IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 210/10
5307763

	BETWEEN	TODD MATHEW DOUGLAS Applicant
	AND	B A LOGGING LIMITED Respondent

Member of Authority:	M B Loftus
Representatives:	Ms Kylie Graham, Counsel for Applicant No appearance for Respondent
Investigation Meeting:	10 August 2010 at Christchurch
Submissions received:	At the investigation meeting
Determination:	17 November 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Douglas, originally alleged that he was both unjustifiably disadvantaged and constructively dismissed. The disadvantage claims relate to an assault on Mr Douglas, his view that the respondent failed to address the situation adequately and/or take adequate measures to provide a safe workplace and an allegation that the respondent attempted to vary Mr Douglas' employment agreement unilaterally. It was those issues that, collectively, led to Mr Douglas tendering his resignation.

[2] After discussing this with counsel, and the fact that the alleged disadvantages were, in the applicants view, instrumental in his decision to resign, it was agreed that the claim be consolidated as one of constructive dismissal.

Non appearance on behalf of the respondent

[3] The respondent was not represented at the investigation meeting.

[4] The claim was filed in the Authority on 2 June. A copy was forwarded to the respondent that day along with advice a statement in reply was required within 14 days. The reply has never been received but Mr Brendon Adcock, a director of the respondent company, phoned the Authority within days. He sought various clarifications before advising that the claim was going nowhere as he was going to place the company into liquidation.

[5] The Authority's normal procedure sees the scheduling of a telephone conference at which the parties discuss the forthcoming investigation meeting, its timetabling and conduct. That was set for Thursday 1 July and Mr Adcock was advised of the timing in writing.

[6] At the appointed time an attempt to phone Mr Adcock was answered by a recorded message advising that he was on Arapawa Island, beyond cellphone coverage and out of contact. The planning discussion proceeded in his absence, though it should be noted that Mr Adcock telephoned the Authority that morning and left a message asking why no one had contacted him.

[7] Mr Adcock was advised of the attempted contact and that as a result of the recorded message the telephone conference had proceeded in his absence. He was advised that the investigation meeting was scheduled for 10 August and that it would proceed if he chose to absent himself. He was also told that if he did wish to participate he must provide details of his defence along with any accompanying documentation he wished to rely upon no later than 2 August. Written confirmation of this advice was forwarded that day.

[8] Mr Adcock acknowledged receipt of the notice referred to in 7 above but did not give any indication of an intention to defend the claim. He did not attend the investigation meeting despite being aware of it and its timing. No explanation has been offered.

[9] I considered it appropriate to continue with the investigation and determine the matter given that the respondent is aware of the hearing, the consequences of not appearing and its repeated failure to actively participate in the process.

Background

[10] Given the respondents failure to participate in the investigation process, the following outline relies on Mr Douglas' description of what occurred.

[11] The respondent is a tree felling and firewood business operating in the Canterbury region.

[12] The applicant, Mr Douglas, was engaged by the respondent as a Digger Operator, though he was asked to perform other duties from time to time and this generally meant operating a chainsaw. For this purpose Mr Douglas initially used one of Mr Adcock's chainsaws that doubled as a company spare but he subsequently bought his own. Mr Douglas says that before buying the chainsaw he sought Mr Adcock's advice as to what would be an appropriate size and the later approved his purchase of a size 46 chainsaw.

[13] There was no written contract though it appears the arrangement was essentially full time. Mr Douglas would leave home so as to arrive at the work site (the location of which could vary) at around 6.45am having picked up his work colleagues on the way. They would commence at about 7am and work through to 4 or 4.30pm. I say 'essentially' as it appears that should Mr Douglas and his colleagues be unable to work due to inclement weather they would not be paid for that day. Mr Douglas was paid $13.75 an hour and received a chainsaw allowance of $50 a month for the purpose of maintaining the chainsaw he had purchased.

[14] At the time of the incident that triggered this claim, Mr Douglas was working a clear felling site near West Melton. The gang comprised three workers. Mr Douglas operated the digger which was used to run logs through a machine designed to remove limbs from felled logs. He would, from time to time, use the chainsaw to help remove what he described as "ugly limbs" that prevented the log being run through the mechanical de-limber. One of his colleagues, Ricky, spent virtually all his

time operating a chainsaw, while the other, Shane, operated a skidder (a machine used to move logs) and, like Mr Douglas, operated a chainsaw on an occasional basis.

