

[2] For the most part Mr Spiller's first year of employment went well. However in June 2007 Mr Spiller removed what he refers to as a "*small amount of scrap metal*" for his own use. Mr Spiller says that, in front of other employees, he was accused of theft of company property and he was subsequently asked to explain to Mr Jon Patrick (the Managing Director of JDR Patrick). Although no disciplinary action was forthcoming Mr Spiller says that Mr Patrick's actions were unjustified and caused him a good deal of stress. In particular Mr Spiller says that Mr Patrick's *failure to clarify what outcome he had decided on* prompted him to instruct his lawyers to raise a personal grievance against his employer for this unjustified action. Along with other concerns Mr Spiller's representative raised his personal grievance with JDR Patrick on 14 September 2007. (See below)

[3] On 7 September 2007 (i.e. a week before Mr Finnigan's letter) Mr Patrick advised Mr Spiller that, from that date, he would be working only three days per week. Mr Spiller says that he was unhappy with this and that at about the same time the company re-employed an ex-employee and other staff were working overtime. Mr Patrick on the other hand says that Mr Spiller did not have the skills to do the other work that was available and that there had been a drop off in work in the particular area in which Mr Spiller had skills. There appears to be no dispute that there was no consultation with Mr Spiller regarding this reduction in hours and the company relied solely on the wording of his employment agreement as cited above.

[4] On 14 September 2007 Mr Finnegan (on behalf of Mr Spiller) wrote to JDR Patrick raising a personal grievance for *unjustified disadvantage* regarding the investigation by JDR Patrick of the *misappropriation* incident, and a further grievance for *unjustified disadvantage* for the *unilateral cutting of Mr Spiller's work hours*. In this letter Mr Finnegan sought compensation for Mr Spiller of \$10,000 and suggested the parties attend mediation.

[5] Mr Spiller says that from as early as June 2007 a number of incidents occurred which, cumulatively, eventually led to his constructive dismissal. Mr Spiller says that particularly from about July 2007 conduct by Mr Patrick which he describes as *harassment and even bullying* became more frequent and aggressive. Mr Spiller says he was singled out with Mr Patrick frequently criticising his work when other staff were present. He says Mr Patrick would often make *snide and condescending*

comments about him calling him lazy or too slow whereas, he says, he believes that he was a thorough and efficient worker. He says that Mr Patrick was constantly checking on him and his work and this harassment included not only criticism of his work but constant questioning of his movements when not in the workshop. In his evidence Mr Spiller outlines a number of particular incidents to illustrate Mr Patrick's *harassment and unreasonable conduct*. For example he says that Mr Patrick was persistently giving him low-level work and often required him to undertake sweeping or cleaning up despite the fact that it was more productive work needing to be done.

[6] Eventually, Mr Spiller says, two incidents on 1 November 2007 were *the final straw*. The first of these events was that Mr Patrick asked Mr Spiller to take over a particular job (operating a punching machine) but shortly after he started the job Mr Patrick came to him and said that he was *too f***ing slow* and called an apprentice to take over the work. Shortly afterwards he says that Mr Patrick, in front of a customer, told him *in a scolding tone* that he should remove a particular pair of safety gloves. In his evidence Mr Spiller says

I felt that this was the final straw and he was going to be no letup to the harassment and belittling I would be receiving from Mr Patrick. My choice was to put up with the stressful and emotionally draining work environment or leave.

Mr Spiller says he then explained to the foreman that he was leaving and reasons for doing so and left the workplace. On 5 November 2007 Mr Finnegan again wrote to JDR Patrick raising a further grievance for constructive dismissal.

The issue is to be determined

[7] The first issue for determination is whether or not Mr Spiller has a personal grievance against JDR Patrick. In this regard Mr Spiller says that he has three personal grievances against his former employer.

- a. that he was unjustifiably disadvantaged by the way in which JDR Patrick investigated the allegations of theft against him.
- b. that he was unjustifiably disadvantaged by the unilateral reduction in his hours of work; and

- c. that those incidents, together with the ongoing harassment and victimisation by Mr Patrick, resulted in his unjustified constructive dismissal.

