

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 325/08
5112817

BETWEEN

CHRISTOPHER JAMES
CAUSER
Applicant

AND

GLEESON & COX
TRANSPORT LIMITED
Respondent

Member of Authority: Marija Urlich

Representatives: In person, for Applicant
Eddie Mann, for Respondent

Investigation Meeting: 6 August 2008

Further information received: 15 August, 3 September 2008

Determination: 16 September 2008

DETERMINATION OF THE AUTHORITY

[1] Mr Causer was employed by Gleeson & Cox as a yard supervisor from 30 October 2007 until his resignation four weeks later. During his employment he was based in the "South Yard", one of four yards operated by Gleeson & Cox in Auckland. The yards supply and distribute building and landscaping materials.

[2] Mr Causer reported to Michael Forde, the yard manager, who directed his induction and training. Some of that training was carried out in yards other than the South Yard and was provided by other yard supervisors. Mr Forde conducted a performance review of Mr Causer's work in the third week of his employment. This was in line with the parties' agreement that Mr Causer's employment was subject to a probationary period. The review was critical of Mr Causer's performance and Mr Forde sought his improvement in specific areas.

[3] Shortly after the performance review Mr Causer went to senior managers at Gleeson & Cox and complained that Mr Forde was bullying him and treating him unfairly. Mr Causer resigned the following day.

[4] Mr Causer says his resignation amounts to an unjustifiable constructive dismissal. He seeks lost wages, compensation and costs.

[5] To determine these claims I must answer the following questions¹:

- Did Mr Causer resign as a consequence of a breach of duty by Gleeson & Cox? and
- If so, was that breach sufficiently serious as to make Mr Causer's resignation reasonably foreseeable?

[6] If these questions are answered in favour of Mr Causer then I will consider his claim for remedies.

Did Mr Causer resign as a consequence of a breach of duty by Gleeson & Cox?

[7] Mr Causer wrote to Mr Forde on 20 November 2007 confirming his verbal resignation earlier that day:

Given the unpleasant situation that has developed and my last ditch efforts to try and find some sort of resolution by dealing with someone higher up in the company being completely unsuccessful it has become clear that the situation has become untenable.

It is with much regret that I am forced to resign from a job that I was enjoying.

[8] The resignation letter reveals two reasons for Mr Causer's resignation; the first that the workplace had become *unpleasant* and the second that his attempts to rectify the situation had failed.

¹ *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd* [1985] ACJ 963

(i) the unpleasant situation

[9] Mr Causer kept a diary during his employment with Gleeson & Cox. He recorded the following incidents which he describes as bullying behaviour making his position untenable:

- 1 November 2007: Mr Causer's first contact with Mr Forde following the commencement of his employment. He records Mr Forde *growled* at him because he had not diverted the office telephone and spoke with him in a way which was not complimentary or respectful;
- 8 November 2007: Mr Causer records that Mr Forde told him to order all office supplies through Mr Forde and the following week told him all office supplies orders should go through head office and that he (Mr Causer) *should have known*;
- 12 November 2007: Mr Forde reprimands Mr Causer for letting a yard employee make a delivery that Mr Forde had requested earlier in the day;
- Mr Forde spoke with Mr Causer about cash going missing from the South Yard on a day when Mr Causer had been at the North Shore Yard;
- Mr Forde asked Mr Causer to put through an order for a new product which did not appear on the product ordering drop down menu;
- Mr Forde reprimanded Mr Causer for using open cheques when this was the system used in the North Shore Yard;
- Mr Forde reprimanded Mr Causer for arriving at the North Shore Yard late when he had arrived at work, at the South Yard, at his usual start time;
- Mr Forde told Mr Causer he was taking a long time to learn things and insulted him by comparing him with an employee with a learning disability; and
- Mr Forde criticised Mr Causer's narrative box entries.

[10] Mr Causer said the consequence of Mr Forde's conduct was that he became very stressed and experienced headaches during the final days of his employment. He did not raise these concerns with Mr Forde.

[11] Mr Forde denies that he spoke to Mr Causer in an abusive manner. He denies that he deliberately tried to *set up* Mr Causer. He said he put a lot of effort into Mr Causer's training and was always available to help. He said when Mr Causer advised of his resignation he asked him to reconsider his decision to resign.

[12] Mr Forde said he had serious issues with Mr Causer's work. These were formally drawn to Mr Causer's attention on Friday 16 November 2007 during a performance review. Mr Forde said the issues had been raised with Mr Causer as they arose. This is consistent with Mr Causer's evidence.

