IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 180/09
File Number: 5042118

	BETWEEN	Timothy Ouseley Applicant
	AND	Silver Fern Farms Limited Respondent
Member of Authority:	Denis Asher	
Representatives:	David Oliver for Mr Ouseley Tim Cleary for the Company	
Investigation Meeting	Napier, 23 & 24 July 2009	
Submissions Received	By 3 November 2009	
Determination:	13 November 2009	

DETERMINATION OF THE AUTHORITY

The Problem

[1] Did the Company fail to provide Mr Ouseley with a safe workplace? Was he injured because off *"a serious health and safety deficiency imposed on him"* (personal grievance advice dated 9 February 2005) by the respondent? Did Mr Ouseley terminate his employment because *"the employer … substantially breached* (his) *employment agreement and* (it was) *no longer reasonable to expect Mr Ouseley to continue"* (personal grievance advice dated 2 December 2005) in the respondent's employment?

[2] Was he also subjected to unjustified written warnings and did the Company interfere in his rehabilitation plan?

[3] Is Mr Ouseley entitled to any remedies?

The Investigation

[4] Mr Ouseley's first statement of problem was filed in the Authority on 22 January 2008. He sought compensation of lost wages, $30,000 for humiliation, interest and costs or awards in respect of claimed breaches of his employment agreement resulting in, he says, lost earnings, future economic losses, past medical and counselling expenses, non-economic losses of $60,000, interest and costs.

[5] In its statement in reply filed on 8 February 2008 the Company denied Mr Ouseley's allegations. It said it was not liable for any physical and/or psychological condition the applicant has or had, that it justifiably and fairly issued warnings and the outcomes were justified, it did not unlawfully interfere with Mr Ouseley's rehabilitation and that it did not constructively dismiss the applicant.

[6] Mediation on the parties' own volition and by direction from the Authority did not resolve this problem.

[7] Because of Mr Ouseley's ill-health, separate proceedings involving his reviewing of an ACC decision and as a result of retrieving archived information, delays have occurred in this matter going to both the directed mediation and to an investigation.

[8] Commencing in June 2009 Mr Ouseley made several applications for adjournment of the investigation agreed to by the parties during a telephone conference on 19 March: all applications were declined for reasons communicated to the parties, following receipt of their written and/or oral submissions.

[9] Following the incomplete investigation on 23 & 24 July the parties agreed the Authority would determine the matter following receipt of their submissions.

[10] Mr Ouseley has received a legal aid grant covering this investigation.

Background

[11] Mr Ouseley worked in the respondent's Whakatu plant, Hawkes Bay, in every killing season from in or about November 2002 to in or about December 2005.

[12] Mr Ouseley worked in the beef offal room from in or about September 2003 to in or about February 2005.

[13] Mr Ouseley's duties included packaging beef product into cartons and stacking the cartons into pallets. Considerable heavy lifting of product and cartons was required.

[14] During his employment Mr Ouseley raised the issue of staffing levels and carton processing problems with the Company and the Department of Labour on a number of occasions, who investigated and concluded the issues of concern to the applicant were being properly managed.

Mr Ouseley's Position Summarised

[15] The Company had a duty to do what was reasonable to protect Mr Ouseley from harm in his workplace. Central to this duty was a contracted obligation to ensure appropriate manning and job rotation. It failed to do so.

[16] Mr Ouseley's employment in the beef offal room was characterised by frequent and serious under-manning because of absenteeism.

[17] Because of increased workloads, Mr Ouseley suffered workplace musculoskeletal and nerve disorders to his right shoulder from in or about July 2004 which culminated in or about 2 February 2005, and has suffered anxiety and stress.

[18] Specifically, Mr Ouseley says his employer grossly mismanaged the manning of the beef offal nightshift over a very long period: the offal room was undermanned regularly. Absentee and injured co-workers were not replaced as agreed to in the

collective agreement; co-workers were also not provided with appropriate training to do the carton processing requirements of the job. Proper job rotations and lunch breaks designed to rest the body were not possible resulting in the applicant doing excessive carton lifting each shift. The dropping of product by the Company barely reduced the excessive physical lifting.

[19] Since about July 2004 Mr Ouseley has suffered severely from his injuries: he has consulted many health professionals including his general practitioner (who specialised in musculoskeletal disorders), occupational health practitioners, orthopaedic surgeons and a psychologist; he has tried many treatments but his injuries have not come right and he needs further surgery. Treatment under the ACC regime from February 2005 included steroid injections, physiotherapy, acupuncture, counselling and shoulder surgery.

[20] Mr Ouseley is suffering from anxiety and depression, sleep deprivation and other medical problems.

