

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 426/09  
5104001

BETWEEN                      GEOFFREY LAWRENCE  
   Applicant  
  
AND                                EUROPEAN SPECIALISTS  
   LIMITED  
   Respondent

Member of Authority:        Marija Urlich  
  
Representatives:              Glenys Steele, for Applicant  
   Mania Hope, for Respondent  
  
Investigation Meeting:        24 November and 4 June 2009  
  
Submissions Received:        11, 19 and 25 June 2009  
  
Determination:                30 November 2009

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**DETERMINATION OF THE AUTHORITY**

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[1]     In April 2007 Tony Bardell and Michelle Ganley, directors and shareholders of European Specialists Limited, purchased the car repair business in which Geoffrey Lawrence was employed. Mr Lawrence accepted a position with the new owner.

[2]     The business specialises in the servicing and repair of Mercedes cars. Mr Bardell described these cars as *overly engineered and difficult to work on*. Mr Bardell managed the business on a day-to-day basis. He is not a mechanic. At purchase Mr Lawrence was the only qualified mechanic employed by the business.

[3]     By late November 2007 Mr Lawrence had resigned from his employment with European Specialists. He says his resignation amounts to an unjustified constructive dismissal because, he says, throughout his employment with European Specialists he was issued with indiscriminate warnings given without process or substance and abused by Mr Bardell. In the alternative he says the warnings unjustifiably

disadvantaged him in his employment. He seeks remedies commensurate with the alleged personal grievances.

[4] European Specialists says Mr Lawrence was not unjustifiably constructively dismissed and that there has been no conduct towards him which would render resignation a foreseeable consequence. It denies the warnings were procedurally or substantively unjustified and says, in any event, the warnings issued before 19 October 2007 have not been raised within the 90-day statutory timeframe.

### **Relevant legal principles**

[5] Constructive dismissals typically fall into the following categories – an employer gives an employee a choice between resigning or being dismissed, an employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign and/or a breach of duty by the employer causes the employee to resign<sup>1</sup>.

[6] Mr Lawrence says his constructive dismissal arises from the last of these categories. I accept that is the correct categorisation of his claim.

[7] Having categorised the claim what tests must the evidence be assessed against? The first question is whether, having regard to all the relevant circumstances, Mr Lawrence's resignation was caused by a breach of duty owed to him by European Specialists and second whether that breach of duty was sufficiently serious that it would be reasonably foreseeable that Mr Lawrence would resign<sup>2</sup>. These tests need to be read with the statutory test for justifiability set out in section 103A of the Act.

[8] The alternative argument concerns personal grievances for unjustified actions causing disadvantage<sup>3</sup>. Such claims concern two aspects – an established breach of the employment agreement plus consequent disadvantage in employment. Again this test must be read with the statutory test for justifiability.

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<sup>1</sup> *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd* (1985) 2 NZLR 372 (CA)

<sup>2</sup> Cooke P in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers' IUOW* [1994] 168, at p169

<sup>3</sup> Section 103(1)(b) Employment Relations Act 2000

## **The events leading up to Mr Lawrence's resignation**

[9] Mr Bardell and Mr Lawrence agree the employment relationship deteriorated within three months. However, they do not accept each others explanations for the deterioration in the relationship. Mr Bardell says Mr Lawrence refused to perform work he was requested to do, performed work to a poor quality, did not undertake work in a professional manner and displayed a bad attitude. Mr Lawrence says Mr Bardell asked him to sign off warrants of fitness which he had not checked, and from the time he challenged Mr Bardell on this, Mr Bardell's attitude towards him changed and he was either rude or ignored him.

[10] Notwithstanding their different views as to the cause of the deterioration the parties took steps to address their relationship. Mr Lawrence attended a meeting with his parents, Mr Bardell and Ms Ganley on 23 July. At the meeting Mr Lawrence and Mr Bardell tabled their concerns and agreement was reached that a weekly meeting would be held to discuss issues as they arose in the workplace.

[11] Between early August and mid September Mr Bardell raised six specific concerns with Mr Lawrence. Mr Bardell described four of these as verbal warnings. I am satisfied they do not meet the accepted standards of procedural or substantive fairness to be fairly characterised as disciplinary warnings. However, I am satisfied concerns were drawn to Mr Lawrence's attention regarding compliance with work procedures. I record Mr Lawrence took no steps at the time to challenge these alleged warnings.

[12] In late October Mr Lawrence returned to work after three weeks leave. Two days later Mr Bardell handed him the following letter:

*To Geoff  
European Specialists Ltd are issuing you with a written warning.  
The written warning is pertaining to your theft of company funds and is a serious misconduct as per 13.2 of your employment contract.  
I wish this process to involve mediation and you are required to have a support person present at a time convenient to all parties.  
If the result of the mediation is not a satisfactory one then instant dismissal could result along with criminal charges being laid.  
Please contact me when a time is available for yourself and your support person.  
Tony Bardell*

[13] No supporting information was provided with this letter. It is fair to say Mr Lawrence would not have known what alleged actions of his the warning related to.

[14] A meeting was arranged for 29 October. Mr Lawrence attended with his parents and Ms Steele. The parties agree the meeting was not constructive. I have reviewed the notes of the meeting; the basis for the warning was not clarified, Mr Bardell had not completed his investigation into the theft allegation. I am satisfied the warning was not fair or reasonable.

[15] Later on 29 October Mr Lawrence was issued with another written warning. This one related to *not following correct procedure in ordering stock*. The letter records that Mr Lawrence has already been issued with verbal warnings regarding this issue and concludes any repeat of the conduct could result in dismissal. No supporting information was provided with this warning. Mr Lawrence was not given a fair opportunity to comment prior to the warning being issued. I am satisfied the warning was not fair or reasonable.

[16] Ms Hope submits the 25 October warning was withdrawn and replaced by the 29 October warning. I do not accept this submission. While I accept Mr Bardell continued his investigation into the allegation, it does not follow, in the circumstances of this case that the effect of this continued investigation was the withdrawal of the 29 October warning. There is no evidence the warning was withdrawn. Mr Bardell understood the process was to issue the warning then make investigative inquiry. He had issued warnings to Mr Lawrence without regard to due process in the past.

[17] Consistent with the 25 October warning being live Mr Lawrence wrote to Mr Bardell after the 20 October meeting and provided some response to the issues raised by the 25 and 29 October warnings. Prior to his resignation Mr Lawrence did not receive a response to this response.

[18] On 21 November Mr Lawrence overheard a telephone conversation Mr Bardell was having. Mr Lawrence says he heard Mr Bardell say he (Mr Lawrence) was *useless* and an *idiot*, that he *had had enough* and *just wanted to get rid of [him]*. He says he knew Mr Bardell was talking about him because he thought he heard him

say *Geoff* and heard him use words from his letters. Mr Bardell denies any such conversation took place and could not have given the office is very small.

[19] Mr Lawrence did not speak with Mr Bardell about the overheard conversation because he says Mr Bardell was so unapproachable.

[20] At about this time Mr Lawrence applied for and was interviewed for another position.

[21] On 26 November Mr Lawrence tendered his resignation giving one week's notice and offering a further week to fulfil existing customer obligations. I am satisfied Mr Lawrence had not received an alternative offer of employment at this point.

[22] Mr Lawrence told me he resigned because he was *so freaked out [he] had to get out of there*, and that he had received *so much aggravation [he] felt it was ripping [him] apart*.

### **Was Mr Lawrence constructively dismissed?**

[23] As stated above, to establish a claim of constructive dismissal Mr Lawrence must show that European Specialists breached duties owed to him and those breaches of duty were sufficiently serious to make resignation foreseeable. For the following reasons I am not satisfied the evidence establishes these tests have been met.

[24] I accept that prior to October 2007 the parties' relationship had deteriorated. I also accept the parties took steps to articulate their concerns. However, I am not satisfied that either party was prepared to recognise there was any legitimacy in the other's concerns and seek ways to accommodate those concerns. Such conduct is not consistent with a good faith relationship.

