

**IN THE EMPLOYMENT COURT
WELLINGTON**

**WC 21/08
WRC 19/06**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	DAVID MITCHELL Plaintiff
AND	BLUE STAR PRINT GROUP (NZ) LTD Defendant

Hearing: 3 and 4 November 2008
(Heard at Wellington)

Appearances: David Mitchell in person
C Heaton, Counsel for Defendant

Judgment: 23 December 2008

JUDGMENT OF JUDGE C M SHAW

Introduction

[1] Mr Mitchell's claim is that he was unjustifiably constructively dismissed by his employer Printlink (now known as Blue Star Print Group (NZ) Ltd) because he was forced to resign after he suffered physical and psychological harm arising from his working conditions.

[2] Mr Mitchell says that Printlink failed to take steps to both prevent the harm occurring to him and to assist his recovery and he had no alternative but to resign. In particular he alleges that Printlink took steps to stop his entitlement to ACC compensation.

[3] Printlink says that it had no knowledge of any medical problems suffered by Mr Mitchell until he first reported an injury on 29 July 2003 and thereafter took all necessary steps to ensure his well-being although these were interrupted by Mr Mitchell's resignation on 30 December 2003.

[4] The Employment Relations Authority investigated Mr Mitchell's employment relationship problem. He was seeking exemplary damages, loss of income, and compensation. The Authority determined that:

- Exemplary damages are not available as a remedy for a personal grievance.
- At all times the company endeavoured fairly and reasonably to provide Mr Mitchell with a good and safe working condition.
- Mr Mitchell's injuries were workplace related.
- As his claims arose directly out of a personal injury he is barred from receiving compensation.
- His claim for constructive dismissal cannot succeed because Mr Mitchell was not fit to resume his occupation and he continues to receive ACC compensation.
- The company did not breach the terms and conditions of the employment agreement and there was nothing foreseeable about his decision to resign.

[5] Mr Mitchell challenges that determination. The challenge was heard de novo.

[6] Mr Mitchell expressed considerable dissatisfaction with both the outcome and the manner of the investigation in the Authority but accepted that the appropriate method of challenge was by way of a rehearing rather than a critique or review of the Authority's determination. He also accepted that exemplary damages are not available as a remedy for a personal grievance.

[7] Mr Mitchell represented himself and gave evidence. Three witnesses gave evidence for the company.

The issues

1. Did the defendant breach a duty owed to the plaintiff?
2. If so, was the plaintiff's resignation caused by that breach?
3. Was the breach of sufficient seriousness to make it reasonably foreseeable by the defendant that the plaintiff would not be prepared to work under the conditions prevailing?¹
4. If Mr Mitchell's claim is successful is he entitled to any monetary compensation or other damages in the light of his receipt of payments of accident compensation under the Injury Prevention, Rehabilitation, and Compensation Act 2001 (IPRC Act) since 2003?

The facts

[8] Mr Mitchell was employed by Printlink and its predecessor company, GP Print, since 1999 as a skilled guillotine operator. There is no dispute that he was very good at this work which required precision and accurate cutting of papers for customers which included official Government documents.

[9] Initially he was employed doing manual work on five 8-hour shifts on an old style guillotine at a plant in Masterton. In 1997 the company moved operations to Petone and from then on Mr Mitchell was employed on an individual employment contract. At the time of his resignation he was working three 12-hour shifts on Monday, Tuesday, and Wednesday. By then he was operating a sophisticated guillotine machine which air-lifted stacks of paper for cutting.

[10] The machine ran 24 hours a day. Smaller cutting jobs were done on another machine. From 2000 there were 4 guillotine operators each working 12-hour shifts and another operator, Keith Riddick, who worked the day shift in the position of guillotine/padding.

[11] In 2002 a consultancy firm assessed the work of the company and interviewed the staff. As a result of Mr Mitchell's reported workload the company asked him to work with another person to help him as well as to enable Mr Mitchell to train him. The assistant was with him for a few months from September 2002 when at Mr Mitchell's request he was moved elsewhere.

[12] In March 2003 as a result of a reorganisation Mr Riddick was moved to the dispatch department leaving four people doing most if not all of the guillotine work. Printlink intended that following this move the situation would be reviewed over the next 3 to 6 months. Mr Ward, the general manager of Printlink, said there was a fair bit of analysis done about the changes but did not know the extent to which the guillotine operators had been involved in the decision to reorganise.

