



New Zealand Employment Relations Authority Decisions

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Kiss v Yeoman Industries Limited (Auckland) [2017] NZERA 109; [2017] NZERA Auckland 109 (10 April 2017)

Last Updated: 30 April 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2017] NZERA Auckland 109
3001371

BETWEEN WILLIAM STEWART KISS Applicant

A N D YEOMAN INDUSTRIES LIMITED

Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Oliver Christeller, Counsel for Applicant

No appearance by or for Respondent

Investigation Meeting: 10 April 2017 at Auckland

Date of Oral

Determination:

10 April 2017

ORAL DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] The applicant, Mr William Kiss, worked as a general engineer/line setter at the respondent company, Yeoman Industries Limited (Yeoman Industries) from on or about April 2001 until he resigned on 1 July 2016.

[2] Mr Kiss says he was forced to resign as a result of physical abuse and ongoing verbal abuse in the workplace from Mr Des Saunders, a fellow employee at Yeoman Industries, and verbal abuse from Mr Troy Yeoman, including an incident of extreme verbal abuse. Mr Troy Yeoman is the factory manager and was the person to whom Mr Kiss directly reported.

[3] Mr Kiss says the abuse which occurred on Monday, 27 June 2017 was so extreme that he felt unsafe and could not remain working at Yeoman Industries.

[4] Mr Kiss says his resignation amounted to an unjustified constructive dismissal and he seeks remedies including compensation for hurt and humiliation which he says he suffered as a result of the abuse. He also seeks lost remuneration for the period of time it took to obtain employment following his dismissal and for the subsequent period of time until today's date being the difference of income between what he would have earned if he was at Yeoman Industries and what he has actually earned since his alleged dismissal.

Non-appearance of the respondent

[5] Yeoman Industries failed to file a statement in reply to the statement of problem. After being directed by the Authority to

do so, it sent a letter setting out its response to the Authority. Essentially, the response is that Mr Kiss resigned and had received verbal and written warnings during his employment. No evidence was provided and Mr Kiss denies it.

[6] There was no attendance by or on behalf of Yeoman Industries at the investigation meeting today. I am satisfied that Yeoman Industries was properly served with the statement of problem and subsequent correspondence from the Employment Relations Authority together with a notice of the investigation meeting.

[7] A check of the Companies Office Register confirms that Yeoman Industries has not been struck off and appears to be trading and that Mr Bruce Yeoman remains one of its directors.

Investigation meeting

[8] I am satisfied that Yeoman Industries was properly served with the proceedings and with the notice of investigation meeting. Therefore, I proceeded to investigate the issue as to whether or not Mr Kiss was unjustifiably constructively dismissed by Yeoman Industries.

[9] I conducted my investigation in the absence of Mr Bruce Yeoman or any other representative from Yeoman Industries as they failed to appear.

[10] Mr Kiss filed a witness statement prior to the investigation meeting as did his wife, Mrs Mary Kiss, and fellow staff members at the time at Yeoman Industries,

Ms Theresa Aukino and Ms Carole Ngatama. Each swore on oath that their evidence was true and correct.

[11] As allowed under [s.174E](#) of the [Employment Relations Act 2000](#) (the Act), this determination does not set out all of the evidence. Relevant facts and legal issues are set out along with the Authority's conclusions.

Background

[12] By way of background, Yeoman Industries is in the business of manufacturing products such as bottled drinks, vinegars and essences. Mr Kiss worked at Foodstuffs before being offered a job as an engineer/line setter at Yeoman Industries. Mr Kiss' job at Yeoman Industries was to set up machines for production, fix machines and maintain them. Mr Kiss reported to the factory manager, Mr Troy Yeoman who is the son of the managing director, Mr Bruce Yeoman.

[13] For much of his employment with Yeoman Industries, Mr Kiss had a positive relationship with both Mr Troy Yeoman and Mr Bruce Yeoman. They played golf together and attended various social engagements.

Working relationship with Mr Saunders and Mr Troy Yeoman - 2015

[14] In around 2015, Mr Kiss says he and Mr Saunders had an argument about the work Mr Kiss was undertaking. Mr Kiss was stacking pallets in rows and Mr Saunders began moving them. Mr Kiss became frustrated and asked Mr Saunders what he was doing. Mr Saunders retaliated by swearing at Mr Kiss and then forcefully hit his shoulder with a closed fist. Mr Kiss tried to contact Mr Troy Yeoman but was unable to. As a result of the altercation, Mr Kiss says he felt intimidated and contacted the Police about the situation.

[15] On the Monday following the altercation, Mr Kiss was called into a meeting by Mr Bruce Yeoman. Mr Bruce Yeoman and Mr Troy Yeoman attended the meeting, as did Mr Saunders. Mr Saunders and Mr Kiss were not able to agree about what had occurred at the meeting. At the conclusion of the meeting, Mr Saunders and Mr Kiss were informed they were each going to be issued with a warning but this did not occur.

