

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2016] NZERA Wellington 28  
5560167

BETWEEN	DAVID CRICHTON Applicant
AND	TD DRILLING 2014 LIMITED First Respondent
AND	TD DRILLING LIMITED Second Respondent

Member of Authority:	M B Loftus
Representatives:	Paul McBride, Counsel for Applicant No appearance for Respondents
Investigation Meeting:	3 December 2015 at Wellington
Submissions Received:	At the investigation meeting
Determination:	3 March 2016

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant, David Crichton, claims he was unjustifiably dismissed (albeit constructively) on 4 March 2015. Here it should be noted there is an issue as to who he was employed by - TD Drilling 2014 Limited or TD Drilling Limited (both referred to as TD).

[2] Mr Crichton also claims the events which led him to conclude he was constructively dismissed also constituted unjustifiable disadvantages. In particular he says TD:

- a. Failed to address health and safety concerns including concerns colleagues were under the influence of drugs and/or alcohol at work;
- b. Identified Mr Crichton as the source of accusations others consumed drugs at work which created further risk of potential harm through the actions of hostile colleagues;
- c. Failed to comply with its duty to keep Mr Crichton healthy and safe at work;<sup>1</sup>
- d. Inappropriately required Mr Crichton to undergo a drug test;
- e. Engaged in inappropriate behaviour such as swearing at Mr Crichton and issuing unjustified warnings; and
- f. Failed to act in good faith.

[3] TD denies any of the accusations have validity.<sup>2</sup>

### **Non-appearance of the Respondent**

[4] TD was neither present nor represented at the investigation meeting. That raised the question of whether or not I proceed in its absence.

[5] There is no doubt TD is aware of the investigation. It (or more correctly the solicitor it then engaged) participated in a telephone conference during which the investigation meeting was scheduled. The notice of investigation meeting was sent and received at the address provided as that for service. The notice of meeting includes advice that should a respondent fail to attend the Authority may proceed and issue a determination in favour of the applicant.

[6] Counsel, while no longer acting, confirmed TD's principles were aware of the investigation and that was confirmed in subsequent correspondence between TD and

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<sup>1</sup> Section 6 of the Health and Safety in Employment Act 1992 and clause 8 of Mr Crichton's employment agreement

<sup>2</sup> Statement in Reply dated 18 June 2015

an Authority support officer prior to the meeting. This exchange included TD's provision of witness statements three days before the meeting.

[7] Despite that TD was not present and provided neither notification of nor a reason for its absence.

[8] I am satisfied TD is aware of the investigation meeting and the consequences of non-attendance yet chose not to attend. In the circumstances and given the absence of an explanation I considered it appropriate to continue.

### **Background**

[9] Mr Crichton commenced with TD as a Digger Operator in November 2014. He had considerable relevant experience as a worker, supervisor and manager.

[10] TD was owned and managed by Euan and Susan Tweeddale.

[11] The first event of which he complains occurred on 29 Jan 2015 when he and a colleague stopped at a petrol station on the way to a work site to get a coffee. He says notwithstanding the fact this was as a common occurrence Mr Tweeddale pulled in behind and swore at the two. It is also alleged Mr Tweeddale told Mr Crichton he would get a warning for this though the other employee was not similarly disciplined.

[12] TD accepts Mr Crichton was spoken to about his having taken an unauthorised break but denies its approach was improper or that a warning resulted.

[13] The next event occurred on 16 February 2015. Mr Crichton hit a telecom cable while operating his digger. He accepts he did not follow protocol and check the plan as he had been advised by the supervisor the area was clear. He says he was again advised he was to receive a warning despite none being issue to either the supervisor or the site spotter who oversaw the diggers operation.

[14] TD's says is it is not for the supervisor to check for cables and responsibility lies with the operator and his spotter. Notwithstanding that TD denies taking any disciplinary action at the time and the event was not formally raised with Mr Crichton until 4 March.

[15] Mr Crichton says when he arrived at work on 21 February he noticed 7 colleagues, including the foreman, appeared heavily intoxicated. He says the

supervisor also noted their condition, cancelled work for the day and sent all 10 staff home. Mr Crichton expresses concern no further action was taken and he was not paid for the day as a result

[16] TD denies the staff were intoxicated but accepts a number were *hungover*. It says the works cancellation was an appropriate response given possible health and safety issues and claims failure to pay was an oversight which has since been remedied. Mr Crichton accepts payment has now been made but says that was only after his lawyer raised the issue.

