

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Stephen Wilford (Applicant)  
**AND** Aden Electrical Ltd (Respondent)  
**REPRESENTATIVES** Stephen Wilford in person  
Christopher Eggleston for the respondent  
**MEMBER OF AUTHORITY** James Wilson  
**INVESTIGATION MEETING** 8 and 15 November 2006 in Auckland  
**DATE OF DETERMINATION** 19 January 2007

**DETERMINATION OF THE AUTHORITY**

**General comment on summary of evidence**

[1] During the course of my investigation I received a great deal of evidence, both written and oral from Mr Wilford and his partner and from witnesses for Aden Electrical. In this determination I have attempted to summarise much of this evidence while, I hope, recording the salient points and capturing the essence of the events which led to Mr Wilford's resignation. If I have omitted or downplayed any particular points of evidence or argument that the parties believe are germane, or I have not been sufficiently clear or precise, I apologise. I can assure all of those concerned that I have taken into account all of the evidence presented to me, whether or not recorded in this determination, in reaching my conclusions.

**The events leading to the employment relationship problem**

**Mr Wilford's perspective**

[2] Mr Stephen Wilford commenced employment with Aden Electrical as an electrical apprentice in May 2004. His employment went relatively smoothly until early in 2005 when, he says, he first started to be subjected to harassment by a fellow apprentice, Joel. In the first instance Mr Wilford says this harassment took the form of a "negative attitude" and Joel "talking down" to him. In April 2005, Mr Wilford says, Joel seemed to go out of his way to "put him down" in front of others. He says that he confronted Joel regarding his attitude but that Joel brushed it off and made light of it.

[3] In May he was advised his supervisor, Mr Paul Cooper, that he would be working on a particular worksite under Joel's supervision. He advised Mr Cooper that he "didn't think it was a good idea" that he work with Joel as they didn't get along and that Joel had picked on him at a previous job. He was told, he says, that he "would just have to accept it". During the week 17 to 23 May 2005 Mr Wilford says that he was left with Joel in sole charge of him for most of the time. He says that during that week Joel treated him badly. In his evidence Mr Wilford outlines a number of examples of ways in which he was treated by Joel, including:

- Questioning Mr Wilford about his sexuality and lifestyle, asking about his drug habits and making suggestive comments regarding his girlfriend.
- Repeatedly accusing Mr Wilford of being lazy or F\*\*\*ing lazy, and telling him his work was "crap".
- Telling Mr Cooper that Mr Wilford was lazy while at the same time taking many cigarette breaks and trips to the shop and taking credit for work which Mr Wilford had done.
- Telling Mr Wilford of his expertise in martial arts and demonstrating punches and kicks in an intimidating way, including bragging about hitting people.
- Requiring Mr Wilford to push him around on a scaffold over rough terrain, abusing him and ordering him to fix things. This Mr Wilford says was deeply humiliating and left him fatigued and in some pain.

[4] This list is by no means exhaustive but illustrates the type of behaviour outlined in Mr Wilford's evidence. He says that the cumulative effect of Joel's actions was to make him feel humiliated and demoralised and that he dreaded the thought of having to work with Joel again.

[5] For the next two weeks Mr Wilford was working on sites where Joel was not present. However on or about 7 June, Mr Wilford's says, an incident occurred which was "the final straw". On that day Mr Wilford says Joel repeatedly punched the rear window of his car while relating a story about a stabbing incident. Joel, according to Mr Wilford, suggested that he knew who had done the stabbing and that he himself would have stabbed the man as he owed the victim money. Mr Wilford says that this exchange made him feel physically sick and it was clear to him that Joel was threatening him.

[6] Following this incident Mr Wilford approached Mr Cooper, explained what had happened, said that he could not work with Joel any longer and asked that he be put into situations where he would not have to work with him. Mr Cooper apparently advised Mr Wilford that he was needed on that site as there were no other available workers. Mr Wilford emphasised that he could not work on the same site as Joel any longer. Mr Wilford says that Mr Cooper advised him later that day that he had found an alternative site for the following day.

[7] Mr Wilford says that he had a sense of "relief and triumph" that he would be free of Joel's harassment. However during the course of the next day he was asked to go back to the same work site. When he said that he was not prepared to go he was advised that Joel would not be there. However when he arrived he discovered that Joel was present and drove off in a state of distress. Later that day he was advised to go to another site.

