

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 187/08  
5117862

BETWEEN                      KEITH ANDREWS  
Applicant

AND                              NYALABERRY LIMITED  
TRADING AS KERIKERI  
MITRE 10  
Respondent

Member of Authority:      Robin Arthur

Representatives:            Leeann de Vries for Applicant  
Richard Mark for Respondent

Investigation Meeting:      15 May 2008 at Whangarei

Determination:              23 May 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The Applicant worked as a salesperson in the Respondent's Kerikeri store for more than five years. He says his resignation given on 11 June 2007 was really a constructive dismissal following a number of actions of the Respondent unjustifiably disadvantaging him. He seeks two weeks' pay in lieu of notice. He says this is due because the Respondent's managing director said he need not work out the notice period. He also seeks compensation for distress and costs.

[2]     The Respondent says the Applicant resigned voluntarily and agreed not to work out his notice. It says both parties understood there would be no pay in lieu for that period. It denies constructively dismissing the Applicant by breaching his terms of employment in any way sufficiently serious to cause him to resign. It also denies there was any unjustified disadvantage to the Applicant but says that even if there

were, some of the issues raised by the Applicant are well outside the statutory period for raising a personal grievance.

### **The law**

[3] The Applicant's claim is in relation to what is often described as 'the third category' of constructive dismissal, alleging that his resignation was not freely made but was a response to one or more breaches of duty by his employer under his terms of employment: *Auckland Shop Employees IUW v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 at 375, ERNZ Sel Cas 136 at 140 (CA).

[4] The Court of Appeal in the *Woolworths* case adopted this description of the duty being breached and how to identify it in such cases (citations omitted):

*" ... it is clearly established that there is implied in a contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.*

*... To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract; the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.*

*... The conduct of the parties has to be looked at as a whole and its cumulative impact assessed. ...*

*... We regard this implied term as one of great importance in good industrial relations."*

[5] To assess whether an apparent resignation amounts to an actual constructive dismissal in a case of this type, the Authority considers whether:

- (i) the resignation was caused by anything that the employer did, and
- (ii) what the employer did was a breach of duty under the employment agreement, and
- (iii) if there were a breach, was it sufficiently serious to make it reasonably foreseeable that there was a substantial risk that Applicant would resign?

[6] In making this inquiry the Authority also bears in mind the following caution from Judge Williamson in *Wellington Clerical Workers IUW v Greenwich* [1983] ACJ 975, ERNZ Sel Cas 95 at 104:

*“It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the borderline which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify termination of the employment relationship.”*

### **The investigation**

[7] Written witness statements were provided by the Respondent’s majority shareholder and managing director, Lance Richards and its office manager Rowena Austin.

[8] Attached to the Applicant’s statement of problem was a copy of handwritten notes written soon after his resignation. Those notes set out the substance of his case, along with his advocate’s letter raising the personal grievance and copies of other correspondence between the parties.

[9] At the investigation meeting the Applicant gave affirmed oral evidence and Mr Richards gave additional sworn oral evidence. I had earlier excused Ms Austin from attending the meeting, intending to interview her by telephone conference if needed, but found that all relevant points were covered sufficiently by Mr Richards’ evidence.

[10] The representatives had the opportunity to ask additional questions and provided closing arguments at the meeting.

### **The issues**

[11] The issues for resolution are:

- (i) whether the Applicant’s resignation was forced by actions which were breaches of duty by the Respondent; and
- (ii) if the Applicant was not constructively dismissed, was he nevertheless disadvantaged by any of those actions, and if so, whether any grievance on those actions had been raised within the statutory period; and
- (iii) if there were any unjustified dismissal or disadvantage, what remedies are due to the Applicant, after considering his obligation to mitigate any loss

and any reduction for any blameworthy contribution he may have made to the circumstances of any grievance established; and

- (iv) whether the Applicant and the Respondent agreed that he need not work out his notice and, if so, whether he is entitled to two weeks pay in lieu of that notice.

