

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 24/10
5152670**

BETWEEN JOHN KONING
 Applicant

AND INDUSTRIAL SERVICES LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: Applicant In Person
 No appearance for Respondent

Investigation Meeting: 17 June 2009

Determination: 20 January 2010

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Mr John Koning (“Mr Koning”) claims he was unjustifiably constructively dismissed from his employment with Industrial Services Limited (“ISL”). The time for lodging a statement in reply was enlarged twice at ISL’s request but it has failed to lodge a statement in reply. ISL did not seek leave to defend the application out of time.

The facts

[2] Mr Koning commenced employment with ISL on 9 June 2008 as a waterblaster/operator/driver. The terms of the employment were recorded in a written offer of employment. At the time his employment ended, Mr Koning was employed as a supervisor/operator working at the Mainzeal western city wharf site.

[3] By letter dated 11 December 2008 Mr Koning wrote to ISL's general manager Mr Anil Singh ("Mr Singh") giving notice of his immediate resignation. He wrote materially:-

Due to all that has transpired this morning, I am left with no other alternative but to tender my resignation with immediate affect(sic) as I am sure you are well aware of the highly unprofessional approach and abuse from Byron this morning.

[4] Mr Koning tells the Authority that at about 8.00am on the morning of Thursday 11 December 2008, Mr Byron Hill ("Mr Hill") arrived at the Mainzeal site where Mr Koning was supervising. Mr Koning and the workers were unable to commence waterblasting because the truck battery was flat. Mr Hill was not pleased with the situation.

[5] Mr Koning says he told Mr Hill that the site owner wished the truck moved. He says Mr Hill told him to remove the truck battery and became angry and abusive and directed personal abuse at him.

[6] Mr Koning says that Mr Hill then asked why Mr Koning had not trained any of the workers to operate the truck. Mr Koning told him he had been instructed by the previous supervisor only supervisor/operators were to operate the pumps on the ultra high pressure trucks. Mr Koning says Mr Hill then said "*McGlone no longer works here and everyone on site needs to know how to operate the uhp units*".

[7] Mr Koning says Mr Hill was not pleased that one worker was not wearing a high visibility vest. He says that Mr Hill said the worker's dress code was worse than a "fucking dog". Mr Koning says that when he objected to the way Mr Hill was speaking, Mr Hill said he would speak however he (Mr Hill) wanted. Mr Koning says Mr Hill said "*I am Byron fucking Hill*", "*I will be boss of this company one day*".

[8] Mr Koning says Mr Hill told him to "*fuck off*" and that he would come back and run the operation himself if Mr Koning was unable to control the "*rag tag useless islanders*". He says Mr Hill also said "*they could also fuck off as there are many*

more useless fuckheads on the street [he] could employ". Mr Koning says Mr Hill continued to speak in this abusive way for 8-9 minutes.

[9] Mr Koning says that he then asked Mr Hill if he had any jumper leads as he needed to move the truck. He says Mr Hill responded with abuse and said *"take the fucking pump battery and start the truck, when I get back in the next 40 minutes and this operation is not up and fucking running all of you arseholes can fuck off and collect your wages"*.

[10] Mr Koning says that he then called Mr Alec Henry ("Mr Henry") and reported his interaction with Mr Hill. He says he told Mr Henry that it was his full intention to "fuck off" from the Mainzeal work site as that is exactly what Mr Hill had "insinuated". Mr Koning emailed his letter of resignation to ISL.

[11] Mr Hill denied the conduct attributed to him by Mr Koning. He says he arrived at the Mainzeal site and saw the machine was not running and workers were "milling around" not working. He says he also saw that two workers were not wearing hard hats or high visibility vests. He said another worker had work boots that were not laced properly. He says he was angry at what he saw.

[12] He says that he *"went off at Mr Koning"*. He says he said *"Why are these bastards not wearing their PPE"* and *"if you can't do this fucking job I'll fucken do the job"*. He says he also said *"I can get some fucken other guys to do the work"*. He denies telling Mr Koning to fuck off. He says instead he told Mr Koning to *"fucken sort it out, I'm out of here"*. He says he then left and subsequently he was informed by Mr Alec Henry that Mr Koning had quit and so he was required to return to the site.

[13] Mr Hill admits that he used bad language. But he denies that he was personally abusive to Mr Koning. He also denies using any racist language. He says that Mr Koning did not raise any objection and said "yeah, yeah" such that he left the site with the impression that Mr Koning was going to carry on with his work. He says at no stage did Mr Koning raise any objection.

The merits

[14] Was Mr Koning unjustifiably constructively dismissed? The settled tests for constructive dismissal are:-

- (i) did the employee resign?
- (ii) was the resignation caused by a breach of duty on the part of the employer?
- (iii) if it was, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[15] It is clear that Mr Koning did resign. His letter to Mr Singh of 11 December 2008 is proof of that.

[16] Having seen and heard from Mr Koning and Mr Hill, on balance I prefer Mr Koning's evidence. I consider it is corroborated by his contemporaneous letter of resignation. I accept that it is more likely than not that Mr Koning was moved to immediately resign because of the way that Mr Hill spoke to him. I therefore conclude that Mr Koning's resignation was caused by a breach of duty by ISL.

[17] I accept that Mr Hill's conduct towards Mr Koning was very serious. It was entirely inappropriate and unacceptable. I accept that there is likely to be bad language used in this workplace, but abusive language directed in a personal way is altogether different. I accept Mr Koning's description of the severity of the language and abuse directed at him by Mr Hill. I accept that conduct was in breach of the duties owed to Mr Koning and that such breach was serious. I accept it was serious enough to have been directly causative of Mr Koning's resignation.

The determination

[18] I determine that Mr Koning's resignation was caused by a serious breach of duty by Industrial Services Limited. **I determine that Mr Koning has a personal grievance for constructive dismissal.** He is entitled to remedies in resolution of that personal grievance.

The resolution

[19] Having made those findings and in considering both the nature and the extent of the remedies to be provided, I am bound by section 124 of the Act to consider the extent to which Mr Koning's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly. I am satisfied that Mr Koning did not contribute to the situation that led to his personal grievance and there is no basis to reduce the nature or extent of any remedies to be provided to Mr Koning.

Reimbursement

[20] Mr Koning says that he has made at least 20 applications for employment including those referred to him by WINZ as well as other waterblasting and truck driving positions. I am satisfied that Mr Koning has lost income as a result of the personal grievance. I am further satisfied that he has taken steps to mitigate his losses. I award him lost income of three months wages. **I order Industrials Services Limited to pay to John Koning three months gross wages as reimbursement.**

Compensation

[21] Mr Koning says that the way that Mr Hill spoke to him on 11 December 2008 was the final straw for him. He says that he is a man of 53 years of age and he has never been spoken to in such a fashion before. He says the way he was spoken to was the worst he had ever heard another human being spoken to before. He says that Mr Hill lost his self-control. Mr Koning says that he has experienced severe financial hardship as a result of the personal grievance.

[22] I am satisfied that Mr Koning has suffered hurt and humiliation, loss of dignity and injury to his feelings as a result of being unjustifiably constructively dismissed. Having regard to his evidence, his length of service and the nature of the personal grievance, I award him compensation of \$5,000.00. **I order Industrial Services Limited to pay to John Koning the sum of \$5,000.00 as compensation.**

Leon Robinson
Member of Employment Relations Authority