[8] On or about 10 June Mr Wilford says he met with Mr Cooper and explained in detail what Joel had done and why he could not work with him. He says that Mr Cooper seemed sympathetic and agreed to keep them apart.

[9] A few days later Mr Wilford says he heard another employee, Tommy, say to several other employees "this guy needs the bash" and gestured with his fist in Mr Wilford's direction. Mr Wilford says that later that day he overheard Tommy saying to another employee "I've known Joel for 6 years, who does this (Mr Wilford) think he is".... He says he overheard Tommy making other negative comments about him, behind his back but within earshot, including the describing him as a "little shit" and other such derogatory comments. Later that week Mr Wilford says he mentioned to his supervisor, Mr Greg Cramond, that he was being sworn at by Tommy and that this appeared to be because Tommy was a friend of Joel's. Shortly after making this complaint he says he was approached by Tommy regarding a work matter and asked Tommy if he was going to continue to give him a hard time. He says that Tommy "flew into a rage and launched into an angry tirade". This confrontation was interrupted by Mr Cooper and Mr Cramond. Mr Wilford says that Mr Cramond told him that he would have to work with Tommy at some point but on this site he would keep Tommy in line. He said that talking to Tommy like that was stupid. Mr Wilford says this incident left him dazed and shocked and that the way had been treated by Tommy and by Mr Cramond was totally unfair.

[10] On or about 24 June Mr Wilford says he was under continuing pressure from Mr Cramond and Mr Cooper to work with Joel and it was clear that Mr Cooper's promise to keep finding work on different sites from Joel was not going to last. He says he told Mr Cramond that he felt that he would have no choice but to leave if this was the way things were going to be.

[11] On or about 27 June 2005 Mr Wilford says he arrived at work to find that Joel was going to be working on the same site. Mr Cramond apparently directed that they work from opposite ends of the building but Mr Wilford says that this would have resulted in them meeting at some stage in the middle of the building. Mr Wilford says he felt so distressed by this possibility that he could not keep working. He says he tried to talk to Mr Cramond who said that he would have to work with Joel. Mr Wilford said that he left the site feeling deeply disappointed and shocked. He says he immediately went to head office in arrange a meeting with Mr Cooper and Mr Cooper's supervisor, Mr Ian Williams.

[12] At his meeting with Mr Williams and Mr Cooper Mr Wilford says he again canvassed all of his concerns regarding the bullying to which he had been subjected. He says that Mr Williams position was that he just had to accept the situation. Mr Wilford says he explained he needed a period of respite but both Mr Cooper and Mr Williams tried to persuade him to work with Joel and told him he needed to be able to work with anybody, that they could not juggle people around to keep them separate, that it was his problem and that he should sort it out. Mr Wilford says that by this time he began to feel dizzy and sick and advised them that he could not think clearly. He said that he advised Mr Williams and Mr Cooper that he felt he had no choice but to look for other work if the company continued to place him with Joel. He says he suggested alternatives such as being placed in the Services Department or placing him with employees who were not hostile. Apparently none of the options he suggested was possible. At the conclusion of the meeting Mr Wilford says he was very distressed and Mr Williams sent him home on stress leave.

[13] While on stress leave Mr Wilford had two or three telephone conversations with Mr Williams and on the morning of 29 June returned to work on a site with Tommy. He says that despite attempting to keep out of Tommy's way Tommy confronted him on several occasions making disparaging remarks and asking him difficult electrical theory questions.. He says that he left work on Friday feeling very despondent and distressed.

[14] On Monday 4 July Mr Wilford says he met with Mr Williams and advised him of his difficulties in working with Tommy and that he needed some respite without stress. He says that Mr Williams reluctantly agreed that he would be transferred to the service department the next day. Unfortunately when he arrived at the service department he was told by the manager that he was not working there, that he could give him only two days work and that he would then have to go back to the previous work side. (Apparently Mr Williams had left a message on Mr Wilford's cellphone the previous evening telling him not to report to the service department but to the previous work site.) After one day's work at the service department Mr Williams advised him that he would be working with Tommy the following day. He says he advised Mr Williams that the stress of working with Tommy was too much and that he could not do it. When Mr Williams confirmed that no other site was available Mr Wilford explained that he would need to take stress leave starting immediately.

