edge bander and so Mr Nicholls spent most of the day sweeping the floors. He describes how galling this was as an experienced and skilled tradesman.

[44] On the following Monday, 27 June 2005, Mr Nicholls raised with FML how long it would be before he went back to his own machine. The General Manager accused him of disobeying a lawful instruction in refusing to operate the edge bander.

[45] Mr Nicholls said that he asked for a witness to this discussion and the General Manager refused to allow it.

[46] Mr Nicholls said that he told the General Manager that he was not refusing a lawful instruction, simply questioning how long he was to be operating the machine he had been put on to. He pointed out again to the General Manager that the machine that he was being made to operate was operated by two people and that it brought him closer into contact with his work mates, all of whom were now making fun of him.

[47] Mr Nicholls pointed out to the General Manager that FML had done nothing to address the concerns that he had raised about his work mates.

[48] Mr Nicholls said that the General Manager of FML insisted that he was disobeying a lawful instruction and required that Mr Nicholls leave the workplace immediately and obtain advice. Mr Nicholls was physically escorted from the premises by the General Manager.

[49] Mr Nicholls arranged for his partner, Ms Atwill, to hand write a letter raising a personal grievance and this was done that evening, 27 June 2005. The letter was dated the following day and hand delivered by Ms Atwill.

[50] By this time Mr Nicholls was seriously stressed and gave evidence of being so upset by the turn of events at the workplace that he was regularly vomiting, not eating and not sleeping. Ms Atwill confirmed that evidence and said that from the point at which the troubles at work started, her partner had turned from being a *happy go luck person, sociable with friends and family to not wanting to go out anywhere. He was not sleeping. Most nights I slept alone while he sat up for hours. ... he was vomiting and not able to eat because of the stress.*

[51] By letter dated 4 July 2005 Mr Nicholls was summoned to what that letter makes quite clear is to be a disciplinary meeting. Amongst other things, the letter refers to Mr Nicholls' *personal conduct having a negative impact on our work environment*.

[52] The letter also referred to the allegation that Mr Nicholls had refused to obey a lawful instruction or referred to his alleged personal grievance. It indicated that disciplinary consequences might flow from the meeting.

[53] When Mr Nicholls and his representative turned up for the meeting on 6 July 2005, the General Manager of FML proceeded, according to Mr Nicholls' evidence, to tell Mr Nicholls and his representative that the matter *was not disciplinary* and that Mr Nicholls' position *was not at risk*. According to Mr Nicholls' evidence, the General Manager of FML said that he *simply wanted to talk about my personal grievance*.

[54] Mr Nicholls' evidence is that his representative challenged the General Manager of FML that his behaviour was now inconsistent with the clear terms of the letter of 4 July and the General Manager of FML allegedly said in response that the letter had been drafted by the company's adviser and did not necessarily represent his view.

[55] That being the position, Mr Nicholls said that he was advised by his representative to speak freely about the issues that were troubling him in the workplace and his relationship with his work mates, and he did this at length.

[56] Then, quite suddenly, Mr Nicholls recalls the FML General Manager turning in his seat to the bookcase behind him, extracting a piece of paper and, reading from that piece of paper, proceeded to suspend Mr Nicholls on full pay to enable an investigation to take place on the matters that Mr Nicholls had just referred to.

[57] Mr Nicholls' evidence is that the suspension was predetermined and he says this at least in part because he observed the General Manager reading from a piece of paper which clearly was prepared in advance of the meeting.

[58] Mr Nicholls also says that the suspension came *completely out of left field*. As Mr Nicholls and his representative were leaving the room where the meeting was held, Mr Nicholls said that the General Manager of FML said, in so many words, that the suspension was for raising the personal grievance.

[59] By letter dated 6 July 2005 (also the date of the first meeting between the parties) to Mr Nicholls' representative from FML's representative, Mr Nicholls was summoned to a further meeting. I remark in passing that the investigation which FML represented justified the suspension at the 6 July meeting, must have been a very quick one if FML's representative is able to write a letter that very day summoning Mr Nicholls to yet another meeting.

