

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2014] NZERA Wellington 21  
5414314

BETWEEN VICENTE ALBA  
Applicant

AND PEGASUS STATIONS LIMITED  
Trading As MOBIL KARORI  
Respondent

Member of Authority: G J Wood

Representatives: Ben Paradza for the Applicant  
Susan-Jane Davies for the Respondent

Investigation Meeting: 30 January 2014 at Wellington

Further Information  
Received: By 3 February 2014

Determination: 3 March 2014

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant, Mr Alba, claims that he was unjustifiably constructively dismissed because of harassment and bullying by his immediate manager, Mr Phil Rankin, which was not properly investigated or addressed by the respondent, Mobil/Mobil Karori.

[2] Mobil Karori denies that Mr Alba was bullied or harassed by Mr Rankin and that it failed to properly investigate Mr Alba's complaints. As a result it claims that it had not breached any significant duties to him leading a substantial risk of his resignation being reasonably foreseeable and thus that Mr Alba resigned voluntarily.

[3] By way of counterclaim Mobil seeks repayment of the additional month's pay Mr Alba was inadvertently overpaid when he received his final pay. Mr Alba accepts

that he was overpaid, but did not realise it at the time and has since spent the money, with no prospect of it being repaid because of his ongoing commitments.

### **Factual discussion**

[4] Mr Alba was employed as the retail store manager at Mobil Karori between 17 December 2007 and 30 May 2013. Mr Alba believed he had been bullied and intimidated by his new territory manager, Mr Phil Rankin, who had started in that position in August 2012. Mr Alba sought legal advice on the perceived bullying and subsequently arranged to meet Mobil's human resources manager, Mr Ian Sansum, on 21 February 2013. At that meeting Mr Alba handed Mr Sansum a letter raising a personal grievance for unjustifiable action. I note that no such claim has been pursued in the Authority.

[5] Mr Alba's employment agreement provides, by way of incorporation, all policy decisions made from time to time by Mobil concerning employment matters. Exxon Mobil, the parent company of Mobil Karori, has a worldwide anti-harassment policy prohibiting any form of harassment even if *the harassing conduct is lawful*. The object of the policy is to *provide a work environment that fosters mutual employee respect and working relationships free of harassment*. Under the policy harassment is defined as:

*Any inappropriate conduct which has the purpose or effect or:*

- *Creating an intimidating, hostile or offensive work environment;*
- *Unreasonably interfering with an individual's work performance; or*
- *Affecting an individual's employment opportunity.*

[6] The policy states:

*Individuals who believe they may have been subjected to harassment should immediately report the incident to their supervisors, higher management, or their designated Human Resources Department contacts. Or complaints will be promptly and thoroughly investigated ...*

*No retaliation will be taken against any employee because he or she reports a problem concerning possible acts of harassment. Employees can raise concerns and make reports without fear of reprisal. ...*

***There are two major categories of harassment:***

***Hostile Work Environment:*** *The purpose or effect of this type of harassment is to unreasonably interfere with an individual's work performance or to create an intimidating or offensive work environment. To determine if specific behaviours can*

*create an intimidating or offensive work environment, a 'reasonable person' test is applied. Would a reasonable person be genuinely offended or intimidated by the specific conduct? Would the behaviour cause the work environment to be offensive or intimidating for a reasonable person?*

[7] The other major category does not apply in this case.

[8] The policy also provides for a harassment resolution process. The harassment resolution process notes that it is critical that employees use the process, because otherwise failure to bring forward legitimate complaints allows the inappropriate behaviour to continue and that Courts have held that individuals are expected to use their employer's preventative and corrective measures.

[9] As part of the process employees are encouraged to warn offenders of behaviour they consider unwelcome and offensive.

