

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Hayden Darbyshire & Andy Dyke (applicants)
AND	PPCS Limited (respondent)
REPRESENTATIVES	Simon Mitchell for Messrs Darbyshire & Dyke Tim Cleary for PPCS Limited
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Palmerston North & Wellington, 20 March, 17 & 18 April & 7 May 2007
DATE OF DETERMINATION	10 May 2007

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. In their statement of problem filed on 23 February 2007, as amended on 14 March, and by way of an initial application for urgency, Messrs Darbyshire & Dyke asked the Authority to resolve their employment relationship problem by way of an order under s. 28A (8) (b) of the Health & Safety in Employment Act 2002 (H&SEA) that operating a bandsaw without water is likely to cause serious harm to them. As set out in their closing submissions, they also consider that the Company is obliged to minimise the hazard under s. 10 of that Act and is failing to do so. Finally, the applicants seek appropriate redress for the unlawful conduct of the Company pursuant to their lawful refusal to carry out a task they had reasonable grounds to consider dangerous.

2. In its statement in reply received on 5 March the Company said the applicants had unreasonably refused to comply with lawful instructions to work on the plant's bandsaws without water.
3. Mediation and numerous subsequent efforts by the parties with the facilitation of the Authority, to settle their employment relationship problem, have been unsuccessful.
4. By agreement an investigation was scheduled for 20 March in Palmerston North. During the investigation the applicants asked for, and were granted, an adjournment so that they might obtain expert evidence in support of their claims. As it happened, the applicants did not attend the investigation convened on 17 April; Mr Darbyshire was present on 18 April. The applicants did not produce any expert evidence. The reasons for the absence of the applicants and their expert evidence were explained to the Authority and I elected to continue with the investigation. A final day's investigation was scheduled for 7 May, in particular to allow the applicant's further time to obtain expert evidence. As it happened, the applicants abandoned the calling of expert evidence. The investigation was completed in a half day, by way of final evidence and closing submissions.
5. The parties usefully provided witness statements and relevant documents in advance of, and during, the investigation.

Background

6. Much of the relevant background detail is either not in dispute or can be readily resolved by way of the following summary.
7. The Company is a meat processing business with a plant in Waitotara, outside of Wanganui.
8. The applicants were employed in the plant as nightshift sawmen/boners. Mr Darbyshire has ten years experience, 9 of which involved work on the bandsaw in the boning room. Mr Dyke has over thirty years of work in the meat industry and has worked at Waitotara since 2000.
9. Prompted by customer requirements for enhanced food hygiene standards, and by way of a Company wide review undertaken in early 2006, the respondent has been phasing out the use of water as a lubricant on its bandsaws.

10. From the Company's perspective, the phasing out of water at the Waitotara plant commenced on 1 March 2006 by way of a meeting with the dayshift boning delegate and two sawmen. Sawmen (but not the applicants) were taken to other Company plants to show how those plants had adapted to dry sawing. Other measures included pre-season staff induction meetings (at which Mr Darbyshire was present, but not Mr Dyke), separately briefing each shift team and providing updates at monthly health and safety committee meetings.
11. Mr Darbyshire and Mr Dyke say they were never directly consulted about dry sawing. The former accepts signing for, and receiving, an employee induction handbook (the handbook). Mr Dyke says that, starting later in the season, he did not receive the handbook, nor was he present at any meetings during which the Company spoke of its plans to move to dry sawing.
12. Various modifications were progressively made to the bandsaw process during 2006 including the removal of water jets and – to compensate for the loss of water – heated saw tops, a special dimple-top surface and specialised carcass conveyors.
13. As experienced sawmen, the applicants were required to work on the bandsaws once the modifications were made but both refused citing health and safety reasons. As a result, and following meetings on 10 & 11 January 2007, Messrs Darbyshire and Dyke were stood down, or suspended, without pay.
14. A Department of Labour inspection of the new process resulted in a report dated 19 January 2007. Amongst other things the report says:

(The) issue ... is one that needs to be addressed through consultation with all parties and a risk assessment done of the risk elevation that the discontinuation of water has brought about. ... This relates directly to 28A (5) (of the H&SEA) which limits the refusal to do the work to where the risk has materially increased beyond the understood risk.

15. The report also says:

In terms of health and safety we consider that there has been a raised risk profile in terms of the bandsaw operation but we do not consider it a material increase as stated in the (H&SEA).