[17] The next and perhaps key event occurred on 27 February. Mr Crichton says a colleague, M, drew his attention to a number of others who were in a van apparently taking drugs. He says this concerned him for two reasons. First it posed a health and safety risk and second such behaviour might jeopardise TD's chances of getting further work and therefore have a negative impact on his job.

[18] On 1 March Mr Crichton telephoned Mr Tweeddale and told him about the events of 27 February. He asked that the call be treated as confidential and says Mr Tweeddale agreed. Mr Tweeddale denies confidentiality was discussed and says he would not have agreed if it had been raised. He says he considered the allegations serious and discussed them with the foreman who agreed all staff should be tested over time.

[19] On 2 March the foreman called a staff meeting at which he is said to have advised all present that Mr Crichton had reported the alleged drug use and this was going to mean drug testing. Mr Crichton says this caused him extreme concern. A number of his colleagues had a history of violence, drug use and imprisonment and he now felt he was possibly at risk of a retaliatory reaction. He considered the situation unpredictable and unsafe.

[20] Mr Crichton says following the meeting he and M were told to go to the depot where they and the foreman were then drug tested. He takes issue with this as he claims no other employees were then tested. He also expressed concern M failed the test but was allowed to return to work regardless. M accepts that was the case – as he put it his result *was swept under the carpet*. M adds the others were tested after Mr Crichton left TD's employ but no action was taken in respect to five failures.

[21] TD denies Mr Crichton was identified as the source of the allegations but claims other staff would have figured out who it was in any event. TD refers to the later testing of other staff and says two were *stood down* as a result.

[22] Mr Crichton then left the workplace and after speaking to his wife she called Mr Tweeddale. It is alleged Mr Tweeddale told her he found the drug allegations hard to believe and that he trusted his staff. It is also alleged Mr Tweeddale said he could not afford to test all at once but it would be done over the following weeks and that M had failed to corroborate Mr Crichton's allegations. Mrs Crichton says Mr Tweeddale accepted her husband had been identified as the complainant and agreed that should not have happened but then added he considered the issue a storm in a teacup. Ms Crichton says when she asked what support would be available for her husband she was told *nil*.

[23] Mrs Crichton told her husband of the conversation. He then returned to work but was removed from the digger. He says that while it was normal he perform other work he had never before been required to do so for an extended period. TD says the performance of other tasks was *standard procedure* and aired allegations about Mr Crichton's inadequate care of truck and tools when it responded to this.

[24] Mr Crichton then took the next day off work. He called in sick and says he did so in fear he would again be singled out for negative attention.

[25] On 4 March Mr Crichton arrived at work. He says he was cornered by Mr Tweeddale who loudly advised, before at least five other employees, that while serious his allegations were unsubstantiated given the foreman's clear test and the fact M had not seen anything. He says Mr Tweedle then accused him of causing *a big f...ing rift here*. Mr Crichton says he stated the two should be having the discussion in private but claims Mr Tweeddale continued to act inappropriately. Mr Crichton therefore decided to leave.

[26] He says he then considered the situation and concluded he could not return. He says:

*It doesn't take much to realise the huge difficulty I would have had continuing to work with the others. I had raised a serious concern and it could have impacted on their incomes, so from their perspective I had crossed them. They would not be able to be trusted ... The day after talking to [Mr Tweeddale] I had already been targeted by being only one of three workers drug tested, without*

*cause or random selection, and was then put on the concrete cutter all day instead of doing my usual work. That would have been just the start of it.*

[27] Mr Crichton then contacted Mr McBride who wrote to TD the following day. The letter advised Mr Crichton's decision to depart and raised his personal grievance.

[28] TD says it was Mr Crichton who arrived at work intent on trouble – it claims *It appears from his manner he was trying to be intimidating.* TD says Mr Tweeddale approached in order to raise a concern about what he saw as Mr Crichton's unauthorised absence on 2 March (refer [22] above) but did not have an opportunity to do so as Mr Crichton became aggressive and kept asking asked if he (Tweeddale) wanted to fight. TD says Mr Tweeddale responded by walking away.