[13] Mr Mitchell believed those changes meant he had to absorb another operator's job and verbally complained to Mr Ward and to one of his direct supervisors, Terry McBirney, about the pressure and stress that he was under. Mr Ward said that at that time Mr Mitchell was offered a change of shift but refused that. Mr Mitchell denies he was offered such a change. Mr Ward denied the changes resulted in a heavier workload.

[14] Mr Ward described Mr Mitchell as assertive and not one to suffer in silence. They had various animated discussions. Mr Ward said Mr Mitchell felt passionately about some things. In June or July 2003 Mr Mitchell complained to him that he didn't like working on Mondays because there was too much work backed up after the weekend shifts. Mr Ward perceived that Mr Mitchell's problems were focussed on money rather than his injuries although he acknowledged that his requests for his contractual entitlements such as the tea break allowance were not unreasonable.

[15] At that time there was no system at the company requiring such verbal complaints to be recorded. They were supposed to be investigated by the operations manager or passed to a supervisor.

¹ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168; [1994] 2 NZLR 415 (CA)

[16] Mr Mitchell told the Court that his workload included precision pre-trim work which was demanding. He often cut jobs left over from the night shift. Although the company did not demand he do this it is evidence of his work ethic and diligence. Throughout his work he took few if any tea breaks. He said that his immediate managers, Hans De Boer and Mr McBirney, pressured him to keep working. Neither of these men were called to give evidence. They have since left the company.

[17] One of Mr Mitchell's colleagues, John Woods, confirmed that over the period from mid 1998 to mid 2003 the work flow meant a lot of tea breaks were not taken. Mr Mitchell's 1997 individual employment contract contemplated that employees may be required to work through their tea breaks. Clause 9(c) expressly provided for payment for this. Mr Mitchell received a \$1 hourly increase to compensate for these lost tea breaks after requesting it.

[18] On 29 July 2003 Mr Mitchell told Kevin Verrall, the administration manager, that he had a sore chest and arms. Mr Verrall helped him fill out an injury report and told him to give that to his supervisor. Mr Verrall raised this injury at the next meeting of the health and safety committee on 31 July. The minutes of that meeting record:

...

Dave Mitchell has reported getting a sore back, arms, and chest, due to heavy work-load on the guillotines, caused by covering for other staff that are sick or on leave.

...

[19] His only follow-up from this complaint was to ask Mr Mitchell how he was and advised him to speak to his managers if he had concerns about his workload.

[20] Mr Verrall had been the health and safety person at Printlink for about 18 months at this time and was still coming to grips with the role. He did not know much about the issues of stress although since then he has had some training.

[21] After reporting his accident on 29 July Mr Mitchell worked as usual on 30 July. Mr Ward said no one forced him to return and thought Mr Verrall and Mr De Boer would have checked that he was all right. There was nothing at that time to suggest that this was a more significant event than other sick notes received by the company.

[22] On 4 August Mr Mitchell was to return to work but suffered another injury on that day. From then until 19 August he worked as usual 3 days a week. On 19 and 20 August he took sick leave and on 26 August filled out another accident report as he was suffering the same injury as before but to both sides of his chest and arms. He stated on his injury form that it was because of “*again not replacing night cutter – put extra work on day shift.*” He also applied for coverage from ACC.

[23] On 28 August 2003 ACC acknowledged that his claim was work-related and began an investigation by notifying Printlink, Mr Mitchell, and his GP and asking for follow-up information from all of them. This was the first that Mr Ward had knowledge of a work injury claim. It had not been brought to his attention before that by his staff upon whom he relied for such information.

[24] When Mr Mitchell returned to work on 1 September 2003 nothing had changed about his workload. No steps had been taken by Printlink to address his concerns.

[25] Mr Verrall later acknowledged to Occupational Health and Safety (OSH) that there had been no follow-up immediately after the first notification. He had not forwarded the accident form to Mr McBirney nor had he notified OSH of the injury because he was not aware it was serious harm injury.

[26] Mr Ward had been generally aware of Mr Mitchell’s concerns but found it difficult to identify the true stress/workload issues apart from financial ones. He couldn’t understand why Mr Mitchell felt pressure when other employees did not. He also believed Mr Mitchell had other employment outside his Printlink work and was doing maintenance and other work on his own home.