[16] Mr Kiss says he felt the Yeomans were more concerned about the fact that he had involved the Police than the actual altercation between him and Mr Saunders. No investigation was undertaken by Yeoman Industries into the matter and following this incident, Mr Kiss says he began to be treated with hostility by Mr Troy Yeoman. Mr Kiss and his wife both say it was after this time that Mr Kiss began being isolated in the workplace and at social functions by Mr Troy Yeoman. Mr Saunders' attitude was also one of hostility after this incident.

[17] In late May 2016, Yeoman Industries employed a new staff member, Darren, who was responsible for despatching goods. Mr Kiss thought that Darren had been employed to replace a staff member who had returned home to the Bay of Plenty. In fact, Darren was assigned to work with Mr Kiss and told Mr Kiss that he had been told that he was to learn Mr Kiss' job from Mr Kiss. Mr Kiss felt uncomfortable about the situation because Mr Troy Yeoman had never talked to him about teaching Darren his job.

Monday, 20 June 2016

[18] Each Monday morning, there were production meetings at which Mr Troy Yeoman, Mr Saunders, Mrs Mary Kiss and a representative from Dyna Plus together with Mr Kiss attended.

[19] On Monday, 20 June 2016 at the regular meeting, the group was informed that Yeoman Industries was to be losing the carbonated beverage bottling work from Foodstuffs. This was a concern as it was a significant part of the work undertaken by those at the meeting.

Monday, 27 June 2016

[20] On Monday, 27 June 2016, Mr Saunders approached Mr Kiss while Mr Kiss was changing a machine with Darren. Mr Saunders informed Mr Kiss that he was not to come to Monday morning meetings any more. Mr Kiss responded that Mr Saunders was not his boss and according to Mr Kiss, Mr Saunders responded aggressively that he *"fucking soon will be"*. Mr Kiss was concerned about this and did not attend the meeting as he had always done.

[21] At approximately 10am on the same day, Mr Troy Yeoman approached

Mr Kiss in the presence of Darren. Mr Troy Yeoman asked Mr Kiss what his problem

was. Mr Kiss assumed this was about the earlier exchange he had with Mr Saunders. Mr Troy Yeoman became angry and agitated. Mr Kiss was very unhappy about the way he was being spoken to by Mr Troy Yeoman and took his cellphone out and began recording the conversation between them. Mr Troy Yeoman told Mr Kiss to *"go ahead and record me"*. Mr Kiss says the conversation was extremely intimidating. At times Mr Troy Yeoman's face was approximately a foot away from his and he repeatedly swore in an extremely aggressive manner.

[22] The Authority was provided with a digital recording of the conversation. The conversation ran for approximately three minutes and during it Mr Troy Yeoman is heard repeatedly shouting at Mr Kiss, swearing abusively and in a degrading manner. During the exchange, Mr Troy Yeoman informed Mr Kiss that *"Des runs the fucking show"*. Mr Kiss was told by Mr Troy Yeoman that he would take him through the *"written warning fucking system"* and called him a *"fucking arrogant c****"*. He was repeatedly told to listen to *"Des or fuck off"* and that he was a *"silly old man"*.

[23] Mrs Kiss had been told by a fork hoist driver that Mr Troy Yeoman was yelling at Mr Kiss and she should go down immediately to see what was happening. She did so and witnessed some of the exchange. Mrs Kiss says the exchange was extremely aggressive and abusive. She saw Mr Troy Yeoman shouting in very close range to Mr Kiss and heard Mr Kiss being sworn at and called a *"silly old man"* along with the other expletives referred to earlier. Afterwards, Mrs Kiss says Mr Kiss was shaking uncontrollably and they went to a private place in the factory where he broke down in tears.

Events following this exchange

[24] Mr Kiss says he was unable to return to work the next day and was extremely concerned about his and his wife's financial future. He felt that he was responsible for earning the money in the marriage and was deeply concerned that because of his age he would not be able to get another job.

[25] Mr Kiss returned to work on Wednesday and Thursday, 29 and 30 June, but the atmosphere was unfriendly. Mr Saunders and Mr Troy Yeoman were rude to him and on one occasion Mr Troy Yeoman told him to *"get that fucking work done"*.

[26] There was no attempt by Mr Troy Yeoman to apologise or to discuss the incident on 27 June 2016. In fact there has never been any apology from Mr Troy Yeoman or anyone else at Yeoman Industries following this incident.

Resignation

[27] On 30 June 2016, Mr Kiss told his wife that he could not continue working at Yeoman Industries any longer and that he would have to resign. Mrs Kiss typed up Mr Kiss' resignation.

[28] On Friday, 1 July 2016, Mr Kiss gave Mr Troy Yeoman the resignation letter and later in the day Mr Troy Yeoman yelled at him *"where are your fucking keys, give them here"*. Mr Kiss felt extremely embarrassed and distressed by the way in which he was being treated.

[29] On 4 July 2016, Mr Kiss attempted to go into work but was so tense, stressed and sick in his gut that he was unable to do so. Mr Kiss went to the doctor, explained the situation and was prescribed sleeping pills and put off work for the rest of the week's notice period.

Constructive dismissal?