[15] On 6 July 2005 Mr Wilford obtained a medical certificate which he forwarded to Aden Electrical. This certificate said:

*This is to confirm that(Mr Wilford) is currently suffering stress symptoms and anxiety stemming from ongoing problems and conflicts at work. (Mr Wilford) feels these issues have not been adequately addressed by management at his place of work, and because of this he has been forced to take stress leave from work at this time.*

[16] On 11 July Mr Wilford's legal representative, Kevin Muir, wrote to Aden Electrical setting out a summary of Mr Wilford's concerns and seeking assurances regarding future contact with Joel and Tommy. This letter asked for a response by 4 p.m. on 12 July. In response to this letter Aden Electrical's Contracts Manager, Mr Marc Malone rang Mr Muir advising that he had just left on holiday but asked if he could deal with the matter on his return the following week. He apparently expressed surprise that Mr Wilford had not complained directly to him with such serious concerns. He advised that, if Mr Wilford's complaints were upheld he would arrange for Mr Wilford's salary to be paid while he was on stress leave.

[17] On 15 July, without waiting for Mr Malone to return, Mr Wilford, by way of a letter from Mr Muir, resigned from Aden Electrical. In a subsequent letter Mr Muir submitted personal grievance claims on behalf of Mr Wilford.

[18] In addition to his claim that he was unjustifiably disadvantaged and constructively dismissed Mr Wilford makes two further claims:

(i) That he should be paid for attending a two-week apprenticeship block course. He says that a letter sent to him from the training institution advising him of a block course did not arrive at his home address. He says that the institution apparently wrote to Aden Electrical and, on the first morning of the course, phoned Aden enquiring where he was. He says that Aden did not attempt to contact him and he therefore missed the course. The only available "replacement" course was in late July and this meant that he was unable to commence his new employment until 1 August. He says that had he attended the block course while employed by Aden he would have been paid to attend. He seeks payment of wages for this period.

(ii) That without his authority and contrary to his employment agreement, Aden Electrical deducted \$110.02 from his final pay by way of payment for a pair of safety boots which Aden had supplied. He seeks reimbursement of this amount.

[19] In his final written submissions Mr Wilford has summarised his claims as follows:

*(Mr Wilford) resigned from his employment with Aden Electrical because he had complained of verbal bullying by two employees, Joel and Tommy, and Aden had refused, and was continuing to refuse to place him in a safe working environment, with full knowledge of (Mr Wilford's) genuine distress. Despite repeated complaints, the manager of Aden's Contracts Department, Ian Williams "stuck to his guns" and refused to move Mr Wilford away from Tommy, one of the individual's Mr Wilford had complained was bullying him.*

*After (Mr Wilford) resigned, he was unable to start his new job for two weeks because of a compulsory block course. If he had continued in Aden's employment, Aden would have paid him to attend the block course. Mr Wilford seeks compensation for lost wages from the day he last worked (5 July 2005) up to the date he was able to start his new job on 1 August 2005 - a period of 18 working days.*

*(Mr Wilford) also seeks to recover a sum of money which had been unlawfully deducted from his final wage for the price of boots which Aden had previously paid for. Aden had agreed, during (the investigation meeting) that this claim was accepted, but to date no payment has been received.*

[20] Mr Wilford says that he was subject to unjustified disadvantage and constructively dismissed from his employment with Aden as a result of a series of serious, ongoing breaches of Aden's duties to him as an employer including:

- failing to promptly and adequately investigate, and/or take action regarding his complaints of bullying and harassment;
- failing to take practical steps to keep Mr Wilford safe;
- failing to provide Mr Wilford with a safe workplace to return to after he had been away from work on stress leave.

In addition to the recovery of wages Mr Wilford seeks \$15,000 as compensation for humiliation and stress caused by Aden's breaches of duty. He also requests that the Authority impose a penalty against Aden on the grounds that Aden breached its duty to act in good faith and that these breaches were deliberate, serious and sustained.

### **Aden Electrical's perspective**

[21] Aden Electrical denies that Mr Wilford was subject to unjustified disadvantage or that Aden breached its contractual duty to act as a good employer. Aden says that all the issues raised by Mr Wilford were investigated and that all reasonable practical steps were taken in order to address Mr Wilford's perceived concerns. Aden argues that Mr Wilford must bear the onus of proof in establishing:

- (i) that he was the subject of bullying etc;
- (ii) that he reported his concerns to his employer;
- (iii) that the steps taken by Aden to investigate and address his reported concerns were insufficient and failed to guarantee Mr Wilford's safety in the workplace; and
- (iv) that Aden's conduct constitutes a serious breach of duty raising a substantial risk that Mr Wilford's resignation was foreseeable.