**What caused the resignation?**

[12] The Applicant's evidence – particularly notes he wrote on 11 June 2007 – identified four actions of the Respondent as amounting to breaches of duty and leading him to resign. These were (i) changes of roster in May and August 2006; (ii) querying of a leave application in May 2006; (iii) exclusion from staff meetings; and (iv) querying of time off for treatment of an injury.

[13] Each action is now considered as to whether it amounted to an unjustified action by the Respondent or otherwise was a breach of the Respondent's duties to the Applicant that was so serious that the risk of the Applicant resigning was substantial and reasonably foreseeable.

**Did the employer breach its duties?**

*(i) Changes of roster in 2006*

[14] In May and August 2006 the Applicant was asked to change his existing hours of work. The May change was part of reorganising the roster following the resignation of another worker. The August change was to accommodate the employment of another worker.

[15] The Applicant's employment agreement provided for a minimum of 22 hours a week and included a clause allowing for changes of duty and hours after consultation with him.

[16] It is clear from correspondence exchanged between the Applicant and Mr Richards at the time that, while the Applicant was not happy with having to make

changes, those changes followed discussion between the parties so that the Applicant was properly consulted and that he, albeit reluctantly, agreed to the changes.

[17] There is no evidence that the Applicant was treated less advantageously than any other staff member in changes to the roster.

[18] I find the actions of the Respondent in changing the Applicant's roster in 2006 did not amount to a breach of duty or an unjustified disadvantage to him.

*(ii) Querying of a leave application*

[19] Around May 2006 Mr Richards told the Applicant that some leave he had sought could not be granted. The Applicant told Mr Richards that he had submitted a leave form some six weeks earlier and it had already been approved. After checking Mr Richards accepted that the leave had already been granted and the Applicant took the leave as planned.

[20] There was clearly some tension with Mr Richards over what days were taken by the Applicant as leave. The Applicant was asked not to take leave only on Sundays and was asked to clear leave requests with either Mr Richards or Ms Austin who controlled the roster rather than with another manager. Neither request was unreasonable.

[21] I find Mr Richards' actions in mistakenly querying the Applicant's pre-approved leave on one occasion did not amount to a breach of duty or an unjustified disadvantage to him.

*(iii) Exclusion from staff meetings*

[22] I accept the Applicant's evidence that he was told by Ms Austin that "*there was no need for me to attend [staff] meetings*". This was despite a notice in the workplace that "*requested that all staff attend*". The Applicant suggests this amounted to some disadvantage to him because he did not see subsequent minutes of those meetings and missed out on both information and an opportunity to informally socialise with other staff.

[23] Mr Richards' evidence was that few if any of the part-time staff attended those meetings, which were paid, but that the Applicant had attended some and was not excluded or prevented from attending them if he wished to do so.

[24] The Applicant agreed that he had not indicated that he would prefer to attend staff meetings and confirmed that he was never told he would not be paid if he did attend them. It was open for him to have said he would like to come along even if Ms Austin thought he did not "need" to do so. On that basis I find Ms Austin's actions did not amount to a breach of duty or an unjustified disadvantage to the Applicant.

*(iv) querying time off for injury treatment*

[25] This is the event – which occurred on 8 June 2007 – that is the strongest of the Applicant's claims of disadvantage and breaches of duty. It occurred on a Friday and the Applicant resigned on the following Monday. It was also well within time for the grievance subsequently raised by the Applicant.

[26] The background is that the Applicant had suffered a work injury in November 2006. He hurt his back helping another staff member lift a heavy item onto a shelf. An ACC claim was submitted through his General Practitioner and he was referred to an osteopath. The Applicant gave the ACC form to Ms Austin.

[27] In May 2007 the Applicant complained to his GP about continuing pain and the GP, noting that the Applicant was still covered by ACC for the injury, referred him to a physiotherapist for further treatment.

