

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN John Patrick O'Connor (Applicant)
AND Natural Wood Creations Limited (Respondent)
REPRESENTATIVES Lynda Emmerson, Counsel for Applicant
Bryce Quarrie, Counsel for Respondent
MEMBER OF AUTHORITY Vicki Campbell
INVESTIGATION MEETING 22 April 2004
SUBMISSIONS RECEIVED From the Applicant – 28 April 2004
From the Respondent – 3 May 2004
DATE OF DETERMINATION 12 May 2004

DETERMINATION OF THE AUTHORITY

The employment relationship problem

- [1] In a statement of problem received on 17 October 2003 the applicant, Mr John O'Connor says that the respondent, Natural Wood Creations Limited ("NWC"), unjustifiably dismissed him or subjected him to an unjustifiable disadvantage in his employment and thereby constructively dismissing him.
- [2] In its statement in reply NWC denies Mr O'Connor was dismissed or subject to an unjustifiable action which could cause him to leave his employment. NWC says Mr O'Connor abandoned his employment.
- [3] At an investigation meeting held on 22 April 2004 I heard evidence from Mr O'Connor, and Mr Mark Montgomery, an OSH Inspector with the Department of Labour, based in Whangarei, on behalf of the applicant. For the respondent, I heard from Mr Ian Moratti, the proprietor and director of NWC; Mr Henry Hauraki, Office Manager; Mr Mark Gray, Shop Foreman; and Ms Elaine Crawford, Office Assistant/Payroll Clerk.

Background

- [4] Mr O'Connor was employed by NWC on 24 September 2002.
- [5] NWC manufactures Kauri clocks.
- [6] Mr O'Connor did not have a written employment agreement.

- [7] During the normal course of a day Mr O'Connor would start his day by finishing work not completed the day before, in the pouring room. He would mix resin and hardener and pour it on the clocks. He would then proceed to prepare wood, by shaping and sanding until about 2.30pm when he would return to the pouring room to work again with the resin products. It was common ground that during the course of a normal day employees would work in the pouring room about 2 hours in the morning and 2 hours in the afternoon.
- [8] Approximately two weeks into his employment Mr O'Connor asked Mr Moratti about the dangers of working with resin. Mr Moratti told Mr O'Connor that the resin being used in the workplace was one of the less toxic resins.
- [9] In his statement of evidence Mr O'Connor claims the company did not provide any protective equipment for use in the pouring rooms. I am satisfied however, that all manufacturing staff at NWC were supplied with personal protective equipment in the form of masks, rubber gloves and aprons for use in the pouring rooms.
- [10] It was the evidence of the respondent that Mr O'Connor would only occasionally use the masks provided. Mr O'Connor acknowledged that he would remove his mask while he was in the pouring room. Mr Gray told me he often had to tell Mr O'Connor to wear his mask. Mr Gray and Mr O'Connor even looked at ways he could make wearing the mask more comfortable. This did not have the desired effect, and Mr O'Connor continued to remove his mask while working in the pouring room.
- [11] It was common ground that staff would use acetone to clean their hands after working in the pouring room. Mr Moratti told me that he saw Mr O'Connor washing his arms with the acetone as well. At the investigation meeting Mr O'Connor admitted that he had used the acetone to wash with.
- [12] Within two months of commencing employment, in November 2002, Mr O'Connor lost his sense of taste. He also began to develop a rash on his arms. Mr O'Connor did not alert his employer to these problems at this time.
- [13] In April 2003 Mr O'Connor consulted his Doctor who advised him that he had "Gaelic skin" and that this skin type was more susceptible to reactions when working with resins.
- [14] On his return to work, Mr O'Connor advised Mr Hauraki about his visit to his doctor. Mr Hauraki contacted Mr Moratti, who was at that time completing a business trip in the South Island.
- [15] Mr Moratti told Mr Hauraki that Mr O'Connor was not to work in the pouring room until his doctor had provided him with a clearance to return. Alternative duties were found for Mr O'Connor and when Mr Moratti returned from the South Island he brought a wood lathe to the factory which Mr O'Connor used.
- [16] Sometime in June 2003 Mr O'Connor contacted the manufacturers of the resin product requesting information. He was told that Material Safety Data Sheets had been provided to his employer and that they should have been displayed.
- [17] Mr O'Connor requested copies of the MSDS sheets from Ms Crawford, who provided copies for him.

[18] On 16 June 2003 Mr O'Connor, who was concerned with his health and safety at the workplace, visited the Department of Labour office and spoke to an OSH Inspector. Mr O'Connor was advised that he had two options. He could become part of the Notifiable Occupational Disease Scheme (NODS) or he could proceed with a formal notification. Mr O'Connor chose to formally notify OSH of a health and safety problem.