[27] On 8 September 2003 Mr Mitchell wrote a letter of complaint to Printlink. He outlined his problems over his 7 years of employment during which he said he had endured a lot of stress. He reminded the company of his issues including the shift to Petone, the changes to manning levels, his struggle to keep up with the demands of the job, his lack of tea breaks, and having to absorb the work of the cutter who had been moved to dispatch. He said he'd spoken to Mr De Boer about working "*like a dog*." He concluded "*Over the years i have continued to complain of the extra workload and the duress pressure i have been put under i have trouble writing and cannot explain all the times but it is taking a toll on my family and myself so i am giving management 14 days notice to remedy the cutting problem.*"

[28] This complaint was the second significant signal to Printlink about Mr Mitchell's state of health but there was no evidence that Printlink responded to Mr Mitchell about it or took any steps to investigate it. Mr Ward said Mr Mitchell's absence on sick leave meant he was only at work on 5 days after that before he resigned and the company did not have time to do anything.

[29] After his letter of complaint Mr Mitchell went on sick leave for 3 weeks and returned on 29 September 2003. No changes had been made. On 30 September after a day at work with no breaks and little food he blacked out at his machine, and hit his head on the guillotine. When he came to he filled out an accident report sheet and told a co-worker what had happened. He then left work and attempted to drive home but blacked out again and had an accident. He was taken to hospital where he was deemed unfit for work until 6 October 2003.

[30] Mr Mitchell's GP, Dr Middleton, informed ACC of that incident and asked it to work with his employer to alleviate the strain on Mr Mitchell. Mr Mitchell also notified OSH.

[31] On 10 October 2003 Printlink responded to ACC's request for information. Mr McBirney completed the ACC questionnaire and work injury report. He said that the injury had been reported but not witnessed. The address where it occurred was stated to be "*unknown?*" Under the heading "*Cause of injury*" he said that he was unsure if the injury was related to the claimant's employment and wrote "*we*

understand he has been undertaking Home renovations on his property which includes heavy process building/moving - other operators have not had problems.” Mr McBirney also wrote *“He has had a second job, pumping petrol and receipting money - moving products .- Changing gas bottles - filling shelves. Home renovations – remodelling his house (taking out walls).”* Mr McBirney told ACC that the workload at Printlink had reduced over the previous 18 months.

[32] A few days later Dr Middleton completed a medical practitioner cover questionnaire for ACC. He diagnosed biceps tendonitis with pain in both arms and the chest wall. He also noted Mr Mitchell’s volume of work had increased with no changes made when he was obviously unwell. He said he had a marked increase in his stress levels and was diagnosed as being in serious depression.

[33] An occupational therapist did a worksite assessment for ACC. The conclusion was *“The decision re his work situation is entirely up to David. If he returns to work some discussion with management is required, and he must take appropriate breaks for lunch and tea.”*

[34] Mr Turner, an occupational physician, examined Mr Mitchell for ACC. He set out his history and concluded that there was no evidence that he was suffering from a physical injury, that he was stressed from his relationships at work and in particular from his perceptions of his workload. He found clear evidence of non-accident related psychosocial problems. He noted Mr Mitchell’s other work and home renovations which Mr McBirney had referred to.

[35] On 11 December 2003 Mr Mitchell was told by ACC his claim for cover was declined and he would get no further help for treatment costs or support for his condition.

[36] Shortly after that he was also advised by the Land Transport Authority that his driver’s licence had been suspended following his car accident on 30 September.

[37] Mr Mitchell said that by this time he just felt like “stringing himself up” the pressure was so much. He had lost his licence, ACC cover had been discontinued, and he could not work because of his medical condition.

[38] On 12 December 2003 Mr Verrall wrote to Mr Mitchell on behalf of Printlink:

...

Dave

I am sorry it has taken so long to contact you regarding the concerns that led to your injury. I understand from the latest ACC certificate that you could return to work in the near future. This is great news and everyone is looking forward to seeing you.

To let you know of the changes regarding the work loading of the guillotines we have set up a dedicated Xpress area that has its own guillotine (the one behind yours) which has reduced the Polar loading by about 25%.

I am also sure that at times of high pressure demands that an assistant can be found to assist you with the heavy loading and pallet transport.

We have also changed our accident reporting procedures so that meaningful discussions can take place as soon as possible after a reported incident.

