

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 217/09
5106933

BETWEEN MICHAEL PEITA JNR
 Applicant

AND UNITED CARRIERS
 LIMITED
 Respondent

Member of Authority: R A Monaghan

Representatives: D James, counsel for applicant
 S Leftley, advocate for respondent

Investigation Meeting: 23 March 2009 at Kerikeri

Submissions received: 7 April 2009 from applicant
 17 April 2009 from respondent

Determination: 2 July 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Michael Peita Jnr says his former employer, United Carriers Limited (“UCL”) dismissed him unjustifiably. He said in his statement of problem that he was constructively dismissed, and unjustifiably disadvantaged, and that he was pressured to resign by his employer and other employees.

[2] UCL denies there was a dismissal, and that Mr Peita’s employment was affected to his disadvantage by an unjustified action on its part. It says it was in the course of addressing a serious issue that had arisen between Mr Peita and his colleagues when Mr Peita failed to return to work and failed to notify it of his intentions.

Background

[3] Mr Peita was employed as a driver at UCL's Kerikeri branch, commencing on 12 January 2007.

[4] The events leading to the termination of his employment began when the branch workshop was broken into very early in the morning of Monday 1 October 2007. Two motorbikes were taken. The motorbikes belonged to Brent Hall, a contract mechanic who operated the workshop. When the break-in was discovered at the start of work that day, the loss was reported to the area co-ordinator at the Kerikeri site, Viv Hunt, and to the police.

[5] Mr Hall told Mr Hunt shortly afterwards that he believed Mr Peita and his friend Keeghan Williamson were involved. Mr Williamson had been at UCL on a work experience programme, shadowing Mr Peita at work for some two weeks. Mr Hunt instructed Mr Hall to leave the matter to the police.

[6] When Mr Peita arrived at work that morning he was told of the theft, and suspected Mr Williamson of being involved in it. At or about the end of the day he informed his colleague, Haami Reti, of his suspicion and of his plan to speak to Mr Williamson about the matter. Later he did so, and Mr Williamson admitted his involvement.

[7] Mr Peita did not report to work on the morning of 2 October. When Mr Reti reported for work he informed Mr Hunt of Mr Peita's plan to speak to Mr Williamson. Mr Hunt despatched Mr Reti to Mr Peita's home to dissuade him from doing so. Mr Peita said in his written statement of evidence that Mr Reti advised he had been sent to tell Mr Peita to stay inside his house because there was a 'crossbow and shotgun out on me'. If Mr Reti gave that information it was not at Mr Hunt's instigation as Mr Hunt was unaware of the matter at the time.

[8] During the visit there was a phone call from Mr Hunt, in the course of which Mr Hunt became aware that Mr Williamson admitted his involvement.

[9] Keiryson Cooper, a cousin of Mr Peita's who also worked at UCL, went to Mr Peita's house in or about the late afternoon of 2 October to ask Mr Peita if he was involved in the theft. According to Mr Peita that first visit was friendly. Mr Peita told Mr Cooper that his gut feeling about Mr Williamson was correct, and that the stolen motorbikes may be in town. Mr Cooper appeared to accept what Mr Peita was saying, but there were further visits during which Mr Cooper was becoming increasingly angry.

[10] Despite Mr Peita's impression, still later on the same afternoon Mr Cooper telephoned Mr Hunt to advise of his visit. According to Mr Hunt, Mr Cooper said then and subsequently that he did not believe Mr Peita's denial of involvement, was very upset, and felt he was to blame because he had recommended Mr Peita for employment. Mr Hunt sought to calm him, also telling him the matter was a police matter and he should leave Mr Peita alone.

[11] On 3 October Mr Hunt received a medical certificate stating Mr Peita was unfit for work until 5 October. The certificate did not specify the reason, but Mr Peita was suffering from the effects of an earlier injury to his leg and his absence was unrelated to the issues developing at the workplace. Unfortunately, in the meantime his absence fuelled suspicions and rumours about his involvement even though the staff were aware that Mr Williamson had admitted to the theft.

[12] Mr Cooper visited Mr Peita's home again on the morning of 5 October – shouting, swearing and saying Mr Peita should resign.

[13] Mr Peita did not report for work that day, instead attending the company's offices asking to speak to Mr Hunt. He told Mr Hunt he did not feel it was safe to return to work because threats had been made against him. He raised the 'crossbow and shotgun' threat, although at the time he was unsure of its meaning and the threat was not in itself a barrier to his returning to work. Mr Hunt was not sure of the meaning either, although he also said the person concerned subsequently admitted to making the threat.

[14] Mr Peita told Mr Hunt that Mr Cooper had visited his home, accused him of being involved in the theft, and told him he should resign. Mr Hunt told Mr Peita he did not seek a resignation, and that he would speak to Mr Cooper about Mr Cooper's behaviour.

