IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 398/10
5296324

	BETWEEN	JENNY HUNTER Applicant
	AND	CANPAC INTERNATIONAL LIMITED Respondent

Member of Authority:	K J Anderson
Representatives:	J Peebles, Advocate for Applicant S Beard, Advocate for Respondent
Investigation Meeting:	12 July 2010 at Hamilton
Determination:	6 September 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Hunter claims that she was subjected to an unjustified constructive dismissal; manifested by the resignation from her employment on 3rd March 2009. Ms Hunter asks the Authority to find that she has a personal grievance and award her the remedies of reimbursement of wages for 3 months and compensation of $10,000. The respondent, Canpac International Limited ("Canpac") deny that Ms Hunter was constructively dismissed and say that circumstances arose whereby Ms Hunter was advised that she was required to wear hearing protection, and that the failure to do so would place her employment in jeopardy. Ms Hunter subsequently advised Canpac that she was not prepared to wear the hearing protection as required, and resigned.

Background Facts and Evidence

[2] Ms Hunter had been employed by Canpac for approximately eight years in the role of a setter which involves running metal canning machines and supervising machine operators. Ms Hunter has severe hearing loss, a condition that existed prior to the beginning of her employment with Canpac. Ms Hunter wears a hearing aid, without which she cannot hear.

[3] There is a requirement that employees must wear hearing protection in the Canpac workplace where Ms Hunter was located. While the evidence is not entirely clear, it seems that in 2004, following a complaint from another employee, an issue arose regarding whether Ms Hunter should be required to wear hearing protection. Ms Hunter had never worn hearing protection because she had experienced difficulties because the hearing protection caused feedback in her hearing aid. Apparently, an occupational health and safety officer (Dennis Shaw) was consulted about Ms Hunter's circumstances. He advised that Ms Hunter was not required to wear hearing protection and that she should adjust the level of her hearing aid to a level that was comfortable for her.[1]

[4] It seems to have then been accepted by Canpac management that Ms Hunter was not required to wear hearing protection. However, some time in February 2008, it was brought to the attention of the Process Manager, Mr Mark Bennett, that Ms Hunter did not wear hearing protection. The evidence of Mr Bennett is that until then (February 2008), Canpac believed that Ms Hunter did not have to wear hearing protection, albeit the noise levels in her work area are around 90-100 decibels. But it seems that as a result of a health and safety policy update in November 2008, possibly connected with the Fonterra Group taking over the ownership of Canpac, the fact that Ms Hunter was not wearing hearing protection, came under scrutiny again. The *Noise & Hearing Protection* policy for the Canpac site is quite comprehensive. Among other things, it provides that:

> It is the responsibility of the individual to look after and care for hearing protection.

And;

> The use of hearing protection is not a matter of choice, and failure to wear hearing protection where required is serious misconduct and may result in disciplinary action.

[1] File note (Catherine Simons) dated 1/7/04.

[5] The further evidence of Mr Bennett is that in March 2008, opinions were sought from an Occupational Health and Safety doctor, and an audiologist, about whether hearing protection was necessary for an employee, such as Ms Hunter, who had a hearing impairment. The advice was that Ms Hunter should be wearing protection. On the basis of this advice and the advice of the Canpac Occupational Health Nurse, Ms Judy Osborne, Ms Hunter was referred to a specialist audiologist for an opinion.

[6] Ms Hunter attended an appointment with an audiologist at Waikato Hospital on 1st July 2008. A report was produced by the audiologist; the relevant points are set out in a **SUMMARY AND IMPRESSION**:

> Today's results show a severe to profound mixed hearing loss bilaterally for which Jennifer is fitted with a powerful behind the ear hearing aid on the right.
>
> *In my opinion, there should be no contraindication to wearing hearing protection over top of the hearing aid.* Her new hearing aid is water resistant, so should be relatively immune to moisture damage due to sweat. Provided that the hearing aid have [sic] a special listening programme added for when she is working on the factory floor (with maximum feed-back management and significantly reduced output for loud and maximum level sounds) this should hopefully be an effective solution to the problem for both parties. I have discussed this with John and arrangements will be made to adjust the hearing aid for use with hearing protection at her next appointment.
> While a degree of Jennifer's conductive hearing loss will afford her a degree of protection from sensorineural harm, it is impossible to predict how effective this will be given the wide individual variations of the impact of noise damage on the inner ear. *I would not recommend that her conductive overly be relied upon to protect her ears from noise damage in the work place.*
> [The emphasis is that of the audiologist.]

