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## **Small v Sims Brothers (1992) Limited (Christchurch) [2011] NZERA 578; [2011] NZERA Christchurch 126 (19 August 2011)**

Last Updated: 2 September 2011

**IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH**

[2011] NZERA Christchurch 126  
5295330

BETWEEN MATTHEW IAIN SMAILL

Applicant

A N D SIMS BROTHERS (1992)

LIMITED

Respondent

Member of Authority: Representatives:

Investigation Meeting:

Submissions:

Date of Determination:

Philip Cheyne

Janet Marquet, Counsel for Applicants Jen Wilson (to 25 November 2010) & Diana Hudson (from December 2010), Counsel for Respondent

25 & 26 November 2010 at Dunedin

4 April 2011 at Dunedin

19 August 2011

### **DETERMINATION OF THE AUTHORITY**

#### **Introduction**

[1] This file and my hearing notes from the investigation meeting were in the Authority's Christchurch office which was inaccessible following the February earthquakes until recently. I had done some preliminary work on aspects of the determination before the earthquake and I heard submissions in person from counsel in April 2011. Work on the determination could not continue until the file and especially my hearing notes were retrieved from the office. Since then I have reread the entire file and my hearing notes, considered counsels' submissions and finalised this determination.

[2] I appreciate and want to acknowledge the patience of the parties and counsel through this difficult time.

#### **Employment relationship problem**

[3] Sims Brothers (1992) Limited owns and operates an automotive mechanics business in Dunedin. I shall refer to the respondent as the company or Sims Brothers. It is a family owned and operated business. Roy Roker is a reputable mechanic and a principal of the company. His wife Bev Roker is also a principal and works in the administrative side of the business.

[4] Matthew Smaill worked at Sims Brothers as a young apprentice mechanic from late 2005 when he finished school until February 2010 when he resigned in circumstances that give rise to his claim of constructive dismissal. It is common ground that the employment relationship was good for most of the employment. Indeed Mr Smaill was nominated by the company for and received the Otago Branch Motor Trade Association Apprentice of the year award for 2008. However, Mr Smaill says that from mid 2009 the Service Manager (Brian Eade) made his life miserable and from September 2009 he was bullied, abused and assaulted by Roy Roker so that the work environment became intolerable and he had to resign.

[5] For the most part the facts alleged by Mr Smaill are disputed by the company. I will need to carefully canvass the evidence about the various events and resolve those disputes before turning to the immediate context in which the employment ended. It is convenient to deal with matters chronologically but I should note that I have based some of my findings where the evidence is in dispute on an overall assessment of Mr Smaill's and Mr Roker's conduct, including what happened during Mr Smaill's last day at work. First I will mention the people involved.

### **Those involved**

[6] Mr Smaill's parents, Iain Smaill and Joanne Smaill were present at several meetings after Mr Smaill first brought various concerns to Mr Roker's attention. Naturally they are very supportive of their son so they cannot be regarded as disinterested witnesses. An extra element is that there was a friendship between them and Mr and Mrs Roker and at one stage there were discussions between them about Mr and Mrs Smaill possibly buying the company's business. For a time Mrs Smaill was also employed by the company.

[7] Jeffrey Sharp, Brian Billyard and Brendon Eggeling are all former employees of the business. They offered evidence that was generally supportive of Mr Smaill but they observed only a few specific events.

[8] Bev Roker works for the company at the workshop as the business administrator. Nicola Roker is their daughter and she also works there in the office. As with Mr and Mrs Smaill, Mrs Roker and Ms Roker are not disinterested witnesses. Brian Eade commenced work with Sims Brothers in June 2009 as the Service Manager. To the extent that there are allegations made against him he too cannot be regarded as disinterested. Sheldon Booth is an apprentice mechanic at Sims Brothers. He started work there about 5 months before Mr Smaill's employment ended and considers it a good work environment.

### **Initial problems**

[9] Mr Smaill's evidence is that from around mid 2008 the working environment and atmosphere at Sims Brothers started to deteriorate. Mr Eade's evidence is that he was told by Mr Roker (around when he started in mid 2009) of *issues with the staff that he did not understand, and that he was concerned that Matt [Smaill] was depressed and run down*. Mr Eggeling's evidence is that he noticed the tension and feeling of unhappiness in his work mates when he started work there in about November 2009. Clearly by mid 2009 there had been some deterioration in the previous good working environment experienced by staff generally.

