

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 235
5431758

BETWEEN NICHOLAS DOLLING
Applicant

AND TE RAPA WHOLESale
CARS 2009 LIMITED
Respondent

Member of Authority: P R Stapp

Representatives: John Dewar, Advocate for Applicant
Simon Scott, Counsel for Respondent

Investigation Meeting: 10 April 2014 at Hamilton

Submissions Received by: 9 May 2014

Date of Determination: 16 June 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This employment relationship problem is about the credibility of Mr Nicholas Dolling and the witnesses for Te Rapa Wholesale Cars 2009 Limited (Te Rapa Wholesale Cars): Mr Grant Wilson, managing director (Mr Wilson), Mr Aaron Mahon, sales person (a previous employee), and Cory Wilson, Mr Wilson's son. Mr Cory Wilson did submit a statement of evidence for the Authority's investigation meeting, but did not turn up to address it because of work commitments. The credibility matter relates to the comments that Messrs Dolling, Grant Wilson and Mahon made during Mr Dolling's employment at Te Rapa Wholesale Cars, and Mr Dolling's reasons for resigning from his employment on 13 August 2013.

[2] Mr Dolling resigned after eight weeks work at Te Rapa and after an inter-personal matter came about with a co-worker (Mr Aaron Mahon), when he claims that

in the course of the discussions leading up to 13 August he was demoted by Mr Wilson from his position as the business manager/sales manager to the role of sales person only and Mr Wilson did not investigate the problem between him and Mr Mahon and had no process to deal with it. Mr Dolling says that consequently he left humiliated, ostracised and alienated from his employment.

[3] Te Rapa Wholesale Cars 2009 Limited denies all Mr Dolling's claims.

The Issues

[4] There are a number of factual issues and the relevant issues will be disposed of by me during the course of my outline of the facts. The main issue is whether or not Mr Dolling's resignation is a constructive dismissal relating to a serious breach by the employer in regard to Mr Dolling's employment and whether the resignation was reasonably foreseeable.

[5] If Mr Dolling is successful he has claimed lost wages from 14 August 2013, compensation for hurt and humiliation in the sum of \$20,000 and costs. He also sought a penalty against Te Rapa Wholesale Cars for failing to have a written employment agreement. This claim cannot be taken any further because the action has not been brought by a labour inspector (under s 64 (4) of the Employment Relations Act 2000 (the Act)). It was accepted that the claim for the penalty cannot proceed.

[6] In the course of his evidence being presented during the Authority's investigation, Mr Dolling also made a claim for the recovery of wages, commission and holiday pay owing to him at the time of his dismissal. In his written statement of evidence he says he was owed wages and commission totalling \$1,862.00, plus holiday pay. This was the first time that this claim was made and the respondent put on notice of the details. The claim was not made in the statement of problem and the personal grievance letter (10 September 2013 and 19 August 2013 respectively), although Mr Dolling did allude to not being paid. Prior to the claim there was no request by Mr Dolling at any time for his wage time and holiday records. However, Te Rapa Wholesale Cars agreed during the Authority's investigation meeting that it had withheld Mr Dolling's final pay over a notice issue, and it agreed to pay Mr Dolling what amounts to be his final pay. Te Rapa Wholesale Cars agreed to pay

\$1,862 owing plus the calculation of holiday pay (8% of the total gross earnings received by Mr Dolling during his employment at Te Rapa Wholesale Cars).

[7] During the Authority's investigation meeting Mr Dolling acknowledged that he was not fit for work from 14 August 2013 for three months, and he had no medical proof of any arrangements that he could work for fewer hours. His claim for lost wages was abandoned during the investigation meeting.

The facts

[8] Mr Dolling commenced his employment at Te Rapa Wholesale Cars 2009 Limited on 17 June 2013. It is conceded and acknowledged that there was no employment agreement in writing between the parties.

[9] It is agreed that Mr Dolling's remuneration and commissions were settled between the parties at the time his employment commenced. Messrs Dolling and Grant Wilson acknowledged there was a document that outlined the remuneration and commission structure, but neither of them produced the document.

[10] Both parties are in dispute over the title of Mr Dolling's role ie sales manager and/or business manager/sales manager. I accept that the generic nature of Mr Dolling's role was as the business manager/sales manager.

