

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 158/07
5031632

BETWEEN MICHAEL AVERY
 Applicant

AND NEW WOOL PRODUCTS
 LIMITED
 Respondent

Member of Authority: Paul Montgomery

Representatives: Brent Climo, Advocate for Applicant
 Dean Kilpatrick, Counsel for Respondent

Investigation Meeting: 21 August 2007 at Nelson

Submissions received: 5 September 2007 from Applicant
 5 and 13 September 2007 from Respondent

Determination: 21 December 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant was initially employed as a casual worker installing wool insulation batts in houses when work was available. Later, in July 2005, he began working in the factory making the batts when product was needed to meet orders. Mr Avery says the hours varied but that there was an increase in demand in July and August 2005 and his hours increased to between 30 and 40 in some weeks from that time on.

[2] He says he was dismissed by the respondent after raising safety concerns with Mr Newton, the respondent's Managing Director. Mr Avery seeks eight weeks loss of remuneration, \$12,000 compensation for hurt and humiliation, costs and the refund of his filing fee.

[3] For the respondent, Mr Newton says the applicant was not dismissed from his employment but came into the workplace on 31 January 2006, handed in his boots and

overalls and requested his wages and holiday pay until that date. Mr Newton said that he took these actions to signify that Mr Avery was leaving his employment with the company. The respondent resists the applicant's claims for remedies.

[4] The parties attempted to reach an agreement resolving their difficulties in mediation but were unable to do so.

The facts

[5] Mr Avery says that in early July 2005 he became concerned about safety in the factory and that he raised his concerns with Mr Newton *over a period of six months* pointing out the unsafe areas to his employer. He says Mr Newton told him he would look at the situation but that nothing was ever done.

[6] The applicant says that toward the end of 2005 he was told by Mr Newton that a potential buyer was investigating the purchase of the business. Mr Avery also says Mr Newton offered him a permanent position as foreman and an increase of 20% in his wages. The applicant says he would like to accept the position but would want to negotiate the pay increase. As a result, nothing occurred at that point.

[7] Mr Avery said *as things rolled into December and by mid January I had still concerns that nothing had not yet been done about the safety in the factory and asked Mr Newton how long it would take to get safety in the factory up to standard. He said he was working on it*".

[8] On 25 January 2006, the factory ceased operations for maintenance, shutting machinery down for that purpose. On that day the applicant told the respondent he would return when the factory was safe. The respondent says Mr Avery, at that time, provided no details of his concerns or what he needed to be remedied before he returned to the workplace.

[9] Mr Newton says he tried to contact Mr Avery over the next few days but had no success. It seems that Mr Avery may have moved during that period.

[10] On Thursday, 31 January 2006, the applicant returned to the factory. He handed in his overalls and boots and asked for his wages and holiday pay. Again, says Mr Newton, Mr Avery did not provide any specific details of his concerns to the respondent.

[11] The respondent says it took those returns and the request for wages owed and holiday pay as a request from a casual employee to end the employment relationship. It says Mr Avery's failure to provide details of his concerns on the safety of the plant, as he had undertaken to do, confirmed that view.

[12] On 16 February 2006, Mr Avery lodged a complaint with the Occupational Safety and Health section of the Department of Labour in Nelson, but asked for his identity to be kept confidential. As a result, Ms Sharon McDonald undertook an unannounced inspection of the factory on 17 February 2006. She said she found a lack of formal health and safety systems and the factory and office she described as *dirty and untidy and full of clutter*. Ms McDonald also said that she was advised that a specialist, Mr Alf Cosgrove, had been involved in assessing and modifying the workplace as part of pre-sale due diligence by a prospective purchaser, and that there was evidence that work was under way to address safety concerns. She said she had an assurance that the plant would not operate until Mr Cosgrove's recommendations had been actioned. As a result, no prohibition notice was issued. Some time after the new owners took over, Ms McDonald revisited the site after a letter from them and expressed her confidence in both the new owners and Mr Cosgrove's actions.

The issues

[13] In order to determine the matter, the Authority needs to resolve the following issues:

- What was the employment status of the applicant; and
- Did the applicant formally raise his specific concerns regarding the operational safety of the plant with the respondent; and
- Was the applicant timely in detailing those concerns prior to 31 January 2006; and
- Did the actions of the applicant when handing in his boots and overalls and asking for his wages and holiday pay signal to the respondent the applicant's decision to resign; and
- Was the severance of the employment relationship at the initiative of the respondent; and

- If the dismissal was unjustifiable, what remedies are due to the applicant; and
- Did the applicant contribute to the circumstances that gave rise to the dismissal?

The test

[14] In this matter, the test to be applied by the Authority is that set out at s.103A of the Employment Relations Act 2000. This requires the Authority, on an objective basis, to consider whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal action occurred.

