Determination Number: CA 34/07
File Number: 5042613

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH OFFICE

BETWEEN	Kit Sara (Applicant)
AND	D H Bull (1988) Ltd (Respondent)
REPRESENTATIVES	Susie Tait, counsel for the applicant Foster Raharuhi for the respondent
MEMBER OF AUTHORITY	Philip Cheyne
INVESTIGATION MEETING	Christchurch, Thursday 14 December 2006
DATE OF DETERMINATION	30 March 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Kit Sara worked at D H Bull (1988) Limited (DHB) from 16 May 2005 until he resigned in early May 2006. He worked 10 hours per day, 4 days per week with a half hour lunch break. Mr Sara says that he was constructively dismissed and relies on *Auckland Shop Employees' Union v. Woolworths (NZ) Ltd* [1985] 2 NZLR 372. It is also said that DHB breached the apprenticeship agreement and associated arrangements. Finally there is a claim for arrears of wages, recovery of wages unlawfully deducted and the imposition of a penalty under the Wages Protection Act 1983.

[2] DHB is a company principally owned by Mr and Mrs Raharuhi, both directors and who work in the business. It operates a blacksmithing and general engineering business, a trade in which Mr Raharuhi is obviously very experienced. In September 2005, DHB and Mr Sara entered into a modern apprenticeship training agreement in maintenance and diagnostics in mechanical engineering. Difficulties arose in April 2006 over whether Mr Raharuhi was providing sufficient work and supervision related to Mr Sara achieving the required unit standards. There followed angry exchanges between Mr Sara and Mr Raharuhi. Mr Sara resigned by giving notice on 8 May 2006 intending to finish on 18 May 2006.

[3] To resolve the problem, it is necessary to canvass more closely the apprenticeship arrangements and the exchanges between Mr Sara and Mr Raharuhi that preceded the resignation.

Apprenticeship arrangements

[4] Competenz is the relevant industry training organisation. Tony Greenwood is its southern area manager and was involved in the beginning and ending of Mr Sara's apprenticeship although the relevant direct contract was generally through Bernie Streeter. To some extent, Mr Greenwood's evidence is critical of Mr Raharuhi but I will put that aside as most of it is based on hearsay information gathered from Mr Streeter and others who did not give evidence to the Authority. A point that can safely be taken from Mr Greenwood's evidence is that Mr Sara is progressing well in his apprenticeship with a new employer.

[5] The arrangement for this sort of apprenticeship is that Competenz provides support and mentoring for the apprentice and the employer, acts as a conduit for funding and sets and approves the required standards of achievement. An apprentice needs an assessor who decides whether the apprentice has met the required standards. That person is often the employer, but they need to be registered with and acceptable to Competenz as an assessor. The arrangement originally agreed between Competenz, Mr Sara and Mr Raharuhi was that Mr Raharuhi would be the assessor.

[6] The apprentice will generally learn on-the-job as well as through block courses in a Polytechnic. Mr Sara attended his first block course in February 2006. There is a fee payable to the Polytechnic of $790 for that course. Often an employer will meet that cost for the apprentice, but it is not a requirement. Mr Sara and Mr Raharuhi agreed that the course fee would be paid by DHB but that Mr Sara would repay half the fee ($395) by deductions from wages at the rate of $10 a week. In evidence, Mr Sara accepted that he still owes DHB some money pursuant to this arrangement. Indeed, that has always been his position.

[7] At some point, Mr Raharuhi decided that he was not prepared to pay the fee and do the course required by Competenz to register him as an assessor. As a result, Mr Sara required an external assessor. Mr Sara's evidence, which I accept, is that he told Mr Raharuhi that he needed to sign a form to allow the appointment of an external assessor. Mr Raharuhi did nothing about this.

[8] Part of the monitoring and mentoring of the apprentice includes visits from the Polytechnic tutor. In Mr Sara's case, that was Tony Smith. There arose a difficulty over arrangements for Mr Smith to visit. What appears to have happened is that Mr Smith rang and spoke to Mr Sara about when to visit. Mr Sara asked Mr Raharuhi, who nominated midday. He chose that time because it coincided with Mr Sara's lunch break. However, midday was not suitable to Mr Smith who presumably had other commitments. Mr Raharuhi would not agree to a visiting time within Mr Sara's ordinary working hours. Mr Raharuhi's evidence is that he was paying Tony Smith to do a job so he had to come to DHB when it suited Mr Raharuhi. He also says that a visit at midday would share the (time) cost between Mr Sara and DHB in line with the arrangement about the polytechnic fees. This impasse appears to have arisen in April 2006. It is an example of how unnecessarily difficult Mr Raharuhi can be.

