

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Anthony Franz O'Brien (Applicant)
AND Renton Chainsaws and Mowers Limited (Respondent)
REPRESENTATIVES Ian Thompson, Advocate for Applicant
Peter D Zwart, Advocate for Respondent
MEMBER OF AUTHORITY Helen Doyle
INVESTIGATION MEETING 27 January 2003
DATE OF DETERMINATION 27 February 2003

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] The applicant, Anthony O'Brien, says that he was unjustifiably constructively dismissed from his employment with the respondent, Renton Chainsaws and Mowers Limited ("Renton Chainsaws") and/or was unjustifiably disadvantaged in his employment.

[2] The respondent says that Mr O'Brien resigned from his position by letter of resignation dated 24 June 2002 and was not dismissed.

[3] Mr O'Brien seeks lost wages in the sum of \$735, compensation for stress and humiliation in the sum of \$15,000 and costs.

Background

[4] Mr O'Brien commenced employment with Renton Chainsaws in Hokitika on 26 March 1997 as a salesperson and mechanic.

[5] He was party to an individual contract of employment dated 19 August 1997.

[6] The contract provided that Mr O'Brien would be required to carry out duties at either of the respondent's shops in Hokitika and Greymouth. Initially Mr O'Brien worked at Hokitika from Monday to Wednesday and Greymouth on Thursday and Friday of each week. That was subsequently changed and from 26 July 2001 Mr O'Brien only worked Fridays at Greymouth.

[7] It was not in dispute that the relationship between Mr O'Brien and the employee in charge of the Greymouth shop, Mr X, was not good.

[8] The difficulties, Mr O'Brien said, with Mr X were historical and culminated he said in him resigning for the reasons expressed in a letter dated 24 June 2002. The letter provided:

24/6/02

To: The Manager of Renton Chainsaws and Mowers

Due to ongoing bullying by X in the Greymouth branch of Renton Chainsaws and Mowers, I find that I am unable to deal with customers when he is there. On a number of occasions he has displayed physical violence towards me (I have been attacked by X on a number of occasions), even in front of customers.

It is a breach of my rights to be unable to deal with customers and to be unable to work on machinery without X watching over me, and criticising (sic) my work. He has often accused me of stealing his sales and will not allow me to deal with customers when he is present.

Since Renton Chainsaws has purchased computers and has been connected to the Internet X has been downloading porn from the Internet and leaving it on the computer in full view for me and any customer that walks in to see. I find this very upsetting as to the content that he has left for people to see. This is Sexual Harassment and I will not tolerate this behaviour anymore.

I can see that the last two times I have complained that nothing was done and I have no option but to give you two weeks notice of my duties.

A.F.O'Brien

[9] When I investigated this problem I decided that it was convenient to break the periods of Mr O'Brien's employment into three, being March 1997 to July 2001, August 2001 to May 2002 and June 2002 to 5 July 2002 and the meeting proceeded on that basis.

March 1997 to July 2001

[10] Mr O'Brien spent the first six months, approximately, of his employment in Hokitika and was not required to work at the Greymouth shop.

[11] In or about September 1997, shortly after Mr O'Brien started going to the Greymouth shop, he said that Mr X pushed him in the shoulders. Mr O'Brien said that the reason Mr X was angry with him was because he had started up a chainsaw outside the Greymouth shop and Mr X could not hear a customer due to the chainsaw noise. He said that Mr X also criticised his work at that point in time.

[12] Mr O'Brien telephoned his manager Martin Cuff later that same day and told him of the incident. Mr Cuff agreed that he would talk to Mr X but said that he could not get to the bottom of the matter. He said that Mr X refused to apologise to Mr O'Brien but that he did not consider Mr X dangerous.

[13] Mr Cuff did accept that whilst Mr O'Brien carried on working at Greymouth after his complaint in or about September 1997 he would occasionally come back to Hokitika and complain to him about Mr X.