[21] The health and safety concerns were raised with the Company on a number of occasions from May 2004 until Mr Ouseley broke down at the end of January 2005. The applicant complained to his union and to OSH (3 times) and only after their investigation did the Company commit to substantial changes.

[22] Mr Ouseley returned to work in April 2005 when his employer began to act unfairly towards him: he says it was a calculated plan to remove him.

The Company's Position Summarised

[23] I accept the Company's arguments and set them out below as my own findings.

Discussion and Findings

[24] This is a wide ranging employment relationship problem going back over an extended time period. Consequently my determination deals with those matters I am satisfied are key components of the problem.

[25] There is an implied term in the parties' employment agreements regarding a duty to maintain health and safety standards: *Attorney-General* v *Gilbert* [2002] 1 ERNZ 31 (CA).

[26] That duty is established by s. 6 of the Health and Safety in Employment Act 1992 (the HSE Act): an employer must take all reasonably practicable steps to avoid harm to employees. This does not mean if an employee is injured at work there has been a breach of that duty. For a breach to occur there needs to be a failure under the requisite statutory standard.

[27] The Department of Labour (DoL) administers the HSE Act. Its inspectors assess workplaces for compliance. They may issue improvement and infringement notices, etc or prosecute, and/or make informal recommendations.

[28] The evidence establishes that absenteeism at the plant was an ongoing problem and the Company and the workplace union agreed to adjust manning levels as set out in the relevant collective employment agreement (clauses 6 (c) & 27 (i)), so that work could continue. Product was dumped to compensate for the lower manning. This policy had been operational for some time prior to 2004.

[29] Until his letter of resignation in January 2005 Mr Ouseley was a union member: he was therefore bound by the agreed changes to manning ratios. Up until then his complaints were in reality with union support for the agreed way of dealing with absenteeism.

[30] After his resignation from the union, he remained bound by individual terms which incorporated the provisions of the collective employment agreement.

[31] Soon after raising his concerns he went off work with an aggravated shoulder injury and, when he returned and shifted to the boning room, there was no evidence of manning being less than in the contract.

[32] The offal room was run on orthodox lines. There was a working health and safety committee and monthly meeting of its members, including union delegates.

[33] Evidence in support of the agreed process being reasonable also lies in the fact that the relevant health and safety committee raised no issues about it. Mr Ouseley may have raised his concerns with his union delegate and health and safety representative but that person did not raise those concerns at meetings of the committee. The applicant did not speak to any supervisor or management representative about it.

[34] The evidence of strain and sprain injuries in the offal room is unexceptional, i.e. 4 injuries in three years.

[35] The Company's evidence demonstrated that, because of conveyors, rollers and stacking efficiencies, the lifting process was not onerous. Other workers employed by the Company lift daily substantially more than Mr Ouseley said he lifted on his work days. There are no health and safety issues with that practice.

[36] While the Company concedes that a breach of the implied duty may occur when a union and employer have agreed on a certain process, in this instances the agreed process was reasonable in the circumstances and there was no indication of a greater rate of injuries or some other health and safety issue.

[37] Evidence in support of the agreed process being reasonable also lies in the fact that Mr Ouseley called in the DoL on two occasions and on each occasion no action was taken.

[38] When management became aware of Mr Ouseley's concerns in January 2005 it immediately responded by directing an investigation. The resulting report (the Walsh Report) made it clear the issues were raised in January 2005 and not any earlier. While Mr Ouseley had mentioned in the previous season he was not happy he would not give any details when asked. The report revealed no health and safety issues.

[39] Mr Ouseley was a longstanding employee in the meat industry. He knew how things worked and how to progress workplace issues. He was for a time a health and safety representative and union delegate for another, large export meat processor. He knew how to report a problem because that is what he did in January 2005. Mr

Ouseley clearly knew at that time he was carrying an injury from the previous season but did not lodge a claim or advise the Company it was causing problems until it was bad enough to put him off work in early February 2005.

[40] For mental injury causation must first be established. The Authority required proof based on an independent medical practitioner but this was never obtained despite the investigation being adjourned in part for that purpose.

[41] That approach is reinforced by an analysis of relevant case law: *Gilbert* (above); *Brickell* v *Attorney-General* [2000] 2 ERNZ 529; and *Mitchell* v *Blue Star Print Group (NZ) Ltd*, unreported, WC 21/08, 23 December 2008, Shaw J. The medical evidence needs to be independently sourced, from an appropriate medical practitioner and be persuasive.