[10] One of Mr Smaill's jobs was to use cleaning chemicals to clean up the workshop floor on a Friday afternoon. On Friday 10 July 2009 when they had run out of the normal chemical Mr Smaill used another chemical. Mr Roker says that it created a serious workplace hazard, that the drum was clearly marked as a hazard and Mr Eade had specifically told Mr Smaill not to use that chemical. Mr Eade's evidence is that he recalls reading the label and telling Mr Smaill not to use the product. I prefer this evidence from Mr Roker and Mr Eade to the extent it differs from that of Mr Smaill.

[11] Mr Roker spoke to Mr Smaill about this episode on the Monday morning (13 July 2009). There is a difference between Mr Roker and Mr Smaill about what was said. Mr Roker's evidence is: *This is the one occasion ...that I raised my voice to Matt but I definitely did not swear or curse at Matt*. Mr Smaill on the other hand says that Mr Roker yelled at him: *Matt, office now! He then yelled On Friday night I was here till six-fucking-thirty cleaning up the fumes and shit you put on the floor. I told you to clean your fucking bin and not leave it on the bench. You know you are fucking better than that - get your attitude sorted out! Mr Smaill tried to talk to Mr Roker but he would not listen. On balance, I prefer Mr Smaill's evidence. He made a note of this later that day which is partly how we now know the date of the incident. On my assessment of Mr Roker's character it is how he probably would speak when especially angry with an apprentice, as he now admits he was. There were also several occasions during Mr Roker's evidence that he vehemently but wrongly denied something but would not recant even when given an opportunity to back down. I have formed the view that Mr Roker knows that he should not have spoken to Mr Smaill like this but he is not prepared to openly admit doing so now.*

[12] Mr Smaill went home at the end of the day very upset. He told his mother about the incident. On Tuesday 14 July she went to speak to Mr Roker. Mr Eade and Matthew Smaill were present. She told Mr Roker that the way he had spoken to Matt was unacceptable. Mr Roker in evidence now denies doing so but I accept Mrs Smaill's evidence that Mr Roker apologised for speaking this way.

[13] There is other evidence that ties in with this episode. Mr Smaill told his doctor on 16 July 2009 that he was very stressed at work, his employer was getting on his case about being depressed and his work not being up to standard and had accused him of taking drugs. He told the doctor that he did not look forward to going to work. I accept that the doctor's notes

accurately record what Mr Smaill said that day to the Doctor. I also accept that Mr Smaill accurately described to his doctor how he felt about work. Mr Roker's conduct on 13 July 2009 was no doubt the worst but was possibly not the only incident to that point that had affected Mr Smaill's attitude to his work. However there is no evidence of any specific incident prior to this time.

[14] Mrs Smaill's evidence is that Mr and Mrs Roker approached her at work one day saying that they were worried about Matt and concerned that he was on drugs. Her response was that if they thought that they did not know her son very well. Incidentally I should note that Mr Smaill's sporting involvement put him at risk of random drug testing. Both Mr and Mrs Roker deny saying any such thing to Mrs Smaill. When questioned, Mrs Roker emphatically denied thinking that Mr Smaill was on drugs or saying it to Mrs Smaill. However, she next said in evidence *At one stage we were going to talk about it, but then we thought no, it can't be true*. This last piece of evidence is inconsistent with part of Mrs Roker's emphatic denial. I prefer Mrs Roker's evidence to the effect that she and her husband entertained the notion that Mr Smaill might be on drugs. On balance I prefer Mrs Smaill's evidence that Mr and Mrs Roker spoke to her about this. Mr Smaill's evidence is that he spoke to his doctor about getting a drug test done because Mr Roker had accused him of taking drugs. The doctor's note confirms that Mr Smaill mentioned this on 16 July 2009 so I accept Mr Smaill's evidence on this point. It is another reason to reject Mr and Mrs Roker's evidence on this topic. The major significance of this point is what it says about the reliability of Mr and Mrs Roker as witnesses. The exchange also contributed to Mr Smaill's feelings about the workplace.