(attachment to statement of problem)

16. Mr Darbyshire said health and safety concerns about dry sawing were raised with a Company supervisor in the first half of 2006: he accepts he may not have used the words 'health and safety' and/or 'dangerous' when he spoke to the supervisor at that time. The supervisor denies the claim.
17. Mr Darbyshire also said that health and safety concerns about dry sawing were raised with a Company manager at a meeting on 14 December 2006 (refer to his record of that meeting produced on 18 April 2007). Mr Dyke was not sure if the words "*health and safety*" and "*dangerous*" were raised at that meeting.
18. The Company says no claims about health and safety were made until a meeting on 11 January 2007 when they were advanced by a union organiser on the applicants' behalf.
19. The applicants claimed that some sawmen, after raising their concerns about dry sawing, by agreement were transferred to boning work: they wish to be treated in the same way. The Company denies those claims and says that the phasing out of water lubrication has occurred at other Company plants without serious incident and that there were difficulties in transferring the applicants back to exclusively boning work.

Company's Position

20. Amongst other things, and as is made clear in a letter from the Company's plant manager, Mr Graeme Stanbury, to the applicants' union, date 13 January 2007, and from at least that date, the respondent was of the view that:

Health and safety has only now become the major factor since the union has been involved in defending what is clearly a refusal to work issue.

21. For that reason, and by way of closing submission, counsel for the Company, Mr Tim Cleary, says his client denies the applicants' assertion they have a genuinely held belief that dry sawing is unsafe and for that reason they stopped work. Instead, the respondent says the applicants refused to work for other reasons.
22. The Company points out that safety was only raised at a very late stage, at the disciplinary meeting on 11 January, some 11 months after the phase-out of the water began. It says the real reason for this problem, it now transpires, is that the task of sawing was made more difficult, not that it was more unsafe, and this is simply an

industrial protest by the applicants (pars 3 & 4 of the respondent's submissions received on 7 May).

23. Alternatively, and assuming that the belief was genuinely held on 11 January, the Company argues the applicants had insufficient reason to continue to refuse working after that meeting: that is because the test at that point was an objective one – s. 28A of the H&SEA. In particular, the Company was entitled to reply on the conclusions set out in the Department of Labour's letter of 19 January: the applicants were similarly bound, by that date, not to continue to refuse the work point blank, unless that is they elected to give up their employment as sawmen/boners.
24. At that point, says the Company, neither the applicants nor their union had evidence to contradict the conclusions set out in the Department's letter. A further hazard assessment undertaken by the Company found there was no material hazard (document received by correspondence from Mr Cleary dated 11 April 2007).

Applicants' Position

25. Amongst other things, the applicants say they refused to carry out dry sawing in reliance on s.28A (1) of the H&SEA. They seek an order under s.28A (8) (b) of that Act that dry sawing is likely to cause them serious harm.
26. They say at the time of their refusal they genuinely believed the work they were required to do, 'wet' sawing, carried an understood risk of serious harm but that it was minimised by the use of water as a saw lubricant. They believed, and continue to believe, that dry sawing materially increases the risk of the saw catching and causing them serious harm: s.28A (5) of the H&SEA.
27. As a result of their concerns they conveyed the same to the Company, tried to resolve the matter with the respondent and then applied to the Authority urgently for an objective resolution by way of an order.

Discussion and Findings

28. At the parties' request, the Authority commenced an urgent investigation into this employment relationship problem. Despite the best efforts of all concerned, the investigation has proved an extended one, and has continued past the point of the plant's

seasonal closure (the date at which the applicants' employment would normally have ceased).

29. A consequence of the extended investigation is that the employment relationship problem has evolved, particularly because of the opportunity for specialist or technical evidence to be called in respect of the health and safety risks of dry sawing.
30. I am satisfied that the Authority's investigation disclosed no basis for either the Company's claim that, at the time this employment relationship problem erupted, the applicants did not hold a genuine belief that dry sawing was unsafe and/or that they were instead articulating "*clearly a refusal to work*" (respondent's letter of 13 January 2007).
31. What has emerged, during the investigation, is clear evidence of the Company's frustration in respect of the applicants' stance. The Company found it, "*... quite bizarre that (the applicants' union) even raise(d) health and safety at the end of a ten month process designed to work through any potential health and safety issues. When considering all the alterations that have been made we believe that substantial improvements in both the working conditions and safety have been made in this area*" (above).
32. The Company's opinion was also based on the belief, "*that at no stage during the process leading up to their refusal to work the saws have either sawmen mentioned the fact that they felt unsafe or approached their supervisor with their concerns*" (above).
33. I am satisfied that, despite the respondent's consultative efforts, it cannot be said with certainty that either man was ever directly consulted about the Company's plans to introduce dry sawing. That is because they were not party to Mr Stanbury's meeting on 1 March 2006, nor did they travel to other plants to observe dry sawing there. Mr Dyke did not attend the meetings referred to in Mr Stanbury's statement (pars 9, 11 & 13) and it may be that he was never inducted by the Company when he recommenced work with it in the second half of 2006; he says the change was never discussed in his presence. Mr Darbyshire's evidence is, effectively, that he was not directly consulted.
34. The Company cannot, and does not attempt to, claim that its meetings with the dayshift boning delegate and two sawmen amounted to meetings with the applicants' union (and thereby the applicants) and that those 3 people were expected to speak on behalf of others.
35. Does this mean the Company is in breach of its obligations to consult the applicants? For the following reasons I do not think so. As it happened, both men became aware of the

