

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Dwayne Harbord (applicant)
AND	Waste Management Limited (respondent)
REPRESENTATIVES	Trent Petherick for the applicant Douglas Stewart for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Napier, 18 February 2005
DATE OF DETERMINATION	23 February 2005

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. The applicant, Dwayne Harbord, says the respondent (the Company) failed to provide him with a safe working environment and thereby unjustifiably constructively dismissed him – statement of problem received on 24 December 2004. He claims lost remuneration and compensation for humiliation, etc of \$25,000, punitive damages of \$10,000 and costs.
2. The Company denies the allegations – statement in reply received 19 January 2005.

3. The parties undertook mediation but their employment relationship problem remained unresolved.

Investigation

4. During a telephone conference held on 4 February the parties agreed to a one-day investigation in Napier commencing at 9.30 a.m. Shortly before the investigation advice was received that Mr Harbord was now legally aided.
5. The parties provided written statements at the commencement of the investigation as well as a bundle of relevant documents. At the conclusion counsel for the applicant, Mr Petherick, provided a written submission with copies of case law on which he relied.
6. The parties' effort during the investigation to settle this matter on their own terms was unsuccessful.

Background

7. The parties are largely agreed as to the key events. They can be summarised as follows:
8. Mr Harbord started employment with the Company as a truck driver in April 2001.
9. The respondent Company is well-known internationally in the waste removal and recycling industry.
10. On 14 April 2003 the applicant was engaged in a discussion with another driver over the respondent's radio telephone (RT) system: a third employee, also a driver, interrupted their discussion and, in blunt language, told them to – amongst other things – do their jobs. The applicant responded with the observation that the other driver was not his boss and was not to tell him what to do. At that point a supervisor, Mr Stuart Hodges, intervened over the RT and told all of those involved to shut up and get back to work.

11. Mr Harbord did as he was told. At the end of that working day, at around 4.00 p.m., he returned his vehicle to the Company's yard in Hastings where, he says, he was physically threatened by the third driver, i.e. the one who had interrupted the earlier RT conversation and had told the applicant and another employee to do their jobs. Mr Harbord says that driver threatened to kill him. He says the threats were repeated, unequivocal and he took them seriously. The threats were made in front of two other employees. The applicant was repeatedly told by the other driver that he had friends who would *"take (him) out within 2 months"* and that he was going to get *"my boys to get you"* by the 14th of June (par 11 of the applicant's statement). The 14th of June was identified as a date when one of the other driver's associates was going to get out of prison.
12. Mr Harbord says he took the threats very seriously as the other driver, while not tall, was physically strong, heavily built, muscular, and because the applicant understood the other driver to be connected to a well known gang. The applicant said he was *"absolutely sure"* (par 14, above) that the other driver was serious, as the conversation was cold and calculated and the threats were repeated.
13. Mr Harbord says he was very shaken by the incident. He immediately called his supervisor, Mr Hodges, and arranged to see him that evening, at 6.30 p.m. The meeting took about fifteen to 20 minutes. The parties to the conversation now have somewhat different recollections as to its content: Mr Harbord says he described his life as having been threatened whereas Mr Hodges understood that the applicant had been threatened. The applicant also says he told Mr Hodges that if the other driver did not stop his threatening behaviour then he had to be dismissed: Mr Hodges disputes that claim. The latter says he asked the applicant to put his complaint in writing so that he could take it further but that Mr Harbord declined to do so. It is agreed Mr Hodges said to the applicant that he would talk to the other driver within the next couple of days. Mr Hodges accepted that, at the time of the 14 April interview with the applicant, he regarded the other driver as capable of intimidating and stand over behaviour and that he had gang connections.
14. Mr Hodges made it clear in his written and oral evidence to the Authority that he accepted at the time that the complaint was a serious one. He says he made it clear to Mr Harbord that the Company would immediately intervene so as to establish the

facts with the respondent subsequently making or not making a decision to discipline. He also said that he would talk to the other driver. He admits, however, that he did not do so. He says instead that the matter “*slipped*” his mind (oral evidence). He also agrees that he did not follow-up on his undertaking as he subsequently assumed the problem had gone away as he did not hear further from Mr Harbord about his original complaint. Mr Hodges readily agreed that, before leaving to go overseas for nearly a month around the beginning of May 2003, he neglected to brief his successor, Mr Chris O’Brien, about the incident.