[9] Also around April, Mr Sara learned that he might have to do a block course at Aoraki Polytechnic in Timaru later in 2006. His evidence is that he spoke to Mr Raharuhi about arrangements. Mr Raharuhi told him that the company would not pay wages for the time required so it would have to be taken as unpaid leave. Mr Sara also says that Mr Raharuhi refused to pay anything towards travel or accommodation costs. Mr Raharuhi's evidence is that no such discussion took place and he did not say those things. On balance, I prefer Mr Sara's evidence on the point.

[10] On 20 April there was a discussion between Mr Sara's mother, Mr Raharuhi and Mrs Raharuhi. There is a brief note of this discussion provided by Mr Raharuhi. It appears that Mr Sara's mother made it clear to Mr and Mrs Raharuhi that Mr Sara was unhappy at work. That was no surprise. By that time there had been several exchanges between Mr Sara and Mr Raharuhi to similar effect. While Mr Sara was becoming increasingly unhappy about the difficulties over his apprenticeship and lack of progress, Mr Raharuhi was becoming dissatisfied with aspects of Mr Sara's work performance.

[11] On 27 April 2006, there was further discussion between Mr Sara and Mr Raharuhi. Mr Sara said he was not interested in the job any more and that he thought Mr Raharuhi was showing no interest in the apprenticeship. In response, Mr Raharuhi criticised Mr Sara's work saying that his last two weeks' work were *rubbish* and that he needed to re-evaluate his position with the company. However, I do not accept that this exchange amounted to a *resign or be fired* ultimatum. Mr Sara was told that he needed to do the basics right before moving on to more technical work.

[12] On 1 May 2006, there was a disagreement between Mr Sara and Mr Raharuhi about whether it was safe to perform a particular task with a grinder. Shortly before this date,

another employee had suffered a major accident. During the exchange with Mr Raharuhi on 1 May, Mr Sara made a comment that invoked the accident. He stated that Mr Raharuhi would be happy if Mr Sara ground his thumb off. Mr Raharuhi's immediate response was to tell Mr Sara to get on with the job and to concentrate on what he was doing. Reflecting on the comment, Mr Raharuhi decided to issue a warning to Mr Sara. Later that day, Mr Sara was called into Mr Raharuhi's office. Mr Raharuhi simply read out the warning letter and wanted Mr Sara to sign it. No grievance has been raised in respect of this letter and it is not a matter that has been referred to in the constructive dismissal argument or in Mr Sara's evidence of the reasons for his resignation.

[13] On or about Saturday, 6 May 2006, Mr Sara obtained a job with another engineering firm which was prepared to take over his apprenticeship. He had been looking for another position for a little while. This is the same firm referred to by Mr Greenwood in his evidence that the apprenticeship is currently progressing well.

[14] On 8 May 2006, Mr Sara gave notice of his intention to finish on 18 May 2006. Events to this point are relevant for the purposes of the constructive dismissal aspect of the problem. However, there are also several incidents during the notice period which need to be canvassed in order to resolve other aspects of the problem.

[15] On 16 May, Mrs Raharuhi told Mr Sara that he owed money to DHB for the full cost of the Polytechnic course and the cost of the Competenz training manual. Mr Sara was given a handwritten note showing that he owed $845.28 for these items after allowing $170 for the repayments that had been made by weekly deductions from his wages. Mr Sara told Mrs Raharuhi that he could not afford to pay this amount in a lump sum and would have to pay it in instalments. Mrs Raharuhi told him that it had to be paid in full by the time he left.

[16] On 18 May, Mr Raharuhi confronted Mr Sara about the alleged debt. Mr Raharuhi told him he would have to sell his car to meet the debt. Mr Sara said that he would not, but Mr Raharuhi demanded the car keys. Mr Sara swore saying *like fuck* or something similar. Mr Raharuhi came closer to Mr Sara and threatened to dump him in the gutter. Mr Sara said he was not scared of Mr Raharuhi. Mr Raharuhi called Mr Sara *an 18 year old prick* and told him he had no future. In response and because he was actually apprehensive about the situation, Mr Sara decided to leave saying that he *did not give a shit* about his final pay. He headed to the locker room followed by Mr Raharuhi. Mr Raharuhi asked Mr Sara *where the fuck do you think you are going* and Mr Sara said he was not going to stay having been spoken to like that. Mr Sara then left, telling Mr Raharuhi that he was a *crappy boss*.

