

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**CA 75/07
5031995**

BETWEEN SERGEY ANTONOV
 Applicant

AND ONYX GROUP LIMITED
 Respondent

Member of Authority: Philip Cheyne

Representatives: Andrew McKenzie, Counsel for Applicant
 Brian Nathan, Counsel for Respondent

Investigation Meeting: at Christchurch, 30 November 2006 and 26 February
 2007

Submissions received: 26 February 2007 from Applicant
 26 February 2007 from Respondent

Determination: 4 July 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Sergey Antonov worked for Onyx Group Limited from about March 2005. In December 2005 he cut his arm while at work. Mr Antonov's problem concerns how Onyx dealt with his resulting incapacity. He says that he was required to undertake heavy work despite Onyx knowing that he had been certified for light duties. Mr Antonov says that this gives rise to a personal grievance of unjustified disadvantage, a breach of his employment agreement and renders Onyx liable to a penalty. In his statement of problem Mr Antonov seeks punitive damages for breach of an implied term of his employment agreement that he be treated fairly and reasonably.

[2] Onyx denies that Mr Antonov has suffered any unjustifiably disadvantage and that there has been any breach of contract. It says that the matter when raised with it originally was resolved by agreement and that Mr Antonov cannot now pursue these claims. Finally, Onyx says also that there is no basis in law for the punitive damages claim.

[3] To resolve these problems I need to set out more fully the events relating to the accident and subsequently, including the circumstances giving rise to Onyx's accord and satisfaction argument. It will be necessary to resolve some evidential disputes along the way. Once these matters have been determined I may need to consider whether an unjustified disadvantage grievance arises and if there is any breach of the employment agreement.

[4] First, however, I will deal with the point concerning punitive damages and Mr Antonov's attempt to amend the personal grievance compensation claim.

Punitive Damages

[5] I took the punitive damages claim to be one for exemplary damages as there was no suggestion that the claim was compensatory. There was a time when it was thought that exemplary damages could be awarded for breach of contract. In *French v. Department of Corrections* [2002] 1 ERNZ 325 for example the Employment Court awarded \$5,000 under the exemplary damages head. However, in *Paper Reclaim Limited v. Aotearoa International Limited* [2006] 3 NZLR 188 the Court of Appeal held that exemplary damages are not available in a breach of contract action. Mr Antonov cannot succeed in his claim for punitive damages. In light of that, Mr Antonov discontinued this aspect of the problem.

[6] Discussion during the directions conference about the Court of Appeal's ruling in *Paper Reclaim Limited* resulted in an attempt by Mr Antonov to increase his compensation claim on the grievance. If a grievance can be established, there will need to some explanation of why the initial assessment of compensation is now inadequate. If it is simply to make up for the loss of the punitive damages claim, the amendment has no merit.

The accident

[7] At the relevant time, Onyx had contracts for curb-side recycling and other refuse collections in Christchurch. Mr Antonov worked on the trucks, either in a team of two or sometimes three depending on staffing, the vehicle and the route. On *Three Up Trucks*, one person drives, a second person runs and lifts bins up to the truck and a third person sorts inside the truck. These same trucks are sometimes operated with only two staff.

[8] When working as a sorter on Wednesday 14 December 2005, Mr Antonov accidentally cut his arm on a broken bottle. He asked the driver to stop the vehicle so he could bandage his arm. There were not sufficient bandages in the truck so the driver called the office. Adam Blackadder was Onyx's Operations Manager. He took some bandages out to where the truck was. There was

some discussion between Mr Antonov and Mr Blackadder about whether he could continue working and Mr Antonov elected to finish what was left of the job. There is no complaint about this aspect.

[9] When he returned to the yard, Mr Antonov was given an *Event Report Form* to complete, which he did. Mr Antonov asked the Logistics Manager (Amanda Reynolds) about going to the doctor. Onyx referred employees to a particular doctor. There is a dispute about what Ms Reynolds told Mr Antonov which it is not necessary to resolve. Mr Antonov went home and attended the 24 hours surgery where they put six stitches into the wound and certified him as unfit for work for two days.

[10] On Thursday 15 December, Mr Antonov delivered the appropriate documentation to Onyx but otherwise remained off work for the two days. Mr Blackadder completed and signed the *Event Report Form* on 15 December. The form requires the manager to complete a risk assessment. Mr Blackadder assessed the risk as being of moderate likelihood with minor consequences. The effect of that classification was that an investigation was not required. However the notes on the form itself required the consequences to be assessed as *moderate* because medical treatment from a doctor was required. If the form had been filled in correctly the risk assessment would have required an investigation.

[11] Mr Antonov returned to work on Monday 19 December. Mr Blackadder's evidence is that Mr Antonov worked around the yard on light duties for that Monday and the Tuesday. Mr Antonov's evidence is that he worked on his usual route. The roster information available does not support Mr Blackadder's evidence and the time sheets show that Mr Antonov worked 10 and 9.25 hours on the two days, suggesting he was engaged in ordinary productive work rather than light duties in the yard. One time sheet shows the truck number. On balance I prefer Mr Antonov's evidence on this point.

[12] Mr Antonov had an appointment for Wednesday 21 December to have the stitches removed. Mr Blackadder arranged for Mr Antonov to work until 2.30pm and then be taken to the appointment. However, Mr Antonov thought it was more sensible for him to go to the appointment at 1pm coinciding with the truck's return to unload material. This is what Mr Antonov did and he was apparently criticised by Mr Blackadder for ignoring the original arrangements. Mr Antonov also says that his pay was initially docked but the shortfall was made up the following pay day.

