

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 90
5354575

BETWEEN JAMES LESLIE IRVINE
 Applicant

AND WALLACE & COOPER
 LIMITED
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: Michael Guest, advocate for Applicant
 Wayne van Vuuren, counsel for Respondent

Investigation Meeting: 3 and 4 April 2012

Determination: 15 May 2012

DETERMINATION OF THE AUTHORITY

- A. The applicant has a personal grievance; he was unjustifiably dismissed, constructively, by the respondent.**
- B. As remedies for his grievance the applicant is awarded six months lost wages of \$75,000 and compensation of \$19,000 under s 123(1)(c)(i) of the Employment Relations Act 2000.**
- C. Costs are reserved.**

Employment relationship problem

[1] The applicant Mr James Irvine alleges that constructive dismissal was the way in which his employment relationship with the respondent Wallace & Cooper Ltd ended. Mr Irvine claims that the dismissal was unjustified. Having raised a personal grievance in that regard he seeks to resolve it with orders from the Authority for reimbursement of wages lost as a result of the grievance, and compensation for humiliation, loss of dignity and injury to feelings.

[2] Mr Irvine's claim is to be determined by applying the test of justification at s 103A of the Employment Relations Act 2000 and, if his grievance is established, by awarding him the remedies claimed of reimbursement and compensation which are available under s 123 of the Act.

[3] Two years lost wages of \$300,000 and compensation of \$30,000 is claimed. A further claim for punitive or exemplary damages of \$30,000 was abandoned by Mr Irvine's advocate, Mr Guest, shortly before the investigation meeting.

[4] Mediation undertaken by the parties prior to the Authority's investigation did not resolve the employment relationship problem.

Termination of the employment relationship

[5] There is no dispute between the parties that Mr Irvine was an employee of Wallace & Cooper when his employment ended abruptly in June 2011.

[6] The termination was confirmed by Mr Irvine in a note he gave to Mr Gary Cross, Managing Director of Wallace & Cooper, which read:

Gary

I found your oral outburst of abuse over the phone on Thursday afternoon totally unacceptable. As a result I am tendering my resignation effective in one hour which is in line with my current employment contract.

I wish to take this opportunity to wish both Brian and you all the best for the future with your acquisition of Andar Holdings.

James Irvine

[7] On 27 June 2011 when he resigned, Mr Irvine had been employed by Wallace & Cooper for only six days. On 21 June 2011 he and Mr Cross had signed an employment offer under which Mr Irvine accepted the position of Sales & Marketing Manager with the company, at a salary of \$150,000 per annum. The commencement date was expressly backdated to 8 June 2011, which was less than three weeks before Mr Irvine resigned.

[8] For a long time before June 2011 however, Mr Irvine had worked in the business known as Andar Holdings and continued to do so during the period in which it was sold and transferred by Mr Irvine's previous employer to Wallace & Cooper.

For several years Mr Irvine had been the managing director of the Andar Holdings business while it was under the ownership of his earlier employer.

The outburst of abuse

[9] In his resignation note Mr Irvine stated that the behaviour of Mr Cross during a telephone call on 23 June had been unacceptable and, in consequence, he was tendering his resignation with one hour's notice.

[10] There is no dispute that Mr Irvine had rung Mr Cross on 23 June to question why he had not received his pay. Mr Cross told him the reason was because Mr Irvine had not filled in timesheets for what was the first pay period with his new employer.

[11] There was some further brief discussion about timesheets before the complained of behaviour of Mr Cross occurred. Mr Irvine in his evidence said that Mr Cross had abruptly and aggressively responded to him with the following utterances:

You're no longer in the front corner office. You are now in the back office! You are a piece of shit and you do exactly what I tell you! If I tell you to shit in a corner you shit in a fucking corner!

[12] Mr Irvine's evidence is that in response to this he said:

Whoa! Whoa! Whoa! I think you've gone too far.

[13] He said that the telephone call ended when Mr Cross said:

Well, you have a good day.

[14] After these exchanges Mr Irvine took the next day off as sick leave.