[15] On the day in question, Thursday 11 June 2009, Mr Douglas was driving a ute. The three had completed work for the day and were retrieving warning signs. Mr Douglas says Ricky was sitting next to him while Shane was in the back seat. He says that he reached for his lighter and found both it and the nearby door handle covered in grease. Mr Douglas believes that Shane had applied the grease on these items deliberately. He says he reached behind for one of the rags normally left on the rear seat, felt some fabric and wiped his hand. He then heard an expletive and was hit on the side of the face with a safety helmet. The 'rag' was actually Shane's jersey and he had taken offence at Mr Douglas using it to wipe the grease from his hands.

[16] The assault left Mr Douglas with a lump on his left eyebrow and, it would later be diagnosed, concussion. He says he also had a headache for some time. He still experiences them and attributes these occurrences to the assault.

[17] On returning home, Mr Douglas sent a text to Mr Adcock advising he had been assaulted. The response read: *"there really aint much can do mayb you should have used rag instead of his top still no reason to throw things around hope hat ok and not broke start costing money"*.

[18] Mr Douglas was upset at the apparent lack of concern and asked Mr Adcock to discuss the matter with Shane.

[19] Mr Douglas says that the following day Mr Adcock arrived at the work site and advised that he was going to discuss the previous days' events with Shane. Mr Douglas goes onto say:

> *"Ten minutes later Brendan spoke to Shane. They were pointing up at me in the digger laughing as they were speaking. They kept looking at me so I knew they were talking about what had happened. I was really upset that they were not taking things seriously. I was very concerned about what had happened as it was a dangerous job and I needed to be able to rely on my work mates"*.

[20] Later that day Mr Douglas blacked out while operating a chainsaw and he also had problems while driving home after work that day. That evening he sent a text to

Mr Adcock advising that he was disappointed with what he had seen of the discussion with Shane, that he felt he was being intimidated and that he no longer felt safe with Shane in a vehicle with him. Mr Adcock replied *"where to from here then? Whats been done is done i had talk what you want me to do now? If he lays finger on you it's a police matter just like any1 hitting you"*.

[21] Mr Douglas replied suggesting that Mr Adcock had a duty to provide a safe workplace before observing *"… im not happy with the result as it is u did not even ask if i was ok and u have let shane laugh about it and state i need a hiding? y did he not get a warning?"*

[22] Mr Adcock's reply read *"yes I know but way it is you may have to harden up a bit and i will put something on paper and send out with pay slip to him we not making money biggest*[sic] *problem to me"*.

[23] Given his view that the matter was not being treated seriously and spurred by Mr Adcock's reference to the Police, Mr Douglas approached them about the assault.

[24] The next day Mr Douglas slept in and when he woke his partner, having concluded he "looked terrible", took him to a doctor. He was diagnosed with concussion and told to remain off work till the following Wednesday (17 June). He advised Mr Adcock by text.

[25] There then commenced a protracted period over which the two exchanged texts. Whilst other things were discussed such as Mr Adcock's view Mr Douglas had been overpaid, the key issue was Mr Douglas' return to work. Mr Douglas says that he wished to return but that Mr Adcock made his return conditional upon the supply of a medical certificate stating that he was fit to return, undertaking a drug test and signing an employment agreement.

[26] The issue of drug testing and the alleged rationale are dealt with in clause 18 of the proposed employment agreement. The clause reads:

> *"The employee agrees to random compulsory drug and alcohol testing at the discretion of the employer. Please refer to BA Logging Health and Safety System under Drugs and Alcohol policy*
> *Compulsory drug testing is a requirement of the OSH Act."*

[27] Mr Douglas thought the situation was resolved on 2 July when he sent Mr Adcock a text asking if he could return the following day and advising that he felt unable to sign the employment agreement as the wage provision had been left blank. He received a response reading *"Can fill out your hourly rate no worry at all just read and make sure you happy with it is main thing. thinks its to wet to work tomorrow anyway"*.

