

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	David Mitchell (applicant)
AND	Blue Star Print Group (NZ) Limited t/a Printlink (respondent)
REPRESENTATIVES	The applicant represented himself Carolyn Heaton for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Wellington, 23 March 2006
SUBMISSIONS RECEIVED BY	5 April 2006
DATE OF DETERMINATION	6 April 2006

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. The problem that the applicant, Mr Dave Mitchell, asks the Authority to resolve is set out in his statement of problem received on 3 October 2005: he seeks *“Exemplary damages – Loss of career satisfaction - Constructive dismissal – Post traumatic Stress – Loss of dignity – Humiliation – Injury to feelings”*. He says the Company failed to act on

his concerns which led to serious harm. And, *“As my career has ended ... I am claiming five hundred thousand dollars”*.

2. The Company says Mr Mitchell’s problem or matter is not clearly specified in his statement of problem. It also denies acting or failure to act in any way that has resulted in serious harm to the applicant. It says he has not suffered a disadvantage in terms of s. 103 (1) (b) of the Act and that he has not been constructively dismissed – statement in reply received on 19 October.
3. Mediation did not settle this employment relationship problem.
4. Agreement was subsequently reached on a 2-day investigation in Wellington commencing, initially, on 26 January 2006. Because of subsequent difficulties experienced by the respondent in presenting its witnesses at that time, and against Mr Mitchell’s opposition, the Authority agreed to a later investigation date of Thursday 23 March 2006.
5. The parties provided witness statements in advance of the investigation as well as bundles of relevant documents. Only one day was required for the investigation. Efforts during the investigation to settle the matter were not successful. Agreement was reached on a final submission timetable.

Background

6. I am satisfied from the evidence produced during the investigation that the following is an accurate summary of relevant background material.
7. Mr Mitchell is 43 years of age.
8. Printlink is a division of the Blue Star Print Group. It was previously known as GP Print Limited and before that as Government Print.
9. Mr Mitchell was employed by the Company and its predecessors for a total of 14 years, first in its Masterton Plant (for 7 years) and then at its Petone plant. He was originally taken on as a tradesman, working on an old style guillotine, which was hard

manual work. From October 1997 Mr Mitchell was employed by way of an individual employment contract.

10. By 2003 Mr Mitchell was operating a guillotine that the parties agree was state of the art. The Company says it is the only one in the Wellington region, that it involves no heavy lifting as the paper is air-lifted and that the heights of the operating surfaces can be adjusted to suit the operator. I record here the observations by both ACC and OSH that, because of the control available to the operator, Mr Mitchell's work station was "*most satisfactory*" (see for example document 57).
11. Sometime in 2003 Mr Mitchell was asked to absorb another operator's job. Mr Mitchell says that, despite complaining about the situation, he was required to continue with the extra workload. The Company claims no additional workload was required of the applicant.
12. On 29 July 2003 the applicant completed an injury/accident form reporting strain & sprain to his chest. He reported the cause as repetitive strain injury and heavy loads. On 31 July Mr Mitchell reported his concerns to health and safety officials on site (document 52). The applicant went to his doctor and was off work for some days. Mr Mitchell made, and ACC accepted, a claim for an injury on 4 August (document 50).
13. On 26 August Mr Mitchell completed another injury/accident details report, repeating the claims made in the 29 July report. He identified the cause of his injury as the non-replacement of the night cutter and extra work on the day shift.
14. On 8 September the applicant wrote a letter of remedy to his operations manager (document 49). A 9 September medical certificate then placed the applicant off work from that day for 14 days. Another medical certificate dated 22 September placed the applicant off work from 22 September for a further 7 days.
15. On 30 September Mr Mitchell collapsed at work. He left but, while driving his car, he had an accident, caused – he says – by blacking out as a result of longstanding, stress inducing issues at his workplace. From 1 October 2003 (until the present day) Mr Mitchell was off work as a result of a work related injury. At around that time he made an application for ACC.