15. At around the same time of making his concerns known Mr Harbord also spoke to the NZ Police. He says he was very nervous about speaking to the Police. This was because of his concerns about gang attitudes to “*narks*” (par 24 of his statement). He was told by the Police that they would have to give the other driver his address to trespass him from the applicant’s property. Mr Harbord felt that was too big a risk to take and decided to leave the matter to his employer to sort out: Mr Harbord did not advise his employer of his approach to the Police or of his subsequent decision to not pursue the matter further with them.
16. Mr Harbord says that, despite a relative quiet period, the other driver continued his intimidatory and threatening behaviour following on from 14 April. The behaviour included gestures – throat cutting or forming with his fingers and thumb the shape of a pistol that he put to his own head. The applicant says that despite having an earlier finishing time in another location, the other driver would appear at Mr Harbord’s yard at around the time the applicant was scheduled to finish and that he would deliberately park his vehicle close to where the applicant was obliged to wash down his work truck. Mr Harbord says that the other driver would then cold stare at him and make comments such as “*I’ll get you*”; “*I’m still going to get you*” and “*I haven’t forgotten*”. According to Mr Harbord, the other driver made it clear that it was up to him whether the applicant was merely hospitalised or killed.
17. Mr Harbord says he could not sleep at night and that he had become a nervous wreck. He says he was very stressed, was always looking over his shoulder and was losing weight. He says the threats turned his world upside down and, ultimately, brought to an end a relationship with his partner who, at the time, was 8-months pregnant.

18. Desperate that nothing had been done by the Company, Mr Harbord says his next initiative was to Mr Hodges' replacement, Mr O'Brien, nearly a month later. On or about 12 May he sent his concerns by text message to Mr O'Brien and then spoke to him by telephone. He says Mr O'Brien told him that he had no idea of the problem. The applicant says it "*came as a complete shock*" that Mr Hodges had not reported his complaint to Mr O'Brien (par 26 of the applicant's statement).
19. The applicant says he again raised the matter with Mr O'Brien on 13 May: he says Mr O'Brien told him that he had taken no action: at the end of his tether, Mr Harbord says he felt the employer could not be trusted to keep him safe and he had to resign.
20. Mr O'Brien recalls event differently: he says he heard from Mr Harbord on the 12th of May, that he understood his complaint and that he spoke to the other driver as soon as he could, i.e. the next day. He says he had no opportunity to report back his initiative to the applicant, or to iron things out, before the latter resigned. Mr O'Brien says he was already aware from the "*grapevine*" (oral evidence) that the other driver was hassling the applicant. He confirmed that Mr Hodges had not reported the applicant's complaint to him and that it was his approach – consistent, he says, with Company policy – that he did not act on matters unless the complainant personally approached him.
21. Mr O'Brien described the other driver as "*a righteous person*" (oral evidence) who had to be spoken to in a particular way. He agreed that the other driver was an intimidating person but said he was not intimidated by him and that it was sometimes necessary to 'face him down' (my term) so as to defeat his stand over behaviour. Mr O'Brien was confident his approach to the other driver would prove effective. The Company agreed with my description of the other driver as a bully. The other driver is no longer employed by the Company.
22. Immediately on ceasing his employment Mr Harbord says he went and saw his GP. He was prescribed sleeping tablets and antidepressants. The applicant says he had no prior history of poor mental health and had never previously taken such medication. Because of ongoing health problems Mr Harbord's GP referred the applicant to the Community Mental Health Team where he saw a Dr Plesner, for psychiatric counselling. Evidence was given to the Authority by Dr Plesner. She

confirmed the absence of a past or family history of mental illness. She explained that the applicant attributed his condition to the harassment he had experienced at work: Dr Plesner had no reason to think otherwise. She confirmed that Mr Harbord was rarely going out, not sleeping well, that his appetite had dropped and he found little enjoyment in the usual things.