[17] The next day, Mr Sara returned to the workplace and asked for his work boots. Mr Raharuhi told him to *go through your lawyer if you want anything*. By that time Mr Raharuhi had received a fax dated 18 May 2006 from Mr Sara's lawyer concerning especially payment of the final wages. Mr Sara also asked for food that he had left in the fridge. Mr Raharuhi told him he would give him nothing.

[18] Competenz sought to have Mr Raharuhi sign a release form required before Mr Sara's new employer could formally offer him an apprenticeship. Mr Raharuhi refused to co-operate and Mr Greenwood resorted to signing the form himself. This is a further example of Mr Raharuhi being unnecessarily difficult.

[19] Finally I should note that Mr Sara mistakenly received a refund from Competenz of $229.69 being money paid to it by DHB. Mr Sara agreed to refund that money which should be returned to Competenz.

Constructive dismissal

[20] To amount to constructive dismissal, a breach of duty by the employer must be sufficiently serious to make it reasonably foreseeable that the employee would not be prepared to work under the conditions prevailing: see *Auckland Electric Power Board v. Auckland*

Provincial District Local Authorities IUOW Inc [1994] 1 ERNZ 168. The breach of duty must also be the cause of the resignation.

[21] The breaches of duty relied on are a failure to provide the required apprenticeship training and support; revoking the agreement to become the workplace assessor; preventing the appointment of another workplace assessor; and preventing Mr Smith from contacting Mr Sara during working hours.

[22] I do not accept that Mr Raharuhi's decision not to do what was required to become a workplace assessor was a breach of duty. Mr Sara's evidence is that he was aware from the outset of Mr Raharuhi's oppositional stance to doing what was necessary to achieve registration with Competenz as an assessor. It is unclear when things came to a head but it did not relate to any issue between Mr Raharuhi and Mr Sara. It was solely due to Mr Raharuhi's view that he should not have to do or pay anything to prove that he is sufficiently competent in his trade to assess a learner. It is another example of him being unnecessarily difficult. However, the apprenticeship system allows the appointment of another person to the role so Mr Raharuhi's decision did not prevent a continuation of the apprenticeship.

[23] The evidence of and for Mr Sara is unclear about how Mr Raharuhi's opposition to the appointment of another person as workplace assessor affected the apprenticeship. Indeed, given that this must have been from April at the earliest, it is unclear how it could have affected the apprenticeship. The documentary evidence that has been provided indicates that Mr Sara was within the expected progress range at two months and six months into his training, although I accept that Mr Sara carried credits from previous study into the apprenticeship that would account for this, at least in part. There is also an activity plan/quarterly review document signed by Mr Sara, Mr Raharuhi and Mr Smith on 23 November 2005 and 28 February 2006 which indicates that planned activities were achieved during that period. If necessary to meet a critical date, Competenz would have taken or facilitated steps to recognise another assessor for Mr Sara. From all this, I am not able to find any breach of duty.

[24] Mr Smith provided a letter setting out some comments on various issues. On the issue of Mr Raharuhi's opposition to him visiting Mr Sara during working hours, he said:

> *When I first went to visit Kit [Sara] everything was fine, but as time went on the visits became more difficult to arrange until June 2006 when I was told that I could no longer visit Kit during working hours, if I wanted to see Kit I would have to visit him during his own time and not when Foster was paying him to work.*

[25] Having heard Mr Raharuhi's explanation for the change of approach over Mr Smith's visits, I find that he was simply being difficult in response to the deteriorating relationship between him and Mr Sara. That does constitute a breach of duty. There is a code of practice under the Modern Apprenticeship Training Act 2000 which sets out underlying principles which include co-operation, collaboration and being a good employer which Mr Raharuhi failed to apply. However, I do not accept that the breach was sufficiently serious to make it reasonably foreseeable that Mr Sara would resign.

