

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 450/09
5125008**

BETWEEN TIARE KELLEHER
 Applicant

AND WIRI PACIFIC LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: Mark Ryan, Counsel for Applicant
 John Ropati, Counsel for Respondent

Investigation Meeting: 11, 12 & 13 August 2009

Submissions Received: 21 September 2009
 5 October 2009
 22 October 2009

Determination: 14 December 2009

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant claims she has personal grievances for unjustifiable disadvantage and unjustifiable constructive dismissal. She further claims she is owed a ten per cent shareholding. The respondent Wiri Pacific Limited ("Wiri Pacific") denies the applicant's claims and says she became increasingly disruptive at work once her illicit sexual relationship with its managing director Mr Lance Noel Worthington ("Mr Worthington") became widely known. The parties were unable to resolve the problem between them by mediation.

Non-publication

[2] By a memorandum of counsel dated 10 December 2009 the applicant makes application for an order that her name and the names of the "respondent" and "the respondent's wife" be "suppressed". I take the reference to the respondent to be

incorrect and counsel to actually intend Mr Worthington. The Authority is advised by Mr Ropati that the "respondent" and "the respondent's wife" do not seek non-publication orders.

[3] It is necessary to first clear up identities. The respondent is Wiri Pacific and not Mr Worthington. Wiri Pacific does not have a wife but Mr Worthington does. On Mr Ropati's advice, his client Wiri Pacific does not seek any non-publication order. Mrs Worthington does not seek an order either. Therefore the application now before the Authority is considered only in respect of the applicant.

[4] Clause 10(1) of Schedule 2 to the *Employment Relations Act 2000* ("the Act") is as follows:-

10 Power to prohibit publication
(1) The Authority may, in respect of any matter, order that all or any part of any evidence given or pleadings filed or the name of any party or witness or other person not be published, and any such order may be subject to such conditions as the Authority thinks fit.

[5] The order is sought "on the basis that there would be no public interest in the delicate matters that were heard by the Authority being linked to the applicant, respondent and/or the respondent's wife". Further, "the non publication of the names of the parties and their respective witnesses would avoid any embarrassment that may be caused by their respective names being published in the Authority's determination". Finally it is said that it is in the interests of justice that the names of both parties and their respective witnesses not be published in the determination of the Authority.

[6] I conclude that there are no grounds to make the order sought and the application is without merit. **I therefore affirm the principle of open justice by declining to make an order that the applicant's name not be published and the application is refused.** I recognise however that the applicant is entitled to challenge my refusal in the Employment Court. For the sole purpose of preserving that right of challenge, I therefore consider it appropriate to grant an interim non-publication order. **I ORDER THAT THE APPLICANT'S NAME IS NOT TO BE PUBLISHED AND THAT ORDER SHALL REMAIN IN EFFECT FOR 28 DAYS FROM**

THE DATE OF THIS DETERMINATION. After that 28 day period, the interim non-publication order will lapse UNLESS there is a further order by this Authority or the Employment Court.

The facts

[7] Wiri Pacific is a limited liability company incorporated on 28 April 2004. It trades as a merchant of timber products.

[8] The applicant commenced employment with Wiri Pacific on 25 January 2006 as Export Manager although she was formerly employed by a related company. The terms of the employment were recorded in a written individual employment agreement signed on 3 February 2006 ("the IEA"). The applicant reported to Mr Worthington.

[9] Two of Mr Worthington's adult children were also employed at Wiri Pacific.

[10] The applicant and Mr Worthington commenced an illicit sexual relationship which proceeded over three to four years. Mr Worthington's wife Mrs Raewyn Worthington ("Mrs Worthington") became aware of the illicit sexual relationship and had retained a private investigator to confirm the situation for her. The private investigator had covertly observed the applicant and Mr Worthington together in Western Samoa where they have travelled for advisedly business purposes. The private investigator reported his observations to Mrs Worthington. When Mr Worthington and the applicant returned to New Zealand on 25 February 2008, Mrs Worthington confronted Mr Worthington with what she had learned. Mr Worthington admitted his sexual relationship with the applicant. Mrs Worthington resolved that she no longer desired her husband and she ejected him from the matrimonial home. She had previously placed his personal belongings in his motor vehicle, changed the locks at the house and changed the alarm code.