We are in the process of redefining procedures and we welcome your input into how we address these and any other issues you have.

Looking forward to you [sic] return.

...

[39] This letter reflected changes to the work place recommended to Printlink by OSH after its investigation which concluded that there were two issues at Printlink:

- 1. Although Mr Mitchell promptly notified the problems he was experiencing and they were recorded on the company's accident notification sheet, no apparent investigation was carried out and as a consequence, no action appears to have been taken.*
- 2. Mr Mitchell's injury is defined as musculoskeletal disease and therefore serious harm, it was not reported as such.*

[40] This report also referred to “extraneous issues” in addition to the health and safety concerns. These included information from Printlink that they believed

activities outside of work, namely his secondary employment, may have contributed to his injury.

[41] When OSH discussed these corrective actions with Mr Mitchell before his resignation he told them he was happy with that but remained on sick leave. On 30 December 2003 he advised Printlink through a consultant that he was resigning. The letter outlined the history of Mr Mitchell's complaints to the company and its failure to take steps to meet those. It went on:

...

Mr Mitchell now has no option but to resign from his employment at Printlink. He is not able to return to work for the reasons I have set out. At the same time ACC have determined he is not eligible for continued cover after 7 January 2004, although this decision is being challenged. He is now forced to apply for a sickness benefit. He holds the company responsible for his current plight.

Please take this letter as notice of his resignation as at 7 January 2004. However, because this resignation is being forced upon him he considers it is in fact a constructive dismissal. As this dismissal is 'unjustified' Mr Mitchell believes it is grounds for a Personal Grievance claim...

...

[42] Mr Mitchell sought a review of the ACC decision. A report by another doctor refuted Mr Turner's opinion and found that all of Mr Mitchell's symptoms arose out of and in the course of his employment. His ACC cover was reinstated in 2004 following a hearing at which Printlink reiterated its views about Mr Mitchell's out of work activities. He received back payment of his ACC entitlements.

[43] At the hearing of the review Mr Mitchell produced evidence from a builder that the work on his house had been done by a professional and that he had finished his casual work with the garage much earlier in 2003. Mr Mitchell remains angry and disappointed by Printlink's attitude to the cause of his injuries.

[44] In spite of its denials Printlink's continuing scepticism about the cause of his injuries was demonstrated by Mr Ward's evidence to the Court. He could not accept that the changes to the number of guillotine operators in March 2003 made any

difference to Mr Mitchell's workload, although he accepted that Mr McBirney incorrectly told ACC that the amount of work being done had reduced over the last 18 months. He also was not prepared to accept that Mr Mitchell's injuries were solely caused by the workplace. When asked if he accepted the findings of ACC he stated *"I don't sort of have a view one way or the other to be honest I mean I simply don't know."*

[45] Further Mr Ward said there was no evidence that anyone else believed that there was an excess workload. When the first accident referral was made on 29 July 2003 it was decided to get the medical information first while Mr Mitchell was on sick leave before taking any steps. When he returned to work Mr McBirney and Mr De Boer kept an eye on Mr Mitchell by watching him but did not discuss that with him.

[46] After Mr Mitchell collapsed on 29 September 2003, changes to his method of work were put into place by Printlink because it was a serious issue. However Mr Ward still said they believed to this day that the structure of his shifts and allocation of work had been reasonable. He did not personally communicate with Mr Mitchell after September because he believed it was being handled by other people.

Medical evidence

[47] It is beyond doubt that Mr Mitchell's physical problems were caused by his workplace. The ACC reviewer found that he had suffered a personal injury caused by a gradual process. It was mainly a bilateral tendonitis injury and he also suffered major psychological damage.

[48] In his report to ACC on Mr Mitchell's physical symptoms Dr Middleton stated that Mr Mitchell was *"also extremely upset & depressed because of the way he has been treated @ work"*. He was now in serious depression.

[49] After his resignation Mr Mitchell was seen by a registered psychologist, Dr Pow. In May 2004 she produced a comprehensive report noting he had had no previous mental disorder and had been a happy and easy-going man until he became ill. She diagnosed a major depressive disorder with symptoms of severe clinical

depression and clear post-traumatic stress symptoms. She reported that he saw his work-related events as changing his life forever and reacted with feelings of helplessness, betrayal, and rage.