[11] The short chronology of events is as follows.

[12] **14 July 2013 to 9 August 2013.** Issues between Mr Dolling and Aaron Mahon start to occur over Mr Dolling allegedly interfering with Mr Mahon's clients.

[13] **Saturday 10 August 2013.** Mr Dolling says he made a complaint about managing Mr Mahon. There were difficulties between the two and there was an altercation in which Mr Wilson had to intervene, and Mr Dolling claims that the matter became an issue about who would have to go. This was adamantly denied by Mr Wilson who says that he wanted both of them to continue working and that to look for a solution he needed to talk to his son first. Mr Wilson acknowledged he said "shut the f... up" to Mr Dolling upon intervening between them. However, he believed that Mr Dolling and Mr Mahon agreed and accepted the situation to work together because they shook hands and had a man hug. After the meeting Mr Dolling continued working and sold a vehicle.

[14] **Sunday 11 August 2013.** This was Mr Dolling's day off. He says that he went into work to collect some of his property. Mr Wilson was at work too, but neither of them approached each other and did not have a discussion. Mr Wilson did observe Mr Dolling take away some of his personal possessions, but thought no more of it at the time.

[15] **Monday 12 August 2013.** Mr Dolling attended work. He says that contact between him and other employees was avoided and he had feelings of being alienated and being ostracised. Later in the day he became sick and went home.

[16] **Tuesday 13 August 2013.** Mr Dolling was still sick. He had a dental appointment that he needed to attend to that had been pre-arranged. He went back to his doctor later in the day and then called into work. He says there was a discussion with Mr Wilson which culminated in him deciding that he had no alternative but to resign over Mr Wilson's decision to alter his terms and conditions of employment, when Mr Wilson re-asserted that his role had changed; that is that he was required to sell cars only. Mr Wilson denied that he had demoted Mr Dolling and says that he had not changed Mr Dolling's role.

[17] Mr Dolling did not return to work. He raised a personal grievance and filed his statement of problem in the Authority. The respondent filed a statement in reply and the parties went to mediation provided by the Ministry of Business Innovation and Employment (MBIE). It falls to the Authority to make a determination.

Determination

[18] Te Rapa Wholesale Cars is a small to medium sized employer where the business is run by the owner (Mr Wilson) on a day to day basis. Mr Wilson was dealing with a problem that involved two of his senior employees, and he approached the matter by intervening in an altercation between them and met with them both, before reasonably deciding to consult his son, a shareholder in the business, before proceeding any further with any other action if needed. There has been no evidence of any decision made by Mr Grant Wilson as to what he was going to do. Mr Wilson believed that a solution had been achieved, although Mr Dolling clearly did not believe that. Given the spontaneous occurrence of Mr Dolling's and Mr Mahon's actions given its resources a fair and reasonable employer could be expected to have a

meeting as Mr Wilson did, and from which Mr Wilson believed there was a solution and I accept that.

[19] I hold that it is more likely than not that Mr Wilson did not change Mr Dolling's role. This is because:

- a. Mr Dolling's remuneration remained the same. His title did not change.
- b. Mr Dolling's terms and conditions of employment did not change despite there being no employment agreement. Mr Dolling acknowledged he never asked Mr Wilson for an agreement in writing once the original appointment to work at Te Rapa had been made.
- c. There are no subsequent changes in writing in regard to Mr Dolling's position, job description and whom he was required to report to.
- d. There was insufficient evidence from both parties as to Mr Dolling's full role, position and responsibilities and duties. As such the evidence from Mr Dolling does not support any change to his role except that Mr Wilson envisaged him having much less to do with Mr Mahon. Given the size of the work place that was entirely reasonable, particularly where there have been no changes to remuneration and duties.
- e. Although Mr Dolling relied on his written notes that he started to take down on Sunday 1 November, I hold that these record his impressions and views of the situation that has to be considered alongside Mr Wilson's adamant denial of changing Mr Dolling's role. Because the notes are more or less contemporaneous they are the best record of the events available. His notes and Mr Wilson's memory about what happened raise the real prospect of a misunderstanding about the situation. That means Mr Dolling has not been able to satisfactorily establish his claim as to a change being made to his role. I hold that his opinion about what happened has likely been influenced by his emotional state at the time since he says he was unwell, upset and got angry, including verbally abusing Mr Mahon. There is no direct evidence that the reason for Mr Dolling's sickness related to any action of the employer given he decided not to call his doctor to give evidence at the Authority's investigation, to establish any medical evidence. Indeed he may well have had genuine feelings of being alienated and being ostracised, but these have to be

considered in the context of how Mr Wilson saw the situation from a different point of view.