[19] On 20 June 2003 Mr O'Connor visited his doctor once again. In a letter addressed to "Whom it may concern" Mr O'Connor's doctor states:

On examination he had an irritant contact dermatitis and flexural eczema. He does not describe a history or family history of any prior eczema, asthma or hay fever. He has good resolution in his rash with local steroid use, soap avoidance and antihistamines and avoidance of the resin exposure. He still has anosmia and poor taste. I suspect he has solvent toxicity and an OSH enquiry may well help to establish this diagnosis. I have completed ACC forms re this today.

He may well be able to continue his occupation but may have to avoid resin exposure.

A copy of this letter was never provided to the company.

[20] On 9 July 2003 and in Mr Moratti's absence, Mr Montgomery attended the worksite of NWC to carry out an OSH inspection. Mr Montgomery was accompanied by Mr Garry Trotman, a hygienist employed by the Department of Labour. Mr Montgomery told me he found a number of issues in the workplace and issued 10 Improvement Notices. Of the 10 Improvement Notices two related directly to the pouring rooms. One of the improvement notices related to the storage of toxic substances in the pouring room and another to the electrical wiring. No issues were identified with the use of resin in the pouring room.

[21] Mr Montgomery told the Authority that he did discuss the respiratory protection with the company, but only in respect of the proper maintenance and cleaning of the equipment.

[22] Mr Montgomery told me that in all his dealings with the company Mr Moratti and his staff had been co-operative with the OSH inspectors. He also told me that the PPE provided to employees to use in the pouring room was adequate and that the masks provided were more than adequate.

[23] Mr Montgomery told me at the investigation meeting that all the improvement notices have been acted on by the respondent and have since been cleared by OSH.

[24] On 10 July 2003 Mr O'Connor's partner telephoned NWC and advised that Mr O'Connor would not be in as he was sick.

[25] On 11 July 2003 Mr O'Connor left New Zealand and travelled to Australia for his daughters' wedding.

[26] During July 2003 Mr Moratti had been out of the country. On 19 July 2003 when he returned to work he noticed that Mr O'Connor was not at work. On enquiry, no-one could assist Mr Moratti as to Mr O'Connor's whereabouts. The usual practice in the workplace was for staff to let Ms Crawford know if they were going on holiday before they left, so that she could arrange their holiday pay. In this case, Mr O'Connor had not advised Ms Crawford that he was intending to take leave nor had he advised or sought approval to take leave from Mr Gray, his supervisor.

- [27] It was Mr O'Connor's evidence that everyone knew he was taking the holiday. He had talked about it a lot at work because the reason for the holiday was to be at his daughter's wedding.
- [28] At the investigation meeting Mr Hauraki told me that staff would normally tell him when they were going away. He accepted that Mr O'Connor had told him that he would be going to Australia for his daughter's wedding and that it would be "...some time in July...". Mr Hauraki told me that he did not know exactly when Mr O'Connor was going or when he would be back at work.
- [29] On 21 July 2003 Mr O'Connor returned to work.
- [30] When Mr O'Connor returned to work on 21 July he was called into Mr Moratti's office. After discussing Mr O'Connor's absence with him, Mr Moratti handed Mr O'Connor a formal letter of warning on his position with NWC. The warning was for failure to provide proper notification for leave.
- [31] No cause of action has been raised in relation to this warning.

Events leading to the ending of the employment relationship

- [32] After giving Mr O'Connor the warning letter at the meeting on 21 July 2003, Mr Moratti told Mr O'Connor of his surprise at OSH being called in without Mr O'Connor raising any issues with him first.
- [33] Mr O'Connor says that when Mr Moratti found out about the OSH inspection "...*he completely lost it. He began calling me names and abusing me.*" He says that Mr Moratti made it clear to him in no uncertain terms that if he was not prepared to work in the pouring room there would be no work for him.
- [34] Mr O'Connor says that he told Mr Moratti that he did not have a problem working in the resin room as long as they were safe. He says he told Mr Moratti that he would not work in the rooms while his health and safety was being endangered.
- [35] Mr O'Connor says that while Mr Moratti had indicated to him that the rooms had been cleared by OSH and were safe to work in he did not trust Mr Moratti.
- [36] Mr Moratti says he told Mr O'Connor that he had to go back to the job. He told me it was Mr O'Connor and not him who was name calling and using abusive language. At the investigation meeting Mr Moratti told me that Mr O'Connor asked whether the room had been cleared by OSH. When told the room was okay Mr O'Connor indicated that he had no intention of going back to the pouring rooms.

