

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 127/07
5034861

BETWEEN

Darren Moore
Applicant

AND

PG 2000 Limited
Respondent

Member of Authority: Denis Asher

Representatives: Mr Moore represented himself
John Dean for the Company

Submissions received: Mr Moore relies on his statement of problem and the
claims made therein
The Company's submissions were received on 26 July

Determination: 12 September 2007

DETERMINATION OF THE AUTHORITY: Strike Out Application

Employment Relationship Problem

- [1] In his statement of problem filed in the Authority on 7 May 2007 Mr Moore said that he had been exposed to large amounts of tungsten and cobalt (t-c) resulting in health problems. Mr Moore holds the Company responsible and seeks unspecified compensation for the ongoing health problems caused him, he says, by the respondent.
- [2] By way of a statement in reply filed in the Authority on 23 May the Company denied there was any causal link between Mr Moore's alleged health problems and his employment with the respondent. The Company denied that it was anyway liable to the applicant for his

alleged current health problems. It also asked that Mr Moore's claim be struck out on the grounds that it was statute barred by s. 317 of the Injury Prevention, Rehabilitation and Compensation Act 2001 (IPR&C Act) and there was no causal link between Mr Moore's alleged health problems and his employment with the Company, and no amendment to his claim would provide Mr Moore with a cause of action against the respondent.

- [3] In a telephone conference convened on 14 June the parties were directed to undertake mediation by no later than 19 July.
- [4] During the same conference call the parties agreed that, in the event of the matter not settling at mediation, the Authority would – on the papers – determine the preliminary question raised by the respondent as to whether it had jurisdiction to investigate Mr Moore's substantive claim.
- [5] The parties subsequently confirmed they had not settled their problem in mediation.

Background

- [6] The following is taken from Mr Moore's statement of problem and its attachments, and the Company's statement in reply and submissions.
- [7] The Company operates a small tool shop. It manufactures tungsten tipped tools (saws, etc) and specialises in precision grinding and cutting.
- [8] Mr Moore commenced employment with the Company around June or July 2003 as a fitter and turner. He had 20 years experience in machine shops but worked with t-c for the first time as a result of his employment with the Company. From October/November 2003 Mr Moore worked elsewhere as a trainee electrical engineer, performing electrical work until January 2004 when he returned to work for the respondent.
- [9] The Company says that from mid-2004 Mr Moore commenced milling, cutting and brazing of tools with cobalt-cemented t-c tips. The job involved manufacturing of cutting blocks for spindle moulders and router bits using metal lathes and milling machines, and cut-off wheels and profile grinders to manufacture the tungsten part of the tools. Mr Moore was required to braze using an oxyacetylene torch.
- [10] Mr Moore says his health gradually deteriorated as a result of carrying out this work with t-c.

- [11] In September 2005 the Department of Labour's Occupational Safety and Health Service investigated the Company's workplace and identified some health and safety hazards: these hazards were remedied in November 2005 and new practices and procedures implemented (including, apparently, use of a coolant spray and a requirement that employees wear a dust and vapour mask while cutting) so as to comply with the OSH report.
- [12] Mr Moore resigned in March 2006. At around that time Mr Moore successfully applied for ACC; he remains, or was until recently, still in receipt of that compensation.
- [13] The Company says that because Mr Moore is in receipt, or is eligible for, ACC compensation he is therefore statutorily barred by s. 317 of the IPR&C Act from pursuing this employment relationship problem.
- [14] The Company also relies on a medical report dated 20 December 2006 stating there is no causal link between Mr Moore's employment with the Company and his alleged health problems.

Discussion

- [15] In Mr Moore's statement of problem he says he was exposed to large amounts of cobalt and tungsten resulting in health problems. In support of his claim he attaches to his statement of problem detailed reports compile by OSH and for ACC as well as product data sheets and safety material documentation.
- [16] The attachments to Mr Moore's statement of problem make it abundantly clear that milling t-c tips (during saw sharpening) can cause airborne dust concentrations great enough to lead to 'hard metal' respiratory disease. Cobalt (a binder ingredient) is considered a crucial factor in producing this disease. Chronic exposure can result in occupational asthma, chronic obstructive pulmonary disease, interstitial fibrosis and potentially irreversible pneumoconiosis.
- [17] One of the OSH attachments to Mr Moore's statement of problem records date event notification and investigation completion dates of 7 September 2005 and 3 May 2006, and confirms key facts including the applicant's use of t-c, Mr Moore's reports of health problems and action taken by the Company, including respiratory protection measures, medical screening and health monitoring and improved exhaust ventilation measures. The

report concludes with a summary of a finding by ACC that its specialists were unable to conclude whether harm had arisen from Mr Moore's work.