[28] On 4 July (a Saturday) Mr Douglas received a text from Mr Adcock reading *"are you going to be at work on monday got to let my fill in guy know you need to stop mucking around do you want job or not"*. Mr Douglas replied that he would be at work the following Monday (6 July) and he was instructed to be at the firewood yard by 6.45am.

[29] Mr Douglas says that he reported to work to be told that they were not going to an external site but staying in the yard. He says he signed the employment agreement and that talk then turned to the whereabouts of his chainsaw. Mr Douglas's chainsaw had had a serious fault and was, at that time, being repaired by its supplier in Nelson. It had been gone for some time due to the unavailability of required parts. At the time of this discussion Mr Douglas expected it back on either the Wednesday or Thursday though, as events transpired, that was not to be as the parts remained unavailable. Mr Douglas says Mr Adcock told him to go and not to return until he had the chainsaw back.

[30] Mr Douglas again sent a text the following morning repeating that he had a work clearance and asking what time he should come to work. He says he did this as the spare chainsaw was then being used by a casual employee and that as a permanent he felt he had a superior right of access. He does, however, accept he did not explain that rationale to Mr Adcock.

[31] Mr Douglas continued to text over the next couple of days seeking work and while not all were answered the gist of the responses that were received can be summarised by two texts sent by Mr Adcock on 9 July. The first read *"Stopped logging to clean out the wood yard might just do firewood next couple of months see where we go from there don't really know, whole world seems* [expletive] *at the moment"*.

[32] The second read *"Well if you had* [expletive] *chainsaw you could have worked all week in wood yard not my fault you got no chainsaw what you want me to do just pay you to stand around"*.

[33] Mr Douglas responded to that by asking whether or not work would be available when his chainsaw returned to be told that his chainsaw was inadequate and that he would have to get a size 66 chainsaw. Mr Douglas responded that he could not afford that, to which Mr Adcock texted *"When i worked for a wage i put $50 a week away and never got in a spot like you are, guess your choice to live the way you do, 3 weeks off work and you this broke, sad really"*.

[34] There were a further series of texts the following day commencing with Mr Douglas' suggestion they seek mediation to discuss what he now saw as a developing impasse. After several exchanges that brought a response reading *"Yip ill come with rick and tell then straight you a lazy* [expletive] *that trying to screw over who ever you can for a dollar just a straight out pain in the arse when we go"*.

[35] The texts continued with Mr Adcock essentially telling Mr Douglas that he could work if he got a chainsaw. There were a few other embellishments.

[36] After a days respite, the texts continued on 12 July with the tone getting terser and Mr Adcock questioning whether or not Mr Douglas really wanted to work. The passage that best illustrates the tenor of the days texts reads:

- Adcock *"Just letting you know there work tomorrow, sick of your bullshit, turn up or* [expletive] *off, simple over it, is that clear enough for you to understand"*
- Douglas *"so can i turn up with no saw? Or because I don't have the saw am i fired"*
- Adcock *"How you going to cut wood without saw?"*

[37] The exchange continued with Mr Douglas pointing out that he had been engaged to operate the digger and hardly used a saw before observing *"…so you were fine with my saw, its not my fault you were ok with saw then logging stopped and now you say i need new saw"*.

[38] Mr Adcock responded to that by advising *"If you going to work for me you do as you told, im boss, you just a worker, just remember that, buddy, if you told to use chainsaw, you should be happy to have job at all"*.

[39] There were a couple more exchanges that day but that was essentially that. Mr Douglas wrote to Mr Adcock on 22 July tendering his resignation and advising that he felt he could no longer work for B A Logging Ltd given:

- The assault and Mr Adcock's handling of it which meant, in Mr Douglas's view, that the workplace could no longer be considered safe;
- The fact that while he was primarily employed as a digger operator, he was only being offered chainsaw work; and
- The additional requirement that before returning he replace the chainsaw Mr Adcock had earlier approved as suitable.

[40] Mr Douglas then passed the matter to his solicitors who wrote advising the existence of the grievance on 20 August. There was no response despite a reminder dated 4 September.