[14] Mr O'Brien said that he decided to keep notes about what was occurring when he was working at the Greymouth shop. I have treated the notes with a degree of caution because they appeared out of date order in places and Mr O'Brien conceded that he would not always write his notes immediately following an incident. I have not however disregarded the notes entirely because Mr Cuff does not disagree Mr O'Brien raised some of the matters in the notes with him and the detail in some of the notes was included in two letters written to the respondent.

[15] The first entry in Mr O'Brien's diary is 12 March 1999. Mr O'Brien said that on that date Mr X went "off" about the noise. When Mr O'Brien raised this behaviour with Mr X after the shop had cleared he said that Mr X pushed him and told him that he was bloody useless, using other swear words as well. Mr Cuff recalled Mr O'Brien complaining to him about Mr X at this time. He said that he talked to Mr X and told him not to get near Mr O'Brien.

[16] Mr Cuff said that Mr X's response to the allegations was "bull shit" and it was one employee's word against the others. Mr O'Brien had mentioned going to the police to Mr Cuff next time he was pushed, Mr Cuff said that that was the action he expected Mr O'Brien to take if he was pushed again.

[17] Mr Cuff told me that he sometimes elbowed employees himself out of the way to use the till and he thought that was what Mr X was probably doing with his pushing.

[18] Mr Cuff said that Mr O'Brien was the sort of person who seemed to exaggerate in his view. He said that he thought that Mr O'Brien was "crying wolf" with respect to Mr X and he didn't take it that seriously. He felt that Mr O'Brien was a bit overly sensitive to swearing and anger and took things too personally. He said in his evidence the store customers were on occasion rough and ready and swearing was a normal part of their vocabulary.

[19] Notwithstanding Mr Cuff's view of Mr O'Brien he decided in consultation with one of the directors of Renton Chainsaws Jack Renton to reduce Mr O'Brien's days in Greymouth from two to one per week.

[20] The difficulties during the commencement of his employment to 26 July 2001 that Mr O'Brien said he experienced in his working relationship with Mr X could be summarised as follows:

- Being pushed by Mr X.
- Sales documentation being changed to reflect that someone other than Mr O'Brien was responsible for the sale.
- Not being relieved from duties for morning or afternoon tea and lunch and/or being left alone in the shop whilst Mr X did personal jobs. Mr O'Brien said that as he was a diabetic he needed regular breaks.
- Being put down by Mr X.

August 2001 to May 2002

[21] Mr O'Brien said that although his time at the Greymouth shop was reduced to one day a week the relationship between him and Mr X deteriorated and he decided to submit a personal grievance to Jack Renton setting out the issues of concern.

[22] On 8 August 2001 he wrote to Jack Renton telling him that he was writing a personal grievance because of the way he had been treated at work. The letter referred to:

- Instances when Mr X had done personal shopping, worked on his motorbike and the like away from the shop leaving Mr O'Brien alone in the shop.
- That on 26/07/01 Mr X had been on a number of engine sites leaving Mr O'Brien to do all the work. The engine sites were listed and included NZ personals and Scandles.
- That Mr X had been physically pushing Mr O'Brien twice away from the till when he had been serving customers and inserted his sales number for the sale. The letter also stated "*Remembering not long after I started X assaulted me, with which it should have never happened, and the way it was dealt with was appalling.*"
- That Mr O'Brien had done work on lawnmowers and chainsaws that had never been charged.
- That most of the time Mr O'Brien was not getting lunch breaks or tea breaks

[23] Mr O'Brien said that he hand delivered the letter to Mr Renton. He said that he then talked to him about how he had found the pornographic material he had seen on Mr X's computer offensive and unpleasant and that Mr Renton had responded to the effect that "*this is getting too deep and I am not going down that path*". Mr Renton said that whilst he probably had a conversation at the time the letter was delivered he did not recall any conversation in which Mr O'Brien told him that he found the material on Mr X's computer offensive.