*Employees who are uncomfortable personally confronting others should promptly report the potential harassing conduct to their supervisors, management or Human Resources.*

***Report Offensive Conduct***

*Employees who perceive that the conduct was harassment should promptly report such incidents to their supervisor, management or Human Resources...*

***Harassment Complaint Investigations***

*Where warranted, Human Resources will form a team and conduct an investigation with advice and support from the Law Department. Witnesses will be interviewed and file documents reviewed by a team of experienced investigators...*

*Investigative teams will determine if a policy violation has occurred and make recommendations to line managers... Line managers will implement corrective actions and impose discipline when appropriate.*

[10] In support of his claim for bullying and harassment Mr Alba relied on four principal allegations. They were:

- (i) That on 6 November 2012 Mr Rankin raised his voice to Mr Alba in the forecourt in front of staff and customers because of the failure of another staff member to wear gloves;
- (ii) That on 10 January 2013 Mr Rankin accused Mr Alba of being nervous while Mr Rankin was checking his work;

- (iii) That on another day Mr Rankin told Mr Alba that he disagreed with the previous territory manager who had said that Mr Alba was a solid and good worker;
- (iv) That on 8 February Mr Rankin lost his temper after seeing a poster on the wall and ripped it off (together with another poster) in full view of customers and staff.

[11] Mr Alba's letter contained the following statement:

*If you do not take steps to stop this kind of behaviour and a satisfactory solution is not found in the next 14 days of the date of this letter our client will be left with no choice but to consider resigning from his job. For the record our client loves his job and feels he will not be able to fully function in his role with Phil bullying him the way he has been doing so far.*

[12] Mr Alba alleges that after reading the letter Mr Sansum said *you are filing a case against Mobil you won't win. What does your contract say – did you tell me?* He then repeated that several times and *in a rather disappointing and threatening voice he said 'you should not do that'*. Mr Alba's evidence was that he knew from that point that Mobil was not going to properly investigate his complaints.

[13] Mr Sansum denies making such statements other than to point out to Mr Alba that the policy required him to inform the company first, but that he had raised a personal grievance through his lawyer instead.

[14] I prefer Mr Sansum's evidence on the basis that there was considerable correspondence between the parties over the investigation process and at no point did Mr Paradza, on Mr Alba's behalf, give any indication that such statements had been made. Thus while Mr Alba was clearly concerned throughout about any involvement with Mr Rankin, there was no concern raised about Mr Sansum's involvement. I therefore conclude that if Mr Sansum had made such a statements, which one would not expect from an experienced human resources manager, then Mr Alba and Mr Paradza would not have agreed to his involvement in the process.

[15] What was then agreed between Mr Sansum and Mr Alba was that Mr Alba's interactions with Mr Rankin would be minimised while the investigation took place.

[16] Indeed there were no further complaints made of harassment by Mr Alba about Mr Rankin's behaviour, even in the limited interactions that they did have.

[17] Unbeknown to Mr Alba, Mr Sansum promptly contacted Mr Rankin and got him to prepare a document in response to the complaint and to be interviewed. The interview took place on 25 February 2013. Mr Sansum later interviewed another retail worker at the Mobil Karori site (being noted by Mr Rankin as a potential witness) and he also wanted to talk further with Mr Alba.

[18] Mr Sansum arranged to meet that employee in Wellington the next week. Mr Sansum being based in Auckland, he therefore had to make a special trip to interview the employee. Ms Sansum also intended to speak to Mr Alba that day, although he did not inform Mr Alba of this when he rang him, because Mr Alba had left on leave four days early and Mr Sansum wanted to investigate that matter.

[19] I accept that Mr Sansum was told by Mr Alba when he rang him on 7 March that he had been told to go on leave by a relieving manager (who was in the store as agreed with Mr Alba to help him catch up on work he was behind with, most likely as a result of difficulties Mr Alba was having with a new computer system). Mr Alba and Mr Sansum then discussed whether a person at the same level could give Mr Alba authority to go on leave early, which they both well knew someone at the same level could not do. Mr Sansum therefore believed Mr Alba was on leave without authority. That issue was never resolved, although Mobil later sought to commence disciplinary proceedings against Mr Alba for his failure to get authority to take leave.

[20] Mr Alba claimed to be totally unaware of anything that Mr Sansum did about his complaint between 20 February and 25 March (the date when Mobil's response to the personal grievance was made and mediation was discussed, together with the separate matter of Mr Alba leaving early for a period of annual leave). However it is clear from the above discussion that Mr Alba was aware at least that another employee was being interviewed. I accept on the balance of probabilities (i.e. what is more likely than not) that Mr Alba also agreed to call Mr Sansum on his return. Such an arrangement would only be common sense, as the bullying complaint had to be progressed and Mr Alba had not been directly interviewed, and as Mobil was concerned about his leaving several days early for his annual holiday.

[21] Mr Alba's holiday ran between 5 and 22 March and he was due back on Monday 25 March, the date on which there was a flurry of correspondence between Mr Paradza on behalf of Mr Alba and Ms Davies on behalf of Mobil. As a result there was an agreement to attend mediation. Given Mr Sansum's absence on annual

leave for two weeks in April, Mobil suspended its harassment investigation in the hope that matters would be resolved at mediation, which took place on 24 April 2013.

[22] Unfortunately, mediation (which Mr Alba wanted restricted only to his complaints about bullying and harassment, but which Mobil wanted to discuss issues of Mr Alba's early absence on annual leave and performance concerns) was unsuccessful in remedying matters.

[23] Mr Sansum decided to continue his harassment investigation, but did not inform Mr Alba of this decision or any progress on his investigations, which had now been going for over two months, albeit it had been suspended for much of that period, which Mr Alba should have understood even if he was not directly told so, given the focus on mediation.

[24] In the meantime Mr Alba decided to resign. In his resignation letter he stated:

*...I am saddened on how the company handled my harassment complaint against Phil Rankin and despite seeking mediation with the Department of Labour, the company seems to be fully supportive of Phil's bullying as it has done nothing about it. That is what really prompted me to resign.*

[25] The evidence before the Authority was that Mr Alba referred to what appeared to be without prejudice correspondence after mediation, which he took to mean that he was being threatened with disciplinary proceedings if he failed to resign. I cannot accept that claim, as any such correspondence was not provided and I do not accept that a large multi-national company such as Mobil, represented by an experienced representative such as Ms Davies, would threaten an employee with disciplinary proceedings unless he resigned.

[26] What I conclude is most likely is that Mr Alba was aware that the disciplinary proceedings over his absence early on annual leave had been initiated by Mobil through its legal representative, as forewarned on 25 March 2013. On the face of it this was a matter that Mobil Karori was entitled to pursue. It did not mean that it would reach a finding adverse to Mr Alba, just that the matter of his leaving several days early for his holiday (apparently without proper authorisation) had to be investigated.

[27] Mr Alba worked out his notice with no further concerns over bullying, except that Mr Alba became upset on 7 May 2013 when Mr Sansum rang to tell him that the

preliminary report into harassment was complete and that Mr Sansum would like to discuss the findings with him in person, which could take place the next day, when he was in Wellington. Mr Alba said that he did not want to be pressured and wanted to speak to his representative first, which Mr Sansum agreed to. Mr Paradza responded stating that it was unhelpful for Mr Alba to be involved in the investigation any further, as it was all too late.

[28] The interim report did not focus on the first issue raised in the personal grievance, because that was said to be out of time. It concluded that because Mr Rankin had only half the workload of his predecessor (because the predecessor was dealing with two territories, which was unusual) and because his management style was more detail focused than his predecessor, that *this could be a culture shock to Vic*, but would not justify a finding of bullying and harassment. It noted that there were issues that Mr Alba had to focus on particularly in relation to safety, Wellington having the worst safety record of any Exxon Mobil territory in the world at the time Mr Rankin took over. This meant that there were performance issues at the Karori site (and the others in Wellington) that Mr Rankin was duty bound to address.

[29] However it was also concluded that in one instance Mr Rankin had behaved inappropriately, when ripping an unauthorised poster off the wall and raising his voice to Mr Alba, in the presence of another staff member and a customer. This was said to be a one-off incident and in itself on a moderate scale, which did not support serious allegations of bullying and harassment. It was noted, however, that Mobil had subsequently taken appropriate action with Mr Rankin once it was made known about the incident. This was by way of Mr Rankin's manager advising him of the importance of maintaining discussions with staff at a courteous level at all times and was undertaken before the investigation report was made.

[30] In evidence Mr Rankin denied shouting at or abusing Mr Alba on any occasions. However Mr Rankin did accept that he may have raised his voice on occasion, because he is hard of hearing and thus him raising his voice may occur inadvertently as a result of his hearing problem.

[31] I also note that perception is very important in these matters. Mr Alba found the raised voices offensive. My conclusion, on the balance of probabilities, is that Mr Rankin did raise his voice with Mr Alba on two occasions, once when outside in

November and as observed from a distance by Mr Alba's wife, and secondly when ripping down the posters in front of Mr Alba, another staff member and a customer.

[32] The other complaints Mr Alba highlighted, of Mr Rankin telling him he seemed nervous and his disagreeing with a previous manager about Mr Alba's performance are matters of personal opinion for which Mr Rankin cannot be criticised, because they were genuinely held and not expressed in a hostile manner or with such intent. Here I accept that Mr Rankin was genuinely concerned about Mr Alba's nervous behaviour and was trying to help him by raising this matter. Similarly, there is nothing wrong with a manager giving one of his staff feedback about their performance, even if it is unwelcome and not positive. At Mobil Karori there had been safety issues and Mr Alba was finding the new computer system difficult.

[33] Mobil paid an additional month's pay to Mr Alba inadvertently when he received his final pay. Mr Alba accepts that he was overpaid, but did not realise it at the time. He has since spent the money, believing it to cover his holiday and other final pay, with no prospect of it being repaid because of his ongoing commitments and lack of income, given his reduced hours of work and job security.

[34] The claim for unjustified constructive dismissal and the counterclaim have been unable to be remedied in mediation or in discussions between the parties. It therefore falls to the Authority to make a determination.

### **The law**

[35] The law on constructive dismissal is well established. In *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168 the Court of Appeal held at [172]:

*[172] ... The first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of notice or other communication whereby the employee has tendered the resignation.*

*If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.*

[36] In *NZ Woollen Workers IUOW v. Distinctive Knitwear NZ Ltd* [1990] 2 NZILR 438, the Labour Court addressed the distinction made in *Wellington Clerical Workers IUOW v. Greenwich* [1983] ACJ 965 between inconsiderate conduct causing unhappiness or resentment and dismissive or repudiatory conduct, reasonably sufficient to justify the employee's termination of the employment relationship. The Court held at [488]:

*... Conduct falling short of a breach of a contractual term including any duty implied into by law cannot entitle the worker to cancel the contract by resigning. For example, in this case there was evidence given by workers that Mrs Malcolm sometime snapped at them or spoke to them in a manner which they regarded as inappropriate. That evidence if accepted, by itself, in the absence of any element of unfairness or oppressive conduct, is not enough. The law does not compel parties to a contract to do more than perform it and it does not require them to perform it politely, nor is this Court empowered to enforce courtesy in the workplace, no matter how desirable in that environment that quality undoubtedly is.*

[37] *In that case the Court also relied on a lack of a crescendo of repudiatory conduct after an initial complaint and/or any strong evidence of protest at the respondent's conduct at the time of the resignation.*

[38] Where there are overpayments made by mistake by an employer there is an equitable defence of change of position, which is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full (*Foai v Air New Zealand Limited* [2012] NZEmpC 57).

## **Determination**

[39] While I accept that Mr Alba genuinely felt harassed and bullied by Mr Rankin, the Authority must assess what occurred on an objective basis, as was highlighted above. Here there were issues at the Karori service station, particularly to do with safety and the following of Mobil's clear policies on posters, which Mr Rankin was duty bound to raise with Mr Alba. These concerns no doubt impacted on Mr Rankin's behaviour towards Mr Alba in the two most serious instances of concern to Mr Alba, and to Mobil, as addressed in its harassment investigation. The first incident involved Mr Rankin reacting to seeing a worker, who had previously been badly cut at work, not wearing gloves when handling materials outside the shop. The second incident involved Mr Alba, who had been directed to only place company approved posters in the shop, once again placing an unauthorised supermarket sign in the shop, which could potentially have led to Mobil breaching the Fair Trading Act. These important

issues provided a context for Mr Rankin's behaviour, although it did not excuse his lapses.

[40] It seems clear that the catalyst for the real difficulties between Mr Alba and Mr Rankin was the fact that Mr Alba's wife had seen him raising his voice towards Mr Alba in November, although Mr Rankin was never aware of this fact. This led Mr Alba to feel extremely embarrassed.

[41] I conclude that Mr Rankin's actions on these occasions, although not appropriate, were not sufficiently serious as to constitute a serious breach of duty to Mr Alba. Furthermore, by the time Mr Alba resigned such behaviour had not been repeated for several months, as Mobil had taken sufficient steps, acceptable to Mr Alba, to minimise contact between the two men (*Distinctive Knitwear* applied).

[42] Another main reason for Mr Alba resigning involved the potential for disciplinary action. There was no breach of duty by Mobil in these circumstances, because it was entitled to investigate Mr Alba's absence on leave without it being approved in advance. Mr Alba knew that he was required to get approval from a manager before he took leave and he failed to do so. While he may have had a justifiable excuse to do so, Mobil was entitled to investigate the matter and in any event any investigation had not been concluded before Mr Alba resigned.

[43] Finally, Mr Alba had justifiable concerns that the investigation into his allegations of bullying and intimidation had not been concluded after several months, although he could not reasonably conclude that Mobil had pre-determined the outcome and/or had failed to even investigate the matter. Even although there were legitimate reasons for delays in the investigation process, including people being on annual leave and the appropriate decision by Mobil to suspend the investigation while mediation was pursued, I can understand why Mr Alba was concerned about the delays, particularly as he had not been interviewed personally. However I accept that Mobil had determined to progress the investigation after mediation was unsuccessful and that Mr Alba never raised the issue of delay in the investigation at any time, which would have given Mobil an opportunity to respond to him as to its progress and/or to speed the process up. In these circumstances it cannot be objectively determined that Mobil was delaying the progress to such an extent as to constitute a serious breach of duty to Mr Alba. It therefore follows that Mr Alba's claims for unjustifiable dismissal must be dismissed.

[44] While it is possible under s.122 for the Authority to make a finding that a personal grievance for unjustifiable dismissal is of another type, namely that of unjustified disadvantage as raised in the original grievance letter of 20 February 2013, I decline to do so in this case for three reasons. First, Mr Alba had the opportunity throughout to present that as a separate claim. Second, more importantly, for the reasons given above I do not accept that Mr Rankin's two failures in his communication style were sufficiently serious as to constitute a breach of duty and therefore were not sufficiently serious to constitute an unjustifiable disadvantage in Mr Alba's employment. Third, Mr Alba did not follow Mobil's harassment resolution process (binding on both parties) by raising matters as soon as possible with a senior manager, thus denying Mobil the opportunity to resolve matters without the need for the raising of a personal grievance.

[45] Finally, I dismiss Mobil's counter-claim. Mr Alba was unaware that he had been overpaid and there was nothing that should have alerted him to it. He spent the extra money in good faith and it would be inequitable for him to repay it, especially as he has no secure full-time employment and his family struggle to meet their existing commitments (*Foia* applied).

### **Costs**

[46] Costs are reserved.

**G J Wood**  
**Member of the Employment Relations Authority**