[13] When the stitches were removed Mr Antonov was certified for light duties with the expectation that he would be able to return to normal work on 29 December 2005. He gave that

medical certificate to Mr Blackadder on Thursday 22 December. There is a disagreement between Mr Antonov and Mr Blackadder about what was said at that stage. Mr Antonov's evidence is that Mr Blackadder became angry saying "*you have just had two days off and now you are going to have another week off*". Mr Antonov requested work on a lane truck, in his view being lighter work. Mr Blackadder refused to change the route allocations to accommodate this. Mr Antonov refused to work on the *three up trucks* so he attended to duties around the yard. Several hours later, according to Mr Antonov, Mr Blackadder came and asked if he would replace someone on one of the *three up trucks* who was sick. Mr Antonov agreed to do this. He worked 11½ hours in total that day.

[14] Mr Antonov says that his arm was sore, that he could only use one hand for sorting, that he dropped bottles and cans, that bottles fell off the truck and broke, that he swapped to being a runner, that he could not use both hands to hold onto the grab rails and nearly fell from the truck several times. Mr Antonov says these circumstances caused him to be scared that he might injure or kill himself.

[15] Mr Blackadder's evidence is that he did not become angry nor did he criticise Mr Antonov. He says he asked Mr Antonov to help out and Mr Antonov agreed without mentioning anything further about his arm. Mr Blackadder also says that Mr Antonov made no mention of any problems working on the truck, nor did he call in to advise that he was unable to continue sorting.

[16] I find that Mr Blackadder communicated some frustration or annoyance when faced with Mr Antonov's continuing incapacity. However, Mr Antonov's evidence is that later he was asked and agreed to join the *three up truck* crew. It follows that Mr Blackadder's comments were not so trenchant as to destroy Mr Antonov's goodwill in the situation. I accept that Mr Antonov worked with some discomfort, that he swapped to being a runner and that he became concerned about the risk of further harm. I also accept that none of these concerns were communicated to Onyx at the time.

[17] The next day (Friday) Mr Antonov refused to work on a *three up truck* and asked again to be put on a lane truck. Mr Blackadder asked Ms Reynolds if he had to put Mr Antonov on a lane truck and she said "*no*". Mr Antonov says that Mr Blackadder then made a rude comment about him to Ms Reynolds, who concurred. Mr Blackadder denies making any rude comment and Ms Reynolds' evidence supports the denial. I agree with Ms Reynolds that the alleged comment would have been offensive and I accept her evidence that the comment was not made.

[18] Because of the impasse about truck allocations Mr Antonov worked around the yard on the Friday.

[19] Both men agree that they had a discussion on the Friday about payment for work on the upcoming statutory holidays (the Monday and Tuesday). Mr Antonov says that he asked what the rate was. Mr Blackadder told him that the rate was time and a half plus a lieu day but only if Mr Antonov worked on the *three up trucks*. Mr Blackadder on the other hand agrees that he said the rate was time and a half plus a lieu day but says he made no reference to working on the *three up trucks* to gain that entitlement.

[20] On balance, I prefer the evidence of Mr Antonov. I accept that Mr Blackadder referred to time and half and a lieu day for working on the *three up trucks*, that Mr Antonov responded saying he had the doctor's certificate so it was Mr Blackadder's problem, and that Mr Blackadder said that Mr Antonov could quit if he did not like it.

[21] Despite being certified only for light duties, Mr Antonov was allocated to work on the *three up trucks* as usual on Monday 26, Tuesday 27 and Wednesday 28 December. Mr Blackadder made no arrangements for Mr Antonov to be allocated light duties and Ms Reynolds did not know about the medical certificate that Mr Antonov had given to Mr Blackadder. Mr Antonov complied with the work allocations. I accept his evidence that during these days he suffered similar problems to those experienced on the Thursday.

Mr Antonov's attempts to resolve the problem

[22] Mr Antonov first wrote down his concerns in an email in early January 2006. He also communicated with his union and Bernie O'Brien from the Amalgamated Workers Union took up the matter on his behalf.

[23] Grant Hopewell was Onyx's branch manager. His evidence is that he received via the Union Mr Antonov's written complaint including his demand for an apology. Mr Hopewell's questioning of Mr Blackadder did not support the complaint but he nonetheless decided to bring the matter to an end by apologising to Mr Antonov for any offence or upset. Mr Hopewell says that this apology was offered to and accepted by Mr Antonov with a handshake during a meeting in his office on 13 March 2006 with Bernie O'Brien present. He therefore thought the matter was resolved.

[24] Mr O'Brien's evidence is that Mr Hopewell told him during a meeting between the two of them that an apology had been given to and accepted by Mr Antonov. Mr O'Brien says that he had

meetings with Onyx on 31 January 2006, 9 February 2006, 21 February 2006 and 7 March 2006. Mr O'Brien says that Mr Antonov was not present at this time. To the extent there is a difference, I prefer the evidence of Mr O'Brien. Mr Hopewell must be mistaken about Mr Antonov's presence and the date.

[25] That leaves still the question of whether Mr Hopewell proffered the apology directly to Mr Antonov, as represented to Mr O'Brien. Mr Antonov's evidence is simply that this did not happen. On balance I accept Mr Hopewell's evidence that an apology was offered to and accepted by Mr Antonov sometime after the complaint was communicated to Onyx via the Union. It is likely that Onyx would look to resolve the matter in the manner sought despite Mr Blackadder's disagreement with Mr Antonov's account of events.

[26] Counsel for Onyx submitted and I accept that this amounts to accord and satisfaction. I find that it is not open for Mr Antonov to pursue proceedings having had his complaint resolved as requested. The claims are dismissed.

Summary

[27] Mr Antonov settled his complaint and cannot now pursue proceedings against Onyx.

[28] Costs are reserved.

P Cheyne
Member of the Employment Relations Authority