### **Events from September 2009**

[15] It is common ground that there was a meeting between Mr Smaill, Mr Roker and Mr Eade in early September 2009 at the end of the working day, perhaps on Saturday 5 September 2009. Mr Roker's evidence to explain why this meeting was convened is that *Nothing Brian [Eade] and I did had any effect and we began to get really concerned that Matt might be depressed*. Mr Roker and Mr Eade put to Mr Smaill the following issues: lack of concentration, general poor demeanour, inexplicable mistakes, poor following of directions, lack of attention, concern that he might cause a serious incident, not attending polytech. Mr Smaill did not dispute these concerns and did not explain their cause. Mr Roker's and Mr Eade's view was that Mr Smaill should stand down from work for two weeks and take that time to evaluate what he wanted to do with his life, whether to continue with Sims Brothers or another firm or look for work in another field. They told Mr Smaill to think about these matters over the weekend and come back on Monday with a support person to discuss them. Mr Smaill's evidence is that he felt bullied as a result of this meeting.

[16] There was a further meeting late morning on Monday 7 September 2009 involving Mr Smaill, his parents, Mr Roker and Mr Eade. There were several specific complaints about Mr Smaill's work. It was alleged that he had failed to tighten a wheel nut on a vehicle, was not putting service stickers on vehicles, had used the wrong part on a vehicle and had serviced the wrong trailer. There are notes of the discussion typed up by Mrs Smaill on 8 September 2009 which were not challenged as a substantially accurate account of the meeting. The conclusion was that Mr Roker and Mr Eade would review Mr Smaill in two weeks. It is not recorded in the notes but Mr Roker and Mr Eade agree with Iain Smaill's evidence (which I accept) that they all agreed that if there were to be any further meetings with Matt Smaill he must be allowed to have a representative present with him. The request reflected Mr Smaill's concern about being bullied by Mr Roker and Mr Eade but there is no evidence that this was said to them during this discussion.

[17] On 15 September 2009 Mr Eade criticised Mr Smaill for being late. I accept Mr Smaill's evidence that he had arrived at work by 7.58 am and attended to a couple of work matters before going into the office at 8.03 am where Mr Eade said *You're late! Why are you continuously late?* Mr Smaill referred to traffic and was told not to let it happen again.

[18] On either 16 or 17 September 2009 Mr Roker and Mr Eade reproached Mr Smaill over a matter from the day before. There are notes made by Mrs Smaill of her son's account of the exchange. The notes indicate (and I accept) that Mr Smaill thought he had been asked whether he had checked the toe in on a vehicle while Mr Roker believed that he instructed Mr Smaill to do that job. Mr Roker and Mr Eade reproached Mr Smaill for the way he had replied to Mr Roker. I accept Mr Smaill's characterisation of this meeting as the two older men getting *stuck into* and *having a go* at him. Mr Smaill was not given a reasonable opportunity to explain his side of the issue.

[19] Mr Smaill was upset when he got home after work and he told his parents about this episode. His father's evidence is that he rang Mr Roker at home on Thursday 17 September 2009. Mrs Roker answered and said that Mr Roker was taking her mother home but would ring back on his return. Iain Smaill says that when Mr Roker rang back he told Mr Roker that he considered that his son was being bullied and he wanted a meeting with Mr Roker to discuss matters. Mr Roker said that he would get back to him with a time one night after work. In evidence Mrs Roker denies receiving this call at home. When I asked her how Iain Smaill would know about Mr Roker taking her mother home she said that Mrs Smaill knows that Mrs Roker's mother often (but not always) comes to their place for dinner on a Thursday night and Mr and Mrs Smaill were using this information to make up their evidence about the phone call. It is unlikely but not inconceivable that someone might invent a story of this sort. Apart from anything else there would always be the risk of good evidence to disprove the story. However, Mr and Mrs Smaill did not impress as people likely to invent such a story. I accept on the balance of probabilities that, seeing his son upset and in light of the agreement from the 7 September 2009 meeting that his son would be allowed a representative in the future, Iain Smaill did ring and have the conversations outlined above with both Mrs Roker and Mr

Roker. I also accept that Mr Roker did not call Iain Smaill back with a proposed meeting time.