[11] While at the end of the driveway of the matrimonial home, Mr Worthington telephoned the applicant and informed her that Mrs Worthington knew of their sexual relationship. The Authority finds that the applicant asked whether Mr Worthington

had denied the sexual relationship and when she was told he had not done so, she lamented he ought to have. She enquired whether Mr Worthington needed a bed and he told her that he did not. Mr Worthington then left the matrimonial home in search of motel accommodation.

[12] On 28 February 2008 Mrs Worthington confronted the applicant at Wiri Pacific's premises. Present too was Mr Iona Levi employed by Wiri Pacific in export sales ("Mr Levi"). The Authority finds that Mrs Worthington conducted herself in a calm, dignified and resolute manner as she read out this statement she had earlier prepared, to the applicant:-

[The applicant] your reputation has already preceded you. However one of my flaws - is that I see the good in everyone unless they show me otherwise. I will never forgive you for helping to destroy the happiness and future lives of my children. I curse you. I hope you never know true happiness and I wish that bad luck ill health and poverty follow you to your grave.

[13] When she had read the statement, Mrs Worthington left saying nothing more. Mrs Worthington impressed the Authority as a woman of considerable dignity. Her evidence, corroborated by Mr Levi, that there was no confrontation with the applicant, is accepted. The Authority finds that there was no abuse, no tirade or any confrontation.

[14] The applicant subsequently resigned from her employment with Wiri Pacific leaving this letter dated 7 July 2008 for Mr Worthington:-

Lance

As you know earlier this year I wrote a memorandum to you raising a number of concerns I had in relation to my employment, you failed to address any of my concerns. As a result I instructed a lawyer to formally raise an employment relationship problem, following this you embarked on a course of action that caused me considerable stress and anxiety. In addition your actions have seriously undermined the trust and confidence I have in you as my employer. From the 25th of February 2008 when you told me that as a result of your wife finding out about our affair that it was best that I left your employment, you have followed a course of conduct designed to get me to resign. You have now achieved your purpose, I can no longer work for you, accordingly I give you notice of my resignation from Wiri Pacific Limited. My resignation is effective immediately as I can no longer (sic) able to work in the current work environment.

Regards
[the applicant]

The merits

[15] The applicant claims she has these personal grievances:-

- i) unjustifiable constructive dismissal;
- ii) unjustifiable disadvantage by the actions of Wiri Pacific that led to her resigning from her employment;
- iii) unjustifiable disadvantage by the actions of Wiri Pacific in relation to the issue of a final written warning;
- iv) unjustifiable disadvantage by the actions of Wiri Pacific in that she was subjected to sexual harassment by Wiri Pacific.

These grievances are now discussed in turn and for convenience in reverse order. The claim for shareholding is discussed thereafter.

The sexual harassment unjustifiable disadvantage claim

[16] This personal grievance is explained in her submissions. The applicant says that Mr Worthington invited her to the Allenby Motel in Papatoetoe on 13 March 2008 to talk about work issues amongst other things. She alleges Mr Worthington requested sex from her with the implied threat that if she did not accede to his request then she would lose her job.

[17] The applicant says she raised this grievance in her memorandum to Mr Worthington dated 14 April 2008. Paragraph 4 of that memorandum states this:-

4 A series of telephone calls and attempts were made by you to meet with me - alone, out of office hours. A meeting took place, on the evening of 13 March, for what I made clear was to be a discussion regarding work. During that meeting, at the Allenby Motel, Papatoetoe, the following occurred:

- 1) you explained your personal circumstances, discussed the effect that the discomfort at work was having on yourself and your daughter.*
- 2) You made sexual advances towards me and asked if I would spend the night with you which I rejected.*
- 3) You became angry and once again indicated that I should leave my employ, also citing the discomfort it was causing other un-named people.*

[18] The applicant's evidence to the Authority was that she had made it clear to Mr Worthington when he phoned her on 25 February 2008, that the relationship was over. She says she told him that as far as she was concerned she wanted to keep the relationship work based and professional. She says it was she who ended the sexual relationship with Mr Worthington. She says she had been trying to end the relationship for some months and was not interested in continuing. She says she told Mr Worthington she was not interested in meeting with him unless it was something to do with work. She says he continued to "hit on her" after she had ended the sexual relationship.