16. Mr Mitchell's doctor's report of 2 October, based as it is on the applicant's self reporting, described him as, "... *under considerable stress on his job. He does heavy work and is ... under considerable stress through under-staffing ... He has time off and comes right only to return to a backlog of work with impossible expectations placed on him. ... I am reluctant to clear him for work in view of his current depressive symptoms*". A medical certificate placed the applicant off work from 1 October for 15 days.
17. On 10 October the Company completed an ACC employer cover questionnaire in respect of the 30 September accident. It said of how the injury occurred that it was "*only reported*" and "*not witnessed*", described the address where the injury occurred as "*unknown? origin?*" and attributed the applicant's injury as related not to work but to home renovations and a second job (document 33).
18. After being shown the work place and, separately, meeting Mr Mitchell in his home, an occupational therapist's worksite assessment dated 22 October described, amongst other things, the machinery operated by the applicant as "*well set up*". It also said that Mr Mitchell was able to take breaks when he wished to suit the flow of work (but) that he tended not to take breaks so as to get the work done. The assessment described the applicant's medical problems, including stress at work. It recommended appropriate physiotherapy to resolve Mr Mitchell's, "*semi acute medial epicondylitis*". Were Mr Mitchell to return to work then "*some discussion with management is required, and (the applicant) must take appropriate breaks ...*" (document 30).
19. A 28 October medical certificate placed Mr Mitchell off work from 29 October for 15 days. An 11 November medical certificate next placed Mr Mitchell off work from 11 November for 14 days. On 3 December Mr Mitchell met with the Company.
20. An 8 December medical report from Doctor W E D Turner, diagnosed the applicant's prognosis as "*excellent. There is no reason why he cannot return to similar work ...*". By advice dated 11 December the ACC declined Mr Mitchell's claim.
21. By letter dated 12 December the Company wrote to the applicant acknowledging their earlier meeting, reiterating its position, detailing the remedial steps it had set in place (including a 25% guillotine loading reduction) and that it was looking forward to his

return. By way of an internal memo of the same date, the Company recorded its concerns at the difficulty of discussions with the applicant in identifying the stress/workload issues, his claims for more money, the work undertaken by Mr Mitchell in his own time and whether he was managing his own wellbeing.

22. An undated OSH report that appears to have been generated after 12 December confirms the Company's undertakings. They were: to generate a corrective action form from all reported accidents or incidents, to ensure that misunderstandings in reporting serious harm would not happen in the future and, amongst other things, a reduction of the workload of the applicant's position by 25%. The report concluded with the view that *"this corrective action taken by the employer is appropriate"* (document 57).
23. By letter to the Company dated 30 December 2003 Mr Mitchell both resigned his employment and advised of his claim that he had been constructively dismissed. Prior to the termination of his employment Mr Mitchell was working 3 twelve hour shifts, on Mondays, Tuesdays and Wednesdays. On 9 January 2004 he applied for a Sickness Benefit.
24. Following a request to prepare a report for a review of two ACC decisions, Dr R. Wigley dated 21 March (document 9) advised that *"all of Mr Mitchell's symptoms arose out of and in the course of his employment ... ACC cover would allow adequate rehabilitation with a much better prospect of eventual return to work."*
25. On 26 April a review quashed the earlier ACC decision to withdraw compensatory payments to the applicant.
26. A psychological assessment dated 22 May found, that, amongst other things, Mr Mitchell was clinically depressed, that he exhibited post traumatic symptoms, there appeared to be no previous history of these disorders and he was not fit to return to his previous position. A 20 July psychological assessment described the applicant as eager to attend further counselling and that he demonstrated the ability to apply, and benefit from, strategies taught to him. A prognosis set out in a 3 August orthopaedic assessment report and treatment plan described it as unlikely that the applicant would be able to return to his previous occupation as a guillotine operator, even with

successful surgery. Mr Mitchell subsequently underwent surgery for release of nerves in the right elbow. An initial medical assessment dated 1 November included various occupational options.