[20] On 29 September 2009 Mr Roker spoke to Mr Smaill about an upcoming polytechnic two day block course asking him if he wanted to attend it. Mr Smaill said he did and Mr Roker told him that he would have to take holidays as he was not prepared to give him paid time off otherwise. Mr Roker's evidence, which I accept, is that he was not prepared to pay for attendance at this optional pre-exam course because of his view that Mr Smaill had not bothered to attend the regular night classes. I note that the relevant Apprentice Report shows that Mr Smaill's evening class attendance at 58% and that he achieved *A very good result* overall for the year.

[21] Mr Smaill's evidence, which I accept, is that Mr Roker asked him on 1 October 2009 if he and his father still wanted the meeting asked for on 17 September 2009. Mr Smaill confirmed that they did.

### **Assaults?**

[22] Mr Smaill says that there was an incident on 7 October 2009 when he was slapped or hit on the back of the head by Mr Roker. Mr Roker denies this. It is not suggested that anyone else witnessed the incident. The situation unfolded as follows. Mr Smaill says that at about 2pm Mr Roker came to him and asked him for a meeting now. Mr Roker went over Mr Smaill's previous mistakes and would not let him speak. Mr Roker was overbearing and aggressive and invaded Mr Smaill's *personal space*. He told him he was costing him money and that he was the boss and said *If I have to give you final notice then so be it!* At the end Mr Roker slapped Mr Smaill on the back of the head and said *Let's get back into it!* Mr Smaill's evidence is based on a note he wrote and dated 7 October 2009. Mr Roker says that the evidence about him hitting Mr Smaill is untrue but he does not deny speaking to Mr Smaill.

[23] There is evidence of a second similar incident on 6 November 2009. Again it is not suggested that anyone else witnessed this incident. Mr Smaill was fitting a seat into a vehicle. His evidence is that Mr Roker told him he should be using a 3/8" drive ratchet instead of a VV" drive ratchet. Mr Smaill said he knew but it was what he had in his pocket and he would check it later with the correct one. Mr Roker launched into an abusive tirade about tools which included calling Mr Smaill *cunt-head*. He finished this by slapping Mr Smaill on the side of the head saying *Smart arse know it all apprentices!* Mr Smaill's evidence reflects a note made by him. Mr Roker denies ever hitting or swearing at Mr Smaill but acknowledges there was an exchange about use of the correct tool. Mr Roker's admission in evidence to twice yelling at Mr Smaill does not relate to this occasion.

[24] There is a signed but unsworn statement from Iain Smaill's lawyer (John Lucas) to the effect that he was phoned by Iain Smaill and told of an assault situation but he did not note any details or when he received the call. There is also Mrs Smaill's evidence that she was told by her son about the 6 November 2009 matter that day after work. Neither alleged assault is specifically recorded in the doctor's notes although the 10 November 2009 notes reads *also work no better. Still getting harassed by boss most days* while the 24 November 2009 note includes *last month at work not as bad*.

[25] For the most part I am left to determine these points based on my assessment of the reliability of Mr Smaill and Mr Roker as witnesses. Mr Roker impressed me as someone who could get angry and become abusive in the manner alleged. There is a similarity between words allegedly used on 6 November 2009 and words allegedly used by Mr Roker (and which I later find were used) at the time the employment ended. I conclude that Mr Roker probably did verbally abuse Mr Smaill in the manner alleged. If Mr Roker did not give reliable evidence about that part of the exchange it is difficult to place much store on his denial of the assaults. Mr Smaill on the other hand generally gave reliable evidence. I therefore accept his evidence that he was slapped on the back of the head by Mr Roker on these two occasions.

### **Subsequent events and Final warning**

[26] There is evidence, which I accept, of Mr Eade reproaching Mr Smaill on 29 October 2009. It is not necessary to canvass the details.

[27] Mr Smaill saw his doctor again on 10 November 2009 and was prescribed Citalopram. The notes record him telling his doctor *still getting harassed by boss most days, feeling down, ...nearly done w apprenticeship but boss yet to sign paperwork, looking for new job...*

[28] There was the Christmas work function on 6 December 2009. Mrs Roker told staff that the business would pay for taxis. However, Mr Smaill decided to organise at his own expense a limo to take him, his parents and a work colleague to the function. Mrs Smaill's evidence is that *Bev Roker got stuck into Matt about getting the Limo* and that Mrs Roker was angry. Mrs Smaill says that Mrs Roker was yelling about it the next day at work. Mrs Roker's evidence is that she was not yelling about this at work. However it is clear that she felt strongly at the time. She seems to have thought that Mr Smaill would expect the company to pay for the limo and that other staff would think the company had paid for Mr Smaill's group to have a limo when they would only get a taxi supplied. Mrs Roker still seemed to have an issue about it at the investigation meeting. Her evidence is that she was not happy about it, that they (Mr Smaill, his parents and the work colleague) were smirking about arriving in a limo and she had to field questions from others about why they were not provided with a limo. I find that Mrs Roker did criticise Mr Smaill about this during or after the Christmas function. It is not necessary to make any other findings about this issue.