[30] Although Mr Kiss' employment by Yeoman Industries came to an end by his resignation, it clearly amounted in my view to a constructive dismissal which was unjustified. During the conversation on 27 June 2016, Mr Kiss' manager acted towards him in an abusive and aggressive manner. I heard the digital recording of the conversation which put me in no doubt that Mr Troy Yeoman intended Mr Kiss to resign from his employment.

[31] Mr Troy Yeoman told Mr Kiss to *"fuck off"* and told him he would put him *"through the fucking written warning system"* so even if Mr Kiss had resigned, it was clear that Mr Troy Yeoman was going to ensure that Mr Kiss went through a process at

the end of which he would be dismissed.

[32] The abuse on 27 June 2016 and subsequently, in my view, amounted to a serious breach of Mr Kiss' employment agreement.

[33] Further, following the altercation between Mr Kiss and Mr Saunders in 2015, Mr Kiss was isolated and treated badly by both Mr Saunders and Mr Troy Yeoman.

This behaviour occurred for at least a year. Mr Kiss put up with it because he needed the job. This behaviour and conduct in my view amounted to a course of conduct which was designed to force Mr Kiss to resign.

[34] Mr Kiss had been employed by Yeoman Industries for some 15 years and the way in which Mr Troy Yeoman and Mr Saunders acted and the way in which Mr Troy Yeoman spoke to Mr Kiss and treated him on 27 June 2016 and in the days after amounted, in my view, to a fundamental breach of the employment relationship. The environment was no longer a safe work environment for Mr Kiss to work in.

[35] As mentioned the resignation, in my view, constituted a constructive dismissal which was unjustified.

Remedies

[36] Pursuant to [s.123\(1\)\(b\)](#) and [s.128\(1\)](#) of the [Employment Relations Act 2000](#) (the Act), Mr Kiss is entitled to a loss of remuneration which he would have earned for the period of three months following his dismissal. Under [s.128\(3\)](#) of the Act, the Authority has discretion to award more if it is inclined to do so.

[37] Dealing first with the loss of remuneration, at the time of Mr Kiss' dismissal, he was working 71 hours per week at the rate of \$21.56 per hour for a weekly income of \$2,027.76. Mr Kiss was unemployed from 7 July 2016 until approximately 6 September 2016 and then found a job earning \$600 per week.

[38] Mr Kiss attempted to find jobs for the approximately two month period following his dismissal on 4 July 2016. Mr Kiss tells me that he applied for some 15 jobs and finally obtained employment on 6 September 2016.

[39] Mr Kiss' actual loss as of today amounts to \$61,082.64. This is for the entire period since his dismissal.

[40] I am going to exercise my discretion under [s.128\(3\)](#) of the Act and award loss of earnings for a period of six months from the date of dismissal. I calculate that for the period of six months, Mr Kiss would have earned \$52,721.00 if still employed by Yeoman Industries. Taking into account the actual earnings during the six month period I calculate the earnings amounted to \$10,200 and the balance therefore of actual losses for that period of time amounts to \$42,501.00.

[41] I order Yeoman Industries to pay Mr Kiss the sum of \$42,501.00 gross within 21 days of today's date.

Compensation for hurt and humiliation

[42] Turning now to hurt and humiliation, under [s.123\(1\)\(c\)\(i\)](#) of the Act. I find that the consequences to Mr Kiss of his unjustified dismissal were significant. At the time of his dismissal Mr Kiss was aged 68. He and his wife had hoped that he would be able to continue working until he was 70 and they then intended to buy a house in Hawke's Bay.

[43] Mr Kiss was a long term employee of Yeoman Industries and there was no evidence of any warnings or issues concerning his conduct before the Authority. The dismissal has had a serious impact on him.

[44] Mrs Kiss gave evidence of the inability of Mr Kiss to be able to sleep properly or to eat properly after the dismissal on 1 July 2016. Mr Kiss' doctor provided the Authority with a letter which confirmed the consultation on 4 July 2016 with him. In his letter the doctor describes Mr Kiss as being particularly:

... physically agitated with a tremor when talking about the situation. I felt he was in quite a bad way, emotionally and prescribed him some sleeping tablets and suggested the rest of the week off work. ... I would advise against his return to that work situation as I think it would be emotionally difficult and given that the situation was going for at least 18 months prior to coming to a head as it did it is difficult to think that things can be resolved at all.

[45] Mr Kiss was largely responsible for the financial obligations of the relationship and felt humiliated that he was unable to do so after he resigned. Mr Kiss and his wife are in a community in which he was expected to provide for his wife but could not do so. Mr Kiss suffered significant stress and embarrassment as a result.

[46] I consider that an appropriate award for hurt and humiliation in the circumstances is \$17,000. I order Yeoman Industries Limited to pay Mr Kiss the sum of \$17,000 compensation pursuant to [s123\(1\)\(c\)\(i\)](#) of the Act, within 21 days of today's date.

Costs

[47] Costs are reserved. Mr Kiss has 14 days in which to provide the Authority with details of costs in relation to this matter.

Anna Fitzgibbon

Member of the Employment Relations Authority

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