27. A 15 December psychologist report said that, since July, Mr Mitchell had undergone intensive rehabilitation, both physical and psychological:

All therapists have admired your commitment and the progress you have made. ... There were many positive signs that 2005 would provide a successful return to employment. There is general agreement among therapists who have worked with you that you will quickly become a valued employee, once you have established a new occupation.

28. Mr Mitchell remains today on ACC. He has undertaken no employment since 29 September 2003 other than unpaid work experience.

Applicant's Position

29. Mr Mitchell is not legally qualified or experienced. He expressly sought (and was assured of) the Authority's forbearance in pursuing his claims.
30. As set out by Mr Mitchell in his original statement of problem, as well as a supplementary statement received on 1 March and a closing submission dated 4 April 2006, he says amongst other things that in 2003 he was asked to absorb another operator's job "*then in early July 2003 injuries started to occur*" (undated document in supplementary statement). He says from that time he complained to his employer, who did nothing to address his legitimate concerns, and raised claims with ACC.
31. Mr Mitchell says his former employer is responsible for ACC subsequently declining his claim. He takes issue with the respondent's advice to ACC, and it challenging his position at the ACC review, that he had a second job, was renovating his home, no other operators had problems, the Company's workload had reduced and he could take breaks whenever he wished, to suit the flow of work: he says these allegations were lies, that their effect was to humiliate him in front of various third parties and that

the Company conspired against him. I note here that, as it happened, Mr Mitchell successfully challenged ACC's decision and his payments were reinstated.

32. Mr Mitchell says he worked for the Company for 14 years. Because of its actions, or lack of them, he says he can never again work as a guillotine operator. Mr Mitchell holds the respondent accountable for, as he sees it, the fact that his "*career is gone and my family destroyed*" (closing oral submissions).
33. In his closing submission Mr Mitchell raises the issue of the loss of his income protection insurance. He says the Company's denial of his workplace accident caused him to lose that benefit. I note here that this claim is not set out in the statement of problem, either as a remedy or as part of the employment relationship problem. It is not detailed, in particular, in the attachment to the statement of problem, document 1, "*In brief what happened at Printlink*", dated 3 February 2005). Mr Mitchell did not pursue this matter during the investigation.

Respondent's Position

34. The Company denies breaching its employment agreement with the applicant.
35. In the alternate, the Company does not accept that Mr Mitchell's resignation was caused by the (disputed) breach. It does not accept that it was reasonably foreseeable that resignation was the applicant's only option: *Auckland Electric Power Board v Auckland Provincial District Local Authorities Offices IUOW etc* [1994] 2 NZLR 415 (CA).
36. The Company accepts the implied term that it must take reasonable steps to provide a safe workplace: *Attorney-General v Gilbert* [2002] 2 NZLR 342 (CA).
37. If the applicant did suffer injury, Mr Mitchell is unable to bring a claim for compensation because of ss. 317 (1) & 318 (2) of the Injury Prevention Rehabilitation and Compensation Act 2001 (IPR&C Act).