[24] The letter of 8 August links the complaint about the visits by Mr X to the search engines to the fact that Mr X had visited the various sites and that was all that he had done on 26 July 2001 whilst Mr O'Brien had performed all the work. It does not specifically refer to any offence that Mr O'Brien may have taken to the images he saw. The notes Mr O'Brien took on 26 June 2001 do not make any mention of the offence Mr O'Brien took at the images he saw.

[25] Mr O'Brien said that on 3,4 or 5 occasions Mr X left pornographic pictures on his computer that he saw. The computer that Mr X used was based in the office that Mr Cuff used when he went to the Greymouth shop. It was the only computer with an Internet connection. Mr O'Brien said that occasionally when he wriggled the mouse from the screen saver a pornographic picture came up on the screen. He talked about taking a customer into the office to order some parts from the manual that could be accessed from the computer. The customer saw an image of a naked person and thought Mr O'Brien was responsible for it being there.

[26] Mr Renton asked Mr Cuff to investigate the matters in the letter of 8 August. Mr Cuff decided not to show Mr X the letter because he thought it would ruin the working relationship between Mr X and Mr O'Brien. Before he went to see Mr X he wrote some notes based on Mr O'Brien's letter.

[27] The notes provide:

- *What do you call bullying*
- " *physical violence number of occasions*
- " *attacked*
- " *What do you call critising your work Is it constructive criticism. I do it to Dave, X & Tony at times not always constructive*
- *Stealing sales doesn't matter, none of us are on commission. X like me probably does get frustrated when he is listening & steps in to try and get a deal. He is the better salesman & slings a good line & knows his product better*
- *What are you doing checking computer to see what X is up to*
- *Verbal abuse & physical abuse?*

[28] Mr Cuff said that he talked with Mr X about Mr O'Brien. He said that he told Mr X to allow Mr O'Brien an hour for lunch and that he was not supposed to use the computer for personal use at

work. Mr X denied that he pushed Mr O'Brien around but accepted that he may have accidentally pushed him when they were both at the counter serving. Mr Cuff said that he told Mr X to take it easy around Mr O'Brien; always to let him have a lunch break and not to touch him. He said that Mr X agreed to that.

[29] Mr Cuff said that he did not talk to Mr X about the customers or spending time away from the shop. He said that Mr X was in charge of the shop and that all the customers in theory were his not Mr O'Brien's. He also thought that as Mr X and Mr O'Brien did not get on well they were probably better off apart. He said that if it was not busy in the shop then it would be easier for both of them if one was away rather than sitting in the shop getting at each other. Mr Cuff said that he checked the worksheets for 26 June and they indicated that both Mr X and Mr O'Brien had done very little charge out work that day.

[30] Mr Cuff went back to the directors of Renton Chainsaws, Jack Renton and Graeme King and told them the result of the investigation. Mr Cuff told them that he accepted that Mr X had probably "*stepped in*" to deal with customers while Mr O'Brien was dealing with them but that Mr X had denied ever physically pushing or assaulting Mr O'Brien. Mr Cuff told Mr Renton that in his view Mr O'Brien had exaggerated the issues. He felt that Mr O'Brien commonly complained, in his words "*he whinged a lot about nothing*".

[31] Mr King said that it was agreed that Mr Cuff should talk to Mr O'Brien about the investigation. Mr Cuff said that he did tell Mr O'Brien that he had spoken to Mr X about the complaints but that he had not laid it on the line with Mr X and that Mr O'Brien appeared happy with that.

[32] Mr O'Brien denied that he had had a conversation with Mr Cuff or anyone else about the 8 August letter. He said Mr X was somewhat "*huffy*" at him about that time that suggested something had been said. Mr O'Brien also said that for a time he got lunch breaks but not tea breaks. Mr O'Brien said that Mr Cuff was totally one-sided in Mr X's favour and he felt like an outsider. He said that his health deteriorated during this period and he felt quite worthless and for a time stopped writing his notes.

[33] Mr O'Brien made an entry into his notes on 23 November 2001 that the computer at Greymouth was filled with porn and that the main page brought up a man fully naked and many other pornography websites had been visited, mainly gay and bisexual websites. He said that he found the particular pornographic bi-sexual material that he saw on Mr X's computer from time to time very offensive. He said that he couldn't stand it and tried not to use the computer.