[15] Mr Hunt spoke again to Mr Cooper. Mr Cooper admitted telling Mr Peita to resign. He continued to maintain that Mr Peita was involved in the theft in the face of Mr Hunt's efforts to dissuade him, but agreed to leave Mr Peita alone and let the police deal with the matter.

[16] Mr Peita did not report for work on Monday 8 October. Mr Hunt chose to treat the absence as an opportunity for Mr Peita and the staff to cool down, although Mr Peita later provided a further medical certificate in support of the absence. The certificate stated that Mr Peita would be fit for work on 11 October. Again the certificate did not specify a reason for the lack of fitness to work, but the reason was that Mr Peita's leg was still sore.

[17] Mr Peita reported to work on 11 October, feeling happy and enthusiastic about his return. His evidence was that Mr Hunt asked to speak to him in the office. There Mr Hunt advised that he had been speaking to 'the boys' and it would be best if Mr Peita resigned. When Mr Peita asked why, he was told that if he did not resign, six others would. He broke down in tears. Mr Hunt advised that he may be able to help Mr Peita find another job. He suggested Mr Peita approach United Civil Construction ("UCC"), the roadworks division of the group to which UCL belongs and which operates from premises on the same site.

[18] Mr Peita went immediately to UCC, at about 8 am. The manager asked him to return at 9 am. Mr Peita felt frustrated and began walking to Kerikeri township. He telephoned his partner, Rewetu Anderson, who collected him and took him home.

[19] In oral evidence Mr Hunt agreed that Mr Peita reported for work that morning, and that he invited Mr Peita into his office. According to Mr Hunt, Mr Peita said he still did not feel safe returning to work. Mr Hunt told Mr Peita it might be a good idea to work elsewhere for a short while, and suggested a temporary transfer to UCC.

[20] Mr Hunt denied having any discussion about Mr Peita's resignation. However Mr Peita's evidence about the conversation was detailed, and during the investigation meeting Mr Hunt acknowledged some aspects of it. Overall I consider it likely that Mr Hunt told Mr Peita his colleagues wanted him to resign and that Mr Peita became very upset as a result.

[21] When he made the suggestion about a move to UCC, Mr Hunt had not discussed the matter with the manager at UCC. No details were available about what, if anything, Mr Peita could do there. After speaking to Mr Peita, Mr Hunt spoke briefly to the manager about the possibility of a job on a works gang.

[22] By this time Mr Peita was on his way home. It was in effect common ground that, while on the way, he had a telephone conversation with Mr Hunt about the possibility of a job with a works gang. When he arrived home there was another conversation with Mr Hunt, during which there was a discussion about why Mr Peita had not attended the 9 am interview. There was a conflict in the evidence about whether Mr Peita told Mr Hunt he felt he had been shafted, and Mr Hunt agreed he had. Ms Anderson gave evidence that she heard this exchange on a speakerphone. Although Mr Hunt denied saying anything about Mr Peita being 'shafted', in the circumstances I consider it likely the comment was made.

[23] The events of 11 October as he saw them caused Mr Peita to write a letter of the same date, which Mr Hunt received on Monday 15 October. The letter was expressed to be a letter of personal grievance, in that Mr Peita's employment 'has/or going to be terminated from 11.10.07 due to employee's relations with other employees at the job site.' The letter went on to record that other employees were threatening to 'throw in their jobs' if Mr Peita returned to work. The other employees' expressed concerns about Mr Peita resulted in an unfair request for his (Mr Peita's) resignation.

[24] The letter acknowledged the indication given on 5 October that any resignation would not be accepted. However it went on to say that Mr Peita was being treated as if he were in 'the wrong', resulting in a request for his resignation on 11 October.

[25] The letter continued:

“I have thought long and hard about the reasons why I should hand my resignation in and the reasons why I shouldn’t. And stated below are a list of reasons why I shouldn’t [positive aspects of Mr Peita’s conduct as an employee were listed].”

[26] The letter ended by saying Mr Peita had sought advice, and sought mediation.

[27] On receipt of the letter Mr Hunt contacted the company’s HR manager, Ruth Broadworth. A meeting was arranged for Thursday 18 October, in order to discuss and attempt to resolve the issues. Meanwhile Mr Peita remained absent from work.

[28] On the morning of 18 October, before the meeting started, Mr Hunt and Ms Broadworth spoke to Mr Hall and Mr Reti with a view to assessing whether emotions had cooled. The information they received indicated the staff continued to believe Mr Peita was involved in the theft, and were still angry.

[29] The meeting with Mr Peita began with a discussion of the reason for Mr Peita’s personal grievance. Mr Peita said his concern was that he had been asked to resign. Mr Hunt denied making such a request. Ms Broadworth reiterated that Mr Peita’s resignation was not sought.

