

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 353
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BETWEEN	JAMES ELLIS, SHARON ZER and TATIANA STAVROVSKA Applicants
A N D	HYGIENE FOUNDATION LIMITED Respondent

Member of Authority: James Crichton

Representatives: Applicants in person
No appearance for Respondent

Investigation Meeting: On the papers

Date of Determination: 9 August 2013

SECOND DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In its determination between these parties dated 5 July 2013 issued as [2013] NZERA Auckland 285, the Authority dealt with the wages claims in respect of the three applicants directing that wages arrears owed to each of them by their former employer, Hygiene Foundation Limited (Hygiene Foundation), be paid.

[2] The statements of problem filed by the applicants all raised constructive dismissal allegations as well. Because Hygiene Foundation did not attend the investigation meeting, the Authority determined to deal at first instance only with the wages issue because the ample documentary evidence supported the conclusion that Hygiene Foundation acknowledged wages were due and owing and, in any event, that

view of matters was amply supported by the executed employment agreements and other company documentation.

[3] The position is otherwise with the constructive dismissal allegation where the only evidence available to the Authority was that offered by the applicants. In an effort to have Hygiene Foundation address the issue, the Authority gave the respondent employer a further opportunity to engage with it; and a specific request was made for Hygiene Foundation to indicate its willingness to engage with the Authority even by telephone or email. No response whatever was received from Hygiene Foundation and on that footing, the Authority is satisfied that it can proceed to make determinations on the claims before it, Hygiene Foundation having been given ample opportunity to engage with the Authority but having simply failed to do so.

[4] Each of the applicants was employed by Hygiene Foundation in the role styled Regional Manager. They all started their employment on 26 November 2012 and they had all resigned within a month of that date, each alleging that they resigned under duress.

[5] The three elements of that duress were respectively the signal failure to pay the wages due and owing during the employment, various threats made by officers of Hygiene Foundation against each of the applicants, and the contention that Hygiene Foundation deliberately misled the applicants in respect of the nature of the employment.

[6] The first issue, the failure to pay wages, has already been the subject of the Authority's first determination in this matter. As a matter of fact, the evidence is plain that each of the applicants was entitled to receive payment for the services that they provided and yet no payment was forthcoming. Furthermore, the evidence before the Authority supports the conclusion that Hygiene Foundation accepted that each of the applicants was providing work, accepted that wages were due and owing, but simply failed to pay those wages.

[7] The second issue is the way in which each of the applicants was treated by Hygiene Foundation. Mr Ellis, for instance, referred to being threatened with dismissal for complaining about the shoddy way in which Hygiene Foundation was operated. In his evidence to the Authority, he referred to the last two weeks of the

employment as being a “nightmare” saying that he and the other two applicants were “*treated like garbage*” and were “*constantly being threatened with the loss of our jobs*”.

[8] Clearly, this evidence from Mr Ellis does not go so far as to identify one of the traditional three legs of a constructive dismissal, namely the statement from the employer that the employee must resign or face dismissal, but the Authority is satisfied that that evidence from Mr Ellis of general threats about dismissal is, when considered in conjunction with the failure to pay wages and the misleading of employees, a proper basis to conclude that, in effect, the behaviour of Hygiene Foundation was so extreme as to constitute a breach of the employer’s duty such as to invite a reasonable independent observer to conclude that the resignation of the employee was a foreseeable consequence.

[9] Other evidence from Ms Stavrovska on the threats made against her referred to a meeting that all of the applicants attended with management of Hygiene Foundation on 16 December 2012. Ms Stavrovska said that as a consequence of that meeting, she felt threatened and bullied by the employer and genuinely afraid for her personal security and wellbeing.

[10] Similarly, Ms Zer also referred to the 16 December 2012 meeting and said that she personally was shouted at as if she were a child in childcare. Ms Zer said that much of the invective seemed directed at her personally with one of the management team of Hygiene Foundation saying quite explicitly to her that that manager did not like Ms Zer. This was in the context of Ms Zer seeing a potential client on 15 December 2012 where, on instruction, she had offered free membership as an introductory offer to the services allegedly provided by Hygiene Foundation and then had to deal with complaints from her client when Hygiene Foundation promptly invoiced the client for the services.

[11] The third and final aspect is that each of the applicants referred to being misled about the nature of the work that they were required to perform and indeed about the nature of the services to be sold by them on behalf of Hygiene Foundation. In effect, each of them was given a target of selling contracts and each said the target was simply unrealistic. Worse than that, none of them were given the tools to perform the job and each of them was expected to “*solicit clients based on false promises of*

services that Hygiene Foundation was not legally certified to do nor was competent to provide”.

[12] Of particular concern to all the applicants was that each of them was required to go guarantor for equipment leased in the name of Hygiene Foundation from a company called Flexirent.

[13] The Authority notes that all three applicants engaged with Flexirent and that company very honourably immediately removed the guarantor obligations for the applicants once the applicant’s circumstances had been explained to it.

[14] All of the applicants resigned their employment around 20 December 2012. The resignation letters have been provided to the Authority. Two out of three of those letters make clear that the resignation is forced on the writer by the unsatisfactory nature of the relationship. For the avoidance of doubt, the Authority is satisfied that in each case, the resignation was not a voluntary one but was a resignation forced on the applicants by the various breaches of duty committed by Hygiene Foundation which, taken in their totality, would cause a reasonable independent person to regard the resignations of the applicants as reasonably foreseeable consequences of Hygiene Foundation’s breaches of its duty as employer.

Determination

[15] The Authority is satisfied that each of the applicants has suffered a personal grievance by reason of having been constructively unjustifiably dismissed. The Authority is satisfied that Hygiene Foundation has committed three significant breaches of its duty as employer in respect of each of the three applicants such that a proper consideration of the totality of those breaches is that a reasonable person would conclude that it was reasonably foreseeable that resignations would follow from such treatment and/or behaviour.

[16] The Authority is satisfied that none of the applicants has contributed in any way to the circumstances giving rise to their personal grievance: s.124 of the Employment Relations Act 2000 (the Act) applied.

[17] To remedy the grievances that the Authority has found, the following remedies are to be made available by Hygiene Foundation to each of the applicants:

- (a) Compensation under s.123(1)(c)(i) of the Act in the sum of \$5,000;
- (b) A contribution to lost wages in the sum of \$15,000 gross.

[18] The evidence that the Authority heard from each of the applicants in respect of the humiliation, loss of dignity and injury to feelings was graphic indeed. None of the applicants was able to find work after the termination of their employment with Hygiene Foundation and so each is entitled to be reimbursed for the remuneration they lost as a consequence of the dismissal: s.128(1) of the Act applied.

James Crichton
Member of the Employment Relations Authority