[7] Following the receipt of the audiologist's report, Ms Hunter was asked to wear hearing protection. Mr Bennett says that this was to ensure that her hearing was "*not further damaged*." Management and Ms Hunter, along with the site union representative, attempted to "*trial"* a range of ear protection.

[8] On 15th October 2008, Ms Osborne records in an email to Mr Bennett, Mr Neil Mallard, the Plant Manager, and Mr Paul Josling, Ms Hunter's supervisor, that the recommendation of Waikato Hospital audiologist was that Ms Hunter:

> "… must wear hearing protection and not rely on her present hearing deficit to protect the inner ear.

> This is also the stance of the Dept of Labour Doctor Dr David Prestage – no exceptions."[2]

I note that the Waikato Hospital audiologist does not say in her report that Ms Hunter "must wear hearing protection," rather she says that Ms Hunter could not rely on "her conductive overlay" to protect her ears from noise damage. Indeed, the audiologist's report is not entirely conclusive. Ms Osborne also records that Ms Hunter now has a new waterproof hearing aid and that her personal audiologist has adjusted this for use with hearing protection, but Ms Hunter was still reluctant to wear earmuffs. Because Ms Hunter did not find any of the products that had been tried as being suitable, she was given the option of going to a local safety equipment shop to select some hearing protection that was suitable and Canpac would pay. There is evidence from Mr Bennett that, to his knowledge, Ms Hunter did not visit the supplier, Ms Hunter says that she did visit the supplier but could not find earmuffs that were suitable.

[9] On 1st December 2008, Ms Osborne sent an email to Ms Hunter with an attached letter. In essence, the letter was a draft that Ms Osborne was seeking Ms Hunter's comments on before sending it to Mr Mallard, Mr Bennett and Mr Josling on 3rd December. It records (paraphrased) that:

a) Considerable effort had gone into reviewing the need for Ms Hunter to wear hearing protection.

b) Ms Hunter now had a technically advanced hearing aid which had been programmed by her audiologist with the added benefit that it can be worn under earmuffs without detriment to the device.

c) Ms Osborne had spoken to Ms Hunter and had been informed that the earmuffs she had tried were not comfortable. It had been suggested that Ms Hunter could go to NZ Safety to find earmuffs that were suitable – Ms Osborne recorded that Ms Hunter had not done this.

d) Ms Osborne had confirmed with the occupational health physician (Dr Prestage) that there is no precedent for anyone not to wear hearing protection in a designated noisy workplace.

[2] The understanding of the Authority is that Ms Osborne contacted Dr Prestage (Department of Labour – Occupational Health and Safety) and enquired if there was any precedent for anyone not to wear hearing protection in a designated noisy workplace and he confirmed there was not.

e) The audiologist had emphasised in her report that the specific hearing loss suffered by Ms Hunter should not be relied upon to protect her inner ear from noise induced hearing loss.

f) As a result of review conducted, Ms Hunter must wear hearing protection in the workplace.

g) Mr Osborne noted that Ms Hunter had reservations about this, citing that she feels more vulnerable and at risk and that this was understandable given that Ms Hunter had spent many years not wearing protection.

h) Recommendations are that Ms Hunter be fitted with one of two particular earmuffs that are currently available and that it is acceptable practice to allow a short space of time to adapt to wearing hearing protection; i.e. in progressively extended periods, so that by two weeks the protection is worn at all times.

i) Should Ms Hunter not be comfortable and compliant "at this stage" she could be offered some life skills support around managing the change required of her.

[10] There is no evidence that Ms Hunter made any response to the content of Ms Osborne's letter before it was forwarded to the three intended recipients.