[8] Should any or all of these grievances be upheld the second issue for determination is what, if any, remedies is Mr Spiller entitled to receive.

Legal considerations

[9] To determine whether or not Mr Spiller has a personal grievance in respect to the first of his concerns in isolation, it is necessary, in terms of section 103A of the Employment Relations Act (the Act) to consider whether or not JDR Patrick's actions and how JDR Patrick acted were *what a fair and reasonable employer would have done in all the circumstances at the time*.

[10] Mr Spiller has also framed his second alleged grievance as being a personal grievance in terms of section 103A. However while the action was certainly to Mr Spiller's disadvantage JDR Patrick have justified the reduction in hours as being simply the operation of Mr Spillers employment agreement which, they say, allowed them to reduce his hours should there be insufficient work. Determination of this issue therefore must be dealt with in two stages: did Mr Spillers employment agreement allow JDR Patrick to reduce his hours of work and, if so, was the way in which this change was implemented *what a fair and reasonable employer would have done in all the circumstances at the time*.

[11] Mr Spiller third grievance is that he was constructively dismissed. The law regarding constructive dismissal is well-established. In 1985 the Court of Appeal in *Auckland etc Shop Employees etc IUOW v Woodworth (NZ) Ltd* (1985) ERNZ Sel Cas 136, 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.

Background

[12] In order to properly determine Mr Spiller's claims it is necessary to briefly outline the parties respective recollections of the major events. It is not my intention to outline in any great detail the extensive evidence I have received from both Mr Spiller and Mr Patrick. In many instances there is broad agreement that particular incidents took place. What is in dispute is the specific details of these events and the interpretation put on them.

Accusations of misappropriation

[13] Mr Spiller accepts that he did use some scrap metal to manufacture flashing ifor his own use. However he says that the metal he used he took from the disposal bin and he manufactured the flashings in his own time. He says that many staff used the workshop for their own purposes from time to time, without seeking Mr Patrick's approval.

[14] Mr Spiller says that Mr Patrick approached him as he was about to leave the workshop and advised that he had an issue with the fact that there was some galvanised steel in Mr Spiller's car. Mr Spiller says Mr Patrick made it clear that he considered that Mr Spiller had engaged in theft and that he would need to consider what sanctions should be imposed. A couple of days later, Mr Spiller says, Mr Patrick advised him that he wished to meet with him, that he could bring a support person, and he *was intending to issue a written warning*. Mr Spiller says in a subsequent discussion he advised Mr Patrick that he did not consider the matter serious enough to warrant a warning, apologised to Mr Patrick and again reiterated his explanation that the job had taken only a few minutes and that the metal was scrap. At the end of discussion Mr Spiller says Mr Patrick advised him that he had breached his employment agreement and that he, Mr Patrick, had taken legal advice. He says that nothing further was said to him by Mr Patrick and he was left feeling *extremely stressed and anxious not knowing what might happen next*. It is this stress that forms the basis of Mr Spiller's first alleged personal grievance.

[15] Mr Patrick's version of this incident is that he was certainly upset that Mr Spiller had used company property, that the metal used was not scrap and could be used for other purposes and that he had a long-standing and well understood policy that staff should seek his approval before undertaking private work. He says that although at first Mr Spiller would not acknowledge the seriousness of his actions he subsequently appeared to do so and apologised. At this point he decided not to issue a warning of any description and let the matter lie. He does not dispute that he did not convey this decision to Mr Spiller but pointed out that Mr Spiller continued to work for the company for a further five months before resigning.

Reduction in working hours

[16] Mr Spiller says that, without warning or consultation Mr Patrick advised him on 7 September 2007 that from that point his hours would be reduced from 4 days a week to 3 days a week. He says that only a few days before Mr Patrick had indicated that the company was busy again and there was a lot of work on, he had reengaged an ex-employee and about the same time other work colleagues were working overtime.