- [37] Mr O'Connor's response to the requirement of him to return to undertake his duties was to walk out of the office. Mr Moratti, Mr Henry and Ms Crawford all say that when Mr O'Connor left the office he was angry. Mr Moratti and Ms Crawford told me that "...[Mr O'Connor] *stormed out shouting "I'll see you in Court"*. Ms Crawford told me Mr O'Connor slammed the door shut and stormed over to her and shouted "*You knew I was going to Australia to my daughter's wedding*". Ms Crawford told me she told Mr O'Connor she did not know. She says Mr O'Connor then called her a "*stupid lying bitch*". Mr O'Connor denies this.
- [38] It was common ground that Mr O'Connor then left the office and has not returned.
- [39] Mr Moratti sent a letter to Mr O'Connor which he received on 24 July 2003. I have set this letter out in full:
- On 24.9.02, as Managing Director of Natural Wood Creations, I hired you to help with the manufacturing of Kauri Clocks.*
- Approximately 8 weeks ago you suggested that you had developed an allergy to the resins my Company uses. Since that time you have refused to work in the finishing room. As this is a major part process of our product, your refusal to work in the finishing room has meant that production is reduced by approximately one third, and has consequently put a great financial strain on my business.*
- In light of this, I am requesting that you return to the finishing room to carry out the job which you were initially hired for.*
- [40] Mr O'Connor did not contact his employer on receipt of this letter.
- [41] On 25 July 2003 the Department of Labour Medical Practitioner advised Mr O'Connor that because of his "allergic" response to the epoxy resins, it was unlikely that the exposure level could be reduced to a sufficiently low level to prevent recurring symptoms in a sensitised individual and he recommended a change of occupation for Mr O'Connor.
- [42] A copy of this letter was not made available to the employer until this matter was filed in the Employment Relations Authority.
- [43] On 28 July 2003 after not hearing from Mr O'Connor, Mr Moratti wrote to Mr O'Connor and advised him that unless Mr O'Connor was in contact by 5.00pm on Thursday 31 July 2003 his departure would be treated as an abandonment of employment.
- [44] On that same day a letter was written by Mr O'Connor's legal representative raising a personal grievance on behalf of Mr O'Connor.
- [45] The letters appear to have crossed in the mail.
- [46] At the investigation meeting I asked Mr O'Connor why he had not made contact with his employer either before or after receiving the 28 July 2003 letter. Mr O'Connor was adamant that he had been dismissed on 21 July 2003 at the meeting in Mr Moratti's office.
- [47] I also questioned Mr Moratti about what steps he had taken to locate Mr O'Connor and discuss his absence with him. Apart from the two letters sent to Mr O'Connor, Mr Moratti told me Mr O'Connor had moved and he did not have a telephone number for him and that he was reluctant to go to his house.

[48] Despite mediation, the parties have been unable to resolve this employment relationship problem; Mr O'Connor still considering he was dismissed and NWC considering that he abandoned his employment.

Discussion

Did Mr O'Connor abandon his employment?

[49] If there was not abandonment the issue then becomes whether there was an actual or constructive dismissal. The issue of abandonment was discussed by the Court of Appeal in *E N Ramsbottom Ltd v Jodie Chambers* (Unreported, Richardson P, Keith J, Tipping J, 31 August 2000, CA 307/99, at paragraph 26:

“At a late stage in the oral argument in this Court, Mr Cressey submitted that where the issue is whether the employee abandoned the employment, the employer should be cautious in drawing that inference and must face a high threshold of contending that the employment ended on the employee’s initiative in that way. There is substantial force in that submission and clearly the need for trust and fair dealing in the employment relationship should encourage the employer to make enquiries of the employee where the employee has not clearly evinced an intention to finally end his or her employment.”

[50] These comments have even greater force under the Employment Relations Act 2000, where the parties to employment relationships are required to deal with each other in good faith. In this case, Mr Moratti wrote to Mr O'Connor twice in an effort to ascertain what his intentions were. In the second letter he gave clear notice to Mr O'Connor that failure to contact him would result in his employment being terminated by reason of abandonment.

[51] Of course by the time he received that letter, Mr O'Connor’s representative had raised a grievance claiming an unjustified dismissal.

[52] As I have already pointed out earlier in this determination, it appears the letters from Mr Moratti and Mr O'Connor’s representative crossed in the mail.

[53] Mr Moratti was clearly concerned that Mr O'Connor had abandoned his employment and took the very proper step of writing to him on 21 and 28 July 2003 to clarify the position. Mr O'Connor did not respond to either letter.

[54] On receipt of the letter from Mr O'Connor’s representative it should have become clear to the company that Mr O'Connor had not abandoned his employment in the strict meaning of the term, but believed that he had been dismissed.

[55] For this reason I find that Mr O'Connor did not abandon his employment, but left under the apprehension that he had been dismissed.

Was there an actual dismissal?

[56] The initial onus is on the Applicant employee to show that a dismissal occurred and that there is a prima facie case of grievance (*Wellington Drivers IUOW v Fletcher Construction Co Ltd* [1982] ACJ 663.