[29] On 9 December 2009 Mr Smaill was working under Mr Eade's supervision who said he wanted to be present when Mr Smaill put the cylinder heads back on the vehicle that was being worked on. There was the potential for serious damage to the engine if the task was not performed correctly. Mr Smaill did as instructed for the first part of the job. Mr Eade was then called away on other work. Mr Smaill waited for a while, then went and reminded Mr Eade that he was ready to do the second part of the job. He also spoke to Mr Roker who reiterated Mr Eade's instruction. After another while when Mr Eade had not returned Mr Smaill got another tradesman to help. Mr Eade then returned. He criticised Mr Smaill using profane language for not waiting for him. Mr Eade admits raising his voice to Mr Smaill and being *pretty upset* over this incident. I find that he probably did use profane language.

[30] Either the night of the incident (Mr Eade's evidence) or the next morning (Mr Smaill's evidence), there was a meeting about it between Mr Eade and Mr Smaill. Mr Eade told Mr Smaill that things were not good, that his disobedience of the order was grounds for instant dismissal, and that nothing had changed despite previous meetings. Mr Eade told Mr Smaill that there were two options: a written warning or DCM. Mr Smaill asked what DCM meant and was told it meant *Don't come Monday!* Mr Eade told him it was his choice but Mr Smaill said they had to make the best choice for Sims Brothers. Mr Eade told him he would have to speak to Mr Roker but he already knew that Mr Roker did not want Mr Smaill there any longer. This account is based on Mr Smaill's notes but Mr Eade does not dispute the broad thrust of the exchange.

[31] There were discussions between Mr Eade and Mr Roker about this matter, probably after the exchange between Mr Smaill and Mr Eade just mentioned. Mr Eade's evidence, which I accept, is that it was agreed that they would give Mr Smaill a warning. Mr Eade drafted it and checked the draft with Mr Roker before giving the warning to Mr Smaill. That happened on Friday 11 December 2009. Mr Smaill's evidence is that Mr Roker, Mrs Roker, Nicola Roker and Mr Eade were in the office when he was given the warning letter. Nicola Roker's evidence is that she was not even on site at the time. There is no proper basis to disbelieve Ms Roker's evidence so Mr Smaill must be wrong on that point. Mr Smaill confirmed that he entered the office from the workshop rather the adjoining reception/office area which is partitioned off from Mr Eade's office. Anyone else would have been in the partitioned off area so they were not really present. Mr Eade gave Mr Smaill an envelope with the warning letter inside. I accept Mr Smaill's evidence that he was told that he was *fucking lucky* that this was all he was getting in light of his previous mistakes. It is not necessary to set out the text of the letter except for the final paragraph which reads in bold:

***Sims Brothers (1992) Ltd do hereby give you your final warning. Any further breaches of instructions or procedures will result in instant termination of your employment with Sims Brothers (1992) Ltd.***

[32] Mr Smaill sought legal advice about this warning. His solicitor wrote to Sims Brothers on 15 December 2009 raising a personal grievance about the final warning and referring to *a number of other issues regarding Mr Smaill's treatment at work, including bullying, verbal abuse and what can only be described as an assault*. Mr Roker wrote back on 15 December 2009. His letter reads:

*Dear Janet*

***Matthew Smaill - Employment***

*Sims Brothers (1992) Ltd acknowledge your letter dated 15 December 2009 regarding our employee Matthew Smaill.*

*We do not know what Matthew has done with his previous written warnings which we obviously have a record of. Matthew has also had support people at the other meetings which were recorded.*

*In order to address the accusations of bullying, verbal abuse and assault which we have not been notified about at the time of the incidents, we need in writing the dates, names and details of when these allegations took place in order to investigate these claims.*