[34] On 24 May 2002 Mr O'Brien said that Mr X pushed him away from the customer he was serving and when he returned to Hokitika he talked to Mr Cuff about going to mediation about the situation between himself and Mr X. Mr Cuff said that he didn't know about mediation and would have to talk to Mr Renton. Mr Renton was unavailable so Mr Cuff talked with Mr King. Mr King thought that the mediation would be between Mr X and Mr O'Brien.

June 2002 to 5 July 2002

[35] Mr O'Brien wrote a letter to the mediation service seeking mediation between the company and himself on 6 June 2002.

[36] On 13 June Mr O'Brien wrote a letter to Mr Renton submitting another personal grievance. The letter referred to the same sort of complaints raised in the 8 August 2001 letter and included the fact that Mr O'Brien found the content of the pornography downloaded by Mr X from the internet

disturbing. He referred to ongoing bullying and said in the letter *“I will no longer tolerate this behaviour of verbal and physical abuse, I find the sexual content on the computer upsetting. I have on several occasions tried talking to Martin about the conflicts but he told me they were a personal problem between X and myself.”*

[37] The letter ended with Mr O’Brien enquiring of the company if they would be willing to attend mediation and he stated that until the matter was resolved he refused to work in Greymouth. Mr O’Brien handed the letter to Mr King as Mr Renton was unavailable. Mr King said that he would deal with it and refer it to Mr Renton when he returned.

[38] Mr King said that he assumed the mediation would be between Mr X and Mr O’Brien. I find that he expressed to Mr O’Brien some pessimism about the chances of mediation being successful but he did say that the company would support a meeting or mediation between Mr X and Mr O’Brien.

[39] Mr King showed Mr Cuff the 13 June letter and it was agreed that Mr O’Brien would not be required to work in Greymouth until the matter was resolved. Mr O’Brien did not go back to the Greymouth shop but said that Mr Cuff did not tell him that there had been agreement to this.

[40] Mr Cuff did get Mr O’Brien’s agreement to show a copy of the 13 June letter to Mr X and he duly talked to Mr X about the letter on either 17 or 18 June.

[41] He wrote down Mr X’s comments on the letter together with some comments of his own. Mr X denied any physical violence toward Mr O’Brien and said *“If I had attacked him he would not be standing”*. He denied taking customers from Mr O’Brien and whilst he admitted looking at pornography on the computer he denied downloading porn and leaving it for Mr O’Brien to see. He admitted doing his own jobs at work when not busy but Mr Cuff said that he was aware of this.

[42] Mr Cuff also noted on the letter that *“no one else has a ongoing problem [with X]. X like the rest of us have the odd conflict but its here & gone not dwelled on.”*

[43] In terms of mediation it was noted on the letter that Mr X in terms of mediation said *“voluntary and get stuffed.”*

[44] Mr King said that there was then an investigation carried out into the use of the computer by Mr X by carrying out a check of the Internet records.

[45] On 24 June Mr O’Brien said that Mr King and Mr Cuff spoke to him separately in the morning. Mr King told Mr O’Brien that he and Mr X were two people on the ends of a pole and poles apart and Mr Cuff said that there was no evidence to prove the points in the letter. Mr Cuff said that he could not recall having a discussion with Mr O’Brien on the morning of 24 June but he said that he could not say yes or no and that it could have come up. Mr King likewise could not recall a discussion on 24 June whereby he said that Mr O’Brien and Mr X were poles apart but that he may have referred to being poles apart in terms of mediation at an earlier date.

[46] Mr O’Brien said that he then decided to resign as he felt that nothing had been done about the situation with him working with Mr X and that nothing would be done.