In his submissions on behalf of Aden Electrical Mr Eggleston summarises his clients position on each of these points. He argues:

(i) The accusations levelled against Joel and Tommy do not fit within the generally accepted definitions of bullying, harassment and intimidation. Mr Wilford claims that he was the subject to serious harassment in the workplace sustained over a period of time and on occasions in front of independent witnesses. However Mr Wilford has produced no independent witnesses to support his allegations and the alleged perpetrators have given clear unequivocal and credible evidence denying all allegations against them. In one case where an altercation was witnessed, two witnesses identify Mr Wilford as the aggressor. For Mr Wilford to be successful in his claims the Authority must be persuaded on the balance of probability that it prefers the uncorroborated evidence of Mr Wilford against the credibility of the alleged perpetrators and other witnesses. In his submissions Mr Eggleston examines Mr Wilford's evidence and that of Aden's witnesses in some detail and argues that Aden's version of events should be preferred other than that of Mr Wilford.

(ii) Mr Wilford did not adequately or promptly report his concerns to his employer in a manner whereby his employer was given a reasonable opportunity to investigate and take appropriate action. Mr Wilford had ample opportunity to express his concerns regarding Joel to Mr Cooper but it was not until several weeks after what Mr Wilford refers to as the most serious incident, that he said he could no longer work with Joel. Under all the circumstances it was not surprising that Mr Cooper assumed that this was simply a personality issue between the two employees. When he, Mr Cooper, raised the issue with Joel he could be no more specific than to tell Joel that Mr Wilford did not want to work with him and to ask Joel if he had done anything to upset Mr Wilford. I.e. Mr Cooper took the only reasonable step that was open to him. Mr Eggleston says that at the first meeting with Mr Cooper and Mr Williams Mr Wilford, despite his subsequent, assertions, was not specific about his concerns and they were not made aware of anything more specific than a personality clash - a common occurrence on a construction site. Mr Wilford must accept a significant responsibility for ensuring confusion by not providing specific information to Mr Cooper when he first requested it.

Mr Cooper says that in the confrontation with Tommy he perceived Mr Wilford to be more aggressive and Tommy the innocent recipient. At his second meeting with Mr Williams and Mr Cooper following that incident Mr Wilford did not mention the "bash" comment. Again it is not surprising that Aden treated this as a personality clash and having already moved Mr Wilford to another site to be away from Joel it was running out of options and patience.

(iii) The steps taken by Aden in order to address Mr Wilford's stated concerns were adequate under the circumstances. When the objection to working with Joel was first made Mr Cooper spoke with Joel who denied the wrongdoing. Despite that denial Mr Cooper agreed to transfer Mr Wilford to another site. On occasions when Mr Wilford was required to work on the same site, Aden instructed Joel to stay away from Mr Wilford and assigned jobs in working areas well away from Mr Wilford. After the complaint about Tommy he was spoken to and told to keep away. Mr Wilford was also advised to see a supervisor if he had further concerns and not to take matters into his own hands. Mr Williams offered to arrange meetings with Joel and/or Tommy to see if matters could be worked out between them. Mr Wilford refused these offers. Despite all these steps Mr Wilford insisted on written assurances that he could be kept away from Joel and Tommy or, preferably, transferred out of the Contracts division. This was simply not an option.

(iv) Immediately Aden received the letter from Mr Wilford's representative, Mr Malone telephoned Mr Muir despite being on leave. Mr Malone believed that he had reached an agreement that Mr Wilford would await Mr Malone's return before taking matters further. Mr Eggleston points out that this letter was the first time that Mr Wilford's concerns had been put in writing. Despite the agreement reached with his representative Mr Wilford chose to resign. This appears to have been triggered by Mr Wilford obtaining work elsewhere and learning that he had missed a training course.