38. There was no conduct on the part of the employer so outrageous that compensation was not an adequate remedy: *Bottrill v A* [2002] 2 NZLR 721 (Privy Council) and *Gilbert* (above).
39. The Company does not accept Mr Mitchell's claim that he was injured as a result of overwork and that there was a lack of responsiveness by management regarding his concerns.
40. The applicant at no time put the Company on notice of his concerns as to health and safety matters and that he felt he was at risk of injury. His communication of 8 September 2003 (document 49) is non-specific as to when he raised his concerns. It is specific that he would accept more pay for the pressure he was under. His claim that "*over the years I have broken down twice with the pressure*" (document 49) is not supported by any accident reports and is denied by the respondent.
41. The applicant's 14-days notice "*to remedy the cutting problem*" (document 49) is non-specific as to the actual remedy sought. The corrective action as advised by OSH was implemented immediately it came to hand. During the investigation the Company explained to Mr Mitchell that it did not fail to respond to concerns or to his work accident form as it was awaiting advice from his doctor as to the applicant's medical condition (refer to document 53).
42. Because of the satisfactory work set-up, the OSH Report concluded that an increased workload was a factor in the applicant suffering his injury. The Company does not accept that conclusion. The only evidence in support comes from the applicant himself, as self-reported to doctors, etc. While the Company accepts that, in early March 2003, one of its then 4 guillotine operators moved out of the bindery area, work volumes did not significantly increase. The plant worked to 12-hour production schedules but employees were not instructed to finish any job before finishing at the scheduled time. Employees, including the applicant, were and are encouraged to take their scheduled tea and lunch breaks at all times even though paid an extra allowance if they work through breaks. However, Mr Mitchell could have taken a break at any time – such a request would have been accommodated.

43. Mr Mitchell approached no one to say his workload was unachievable. The Polar guillotine works at a fixed speed and cannot be made to go any faster.
44. The Company has for several years, and remains committed to, providing resources for employees to manage their health and wellbeing. These include free medical and income protection insurance, access to health and safety representatives and annual "Wellness" checks provided through Aetna. Employees are encouraged to raise with the medical staff, in confidence, any health concerns they have. The respondent does not believe that Mr Mitchell availed himself of that service in the two or three years prior to his departure or, if he did, that he was not prepared to follow the advice of medical staff to lose weight.
45. In an attempt to assist Mr Mitchell he was provided with an assistant: the arrangement lasted only 6-months as the applicant complained that the assistant made matters worse because of the need to supervise or train him.
46. Mr Mitchell has never been slow in coming forward in respect of matters that did not suit him including shift arrangements, nor wanting to be paid more for what he did (see document 49): it was the Company's experience that the applicant was not one to suffer in silence.
47. The Company denies it deliberately provided false information to ACC: it now accepts Mr Mitchell's assertions that secondary employment and house renovations did not contribute to his health condition.

Discussion and Findings

Exemplary Damages

48. Mr Mitchell seeks to punish the Company for its actions or failures by way of an exemplary damages claim for \$500,000. I am satisfied that claim cannot succeed, for the following reasons:
49. Exemplary damages are not available in respect of personal grievance remedies:

There is no basis for a claim for exemplary damages arising from a personal grievance as s 123 of the Employment Relations Act 2000 defines the remedies available and these do not include exemplary damages

Western Mailing Ltd v Subritzky [2003] 2 ERNZ 465

50. In the alternative, I am also satisfied Mr Mitchell is not entitled to general damages for the following reasons.
51. There is contradictory evidence as to whether Mr Mitchell suffered a physical injury caused by his workplace. But, what is clear is that the ACC Review Decision determined he had suffered a personal injury caused by a gradual process (document 7).
52. An employee's employment can be unjustifiably disadvantaged as a result of a failure by an employer to provide a safe and healthy work environment: *French v The Chief Executive of the Department of Corrections* [2002] 1 ERNZ 325. As a result, an employer may be liable for breach of duties in respect of safety and health and, in limited circumstances, damages are payable. However, matters of safety and health must be placed into a balanced or proper context. Employers are under an obligation to provide working conditions that are 'good' and 'safe' but only to the extent that it is reasonable to do so in all the circumstances.
53. Additionally, payment of compensation is restricted by the effect of the IPR & C Act, particularly s.317. The extent of those limits can be seen in *Brittain & Ors v Telecom Corporation of NZ Ltd* [2001] ERNZ 647: damages are not payable when they are related to bodily injury (p 658). The comprehensiveness of that restriction is set out in *A-G re Commissioner of Police v V & Ors*, unreported, CA 207/01, 10 June 2002.
54. Two sets of employment related circumstances exist outside the scope of New Zealand's accident compensation legislation that can give rise to an action for damages. The first is purely mental injury, for which cover does not exist under the legislation in any employment context: refer *Brickell v Attorney-General* [2000] 2 ERNZ 529.