[19] The applicant agrees that she met with Mr Worthington at the Allenby Motel on the evening of 13 March 2008. She says he had phoned her and asked her to meet with him at *The Landing* in Onehunga. She says she told him she would only meet if the sole purpose of the meeting was to discuss the work situation. She says that when she arrived at *The Landing* Mr Worthington was on the telephone looking for accommodation. She says Mr Worthington asked her to accompany him to the Allenby Motel because their discussion would be too personal and he wanted privacy to talk about his daughter and family. The applicant says she agreed to follow him to the Allenby Motel for those reasons only.

[20] At the Allenby Motel the applicant says that Mr Worthington asked that their dinner meals be delivered to his motel room. She says that Mr Worthington talked about his daughters and his concern for their mental state. He talked about how his separation from his wife because of the sexual relationship with the applicant had affected his family and his two daughters in particular. The applicant says that Mr Worthington finished his meal before she did and he went to shower. She says he emerged wearing only a towel. She says he asked her to stay the night but she refused. She says he suggested that she either leave her job or work at the Mt Roskill branch or work remotely or take leave without pay. She says he was angry as he made those statements to her. She says Mr Worthington explained that the situation was uncomfortable for everyone. She says she told him she did not see why she should leave her job and that he then said to her she should just leave anyway. At that

point she says she told Mr Worthington she was not interested in meeting him anymore unless it had something to do with work and then she left.

[21] Mr Worthington says that the applicant followed him into the bathroom and watched him as he showered. He says that he then asked her if she wanted to stay the night but she declined because she was going to meet friends downtown for drinks. He denies telling her that she had to leave. He agrees that they both discussed other options for the applicant but in the context that they both accepted the situation was unpleasant for all concerned and also because she had previously indicated she was considering moving to Wellington. He says she said to him that he would find it hard to replace her as a manager. He says that although they did discuss various options the applicant participated fully and voluntarily in that discussion. He says she was non-committal however.

[22] The applicant consistently told the Authority she did not desire any non-work related contact with Mr Worthington and that he kept "hitting on her" and she did not welcome his advances. She says she did not want to be alone with him. She gave evidence she told Mr Worthington many times she was not interested in talking to him unless it was about work.

[23] Mr Worthington says that 13 March 2008 was the applicant's birthday. He says they agreed to meet at *The Landing* in Onehunga because it was her birthday. Mr Worthington also says that at 1.00am that morning the applicant sent pxt messages to his mobile phone of naked women. He produced the company mobile phone records for the applicant's mobile phone to the Authority verifying the transmission of pxt messages from that phone to his. He said that when she was alone with him in his office later that morning the applicant exposed and photographed her vagina on her mobile phone. The applicant told the Authority she had no recall of these events.

[24] The applicant initially told the Authority her sexual relationship with Mr Worthington was confined to sexual intercourse on overseas business trips they took together. On a later day when she was re-examined by her counsel, she revised her earlier evidence and explained she and Mr Worthington had had sexual intercourse at

many places including while away on business trips, at mill visits, motels, hotels and at Mr Worthington's home. My displeasure at that revised evidence would have been obvious to all at the investigation meeting and I reminded the applicant that on three consecutive days she had taken an oath to tell the whole truth.

[25] I formed the view that the applicant's evidence could not be relied on. Having seen and heard Mr Worthington and the applicant I prefer Mr Worthington's evidence wherever it is in conflict with the applicant's.

[26] I therefore find that the applicant was not "hit on" by Mr Worthington for sexual intercourse. I do not accept her evidence that she told Mr Worthington she only wanted business contact with him and that she did not wish to be alone with him.

[27] I find that Mr Worthington asked the applicant if she wanted to stay the night while she watched him shower in the motel room she had followed him to at the Allenby Motel the day of her birthday. I find that there was no implied threat that if she did not accede to his request then she would lose her job.