*As we take these allegations very seriously, please forward us the details of the above*

*incidents so we can carry out our own investigation*

*Yours faithfully*

*Roy Roker*

*Manager*

[33] Two matters arise from this correspondence. First, Mr Roker's claim not to be aware of any prior allegation of bullying. That is also Mr Roker's evidence but I do not accept that evidence. Iain Smaill mentioned bullying on 17 September during his phone discussion with Mr Roker who promised to arrange a meeting but did not do so. The second matter is the claim about previous written warnings. There are none. When I asked Mr Roker about this he first attributed the claim to his daughter who he said typed the letter. When pressed he acknowledged that she was not responsible for the content. He then explained the claim by saying *Maybe it's my English*. Mr Roker has otherwise shown the ability to express himself clearly. His last

explanation was that the final warning was withdrawn anyway as soon as they received the solicitor's letter. That too is incorrect. These exchanges have contributed to my assessment about Mr Roker's reliability as a witness.

[34] On 22 December 2009 there was an incident where Mr Smaill used a vice instead of a press to do a job (contrary to instructions) which resulted in him breaking the vice. Mr Eade's evidence, which I accept is that he heard Mr Roker raise his voice to Mr Smaill on this occasion. Mr Roker's evidence is to similar effect.

[35] Mr Smaill finished work for Christmas in late December and resumed work in the New Year after the Christmas closedown.

[36] Sims Brothers instructed Otago Southland Employers Association (OSEA) to represent the company over the grievance claim. By letter dated 3 February 2010 OSEA responded further to the lawyer's letter of 15 December 2009. The letter says that the final written warning was substantively justified but acknowledges that it was procedurally unfair so was withdrawn. There are a number of subsequent complaints listed which the letter said *will need to be addressed, either at mediation or via a disciplinary meeting.*

[37] On 4 February 2010 there was an incident where Mr Eade chided Mr Smaill for taking too much time over a job. Mr Smaill endeavoured to explain why the job had taken longer than usual but Mr Eade would not listen.

### **Termination of the employment**

[38] Mr Smaill arranged some annual leave for February 2010 to attend a rowing regatta in the North Island.

[39] Arrangements were also made for a mediation meeting for Thursday 11 February 2010. Mr Smaill also organised with his father to help him remove his tools from the workplace at the end of work on 10 February. Mr Smaill and his father got the tools onto the truck and they asked Mr Roker to check the tool box before they left the premises. Mr Roker started to check the tool box but he stopped part way through. There is a dispute about part of what happened next. It is not suggested that anyone else overheard the exchange. Mr Roker's evidence is that he was cross and angry. That is not in dispute. His evidence is that he asked *What am I checking the tools for - I never do that!* He leaped off the truck and swore at Iain Smaill by saying *Fuck off!* Mr Roker denies using any other abusive language during this exchange.

[40] Matt Smaill's evidence is that he wrote a note about this exchange immediately after they left in the truck. His and his father's evidence is based on the note. The note reads:

*10/2/10 5.23pm*

*Dad arrived at 5.pm. On the advice of my lawyer, we asked Roy to check my tool box before we left, 20 mins later he pulled me aside and asked dad to step out, he said to me "what the fuck do you think your doing." I said, what I've been told to do, He said by who, I said my lawyer, He said do you have anything to say, I said no, He said oh fuck this, I then asked him again to check my tool box he checked it whilst saying "I don't even want to do this I don't even want to see you cunts again. Fuck off!!! We never said anything to him.*

*He also went onto say you need to stand up for myself as your father won't be here forever.*

*He turned to dad & said let him grow*

*His manner & tone was extremely aggressive* [41] As to the exchange on 10 February 2010 I prefer the evidence of Mr Smaill and his father. Mr Roker was angry on his own admission. As noted above my impression is that he is a man who could be abusive in the manner alleged when riled or angry. The note was made within a few minutes of the incident when Iain Smaill stopped the truck shortly after leaving the workplace. Matt Smaill made the note because he had been advised to keep a record.

[42] I asked both Matt Smaill and Iain Smaill why they wanted to remove the tools from the workplace. Both men denied that it was in preparation for resignation.