[11] Mr Bennett attests that on 19th December 2008, Ms Hunter was provided with audio earmuffs to trial. He says that Ms Hunter refused to trial the earmuffs and simply put them on and quickly removed them again. As a consequence, Ms Hunter was suspended from her employment. Ms Hunter says that as soon as she tried the earmuffs on, she knew "instantly" that they were not right as she was getting "feedback" from her hearing aid.

[12] On 22nd December 2008, a meeting took place with Ms Hunter to discuss her refusal to wear the hearing protection. Mr Bennett says that Ms Hunter was invited to provide evidence from her audiologist that a failure to wear hearing protection would not harm her hearing. Matters were then left until 5th January 2009 to allow Ms Hunter to take annual leave and to allow her time to provide a report from her audiologist. However, as Ms Hunter has told the Authority, given the Christmas/New Year holidays, it was not possible to see her specialist until February 2009.

[13] Further meetings took place on 5th January and 8th January 2009 without any real conclusion. The position of Canpac was confirmed in a letter dated 8th January 2009 from Mr Bennett to Ms Hunter. Mr Bennett confirms that Ms Hunter had expressed that:

> … you would feel unsafe if you were required to turn off your hearing aid and wear earmuffs. However you have not provided any specialist documentation supporting your view. We feel we have provided you sufficient time to provide this. We must act on the medical information we have, therefore we require you to return to your normal role and wear hearing protection at all times while in noise hazard areas. Alternatively, we require you to provide specialist written documentation for us to consider which states that you are not required to wear hearing protection, including the reasons why not.

Further annual leave was approved for Ms Hunter until 19th January to allow Ms Hunter to seek "documentation." Mr Bennett concludes his letter:

> Failure to return to work on this basis (or alternatively failure to provide satisfactory medical evidence supporting your view) by 20th January 2009 will put her [sic] employment in jeopardy and accordingly we will need to meet with you to discuss this possible consequence.

[14] On 14th January 2009, Ms Hunter provided a brief note from her GP, who wrote:

> Not wearing ear muffs will cause no further damage to Jennifer's hearing loss that has been diagnosed in the past.

Mr Bennett says that this was not acceptable as it was felt that a GP was not qualified to make this type of assessment. I accept that this was a reasonable view.

[15] A further meeting took place on 20th January 2009. Ms Hunter was accompanied by two union representatives. Ms Hunter was offered alternative duties with the training coordination team; out of the area where hearing protection is required. Mr Bennett says that this was to allow Ms Hunter to meet with her specialist audiologist on 2nd February; which duly occurred.

[16] The evidence is unclear as to what happened after 2nd February but it seems to be commonly accepted that Ms Hunter was given until 23rd of February 2009 to present appropriate medical evidence that she is able to safely work without hearing protection. In the interim period, Ms Hunter consulted with an employment relations advocate, Mr John Peebles. Via a letter to Mr Bennett dated 22nd February 2009; Mr Peebles proposed a meeting with Canpac to: "… resolve this matter prior to any harsh or adverse decisions being made."

[17] Mr Bennett responded immediately via a letter dated 23rd February and concluded, by informing that:

> We now regret to confirm that unless Ms Hunter contacts us within 7 days of this letter to confirm that she will return to work immediately and comply with all safety requirements, including wearing hearing protection, her employment will be terminated without notice. Given the specialist advice we have received and the fact that our safety obligations at law are not negotiable, our position regarding hearing protection is not negotiable, so we do not understand how an additional meeting can benefit Ms Hunter.