[50] Dr Pow said that the events around his arm injury, being off work, and perceived unfairness in his treatment by Printlink management and ACC were the triggers for his post-traumatic stress disorder symptoms. His physical condition was implicitly involved in the events producing his psychological condition. She noted that Mr Mitchell had told Wellcheck who ran Printlink's Employee Assistance Programme about his stress levels but they had attributed this to his weight rather than his workload. Dr Pow continued:

..
In conclusion, stress due to workload has been building up for years, resulting in collapse, tendonitis, anxiety and depression. The process of feeling unfairly treated by work and then ACC, has left Mr Mitchell feeling completely disempowered and without dignity. He has developed PTSD symptoms. His condition is exacerbated by his financial situation. He often misses meals to feed his children and overlooks other health care.

...

[51] In July 2004 at ACC's request he was seen by another psychologist, Dr Ridding, to assess the appropriateness of psychological counselling. Dr Ridding recorded that Mr Mitchell believed his employers were actively unfair and self-protective in their handling of his affairs since he expressed concerns about his work volume. He was shocked by the content of the company's written report to ACC.

[52] Dr Ridding recorded that he had had a major emotional response to his injuries. He grieved the competence, respect and income he had achieved in 20 years' work experience.

Claim for constructive dismissal

1. Was the defendant in breach of its duty to the plaintiff?

[53] Mr Mitchell's individual contract was unchanged from 1997 and apart from setting out conditions of service is silent as to the obligations to the parties. However, it is an implied term of all employment relationships that the parties do not

breach each other's trust and confidence. Since 2000 parties are required by s4 of the Employment Relations Act 2000 to act in good faith towards each other. An employer is also obliged to meet its obligations under the Health and Safety in Employment Act 1992 to take all practicable steps to ensure a safe workplace.

[54] I am satisfied that Printlink was in breach of these requirements. Although Mr Mitchell was outspoken, forthright, and at times demanding, he was a long-standing and valued employee.

[55] There was a culture of working through breaks to get the job done. Mr Mitchell's supervisors did nothing to encourage taking regular breaks. From mid 2003 Mr Ward had personal knowledge that Mr Mitchell felt under pressure as a result of the changes to guillotine operators' shifts. I accept that at that time Mr Ward talked to Mr Mitchell about a possible change to his shift but there was no evidence that there was an investigation of any depth or any attempt to regulate the flow of work that was of such obvious concern to Mr Mitchell. The events at this time were a prelude to his first formal injury complaint which was specifically about workloads. As noted by OSH the company did not investigate or follow up that complaint nor was it alert to the possibility of serious harm from musculoskeletal disease.

[56] When Mr Mitchell twice returned to work following periods of sick leave to find the same conditions that had caused the physical injuries, he became increasingly frustrated about the lack of changes. In turn this led to his increasing levels of stress.

[57] The only step taken by Printlink at this time was to covertly monitor Mr Mitchell while at work. Apart from that it did not communicate with him or otherwise discuss his condition with him or seek to engage in any active attempts to find a way through his workload problems until effectively directed to do so by OSH.

[58] In addition, at this time Printlink through its managers and supervisors had a view, based on rumour and unchecked facts, that his injuries were likely to have

been caused by Mr Mitchell's out of work activities. Its failure properly to investigate or give Mr Mitchell an opportunity to comment on these allegations before conveying them to ACC was not fair. This misinformation was taken into account by Mr Turner and then ACC. It contributed to the stopping of Mr Mitchell's ACC cover and resulting financial distress.

[59] I find that Printlink did not manage the risk and take all reasonable and practicable steps from the time that it knew of his physical injury on 29 July. Simply referring his injury to a health and safety committee meeting without further follow-up was not sufficient. The company relied on OSH and ACC to investigate the matter rather than taking its own pro-active steps to manage the problem that was manifest in its workplace.

[60] Printlink was also in breach of its good faith obligations to Mr Mitchell when it failed to react at all to his letter of 8 September 2003 specifically outlining the toll the workplace issues were taking on himself and his family and giving it 14 days' notice to remedy the cutting problem. It made no effort to contact Mr Mitchell at that time to open up lines of communication with him. The fact he was on sick leave is not an adequate reason for that failure.

[61] Subsequent letters from Printlink reiterated that they wished him to return to work although the first of those was not sent until 12 December 2003. If the company did want him back it is difficult to understand why it would not have taken immediate steps to answer his letter of 8 September and attempt to address what was obviously a cry for help. I conclude that Printlink was in breach of the implied terms of trust and confidence and good faith in its employment relationship with Mr Mitchell.