[15] Mr Cross denies that he told Mr Irvine to "shit in the corner." His evidence is that during the telephone call late in the afternoon of 23 June 2011 he and Mr Irvine exchanged words about the latter's pay not going through because of his failure to submit timesheets. Mr Cross described the exchange as amounting to a debate on the issue which was carried on to a point where he had said to Mr Irvine:

James, you're not in charge here any more. If you're told to sit in the corner, then you should sit in the corner.

[16] At the investigation meeting Mr Irvine and Mr Cross gave evidence and were extensively questioned about this and other aspects of the personal grievance claim.

[17] There was also evidence given by Mr Mark Evans, formerly Group CFO of Wallace & Cooper. He said that at the time the phone call took place between Mr Irvine and Mr Cross he had been walking to the latter's office to discuss a work matter. Although when he arrived the door was closed, he said he could hear Mr Cross yelling from inside. His evidence was:

The words I clearly heard were something about – “front office and now in the back office”. He then proceeded to yell on the phone “you are a piece of shit and if I tell you to shit in a corner then you shit in a fucking corner”.

[18] Mr Evans said he later realised that Mr Cross had been yelling over the phone at Mr Irvine, as the latter had rung him on the evening of 23 June and told him about a “very unpleasant phone call with Mr Cross.”

[19] After the phone call, later on the evening of 23 June, Mr Irvine visited Mr Brian Kenton. He is a 75% shareholder in Wallace & Cooper, the balance of the stock being owned by Mr Cross.

[20] In answer to cross-examination Mr Kenton accepted that Mr Irvine had complained to him on the Thursday night that he had been told by Mr Cross to “shit in the corner.” In his written brief of evidence he had stated the opposite, that Mr Irvine had not complained to him about being spoken to rudely on the telephone by Mr Cross. I accept as correct his answer to cross-examination.

[21] Mr Kenton confirmed that in response to Mr Irvine's complaint he had spoken to Mr Cross soon after and asked him, “what the hell is going on?”

[22] I accept Mr Irvine's account of the words used by Mr Cross during the telephone call at about 5pm on Thursday, 23 June 2011. I regarded Mr Irvine as having given a truthful account of words he says Mr Cross berated him with during the telephone call. I also regarded the account given by Mr Evans as truthful in respect of what he had heard being yelled by Mr Cross from within his office.

[23] It has been established and is relevant that Mr Cross has a propensity to express himself at times plainly but crudely, sometimes using physical gestures such as banging tables to help make his point.

[24] Part of a sound recording secretly made by Mr Evans during a meeting with Mr Cross and others was produced to the Authority. In this excerpt Mr Cross can be heard using the word “fuck” or its derivatives many times with a distinct intermittent accompanying noise which, Mr Evans was able to say from being present to witness it, was Mr Cross hitting the top of the table for emphasis.

[25] Although there is an issue between the parties as to why the complete tape recording was not produced, the parts that were not provided to the Authority make no difference to the words Mr Cross used and which can be heard. Relevantly, these include discussion with Mr Evans, as company financial controller, and two other accountants, about the accounts and the accounting procedure. Mr Cross refers to the material as being “a crock of shit from day one” whose unreliability was such that “I’d wipe my ass on them ... there you are! If you want it!”

[26] It is also relevant when considering this form of expression used by Mr Cross that he had referred to himself on occasions as “an arsehole.” He agreed readily in his evidence that he had done so and had also stated to others on occasions that he had some expertise at being “an arsehole,” and to a high degree.

[27] The liberal use by Mr Cross of words such as “shit” and “arsehole” with reference to particular people as well as things was again demonstrated, I find, on Monday 27 June after Mr Irvine had handed his resignation letter to Mr Cross. Mr Irvine’s evidence is not disputed by Mr Cross that after handing over the letter and being requested to give back his vehicle keys and cell phone, there was an exchange when Mr Irvine resisted giving back the phone because he claimed ownership of the number. As this exchange grew more heated Mr Irvine went to leave the office and go to his car. On the way, followed by Mr Cross, he passed through an office in which there were five people. In front of them, waving towards Mr Irvine, Mr Cross had exclaimed:

This man is an arsehole. He has backstabbed every single one of you in the office. In particular, [named employee], in as little a time ago as the management meeting last week. He is out of here. He is gone. This man will not give his cellphone back.