[18] However, apparently unknown to Mr Bennett, on or about the same day (23rd February), Ms Hunter received a letter from her specialist, Mr Litchfield; the outcome of her appointment on 2nd February. The relevant content of the letter is:

> I assume given the type of factory situation she is in and the claimed recommended grade of earmuff, that the noise level is under 90dB. She mentioned that some people just wear earplugs in that area, and these are approved.
> Jennifer cannot wear earplugs obviously and so I have suggested that she wear very simple, cheap earmuffs as one might obtain from the Warehouse, or that she wears the Class 3 earmuffs given and she remove the padding inside. The Class 3 earmuffs might be expected to reduce the sound by 20-25dB. But without lining if they are fitted correctly over the ear, they should reduce the sound by about 10dB. This would be the equivalent to earplugs. She should have the MPO adjusted by the Audiologist. This prevents her receiving sounds above 95dB should these occur. Again I am assuming that it would be unusual for 95dB sounds to occur in this factory situation.
> In summary I consider that it probably does not matter whether or not she wears earmuffs with the right hearing aid. However it is possible that some of the frequency thresholds could be increased close to the normal threshold of hearing with her hearing aid, and therefore at least a 5dB reduction would be advisable.

[19] On the morning of 3rd March 2009, Ms Hunter took Mr Litchfield's letter to the Plant Manager, Mr Mallard. His evidence is that he pointed out to Ms Hunter that there is a New Zealand Standard in regard to providing appropriate hearing protection and the Warehouse product would not be appropriate. Nor would it be an option to remove the padding from other earmuffs as suggested by Mr Litchfield. In summary, Mr Mallard says that any option that involved "non-approved" hearing protection would not be acceptable as Ms Hunter still needed to have some hearing protection.

[20] As a result of receiving Mr Mallard's opinion pertaining to Mr Litchfield's suggestions, Ms Hunter presented her resignation on the afternoon of 3rd March. Ms Hunter says that she felt that she was "*bulldozed*" into resigning as she feels that Canpac took exception to her obtaining outside assistance in the form of Mr Peebles. Ms Hunter believes that Canpac should have met with Mr Peebles and taken due notice of Mr Litchfield's suggestions. Ms Hunter says that she was left with the option

of wearing the hearing protection or resigning as she did not want to be dismissed. She also chose to resign because the hearing protection would have prevented her from hearing in the workplace, a situation that she believes would have been unsafe for her. Further, Ms Hunter says that she needed to be able to hear in order to carry out her job in regard to assessing whether the machines were operating effectively.

Analysis and Conclusions

[21] The first issue for determination is whether or not the resignation of Ms Hunter was, in reality, a constructive dismissal. The onus is on Ms Hunter to show that there was a dismissal. Given the ultimatum set out in Mr Bennett's letter of 23rd February 2009, in that Ms Hunter had 7 days in which to return to work, on the basis that she must wear the hearing protection, or have her employment terminated without notice, and given that her evidence is that she was unable to wear the protection, as to do so would deprive her from hearing to an acceptable level, and compromise her safety and general effectiveness in the workplace, Ms Hunter believed that she was left with little choice. Rather than be dismissed, Ms Hunter resigned.

[22] The circumstances pertaining to Ms Hunter do not fit neatly within the generally accepted criteria that can be applied to a resignation,[3] which in reality, is a constructive dismissal. However, the Court of Appeal in *Commissioner of Police v Hawkins* [2009] 3 NZLR 381 (CA 397/2008) referred favourably to the findings of Judge Shaw in the Employment Court judgment on appeal[4] in regard to examining the circumstances surrounding a resignation and the motivation for it:

> We agree with Judge Shaw's assessment of this issue (at [30]):
>
> "While a personal grievance for unjustified dismissal requires the grievant to show that there has been a dismissal, in the case of constructive dismissal this is not so. A person who apparently voluntarily resigns or otherwise leaves their employment is not precluded from bringing a claim for constructive dismissal by reason of that action. That is because the very nature of the claim for constructive dismissal is dependent on the events which preceded it. It is artificial to separate the events leading up to a constructive dismissal and the way in which the employee actually left their employment.
> As the Court of Appeal said in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168 at 172, it is necessary to examine all the circumstances of the resignation not just the terms of the notice or the way the employee has tendered the resignation. Claims for constructive

[3] For example: *Auckland Shop Employees v Woolworths (NZ) Ltd* [1995] 2 NZLR 372 and *Auckland Electric Power Board v Auckland Provincial District Local Authorities IUOW Inc* [1994] 1 ERNZ 168.
[4] *Hawkins v Commissioner of Police* [2007] ERNZ 762.