2. *Cause of resignation*

[62] The letter from Mr Mitchell's representative on 30 December 2003 outlined in no uncertain terms that he was resigning because of the failures of Printlink to take steps to alleviate his difficulties at work. That letter also referred to the company's attempt to shift the blame for his condition and injury to outside work

activities which Mr Mitchell saw as another example of a lack of support from management for the employment relationship issues he had complained about.

[63] I accept that those factors led directly to Mr Mitchell resigning from his position.

Was the resignation reasonably foreseeable?

[64] I find that a combination of Mr Mitchell's verbal complaints, his two formal reports about work injuries, and in particular his letter of 8 September 2003 were sufficient to put Printlink on notice that his continuing employment was at serious risk because of his stress and physical injuries. It was accepted by Ms Heaton that from 29 July 2003 the company was aware of the full extent of his injuries.

[65] Although the company belatedly made changes to the workplace which may have improved Mr Mitchell's situation, it did not discuss these with him beforehand. They were simply announced in a letter after it had received notification from ACC that there were no work-related injuries. This letter was sent some 6 weeks after the expiry of the 14 days' notice given by Mr Mitchell to make changes to his workplace.

[66] I conclude that it would have been reasonably foreseeable to Printlink that Mr Mitchell had become so ill, stressed, and frustrated with the lack of action that he would no longer wish to return to the workplace.

[67] I conclude that Printlink did not act fairly and reasonably² towards Mr Mitchell and that he was constructively dismissed.

Remedies

[68] Mr Mitchell has claimed for:

- Reimbursement of wages and allowances lost as a result of the grievance less income received from WINZ and ACC for 5 years.

² *W & H Newspapers Ltd v Oram* [2000] 2 ERNZ 448 (CA)

- Loss of benefits including costs of refinancing and borrowing associated with the refinancing of his house, loss of a motor vehicle, and the value of contractual benefits lost which he might have been expected to obtain.
- \$100,000 compensation for hurt and humiliation.

[69] Section 317(1) to (3) and s318 of the IPRC Act prevents proceedings for damages arising directly or indirectly out of personal injury.

[70] Section 26 defines the term “*personal injury*.” It includes:

...

- (b) *physical injuries suffered by a person, including, for example, a strain or a sprain; or*
- (c) *mental injury suffered by a person because of physical injuries suffered by the person; or*
- (d) *mental injury suffered by a person in the circumstances described in section 21; or*
- [(da) *work-related mental injury that is suffered by a person in the circumstances described in section 21B; or*]

...

[71] The IPRC Act does not bar exemplary damages for any conduct by the defendant that results in personal injury but the plaintiff must show conscious wrongdoing or conduct by the defendant so outrageous that compensation is not an adequate response.³

[72] The Accident Compensation legislation removed the right to seek damages at common law for personal injury but conferred the right to compensation under the statutory scheme.⁴ Its purpose is to prevent double recovery but it is not designed to preclude recovery of any other compensation. To hold otherwise would offend against the fundamental principle that citizens should not be denied access to the

³ *Bottrill v A* [2003] 2 NZLR 721 (PC)

⁴ *Queenstown Lakes District Council v Palmer* [1999] 1 NZLR 549 (CA)

courts, save in rare and appropriate circumstances, and pursuant to clear statutory language.⁵

[73] If there is no cover for the personal injury or the injured person can show harm or disadvantage that does not arise out of the personal injury he or she may bring a claim for common law damages in common law or under the Employment Relations Act 2000.

[74] In *Bint v Capital Decorative Concrete Ltd*⁶, a wrongful dismissal case, Chief Judge Goddard noted that the plaintiff could not recover any compensation for his physical injuries because it was precluded by the equivalent of s317 of the IPRC Act. However, this did not prevent an action for damages for wrongful dismissal.

[75] The Court of Appeal approved the findings of the Chief Judge in *Bint in Attorney-General in respect of the Commissioner of Police v B*⁷. The Court of Appeal said that the Chief Judge's remarks were "*apt to be noted... because they indicate the ability to rely on a cause of action disjunctive of injury by accident.*" The Court then said at paragraph [20]:

We accept that in principle an employer may be liable for breach of duties to an ill or injured employee. There may, for example, be discriminatory conduct towards an injured employee; or in a case like Bint the method of dismissal of an injured employee may cause damage for which compensation is not available under the accident compensation legislation by reason of its cause being entirely disjunctive of the injury.