[28] I accept that Mr Cross also said loudly to Mr Irvine:

You have given one hour’s notice. You sit in your chair in your office. You don’t do anything. You don’t talk to anyone. You don’t leave for an hour.

[29] Mr Irvine ignored the request and upon reaching his car and getting into it had a minor physical altercation with Mr Cross who seized the car keys until Mr Irvine had handed over his cell phone.

[30] I accept that at this time Mr Cross further berated Mr Irvine, saying:

You're just a fucking sniveller. Why don't you go up and talk to your mate, Brian [Kenton].

[31] Mr Cross himself then rang Mr Kenton, saying to Mr Irvine:

In fact I'll ring him now. You're just a fucking sniveller. You're just a fucking sniveller mate.

[32] Mr Irvine spoke to Mr Brian Kenton on the phone before handing over his cellphone to Mr Cross, as requested of him by Mr Kenton. Mr Irvine then drove off to see Mr Kenton and complain about the actions of Mr Cross and seek an apology.

[33] I accept the evidence of Mr Irvine and Mr Evans as to what Mr Cross had said. I consider it more likely than not that he said "shit" several times rather than "sit," as this mode of address is consistent with his habitual form of expression employing faecal or defecatory references.

[34] It is clear to me that Mr Cross had spoken to Mr Irvine with a sense of increasing exasperation over the latter's attitude towards his new employer and a conveyed self belief in his high degree of seniority and proprietorial role in the business which had only very recently been acquired by Wallace & Cooper. Dissension between Mr Cross and Mr Irvine had been growing rapidly over those matters. I find that Mr Cross did have a verbal explosion and used the words as claimed by Mr Irvine.

[35] The Authority cannot readily conceive of any situation where an employer could be justified in speaking to any employee, no matter what age, gender or position, in those terms. There is no suggestion that, on this occasion, the words were used in jocular banter between two people engaged in ribbing each other. The telephone call made by Mr Irvine on 23 June was a serious communication in which he had endeavoured to discuss with his employer a significant matter affecting his employment, and during which he had expressed contrary views of the employer's requirement for him to keep a timesheet. Whether Mr Cross had grounds for

disagreeing with Mr Irvine, he had no justification and was given no provocation for addressing Mr Irvine in an obscene, demeaning and degrading manner.

[36] I am quite satisfied that Mr Irvine, as he said to Mr Cross at the time, found the words totally unacceptable and reasonably felt that he had to resign as a result.

[37] I consider that although there were other factors that had led in previous days to dissension between Mr Cross and Mr Irvine, it was the abuse he received during the phone call on 23 June that was the substantial reason for or proximate cause of the decision he made to resign.

Constructive dismissal

[38] I find in the circumstances that although the termination of employment was described by Mr Irvine as being by “resignation,” as a matter of legal principle applied to the circumstances, the termination was a constructive dismissal.

[39] Advocate and counsel, Mr Guest and Mr van Vuuren, both referred in their submissions to the leading case in this area of law of *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW* [1994] 1 ERNZ 168, often called ‘the meter reader’s case.’

[40] As stated by the Court of Appeal in its decision, the correct approach to claims of constructive dismissal is:

In such a case 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 a 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.

[41] I have found that the resignation was caused by a breach of duty on the part of the employer. Mr Irvine responded almost immediately to the behaviour of Mr Cross by tendering his resignation, in circumstances where he had been grossly humiliated and degraded by the language and behaviour of Mr Cross during the telephone call of 23 June. Those circumstances extended to the fact that Mr Cross, immediately after

the telephone call, made no attempt to retract his language or apologise for his behaviour, something which might have led to the employment continuing.