[17] Mr Patrick says that Mr Spillers skills were predominantly in the fabrication of sheet metal ducting and that with the downturn in work he was unable to continue to employ Mr Spiller for the 36 hours per week originally contracted. He says that while other specialised work was available, a large percentage of these jobs were beyond Mr Spillers skill level. Mr Patrick says that, while he accepts that Mr Spiller was not happy with the reduction, he believes he was entitled, in terms of Mr Spiller's employment agreement to reduce Mr Spiller's hours. He does not dispute that there was no consultation with Mr Spiller on this reduction in hours.

Harassment and victimisation

[18] In his evidence Mr Spiller outlines a number of incidents which he says amount to harassment and victimisation. He says that Mr Patrick frequently criticised his work with other staff present and often made *snide and condescending comments* about him saying he was lazy, too slow and wasted time and money. He says that Mr Patrick was constantly checking on him and his work with extraordinary frequency and was not uncommon for Mr Patrick to sometimes walk directly from his office to Mr Spiller's

workstation three or four times a day. Two examples taken from Mr Spiller's evidence will serve to illustrate his concerns:

.. a month or so before I was constructively dismissed. Mr Patrick asked me to make ducting to remove fumes from the welding area in the workshop. It was Friday afternoon and I had spent less than half an hour making steel brackets to support the ducting from the roof trusses. Mr Patrick told me that he didn't like the brackets, angrily threw them to one side and swore at me. This happened in the middle of the workshop and was witnessed by my work colleagues. Mr Patrick then remade them and put the duct up himself the following Monday.

I didn't believe there was anything wrong with the brackets that I had made. The brackets were simple and straightforward and I had made countless similar brackets in the past. There was no reason for Mr Patrick to have had any issue with the brackets that I had made and his criticism could only have been to publicly humiliate me in the middle of the workshop.

Another example was in July 2007. Mr Patrick reviewed a site job for Huhtamaki Packaging that I had completed that week. He said I had taken too long and that the fan exhaust bend that I had fabricated looked "gay". He said that I needed to take it down and remake it even though the item met all of its functional and design requirements. There had been no plans and specifications given to me and Mr Patrick's initial instructions had been vague and not written (a common complaint his staff had). Mr Patrick had seen me fabricating the bend that he was so critical of in the workshop but had waited until the job had been finalised before criticising me and my work in front of workmates.

I was directed to remove that part of the ducting and re-fabricate and install it.

The "final straw"

[19] In hindsight it is clear that letter written by Mr Finnegan (Mr Spiller's representative) to JDR Patrick on 14 September 2007 had a significant impact on the relationship between Mr Spiller and Mr Patrick. In that letter Mr Spiller raised to personal grievances against his employer and sort \$10,000 in compensation. Although Mr Patrick said when asked that this letter made no difference to his

relationship with Mr Spiller there is no doubt in my mind that Mr Patrick felt aggrieved. Despite Mr Patrick's assertion that he treated the Spiller no differently from any other staff member his evidence suggests that a number of incidents (including the "misappropriation" incident) meant that he had a relatively low opinion of Mr Spiller. The letter raising the personal grievances, and seeking compensation, exacerbated this situation. It is a great pity that the parties did not take up Mr Finnegan's suggestion that they attend mediation at that time. It is against this background that the events which Mr Spiller refers to as *the final straw* unfolded.

[20] On the morning of 1 November 2007 Mr Spiller says he was allocated a very simple job which involved using a foot operated punching machine to insert a hole in a small steel plate. Shortly after he started this job Mr Patrick came up to him and, angrily, said that he was *too f***ing slow* and told him to pass the job to an apprentice. Mr Spiller says that Mr Patrick told the apprentice that he needed him to resume the job because Mr Spiller was too slow. Mr Spiller says that he then picked up a pair of ordinary leather safety gloves from another worker's workbench and commenced moving scrap metal. He says that he had never heard any suggestion that any worker should not wear another man's gloves. At this point Mr Patrick asked him why he was wearing another person's gloves and instructed him, angrily and in front of a client, to remove them. Mr Spiller says that these two events were humiliating and precipitated his decision to resign immediately.