23. Mr Harbord confirmed he had delayed pursuing his personal grievance until he was emotionally fit to do so.

Discussion and Findings

24. On a balance of probabilities basis I am satisfied that the applicant was unjustifiably constructively dismissed for the following reasons.
25. The duty to provide a safe system of work has long been recognised as a fundamental condition of the contract of employment: e.g. *Auckland Electric Power Board v Auckland Provincial District Local Authorities Offices IUOW Inc* [1994] 1 ERNZ 168 (CA).
26. The common law obligations of the employer are now broadly reflected in the Health and Safety in Employment Act 1992. The respondent is under a statutory obligation to take all practicable steps to ensure the safety of employees while at work: s. 6 of that Act. That safety includes protection from both physical and psychiatric harm: *Walker v Northumberland County Council* [1995] IRLR 35.
27. Section 2 of that Act defines a workplace “hazard” as including “... a situation where a person’s behaviour may be an actual or potential cause or source of harm to ... another person.”
28. In this case the hazard alleged by Mr Harbord personal harassment and potential violence from another employee. Violence can be physical or non-physical. In this instance the bullying endured by the applicant amounted to psychological assault.
29. A new subsection was added by way of an amendment in 2002. It provides as follows:

To avoid doubt, a person required by this Act to take all practicable steps is required to take those steps only in respect of circumstances that the person knows or ought reasonably to know about.

30. Section 19 of the same Act requires every employee to take all practicable steps to ensure their own safety and that no action or inaction by them while at work causes harm to any other person
31. A clear line of authority exists confirming an employer's obligation to provide a safe working environment and the damages that can result from a failure to meet that responsibility: see *Walker* (above) and the various *Gilbert v Attorney-General*, etc decisions by both the Employment Court and Court of Appeal, etc.
32. The Company was any way under a strong contractual duty to take preventative measures to achieve the same because clause 15 of the applicant's employment agreement provides that it is the respondent's objective,

*... to prevent accidents and exposures resulting in or **having the potential** to result in **injury, illness** and property damage involving its employees ... and otherwise to provide a safe and healthful work environment.*

(emphasis added)

33. There is a separate but equally clear line of authority to be applied in respect of claims of constructive dismissal. That line includes the Court of Appeal's decision in *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd* [1985] 2 NZLR 372.
34. The applicant claims he resigned as a result of the respondent acting in breach of its duty to take all practicable steps to ensure his safety while he was at work: i.e. the Company acted in breach of the third of the three non-exhaustive categories of constructive dismissal referred to in *Woolworths* (above) and thereby caused Mr Harbord's resignation.
35. Consistent with the criteria set out in the *Woolworths* decision, and after having regard to all of the circumstances of the resignation I accept that claim. I am also

satisfied the breach of duty was of such seriousness that a substantial risk of resignation was reasonably foreseeable.

36. Mr Harbord met his obligations under s. 19 of the Health and Safety in Employment Act 1992, to take all practicable steps to ensure his own safety, by advising the company of the hazard he faced.

37. I accept Mr Petherick's submission that, in this instance, the respondent's duty to act can be likened to a situation where an employer encounters the distribution of pornographic material or a complaint of sexual harassment: an immediate response was called for. In this case, the Company had an obligation – regardless of whether it was put in writing or presented orally – to immediately investigate and, if satisfied a risk existed, take all practical steps to ensure Mr Harbord's safety. That it failed to do so was unconscionable in this instance because:
 - it accepted Mr Harbord's honestly held fears;
 - the reputation of the offender was already well known to it;
 - it immediately accepted its obligation to talk to him but failed to do so;
 - at least one other supervisor was aware through the grapevine of the ongoing harassment but also failed to act on it until he received a complaint directly from the applicant himself; and
 - the Company knew at the time of Mr Harbord's termination that the other driver *"was PART of the reason he was leaving"* (refer to the undated statement from Mr Hodges attached to the Company's letter of 28 August 2003 to the applicant's counsel, document G).

38. As I make clear above, the respondent accepted from the outset as credible and genuine the applicant's complaint that he had been threatened yet it failed to act immediately on the complaint. It was not until a month later that a Company representative spoke to the other driver and told him to stop threatening Mr Harbord. That the Company accepted Mr Harbord's complaint he had been subjected to harassing and intimidating behaviour can not be doubted as it did not, at the time of the second complaint, bother to seek the other driver's view before instructing him to cease his threatening conduct. It is also astonishing that little or even no action appears to have been taken by the Company during the period Mr Harbord worked

out his notice, to attempt to assure him that his safety concerns were being addressed.

