

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 119/07
5042204

BETWEEN

TONY OOSTHUYSEN
Applicant

AND

HUMES INDUSTRIES
LIMITED
Respondent

Member of Authority: James Crichton
Representatives: Peter Macdonald, Advocate for Applicant
Scott Fairclough, Counsel for Respondent
Investigation Meeting: 14 June 2007 at Christchurch
Determination: 2 October 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Oosthuysen) filed a statement of problem on 11 September 2006 and subsequently filed an amended statement of problem on 28 September 2006. It is that amended statement of problem which forms the basis for this claim. In the statement of problem, Mr Oosthuysen alleges that he has been unjustifiably dismissed by way of a constructive dismissal and/or has suffered a disadvantage as a consequence of the respondent (Humes) committing an unjustified action.

[2] In the statement of reply filed by Humes on 10 October 2006 they resist the claim of constructive dismissal and the claim of unjustified disadvantage.

[3] As to the claim of constructive dismissal, Mr Macdonald quite properly conceded at the beginning of the investigation meeting that that claim had no possibility of success,

Mr Oosthuysen having tendered his resignation before the matters complained of in his statement of problem.

[4] It follows that the only issue for determination here is Mr Oosthuysen's claim of an unjustified disadvantage.

[5] Mr Oosthuysen commenced employment with Humes on 25 October 2005 and was employed in terms of an individual employment agreement. On 27 February 2006, Mr Oosthuysen tendered his resignation to take effect from 2 June 2006. That resignation was subsequently accepted by Humes.

[6] On the afternoon of 3 March 2006 (that is both after Mr Oosthuysen had resigned and after Humes had accepted his resignation) Mr Oosthuysen suffered a work related injury.

[7] The injury was sustained on a Friday and Mr Oosthuysen's evidence was that, by agreement with Humes, Mr Oosthuysen immediately visited the Hornby Medical Centre for treatment.

[8] The Hornby Medical Centre required Mr Oosthuysen to obtain further advice, in particular X-rays of his damaged hand, and accordingly referred him to the 24 Hour Medical Centre in Bealey Avenue which has X-ray facilities.

[9] Mr Oosthuysen provided a copy of the medical certificate furnished by the Hornby Medical Centre to Humes. There is no dispute by Humes about the receipt of this medical certificate. For the sake of convenience I refer to this medical certificate as Medical Certificate 1.

[10] Mr Oosthuysen then went to the 24 Hour Medical Centre on Bealey Avenue and X-rays were taken and subsequently a further medical certificate was prepared by the 24 Hour Medical Centre. For the sake of convenience, I refer to this medical certificate as Medical Certificate 2.

[11] Mr Oosthuysen says that he travelled to the workplace on Monday morning 6 March 2006 and physically handed a copy of Medical Certificate 2 to Mr O'Neill the Manager and to his team leader. Neither Mr O'Neill nor the team leader recall this event

happening and neither of them say they saw the Medical Certificate 2 that came from the 24 Hour Medical Centre.

[12] The importance of this conflict in the evidence is that whereas the Hornby Medical Centre had determined that Mr Oosthuysen would be able to return to work on Monday 6 March 2006, the 24 Hour Medical Centre determined that Mr Oosthuysen needed a week off work to rest his damaged hand.

[13] Mr Oosthuysen returned to see the Hornby Medical Centre later that morning, 6 March 2006, for follow up care. This was consistent with the direction made by the 24 Hour Medical Centre. The Hornby Medical Centre decided to persevere with the treatment regime determined by the 24 Hour Medical Centre (rather than the Hornby Medical Centre's original view that Mr Oosthuysen could return to work) and Mr Oosthuysen's evidence is that the Hornby Medical Centre faxed through to Humes a fresh medical certificate. Mr Oosthuysen said in his evidence that Hornby Medical Centre had told him not to return to work. This medical certificate is Medical Certificate 3.