[26] That leaves the general allegation of a failure to provide the required apprenticeship training and support. From Mr Sara's perspective, he was not getting sufficient instruction or being given the right sort of work to allow him to make as much progress with meeting unit standards as he would have liked. From Mr Raharuhi's perspective, there were some problems with the work being performed by Mr Sara and he thought that Mr Sara was trying to run before he could walk. There needed to be some communication between Mr Sara and Mr Raharuhi about these different views in order to reach agreement satisfactory to both about the future conduct of the apprenticeship. Competenz and Mr Smith would have been well placed to assist with this. However, Mr Raharuhi would not engage with them. His style of communication with Mr Sara became more aggressive and oppositional as their relationship deteriorated. However, I do not accept that it reached the point of amounting to a breach of duty either generally or with respect to the requirements of the apprenticeship. Mr Sara's dissatisfaction caused him to look for another job. He resigned once he had secured another

position. His evidence is he would not have resigned from DHB until he had other work to go to. That position is perfectly understandable, but it leads me to conclude that this is a case where the employer's conduct has not crossed the line from being inconsiderate to being dismissive: see *Wellington etc Clerical etc IUOW v. Greenwich* [1983] ACJ 965.

[27] Counsel argued that Mr Raharuhi's refusal to pay wages for the upcoming block course in Timaru also amounted to a breach of duty entitling Mr Sara to resign and claim constructive dismissal. However, the difficulty with this argument is the decision of the Court of Appeal in *Business Distributors Ltd v. Patel* [2001] ERNZ 124 that an employee cannot say they are constructively dismissed in anticipation of something that lies well in the future and which might not occur. That exactly fits the issue concerning the block course in Timaru.

[28] For the foregoing reasons, I find that Mr Sara was not constructively dismissed when he gave notice of resignation on 8 May 2006.

Disadvantage

[29] In large measure, the same grounds dealt with above are advanced also in order to establish an unjustified disadvantage grievance. However, I reject that claim for the same reasons set out above. I have found a breach with respect to Mr Raharuhi's opposition to Mr Smith visiting within Mr Sara's work hours but there was no disadvantage arising from this conduct so it cannot separately amount to a grievance.

[30] There is merit, however, in Mr Sara's complaint about how the employment ended on 18 May 2006. Mr Raharuhi demanded money from Mr Sara or his car keys effectively as security. When that was not agreed, he then made it clear that he would not pay Mr Sara his final wages, a stance that has been maintained to the present. Mr Rarahuri's conduct towards Mr Sara was angry and abusive. No doubt Mr Sara responded angrily and abusively as well, but the responsibility for exchange rests principally on Mr Raharuhi's shoulders. By comparison, the exchange the day before between Mrs Rahahuri and Mr Sara had not become abusive. Mr Raharuhi's conduct was so petty that he would not permit Mr Sara to collect his own boots or food items. I find that Mr Sara was disadvantaged by Mr Raharuhi's conduct early on the last day of the employment, so he has a personal grievance arising from that.

[31] It is convenient to explain the point about boots. DHB bought a pair of work boots for Mr Sara but he had also used his own boots which remained at the workplace. He wanted to retrieve his own boots but leave DHB's boots upon leaving. The point remained unresolved despite the solicitor's attempts to arrange the return of Mr Sara's boots. At the investigation meeting, I directed Mr Raharuhi to have Mr Sara's boots delivered to the Authority's office for Mr Sara to uplift them. Mr Raharuhi complied with this direction. There is no good reason why they were not returned to Mr Sara earlier.

Remedy for the grievance

[32] There is no lost remuneration in respect of the established grievance. DHB calculated pay for a full week including 18 May 2006 even though Mr Sara left early. I will deal with the failure to pay the wages later in this determination.

[33] Mr Sara is entitled to a modest award of compensation for the distress and aggravation caused by Mr Raharuhi's conduct on the last day. I assess that at $1,000 and order D H Bull (1988) Limited to pay that sum to Mr Sara. The level of compensation also reflects Mr Sara's comparatively minor contribution to the situation that day.

[34] It is not necessary to deal with Mr Sara's claim for compensation to cover the possibility that he might achieve a qualified person's rate of pay later than otherwise because of the problems with his apprenticeship at DHB. If it had been necessary, I would have found that no

loss could be established. At this point, it appears that Mr Sara is making good progress with his apprenticeship in line with original expectations, despite the problems at DHB.

Arrears of wages

[35] Mr Sara was entitled to final wages including holiday pay of $1,055 gross. I infer that he received $250 by way of an automatic payment directly to his bank account. The balance (less tax) should have been paid when he left, but DHB retained it against its claim that it was owed $845.25 for course and manual costs.