[22] By way of summary of Aden Electrical's position Mr Eggleston says:

*... (Mr Wilford's) claims of bullying, harassment and intimidation have not been established on the evidence. It is further submitted that the steps that (Aden Electrical) took to address his various concerns were reasonable in the circumstances, even though the complaints have not been borne out by the evidence. Finally, it is submitted that given the specific agreement reached between the parties on 13 July 2005, (Mr Wilford's) decision to resign could not to be said to have been the only option open to him at that time and nor could it be said to have arisen at (Aden Electrical's) initiative. On that basis, (Mr Wilford's) claims must be dismissed...*

## **Legal considerations**

[23] In light of the well settled law, in determining whether or not Mr Wilford was constructively dismissed it is necessary to answer two questions. Firstly was Mr Wilford's resignation caused by a breach of duty on the part of his employer, Aden Electrical. Secondly, if there was a breach, was that breach of sufficient seriousness as to make it reasonably foreseeable by Aden Electrical that Mr Wilford would not be prepared to continue to work under the prevailing circumstances. If the answer to these two questions is "yes" then Mr Wilford is likely to succeed in his claim that he was constructively dismissed.

[24] In *McGowan v Nutype Accessories Ltd* [2003] 1 ERNZ 120, which dealt with a case involving bullying, Judge Shaw, in the Employment Court said:

### ***Constructive dismissal***

*[52] The elements required to make a finding of constructive dismissal are well settled. Mr Wicks' summary of these was not disputed. For the plaintiff to establish there has been a constructive dismissal he must prove:*

- (a) That his resignation was caused by a breach of duty on the part of the defendant company; and*
- (b) that the employer's breach, if one occurred, was of sufficient seriousness to make it reasonably foreseeable by the defendant that the plaintiff would not be prepared to work under the conditions prevailing.*

[53] *It was accepted by the defendant that an employer is under a duty to provide a secure workplace; to take all reasonable care to avoid exposing an employee to harm; and to provide and monitor a safe workplace.*

[54] *The plaintiff's statement of claim pleads that the defendant breached implied terms in the employment contract to take all reasonable care to avoid exposing him to unnecessary risk of injury to his physical and psychological health and would provide and maintain a safe system of work.*

[55] *In the context of health and safety legislation, the Chief Justice has held<sup>2</sup>:*

*The legislation requires the employer to do what is practicable to contain known and unacceptable risks. The statute seeks to prevent harm to employees by promoting health and safety management. The reasonableness of the employer's conduct must therefore be measured against knowledge reasonably attained by employers mindful of their responsibilities.*

[25] In addition to his claim that he was constructively dismissed Mr Wilford has claimed that he has a personal grievance against his employer in that he was subject to *unjustified disadvantage*. The disadvantage, he claims, was caused by Aden's failure in its duty to him (both in terms of his employment agreement and in terms of relevant health and safety legislation), to properly investigate his concerns and to take all practicable steps to ensure his safety while at work. In this regard Mr Wilford points to s103 of the Employment Relations Act which provides:

**103 Personal grievance**

(1) *For the purposes of this Act, **personal grievance** means any grievance that an employee may have against the employee's employer or former employer because of a claim –*

- (a) that the employee has been unjustifiably dismissed; or*
- (b) that the employee's employment, or one or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer; or*
- (c)...*

And:

**103A Test of justification**

*For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action 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 the dismissal or action occurred.*

## Discussion

### Unjustified action

[26] During the course of my investigation I questioned both Joel and Tommy regarding Mr Wilford's allegations of bullying and harassment. Both employees adamantly denied that any such behaviour took place. Joel insisted that Mr Wilford *had taken innocent events and twisted them to make them look bad* and that *Mr Wilford struck (him) as being quite paranoid and only wanted to hear the negative stuff.*

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<sup>2</sup> *A-G v Gilbert* [2002] 1 ERNZ 31 at 52

[27] It is also pertinent to note the general perception that other employees, including senior management, had of Mr Wilford. By way of illustration:

- Mr Cramond, in his evidence says that he *was told by a number of people who had worked with Mr Wilford that he was a bit strange and a loner, and: (Mr Wilford) tended to get a bit "loopy" after one bottle of beer and then tried to be funny.*
- Mr Cooper said *I think that (Mr Wilford) is essentially a loner and would always have trouble fitting in to a contracting environment.*
- Mr Malone said *(Mr Wilford) was certainly an unusual character. Although technically he was competent enough given his level of training, there was always something about (his) behaviour that struck me as odd.*