Determination

[41] As said earlier, the respondent's non attendance means that my understanding of what occurred relies on Mr Douglas' unchallenged evidence. I do, however, accept that evidence. The presentation was entirely credible and it was supported with a transcript of the text messages that passed between Messrs Douglas and Adcock.

[42] In *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd* (1985) ERNZ Sel Cas 136; [1985] 2 NZLR 372 (CA)] the Court of Appeal held that constructive dismissal included, but was not necessarily limited to, cases where:

(a) An employer gives an employee a choice between resigning or being dismissed.

(b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.

(c) A breach of duty by the employer causes an employee to resign.

[43] Mr Douglas claims that his situation falls under the third of the above categories and that the issues outlined in paragraph 39 above constituted breaches of duty that brought about his resignation.

[44] The issues to be determined with such a claim were discussed in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers' IUOW* [1994] 1 ERNZ 168; [1994] 2 NZLR 415 (CA), a case which, ironically, also involved a claim that the employer had failed to address concerns about the provision of a safe workplace. At p 172; p 419 Cooke P (for the Court) said:

> *"In such cases as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach."*

[45] An employer is under a duty to provide a safe workplace. Fulfilling that duty must surely include addressing an alleged assault by one employee on another in a meaningful way.

[46] Mr Adcock has, in attempting to fulfil that duty, failed dismally. There is no evidence that he treated the matter with anything other than disdain. His first response to advice of the assault was to send a text bemoaning the fact he had young employees and suggesting all they needed to do was adhere to one simple rule - harvest four loads of wood a day. There is the comment that suggests Mr Adcock places potential damage to the helmet above that done to his staff and later in the text conversation Mr Adcock responded to Mr Douglas' advice that he may involve the police by telling him not to do so in work time *"…cos got wood to pull 4 loads a day"*. Whilst there is a suggestion he will discuss the issue *"with you guys"* the evidence is that the discussion was limited to a brief chat with Shane at which he and Mr Adcock joked about the situation. There is no evidence the matter was meaningfully discussed with Mr Douglas or that any meaningful action was taken in respect to Shane. Mr Adcock's replies indicate that his sole interest was productivity and show no regard for the duties and obligations he has to his employees. His response fell

well short of what was required and he did not amend his approach despite Mr Douglas' on-going and repetitive reference to his concerns.

[47] There is also the issue of changing Mr Douglas' duties and requiring him to work in the yard with a chainsaw while not allowing him to perform the duties he was engaged for. At its most basic the employment relationship involves an exchange – labour for remuneration. The form of labour provided is therefore an integral ingredient in the contract between the parties and for one party to attempt to unilaterally change the nature of that ingredient can well constitute a breach.

[48] This must be especially true when the change is accompanied by a set of arbitrary changes to previously agreed practices and conditions that precluded Mr Douglas from performing his 'new' duties. Not only did Mr Adcock discontinue his earlier practise of allowing Mr Douglas to use the spare chainsaw by allowing its continued use by someone with, arguably, a lesser right to the privilege, he chose to resile from his earlier agreement that a size 46 was adequate. This placed Mr Douglas in a situation where he would remain precluded from working even when the previously acceptable chainsaw was repaired. These changes arguably amount to an actual, as opposed to constructive, dismissal as Mr Douglas was effectively bared from working due to actions and decisions solely attributable to Mr Adcock, a principle of the respondent employer. That they constituted significant changes to the existing employment agreement goes without saying and they thus breached the duty to adhere to the contract.

[49] It is not surprising Mr Douglas concluded that he was the victim of multiple breaches that effectively precluded his continuing in the employment. Indeed, as already said, it may well be that the employers actions amounted to an actual dismissal but that is not the issue here given Mr Douglas' resignation.

[50] That then raises the question of whether a substantial risk of resignation was reasonably foreseeable. The answer must be yes.

[51] The content of the text messages show that Mr Douglas gave Mr Adcock plenty of notice that he had concerns, that he considered Mr Adcock's responses to make it difficult for him to feel he was safe at work and that Mr Douglas wanted the

matters addressed/resolved. Similarly the way in which Mr Douglas responded to the various impediments that Mr Adcock placed in the way of his return make it clear he considered he was being unreasonably precluded from working and that must clearly raise the possibility that Mr Douglas could consider the relationship at an end. If nothing else, the request the parties attend mediation should have sent a loud and clear warning.