[14] At 2.42pm on Monday 6 March 2006, Humes received Medical Certificate 3 from the Hornby Medical Centre. They were puzzled by this certificate according to the evidence of Humes' witnesses, because it was from the same medical practice as Medical Certificate 1 (which they had also received) but was completely at odds with Medical Certificate 1. Had Humes seen Medical Certificate 2 (the one from the 24 Hour Medical Centre in Bealey Avenue) they would have understood why the Hornby Medical Centre had changed its view, but their evidence is that they never saw the medical certificate from the 24 hour surgery until the matter went to mediation.

[15] Because, based on the Medical Certificate 1 Humes were expecting Mr Oosthuysen to return to work, and because their evidence is that he did not visit the workplace on Monday morning 6 March to hand in the copy of the medical certificate from the 24 Hour Medical Centre, Humes spent much of Monday trying to contact Mr Oosthuysen by telephone and being unsuccessful. Mr Oosthuysen did not respond to those calls.

[16] What Mr Oosthuysen did do was ring Humes Human Resources people in Auckland and spoke to one of the staff there about his sick leave entitlement. At no stage did Mr Oosthuysen return any of the calls from his workplace. In his evidence, he refers specifically to a voicemail message he received from Mr O'Neill his manager at 15.45pm on 6 March which Mr Oosthuysen regarded as threatening. The message referred to Humes having received Medical Certificate 3, having booked Mr Oosthuysen in for another consultation with the Hornby Medical Centre, and with Humes expectation that Mr Oosthuysen would return to work the following day, Tuesday 7 March 2006. The threat which Mr Oosthuysen complains about is contained in the following phrase ...*I would hate to see that you don't turn up tomorrow morning, obviously that would be a failure to attend.*

[17] Despite having received that message Mr Oosthuysen maintained his stance of not talking directly to his workplace and he rang Human Resources in Auckland again, and again was told that he did not have to return to work if he had a medical certificate.

[18] Mr Oosthuysen says that when his partner returned home from work she indicated that she also had been receiving calls from his workplace.

[19] Mr Oosthuysen did in fact return to work on Tuesday 7 March 2006, but not at 8am, his normal start time. His evidence was that because he was taking medication for the pain of his damaged hand, he was unable to drive, and he had to arrange transport. He says that he finally arrived at work at 11am and was then subjected to a tirade from Mr O'Neill. Mr Oosthuysen left the workplace to attend the further medical appointment which Humes had made and subsequently returned to work doing as much as he was able with his damaged right hand. Mr Oosthuysen's evidence is that Humes subjected him to harassment and rudeness as a consequence of his injury, views which Humes vigorously deny.

[20] Mr O'Neill's evidence of the discussion he had with Mr Oosthuysen on the Tuesday morning is quite different from Mr Oosthuysen. He denies there was a tirade; he says that he simply tried to explain to Mr Oosthuysen why Humes had been trying to get hold of him because they did not know what was going on and his behaviour in not being at the workplace was inconsistent with the only medical certificate they had.

Mr O'Neill vigorously denied Mr Oosthuysen's assertion that Mr Oosthuysen had been harassed or humiliated and said that it was possible for Mr Oosthuysen to do light duties until his hand healed and that is in fact what happened.

Issues

[21] It will be helpful to analyse the factual matrix piece by piece in order to assess whether Mr Oosthuysen has suffered a disadvantage as the consequence of an unjustifiable action by Humes.

Medical Certificate 1

[22] When Mr Oosthuysen injured his right hand at work on 3 March 2006, he immediately sought medical advice from the Hornby Medical Centre and there is no dispute that that medical certificate was furnished to the employer.

[23] This first medical certificate provided that Mr Oosthuysen would be able to undertake *sedentary work for eight hours a day from 3 March 2006* (that is the day of the injury) and that he would be able to return to normal work on 7 March 2006 (that is the Tuesday immediately following the injury).

[24] That is the context then in which Humes devoted significant energy to endeavouring to contact Mr Oosthuysen on Monday 6 March because according to the medical certificate which it is common ground they received (Medical Certificate 1) Mr Oosthuysen could have been expected to return to the workplace on that day.