39. The Company also clearly accepted the veracity of Mr Harbord's complaint in part at least because it had no reason not to and the character, and conduct, of the other driver was already well known to it. By the time Mr O'Brien was advised of Mr Harbord's concerns he was already aware, via the grapevine, of the other driver's behaviour. However, he elected to instruct the other driver only after the applicant – for the second time – articulated his complaint.
40. According to Mr O'Brien, his response was consistent with Company policy, that seriousness is measured in whether matters are reduced to writing. That cannot be so: an appendix to Mr Harbord's employment agreement provides that,

*... you **should** write a letter to the Company, setting out:*

- 1. Details of your grievance, dispute or problem; and*
- 2. What solution you seek to resolve the matter.*

(emphasis added)

41. It can be seen that the provision is clearly not mandatory. As it happened, neither supervisor required the applicant to put his concerns in writing at or after the time he raised them, before they were prepared to act on them.
42. I am satisfied that, by failing to act immediately in response to a serious allegation that it clearly accepted from the outset, the Company failed to take all practicable steps to ensure the safety of Mr Harbord while he was at work. It unnecessarily subjected the applicant to an unhealthy and unsafe working environment when its supervisor allowed the applicant's complaint to slip from his mind. Leaving aside the parties' differences as to how long Mr Harbord gave the Company to respond to his second complaint, I am satisfied that by then the damage had already been done and the applicant was entitled to conclude the respondent had repudiated his employment agreement.

Remedies

43. Mr Harbord seeks punitive damages: Mr Petherick was unable to provide me with any reference to statute or case law such to support his argument the Authority enjoyed the power to grant such a remedy. Section 123 of the Act defines the remedies available; see *Western Mailing v Subritzky* to be reported [2003] ERNZ, WC 22/03, Shaw J, 10 June 2003. There is no evidence of deliberate mistreatment by the Company or of gross oversight such as to warrant punitive or exemplary damages. I am any way satisfied that the applicant's claims can properly be met by conventional remedies.
44. The applicant gave compelling evidence of the impact and effects on him of the sustained threats to his wellbeing and the respondent's failure to fairly and reasonably address his concerns. Mr Harbord's evidence was clearly supported by that of his psychiatrist, Dr Plesner. On the strength of that evidence I find that there is no good or objective reason to look outside of the employment relationship problem for the cause(s) of the applicant's health problems.
45. Having regard to the applicant's evidence of the extent and especially painful nature of the humiliation, etc that he experienced arising out of the Company's failure to take all practicable steps, I am satisfied that a significant award is called for: in all the circumstances of this case I am satisfied that the amount \$15,000 compensation is appropriate: ss. 123 (1) (c) (i) of the Act applied.
46. Mr Harbord's evidence is that he did not seek employment following his resignation because he was not fit to undertake it. Some time after his resignation he was granted a sickness benefit. It is only recently that the applicant has found fresh employment. I accept that Mr Harbord was initially not fit to pursue work because of the effects of his constructive dismissal. I also accept that this is an instance in which, because his ill-health is entirely attributable to the Company's breach of its duty to protect him, the applicant should be able to recover wages lost to him until recently when, with his health recovered, he was able to resume employment. I leave it to the parties to calculate the sum involved; leave is reserved if their agreement is not forthcoming.

Contributing Behaviour

47. The investigation disclosed no evidence of any action by Mr Harbord that contributed to the situation that gave rise to his personal grievance. Having clearly articulated his concern, and the Company having clearly accepted he had every reason to be concerned, the responsibility to act lay with the Company. It failed to meet its obligation and Mr Harbord is in no way accountable for that failure: s. 124 of the Act applied.

Determination

48. For the reasons set out above I find in favour of Dwayne Harbord's claim that he was unjustifiably constructively dismissed by the respondent, Waste Management Limited.
49. I therefore direct the respondent to pay to the applicant \$15,000.00 (fifteen thousand dollars) compensation for humiliation, etc.
50. I also direct the respondent to pay to the applicant wages lost to him from the period of his termination until he recently commenced employment: leave is reserved to the parties in the event agreement is not forthcoming on the sum involved.
51. As requested costs are reserved.

Denis Asher

Member of Employment Relations Authority