[47] On 26 June there was a meeting between Mr King, Mr Renton and Mr O’Brien. At that meeting there was discussion about whether Mr O’Brien’s resignation should be accepted or not. Mr O’Brien said that he didn’t see why he was being forced to resign. Mr King and Mr Renton said that they needed someone who could commute between Hokitika and Greymouth and there was an

ongoing problem. In the circumstances they felt that they had no alternative but to accept the resignation.

[48] Mr O'Brien's last day was 5 July 2002.

The issues

[49] I approached my investigation of this matter on the basis that the unjustified disadvantage claim was essentially the same as the unjustified constructive dismissal claim.

[50] It was clear that Mr O'Brien was basing his claim on the third category of constructive dismissal referred to by the Court of Appeal in *Auckland etc Shop Employees IUOW v Woolworths* [1985] ERNZ Sel Cas 136 that there had been a breach of duty by the employer.

[51] The issue for me to consider is whether having examined the facts, Mr O'Brien's resignation was caused by a breach of the implied duty of fair treatment on behalf of the employer. If the answer to that is yes then I have to ask whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that Mr O'Brien would not be prepared to work under the conditions prevailing.

Determination

[52] In answering the first question I have considered not simply the letter of resignation, but the circumstances of the resignation. It was clear that there had been an unsatisfactory relationship for many years between Mr X and Mr O'Brien. There had been several complaints about Mr X pushing/shoving Mr O'Brien including one made very early on in Mr O'Brien's employment. Mr Cuff agreed that Mr O'Brien had made complaints to him.

[53] There was a duty on Renton Chainsaws to provide Mr O'Brien with a safe and secure workplace. Failure to do so would amount to a breach of duty of fair treatment.

[54] Having investigated the matter I conclude that the action taken by Renton Chainsaws following at least four complaints by Mr O'Brien was inadequate and ineffective. I accept that Mr Cuff spoke to Mr X but complaints continued to be made by Mr O'Brien despite Mr Cuff telling Mr X not to touch Mr O'Brien. Renton Chainsaws should have seen that matters were not improving and dealt with the complaints more effectively. Any investigation of Mr X was also tainted by Mr Cuff's own view of Mr O'Brien as an exaggerator and a whinger.

[55] I was concerned that Mr Cuff seemed to minimise the seriousness of pushing another employee by assuming that the contact between Mr X and Mr O'Brien was limited to elbowing and because on occasion he elbowed others out of the way it was acceptable. This view is quite clear from reading Mr Cuff's notes after the 8 August 2001 letter. Mr X did accept when questioned by Mr Cuff that he may have accidentally pushed Mr O'Brien when he "*stepped in*" to serve at the counter. One may accept that one incident of pushing may be accidental but here there were several incidents. The complaints of pushing can be categorised as violence toward Mr O'Brien. The complaints needed to be properly investigated and Mr O'Brien needed to be protected from any reoccurrence. I do not find that the complaints were properly investigated and neither do I find that Mr O'Brien was protected from reoccurrence of the pushing. Mr Cuff's own view on pushing or elbowing may have had the effect of condoning the action of pushing another employee away at the counter.

[56] Mr Cuff did not, I find, advise Mr O'Brien clearly or formally of the outcome of his discussions with Mr X or his own view that Mr O'Brien's complaints were exaggerated. Mr O'Brien was left with the impression that nothing had been done or would be done and that he was expected to carry on working with Mr X in those circumstances. I do not accept Mr Cuff's evidence that after the 8 August 2001 letter Mr Cuff talked to Mr O'Brien and he was satisfied with the steps taken by Mr Cuff. I prefer the evidence of Mr O'Brien that he was not informed of any steps taken with respect to his letter of 8 August 2001.

[57] In terms of the issue with respect to sexual harassment I find that the complaint was not clearly made to Renton Chainsaws that Mr O'Brien was subjected to visual material of a sexual nature that was unwelcome and offensive to him until his letter of 13 June 2002. I have reached that conclusion by considering carefully the letter of 8 August 2001 and the notes Mr O'Brien said that he made at that time. The investigation into that matter was not completely concluded at the time when Mr O'Brien resigned.