[28] Another factor to be taken into account is what Aden say is the "generally accepted nature" of construction workplaces. Again by way of illustration, Mr Cramond said:

*(Mr Wilford) also complains that (Mr Cooper) told him that people used rough language on work sites. Of course they do, as well as telling rude jokes and ribbing. I told (Mr Wilford) clearly that if he did not want to receive ribbing, then he should not try to give it out. Although (Mr Wilford) insisted on joining in the banter, he did not receive ribbing well.*

[29] Aden Electrical argue that Mr Wilford was not specific in his complaints regarding either Joel or Tommy. They say that Mr Wilford's request to work only at sites where neither Joel nor Tommy were present was a practical impossibility but that they did what they could to address Mr Wilford's concerns. This included speaking both to Joel and to Tommy and asking them to "stay away from" Mr Wilford whenever possible.

[30] All of the above lead me to the conclusion that Aden, while not completely dismissing Mr Wilford's concerns did not take them particularly seriously. Because he was "different" his colleagues and managers discounted Mr Wilford's concerns as being either imaginary or over dramatised, and/or saw Mr Wilford as being oversensitive to the normally accepted "robustness" of the construction industry environment. Such a "macho" attitude to workplace relationships may once have been acceptable. However society's tolerance of such an attitude has changed. Just as bullying in schools and intolerance towards those of different cultures are no longer acceptable/ so to has the assumption that all employees in a particular workplace should accept what they find uncomfortable merely because it has always been tolerated and condoned. These changes have been enshrined by parliament in legislation such as the Human Rights Act, the Health and Safety in Employment Act and the Employment Relations Act.

[31] Aden Electrical say that Mr Wilford was not specific in his complaints. While this may be true Mr Wilford was quite specific in his reaction. He said clearly and unequivocally that he did not wish to work on the same site as his tormentors. On a couple of occasions Mr Wilford felt so traumatised by being on the same site as either Joel or Tommy and that he risked disciplinary action by walking off the job. Mr Williams in his evidence regarding a meeting with Mr Wilford said:

*It was clear that (Mr Wilford) was very upset and was not handling matters well. At one point he leaned forward and put his head on the table.*

[32] In the face of such clear distress a *fair and reasonable employer* would have, and in my judgement should have, undertaken a full and thorough investigation. To choose not to do so was, I find, an unjustified action by Mr Wilford's employer. As already stated, during the course of my investigation I interviewed both Joel and Tommy. Their evidence conflicted starkly with the version of events outlined by Mr Wilford. Aden Electrical say that the evidence before the Authority does not establish that bullying took place. That is not the point. Whether or not I accept their evidence over that of Mr Wilford is not relevant. It was Aden's duty as an employer to establish the truth of Mr Wilford's allegations by undertaking a thorough investigation with an open mind. Had Aden Electrical undertake their own investigation they may have accepted and addressed Mr Wilford's concerns or dismissed them as unfounded.

Either way they could have pursued options for addressing the issues raised (e.g. informal mediation) and would have fulfilled their obligations to take every possible step to ensure that Mr Wilford's workplace was safe.

### **Constructive dismissal**

[33] I have found that Aden Electrical's action in choosing not to properly investigate Mr Wilford's concerns was unjustified. However I do not find that he was constructively dismissed. While Mr Wilford may have lost confidence in his employer to provide him with a safe workplace Mr Malone had, albeit belatedly, asked Mr Wilford to give him time to investigate Mr Wilford's concerns. Mr Wilford was at that point not at work, and therefore not at risk. Mr Malone had undertaken that, should his complaints be upheld he would be paid for the time he was absent. Mr Wilford chose, because he had received an offer of alternative employment, to resign without waiting for the outcome of Mr Malone's enquiries. While his stress regarding his treatment in the workplace was obviously a precipitating factor which led him to seek alternative employment, his resignation cannot be said to have been *caused by a breach of duty on the part of his employer* [McGowan, see para [23] above]. At the time he chose to resign Mr Wilford had an option; he could have chosen to wait until Mr Malone returned from leave, a matter of days, and complete his investigation.

### **Deduction from wages**

[34] For the sake of completeness I record that during the course of my investigation Aden Electrical accepted that they should not have deducted \$110.02 from Mr Wilford's a final pay. They agreed that they would refund this money to Mr Wilford. If they have not already done so they should do so at the earliest opportunity and in any event not later than seven days after the date of this determination.