[30] Regarding the threats, Mr Peita referred to Mr Cooper’s visits and to being told there was a ‘crossbow and shotgun’ out on him. Ms Broadworth sought to discuss the nature of the threats in more detail, as well as ways of ensuring Mr Peita’s safety at work. She advised that the staff would be spoken to about the threats and would be instructed that intimidating behaviour was not acceptable. She advised further that she sought a temporary arrangement to keep Mr Peita away from the site until feelings had cooled.

[31] The possibility of working at UCC was raised again, as was the possibility of working at UCL’s Whangarei site. Mr Peita was asked to consider his response, and to meet again on 24 October to discuss his decision. He commented at the investigation meeting that he did not understand the proposal, or how it would be

good for his safety. Indeed he said it was unfair that he should be expected to work elsewhere since he had done nothing wrong, and that if anyone should be moved it was the other staff members.

[32] After the meeting Ms Broadworth and Mr Hunt met with Mr Cooper, who had not been present earlier in the day. Mr Cooper repeated his view of Mr Peita's involvement and his sense of personal responsibility for Mr Peita's actions. He was again instructed that the behaviour was to stop.

[33] On Saturday 20 October Mr Hunt met with the drivers. He described the atmosphere of the meeting as initially quite hostile. He informed the staff that no-one should be visiting Mr Peita or pressuring him to leave. UCL regarded such behaviour as unacceptable and if it was happening it was to stop.

[34] There was a further meeting between Ms Broadworth, Mr Hunt, Mr Peita and Ms Anderson on 24 October. Mr Peita had not reported for work in the interim. He advised that he did not wish to work out of the Whangarei office, or for UCC. He wished to return to his normal place of work. Ms Broadworth replied that raised the possibility of confrontations at work if he did so, because feelings were still running high. Mr Peita responded that he could handle the matter and would go to Mr Hunt if there were any difficulties.

[35] Mr Peita had also sought from Mr Hunt an apology for the way he had been treated on 11 October. UCL understood him to be seeking an apology from the staff. In any event, it was in effect common ground that UCL's response was that it was difficult for UCL to control the actions of staff members outside work time.

[36] The meeting ended with Mr Peita re-stating his wish to return to work. He also said he would be seeking advice about his treatment up to and including 11 October. When asked at the end of the 24 October meeting if he would return on 'Monday' (29 October) he said he would 'think about it.' Even so, UCL expected him to report for work on 29 October.

[37] Mr Peita did not report to work on 29 October. Mr Hunt said he sought to contact Mr Peita several times but did not obtain a response, while Mr Peita denied receiving any such contact. When nothing had been heard by the end of the week, Mr Hunt advised in a letter dated 2 November 2007:

“As you did not return to work on the 29th October and have not responded to phone calls and the message left on your phone I have to assume that you have decided that you will not be returning.

Therefore I have terminated your employment with United Carriers Limited Kerikeri as of the 29th October 2007.”

[38] Clause 10 of the parties’ written employment agreement provides that:

“If the employee is absent from work for more than 3 consecutive working days, without notification to the employer, this contract shall be deemed to be terminated and the employee shall be deemed to have abandoned his employment without notice.”

[39] Mr Peita has not sought to rely in support of a grievance on any matter arising out of the 2 November letter. He has relied throughout on the grievance raised in his 11 October letter.

Whether there was a dismissal

[40] A termination of employment can amount to a constructive dismissal if it falls within one or more of the following categories:

- (a) the employee is told to resign or be dismissed; or
- (b) the employer follows a course of conduct with the deliberate and dominant purpose of coercing the employee to resign; or
- (c) a breach of duty on the part of the employer caused the resignation, and the breach was sufficiently serious to make it reasonably foreseeable by the

employer that the employee would not be prepared to work under the conditions prevailing.¹

[41] Mr Peita says his employment was terminated by the employer by its conduct between 1 and 11 October 2007. The conduct concerned the suggestion that Mr Peita resign or seek alternative employment for the period it would take to provide a safe environment, and UCL's inability to provide a safe environment.

1. The resignation

[42] It was arguably open to Mr Peita on 11 October to treat his employment as being at an end that day, but I find on the facts that he did not do so. His response to the events of the day was uncertainty about the continuation of his employment and in particular whether he should resign.

[43] Accordingly UCL believed correctly that, during the meetings of 18 and 24 October, it was addressing a problem in an employment relationship which both parties treated as continuing at the time. UCL confirmed that Mr Peita's resignation was not sought, attempted to discuss ways in which Mr Peita's safety at work could be protected, and to that end proposed a temporary move elsewhere. Accordingly, if Mr Peita had believed he was being asked to resign on 11 October, he was now being assured that his resignation was not sought.

[44] The attempts to address the problem caused by the reactions of Mr Peita's colleagues can be assessed with reference to decisions of the Employment Court on compatibility in the workplace. UCL had an obligation to enquire fully into the wider problem caused by the ill-feeling in the workplace and make attempts to resolve it.² In doing so, it was also obliged to act as a reasonable and fair employer would act.