[18] A separate letter from the Department dated 10 May 2006 records that it had been working with the respondent for some months *"toward your effective management of various hazards at PG 2000 Ltd. Much of our concern has been about the management of the chemical hazards associated with Tungsten Carbide, and cutting/grinding that is associated with this product in your workplace"*. The letter goes on to record agreed steps in respect of improved ventilation, health monitoring, management of noise and strict hygiene requirements to minimise the ingesting of cobalt.

[19] Other attachments include:

a. A detailed medical assessment dated 7 February 2006 from Dr Christiaan Barnard, occupational medicine specialist and director of WorkWise, Wellington. Amongst other conclusions Dr Barnard said it was not possible to make a definite diagnosis prior to a further assessment and that Mr Moore experiences a variety of symptoms *"most of which cannot be attributed to exposure to tungsten carbide alone"*.

b. A letter dated 28 July 2006 from Francis Hall, Head & Neck Surgeon providing a diagnosis of *"inflammation of the nasal mucosa and systemic symptoms secondary to occupational exposure to tungsten-carbide"*. Mr Hall considered *"Darren's condition to be caused as a direct result of his exposure to tungsten-carbide at work (and t)here are no non work exposures that may have contributed to this condition"*.

c. Advice from the ACC dated 18 April 2007 that it had overturned its decision of 13 February 2007 and reinstated weekly compensation payments to the applicant, *"because we need to undertake further investigations regarding your incapacity for work"*. This follows an earlier letter from ACC advising it had initially accepted,

a claim for exposure to tungsten carbide with cobalt binding.

The symptoms that ACC agree are related to your exposure are covered in both of Dr Strack's reports. These include irritant rhinitis and gastrointestinal problems with diarrhoea and sensations of hotness.

Note: I provide the summary of medical views set out above only so as to illustrate the history of medical views of Mr Moore's undisputed medical problems.

Findings

- [20] I accept the respondent's claim that Mr Moore is statute-barred from pursuing this matter in the Employment Relations Authority for the following reasons.
- [21] Mr Moore is seeking "*compensation for the ongoing problem (his employer) has caused*" (see statement of problem).
- [22] Mr Moore has also claimed ACC compensation for a work related personal injury.
- [23] Section 317 of the IPR&C Act provides that:
- (1) *No person may bring proceedings independently of this Act, whether under any rule of law or any enactment, in any court in New Zealand, for damages arising directly or indirectly out of:*
- (a) *personal injury covered by this Act.*
- [24] The evidence before the Authority (refer to the ACC letter of 18 April 2007 attached to both the applicant's statement of problem and the respondent's submissions of 26 July) is that Mr Moore is receiving or is entitled to receive compensation under the IPR&C Act.
- [25] Whereas s. 317(2) of the IPR&C Act provides for proceedings in respect of express contractual or agreement terms, Mr Moore's employment agreement contains no express terms entitling him to monetary payments in the event that he suffers a personal injury while at work such as to escape the effect of s. 317, above.
- [26] Mr Moore is not claiming exemplary damages which are any way not available in respect of personal grievance remedies: *Western Mailing Ltd v Subritzky* [2003] 2 ERNZ 465.
- [27] An employee's employment can be unjustifiably disadvantaged, and damages can result, because of a failure by an employer to provide a safe and healthy working environment: *French v The Chief Executive of the Department of Corrections* [2002] 1 ERNZ 325. Matters of health and safety must, however, be placed in a balanced context, i.e. an employer's obligation extends to good and safe working conditions to the extent that it is reasonable to do so in all of the circumstances.

- [28] From the evidence before the Authority I am satisfied there is no reason to find that the Company either knew, or should reasonably have known, that Mr Moore's working conditions were in breach of its health and safety obligations, i.e. to do all it reasonably could to minimize hazards. For example, there is no history of like-illness affecting other employees, nor is there evidence of failure by the respondent to promptly implement appropriate and remedial health and safety measures when they were drawn to its attention by the Department of Labour.
- [29] However they are categorised, Mr Moore's injuries are apparently workplace related and that is why he is in receipt, or is eligible to receive, ACC compensation. The unspecified damages claimed by the applicant arise directly or indirectly from a personal injury and Mr Moore is thereby barred from claiming and receiving other compensation.

Determination

- [30] For the reasons set out above I find against Mr Moore's claims for damages against the Company.
- [31] Costs are reserved. Subject to Mr Moore's views, I would expect that costs follow the event in the usual way and, also in the usual way, that the Company take account of Mr Moore's circumstances in attempting to recover a contribution to its fair and reasonable costs and do so by way of realistic instalments.

Denis Asher
Member of the Employment Relations Authority