[25] I am not persuaded that anything I heard constituted harassment by Humes of Mr Oosthuysen or his partner. The only text of a message that was made available to the Authority was one forwarded by Mr O'Neill himself at 3.45pm on 6 March. While the comment from Mr O'Neill about *a failure to attend* might not be particularly artfully phrased, in all the circumstances if Mr O'Neill had received only Medical Certificate 1 and had not been able to contact his employee by telephone then one could imagine a level of frustration becoming evident.

[26] For his part, Mr Oosthuysen maintains that Humes would have known that his medical circumstances had changed because his evidence is that he took into work a copy

of Medical Certificate 2 (the one from the 24 Hour surgery) and gave it to his team leader Darren Clark. Both Mr Clark and Mr O'Neill gave quite unequivocal evidence that they did not meet with Mr Oosthuysen on Monday 6 March 2006 as he contends and that they were never shown a copy of Medical Certificate 2 at that time. Indeed Mr O'Neill says the only occasion that he saw it before the investigation meeting was at the mediation.

Medical Certificate 2

[27] This medical certificate which was the one issued by the 24 Hour surgery is the pivotal point in the dispute between the parties. Mr Oosthuysen maintains that he provided a copy of this medical certificate to Mr Darren Clark his team leader on the morning of 6 March 2006 and that he showed a copy of the medical certificate to Mr O'Neill shortly thereafter.

[28] Mr Clark and Mr O'Neill both gave the Authority unequivocal testimony to deny that Mr Oosthuysen had either visited the work premises on that day or indeed had given them or shown them a copy of Medical Certificate 2. Mr Clark in particular accepted he could have been mistaken about not meeting with Mr Oosthuysen, but he says if he did meet with Mr Oosthuysen and received the copy of the Medical Certificate 2, he would not have behaved the way he did afterwards.

[29] Mr O'Neill points out in his evidence that had he received Medical Certificate 2 he would have been less troubled and confused by the apparent sudden change of direction by the Hornby Medical Centre. It will be remembered that there was an initial certificate from the Hornby Medical Centre issued on the day of the injury, 3 March, which contemplated that Mr Oosthuysen would be fit for *sedentary* duties from the day of the injury and could return to normal duties on Tuesday 7 March.

[30] Then, having referred Mr Oosthuysen to the 24 Hour surgery, the Hornby Medical Centre saw him again on Monday 6 March as a follow up visit from his visit to the 24 Hour surgery where X-rays were taken. Because the diagnosis from the 24 Hour surgery was slightly different, it appears that the Hornby Medical Centre chose to change their approach to Mr Oosthuysen's care and to fall in with the suggestion from the 24 Hour surgery to the effect that Mr Oosthuysen was to be off work for five days to receive

pain relief and to be reviewed by his General Practitioner again during the period he was off work.

[31] I have seen the medical certificate issued by the 24 Hour surgery. I am absolutely satisfied it is genuine but the issue is not whether a medical certificate was created after Mr Oosthuysen visited the surgery but rather whether a copy of that certificate was ever provided to the employer. Mr Oosthuysen's evidence is that the 24 Hour surgery undertook to fax a copy of the certificate to Humes and Mr Oosthuysen also stated on oath that he had called at the workplace on the morning of 6 March and physically handed over a copy of the certificate to his team leader.

[32] I am satisfied on the balance of probabilities that Mr Oosthuysen's recollection of events is mistaken. I cannot imagine why Humes would be confused about such a significant issue as this if they had received either the faxed copy of Medical Certificate 2 or indeed the physical copy which Mr Oosthuysen says that he brought into the workplace. Humes behaviour is inconsistent with them knowing that Mr Oosthuysen's medical prognosis and treatment regime had changed. Why would Humes bother to ring Mr Oosthuysen obsessively during 6 March and also trouble his partner by telephone if they knew where Mr Oosthuysen was and what was happening to him?

[33] In all the circumstances then I am satisfied that Humes did not receive a copy of Medical Certificate 2 and indeed never sighted it until the mediation.

Medical Certificate 3

[34] The third medical certificate clearly was provided to Humes. This is the certificate also issued by the Hornby Medical Centre which as I have just indicated was in effect a re-working of the original medical certificate provided by the Hornby Medical Centre but informed by the additional information which had come from the 24 Hour surgery.

[35] It is clear from Mr O'Neill's evidence that Humes received a faxed copy of the second medical certificate from the Hornby Medical Centre (Medical Certificate 3) at 2.42pm on Monday 6 March 2006. It is also clear from Mr O'Neill's evidence that

Humes were confused by the receipt of Medical Certificate 3, precisely because they had not seen Medical Certificate 2.

[36] Indeed, receipt of Medical Certificate 3 by Humes clearly provoked Mr O'Neill to make the telephone call to Mr Oosthuysen the text of which Mr Oosthuysen sets out in his brief of evidence – this is the voicemail message received by Mr Oosthuysen at 3.45pm on Monday 6 March 2006.

The meeting on Tuesday 7 March 2006

[37] There are two different versions of this meeting. Mr Oosthuysen says that he was harangued by Mr O'Neill; Mr O'Neill denies that vehemently and even says that Mr Oosthuysen apologised for not getting in touch with him the previous day although Mr Oosthuysen denies the apology.

[38] Mr Oosthuysen says that a number of co-workers expressed their concern to him about the meeting and its allegedly intemperate nature although none of them gave evidence to the Authority and Mr O'Neill who impressed me as a credible and straightforward witness had an entirely different recollection of how that meeting transpired.

[39] Mr Oosthuysen did say in his evidence that his relationship with Mr O'Neill was not particularly strong and he described his relationship with Mr O'Neill as *strained*.

[40] Mr O'Neill certainly told me that he made it quite clear to Mr Oosthuysen that he *wasn't happy* that Mr Oosthuysen had not bothered to return his calls or indeed the calls of other staff trying to find out what was happening. I confess I found Mr Oosthuysen's explanation for his failure to respond to these messages entirely unconvincing. It seemed to me that Mr Oosthuysen's explanation that he *did not see the point in talking to Mr O'Neill* was odd when he was prepared to take the trouble to ring the Human Resources people by way of a toll call to Auckland to discuss matters with them.

[41] In my opinion, Mr O'Neill was perfectly justified in feeling *hacked off* with Mr Oosthuysen for not returning his calls and he was entitled to remonstrate with Mr Oosthuysen for that. Furthermore, I was interested that Mr O'Neill thought that he

had a good relationship with Mr Oosthuysen and was very surprised when Mr Oosthuysen gave his evidence before the Authority and indicated that his relationship with Mr O'Neill was not all it could be. Mr O'Neill said that he was sorry that Mr Oosthuysen had resigned and observing him making that statement, I think he meant it.

Subsequent events

[42] Mr Oosthuysen claims that after the Tuesday meeting with Mr O'Neill, he was subjected to various forms of harassment and humiliation as a consequence of his earlier injury. No evidence was given of this alleged harassment other than the bare assertion of it happening.

[43] For his part, Mr O'Neill absolutely denied any such behaviour. He gave evidence which I accept as truthful that he *asked Tony on numerous occasions how he was*.

[44] Mr Oosthuysen worked out his notice for some three months after the events complained of and given the nature of his injury, it seems unlikely that he would have been incapacitated for very long. On balance I find the suggestion that there was any humiliation or harassment of Mr Oosthuysen simply unbelievable.

Determination

[45] For the reasons I have advanced in the foregoing analysis, I am not persuaded that Mr Oosthuysen has a viable claim for having suffered disadvantage as a consequence of an unjustifiable action by Humes. I am satisfied that Humes never received Medical Certificate 2 so the actions they took to try to establish what was going on were, in all the circumstances, what I think a fair and reasonable employer would do confronted with those confusing facts.

[46] Mr Oosthuysen's claim having failed in its entirety, the Authority is unable to assist him further.

Costs

[47] Costs are reserved.

James Crichton
Member of the Employment Relations Authority