¹ **Auckland Shop Employees IUOW v Woolworths (NZ) Limited** [1985] 2 NZLR 372; **Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW** [1994] 2 NZLR 414, [1994] 1 ERNZ 168.

² **Canterbury Clothing & Related Trades IUOW v Caroline Goodman Fashions Ltd** [1982] ACJ 121

[45] Similarly UCL had an obligation to take all practicable steps to ensure Mr Peita's safety at work.

[46] In that context, at least raising and discussing with Mr Peita the possibility of temporary work elsewhere was an option that was reasonably open to UCL. Arguably it was in Mr Peita's best interests to be absent while feelings cooled. It is understandable that Mr Peita would consider all of this stigmatised him when he had done nothing wrong, but it is unrealistic and not practicable to suggest that his colleagues should be required to work elsewhere while he alone remained.

[47] Moreover when Mr Peita declined the alternatives offered, discussion turned to how a return to work might be achieved and Mr Peita indicated his intention was to return. By the end of 24 October UCL understood there was a consensus on the point, although it was confused by Mr Peita's final comment, and expected Mr Peita to return to his normal work on 29 October.

[48] I do not find anything in any of the above meets the tests for the existence of a constructive dismissal in respect of UCL's actions up to and including 11 October. Since no resignation was offered on that date, it is not open to Mr Peita to nominate that date as a cut-off date as far as the termination of his employment is concerned, and effectively to take out of context or disregard the effect of the attempts made subsequently to address the problem he had raised.

2. Safe place of work

[49] Because the focus in this problem has been on the discussion of 11 October, and the events leading to it, I understand the submission based on the failure to provide a safe place of work also concerns that period. Further, because the focus has been so strongly on Mr Peita's view of what he saw as an unfair request that he resign, I assume the submission is concerned with the circumstances of the request.

[50] To the extent there is reliance on the suggestion that Mr Peita seek alternative employment elsewhere for the period it would take to provide a safe environment, for

the reasons set out above I do not accept overall that UCL acted unfairly or unreasonably in that respect.

[51] To the extent there is reliance on an argument that UCL failed to provide a safe place of work for Mr Peita up to and including 11 October, UCL was not under an absolute obligation to control the conduct of its employees to the extent that it was obliged to prevent them from being suspicious of and reacting adversely to Mr Peita. It was under an obligation to manage the reactions in a fair and reasonable way, and in particular to attempt to de-fuse them or at least ensure they did not get out of hand and place Mr Peita's safety at risk. There was nothing to indicate it breached that obligation in the period up to and including 11 October.

3. Conclusion

[52] For all of the above reasons I find Mr Peita was not constructively dismissed.

Whether there was an unjustified action causing disadvantage

[53] The disadvantage relied on in submissions was UCL's failure to provide a safe place of work by failing to obtain or make a real effort to obtain a commitment from co-employees to withdraw their threats against Mr Peita. For the reasons set out above, I do not accept this submission.

Whether Mr Peita was discriminated against unlawfully

[54] There was a submission in the alternative that UCL discriminated against Mr Peita, contrary to s 104, by reason either directly or indirectly of his refusal to do work under s 28A of the Health and Safety in Employment Act 1992. Section 28A provides in particular that:

“(1) An employee may refuse to do work if the employee believes that the work that the employee is required to perform is likely to cause serious harm to him or her.

(2) An employee who, under subsection (1) is refusing to do work may continue to refuse to do the work if –

- (a) the employee attempts to resolve the matter with the employee as soon as practicable after first refusing to do the work; and
- (b) the matter is not resolved; and
- (c) the employee believes on reasonable grounds that the work is likely to cause serious harm to him or her.

..

(6) An employee who refuses to do work must do any other work within the scope of the employee's employment agreement that the employer reasonably requests."

[55] Mr Peita declined to work from the Whangarei office, as well as the possible transfer to UCC. The refusals were not because those workplaces were unsafe, rather because Mr Peita did not accept that such transfers were fair to him.

[56] The arguably unsafe work was Mr Peita's normal work. However he said he wished to return to his normal job. He assured UCL at the meetings of 18 and 24 October that he was able to and wished to do so. There was no evidence of any refusal to perform that work, let alone a refusal because a return would not be safe.

[57] Finally, the letter of 11 October is not sufficient to raise a grievance of this kind and the grievance has not been raised in any other communication. Section 122 of the Employment Relations Act does not extend beyond the scope of the factual matrix associated with a grievance that was raised.

Costs

[58] Costs are reserved. I note Mr Peita has received a grant of legal aid.

[59] The parties are invited to resolve the matter of costs themselves. If either seeks a determination from the Authority there shall be 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority