

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Murray Taylor (Applicant)
AND Steel & Tube Holdings Limited (Respondent)
REPRESENTATIVES Jenny Guthrie, Counsel for Applicant
Barry Dorking, Counsel for Respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING Dunedin 24 May 2006
DATE OF DETERMINATION 10 August 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Murray Taylor worked for Steel & Tube Holdings Limited from 4 July 2005 until he resigned in September 2005. He says that he has an unjustified disadvantage grievance because Steel & Tube Holdings Limited failed to provide him with an individual employment agreement and because it did not address the workplace bullying that he suffered. Mr Taylor says that this state of affairs continued for some weeks and his health deteriorated so badly that he could not cope. He resigned and he says that he therefore has a constructive dismissal grievance. Mr Taylor seeks compensation for the grievances and the imposition of a penalty for the failure to provide him with an individual employment agreement.

[2] Steel & Tube Holdings says that Mr Taylor misrepresented his skills, experience and personal qualities during the appointment process; that he failed to perform to a satisfactory level; that it provided extensive help and coaching; and that Mr Taylor chose to resign effective 3 October 2005 having been given the opportunity to withdraw his verbal resignation tendered on 27 September 2005.

Issues for determination

[3] The points about the lack of a written employment agreement and misrepresentation will be dealt with first. I will then review what happened during the employment to the extent necessary to resolve the personal grievance claims.

The employment agreement

[4] Mr Taylor was engaged to work in the trade shop to replace another employee who was leaving. The trade shop is part of the respondent's business in Dunedin. Mr Taylor applied for the position by completing a standard application form and attaching his CV. He was interviewed by the Branch Manager (Kevin Jones) and the Administration Manager (Debbie Casson). Mr Jones contacted Mr Taylor's referees who supported his assessment that Mr Taylor would be a suitable appointee. Mr Jones then phoned Mr Taylor and offered him the position and followed that up with a letter dated 28 June 2005.

[5] The letter said that Steel & Tube Holdings has two employment agreements covering the proposed work, either an individual agreement or a collective agreement, both containing the same terms. A copy of neither agreement was included. The letter did include a form headed *Acceptance of Conditions of Employment*. Mr Taylor was asked to bring the signed form with him on his first day. Mr Taylor signed the form and dated it on 4 July 2005. It includes an acknowledgment that *I have read, understood and agree to be bound by the terms and conditions of the Agreement ...*. On the form, Mr Taylor indicated that he did not want to join the Union. There is an *induction process checklist*. Mr Taylor signed and dated that on 4 July 2005 to indicate *conditions of employment explained*.

[6] There is an apparent conflict in the evidence about an arrangement for Mr Taylor to work overtime. Mr Taylor says that he was offered the opportunity to work from 8am to 5pm, take a 30 minute lunch break and work (and be paid) overtime between 4.30 and 5pm each day to make up for the lower wage compared with his previous employment. He understood this arrangement to be unique to him. However, the company's evidence (which I accept) is that others operated under a similar arrangement. It became an issue when Mr Taylor left at 2.30pm one day to go to the dentist. His pay for that week was all at ordinary time because he had not worked more than 40 hours for the entire week. Pay was calculated in accordance with the clause in the collective agreement (and the identical individual agreement) which provides for an overtime rate only when more than 40 hours are worked in the week. Mr Taylor thought he should have been paid overtime for the extra half hour that he worked on the other four days of the week. By that stage (August 2005), there were some other problems so he requested a copy of his employment agreement.

[7] The evidence for Steel & Tube Holdings is that it mistakenly gave him a copy of his signed *acceptance of conditions of employment* form when he requested a copy of his employment agreement after the overtime payment issue arose, but that a copy of the collective agreement was readily available in the staff smoko room and in the office café. Mr Taylor says that he never saw the collective agreement in the smoko room but I accept the company's evidence.

[8] As indicated above, on 4 July 2005 Mr Taylor signed acknowledgments that he had chosen an individual agreement identical to the collective agreement, had his conditions of employment including hours of work and overtime explained, and that he had *read, understood and agree[d] to be bound by the terms and conditions of the agreement*. If he had wanted a copy of his employment agreement at that time, it would have been easy enough for him to request one. There is no difficulty establishing that Mr Taylor's terms of employment, including overtime, were as expressed in the collective agreement. Steel & Tube Holdings did not fully comply with its obligation to actually provide a copy of the intended employment agreement but in all the circumstances, there is no merit in the claim for the imposition of a penalty.

Misrepresentation

[9] Steel & Tube Holdings says that Mr Taylor oversold his skills, experience and personal qualities during the appointment process to such a degree that there was a serious mismatch between his actual skills and the requirements of the position, leading inevitably to a failure by Mr Taylor to perform to a satisfactory level.

[10] There were difficulties for Mr Taylor in picking up the job, more of which later. However, it does not follow that Mr Taylor must have exaggerated or oversold his abilities. The CV, Mr Jones' evidence about what was said at the interview and the recorded comments of the referees all support the view that Mr Taylor represented his skills and abilities in a positive but realistic manner. There is no merit in Steel & Tube Holdings' complaint.

What happened during the employment

[11] The job required Mr Taylor to be familiar with Steel & Tube Holdings' products and the operation of the computer system to promptly process trade sales for waiting customers.

[12] Mr Taylor is critical of Steel & Tube Holdings about the training support he received whilst Steel & Tube Holdings says that Mr Taylor did not perform satisfactorily despite extensive training support. The first point is that the departing employee (Lance) remained at Steel & Tube Holdings for the first 3½ weeks of Mr Taylor's employment. For one week of that time, Lance worked away from the trade shop. While they were working together in the trade shop, Lance tended to take over and deal with any problems.

[13] There is an evidential dispute about the amount of computer training provided. Mr Taylor says that there were only six or seven individual sessions with Ms Casson. Ms Casson says that there were approximately 15 one hour training sessions. I see no reason to doubt Ms Casson's evidence about that. However, Mr Taylor was still not proficient with the computer. He was reluctant to disturb other staff with his problems because they were getting annoyed with him. Eventually, arrangements were made for Mr Taylor to go to a computer course in Christchurch with another employee (Rangi). This was agreed about the end of August 2005 with the course scheduled for the end of September.

[14] A difficulty arose with Mr Taylor taking his breaks. It seems that the practice previously was that staff would interrupt their breaks to attend to customers. Mr Taylor was not prepared to do this and insisted on taking an uninterrupted break. That put him offside with his work mates and he was the target of some banter. One of them (Mike) complained to Mr Taylor that his stance was putting pressure on the others who had to cover for him. Mr Taylor stuck to his guns. He spoke to the foreman (Stan) about the banter who spoke to Mr Jones, who in turn approached Mr Taylor. Mr Jones then spoke to Mike who denied Mr Taylor's account. Mr Jones reported that back to Mr Taylor and the matter ended there. However, Mr Jones did make it clear to other staff that Mr Taylor was entitled to an uninterrupted break. To avoid any banter, Mr Taylor started taking breaks in his car rather than in the smoko room. This was about mid-August 2005.

[15] Because of feedback from other Steel & Tube Holdings branches and customers about incorrectly supplied goods and errors apparent at the branch, Mr Jones asked Mr Taylor to make a list of where he needed more training. Mr Taylor's evidence is that he did not get around to doing this.

[16] Mr Jones also decided to get some of Mr Taylor's colleagues to note his mistakes in a book. There is no reason to doubt Mr Jones's evidence that he spoke only to the administration staff and

that the book was kept in the office. The seventh entry in the book (the first with a date) is dated 18 August 2005. Mr Jones thinks he initiated the book a week or two before that date. There are several negative comments linked to the issue about breaks. Most of the other comments are about mistakes. Several comments are about Mr Taylor's manner with customers. Mr Jones met with Mr Taylor on 24 August 2005 to discuss these matters. Ms Casson was also present. This was not a disciplinary meeting. Mr Jones told Mr Taylor about the book and showed him the various entries. Ms Casson's evidence is that *Murray was obviously shocked ...*. Mr Taylor asked if a book had been kept for anyone else and Mr Jones said there had been no need. Mr Taylor's evidence is that he was *gobsmacked*. It is common ground that Mr Taylor did not mention during this meeting any complaint about continued bullying by work mates.

[17] Next day, Mr Taylor asked for and was given a copy of the mistakes book. His evidence is that when he read it he realised that ... *it wasn't just about mistakes, it was a personal attack on me*. That is a reference to four of the 19 records. Mr Taylor's evidence is that he was angry about a lot of what was written down because it was not fair. He says that others called customers *mate* but he was criticised for doing this. He says he felt unfairly singled out.

[18] By about the end of August 2005, Mr Taylor was sufficiently concerned about his situation to have consulted a solicitor who wrote to Mr Jones on 9 September 2005. The letter says that the seven weeks' employment had been a long and distressing time for Mr Taylor. He felt ostracised by fellow employees for speaking up and having an opinion. This was reportedly affecting Mr Taylor's health and he was not able to cope much longer in the working environment. The letter refers to the breaks issue, unreasonable expectations that Mr Taylor would quickly pick up skills and his request for a copy of the employment agreement. Steel & Tube Holdings was asked to attend mediation to resolve matters.