[36] There is a provision in the employment agreement requiring the employer to reimburse the employee for approved job-related course costs but entitling it to a pro rata refund if the employee leaves within six months. Mr Sara and Mr Raharuhi did not refer to this provision when they reached agreement about apportionment of apprenticeship costs and it is not relevant for present purposes. Rather, they simply agreed that DHB would pay the polytechnic course costs and Mr Sara would reimburse half that cost by weekly deduction. At that point, there was no thought that Mr Sara might leave the employment. The fee was paid by DHB and weekly reductions commenced in line with the agreement. The undisputed amount owed by Mr Sara under this arrangement is $215. That sum may be deducted from other amounts to be paid to Mr Sara.

[37] At the point the employment ended, DHB claimed for the first time $225 for the cost of a manual that was provided as part of the apprenticeship. The manual is for Mr Sara's benefit and he is entitled to retain it. There was no agreement at the time for him to contribute to its cost and it was too late by the time the employment ended for DHB to seek to impose that cost on Mr Sara.

[38] Mr Raharuhi acknowledged during the investigation meeting that two days' pay ($250 gross) was owed to Mr Sara for sick pay.

[39] The result of all of this is that D H Bull (1988) Limited must pay Mr Sara $1,305 gross less tax (to be calculated), less $250 (already paid by automatic pay) less $215 (the remainder of the agreed course costs). Leave is reserved in case there is any difficulty.

[40] This is a payment that should have been made to Mr Sara when his employment ended. He has lost the use of the money in the meantime and he is entitled to interest to compensate for that. D H Bull (1988) Limited is ordered to pay interest at the rate of 9% on the balance owing calculated as above, commencing on 19 May 2006 until the arrears are paid in full.

Breach of Wages Protection Act 1983

[41] In a fax dated 18 May 2006, Mr Sara's solicitor told DHB that the Wages Protection Act 1983 prohibited it from holding onto the wages and holiday pay owed to Mr Sara. In response, Mr Raharuhi claimed that Mr Sara told him to withhold the final pay in lieu of the debt. That is a distortion of what happened. Mr Sara did not agree to this - Mr Raharuhi made that demand. In a letter dated 7 June 2006, Mr Sara's solicitor again refers to the breach of the Wages Protection Act 1983 but DHB did not pay the final wages.

[42] Section 4 of the Wages Protection Act 1983 declares that an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction. There are some exceptions, not presently relevant. DHB did precisely what this Act sets out to prevent and I find that its failure to pay Mr Sara his wages amounts to a breach of this provision. Section 13 provides for the imposition of a penalty for failure to comply with the Act.

[43] Mr Raharuhi can be an obdurate man. That is why DHB did not pay what was owed, even though it was aware of its legal obligations. The circumstances call for the imposition of a penalty on the company which I fix at $1,000. The penalty is to be paid to the Authority and then to the Crown's bank account in accordance with s.136(1) of the Employment Relations Act 2000.

Summary

[44] Mr Sara resigned and was not constructively dismissed.

[45] Mr Sara does have a personal grievance in that he was unjustifiably disadvantaged in his employment by Mr Raharuhi's conduct on 18 May 2006. D H Bull (1988) Limited is to pay Mr Sara $1,000 compensation pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000.

[46] D H Bull (1988) Limited is to pay Mr Sara the wages unlawfully withheld and the two days' sick pay in accordance with the calculations referred to above. D H Bull (1988) Limited is also to pay interest on this amount at the rate of 9%, commencing on 19 May 2006 until the arrears are paid in full.

[47] D H Bull (1988) Limited is to pay to the Crown a penalty of $1,000 for its breach of the Wages Protection Act 1983.

[48] There is a claim by Mr Sara for solicitor/client costs of $4,000. I do not accept that the circumstances call for an award of that kind. Mr Sara has had limited success with a minor part of his grievance claim. However, he has been completely successful with the wages issue. I have some sympathy with the idea that Mr Sara should not have to bear the legal costs expended in recovering wages given DHB's unlawful conduct but the costs associated with that would be only a modest part of his overall costs. To balance these factors, I will treat Mr Sara as the successful party. The meeting lasted about half a day. The matter was a relatively uncomplicated proceeding of its type, not requiring special or unusual preparation. Accordingly I order D H Bull (1988) Limited to pay to Mr Sara the sum of $1,500 in costs.

Philip Cheyne
Member of Employment Relations Authority