### **Penalty for breach of duty of good faith**

[35] In his submissions, although not in his original statement of problem, Mr Wilford has invited me to consider whether, in terms of s4A of the Employment Relations Act, I should impose a penalty on Aden Electrical for an alleged breach of the duty of good faith. Mr Wilford says that when he resigned he gave two weeks notice of termination of his employment. Aden in response chose to accept Mr Wilford's resignation with immediate effect. Mr Wilford submits that he was entitled to give, and be paid for, two weeks notice and that Aden, by not doing so, were discriminating against him on the grounds that he had lodged a personal grievance. I decline Mr Wilford's invitation. If Aden did breach of their duty of good faith any breach certainly was not, as is required by s4A, *deliberate or sustained*.

### **Recovery of wages**

[36] Mr Wilford's resignation is dated 15 July 2005 and is stated to be effective from 29 July 2005. It gave no indication that Mr Wilford would return to work during that period. At the time of his resignation he was on unpaid "stress" leave. While it is true that Mr Malone had indicated that he would arrange for Mr Wilford's salary to be reinstated, this undertaking was dependent on a finding that Mr Wilford's complaints were found to have substance. Mr Wilford, by his resignation, precluded any such possibility. Irrespective of the period of notice given or accepted Mr Wilford was absent from work and had no paid sick leave entitlement for that absence.

[37] Mr Wilford argues that Aden deliberately withheld information regarding his attendance at an electrical apprenticeship block course which resulted in him having to attend a subsequent course, without pay, before he could take up his new employment. There is no sustainable evidence that Aden deliberately withheld this information. I accept that Aden made it clear to all apprentices, including Mr Wilford, that arrangements regarding their attendance at block courses were entirely their individual responsibility. Aden Electrical have no responsibility or liability to pay Mr Wilford for attendance at the block course.

## Determination

[38] For the reasons set out above I find that:

- Mr Wilford has a personal grievance against his former employer, Aden Electrical, in that the actions of Aden Electrical in choosing not to properly investigate his complaints of bullying and harassment constituted an unjustifiable action.
- Mr Wilford was not constructively dismissed by Aden Electrical and does not have a personal grievance in that regard.
- Mr Wilford's request that I impose a penalty on Aden Electrical for an alleged breach of their duty of good faith is declined.
- Aden Electrical is to reimburse Mr Wilford \$110.02 deducted from his wages without approval.
- Mr Wilford is not entitled to reimbursement wages not paid to him while he was on unpaid sick leave and consequent to his resignation.

## Remedies

### Compensation for distress and humiliation

[39] The unjustified actions of Aden Electrical in choosing not to properly investigate Mr Wilford's complaints caused him a good deal of unnecessary distress and humiliation. Mr Wilford is entitled to be compensated for this distress. **In terms of section 123(1)(c)(i) of the Employment Relations Act, Aden Electrical is to pay Mr Wilford \$5,000, without deduction, as compensation.**

### Lost wages and other benefits

[40] For the reasons set out in clauses 35 and 36 above, Mr Wilford is not entitled to reimbursement for loss of wages or other benefits.

## Contribution

[41] I am required by s124 of the Employment Relations Act to *consider the extent to which (Mr Wilford's) actions contributed towards the situation that gave rise to (his) personal grievance and if those actions so require, reduce the remedies ... accordingly.* I have considered Mr Wilford's actions and find that they did not contribute to the situation that gave rise to his personal grievance. If there was any fault in what Mr Wilford did it was that he could have been more explicit in describing his concerns and, perhaps, to have put them in writing. However Mr Wilford, was traumatised by the behaviour he perceived he was being subjected to and, rightly or wrongly, was not confident that he would be protected from that behaviour by his employer. He clearly displayed the emotional and physical symptoms of that trauma. Had his employer properly investigated the cause of that trauma they, I have no doubt, would have been able to establish the voracity or otherwise of Mr Wilford's concerns and addressed them in whatever way was appropriate. The failure to investigate cannot be attributed to Mr Wilford's actions. In terms of s124 I find no reason to reduce the remedies I have awarded to Mr Wilford.

**Costs**

[42] Mr Wilford chose to represent himself during the course of the Authority's investigation. Consequently he has no legal costs to which he can seek a contribution.

James Wilson  
Member of Employment Relations Authority