moves to dry sawing in December 2006, particularly with the removal of water jets and the introduction of other modifications. Concerns were raised by the nightshift sawmen in December, including the applicants, and some changes resulted. Mr Darbyshire says he gave dry sawing 'a go' for two nights before deciding it was, for him, too unsafe. It can be argued that the applicants failed – at that time – to meet their obligations of promptly raising perceived health and safety issues, by failing to adequately articulate their health and safety objections to dry sawing.

36. Matters any way came to a head following the Xmas 2006 break, when the Company committed itself from 8 January to dispense with water on the saws. Shortly afterward both men refused to perform their normal duties, although again – peculiarly and arguably in breach of their obligations to be communicative – they did not give any reasons for their refusal, in particular they did not say it was because of health and safety concerns. Equally peculiar was management's failure to directly inquire as to the reasons for their refusal.
37. At a meeting on 10 January the applicants were told the consequences of refusing a lawful instruction: again they failed to articulate their health and safety concerns and management did not inquire into the reasons for their stance.
38. Another meeting followed on the following day during which, as the above makes clear, it was explained for the first time to the Company, by the applicants' union, that their refusal was based on health and safety concerns.
39. Counsel for the applicants, Mr Simon Mitchell, argues – and I accept, as does the respondent (refer to pars 29-31 of Mr Stanbury's statement) – that from that date, 11 January, the Company was on notice of a health and safety dispute. The Company's response, through Mr Stanbury, was – amongst other things – to accuse the applicants of not acting upon a genuine belief (refer to his letter of 13 January) and to raise his voice and swear at the applicants (Mr Stanbury's oral concession to the investigation). He also threatened disciplinary action and suspending, or "*replac(ing)*", the applicants if they did not undertake the disputed task (the applicants' evidence and Mr Stanbury's letter of 13 January). At another meeting, on 12 January, Mr Stanbury reiterated the same position, that the applicants agree to undertake dry saw work until the Company could employ or train more sawmen. He also advised that they needed "*to make their minds up if they wish(ed) to continue working at Waitotara*" (par 42 of the witness' statement).

40. The applicants say that reaction was in breach of the respondent's contracted and other legal obligations. In this regard I note Mr Stanbury's own acknowledgement to the applicants at the time, "*that there was a correct procedure to go through*" (par 30 of his statement). That procedure is set out in the respondent's "*Refusal to Work Procedure*", as set out on page 14 of its Employee Induction Handbook (provided to the Authority by letter from Mr Cleary dated 19 April 2007).
41. Did Mr Stanbury fail to adhere to the respondent's own process? While coming close to a failure, and for the following reasons, I find that the respondent, while in less than an ideal manner, ultimately met its obligations. The Company came close to a failure because of its unsubstantiated belief that the claim of health and safety was not genuine. Mr Stanbury characterised the applicants' conduct as "*industrial action*" (par 40 of his statement), whatever that might mean. However, his reaction should be seen in the light of the end of a 10-month consultative process, which had resulted in substantial plant modifications, at the point of all of the plant moving to dry sawing, when the Company had made clear it was prepared for sawmen to run at a speed they felt comfortable and safe with, and because there were no other sawmen available to replace the applicants.
42. The Company's response should also be measured in the context of an arguable claim that Messrs Darbyshire and Dyke similarly failed to meet their obligations to adhere to the same process.
43. I am satisfied the Company did not refuse what was in effect, if not named as such, an application initiated by the applicants' union representatives to invoke the refusal to work procedure. As its introduction makes clear, the procedure is "*clearly defined*" and is designed "*in such a way as to allow workers the right to refuse to work with plant, etc or in an environment that is likely to endanger their wellbeing until such time as the issue has been addressed*". Messrs Darbyshire and Dyke were clearly entitled to rely on that policy, while also meeting their obligations under the same.
44. By way of a flow chart, the policy clearly sets out a consultative process commencing with a worker reporting an unsafe condition. The next (and second) step provides for the worker and supervisor to jointly assessing the condition. In the event of no agreement, the next step is for the worker and senior management to assess and "*agree on the condition*". If there is no agreement, the procedure provides next for a management team to assess and "*okay*" the condition: if the worker refuses that ok, the next step provides for a warning procedure and, "*worker placed on another task*". The applicants were offered

other work but had issues about the lesser pay rates and/or tensions with the rest of the workforce arising out of the consequences of their refusal to dry saw.