[25] After Mr Lawrence's return from leave in late October the situation deteriorated further. The cause of that deterioration lies at Mr Bardell's feet. The issuing of the 25 October warning without regard to due process was unreasonable and unjustified. This is not simply a criticism of form. It is clear from the evidence

that Mr Bardell did not commence an investigation into the very serious allegation of theft until after he had issued a written warning to Mr Lawrence. Without an investigation there can be no reasonable or justified basis for issuing any warning.

[26] It is little wonder the meeting of 29 October was so unpleasant. Mr Bardell had put himself in the position of defending the indefensible; he had no grounds for issuing the warning for theft. The reasonable response would have been to withdraw the warning. Unfortunately this did not occur. These unreasonable actions were compounded when Mr Lawrence was issued with a further warning that day.

[27] Was the employment relationship at an end at this point? Mr Lawrence's actions do not indicate he believed this was the case. He did not raise any such concern during the 29 October meeting and subsequently provided a response to the allegations in some detail. Mr Lawrence did not raise his concerns directly with Mr Bardell regarding the overheard telephone conversation.

[28] Was Mr Lawrence's resignation reasonably foreseeable? I am not satisfied it was for three reasons. It was open to Mr Lawrence to challenge the October warnings – that route to resolution had not been exhausted. While the evidence establishes Mr Bardell had a blunt manner and in particular that he spoke unacceptably to Mr Lawrence's mother, such conduct was not so egregious as to make resignation readily foreseeable. Mr Lawrence did not assert any breach of duty which European Specialists could take steps to remedy.

### **Unjustified actions**

[29] I am satisfied Mr Lawrence was unjustifiably disadvantaged in his employment as a consequence of the warnings issued on 25 and 29 October. They were not issued in a fair or reasonable manner and had no substantive basis.

[30] I accept Mr Lawrence would have appreciated that his employment was in jeopardy as a consequence of those warnings. The first warning stated dismissal could result from an unsatisfactory *mediation* or repetition of the conduct and criminal charges could be laid. The second warning stated dismissal could result from repetition of the reprovved conduct.

[31] I find the warnings would have damaged Mr Lawrence's confidence that his employer would treat him fairly and reasonably in the future. Such a reaction would have been particularly acute given the proposed employment agreement between the parties set out a detailed process for resolving employment relationship problems. There are no reasonable grounds why Mr Bardell would have dispensed with that resolution process.

[32] The Authority is statute barred from considering the alleged warnings issued prior to October 2008. Mr Lawrence did not raise personal grievances in relation to those matters within the 90-day time limit and no application for leave to raise personal grievances out of time has been made.

### **Remedies**

[33] Mr Lawrence has established personal grievances in relation to warnings issued on 25 and 29 October 2008. He is entitled to a consideration of remedies sought.

[34] Mr Lawrence gave evidence of his concern at the warnings, their subject and the potential consequences to his ongoing employment. I accept the warnings and the manner in which they were delivered would have caused distress and alarm. The warning dated 25 October contains not only a threat to on going employment but also a threat of criminal charges. Such a threat would have caused particular concern given the total lack of substantive justification for the warning.

[35] Accordingly, I make the following awards pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000 – in relation to the 25 October warning \$6000, in relation to the 29 October warning \$2000.

[36] The claim for lost wages is declined because the claimed loss does not relate to the established unjustified actions.

## **Contribution**

[37] I must now consider whether Mr Lawrence contributed to the circumstances which gave rise to his personal grievance to a degree warranting a reduction in the remedies awarded<sup>4</sup>. I find he did not contribute to those circumstances. There was no cogent basis for the warnings issued on 25 and 29 October.

## **Costs**

[38] Costs are reserved. The parties are invited to attempt to resolve this issue themselves. If they cannot reach agreement then, given the proximity to the Christmas/New Year break, application should be made to the Authority to set a costs timetable. Such application should be made within 14 days of the date of this determination.

Marija Urlich

Member of the Employment Relations Authority

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<sup>4</sup> Section 124 Employment Relations Act 2000