[29] Mr Tweeddale then wrote to Mr Crichton asking that he answer a range of potentially serious allegations. These included the damaged telecom cable ([13] above); the allegation regarding drug use which is characterised as targeting only one employee (the foreman) who was then cleared by testing; the *unauthorised absence* of 2 March; the circumstances of Mr Crichton's sickness on 3 March and *an allegation* [in] *respect to your general standard of work.*

[30] Mr Crichton did not respond. He says that while dated 4 March he notes the letter was sent by e-mail and this did not occur till after TD had received notice of his departure and personal grievance on 5 March.

[31] TD responded to the personal grievance on 9 March. Its position is essentially one of complete denial and was supported by short statements signed by various staff. One of those was signed by M. M says the documents were pre-prepared and presented by the foreman with a demand they be signed. He says there was a lot of coercion and all, including himself, signed. He attributes his decision to do so to a fear *he would be out of a job the next day* should he not.

## **Determination**

[32] Before proceeding there is the preliminary question of who employed Mr Crichton – TD Drilling 2014 Limited or TD Drilling Limited or both. The directorships, shareholding and registered offices of the two companies are identical.

[33] From Mr Crichton's perspective there is no difference with the two being indistinguishable. He says reference was always made to TD Drilling. Both are mentioned in the body of the employment agreement with, for example TD Drilling 2014 Limited being named in the parties clause but TD Drilling Limited as the signatory. The grievance was raised with both and the response of 19 March 2015 was sent on behalf of TD Drilling (ie: neither). Attempts to clarify the issue have not been answered and I note they were followed by formal advice to TD Drilling Limited that, having not been initially cited in the statement of problem, Mr Crichton was seeking to have it joined as a party. That notice was forwarded before the investigation and the response was limited to an assertion Mr Crichton was employed by TD Drilling 2014 Limited and various unsupplied documents could confirm that.

[34] I conclude on the evidence before me, the fact the grievance was raised with both, that neither responded to enquiries aimed at resolving the issue, that neither company appears concerned with differentiating themselves and the fact both are identified in the employment agreement, they shall be held jointly and severely liable for the awards that are going to be made in this determination.

[35] As already said Mr Crichton claims he was constructively dismissed. He also claims the employer actions which led to his conclusion he had been constructively dismissed constituted unjustified actions which affected his employment to his disadvantage.

[36] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd*<sup>3</sup> the Court of Appeal held constructive dismissal includes, but is not limited to, cases where a breach of duty by the employer causes an employee to resign.

[37] There must also be a causal link between the employer's conduct and the tendering of the resignation<sup>4</sup> and the possibility of resignation in response to that conduct should be foreseeable.<sup>5</sup>

[38] While a simplistic summary of more complex law, the underlying assumption is actions or words of the employer amounted to a breach which induced a subsequently proffered resignation. The onus falls on Mr Crichton to establish, prima facie, there was such a breach.

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<sup>3</sup> (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA)

<sup>4</sup> *Z v A* [1993] 2 ERNZ 469

<sup>5</sup> *Weston v Advkit Para Legal Services Ltd* [2010] NZEmpC 140

[39] While TD was not present at the investigation I at least had the advantage of its statement in reply and the *witness statements* (refer [31] above) obtained in March 2015. I therefore had information which could be used to test and challenge Mr Crichton's claims. He passed the test – indeed I found him to be an extremely credible witness. The same can be said of his supporting witnesses whose candidness extended to unsolicited admissions of criminal activity.

[40] It follows I accept Mr Crichton's precise of events. That acceptance leads me to conclude he was, as claimed, constructively dismissed.

[41] The key claims revolve around the provision of a safe workplace. Mr Crichton essentially resigned as he felt TD was duty bound to provide a safe workplace but failed to do so by placing him in a potentially unsafe situation and then refusing to rectify the situation.