45. That is the respondent's own policy and it is trite to observe it was bound to adhere to it.
46. Despite Mr Stanbury's bad-tempered and abusive response, I am satisfied that the Company managed to comply with its obligations under its refusal to work procedure and the H&SEA. That is because I find that the exchanges between the parties commencing on 11 January, albeit crudely, met the flow-chart requirements of the refusal to work procedure. In particular, the workers reported what they saw as an unsafe condition. Assessments were then carried out by the workers and supervisors/senior management, with the latter relying on their actions to date. No agreement was reached. The management team satisfied itself that the condition was okay: the workers were requested to undertake the dispute task and refused: they were then offered, but ultimately declined, other tasks.
47. I also consider, at this point, the claim that the respondent failed to follow up the recommendation set out in the Department of Labour's letter of 19 January and, *"through consultation with all parties (undertake) a risk assessment ... of the risk elevation that the discontinuation of water has brought about"*. I am satisfied that the exchange summarised above also met that requirement.
48. What this means is that, amongst other things, the applicants are entitled to hold to their view that the work is likely to cause them serious harm, but – in light of the evidence now before the Authority – I do not accept that their view is reasonable, and therefore do not find they are entitled to the remedies sought.
49. I am also satisfied that one effect of the Authority's investigation is that further consultation has now occurred with all parties, and – for the following reasons – that additional risk assessments have been effectively undertaken. This is because of the steady accumulation of evidence since 10 & 11 January 2007 to the effect that there is no objective basis in support of the applicants' belief that dry sawing was and is unsafe: s. 28A (5) of the H&SEA. This evidence includes: the finding in the Department of Labour 19 January report there was no *"material increase"* of the risk profile of (dry) bandsaw operation; the evidence gathered by the Company from other plants for this investigation (involving 108 sawmen – see Mr Stanbury's statement at par 48) indicates strongly that the practice has not resulted in any worsening health and safety problems and arguably suggests instead a lessening of laceration incidents; the reiterated view of the Department

of Labour during the Authority's investigation (oral evidence); and the largely unchallenged evidence brought by the Company during the same from various skilled and experienced practitioners indicating that dry sawing may be safer in respect of the applicants' stated concerns, i.e. the risk of serious lacerations and involuntary amputations, etc (refer to the largely unchallenged statements of Messrs Boblea, Dowd and O'Neill).

50. The applicants themselves have produced no expert evidence in support of their concerns.

Result

51. For the reasons set out above I am not prepared to grant the applicants the order sought under s. 28A (8) (b) of the H&SEA.
52. I similarly reject the applicants' claim that, in terms of s. 10 of the H&SEA, the Company has failed to minimise by all practicable means the hazards arising out of dry sawing: there is no evidence to support that claim.
53. The applicants seek a finding that they have a personal grievance arising from disparate treatment: there is no evidence before the Authority to support that claim.
54. The applicants seek an order that they be returned to work: the season has finished so there is no practicable benefit in granting that order. I record here my expectation that Messrs Darbyshire and Dyke will enjoy re-engagement opportunities at the commencement of the next season as boners (assuming they adhere to their refusal to undertake dry sawing) no different from what would have been the situation had this employment relationship problem not arisen. That is because the Company accepts the practice of sawmen/boners giving up the former task, and working exclusively on the latter.
55. Messrs Darbyshire and Dyke also seek to be paid for the time they have been off and compensation for humiliation, etc. I do not accept that they have personal grievances to support these claims. On the first matter I would not be prepared to provide any remedy any way as I am not satisfied from the applicants' evidence of the unsuitability of other tasks offered to them by the Company. In other words, I would not any way have accepted that the applicants made suitable effort to mitigate their losses.

56. On the second claim, had I found in the applicants' favour, I would also have been obliged to find significant contributory fault. That is because it is clear that both applicants knew in advance of 8 January 2007 of the Company's intention to introduce dry sawing. That was plainly obvious from the extensive modifications to their work environment. It was also likely they were indirectly aware of the respondent's intentions as a result of the latter's consultation initiatives. It is clear that an opportunity existed as early as 14 December 2006 for Messrs Darbyshire and Dyke to expressly articulate their concerns to management: they did not. Their obligation to do so is clearly stated in their employment provisions and by way of the good faith obligations of the Act itself.
57. Their last minute communication of otherwise legitimate health and safety concerns was a major cause of the Company's bad tempered response. A reduction of at least 50% would have been entirely appropriate.

Determination

58. For the reasons set out above the directions and remedies sought by the applicants are declined.
59. Costs are reserved.

Denis Asher
Member of Employment Relations Authority