[52] I conclude that Mr Douglas was entitled to act as he did, having been forced to do so by multiple breaches of the employment agreement committed by Mr Adcock on behalf of the respondent. Mr Douglas was constructively dismissed and it goes without saying the dismissal must be unjustified, if only because Mr Adcock failed to attend the investigation meeting and offer an explanation for his actions.

Remedies

[53] The conclusion that Mr Douglas has been unjustifiably dismissed leads to the question of remedies. He sought:

(a) Lost wages;

(b) $10,000 as compensation for hurt and humiliation;

(c) Costs.

[54] Mr Douglas seeks to recover wages lost from the date upon which he found himself unable to return to work when the issue of a suitable chainsaw arose (7 July 2009) and the date of the investigation meeting. He has quantified his loss as being $32,564.67.

[55] In support of his claim Mr Douglas refers to numerous job applications, not one of which has resulted in an interview let alone a job, along with the fact that he is in receipt of an unemployment benefit which means that he will also be receiving assistance to obtain employment from the Ministry of Social Development. However, he also advised that around the end of May he suffered the reoccurrence of a previous injury. That has meant that the type of work he may now perform is limited and the injury could well have precluded him remaining in the employ of the respondent. The fact he may have been required to leave the respondent's employ for this reason must,

in my view, preclude an award of wages beyond the point at which he suffered the reoccurrence.

[56] I also note the claim that the wage loss commenced on 7 July. I can not accept that. This is a constructive dismissal claim and the resignation was not tendered till 22 July. That is, in my view, the date from which any loss should be calculated and what may or may not have been payable while the employment relationship remained in existence is properly the subject of another form of claim.

[57] The above leads to a conclusion that it is appropriate to award wages for the period 22 July 2009 till the end of May 2010. That is a period of forty five weeks. Mr Douglas was paid 13.75 an hour, which equates to $550 for a full time forty hour week. $550 a week for a period of forty five weeks amounts to a loss of $24,750 gross. An order for the payment of that amount shall be made.

[58] Mr Douglas seeks $10,000 as compensation for the humiliation, loss of dignity and injury to feelings (s.123(1)(c)(i) of the Act). He supported his claim with evidence of the hurt he suffered and that was augmented by evidence from a previous landlord who spoke of her observations of the effect that the dismissal had on both Mr Douglas personally and his relationships with others.

[59] The evidence was compelling and, in my view, provided more than ample justification for a significant award. Given that conclusion and the absence of any argument to the contrary I see no reason to grant Mr Douglas less than he seeks and an order shall be made accordingly.

[60] Mr Douglas originally sought interest on any amount he may be awarded for lost wages and compensation. This claim was not pursued when he quantified the remedies he sought at the investigation meeting and there shall not, therefore, be an award under this head.

[61] The last consideration is the issue of contribution. Mr Douglas' only act that could be considered remotely contributory was to wipe his hands on Shane's jersey. Given what followed, that is so minor as to be de-minimus and did not warrant the assault that triggered these events. There is no evidence Mr Douglas did anything that

could be considered inappropriate thereafter. It was Mr Adcock who failed to respond to concerns Mr Douglas properly raised and he who kept changing the terms of employment so as to preclude Mr Douglas' return.

Orders

[62] For the reasons given the following orders are made:

(i) The respondent, BA Logging Limited, is to pay to the applicant Mr Todd Douglas, the sum of $24,750.00 (Twenty Four thousand, seven hundred and fifty dollars) as reimbursement of wages lost as a result of Mr Douglas' unjustified dismissal; and

(ii) The respondent is to pay to the applicant a further $10,000.00 (Ten thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

Costs

[63] I reserve the issue of costs. Assuming that Mr Adcock's previous behaviour makes it unlikely this can be resolved by agreement I require the applicant, if he seeks costs, to make his application within 28 days of this determination. A copy shall be served on the respondent who is to file any response he may have within 14 days of the application.

Mike Loftus
Member of the Employment Relations Authority