The investigation meeting

[15] At the investigation meeting the Authority heard evidence from the applicant in person. It also benefited from the evidence of Sharon McDonald, a Health and Safety Inspector employed by the Department of Labour who, responding to the applicant's complaint of 16 February 2006, undertook an inspection of the respondent's factory.

[16] For the respondent, the Authority heard from Mr Newton and from Ms Natalie Walker, Mr Newton's partner, who also works for the respondent in an office administration role.

[17] Attached to Mr Climo's submissions when they were received was a statement from Mr Avery's partner outlining the difficulties they and their young child had endured following the severance of the employment relationship between the primary parties. While not wanting to be at all dismissive or hurtful to Mr Avery and his family, that statement needed to be before the Authority as a statement of evidence. That would have enabled Ms Johnston's evidence to be tested by questioning. The Authority does not doubt the veracity of the statement but is able to accord little weight to it, given the way it was put before the Authority.

Discussion and analysis

[18] The individual employment agreement signed by both parties clearly identifies the position as *casual/hourly* and provides for a three hour notice period. It also provides specifically for the applicant's holiday pay to be paid:

... at the same time as the salary payment. The amount of holiday pay is 6% per hour of work, which shall be paid less tax, at the same time as the employee's salary payments.

[19] The Authority is satisfied that the applicant was employed in the respondent's factory to produce batts whenever orders for the product were received. On that basis, Mr Avery, in spite of some busy periods, was employed on an "as and when" basis to meet demand for the product.

[20] Mr Avery also said that he drew Mr Newton's attention to what Mr Avery perceived as safety issues. It was clear from the evidence that Mr Avery was aware that the business was for sale and that as part of that process, the prospective buyer commissioned a health and safety audit to ensure the health and safety systems and practices met with the requirements of Health and Safety in Employment legislation. Mr Newton told the Authority that he agreed to carry out any necessary work identified by the audit prior to the sale and purchase document being signed. Mr Newton's evidence was that Mr Alf Cosgrove, who was to carry out the audit, visited the factory first on the morning of 25 November 2005 and during that visit he was introduced to the staff at the factory. Mr Newton confirms that the applicant worked part of that day in the factory doing clean up work.

[21] Following receipt of Mr Cosgrove's report, the respondent says it undertook the recommended health and safety related work which was done mostly during December 2005 and January 2006. On behalf of the respondent, Mr Newton produced copies of invoices from Nelson Reliance Engineering Co Limited which confirm their work in the replacing of machinery guards and other safety-related equipment.

[22] The respondent also produced in front of the Authority a letter from Mr Cosgrove dated 22 May 2006 in which the writer says, among other things:

My first visit to the factory was in November of 2005 when I visited the premises. At the time I was introduced to the staff as a consultant

hired to audit the factory to determine if the systems and practices met with the current Health and Safety in Employment legislation.

The scope of the audit was to review the policy and procedures of the company followed by a physical audit of the factory. On this particular occasion the factory was operational and three staff members (excluding Lindsay Newton) were employed at the time, one in the office and two in the factory.

The audit report highlights the deficiencies and recommendations in the company systems and practices in the factory. These items were to be rectified and subsequently have been rectified and improved on since the first audit.

On that visit and subsequent visits opportunities were available for staff to discuss any safety issues with Lindsay and myself. During the first visit the office person identified the documentation in place for training of staff and the processes in the factory. While these systems were basic they did identify that staff had been trained and had subsequently acknowledged the training given.

During later visits the staff were again given the opportunity to discuss any issues regarding health and safety. One of the staff members recently discussed the positioning of the fire extinguishers, which have subsequently been resolved.

[23] Consistent with Mr Newton's evidence is his diary entry for Wednesday, 25 January 2006. It reads:

12.15 Mickey left work after a one hour meeting to discuss factory procedures. Mickey advised he would return to work after certain things were put into place.

[24] Then a further note is added:

contacted on Tuesday [31 January 2006] said he is returning boots and overalls and wants wages paid up-to-date. Also advises he would provide a list of criteria he wants put into place before he returns.

[25] The content of a meeting between Mr Avery and Mr Newton on 2 February 2006 is broadly set out in some notes taken by Mr Newton in the course of a discussion. He heads that list up *Like to see*. The matters raised are:

- The expectations of the new owners with a job detailed description.
- Need to see the business change from manufacturing as required to a full time position.
- More time required for cleaning the factory after each operation.

- Extensive maintenance programme one or more times per week of entire plant.
- Not supplied with payslips.
- Doing solo operation when there is no second operator.
- Procedure for communication between operators for safety considerations when operating.
- Safety training programme for staff.
- Staff confidence course for employment relations.
- One per month staff meeting for gripe session and communication.
- Lunch breaks – factory stops for half an hour lunch breaks.