55. I do not understand Mr Mitchell's claim to be in respect of purely mental injury, even though the events of and since 2003 have been demonstrably deeply emotionally distressing for him. The OSH investigation report confirms that no formal diagnosis of stress related illness was made (par 3, document 57). Mr Mitchell's distress arises any way directly out of the injuries he experienced in 2003 as he has, throughout, argued that the Company should pay him damages or compensation in respect of bodily injury he experienced during 2003 which, he says, has ended his career as a guillotine operator. He cannot succeed in that claim, or by extension for mental injury, for the reasons set out above, that he is barred by the effect of the IPR & C Act.
56. The second exception to the general bar on damages under the accident compensation scheme is the right to claim exemplary damages. As explained above, exemplary damages are not available to Mr Mitchell in respect of his personal grievance as it is not a remedy provided by s. 123 of the Act.
57. I am satisfied from the evidence that the Company endeavoured fairly and reasonably, at all times, to provide Mr Mitchell with a good and safe working conditions. Their commitment to his wellbeing is evidenced by its acceptance and implementation in December 2003 of the OSH recommendations, to reduce the guillotine operators' workload, etc. The significance of that willingness is not reduced by the changes being effected after Mr Mitchell's injury and after what proved to be his last day of work, 29 September 2003. That is because the Company, at that time, was working toward the applicant's return and could not have possibly know it would prove to be his last working day. The applicant had paid sick leave when he required it. No other guillotine operator has experienced Mr Mitchell's injury.
58. Where the parties disagree as to relevant events I prefer the respondent's version because of Mr Mitchell's doctor's observation that the applicant "*... is a poor historian because of his mental state*" (document 36).
59. Finally, there is simply no evidence of the Company knowingly and deliberately requiring Mr Mitchell to work in an unsafe manner or environment or of it ignoring, or unreasonably delaying acting on, the applicant's concerns or of it conspiring against the applicant.

60. However they are categorised, Mr Mitchell's injuries are clearly workplace related: that is why he continues to receive ACC compensation. The damages claims brought by the applicant arise directly or indirectly out of a personal injury for which Mr Mitchell is barred from receiving compensation.

Constructive Dismissal

61. Mr Mitchell's claim of constructive dismissal also cannot succeed: this is because the applicant is not fit in the eyes of ACC to resume his occupation as a guillotine operator.
62. While Mr Mitchell was denied ACC compensation at the time he first brought this claim, since then however, ACC has accepted his claim: Mr Mitchell therefore cannot sustain his claim that he was dismissed, constructively or otherwise. Mr Mitchell was, and remains, simply unfit to undertake his previous occupation.
63. Additionally, for the reasons set out by the respondent and recorded in pars 39 to 45 inclusive above, I am also satisfied the respondent did not breach the terms and conditions of the employment agreement between itself and Mr Mitchell, and there was nothing foreseeable about the applicant's decision to resign in December 2003.
64. The cause of Mr Mitchell's leaving his employment was his injury at work for which, for the reasons set out above, he cannot be compensated for.

Late Claim

65. As outlined above, Mr Mitchell is raising in his closing submission for the first time a claim the Company caused him to lose the benefit of his income protection insurance.
66. I am satisfied that this is a matter for Mr Mitchell to address with the insurer, with the Company's assistance if necessary, given that the ACC ultimately accepted that Mr Mitchell's symptoms arose out of and in the course of his employment.

Determination

67. For the reasons set out above, I find against the applicant, Mr Dave Mitchell's, claims for exemplary damages and constructive dismissal, against the respondent, Blue Star Print Group (NZ) Limited t/a Printlink.

68. The parties are to attempt to reach agreement on the matter of costs failing which leave is reserved for the matter to be put to the Authority.

Denis Asher

Member of Employment Relations Authority