[19] On 19 September 2005, the solicitor received a response from Mr Jones dated 16 September 2005. The response says that Mr Jones had sought head office advice and would respond when that was received. Mr Taylor was also made aware of this.

[20] Mr Taylor was due to travel to Christchurch for the computer course on Tuesday, 27 September 2005. His wife, Paula Taylor, had gone to Auckland to visit family on Sunday, 25 September. Mr Taylor's evidence, which I accept, is that he had been going to work for some weeks not wanting to but ... *Paula had been making me* On 27 September, instead of travelling to Christchurch, Mr Taylor rang Steel & Tube Holdings. He spoke to Rangi and told him he was sick and would not be going to the course. Mr Taylor also went to see his GP who provided him with a medical certificate for a week off work.

[21] Mr Jones learned of Mr Taylor's non-attendance at the course from the presenter who phoned him. Mr Jones then called Mr Taylor's home without response but got hold of Mrs Taylor on a mobile phone. Later on 27 September, Mr Taylor went into the branch and gave Mr Jones the medical certificate saying that he was unfit for work for six days from 27 September 2005. Mr Jones asked what was wrong and Mr Taylor said that he did not have to tell Mr Jones and that he was resigning. Mr Jones said it was company policy not to accept resignations unless in writing.

[22] There was a discussion between Mr Taylor's solicitor and Steel & Tube Holdings's HR manager (Steve Newby) on Tuesday, 27 September 2005. That apparently followed a discussion between her and Mr Jones the same day when Mr Jones told the solicitor of the resignation. Mr Newby then wrote to the solicitor on 29 September indicating a willingness to attend mediation despite the resignation but requesting more detail of the outcome sought by Mr Taylor. A copy of a letter dated 29 September 2005 to Mr Taylor was also enclosed. That advised Mr Taylor that he could unilaterally withdraw his resignation by notice to Ms Casson before 9am on Monday, 3 October 2005. The solicitor responded by letter dated 30 September 2005 confirming the

resignation and repeating the mediation proposal. Although the parties did later attend mediation, the problem remained unresolved.

Unjustified disadvantage claim

[23] I do not accept that the employer failed to clarify the terms of employment. The terms about payment of overtime are clearly detailed in the employment agreement applicable to Mr Taylor as an individual employment agreement.

[24] It is said that the *mistakes book* was an unjustifiable action. There is no difficulty with a manager recording training or work performance concerns, or mistakes made by an employee. It is not a procedural flaw that Mr Taylor did not know about the *mistakes book* until 24 August 2005. However, it would have been unfair for Steel & Tube Holdings to take any disciplinary or other disadvantageous action against Mr Taylor without first giving him an opportunity to respond to the issues recorded in the book, but that is not what happened here.

[25] However, I find that the manner in which the information was compiled did constitute an unjustified action. There was no proper reason for a staff member who needed to record a mistake by Mr Taylor to have access to the mistakes recorded by other staff members. The manner in which the record was compiled ensured that staff did have that access. The tone of several of the entries is concerning and indicates that at least some staff saw it as more than just a record for training purposes. Steel & Tube Holdings has to take responsibility for it because it initiated the process.

[26] The compilation of the *mistakes book* did disadvantage Mr Taylor. It contributed to his feeling of isolation and I accept that he felt embarrassed and humiliated and felt that the comments written about him were unfair. That in turn contributed to the stress, anxiety and insomnia reported by Mr Taylor's GP. Mrs Taylor's evidence makes it clear that Mr Taylor experienced these conditions in the latter part of the employment.

[27] The second unjustified action on the part of Steel & Tube Holdings was the delay in providing a substantive response to the 9 September 2005 solicitor's letter. At that time, Mr Jones knew that Mr Taylor had been the subject of criticism by work colleagues. He also knew that Mr Taylor had taken to having breaks on his own. There were obvious difficulties with him coming to terms with the work required of him. The letter built on that knowledge by telling Steel & Tube Holdings that the stress was impacting severely on Mr Taylor's health. What was required was a prompt substantive response from Steel & Tube Holdings, if necessary exploring the extent of the problem, and some discussion about and implementation of appropriate measures to address it.

[28] There is an implied obligation on an employer such as Steel & Tube Holdings to provide a working environment and management processes so that undue stress would not be caused to the employee and to take all reasonable care to avoid exposing the employee to unnecessary risk of injury or further injury to his physical or psychological health: see *Attorney-General v Gilbert* [2002] 1 ERNZ 31. In addition, the employment agreement at clause 41 says that Steel & Tube Holdings aims to provide a fair workplace. It encourages an employee with a concern to talk to the employer. To similar effect, the Steel & Tube Holdings *Health, Safety and Environment* policy recognises that stress can have an adverse effect and encourages employees to raise any concern urgently with the company's HR manager. In breach of these express and implied obligations, Steel & Tube Holdings did nothing in response to the solicitor's letter.