[26] In his evidence, Mr Newton said he regarded this as a wish list and given that he was about to sell the business recorded them in the event that the new owners wished to employ Mr Avery, he was able to give some background as to what Mr Avery's requirements might be.

[27] So although there had been a meeting between Mr Avery and Mr Newton on 25 January 2006, there appears to have been no detailed discussion relating to specific shortcomings in the safety equipment in the factory. This is significant because at the time when Mr Avery returned his boots and overalls and collected what was in effect his final pay, he still did not provide any list or the *criteria* he wanted put into place before returning.

[28] The first specific issues came to the respondent's attention only when Ms McDonald undertook her inspection and referred to unguarded machinery, lack of emergency switches and no formal health and safety systems in place. Further, Mr Avery claims he had a number of *near misses*, but reported none of them as required by the company rules. Further, the applicant knew that health and safety work was under way in the factory. For the applicant to claim that his reason for leaving the workplace on 25 January 2006 was because his concerns regarding health and safety were being ignored, is difficult to sustain. Considered in the round, I am of

the view that such concerns as were raised by Mr Avery with the respondent were insufficient to allege a breach of duty so serious as to support the applicant's decision to leave. It is also relevant that, given Mr Newton's keeping the applicant informed of progress on the health and safety related work, it was hardly foreseeable that the applicant would resign his position.

[29] I turn now to Mr Newton's letter of 15 February 2006 to the applicant. Mr Avery says this was the letter which dismissed him from his employment. After covering the issue of holiday pay, Mr Newton says:

We would also like to record that you left the factory of your own accord on Wednesday 25 January 2006 at 12.15 hours during the maintenance shut down. You walked out without notice of termination and when ongoing work was offered.

After you left we attempted to contact you but were unsuccessful. You did not contact me or return to the factory until Tuesday, 31 January 2006 when, of your own accord, you returned your boots and overalls and requested full and final payment.

At this stage, you had been absent without consent or reasonable excuse for three days. We advised you at that time that we considered you had abandoned your employment and you had therefore terminated your employment without notice.

New Wool Products Limited reserves the right to deduct three hours wages for employment terminated without notice as per your employment contract.

For the record, we would like to note the following:

- *At the start of your employment you were given the option to have a copy of your contract or have access on demand to the office file. You chose access on demand to the office file;*
- *At the start of your employment you were offered a pay slip with each pay. You advised this was not necessary, as you preferred to track your earnings by your bank statements.*

Your work history at New Wool Products was very acceptable. You were offered a permanent foreman position with a 20% wage increase, to assist this company through the biggest growth and development stage of its history. You have chosen to reject the above offer, on the day that it became valid, on your own accord and without provocation from myself or this company.

[30] Mr Newton's evidence was that this letter was written to clarify the company's position after the applicant returned unexpectedly to the factory at around 4.30pm on 2 February 2006 with the list of his demands. Mr Newton says that the applicant told him the list was of his expectations of the new owners and he would not be coming

back to work until these demands had been met. Mr Newton said *I told him that I was not particularly interested in hearing his list of demands as he had already of his own accord finished with New Wool Products. I reminded Mr Avery that he had resigned two days ago when he had come in to drop off his gear. I also told Mr Avery that had he not resigned, I would have considered that he had abandoned his job as he had been absent from work without consent for more than three days.*

[31] Mr Newton says that in the face of Mr Avery's insistence that he write down in his own handwriting the list of demands, he agreed to write down that list of concerns. Mr Newton says he then told Mr Avery that as he was no longer employed by the respondent, he was free to approach the new owners of the business about work.

[32] Following the parting of the ways and the advice that Mr Avery had no holiday pay due to him, the applicant approached a Labour Inspector for an investigation into this particular matter. Without going into detail, it is evident from the Labour Inspector's investigation that he was of the view that no monies were outstanding and due to the applicant.

[33] On the evidence before the Authority, I have no difficulty in concurring with that decision.

The determination

[34] Returning to the issues set out above in this determination:

- I find that the applicant was employed as a casual worker and agreed to have his holiday pay paid to him on a weekly basis;
- I find that prior to his resignation, Mr Avery raised a concern over the location of fire extinguishers but only raised his list of demands (many of which were not related to safety) after he had resigned his employment;
- I find that the actions of the applicant when handing in his boots and overalls and asking for his wages and holiday pay clearly signalled to the respondent the applicant's decision to resign. I am satisfied that Mr Newton made it clear to Mr Avery on 2 February 2006 that any

concerns he had were now not relevant to his employment with the respondent but could be taken up with the purchaser in the event that Mr Avery wished to seek work with that party;

- I find that severance of the employment relationship was at the initiative of the applicant;
- I find that the applicant was not dismissed constructively or actually.

[35] Mr Avery does not have a personal grievance and the Authority is unable to assist him further.

Paul Montgomery
Member of the Employment Relations Authority