[43] It is common ground that Mr Smaill worked on the morning of Thursday 11 February 2010. It is common ground that Mrs Roker told Mr Smaill to leave his boots at work when he left. Mr Smaill's evidence is that he was also told to leave his overalls behind. Mr Smaill routinely left these items at work. I asked Mrs Roker why and her response was *Couldn't say, sorry.* I asked again if she could help me understand why and she said *No, sorry.* My impression was that she knew why she had told Mr Smaill to leave the items behind but she but was not prepared to tell me.

[44] Following the mediation (which did not resolve matters) on Thursday 11 February Mr Smaill rang Sims Brothers to say that he would be off work on Friday on stress leave. The medical notes record him seeing his doctor on Friday 12 February 2010 who again prescribed Citalopram and referred him to Ashburn Clinic, a private psychiatric clinic.

[45] Mr Smaill was away at a sporting event during the following week. On 16 February 2010 OSEA wrote to Mr Smaill's lawyer confirming that Mr Smaill remained employed but on paid leave in the meantime. OSEA repeated an offer that Mr

Smaill would work only with Mr Roker for the next six months, that existing disciplinary issues would be set aside and that the company would fund some counselling for Mr Smaill.

[46] There was a response to this by email on 17 February 2010 as follows:

*Dear Jen*

*It is unfortunate that we have not been able to reach agreement.*

*My client will not be returning to Sims Brothers as he no longer feels safe working there.*

*For Matt, the thought of remaining in the employ of Sims Brothers has become untenable. The failure of Mr Roker to address the complaint of bullying when the issue was raised with him, and the fact that Matt continued to be bullied after September 2009 has lead to an unsafe work environment, giving Matt no other choice but to resign.*

*We shall be filing proceedings in the Employment Relations Authority in due course. Janet Marquet*

### **Constructive dismissal**

[47] Mr Smaill says that he was constructively dismissed.

[48] In *Auckland etc Shop Employees' etc IUOW v Woolworths (NZ) Ltd* [1985] ACJ 963, the Court of Appeal held that constructive dismissal includes cases where the employer gives the employee a choice between resigning or being fired, or the employer embarks on a course of conduct with the deliberate and dominant purpose of coercing the employee to resign, or a breach of duty by the employer leads the employee to resign. I will first consider the third category. Not every breach of duty is sufficiently serious to give rise to a personal grievance of constructive dismissal. In *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers' IUOW Inc* [1994] NZCA 250; [1994] 1 ERNZ 168 the Court of Appeal said:

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

[49] I turn first to what caused the resignation. There is evidence from Iain Smaill about the brief discussion between him and his son straight after they left the workplace on 10 February 2010. Matt Smaill told his father *That's what it's been like for me!* Iain Smaill responded *You're not going back!* I have already mentioned the lack of a satisfactory explanation from both men about why they decided to take Mr Smaill's tools from the workplace when Matt Smaill was only going to be on holiday for a week. In evidence Mr Smaill added when I asked him about the tools *It was the mediation that made things change.* Later, in response to counsel he said that following a discussion between himself, his parents and the lawyer *with what had happened that I would resign. It was the conversation that persuaded me not to come back.* I have formed the view that Matt Smaill was considering whether to resign before the incident that occurred on 10 February and Mr Roker's conduct that day was essentially the last straw unless matters were resolved at mediation. They were not and I am not able to inquire into those exchanges. Matt Smaill's decision to resign was caused by the abuse and physical assaults that he had endured for some time. There was no other reason for the resignation.

[50] A number of serious acts and omissions have been proven on the evidence: Mr Roker's abusive tirade on 13 July 2009; the failure to honour the promise of 7 September 2009 about allowing Mr Smaill to have a representative present; Mr Roker's failure to respond following the 17 September phone call from Iain Smaill; the abuse and assault on 7 October 2009; the abuse and assault on 6 November 2009; the complete lack of fair process over the final warning; and the abuse on 10 February 2010. There are also other less serious episodes of abuse referred to above.

[51] I find that it was reasonable foreseeable that Mr Roker's conduct might result in Mr Smaill's resignation. I do not know why Mrs Roker was not prepared to tell me why she insisted that Mr Smaill leave his overalls (and boots, on Mr Smaill's evidence) at work on the morning of 11 February 2010. It may be that she and Mr Roker anticipated that Mr Smaill would not return to work after the incident on 10 February. If so, that would strengthen the foreseeability finding. In any event, the abuse and bullying was of a serious nature and it is hardly surprising that Mr Smaill eventually got to the point where he could tolerate it no longer. That view is reinforced by the company's failure to honour the promise about Mr Smaill's right to a representative.