[60] There was then an exchange between the two representatives about the date of the proposed second meeting, and eventually a date was agreed to. It is interesting to note that the representative for FML concludes a letter of 7 July 2005 with these words:

We would advise that your client is required to attend this meeting and should he not do so he will be dismissed.

[61] Such an observation in the context of an incomplete and already unsatisfactory process reeks of predetermination.

[62] The final meeting took place on 12 July 2005. Mr Nicholls' evidence is that he had no genuine opportunity to be heard and that both the representative for FML and FML's General Manager seemed *hell bent* on dismissal.

[63] A letter was received by Mr Nicholls' representative dated 13 July 2005 which confirmed that Mr Nicholls was dismissed.

[64] The letter sets out in some detail that the basis for dismissal is:

- a) Mr Nicholls' alleged refusal to obey a lawful instruction; and
- b) Mr Nicholls' personal behaviour having *a negative impact* on the work environment.

[65] Finally, Mr Nicholls' evidence and the evidence of his partner, Ms Atwill, is that after the dismissal, his health deteriorated even further, he suffered depression and there was significant financial hardship with the young couple trying to live on one income.

The evidence from FML

[66] Because FML did not appear at the investigation meeting, the only evidence available from the respondent is evidence filed with the statement in reply.

[67] This is not a situation where the respondent party simply fails to engage in any part of the Authority's investigative process. Here the respondent engaged with the Authority for most of the preliminary phase of the Authority's work, but then at the eleventh hour refused to participate in the investigation meeting, notwithstanding the Authority's efforts to make it possible for them to do so by adjusting dates and times to suit.

[68] In consequence of the foregoing observations, there is some evidence available from FML. This evidence consists of a series of statements taken from various work mates of Mr Nicholls, which apparently ground the decision to FML to dismiss Mr Nicholls.

[69] Having carefully reflected on the statements available to the Authority, I reached the conclusion that the statements in no way justify the conclusion that Mr Nicholls has been guilty of conduct so serious as to justify the disciplinary response of dismissal.

[70] As to the allegation that Mr Nicholls disobeyed a lawful instruction, there is no evidence whatever before the Authority that that in fact is the position. All of the evidence (including the evidence from the statements taken by the employer) suggest that Mr Nicholls questioned the right of the employer to deploy him in a particular way. In my opinion, that is a perfectly appropriate action for an employee, particularly in circumstances where the employer has failed in its obligation to provide the employee with a copy of the relevant job description which Mr Nicholls says (and I accept) he has never seen.

[71] It follows that I absolutely reject that the employer's "investigation" supports the conclusion that Mr Nicholls had failed to obey a lawful instruction. That leaves the question of Mr Nicholls' so-called "personal conduct". Again, I see no evidence in the employer's "investigation" of anything other than a workplace difference. Clearly there was a difference of opinion between Mr Nicholls and some of his work mates. But there is nothing whatever to support the employer's contention that, to use their words, *your personal conduct has had a negative impact on our work environment*.

[72] It follows that I am not persuaded that the employer's investigation, as disclosed to the Authority, supports their conclusion that Mr Nicholls approach to the work place was *negative and disruptive*.

Determination

[73] It is a difficult matter to make judgments on an employment relationship problem when one of the parties refuses to engage in the Authority's process. However, it would be unjust and inequitable of the Authority to decline to try to make those judgments simply because the task is more difficult by the non-appearance of one party. To take that stance would grossly prejudice the other party who, for the purposes of the Authority's investigation, has done nothing wrong.

[74] I have set out at some length the sequence of events in terms of the Authority's attempt to try to get this matter set down for a hearing with both parties involved. I consider that the fact that only one party was actually represented at the investigation meeting is through no fault whatever of the Authority or its officers.

[75] I have also set out at length the evidence that was provided to me by Mr Nicholls and his partner. In my opinion, that evidence graphically sets out Mr Nicholls' strong sense of having been done a wrong by his employer, FML. I think the thrust of that evidence from Mr Nicholls is to create the firm impression that the process adopted by FML leading up to the dismissal was so ill considered as to be completely unfair and unjust.

[76] In my view, the unchallenged evidence from Mr Nicholls strongly supports my conclusion that the procedural irregularities of the process adopted by FML were such as to make any dismissal reliant upon that process, unsafe.