[28] The Applicant attended two or three treatment sessions outside working hours. However early in the week beginning 3 June the Applicant made a further appointment for Friday, 8 June. He says the only appointment times available were during his working hours and he booked an appointment for 12.10pm.

[29] The physiotherapist's premises were about five minutes walk away from the workplace and the Applicant expected another staff member would be able to cover his absence.

[30] The Applicant did not tell his supervisor in advance of the appointment date that he expected to be away from work for up to an hour on Friday 8 June to attend the physiotherapy appointment.

[31] On the morning of 8 June he told his supervisor that he would be going to an appointment. The supervisor asked if the Applicant was going during his lunch break. When the Applicant replied that he was not, the supervisor asked if he intended making the time up and the Applicant replied that he had not intended to do so.

[32] The supervisor then went to see Mr Richards who came and spoke with the Applicant shortly before he left for his appointment. Mr Richards asked for more information about the injury. When the Applicant advised that he had given the original ACC form to Ms Austin, Mr Richards questioned whether the Applicant's current treatment was that work injury or some other injury that had occurred meanwhile. Mr Richards also outlined his view of how the system of ACC cover operates. These comments included telling the Applicant that he should claim the time taken for attending the physiotherapy appointment from ACC rather than as wages and that each time the Applicant went for treatment, ACC would charge the Respondent in addition to the levies it already paid.

[33] In response to a question during the investigation Mr Richards said he was concerned that the Applicant had not notified the company in advance of the day of the appointment and that his unexpected absence for an hour "*affects my sales*".

[34] Before speaking with the Applicant Mr Richards had contacted an industry organisation and says he was advised that, as a part-time employee, the Applicant should make any appointments for treatment outside working hours.

[35] It is clear that at least some of what Mr Richards said to the Applicant about the position with ACC cover and costs was inaccurate or overstated. The company might face some additional costs in relation to total claims for work injuries of its employees but would not be liable for the fees of each individual osteopathy and physiotherapy treatment session on the Applicant's work injury. Neither was there a

requirement that the Applicant use his own time to attend treatment; rather that was a matter that he and the Applicant could have discussed.

[36] Also, the notion that the Applicant should apply to ACC for earnings-related compensation for an hour's wages lost by attending a physiotherapy session may be technically correct (see definition of "incapacity" at s6 of the Injury Prevention Rehabilitation and Compensation Act 2001), but it is somewhat fanciful. Mr Richards had not considered the more realistic prospect that the Applicant might be able to use some of his sick leave entitlement to avoid losing wages for attending physiotherapy appointments.

[37] Mr Richards' comments in his 8 June conversation with the Applicant ran the real risk of being likely to mislead or deceive the Applicant and therefore were not, I find, in good faith as defined in s4 of the Act. Neither were they consistent with the implied obligation of trust and confidence on the Respondent in its dealings with him.

[38] In that respect I note too that the emphasis in Mr Richards' conversation with the Applicant that day was to query the veracity of his injury. There was no evidence that Mr Richards inquired as to whether the Applicant was up to working or needed any other assistance for what was, as accepted by ACC, an injury that occurred in the Respondent's workplace. Neither does he appear to have expressed any sympathy for the Applicant's ongoing discomfort. The only action from a health and safety perspective following the original injury had been what Mr Richards told me was a "*self-policed*" arrangement that the Applicant do no further heavy lifting.

[39] In the circumstances outlined above I find that the Respondent's actions in querying the Applicant's physiotherapy appointment amounted to a breach of duties of good faith, trust, confidence and fair dealing.

### **Foreseeability of resignation**

[40] Having established a breach of duty by the Respondent, I now turn to the question of whether this was something that the Applicant could, sensibly and reasonably, have put up with or whether it was sufficiently serious to make it reasonably foreseeable that there was a substantial risk that Applicant would resign

[41] The Applicant had previously, on matters such as changes to his roster, been able to clearly express any concerns he had. In light of the Applicant's previously robust approach the Respondent could not reasonably foresee that its concerns about the Applicant using work time for physiotherapy appointments would cause him to resign. Neither was it a sufficiently serious breach to cause the resignation. Rather it was, in the description given by Judge Williamson cited earlier, "*inconsiderate conduct causing some unhappiness or resentment to the employee*". It was not conduct showing an intention to repudiate the employment relationship or to not be bound by the terms of the Applicant's employment agreement.