[42] I find that Wallace & Cooper through its Managing Director, Mr Cross, breached the employer's implied duty not to act in a manner calculated to destroy or seriously damage the employment relationship. While perhaps Mr Cross behaved with some spontaneity over the phone and without contriving to dismiss Mr Irvine, he must be taken to have intended the consequences of his actions which were that Mr Irvine, like most if not all employees, would not be prepared to tolerate the high level of abuse directed at him personally.

[43] On taking an objective view, I find that the breach was of sufficient seriousness to make it reasonably foreseeable by the employer that Mr Irvine would not be prepared to work under the conditions prevailing. The risk of resignation was substantial and reasonably foreseeable, having regard to the gravity of that breach, I find.

[44] Applying s 103A of the Employment Relations Act, I find that the dismissal was not justifiable: the employer's actions and how the employer acted were not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

Other issues in the employment relationship

[45] Evidence was given and submissions made in relation to six matters of complaint raised by Mr Irvine about the very brief employment relationship. They were:

- (a) Change in reporting structure;
- (b) Quoting and abuse;
- (c) Management of incoming inquiries;
- (d) No salary payment and abuse;
- (e) Further abuse;
- (f) Assault and further abuse.

[46] I have considered that (d) and (e) together constitute the serious breach of duty found by the Authority to have occurred as a result of the employer's conduct or behaviour by Mr Cross towards Mr Irvine.

[47] The first three matters, either individually or collectively, I consider do not show any breach of duty, even at a minor level, by the employer. The matters are relevant only to show the serious pressure the employment relationship was under from the outset. I find that the matters relating to change in reporting structure, quoting and the management of incoming inquiries, were all matters of change that Mr Cross, as Managing Director of Wallace & Cooper, was able to lawfully bring about. They added to the unhappiness of Mr Irvine about the new employment he had hesitantly entered into because they were changes he did not agree with from the way things had been done previously in the business, before it was transferred to Wallace & Cooper. The abuse in relation to the quoting matter was bad language typically used by Mr Cross but was not so much directed at Mr Irvine personally as the later abuse was, in response to Mr Irvine questioning why his salary had not been paid.

[48] The first three matters above, (a), (b) and (c), are relevant to an assessment of how long the employment relationship was likely to have lasted if it had continued beyond 27 June when Mr Irvine resigned.

Post-termination matters

[49] There was also evidence given and submissions made about eight particular matters arising after the resignation by Mr Irvine was given. It was accepted by Mr Guest that the matters could not be applied retrospectively to establish a constructive dismissal, but he submitted they were relevant to the credibility of Mr Cross as well as to aggravation of the harm or loss caused to Mr Irvine through the conduct or behaviour of Mr Cross.

[50] In relation to one of the matters, the withdrawal of Mr Irvine's APEC card issued by the New Zealand Immigration Service, I find that this was not the result of any malicious or deliberate action by Wallace & Cooper to cause Mr Irvine further distress and humiliation after his resignation had been given. I accept that the employer contacted the Immigration Service to advise that Mr Irvine had left the company, which was true, but had then been content to leave it to the Immigration Service as to whatever consequence that might have for his ability to continue

receiving the benefit of the government issued APEC card, a pass or approval which enables the holder to cut down the time and effort required in travelling overseas, as Mr Irvine did on business after leaving Wallace & Cooper. I do not consider that the company reported Mr Irvine's departure from it with the intention of creating havoc to his future travel arrangements.

[51] The other matters raised are relatively minor, I consider, and cannot be viewed collectively as showing a scheme devised by Wallace & Cooper to upset Mr Irvine and disrupt his life or private activities after he had resigned.

Personal grievance

[52] I have found that Mr Irvine was constructively dismissed by his employer, Wallace & Cooper, as a result of a serious breach of duty making it reasonably foreseeable by the employer that Mr Irvine would not be prepared to work on in the circumstances where he had been verbally abused by Mr Cross in a gross and highly personal way. The claim of personal grievance is therefore established.