> dismissal do not require an analysis of the method of the dismissal because the employee invariably makes a decision to leave in such cases. The focus of such claims is on the employee's motivation for that decision, whether the motivation arises from a breach of the employer's duty or other actions by the employer. The mode of leaving is not part of the inquiry into whether the constructive dismissal occurred. It is therefore possible for a claim of constructive dismissal to be brought even where the procedure leading to an application for disengagement is not challenged." [Emphasis added.]

[23] In the circumstances applying to Ms Hunter, relating to her claim of constructive dismissal, the events which preceded her resignation have been set out in some detail above. Canpac, understandably, wished to ensure that their *Noise & Hearing Protection* policy was adhered to, without exception, in order to meet its statutory health and safety obligations. However, it seems to me that while the intention was to ensure that the hearing of Ms Hunter was protected, the result of Canpac's insistence that she comply with wearing generally accepted hearing protection, was that Ms Hunter believed that her safety and efficiency was compromised, due to the fact that she could not hear while going about her assigned duties in the workplace. I conclude that this belief on the part of Ms Hunter was genuinely and realistically held and it presented a problem for both parties. The onus in regard to solving the problem was eventually put back to Ms Hunter to present evidence that her hearing would not be damaged further if she did not wear hearing protection. Given the information that Canpac was relying on and the steps that Canpac took to assist Ms Hunter, it was not entirely unreasonable to ask Ms Hunter to satisfy that onus. However, I conclude that Mr Mallard was too hasty in rejecting outright the suggestions made by Mr Litchfield. The outcome of that rejection was that, coupled with Mr Bennett's assertion that the situation was "not negotiable"[5] Ms Hunter then found herself faced with a choice, that is; to wear the hearing protection and compromise her safety and workplace efficiency overall, because she would not be able to hear, or face dismissal. Rather than be dismissed, Ms Hunter chose to resign.

[24] I find that the motivation for the resignation was that neither of the alternatives presented by Canpac was reasonable for Ms Hunter, given her hearing disability, hence she was constructively dismissed.

---

[5] The letter to Mr Peebles dated 23rd February 2009.

Was the dismissal of Ms Hunter unjustified?

[25] Section 103A of the Employment Relations Act 2000 (the Act) provides the test to be applied. In determining whether a dismissal or an action was justifiable, the Authority is required to consider on an objective basis, 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.

[26] I conclude that there are two actions by Canpac that were unfair and unreasonable and hence led to the dismissal of Ms Hunter being unjustified. The first of these actions was Mr Bennett's response to Mr Peebles in the letter of 23rd February 2009. Mr Bennett made it clear that the position of Canpac was non-negotiable and he was not prepared to meet with Mr Peebles to discuss matters further. As Mr Peebles put it; "*prior to any harsh or adverse decisions being made."* I find that the adoption of a non-negotiable position by Mr Bennett was unreasonable given that he knew that Ms Hunter had met with Mr Litchfield on 2nd of February and was awaiting a report from him as to his assessment of Ms Hunter's hearing impairment and appropriate action. While I cannot be sure, it appears to me that Mr Litchfield may be more highly qualified than the Waikato Hospital audiologist, albeit I do not wish to be seen as being dismissive of her report, and I accept that Canpac were entitled to place some reliance on it. Nonetheless, I find that Mr Bennett was unreasonable in adopting a non-negotiable position before the outcome of Ms Hunter's consultation with Mr Litchfield was known. The adoption of this position by Mr Bennett was completely at odds with Canpac's stance that Ms Hunter should provide an alternative assessment as to the damage that might occur to her hearing, should she not be prepared to wear hearing protection.