[42] Accordingly I find that the Applicant was not constructively dismissed as a result of breaches of duty by the Respondent.

### **Unjustified disadvantage**

[43] How the Respondent dealt with news of the Applicant's work time physiotherapy appointment on 8 June was, as described above, to his disadvantage. The question now turns to whether that disadvantage was unjustified, and, if so, what remedy, if any, is required after considering any contribution by the Applicant.

[44] The question of justification is, under s103A of the Act, whether what the Respondent did – through Mr Richards' actions – was what a fair and reasonable employer would have done in all the circumstances?

[45] I consider that a fair and reasonable employer would have made further inquiries of the reasons for the Applicant's appointment and considered whether further steps were needed to accommodate his needs because of the ongoing effects of the work injury. To that extent the Respondent's actions were not justified and the Applicant suffered a disadvantage that was unjustified.

[46] The Applicant has a personal grievance but I consider, under s124 of the Act, that no remedy is required because of the extent of his contribution to the situation. He knew about the appointment several days in advance of it and could easily have let his employer know so that staff cover for his brief absence could have been arranged.

It would also have been an opportunity to sort out whether he would be paid for that time or not. To inform his employer of the appointment was part of the Applicant's own obligations of good faith, trust and confidence. His failure to do so is blameworthy conduct sufficient to extinguish the modest amount of compensation he would otherwise have received for any distress caused by the Respondent's actions on this particular event.

## **Was notice forgone and pay in lieu agreed?**

[47] The Applicant hand delivered a resignation letter to Mr Richards on Monday, 11 June 2007. The letter referred to "*the necessary 2 weeks notice*".

[48] It was not a work day for the Applicant so after handing over the letter he left the premises. Mr Richards, having quickly opened and read the letter, followed the Applicant out and called him back.

[49] Mr Richards says he then asked the Applicant whether he wanted to work out the period of notice. He says the Applicant "*seemed to be ambivalent*" about working out the notice so Mr Richards said he was prepared to waive the requirement to work out the notice period.

[50] The Applicant made notes about this conversation shortly after returning home that day. Mr Richards accepts as accurate the Applicant's note that he said something along the lines of "*you can leave now if you like*" but Mr Richards denies saying: "*I would like you to finish now*".

[51] The Applicant's note states that Mr Richards last comment to him was "*I'll get [Ms Austin] to make up your pay to Saturday*" and asking the Applicant what time he worked until on that day.

[52] Mr Richards now suggests that reference to making up the Applicant's final pay to that previous Saturday would have made clear to the Applicant that he would not be paid for the two week notice period.

[53] I do not agree. There is no reason to doubt that the Applicant intended working the two week notice period and he did not initiate any discussion about finishing earlier. That notion was suggested by Mr Richards. I consider it more likely than not that the Applicant was aware that the clause in his employment agreement stating the requirement for him to give two weeks' notice also included a discretion for the employer to pay "*wages in lieu of some or all of this notice period*". I also find it more likely than not that the Applicant took Mr Richards to be exercising that discretion to pay out his notice period by saying he could "*leave now*". That explains his ready acquiescence to not working out the notice.

### **Determination**

[54] For the reasons given I find that the Applicant is entitled to an order for the two weeks pay in lieu of notice. The Respondent is to pay the Applicant that amount within 14 days of the date of this determination.

### **Costs**

[55] The parties are encouraged to agree any costs issue. In the event that they are not able to do so, the Applicant may, within 28 days of the date of this determination lodge and serve an application for the Authority to determine costs. The Respondent will have 14 days to reply to any such application.

Robin Arthur  
Member of the Employment Relations Authority