Remedies

[53] In considering remedies, the Authority must make due allowance for any contributory fault or conduct on the part of an employee. I find there was no contribution made by Mr Irvine to the situation that gave rise to his personal grievance. Mr Irvine, as any employee is entitled to do, challenged or questioned actions or decisions of his employer and did so within the bounds of reasonableness although clearly in doing so he strongly irritated Mr Cross. I do not consider, however, that he offered provocation to justify in any way the response by Mr Cross of humiliating and degrading verbal abuse.

Compensation under s 123(1)(c) of the Act

[54] I am satisfied that Mr Irvine suffered significant humiliation, loss of dignity and injury to his feelings as a result of being forced by the gross behaviour of Mr Cross to leave a job he had only just commenced. Mr Irvine was justifiably proud of his long involvement and association with the Andar business and his contribution towards the success of it over the years he had worked for it. That pride began to be dented by Mr Cross with changes he was entitled to make as the senior manager of the company, but it was completely shattered by the abusive behaviour of Mr Cross that

caused Mr Irvine to leave the company suddenly in the way he did. It cannot be a matter of criticism of Mr Irvine that he was proud or even egotistical about the role he had performed for many years in the Andar business. I accept his departure and the way it occurred from the business caused him shame and loss of self-esteem arising from damage to his reputation in the business community, either actual or perceived by him, and also the effects he would have observed and experienced on members of his family such as his wife. As Mr Irvine aptly described his departure, it was “a horrible ending to a lifetime’s work.”

[55] It is no answer for Wallace & Cooper to say he had only been employed by the company for a very short time, as his worth to it as an employee was based on his accumulated knowledge and experience of the business Wallace & Cooper had acquired.

[56] I consider that, in the circumstances, Mr Irvine is entitled to payment of \$19,000 compensation under s 123(1)(c)(i) of the Act, which sum Wallace & Cooper Ltd is ordered to pay him.

Reimbursement of wages or other money lost as a result of the grievance

[57] Mr Irvine’s claim under this head of loss is for \$300,000, being salary for two years.

[58] I do not consider there was any reasonable likelihood that he would have worked for a period that long, had he not resigned. I consider that the pressures the employment relationship was under from its very start were likely to have led to termination of the employment well before 12 months after commencement of it. Even before the employment began Mr Irvine had rejected transfer to Wallace & Cooper when that was offered to him in May 2011. I accept he said at the time that he had no interest in working for an organisation that would be “out of control” or words to that effect. Before becoming employed by Wallace & Cooper he had also derisively referred to its owners, Mr Cross and Mr Kent, as the monkey and the organ grinder.

[59] I consider it is likely that increasing dissatisfaction on the part of Mr Irvine and the availability of other opportunities for him to work in more agreeable conditions and circumstances, would have led him to resign within 12 months. The characters and personalities of Mr Cross and Mr Irvine, and their respective different

backgrounds, attitudes or business philosophies and their positions in the Andar business under its new ownership, had them on a course for collision in the near future which would have led, I am satisfied, to Mr Irvine departing from his employment. Before it had barely started the relationship had begun to become dysfunctional and breakdown. It is unlikely to have continued indefinitely or even for two years, in my view.

[60] As observed by the Court of Appeal in *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 and in *Waitakere City Council v Ioane* [2004] 2 ERNZ 194, the assessment of compensation and lost wages must be individualised to the circumstances of the case and must allow for all contingencies which might, but for the unjustified dismissal, have resulted in termination of the employee's employment. Making that allowance I consider that no more than six months' employment from the date of termination was likely to follow, had Mr Irvine not unwillingly resigned when he did.

[61] Exercising the discretionary power of the Authority under s 128(3) of the Act to award a sum greater than that provided in s 128(2), I fix the lost wages at \$75,000, being salary for a period of six months, which sum Wallace & Cooper Ltd is ordered to pay Mr Irvine.

Costs

[62] Costs are reserved. The parties through their representatives are to try and settle costs. If they cannot Mr Irvine may apply in writing within 21 days of the date of this determination for an order, and Wallace & Cooper Ltd shall have a further 14 days in which to reply.

A Dumbleton

Member of the Employment Relations Authority