[13] Mr Forde and Mr Causer agreed the following specific performance issues were raised during that meeting:

- (i) requirement for detailed narrative for trade orders;
- (ii) cash sales procedure must be followed;
- (iii) importance of identifying correct weights and measures on sales dockets;
- (iv) insufficient cash sales narrative;
- (v) failure to complete yard tasks within allocated time; and
- (vi) two incidents of late arrival to required place of work without advice as to whereabouts.

[14] More generally, Mr Forde raised a concern that Mr Causer was argumentative and challenging about existing systems. Mr Forde wrote to Mr Causer summarising the meeting in which Mr Forde provides a commitment to working though the issues and puts Mr Causer on notice, given he was on a trial period, if his performance in the identified areas did not improve then his employment could be in jeopardy. Mr Causer had not received this letter prior to his resignation.

[15] The Saturday after the performance review Mr Causer worked at the North Shore yard. This shift was without incident. The following Monday Mr Forde queried a docket issued by Mr Causer and accepted his explanation. Mr Causer was not happy that the query had been raised in the first place.

(ii) last ditch efforts

[16] After the docket incident, at about 12pm, Mr Causer telephoned James Gleeson, the owner of the business to say he was having difficulties with his manager, Mr Forde. Mr Gleeson said he would refer the matter on. About an hour later Mr Causer received a telephone call from Mark Boughtwood, the respondent's CEO, who said he would meet him at 3pm that day. Mr Causer said he told both Mr Gleeson and Mr Boughtwood that he wanted a confidential discussion with them because Mr Forde was a bully.

[17] I have received a sworn affidavit from Mr Boughtwood. Mr Boughtwood telephoned Mr Forde and asked what was going on with Mr Causer. Mr Forde said he was going around the yards with a newly appointed yard assistant manager and would meet with Mr Causer.

[18] Mr Forde met with Mr Causer in the South Yard. The yard assistant manager was also present. Mr Forde asked Mr Causer if there were any issues in the yard. Mr Causer said he did not respond because he did not know if Mr Forde was aware of his telephone calls to Mr Gleeson and Mr Boughtwood. Mr Forde then said he would spend the next week sitting in the desk behind Mr Causer in the South Yard.

[19] At 5.15pm that evening Mr Causer went to see Mr Boughtwood. He went through his concerns about Mr Forde's conduct. He told him he thought he was doing his job well but that Mr Forde was *riding* him. He said he felt stressed and was not sleeping well at night. They had a short conversation.

[20] Mr Causer then gave Mr Boughtwood the South Yard keys and said he was not sure what time he would arrive at work the next day. He asked Mr Boughtwood to arrange someone else to open the yard.

[21] Mr Causer did not return to work. He resigned the following day.

(iii) finding

[22] The Court of Appeal discussed resignations consequent to breaches of duty in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* [1994] 1 ERNZ 168, at page 172:

In such a case as this we consider that 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 the 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.

[23] I have considered the evidence carefully and conclude Mr Causer did not resign as a consequence of breaches of duty on the part of Gleeson & Cox. This is because I am not satisfied any breach of duty occurred. I am not satisfied that the close monitoring of Mr Causer's work amounted to a breach of duty particularly given that monitoring occurred during a probationary period. I am satisfied that Mr Forde had a reasonable basis to raise issues with Mr Causer in the performance review in the manner described. I do not accept that Mr Forde spoke to Mr Causer unfairly or in a derogatory manner. He may have spoken gruffly and to the point but in these circumstances this does not amount to a breach of duty.

[24] The strongest aspect of Mr Causer's claim is that his confidential complaint to senior managers was unfairly disclosed to Mr Forde. However, there is no clear evidence that any confidence was breached and that Mr Causer was aware of this breach. When Mr Forde arrived at the South Yard with the new assistant yard manager Mr Causer did not tell Mr Forde if there was anything wrong because he did not know if his confidence had been breached. Mr Causer did not raise this issue with Mr Boughtwood during their discussion the evening before he resigned.

[25] If I am wrong and the conduct complained of amounts to breaches of duty I am not satisfied that those breaches were so serious as to give rise to a substantial risk of resignation. This is because Mr Causer's meeting with Mr Boughtwood on the evening of 19 November 2008 was the first time he had raised his concerns with Gleeson & Cox, he did not tell Mr Boughtwood he was considering resigning and

prior to resigning he had not yet received a response to his concerns. Gleeson & Cox had not had an opportunity to address Mr Causer's concerns. Mr Causer acted precipitately.

Costs

[26] Costs are reserved. Mr Mann may file a memorandum within 14 days of the date of this determination. Mr Causer may file any reply within a further 14 days.

Marija Urlich

Member of the Employment Relations Authority