[28] There is one other allegation related to the claim of sexual harassment. The applicant gives evidence that on 18 March 2008 while she was with her friend and partner, Mr Worthington phoned her to "instigate a meeting out of office hours". Her oral evidence to the Authority was that she was at the Gypsy tea rooms when Mr Worthington called and she told him she was not interested in meeting with him. She says she told him he needed to go sort out his marriage and leave her out of it.

[29] In reply, Mr Worthington presents his mobile phone record to the Authority. Those phone records show calls from Mr Worthington's mobile phone being transmitted via an Australian cellular network. Mr Worthington denies the applicant's evidence and says he was out of New Zealand on the particular date. With the corroborating phone records, I prefer Mr Worthington's denial. I find he did not contact the applicant in the manner she describes on 18 March 2008.

[30] Before leaving this allegation I refer to the applicant's memorandum to Mr Worthington dated 14 April 2008. There she refers to meeting with Mr Worthington at the Allenby Motel on 13 March 2008. Having regard to my findings of the nature of the meeting and the discussion and events that occurred there, I do not regard the applicant's description of events as accurate. Nor do I accept what is alleged therein about contact with Mr Worthington on 18 March 2008 for the reasons I have outlined earlier. Having reached this view of these matters, I do not accept the applicant's memorandum as reliable or accurate.

[31] **I find that the applicant does not have a personal grievance for the pleaded claim of unjustifiable disadvantage for sexual harassment.**

The final written warning unjustifiable disadvantage claim

[32] This claim is explained in the submissions. The applicant submits that the issue to her of a final written warning was in the circumstances substantively unjustified. As well she submits the warning does not advise what the warning is actually for. Finally she says the length of time the warning was to remain in effect cannot be substantively justified.

[33] The warning letter of 24 June 2008 restates the applicant's responses given at a disciplinary meeting she attended with her lawyer and Mr Worthington and Wiri Pacific's lawyer on 19 June 2008. The material advice in the letter is this:-

I am of the view that your conduct is serious misconduct that would justify your dismissal with Pacific. Having said that - a decision had been made to issue you with a final written warning.

The warning will take effect from 23 June 2008 and will remain on your file for 12 months after which time it will not be removed but will be deemed expired. Please note that this warning will form part of your employment history with Wiri Pacific, and may be accessed & reviewed as part of the consideration for decisions regarding your employment with Wiri Pacific including but not limited to recruitment, transfers and promotions.

To clarify matters - as the export manager you are required to report to your managing director. Furthermore under no circumstances are you to drive a company vehicle while under the influence of alcohol.

Please note - if you have a problem with alcohol Wiri Pacific are more than happy to arrange for you to attend counselling to address these issues or give you whatever support you may require to address the issue.

Please be advised that any further breaches may result in disciplinary action up to and including dismissal.

[34] Mr Worthington had written to the applicant by letter dated 9 June 2008 directing her to attend a disciplinary meeting for her to respond to these allegations:-

- 1. You left work on Friday 6 June 2008 at approximately 12.00pm, and did not advise me of your absence;*
- 2. You advised Iona Levi at approximately 3.30 pm on Friday 6 June 2008 that you would not be back at work that day because you had, had too many wines;*
- 3. You then drove your company vehicle to a bar, opposite your work place in Wiri and continued to consume alcohol during working hours;*
- 4. You were then contacted by telephone by myself at approximately 4.30pm on Friday 6 June 2008, and told that you were not to drive the company vehicle due to your intoxicated state;*
- 5. You refused to surrender the keys to the company vehicle when requested to do so. In view of your refusal to surrender the keys a duplicate set of keys was used to drive the car back to the Wiri Pacific yard for safekeeping (and for your own protection);*
- 6. You then went to the Wiri Pacific premises at approximately 6.40pm and removed the company car after being told that you were not to drive the vehicle again;*
- 7. You then drove back to the same bar where you parked the car, and continued consuming alcohol.*

[35] Wiri Pacific advised it did not accept the applicant's responses setting out these matters as its "reasons":-