[42] At the Authority's investigation two reports were presented, one by a doctor and the other a psychologist, as were letters by another psychologist. The doctor's report did not say Mr Ouseley's severe chronic anxiety/depression was the respondent's fault or apportion blame. It said the cause was complex and complicated by ongoing legal issues. His list of stressors contained matters over which the Company had no control and importantly notes the greatest stress was Mr Ouseley's underlying depression and anxiety.

[43] One of the psychologists identified matters which may have precipitated Mr Ouseley's condition but did not link it with anything the respondent may have wrongly done – it is simply Mr Ouseley's perception of wrongful action which led to the condition manifesting itself, or created obstacles for his rehabilitation and progress.

[44] There is no evidence to support the claim that any wrongful actions by the Company have led to harm.

[45] Mr Ouseley claimed three grievances: an unjustified written warning on 16 March 2005, an unjustified written warning on 7 April 2005 and unjustifiable interference with his rehabilitation plan. From his submissions Mr Ouseley appears to

have abandoned the claim in respect of 7 April: no such written warning was produced at the investigation meeting.

[46] There was only one written warning and that is dated 17 March 2005. It was issued because Mr Ouseley reported for work the previous day but left the plant without permission. He is recorded as declining to sign the warning and not offering a written explanation. Leaving the plant without permission is a breach of clause 32 (f) (iii) of the collective agreement. Mr Ouseley was directed to attend work that day as there was a paid union meeting and he was not a union member.

[47] At the investigation meeting Mr Ouseley said he was told to go home by a leading hand. The Authority's investigation was the first time the leading hand's name was mentioned. There is nothing to indicate Mr Ouseley raised this claim in the warning meeting as it is recorded he preferred not to give an explanation at the time. Even if his explanation was correct the warning was still justified as the leading hand had no authority to release employees and Mr Ouseley, as experienced as he was, would have known that.

[48] In respect of Mr Ouseley's various claims that the Company unjustifiably interfered in his rehabilitation plan, I prefer the respondent's evidence that he was not asked to do work specified in the rehabilitation programme as tasks he was not fit to do.

[1] In respect of Mr Ouseley's claim of constructive dismissal, I am satisfied his resignation was not prompted by any of the circumstances categorised by the Court of Appeal in *Auckland etc Shop Employees etc IUOW* v *Woolworths (NZ) Ltd* (1985) ERNZ Sel Cas 136 where, at par 43, it held that constructive dismissal includes, but is not limited to, cases where:

a. *An employer gives an employee a choice between resigning or being dismissed;*

b. *An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and/or*

c. *A breach of duty by the employer causes an employee to resign.*

[49] There is no credible evidence of the Company breaching the terms of Mr Ouseley's employment agreement at all, let alone serious enough to warrant him leaving.

Summary

[50] There is no evidence of Mr Ouseley raising health and safety issues as he claims from at least May 2004.

[51] It is now clear that Mr Ouseley left work at the end of the 2004 season with an injury which was re-aggravated in late January 2005. He was then off work and returned to light duties until the end of that season as part of his rehabilitation by an accredited employer. There were many disputes during 2005 over his obligations to attend work and undertake light duties and rehabilitation.

[52] The Company only became aware of an alleged health and safety issue in the offal room in late January 2005. It conducted an immediate review and implemented suggested improvements. No health and safety issues were revealed.

[53] Despite two in-depth investigations the Department of Labour found no health and safety breaches, notwithstanding which improvements were planned for the next season and implemented.

[54] The Company funded counselling sessions for Mr Ouseley not as part of his rehabilitation but under the Employee Assistance Programme.

[55] Based on advice from two doctors and their opinion he might return to work on light duties, the Company required Mr Ouseley to attend the new season induction but not resume work. Mr Ouseley did not attend and gave no advice he would not be attending. His weekly compensation was suspended because of that failure: his review and appeal of the suspension decision were declined, as it was found he acted unreasonably in refusing to attend the induction.

[56] Separate medical advice that Mr Ouseley should not return to the industry due to anxiety was not married at the time to the applicant's shoulder claim, but was fairly

and reasonably treated by the Company as the commencement of a separate ACC claim for mental injury: the claim was later declined and Mr Ouseley was unsuccessful at having the decision overturned at review and appeal.

[57] The Company consistently acted fairly and reasonably and in accordance with its obligations to Mr Ouseley by way of their employment agreements and its obligations under the Injury Prevention Rehabilitation and Compensation Act 2001, and its actions were those of what a fair and reasonable employer would have done as measured under s. 103a of the Act.

Determination

[58] Mr Ouseley's claims are dismissed.

[59] In light of the advice that Mr Ouseley is legally aided and notice from the Company that costs would not be sought if he was, I determine that costs will lie where they fall.

Denis Asher
Member of the Employment Relations Authority