[58] Notwithstanding that finding, I find that the cause of Mr O'Brien's resigning by letter dated 24 June 2002 was his belief that his employer would not take appropriate action in terms of the issues raised in his 13 June letter. That belief was based on his previous experience of how his other complaints had been dealt with. It was also based on the comments made by Mr King and Mr Cuff following Mr Cuff's initial investigation that I find were more probably than not made on the morning of 24 June 2002. I accept that there was to be a further investigation with respect to the allegation of sexual harassment. I find though that the other issues in Mr O'Brien's letter had been investigated and Mr X had agreed that he had looked at pornography on the computer. It was after that investigation that I find some comments were made to Mr O'Brien that led him to believe that on this occasion too no action would be taken in terms of his complaints. Whilst mediation had been requested it was clear that Mr King expressed a degree of pessimism about the success of mediation because he was under the impression that mediation would be between Mr X and Mr O'Brien. Renton Chainsaws I find distanced themselves from that process because they misunderstood that it required participation by them as employer.

[59] I conclude for the reasons expressed that Renton Chainsaws failed to provide Mr O'Brien with a safe and secure workplace. The company did not properly and effectively investigate Mr O'Brien's complaints that continued to be made over a significant period of employment. This amounted to a breach of the duty of fair treatment and caused Mr O'Brien's resignation because he did not believe that appropriate action would be taken in terms of his latest complaints to keep him safe and secure at work.

[60] After Mr O'Brien presented his resignation and before it was accepted he met with the directors of Renton Chainsaws. I find that he questioned why he had to resign. It was made clear to him that Renton Chainsaws needed someone who could commute between Hokitika and Greymouth and this was an ongoing problem in the circumstances and Renton Chainsaws would accept the resignation. Neither Mr King nor Mr Renton said that they asked Mr O'Brien at the meeting on 26 June to wait for the outcome of the investigation or gave him any reassurance in terms of his complaints. Mr Renton also said that at that stage relationships had become strained in Hokitika.

[61] I then ask the question whether the breach of duty by Renton Chainsaws was of sufficient seriousness to make it reasonably foreseeable that Mr O'Brien would not be prepared to work under the prevailing conditions. I am satisfied that the breach of duty in this case was of sufficient seriousness to make it reasonably foreseeable to Renton Chainsaws that Mr O'Brien would not be prepared to continue to work in the circumstances that existed at the time he resigned.

[62] I find that Mr O'Brien was unjustifiably constructively dismissed.

Remedies

[63] There are no issues with respect to contribution to the personal grievance by Mr O'Brien.

[64] Mr O'Brien is entitled to be paid the sum of \$735 (net) with respect to lost wages.

[65] I order that Renton Chainsaws and Mowers Limited pay to Anthony O'Brien under section 123 (b) of the Employment Relations Act 2000 the sum of \$735 without deduction.

[66] In terms of humiliation and stress I find that the effect of the unjustified dismissal on Mr O'Brien was significant and very serious. I heard from Mr O'Brien and his wife Sandra. Over a prolonged period of time Mr O'Brien complained about Mr X and the situation did not improve as a result of those complaints. Mr O'Brien was prescribed anti-depressant and sleeping tablets on 24 June 2002 and said that his health hit rock bottom. His relationship with his wife deteriorated as a result of the stress. I accept his evidence and the evidence of Mrs O'Brien that he talked about suicide and had feelings of worthlessness. In the circumstances I am of the view that a suitable award would be \$10,000.

[67] I order that Renton Chainsaws and Mowers Limited pay to Anthony O'Brien under section 123(c) (i) of the Employment Relations Act 2000 the sum of \$10,000 without deduction.

Costs

[68] I reserve the issue of costs. I would encourage the parties to attempt to reach agreement on this matter in the first instance. If agreement cannot be reached and the applicant wishes to file memorandum with respect to costs then memorandum is to be filed and served within 14 days after receipt of this determination and the respondent is to have a further 14 days to reply to any such application.

Helen Doyle
Member of Employment Relations Authority