- i. You did not contact your managing director when instructed to do so;*
- ii. You phoned Iona at approximately 3.30 pm and told him that you would not be coming back to work because you had too many wines;*
- iii. You drove your company car while under the influence of alcohol;*
- iv. You continued to consume alcohol during business hours;*
- v. You disobeyed a clear instruction that you were not to drive the company car while under the influence of alcohol;*
- vi. You refused a clear instruction to surrender the company car and or keys;*
- vii. You then entered Wiri Pacific yard after hours, disabled the alarm system; and then took the company car back to the "garden bar" where you continued to consume alcohol;*
- viii. You then drove the company car home later that night while under the influence;*
- iv. You have provided 4 different explanations to justify your conduct on 6 June 2008.*

[36] I do not agree that this warning was not substantively justified. I have considered the evidence gathered by Wiri Pacific in the course of investigating the applicant's conduct on 6 June 2008. I regard it proved that the applicant left work without authority to drink alcohol from lunchtime that day until late that evening. She had no authority to be absent from work. She then failed to comply with her employer's justified instruction that she not drive her company vehicle and that she hand over her keys. She defied her employer's known instructions to her and retrieved the motor vehicle. In my view it was entirely appropriate and I consider a fair and reasonable employer would have issued the employee a warning for the established conduct if not justifiably dismissed that employee. The applicant was not paid good wages to absent herself from work to drink alcohol.

[37] The starting point as always is the IEA. Clause 21 of the IEA deals with disciplinary procedures. There is this note to the clause:-

Each warning shall state clearly what the Employee has done to cause the warning and what is expected of him/her to avoid further disciplinary action and a reasonable time frame indicated within which they are expected to rectify the fault.

It shall also include the Employees explanation and the reasons why such explanation was not considered satisfactory.

It shall also include what assistance the Employer, as appropriate, will give.

[38] Warnings are not about setting up grounds for eventual dismissal. They are directed at avoiding dismissal. The duty of good faith requires the parties to cooperate with a common purpose to see that the employment is continued. The purpose of a warning to communicate to the employee, consistent with the duty of good faith, that their performance or conduct is not acceptable and must be amended. This means the warning must be explicit and clearly identify the unsatisfactory performance or conduct so that the employee can have no doubt as to exactly what it is they are to improve about their performance or conduct. The warning must be clear about the improvement the employer requires and how that improvement will be measured, monitored or assessed. I assess the warning given to the applicant in terms of these principles.

[39] I agree that the final written warning does not **expressly** state what specifically the warning is for. The findings Wiri Pacific reached in relation to the applicant's conduct are apparently the listed "reasons" for rejecting her responses. I consider the warning is somewhat elliptical in that the unsatisfactory conduct is the stated "reasons".

[40] In terms of clarifying the improvement required, the warning does expressly clarify that as the export manager, the applicant is **required** to report to Mr Worthington. It further adds that under no circumstances was the applicant to drive a company vehicle while under the influence of alcohol. There is nothing unclear about those things. There is even a further counselling element to the warning. It advises the applicant that Wiri Pacific is prepared to arrange counselling for her and offers her whatever support she requires to address any alcohol problems she might have.

[41] Because of the nature of the established misconduct, I agree that Wiri Pacific was entitled and permitted to issue the applicant with a final written warning. That is all the more so given my view that a fair and reasonable employer would have been justified in summarily dismissing the applicant.

[42] The applicant says one year was too long for the final written warning to remain effective. It did not expire until 22 June 2009. I note the IEA does not specify any expiry period for warnings.

[43] I accept that as a matter of law, a warning cannot be relied on forever. I accept that a warning can become "stale" or so historical that it is unfair to have regard to it. I accept too that there is no general rule as to the period of time after which a warning will expire, but each case will depend on its own facts.

[44] I consider that as a matter of principle the more serious the established misconduct, the longer the warning should remain in effect. On that basis then, I conclude that having regard to the serious nature of the applicant's established misconduct and the fact that she held a managerial position of responsibility justified the one year period that the warning was to remain effective.

[45] Accordingly I conclude that Wiri Pacific's decision and how it acted in issuing the final written warning to the applicant, were what a fair and reasonable employer would have done. **I therefore find that the applicant does not have a personal grievance for unjustifiable disadvantage in relation to the final written warning. There will be no formal orders in relation to this claim.**

The resignation as unjustifiable constructive dismissal and unjustifiable disadvantage claims

[46] By letter dated 6 August 2008, the applicant's lawyer advised Wiri Pacific the applicant considered she had been constructively dismissed. The advice needed to add that it was considered that constructive dismissal was unjustifiable. However, I accept these parties understood the allegation was unjustifiable constructive dismissal. The applicant submits that her resignation was not a genuine resignation and was a direct result of the respondent following a course of conduct with a deliberate and dominant purpose of coercing the applicant to resign.