[27] The second action that I find was unfair and unreasonable was the rejection of Mr Litchfield's suggestions by Mr Mallard on 3rd March 2009. While I can accept that Mr Mallard's views in regard to departing from New Zealand Standards regarding hearing protection may be entirely valid; at the very least, Ms Hunter was entitled to have the suggestions of Mr Litchfield considered and discussed and even possibly trialled for a period of time. Given that Ms Hunter had worked for the previous eight years without hearing protection, without any apparent detriment, the suggestions of Mr Litchfield may have given her adequate protection, given Ms Hunter's already

current severe hearing loss. Perhaps appropriate tests, before and after a short trial period, would have revealed whether or not Mr Litchfield's suggestions were appropriate. I do not wish to be seen as suggesting that Canpac were unreasonable in regard to their general responsibility to uphold appropriate health and safety measures, as they were not. Rather, I conclude that having had other options presented by Mr Litchfield, particularly specific to the circumstances of Ms Hunter, a fair and reasonable employer would have given close consideration to those options and would have been prepared to discuss the feasibility of implementing Mr Litchfield's suggestions before rejecting them.

[28] For the above two reasons I find that the actions of Canpac in all the circumstances, were not those of a fair and reasonable employer; hence the dismissal of Ms Hunter is unjustified and she has a personal grievance.

Remedies

[29] Having determined that Ms Hunter has a personal grievance, pursuant to s 123(1) of the Act, the Authority may provide various remedies. Also, pursuant to s 124 of the Act, the Authority must, in deciding both the nature and the extent of the remedies to be provided:

> (a) consider the extent to which the actions of the employee contributed towards the situation which gave rise to the personal grievance; and
> (b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly."

[30] I consider that the actions of Ms Hunter did contribute towards the situation which gave rise to the personal grievance. This is because she was particularly reluctant to trial any of the alternatives offered by Canpac in order overcome the problem that existed. I also conclude that Ms Hunter was less than cooperative in regard to obtaining an alternative professional assessment of her hearing condition. The effect of this overall lack of cooperation was that Canpac management eventually, after approximately one year of attempting to resolve matters, found themselves left with little alternative but to inform Ms Hunter that her continued employment was in jeopardy. It seems to me that had Ms Hunter obtained an assessment from Mr Litchfield earlier, Canpac may have been more open to giving some time to assessing the practicability of Mr Litchfield's suggestions, rather than taking the somewhat cursory approach that duly occurred. In the round, I consider that the remedies available to Ms Hunter should be reduced by 20%.

(a) Reimbursement of wages

[31] Ms Hunter seeks reimbursement of wages for 3 months (13 weeks). As Ms Hunter obtained new employment from 25th May 2009, the period of time assessed for loss of wages is 11 weeks and two days. While Ms Hunter has not produced any evidence of any attempt to mitigate her loss of income, I accept that given her age and the current economic environment, she obtained new employment relatively quickly. Ms Hunter was paid $22.17 per hour with a gross weekly income of $886.80[6] ($177.36 per day). Therefore, the loss of income I would have ordered is $10,109.52. But this sum is reduced by 20% leaving a residue of $8,087.62. An order will follow.

(b) Compensation

[32] Ms Hunter seeks the sum of $10,000 under s 123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to feelings. Ms Hunter gave evidence of her embarrassment and humiliation regarding her suspension from employment and the effect of having to leave her employment which she enjoyed and had been in for eight years. I conclude that an appropriate award of compensation is $5,000 reduced by 20%, leaving $4,000.00. An order follows.

Determination

[33] It is determined that:

(a) For the reasons set out above, I find that Ms Hunter was constructively dismissed and the dismissal was unjustified. Ms Hunter has a personal grievance.

(b) Pursuant to ss 123(1)(b) and 128(2) of the Act, Canpac International Limited is ordered to pay to Ms Hunter the gross sum of $8,087.62 as reimbursement of lost wages.

(c) Pursuant to s 123(1)(c)(i) of the Act, Canpac International Limited is ordered to pay to Ms Hunter compensation in the sum of $4,000.00.

Costs: Costs are reserved. The parties are invited to resolve the matter of costs if they can. In the event they cannot, Ms Hunter has 28 days from the date of this determination to file and serve submissions with the Authority.

---

[6] $22.17 x 40 hours

Canpac International Limited has a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority