

Attention is drawn to the non-publication order at para 7 on page 3.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 273/08
510 5590

BETWEEN A
 Applicant

AND B
 Respondent

Member of Authority: Yvonne Oldfield

Representatives: Michelle Clark for Applicant
 David Patten for Respondent

Investigation Meeting: 17 and 18 March 2008

Submissions received: 23 April 2008, 21 May 2008 from Applicant
 9 May 2008 from Respondent

Further Information
received 18 April 2008, 14 May 2008, 27 May 2008

Determination: 1 August 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant in this case, Mr A, left his job after only seven months' employment. He says that he was constructively dismissed, or in the alternative, that employment warnings received during that time were unjustified actions to his disadvantage. In addition he also says that he was discriminated against after disclosing that he is HIV positive.

[2] Mr A was employed in August 2006 as a showroom manager. The respondent's managing director, Ms D, had understood from his application and interview that he was capable and experienced in the areas of sales and customer service and expected that he would perform to a high standard without significant

levels of training or supervision. She was quickly disappointed in his performance, and on 5 March 2007 issued a first employment warning. Meanwhile, he had been experiencing severe headaches and had sought the advice of his doctor (at one point, these were so severe that he was hospitalised with a suspected brain haemorrhage.) In an attempt to diagnose the problem, the doctor ordered a range of tests which revealed a serious (though unrelated) health issue: he was HIV positive.

[3] Mr A got this news within days of receiving the first employment warning. He decided to tell Ms D his circumstances in the hope that she would “ease up” on him, as he put it, and did so on 12 March. Instead on 22 March a second warning was issued. Over the next few days the employment relationship deteriorated still further. On 28 March Mr A resigned his employment.

[4] Immediately upon lodging this matter Mr A asked for a non-publication order with the objective of keeping his health issues confidential. This was not opposed by the respondent and I proceeded to put in place a temporary non-publication order to prevent identification of the parties. Prior to the investigation meeting, in the course of preparation of respondent witness statements, Mr Patten showed Mr A’s witness statement to Ms D and to Mr A’s immediate manager. From information contained in that statement the latter witness became aware for the first time of Mr A’s health status. Calling this “*a breach of confidentiality and an unlawful disclosure*” Counsel for the applicant claims additional compensation for Mr A as a result.

[5] Counsel for the respondent has replied that it was necessary for the witness in question to see Mr A’s witness statement and that it was through an oversight on his part that the reference to Mr A’s health status was not excluded from what the witness saw.

[6] I agree that this witness did need to see the statement as there were a number of areas in it that she needed to respond to in her own witness statement. I also agree that no blame attaches directly to the respondent for the fact that the witness saw the reference to Mr A’s health status. I consider that the representatives must share responsibility for what occurred. It could have been prevented if Ms Clark had alerted Mr Patten to the fact that only the managing director and not Mr A’s manager was understood to be aware of Mr A’s health status and to the fact that his statement

contained references to it that Mr A did not wish anyone else to see. No liability attaches to the respondent for what occurred.

[7] **I now make a permanent non-publication order relating to the names of the parties and any other information that might identify them.**

ISSUES

[8] The issues for determination are as follows:

- i. Whether the first warning was justified;
- ii. Whether the second warning was justified;
- iii. Whether the resignation amounted to a constructive dismissal;
- iv. Whether Mr A was discriminated against because he was HIV positive, and
- v. What if any remedies are appropriate, and whether Mr A contributed to the situation.

FIRST WARNING

[9] Mr A's immediate manager told me that between August 2006 and March 2007 she had growing concerns about that fact that he was not coming up to speed as she expected he should. By way of example she told me that in December she had to talk to him about misuse of the internet, in January about poor showroom management and in February, about a pricing mistake. Mr A does not dispute these conversations and accepted responsibility for the matters raised however he did not understand that they were being viewed as serious. He was therefore surprised on 1 March to receive written notice that he was required to meet the next day with his manager and Ms D to discuss a range of concerns with his performance.

[10] Mr A says that the brevity of the notice put him at a disadvantage in preparing for the meeting but acknowledged that he was already knew something of the matters raised. He was able to put together a document in response to the concerns set out in the written notice and tabled this at the meeting on 2 March. He also confirmed (after being advised that he was entitled to one) that he did not require a representative.

[11] I do not therefore consider him to have been disadvantaged by the late notification of the meeting and its subject matter.

[12] As for the substance of the concerns, Mr A told me that he felt all his explanations were adequate. I accept (as did Ms D) that some were. In other areas however, I consider that he minimised the importance of matters that the respondent saw as impacting seriously on showroom management and customer service. By way of example, he admitted that he had not consistently followed an instruction (given three weeks prior) to quote in writing. This was especially worrying for Ms D as the instruction had been given after an error in a quote given over the phone. Mr A also felt that the respondent's timekeeping requirements were unreasonable and that he was expected to have a higher level of product knowledge than was achievable after only six months in the job.

[13] I do not agree. It is the respondent's prerogative to set performance standards, and Mr A had been employed on the basis that he was very experienced and would very quickly perform at a fully competent level. He was being paid accordingly. I accept that Mr A's performance to that point had not been at the level the respondent could legitimately have expected from someone with his CV and at the salary level he was being paid.

[14] The first warning followed on 5 March. I am satisfied that it was justified.

SECOND WARNING

[15] In the warning letter of 5 March, Mr A was given a list of objectives to meet. One of these ("*explain the Key Account programme confidently and in detail to any enquirer*") was to be reviewed "*one week from March 2.*" In respect of the other areas (knowing showroom stock including pricing, carrying out standard policies and procedures for orders, prices and claims, and increasing product knowledge generally) he had one month in which to improve his overall performance. He was told "*If your performance does not improve considerably by the end of March, you would be given a further and final warning.*"

[16] Mr A's manager told me that in the fortnight immediately after the warning letter she failed to see the improvement she had hoped for. She was also becoming concerned about Mr A's absences from work. In total between 20 February (the point at which he became entitled to statutory paid sick leave) and 28 March (when he resigned) Mr A took 18 days sick leave. (He had also taken several days unpaid sick leave during his first six months of employment.) A further worry for Mr A's manager was the increasingly strained atmosphere within her team (which consisted of herself, Mr A and one other.) The manager herself was to take maternity leave in a few months time and was anxious to see the working relationships in the team improve before she left.

[17] Between 5 March and 16 March she spoke to Ms D about all these matters. When she first employed Mr A, Ms D had not checked all his references. Now she began to suspect he had misrepresented himself at the interview, and decided to contact his former employer. She told me her suspicions were confirmed when, on 13 March, she received an email from that organisation to say that his experience had been overstated in his CV. However, the email contained no details.

[18] Meanwhile, on 12 March Mr A had told Ms D of the distressing news that he was HIV positive, although he asked her not to tell anyone else of this (including his manager.) Ms D accordingly decided that from this point on she would handle Mr A's employment issues by herself.

[19] Within a few days of this, Ms D received some information which was to raise concerns in her mind about Mr A's loyalty. Independent of each other, two individuals who worked in the same premises as Mr A reported that he had told them he was planning to leave his job and to sue his employer. (In addition, after the resignation, Ms D found a personal email sent by the applicant from the respondent's computer in mid March which said his position "*is about to change & I think I want to chill a little and paint some more LOL.*" She says this confirmed what she had been told earlier: that Mr A was planning all along to leave.)

[20] On 16 March Ms D wrote to Mr A asking him to meet with her on 19 March. She says this meeting was to follow up on one of the objectives set out in the warning

letter (relating to the Key Account programme), to discuss the information received from his previous employer and to talk about his high levels of sick leave.

[21] Mr A was very alarmed by the letter. He knew nothing, beforehand, of concerns about his CV. He also says, and I accept, that the way the letter is worded it gives the impression that it was to follow up on all the objectives that had been set for him in the previous warning, despite the fact that he had been given until the end of the month to work on them. He asked immediately for the meeting to be rescheduled. Ms D suggested that they defer it to the 21st and asked him to confirm this by 5.00pm on the 20th.

[22] Mr A left work early on 19 March because he was feeling unwell and took sick leave on 20 March. Ms D did not hear from him by her deadline and assumed that the proposed meeting time would suit. Her office being located in a different city from the showroom in which Mr A worked, she organised travel arrangements accordingly. On 21 March Mr A called in to work and told Ms D that he had sought legal advice. He gave her his lawyers' card and told her that they would be contacting her. When she asked why he had not let her know sooner that the meeting time did not suit, he said he had been in bed asleep. Then (still feeling unwell) he returned home once again.

[23] On 22 March, having heard nothing more, Ms D issued the second written warning, stating:

“we do not consider that you have shown any improvement in your overall performance since our earlier meeting on 2 March...In light of ...the lack of confirmation of your job description from [previous employer] I continue to have very real concerns about the claims made in your CV and I also remain concerned about the number of days which you have recently had off work due to illness...

In the event that you do not show a significant improvement in performance within the next two weeks ...you will be given notice of termination...”

[24] Ms D told me that she did not think the process from 12 March to 22 March was precipitate and noted that she was very concerned about the CV issue. However,

given that the email from the previous employer gave no specifics of what was overstated, I do not consider it can be said that Mr A misrepresented himself. On what was contained in the email it cannot be said that he did more than “talk up” his ability and previous experience in a way common to many interviewees.

Determination

[25] Unlike the first warning, the second has not been justified.

[26] Mr A was not given a reasonable time in which to improve (or even the time originally agreed.) No account was taken of the fact that he was facing serious health problems which impacted on both his emotional and physical fitness to address the respondent’s performance concerns. In addition (as already touched on above) Ms D over-emphasised the significance of the email from Mr A’s previous employer. Finally, of course, Ms D failed to have regard to Mr A’s reasons for not attending a meeting as requested and so proceeded with a warning without having given him an opportunity to discuss any of these issues.

[27] **Mr A has established that he has at least a disadvantage grievance in respect of the second warning letter.**

DISCRIMINATION

[28] Mr A asserts that the disclosure of his health status caused a souring in Ms D’s attitude to him but I have not been satisfied of this. Although I accept that her attitude to him hardened at about the time he made the disclosure to her, I attribute this to other factors. The first was the reported comments that he intended to sue her. The individuals concerned gave very credible and firm evidence to the Authority confirming what they had heard and passed on. I accept their evidence, and conclude that it was to be expected that Ms D became mistrustful of Mr A after hearing from them.

[29] The second factor was Mr A’s high level of absenteeism. It was not tackled in a fair and reasonable way and did not justify a warning. However I am satisfied that it influenced Ms D’s view of the employment relationship, and would have done so

whatever its cause. I also consider her attitude would have been the same whoever the staff member had been to take excessive sick leave. I am not satisfied that Ms D's behaviour has been shown to be discriminatory.

[30] **The claim of discrimination fails.**

CONSTRUCTIVE DISMISSAL

[31] Later in the day on 22 March Mr A was involved in a brief incident with his manager. It arose as follows. Mr A advised a customer to whom he was speaking on the phone that he could not give her a quote there and then but would have to email it to her. His intention was to comply with the instructions he had been given earlier regarding written quotes. The customer was annoyed and when he got off the phone Mr A swore. Hearing him, his co-worker asked whom he had been speaking with. She learnt it was one of her own "VIP" clients, rang back and gave a quote over the phone.

[32] Mr A felt humiliated and abruptly entered the manager's office to ask for an explanation. She confirmed that his colleague was not subject to the same requirements as him regarding written quotes. He told me this felt like the final straw. He left the showroom and did not return.

[33] The manager told Ms D that during this incident Mr A had slammed boxes around and spoken in an aggressive manner which made her feel unsafe. Ms D considered she had to follow up on this. On 23 March she emailed and then wrote to Mr A, calling him to a meeting on 27 March and telling him:

"your behaviour yesterday towards your manager...your use of obscene language in the showroom and then the throwing of boxes and samples in the showroom and warehouse is tantamount to serious misconduct....you will be given the opportunity to explain your conduct...and your subsequent absence from work...if I am not satisfied with your explanation, summary dismissal for serious misconduct may result..."

[34] On 26 March Ms D received a medical certificate stating that Mr A was unfit for work for six days from 23 March. This was followed on 28 March by a letter of resignation.

[35] Mr A told me that he had received no support after the first warning and did not have any confidence that the next meeting would have any positive outcome. He no longer felt the situation could be turned around. He said he made a concerted effort after 5 March but felt that nothing was going to do any good. He said he was struggling to cope with the stress of his work situation on top of his health problems. He felt he had no choice but to leave.

Determination

[36] Although I consider that Mr A must take responsibility for his outburst on 22 March (and will discuss this further below) I accept that the situation regarding the telephone quote was humiliating for him and that his work environment had become very difficult. The letter of 26 March conveyed the impression that the manager's account of what happened had been unequivocally accepted. Following as it did the unfair second warning it gave Mr A reason to believe that he could no longer have trust and confidence in Ms D to give him a fair hearing.

[37] It was argued for the respondent that Mr A intended to leave all along and sought to manufacture a situation in which he would have a grievance. It was submitted that he could not be said to have been constructively dismissed as a result of the events of 12-28 March when he had a prior plan to leave.

[38] I accept, from what I heard from the individuals to whom he spoke, that Mr A was thinking of leaving as early as 14 March. In his own evidence he acknowledged that he was already considering his legal position as a result of the first warning, which he felt was unfair. He also told me (consistent with the personal email referred to by the respondent) that the news that he was HIV positive had made him think about slowing down for a while and concentrating on his health. However, he said he did not plan to leave work as and when he did.

[39] I am satisfied that, although Mr A was thinking of leaving the job, it was the respondent's conduct between 16 March and 28 March that was the immediate cause of the decision to resign at that time. That conduct was, as set out already, unjustified

and unfair. I am satisfied that the resignation arose as a result of breaches on the part of the respondent.

[40] **I accept that Mr A was constructively dismissed.**

REMEDIES

[41] Notwithstanding my findings so far, I am satisfied that Mr A's conduct contributed to the situation that gave rise to his grievance of constructive dismissal. He undermined Ms D's trust in him and so played his part in the breakdown of their relationship. I am referring here to his initial poor work performance, his disloyal comments to third parties, and his outburst on 22 March (which I accept was distressing for his colleagues.) I set his contributory conduct at 25%.

[42] Mr A seeks three months lost earnings as well as compensation for hurt and humiliation. He told me that he was deeply distressed by the termination of his employment and did not feel able to work for many months afterwards. He went on a sickness benefit from 29 March 2007 until 07 November 2007 and did not make any serious attempts to seek work during that time.

[43] Mr A provided me with a letter from the doctor who placed him on a benefit, an infectious diseases specialist and consultant physician at Auckland City Hospital. His letter stated that Mr A came under his care for an HIV related illness on 22 March 2007 but that this acute illness resolved quickly. The reason he placed Mr A on a sickness benefit was that he believed him to be suffering from a significant adjustment disorder. He identified workplace stress as a precipitant and referred Mr A to his GP for ongoing care in relation to this. I heard nothing from Mr A's GP.

[44] Although this evidence supports a conclusion that the circumstances in which Mr A's employment ended added to his stress at that time, it does not suggest that stress associated with the loss of the job was the primary reason for Mr A's ongoing inability to work. Given the health problems he was already facing, and the fact that he had been thinking of leaving his job anyway, I cannot accept that the circumstances in which his employment ended were the principal reason for his decision to go on a sickness benefit with associated reduction in earnings.

[45] **I am not therefore satisfied that Mr A lost wages as a result of the grievance, and make no order pursuant to s.123(1) (b).**

[46] I accept however that he suffered humiliation, loss of dignity and injury to his feelings. I am satisfied that what was already a difficult time in his life was made worse because he was not able to exit the job in his own time and in an orderly way. I conclude that a reasonable level of compensation would be \$8,000.00 less 25% reduction for contribution by Mr A.

[47] Because the disadvantage grievance forms part of what led to the constructive dismissal, it will not be separately remedied.

[48] **The respondent is therefore ordered to pay to Mr A the sum of \$6,000.00 pursuant to s.123 (1) (c) (i).**

COSTS

[49] This issue is reserved. The parties have a period of 28 days in which to make submissions should they wish the Authority to determine the issue.

Yvonne Oldfield

Member of the Employment Relations Authority