[29] Mr Taylor's employment or his on-the-job situation was disadvantaged by the failure to respond. His health deteriorated. I accept the evidence from the GP as an accurate description of Mr Taylor's condition by the end of September 2005. That led to him feeling that he could not face

work any longer. Mr Taylor's evidence about how he felt on 27 September 2005, which I accept, is *I don't think I could have made myself go anyway*.

Constructive dismissal

[30] Counsel agreed that *Auckland Electrical Power Board v Auckland Provincial District Local Authorities Officers IUOW* [1994] 1 ERNZ 168 is applicable.

[31] I find that Mr Taylor resigned predominantly because of the breaches mentioned under the heading unjustified disadvantage. The other reasons for the resignation were also work-related but do not constitute any breach by Steel & Tube Holdings. Mr Taylor is wrong about the overtime arrangement. Mr Taylor got himself offside with his work mates but that is not attributable to Steel & Tube Holdings. Its breach was the failure to take steps to deal with that situation after receiving the solicitor's letter. Mr Taylor was also struggling to come to grips with the job, particularly the use of the computer. However the training and support for the computer work provided by Steel & Tube Holdings was not deficient.

[32] What remains is whether a substantial risk of resignation was reasonably foreseeable having regard to the seriousness of the breaches. Counsel for Steel & Tube Holdings referred me to *Business Distributors Ltd v Patel* [2001] ERNZ 124 to support the proposition that breaches of duty constituting an unjustified disadvantage are not necessarily sufficient to support a claim for constructive dismissal. In that case, the Court of Appeal found that the resignation was not caused by the breaches of duty amounting to an unjustified disadvantage. Rather, the resignation was caused by the employee's unwillingness to accept a new territorial system. In the present case, I am satisfied that the resignation was predominantly caused by the breaches. That was mixed with other reasons not constituting any breach but that does not negate a constructive dismissal: see *NZ Institute of Fashion Technology v Aitken* [2004] 2 ERNZ 340.

[33] I find that a resignation was reasonably foreseeable in light of the solicitor's letter against the background known by Mr Jones. It follows that Mr Taylor was constructively dismissed and has a personal grievance.

Remedies

[34] I find that there is no loss of remuneration properly attributable to a personal grievance whether it is characterised as an unjustified disadvantage or as a constructive dismissal. In its letter dated 29 September 2005 to Mr Taylor's solicitor, Steel & Tube Holdings said it would attend a mediation meeting. In a separate letter to Mr Taylor, Steel & Tube Holdings left it open to Mr Taylor to revoke his resignation in light of the medical certificate indicating that he was unwell. In response to that, there should have been a direct meeting or mediation because that is what Mr Taylor had initially requested in order to sort out the difficulties. Mr Taylor should have accepted the invitation to withdraw his resignation and proceeded with the meeting. That he did not was his own decision and it caused the lost remuneration. Accordingly, there can be no award.

[35] Mr Taylor is entitled to compensation for the emotional distress caused by the established grievances. His claim is for \$10,000. Mrs Taylor gave evidence about Mr Taylor becoming withdrawn and tearful and having difficulty sleeping. She says it was a *truly awful time for the whole family*. The evidence about the effects on her and other family members is not relevant for present purposes, but her evidence makes it clear that there was a significant effect on Mr Taylor. Mr Taylor's GP records him as suffering acute distress, anxiety and insomnia which required a short course of medication and counselling. Accepting that evidence as accurate, I order the respondent

to pay compensation to Mr Taylor in the sum of \$6,000. In awarding that sum, I have attempted to discount the effects from Mr Taylor's incorrect perception about other alleged breaches.

[36] I find that Mr Taylor did not contribute in a blameworthy way towards the situation giving rise to the grievance. Mr Taylor was not responsible for the manner in which Steel & Tube Holdings collected information in the *mistakes book* and he did not contribute to the failure of Steel & Tube to respond in a timely manner to his call for help. While Mr Taylor should have rescinded his resignation when given that opportunity, his failure to do so is fully reflected in the finding about lost remuneration.

Summary

[37] Mr Taylor has established personal grievances of unjustified disadvantage and constructive dismissal.

[38] Steel & Tube Holdings Limited is order to pay compensation to Mr Taylor of \$6,000.00 under s123 (1)(c)(i) of the Employment Relations Act 2000.

[39] Costs are reserved.

Philip Cheyne
Member of Employment Relations Authority