[52] It is not necessary to deal with the other aspects of the constructive dismissal or unjustified disadvantage arguments made on Mr Smaill's behalf.

[53] Finally I should say that on the facts as found the situation came very close to an actual dismissal or sending away by

dint of Mr Roker's conduct on 10 February 2010. It was probably only the imminent mediation date that stopped Mr Smaill taking the abusive comments as an actual dismissal.

## Justification

[54] Whether the decision to dismiss Mr Smaill was justifiable must be determined on an objective basis by considering whether the employer's actions and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time.

[55] There was no attempt by Sims Brothers to justify a dismissal. The dismissal, whether actual or constructive, was completely without justification.

## Remedies

[56] There is a claim for compensation for humiliation, injured feelings and loss of dignity under [s.123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act 2000](#). In submissions counsel argued that \$10,000.00 is an appropriate sum to compensate Mr Smaill.

[57] Mr Smaill saw a consultant psychiatrist on 12 March 2010 following his doctor's referral on 12 February 2010. The doctor's notes confirm that Mr Smaill was prescribed antidepressant medication as a result of symptoms attributed to what had been happening in the workplace. The psychiatrist reported Mr Smaill describing symptoms

*...of both depression and anxiety over the past year, when his attachment to his firm as an apprentice, which had initially gone well, became characterised by increasing criticism from his boss, delivered at times by screaming and yelling at him, and on two occasions physically hitting him. Matt had noticed increasing fatigue, loss of motivation and drive, loss of pleasure in things that would normally give him pleasure (including his rowing activities), and loss of confidence in himself.*

*The symptoms seemed to be a mixture of primary stress overload symptoms with some mild secondary depression, and were responding to both the removal of the stressor by leaving the unpleasant work situation, and the use of antidepressant..*

[58] The views expressed by the psychiatrist are consistent with the evidence given by Mr Smaill and his parents about the effects on him of the dismissal and the abusive behaviour that caused it. There is no reason to doubt any of that evidence. There is a submission that the onset of Mr Smaill's depression preceded any abuse. When the point was put to Ms Smaill by counsel he said *Until mid 2009, I brushed things aside. There were heaps of things, on going. It was always happening.* That is no doubt why the 16 July 2009 doctor's note reads *last several mos. No motivation.* However, there is evidence only of specific episodes of abuse from July 2009. Even if the depression was not wholly caused by the proven abuse, the company's wrongful actions made the depression more serious than would otherwise have been the case.

[59] I consider that \$10,000.00 is an appropriate award of compensation for those proven effects.

[60] The evidence about lost remuneration is unsatisfactory. Mr Smaill told me that he started his current employment in late April or early May 2010. However the claim outlined in counsel's submissions is for three months wages without any deduction for earnings from other employment within the three months. The best course is to reserve the issue to give both counsel an opportunity to confer but to indicate that I would award actual lost remuneration for up to thirteen weeks from the date Mr Smaill's employment terminated with a deduction allowed for any earnings from other employment during that period if at a lower rate.

[61] It was not suggested but I should record that there was no blame-worthy contribution by Mr Smaill to the circumstances giving rise to his grievance. I accept, as did he, that he made some mistakes in his work. However, the grievance arose because of the way Mr Roker in particular behaved not because of Mr Smaill's mistakes.

## Orders

[62] Pursuant to [s.123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act 2000](#), Simms Brothers (1992) Limited is to pay Mr Smaill compensation of \$10,000.00.

[63] Pursuant to [s.123\(1\)\(b\)](#) and [s.128\(2\)](#) of the [Employment Relations Act 2000](#), Simms Brothers (1992) Limited is to pay Mr Smaill compensation for lost wages equal to his actual loss up to 13 weeks following the termination of the employment. Leave is reserved in case of difficulty with quantum.

[64] Costs are reserved. Any claim for costs should be lodged with the Authority and served on the other party within 28 days who may then lodge and serve a response within a further 14 days.

Philip Cheyne

Member of the Employment Relations Authority

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