[21] Mr Patrick says that the job he had requested Mr Spiller to do was required urgently and Mr Spiller, at the rate he was working, would not complete the task on time. He took the job off Mr Spiller because he felt that the apprentice could complete task more quickly. In respect to the gloves being worn by Mr Spiller, Mr Patrick says they were expensive welding gloves which were allocated to another employee and were not *well used leather gloves* as claimed by Mr Spiller.

Discussion

The misappropriation incident

[22] Mr Spiller says that he was disadvantaged by the way in which this incident was handled by Mr Patrick. In particular he says that the accusations made by Mr Patrick in front of work colleagues and the failure of Mr Patrick to inform him that he no longer intended issuing a written warning, caused him stress and anxiety. Mr Patrick says that any conversation with Mr Spiller was not overheard by other staff and that he had carried out a reasonable and fair enquiry into what he considered was a serious issue. He says that once he was satisfied that Mr Spiller understood the point that he was making he decided to take no further action.

[23] The only criticism that can be made of Mr Patrick in respect of this incident is his failure to convey to Mr Spiller that he did not intend to take any further action. However Mr Spiller suffered no other disadvantage than the anxiety of not knowing the outcome. He did not lose his job nor did he receive any formal warning for what in some situations could have been considered serious misconduct and could have had a far more serious consequences. Other than not advising Mr Spiller of the outcome I find that Mr Patrick acted fairly and reasonably in the circumstances. This failure to advise Mr Spiller of his decision is offset by the fact that that decision was, in the circumstances lenient. **Mr Spiller does not have a personal grievance in respect to JDR Patrick's handling of the so-called misappropriation incident**

Reduction in working hours

[24] On its face Mr Spiller's employment agreement did allow his employer to reduce his hours of work *if there is a work shortage for the employee*. However the duty of good faith imposed by the Employment Relations Act requires more than the simple implementation of contractual terms. The duty of good faith requires consultation with affected employees in circumstances where changes to the employer's business will have an effect on those employees. Having reviewed the evidence I accept that there was a work shortage in the particular areas in which Mr Spiller was skilled. The duty of good faith simply required that Mr Patrick advise Mr Spiller that it may be necessary to reduce his hours, in accordance with his employment agreement, and to consult with Mr Spiller regarding alternatives and/or how the effect of this reduction in hours could be mitigated. Unfortunately no such consultation took place and this

lack of consultation exacerbated the stress the reduction in hours inevitably caused to Mr Spiller. **In respect to the unilateral reduction in his hours of work Mr Spiller has a personal grievance against JDR Patrick.**

Constructive dismissal

[25] Mr Spiller has not raised a personal grievance specifically for the victimisation and harassment that he says he was subject too. He does however say that cumulatively this behaviour by Mr Patrick, the events surrounding the alleged misappropriation of company property, the unilateral reduction in his hours of work and the two incidents on his last day at work, amounted to his unjustified constructive dismissal.

[26] In his submissions on behalf of Mr Spiller, Mr Finnegan suggests that, in terms of the Court of Appeal's decision in the *Woolworths* case, Mr Patrick followed a course *with the deliberate and dominant purpose of coercing (Mr Spiller) to resign* and the way in which Mr Patrick treated Mr Spiller was a breach of the employer's duty to deal with Mr Spiller in a fair and reasonable way and to provide him with a safe and healthy working environment.

[27] Prior to the investigation meeting Mr Spiller provided a statement from an ex-work colleague (Mr K) supporting his recollection of the way in which he had been treated by Mr Patrick. However Mr K did not present himself at the investigation meeting and JDR Patrick tabled a written withdrawal of his earlier statement. As his evidence was clearly critical to the establishment of credibility in this matter I took the opportunity to interview Mr K at his current workplace. Transcripts of this interview were made available to the parties and both were given an opportunity to comment on Mr K's answers. When questioned Mr K stated:

- he did not attend the investigation meeting because he did not wish to get involved in this situation, was no longer employed by JDR Patrick and was extremely busy at his new place of work.
- He had signed his original statement, which had been prepared by Mr Spiller, without properly reading it because Mr Spiller had put pressure on him to do so and because he did not wish to upset Mr Spiller.