[47] The settled tests for constructive dismissal are:-

- (i) did the employee resign?
- (ii) was the resignation caused by a breach of duty on the part of the employer?
- (iii) if it was, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[48] The applicant did resign. She wrote the letter dated 7 July 2008 to Mr Worthington. But was that resignation caused by a breach of duty?

[49] The applicant raises multiple complaints in support of her allegation of constructive dismissal. She refers to the development of the Wiri Pacific website and alleges she was excluded from input on the website and was not given updates from Mr Worthington or his daughter regarding the website. She does not explain how she was excluded and I am not persuaded of any breach here.

[50] She says that Mr Worthington declined to assist with the Pacifica Festival. I do not understand how this fact translates to a breach of duty to her. She complains that she was chastised for leaving a new staff member alone. I do not understand how this matter constitutes a breach of duty either. Next the applicant says Mr Worthington advised there would be an audit of Wiri Pacific's Mt Roskill branch. She says that the extra scrutiny was unfair to her. She did not explain beyond that bare allegation. I am not persuaded of any breach of duty here either. The applicant then says Mr Worthington made several attempts to contact her out of work hours. I have already determined that I do not accept that evidence.

[51] The applicant says Mr Worthington did not respond to her memorandum of 14 April 2008. That is not correct. Mr Worthington called a meeting to discuss it with her. It was discussed in a meeting on 22 April 2008.

[52] The applicant refers to a meeting with Mr Worthington on 20 March 2008. She says she had no prior knowledge of what the meeting was about. Her memorandum of 14 April 2008 sets out the matters raised with her at that meeting as well as her full response to them. Wiri Pacific was perfectly entitled to raise performance matters with her and its doing so is not a breach of duty.

[53] The applicant refers to a customer Hosking and apparently, she objects to Mr Worthington contacting the customer directly. I do not accept that was a breach of duty. As concerns the customer Apera, I do not understand how the applicant alleges a breach of duty here. I regret to say the same is true of customers Fisher and Tou. The applicant completely fails to explain how these matters constitute a breach of duty to her.

[54] Finally the applicant refers to the factual background of the final written warning to her. She then refers to a further letter dated 4 July 2008 her raising other disciplinary matters with her.

[55] The Authority is invited to consider the above chronology and narrative of events to conclude, as an objective bystander would it is submitted, that Wiri Pacific coerced the applicant to resign. I completely fail to see matters in this way. I am completely unconvinced of what the applicant alleges. I conclude that Wiri Pacific did not follow a course of conduct with a deliberate and dominant purpose of coercing the applicant to resign. I find there was no breach of duty.

[56] It is unnecessary to consider the final test as to the seriousness of any breach of duty.

[57] **I therefore find that in relation to her resignation, the applicant does not have a personal grievance for unjustifiable constructive dismissal and she does not have a personal grievance for unjustifiable disadvantage. There will be no formal orders in relation to this claim.**

The claim for a shareholding

[58] The applicant alleges she was promised a 10% interest shareholding in the company.

[59] I am not persuaded of the applicant's evidence. I also find her evidence far too vague and uncertain to be enforceable as a contract. **There will be no formal orders in relation to this claim.**

The determination

[60] **The Authority determines that the applicant does not have any personal grievances for either unjustifiable disadvantage or unjustifiable constructive dismissal. The Authority also finds the applicant is not entitled to a 10% shareholding in Wiri Pacific Limited. There will be no formal orders.**

The costs

[61] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Ropati is to lodge and serve a memorandum

as to costs within 28 days of the date of this Determination. Mr Ryan is to lodge and serve a memorandum in reply thereafter but within 14 days of being served with the respondent's memorandum. I will not consider any memorandum lodged outside that timeframe without leave.

Leon Robinson
Member of Employment Relations Authority