[76] This view was confirmed in *Wilding v Attorney-General*⁸ a case in which the New Zealand Bill of Rights Act 1990 was invoked. The Court of Appeal held that the appellant could not claim damages that were quantified by reference to his personal injury but this did not necessarily mean that a breach of a guaranteed right which results in physical injury could not be recognised by an award of *Baigent* damages⁹. In such a case the award must not be quantified so as to provide

⁵ *Queenstown Lakes* at p555

⁶ [1999] 1 ERNZ 809

⁷ (2002) 6 NZELC 96,692; [2002] NZAR 809

⁸ [2003] 3 NZLR 787 (CA)

⁹ *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA)

compensation for the personal injury because the ACC scheme was deemed to have already provided an effective remedy.

[77] I conclude that it is open to this Court to award compensation in personal grievance proceedings in which an employee has suffered personal injury but only for matters disjunctive of the personal injury. This may include compensation for hurt and humiliation under s123(1)(c)(i) of the Employment Relations Act 2000 arising out of an unjustified dismissal or unjustified disadvantage personal grievance. However any compensation awarded must be unconnected to the personal injury suffered.

Conclusion on remedies

[78] I find that Mr Mitchell was suffering psychological stress before 2003 caused by his workload issues. By July 2003 his stress had developed in conjunction with his physical injuries to a very serious extent and was part and parcel of his personal injury. The stress was not disjunctive from his personal injury in the sense required for him to be awarded damages to compensate him for that psychological stress.

[79] However, as well as these physical and psychological injuries I find that he also suffered hurt and humiliation as a result of Printlink's breach of duties to him when he became ill. One of the most significant was Mr McBirney's incorrect statements to ACC about his outside work activities. I am satisfied that apart from his already stressed condition, knowledge of this came as a severe shock to Mr Mitchell. He felt betrayed and let down when he discovered what had been incorrectly said about him.

[80] The other matter was the company's failure to respond to his 8 September 2003 letter. In that letter Mr Mitchell spoke of his trouble in writing, a reference to a serious learning disability which made the production of that letter very difficult. Having gone to that trouble and re-aired all the problems which he had accumulated over the years, it was a serious blow to receive no response at all, let alone an improvement to his working conditions.

[81] For these reasons I find Mr Mitchell is entitled to an award of compensation under s123(1)(c)(i).

[82] I have considered whether there are grounds for reducing such an award by reason of contribution by Mr Mitchell. While Mr Mitchell may have contributed to his personal injuries by not taking tea breaks and being almost too diligent in making up for shortfalls by other shifts, any such contribution relates to the personal injuries which is not the subject of remedies in this Court.

[83] However, he did not contribute to the situation which gave rise to the hurt, humiliation, and injury to his feelings as discussed. Printlink was entirely responsible for that and there will be no reduction for contribution. I assess compensation under this heading at \$10,000.

[84] Apart from this award there can be no compensation for loss of wages or benefits as this is covered by the IPRC Act under which Mr Mitchell has received payments for this purpose. In saying this I acknowledge that Mr Mitchell has, as a result of his personal injuries, lost his career as a guillotine operator and that has had a severe effect on his personal life. However that is not a matter over which this Court has any power to make an award of damages as these losses directly arise out of the personal injury.

Conclusions

[85] The determination of the Employment Relations Authority and its order as to costs is set aside and the following decision stands in its place:

1. Mr Mitchell was unjustifiably constructively dismissed from his employment by Printlink.
2. He is entitled to compensation for the effects of Printlink's breach of duties to him in the sum of \$10,000.
3. There can be no other award for damages for matters which arise out of his personal injuries.

Costs

[86] Mr Mitchell acted for himself in the Court proceedings but did take professional advice at some stages. He is entitled to a contribution towards any costs he has incurred in the course of pursuing his personal grievance to the Court, including disbursements.

[87] Mr Mitchell is invited to send a letter to the Court outlining these costs within 30 days of this judgment. A copy is to be sent to the solicitors for the defendant who is to respond within 21 days of receiving Mr Mitchell's letter.

C M SHAW
JUDGE

Judgment signed at 2pm on 23 December 2008