- f. Mr Dolling's level of detail of who said what to whom was recalled from his notes. Messrs Grant Wilson and Mahon had to rely on what they remembered and neither of them included the detail in their statements of evidence. Mr Wilson says he also wrote down his version of events at the time and put it generally in his statement of evidence. He could not adequately explain where his notes are now, and could not produce them. They were not offered up by his representative. I hold that what remained was a conflict between Mr Dolling and Mr Wilson about what happened and who said what to whom. Mr Dolling has not been able to establish that his version of the events was fully reliable, because Mr Wilson was always consistent in denying Mr Dolling's claims; particularly that Mr Dolling's role was not unilaterally changed and that Mr Wilson genuinely believed that there had been some agreement on the arrangement for the future between Mr Dolling and Mr Mahon to work with each other, even if it involved having more to do with Mr Wilson directly. Also Mr Wilson intervened in an altercation between Mr Dolling and Mr Mahon. Mr Dolling lost self-control. He admitted he was angry. Mr Wilson truthfully acknowledged that he said "shut the f...up" to Mr Dolling.
- g. Mr Dolling acknowledged he decided to leave on the Tuesday when he informed Mr Wilson that he was resigning without any prior notice. Mr Dolling never put any reasons in writing at the time and he could have easily done so by relying on his notes, but instead has only produced them for the Authority's investigation.
- h. Mr Dolling acknowledged he lost his temper and apologised during the meeting held on Saturday 10 August.
- i. Mr Mahon supported Mr Wilson's evidence that there was no change to his role.
- j. Mr Mahon says that Mr Dolling shook his hand and they had a man hug. Mr Dolling agreed.
- k. Mr Wilson says he needed to consult his son before any action could be taken, but that this was circumvented when he reached his understanding that there

appeared to have been some agreement for Mr Dolling and Mr Mahon to continue to work together.

[20] I also hold that Mr Dolling's resignation was not foreseeable to give rise to a constructive dismissal because:

- a. Mr Dolling decided to resign on the Tuesday without any prior announcement and or communication about what he was going to do beforehand.
- b. Mr Dolling was away from work due to being sick and had a dentist appointment that had been pre-arranged.
- c. Mr Dolling taking home some personal belongings is not necessarily a sign of foreseeable resignation, especially since he returned to work and sold a vehicle.
- d. Mr Dolling never formalised any issue in writing with his employer in regard to his allegations of a change in his role and how he felt. Mr Dolling did express how he felt, but that alone is not enough to give rise to a serious breach making it foreseeable that he would resign, especially when he and Mr Wilson were meeting to talk through the issues.
- e. Mr Wilson had reached a genuine conclusion that there was some sort of solution that Mr Dolling and Mr Mahon had agreed to that involved continuing to work with each other at least from the Saturday. This is supported by the hand shake and man hug and that Mr Dolling sold a vehicle afterwards, I hold.

[21] The fundamental plank of Mr Dolling's claim is that Mr Wilson unilaterally changed his role. Mr Dolling has failed to establish on the balance of probabilities that this happened. He had genuine feelings about his situation at work and relationship with Mr Mahon, but despite the interpersonal problems between Mr Dolling and Mr Mahon in their work, the events on the Saturday involved Mr Wilson embarking on trying to sort it out and genuinely believing there had been a solution, as he was entitled to do. Mr Dolling's resignation followed by his own choice and not linked to any breach by his employer in regard to his terms and conditions and employment.

[22] Mr Dolling's claim is dismissed.

Costs

[23] Costs are reserved.

Leave reserved on wages and holiday pay issue

[24] This matter appears to have been settled as it should have been. For completeness the respondent should consider itself on notice in regard to the shortfall in wages and holiday pay claim if the sums are not paid. If there is any issue arising in regard to this matter, I reserve leave for either party to return to the Authority for any orders accordingly.

P R Stapp
Member of the Employment Relations Authority