- [57] In *Actors etc Equity (NZ) IUOW v Auckland Theatre Trust Inc* (1989) ERNZ Sel Cas 247; [1989] 2 NZLR 154 (CA), it was held that a dismissal involves a “sending away”.
- [58] Ms Emmerson submitted that the basis of the dismissal was Mr O’Connor’s refusal to work in the pouring rooms and that when Mr Moratti told Mr O’Connor to return to the pouring room or there would be no job for him this was effectively dismissing him.
- [59] Mr Quarrie submitted that there was no “sending away” and that the letter dated 21 July 2003 made it clear that Mr O’Connor’s position was still open for him.
- [60] Mr Moratti had provided alternative duties for Mr O’Connor as soon as he was notified that Mr O’Connor was suffering the effects of exposure to the resin. After OSH had undertaken their inspection of the workplace Mr Moratti insisted that Mr O’Connor return to the work he had been employed to do. No health and safety issues were raised by OSH during their inspection, in relation to the use of the resin in the pouring rooms and the PPE provided by the company.
- [61] Mr Moratti immediately took steps to confirm in writing to Mr O’Connor that he was required to return to his employment. A letter Mr O’Connor admits he received on 24 July 2003.
- [62] When Mr Moratti told Mr O’Connor the room was safe to work in, Mr O’Connor decided for himself Mr Moratti was not telling the truth and decided he would not return to work in the pouring rooms. He then left the worksite.
- [63] I am satisfied on the balance of probabilities that Mr Moratti did not use words either expressly or by implication that would constitute the “sending away” of Mr O’Connor, and so I find Mr Moratti did not dismiss Mr O’Connor.

Was there a constructive dismissal?

[64] In coming to any conclusions under this head I must determine the following issues:

- Was Mr O’Connor’s failure to return to work caused by a breach of duty on the part of the respondent? And
- If there was a breach, was it sufficiently serious to make it reasonably foreseeable that there was a substantial risk of Mr O’Connor not returning? (*Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168; [1994] 2 NZLR 415 (CA)).

Was Mr O’Connor’s failure to return to work caused by a breach of duty on the part of the respondent?

- [65] The basis of Mr O’Connor’s claim for constructive dismissal is that he left as a result of a breach of duty on the part of his employer, which is the third of the three non-exhaustive categories of constructive dismissal referred to by the court of Appeal in *Auckland Shop Employees Union v Woolworth’s (NZ) Ltd* [1985] 2 NZLR 372.

- [66] The conduct amounting to a breach must impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. (*Malik v Bank of Credit and Commerce International SA (in liq)* [1998] AC 20; [1997] 3 All ER 1 (CA)).
- [67] The Health and Safety In Employment Act 1992 requires all employers to ensure the safety of employees by taking all practicable steps to provide and maintain a safe working environment.
- [68] There is also an implied term in every employment agreement that the employer has a duty to take reasonable steps to maintain a safe workplace (*Attorney-General v Gilbert* [2002] 2 NZLR CA 342).
- [69] Ms Emmerson submitted that Mr O'Connor was being required to return to the pouring rooms "*despite the fact they were at that point – unsafe and a danger to his health*". Further, that the respondent failed to meet the standards OSH had prescribed and the workplace was not safe.
- [70] Mr Quarrie submitted that Mr O'Connor's reaction and his storming out of the office and leaving the premises was unreasonably hasty and did not allow any opportunity for Mr Moratti to enter into discussions over the situation. Further, that it would have been reasonable for Mr O'Connor to have discussed the situation relating to the pouring room and discussed ways of resolving the situation.
- [71] I do not accept Ms Emmerson's submissions. It was Mr Montgomery's clear evidence at the investigation meeting that the use of the resin in the pouring room was not an issue and that the face masks provided by the employer were more than adequate protection. What was unsafe, was Mr O'Connor not wearing the PPE supplied at all times when he was working in the pouring rooms, even and although his supervisor Mr Gray regularly told him to do so.
- [72] I accept that Mr O'Connor's hasty walking out combined with his failure to respond to Mr Moratti's letters removed any opportunity that may have existed for the parties to discuss and resolve the issues about Mr O'Connor working in the pouring rooms.
- [73] Mr Moratti had not received any medical information from Mr O'Connor relating to his skin disorder and so he had no basis for believing Mr O'Connor could not safely return to work in the pouring rooms once they had been inspected by OSH.

Determination

- [74] I find no breach of duty can be established and therefore Mr O'Connor has been unable to meet the first leg of the constructive dismissal test.
- [75] As will be obvious from the discussion regarding Mr O'Connor's claim I have found that Mr O'Connor was neither actually nor constructively dismissed from his employment at NWC. Mr O'Connor's claim is dismissed. He is not entitled to the remedies he seeks.

Costs

[76] Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject within 14 days of this determination.

Vicki Campbell
Member of Employment Relations Authority