[42] That TD was bound to provide a safe workplace is indisputable. It is both a statutory requirement and, in this instance, one expressly covered in the applicable employment agreement. That a breach of this duty can amount to a constructive dismissal is also well accepted.<sup>6</sup>

[43] The evidence of Mr Crichton, M and another ex-colleague leads me to accept drug use was an issue in this workplace. This is especially so given M's concession about his own behaviour in this respect. I also accept the workforce contained members with a propensity for violence. I also accept Mr Crichton's claim he was identified at the meeting of 2 March and if follows I accept this potentiality placed him in a dangerous situation. Finally I accept Mr Tweeddale did little or nothing to address Mr Crichton's resulting concerns. I conclude that was a serious breach and one that could justify Mr Crichton's conclusion an ongoing employment relationship was now untenable. I also conclude this was a foreseeable reaction to the situation.

[44] The conclusion Mr Crichton was constructively dismissed raises the question of whether or not TD can justify the dismissal.<sup>7</sup> TD's failure to attend the investigation means there was absolutely no evidence in this regard so it follows the answer is no.

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<sup>6</sup> See for example *Auckland Provincial District Local Authorities Officers IUOW v Auckland Electric Power Board* [1992] 1 ERNZ 87 and *Weston* [n 5 above]

<sup>7</sup> Section 103A of the Employment Relations Act 2000



[45] The above conclusion leaves four of Mr Crichton's alleged disadvantages unanswered. I have already found in Mr Crichton's favour on the key issues but for completeness I note my acceptance of his evidence and that of M means I accept he was given the alleged warnings. Again there is no evidence they can be justified. It also means I accept it as he who was sworn at on both 29 January and 4 March and Mr Tweeddale was the perpetrator. I must also suggest the decision to drug test Mr Crichton as a response to his complaint of drug use by others appears vindictive and, again, there is no justification of this decision.

[46] Finally there is the claim of a breach of the duty of good faith. It goes without saying the lack of action by TD constitutes a failure to act in a manner conducive to the maintenance of a productive employment relationship. All of these events served to fuel Mr Crichton's disquiet and clearly affected his employment to his disadvantage given his decision to leave and the fact they influenced it.

[47] The conclusion Mr Crichton has a grievance in that he was both unjustifiably dismissed and unjustifiably disadvantaged raises the question of remedies. He seeks wages lost as a result of the dismissal and \$25,000 as compensation for hurt and humiliation.<sup>8</sup>

[48] Section 128(2) of the Act provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. Additional amounts may be awarded on a discretionary basis and Mr Crichton asks that I exercise the discretion and award his full loss to the date of the investigation.

[49] Mr Crichton mitigated his loss with alacrity but in doing so he had to accept a job which paid significantly less than he had received when working for TD. It was also *casual* and there was, at least initially, no guarantee of income. His casual status also meant he received no sick or annual leave. He quantifies his loss as \$11,115.00 net.

[50] Mr Crichton's evidence leads me to conclude this is a situation in which I should exercise the discretion especially as the total is still less than the three months full time wages mandated by s 128 as payable when one has a personal grievance. I do so.

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<sup>8</sup> Section 123(1)(c)(i) of the Employment Relations Act 2000

[51] Turning to compensation. Mr Crichton is claiming \$25,000. I must say that is, in this jurisdiction, a claim that would rarely be attained. That said he did support his claim with strong evidence which, in my view, warrants a significant award. The evidence leads me to consider \$12,000 appropriate.

[52] The conclusion remedies accrue means I must, in accordance with s124 of the Act, address whether or not Mr Crichton contributed to his dismissal in a way which warrants a reduction in remedies. There is absolutely no evidence he did.

### **Conclusion and orders**

[53] For the above reasons I conclude Mr Crichton has a personal grievance in that he was unjustifiably dismissed and unjustifiably disadvantaged in his employment.

[54] As a result I order the respondents, TD Drilling 2014 Limited and TD Drilling Limited, who I find jointly and severely liable, to make the following payments to the applicant, David Crichton:

- i. \$11,115.00 (eleven thousand, one hundred and fifteen dollars) net as recompense for wages lost as a result of the dismissal. PAYE payable on that sum is additional with an appropriate amount to be calculated by the respondents and forwarded to the Inland Revenue Department; and
- ii. A further \$12,000.00 (twelve thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act; and

[55] Costs are reserved.

M B Loftus  
Member of the Employment Relations Authority