- Mr Patrick had put no pressure on him to retract his statement and had simply presented him with the written retraction and asked him to sign it.
- That, contrary to his original statement, he was unable to confirm any of the incidents as he had not been directly involved and had not observed or overheard any of the conversations.
- That from his recollection and his limited observations Mr Patrick had treated Mr Spiller no differently than any other employee.

[28] My assessment of Mr K is that he is a goodhearted individual who was simply attempting to please. In his efforts not to upset either Mr Spiller or Mr Patrick he naïvely agreed to sign whatever statement they requested of him. However under oath, and without the influence of either party Mr K was both forthcoming and clear in his evidence. While the evidence did not contradict Mr Spiller's recollection of events, it did not provide the corroborative evidence that Mr Spiller had suggested.

[29] The first incident, the allegation of misappropriation, although not handled perfectly by Mr Patrick, was on balance handled fairly and reasonably. While I have found that Mr Spiller does have a grievance against JDR Patrick in respect to the unilateral reduction of his hours, this breach of JDR Patrick's obligations simply brought forward, probably by no more than a few weeks, a reduction in hours which JDR Patrick were entitled to implement.

[30] Inevitably when an employee alleges that the behaviour of his employer is such as to cause him stress and anxiety there will be a difference of perception as between the employee and his employer both as to the facts and the effects of the alleged behaviour. Based on the evidence before me I have no doubt that Mr Patrick did subject Mr Spiller to particular scrutiny. However in cases of constructive dismissal it is for the applicant employee to demonstrate that his employer's actions or breach of duty were unreasonable and the direct cause of his resignation. On balance, I do not find that he has established either that the various incidents of harassment and victimisation unfolded in the way that he describes them or that, even taking into account the accumulation of events, he had no option but to resign. **Mr Spiller was not constructively dismissed and does not have a personal grievance in this regard.**

Determination

[31] For the reasons set out above I find that:

- **Mr Spiller does not have a personal grievance in respect to the way in which JDR Patrick investigated the allegations of misappropriation made against him.**
- **Mr Spiller was not constructively dismissed and does not have a personal grievance against JDR Patrick in that regard; but**
- **Mr Spiller does have a personal grievance against JDR Patrick in respect to the unilateral reduction of his hours at work.**

Remedies

Contribution

[32] I have found that Mr Spiller has a personal grievance against JDR Patrick for the unilateral reduction in his hours of work. In terms of section 124 of the Act I consider that Mr Spiller did not contribute towards the situation that gave rise to that personal grievance. It is not therefore appropriate to reduce the remedies to which he is entitled.

Recovery of lost wages

[33] As I have made it clear above JDR Patrick could, with proper consultation, have reduced Mr Spiller's hours simply by invoking the relevant clause in his employment agreement. Had a proper consultation process been followed the reduction in Mr Spiller's hours would merely have been delayed. The appropriate level of reimbursement must be based on an assessment of how long a proper consultation process would have delayed that reduction. Although the consultation process would not have been complex, a fair and reasonable employer would have built into that process adequate time for the employee to adjust to the reduction in income. In my assessment a fair and reasonable employer would have provided a period of four weeks from the beginning of the consultation process to the implementation of the reduced hours regime. Mr Spiller's hours were reduced from four days a week to 3 days a week. **JDR Patrick is to pay Mr Spiller four days wages, less tax, by way of recovery of the wages lost due to the unilateral reduction in his hours of work.**

Compensation for hurt and humiliation

[34] In his evidence Mr Spiller outlined the financial strain caused to him and his family by the reduction in his hours. Although this anxiety was exacerbated by his subsequent resignation I accept that, particularly given its sudden implementation, Mr Spiller was subjected to considerable stress and humiliation as a direct result of the 25% reduction in his income. He is entitled to be compensated for that stress and humiliation. **In terms of section 123(1)(c)(i) of the Act, JDR Patrick is to pay Mr Spiller \$3000, without deduction.**

Costs

[35] Costs are reserved and the parties are requested to attempt to resolve this issue between themselves.. If they are unable to do so Mr Spiller may file a submission in respect to costs within 28 days of the date of this determination. JDR Patrick will then have 14 days in which to file a response.

James Wilson

Member of the Employment Relations Authority