[77] Further, I consider that the evidence available to me from FML by way of their so-called investigation which underpins the dismissal of Mr Nicholls is so inadequate as to make the dismissal substantively unjustified as well.

[78] In my opinion, applying the test set out in s.103A of the Act, the decision of FML to dismiss Mr Nicholls is not a decision that a fair and reasonable employer would have made.

[79] Mr Nicholls has also pleaded a disadvantage and this is based on the contention that FML created the disadvantage by their behaviour at the first meeting of 6 July 2005.

[80] At this meeting, Mr Nicholls says that, having effectively been lulled into a false sense of security by the employer, and in particular told that the meeting was not disciplinary in character, he was then without warning confronted with a suspension.

[81] I am satisfied with Mr Nicholls' evidence on this point at least to the extent that there was no warning and certainly no opportunity for Mr Nicholls to make submissions as to the need or otherwise for suspension. Mr Nicholls' evidence tends to be confirmed by the observations made by FML's own representative in their letter of 6 July 2005 to Mr Nicholls' representative.

[82] It follows then that I am satisfied that Mr Nicholls has suffered a disadvantage as a consequence of an unjustifiable action by FML in respect to the way that FML conducted itself at the initial meeting between the parties on 6 July 2005, both as to the fact of the suspension and the inappropriate process around that, and the reality that the suspension issue was sprung on Mr Nicholls after FML had sought to persuade Mr Nicholls that, notwithstanding the letter of 4 July, the meeting of 6 July was *not disciplinary*.

[83] However, I am not satisfied that one can properly differentiate between the hurt, humiliation and injury to feelings consequent upon the disadvantage and the injury as a result of the dismissal. It follows that I make one award in respect to compensation in relation to the dismissal.

[84] I am satisfied that a significant award is appropriate. The evidence of loss Mr Nicholls suffered is graphic indeed with dramatic and extreme health consequences of the employment relationship problem, as well as financial consequences.

Contribution

[85] Having found the existence of two personal grievances, it is proper for me to consider whether Mr Nicholls contributed at all to either grievance arising.

[86] In relation to the disadvantage grievance, I am satisfied that Mr Nicholls had no part whatever in the arising of that grievance and accordingly the remedies that I award him in that regard are not abated.

[87] In relation to the dismissal grievance, I again reach the conclusion that nothing that Mr Nicholls did brought on the dismissal.

[88] What is true I think is the distress which Mr Nicholls suffered was at least, in part, a function of his own personality and perhaps his heightened anxiety, but I do not consider that those personality factors actually contributed to Mr Nicholls being dismissed by his employer.

Summary of orders

[89] I make the following orders against FML in favour of Mr Nicholls:

- a) Compensation under s123(1)(c)(i) of the Employment Relations Act 2000 in relation to the dismissal grievance in the sum of \$12,000.
- b) Lost earnings which I find proved in the sum of \$3,960 gross.

Costs

[90] Given the non-appearance of FML, it is not appropriate to reserve costs. Mr Nicholls' representative has indicated to me that the total costs incurred by Mr Nicholls, exclusive of GST, amount to \$4,900. The Authority has traditionally not reimbursed GST on costs awards.

[91] I am satisfied that that sum is a reasonable amount in all the circumstances having regard to the extensive preliminary work that was required of Mr Nicholls' representative as a consequence of FML's decision to not involve itself in the Authority's investigation.

[92] In the normal course of events, an award at perhaps 40% of the reasonably incurred costs of the successful party for the proceeding itself, but not preliminary matters such as mediation, would be awarded or a per diem rate might apply.

[93] On the basis of a per diem rate, given that the hearing was a half day's duration only, a figure of perhaps not more than \$1,000 to \$1,500 would be considered. In all the circumstances, such an award does not take proper cognisance of the efforts required by Mr Nicholls' representative in persevering with this matter in most difficult circumstances.

[94] In all the circumstances, I think Mr Nicholls is entitled to an award of costs at the higher end and I direct that FML is to pay Mr Nicholls a contribution to his costs in the sum of \$3,750.

James Crichton
Member of Employment Relations Authority