

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 238/07
5073839

BETWEEN KEVIN MCDONALD
 Applicant

AND ALLEN MOTORS
 NORTHLAND LIMITED
 Respondent

Member of Authority: R A Monaghan

Representatives: B Quarrie, counsel for applicant
 M Broadbelt, advocate for respondent

Investigation Meeting: 2 July 2007 at Kerikeri

Submissions received: 20 July 2007 from Applicant
 20 July 2007 from Respondent

Determination: 08 August 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Kevin McDonald says his former employer, Allen Motors Northland Limited (“Allen Motors”) dismissed him unjustifiably and constructively.

[2] Allen Motors says Mr McDonald’s employment was ended by Mr McDonald’s resignation.

The employment relationship

[3] Mr McDonald had worked for Allen Motors previously, but began the relevant period of employment on 1 October 2003. His initial appointment was as sales manager at Allen Motors’ Kaikohe branch, although shortly afterwards he was appointed as branch manager, Kaikohe and Kerikeri Branches.

[4] Maru Tipene was employed at the Kaikohe branch as a mechanic. He and Mr McDonald did not get on well. Matters came to a head following an accident on 5 April 2005, when Mr Tipene was attempting to load a quad bike onto the back of a customer's utility vehicle. He was driving the bike up a set of ramps leading to the back of the utility when a ramp slipped and the bike tipped. Mr Tipene fell onto the floor and the bike almost landed on top of him. He was badly bruised but otherwise not seriously injured. He was shaken by the accident, and angry because he considered the ramps unsuitable and had been asking Mr McDonald for replacements.

[5] Mr McDonald was not on the premises at the time. He found out about the accident later that afternoon, from other staff members. Mr Tipene had gone to the doctor's, and took a day or two off work. He did not speak directly to Mr McDonald about the accident until the morning of Friday 8 April 2005. The discussion was prompted because it had come to Mr Tipene's attention that Mr McDonald had allegedly treated the accident as a joke. Whether or not the allegation was an accurate assessment of Mr McDonald's reaction, Mr Tipene believed it and became extremely angry. He went to Mr McDonald's office that morning to express his anger. In evidence he accepted that he swore and was abusive, and that his behaviour was unacceptable.

[6] With good reason Mr McDonald saw the behaviour that way too, but also found it threatening and intimidating. After Mr Tipene went back to work he telephoned Allen Motors' managing director, Lawrence Allen. He wanted Mr Allen to travel to Kaikohe from the company's base at Whangarei, to assist him in dealing with the matter. Mr Allen had other commitments, and was aware that Mr McDonald was about to commence a period of two weeks' leave, so suggested to Mr McDonald that he take the leave and the problem could be addressed when he returned. Mr Allen said in evidence that Mr McDonald was very agitated, so he thought a cooling off period would be beneficial to all concerned.

[7] Mr McDonald was not satisfied with Mr Allen's response. Towards the end of the afternoon he contacted Allen Motors' company accountant, David Shuker, for further assistance. Mr Shuker dealt with the matter because by then Mr Allen had left

Whangarei pursuant to his other commitments. Mr McDonald expressed his view of Mr Tipene's conduct. Mr Shuker discussed disciplinary procedures with Mr McDonald, and said he believed a warning might be appropriate. He went so far as to draft a suggested letter of warning, and send it by facsimile to Mr McDonald. The warning addressed Mr Tipene's swearing and abusive behaviour.

[8] Mr McDonald said he had the letter typed on company letterhead, then signed it and placed it in an envelope. At or about 4.30 pm he gave it to Mr Tipene to take home and read. However Mr Tipene went outside and read it immediately, and was enraged by it. He went back into the office, screwed the letter up and threw it at Mr McDonald, swearing and abusing him again. Mr Tipene then left and went home. He had no further discussion with Mr McDonald and reported for work as usual on the following Monday morning, 11 April.

[9] After Mr Tipene left the office Mr McDonald telephoned the main office at Whangarei again. This time he expressed his agitation to Neville Bevan, who was to act as his replacement as branch manager while he was on leave. By then it was close to 5 pm. Mr McDonald told Mr Bevan he had dismissed Mr Tipene and mentioned that Mr Tipene would be returning to the premises to collect his tools. Mr Bevan planned to pursue the matter further the following Monday, when he commenced his duties as Mr McDonald's temporary replacement.

[10] Not surprisingly, there was some confusion on the Monday morning when Mr Tipene arrived at work. Mr Bevan thought Mr Tipene had been dismissed, while Mr Tipene expected to be spoken to about his conduct but had not been advised of any dismissal. Eventually, however, Mr Tipene was advised he was still employed – or, as the company put it, that he was 'reinstated'.

[11] Mr Tipene had never been dismissed. Mr McDonald's reason for indicating otherwise to Mr Bevan was unclear until the investigation meeting. The reason he then gave for saying Mr Tipene had been dismissed was based on a too literal view of the following passage in Mr Tipene's letter of warning:

“Such behaviour is not acceptable to this company and should it occur again your employment will be instantly terminated.”

[12] According to the account he gave in evidence, Mr McDonald regarded Mr Tipene’s swearing and abuse on receipt of the warning as a further occurrence of the unacceptable behaviour in question, so that Mr Tipene’s employment terminated automatically and without more in terms of the warning. That was not the legal effect of the letter, and not the correct way to apply its terms to Mr Tipene’s subsequent conduct. If Allen Motors had recognised and acted on a ‘dismissal’ as Mr McDonald pressed it to do, it could have faced a claim from Mr Tipene of unjustified dismissal.

[13] At the same time Mr McDonald knew that, as branch manager, he was not authorised to dismiss staff. Mr Allen retained that authority. It is therefore not clear why he represented to Mr Bevan on 8 April that Mr Tipene had been dismissed. However Mr Tipene’s immediate dismissal is undoubtedly what Mr McDonald was seeking to obtain.

[14] Mr McDonald telephoned the Kaikohe branch on Monday 11 April to enquire whether there had been any further problems with Mr Tipene. He spoke to Mr Bevan. On being told Mr Tipene was still employed, Mr McDonald became extremely angry and said either Mr Tipene went or he did. Mr Bevan suggested that Mr McDonald enjoy his leave, and the matter could be addressed on his return. Mr McDonald repeated his position that either Mr Tipene left, or he did.

[15] It was the company’s evidence that this was not the only occasion when Mr McDonald indicated an intention to leave. David Gorrie, formerly a sales manager at Allen Motors, said he was on duty at Kerikeri on Saturday 9 April when Mr McDonald arrived in a company vehicle, handed over the keys, and said he did not want people accusing him of taking a company vehicle on holiday when he knew he would not be coming back to work after the holiday.

[16] Mr McDonald denied any such incident on 9 April, saying he was on duty himself that day. He was filling in for Mr Gorrie in terms of an arrangement the two

had for covering Saturday work. He said he did return the company vehicle, but that was on 11 April. He said the vehicle was unsuitable for his holiday needs, and he took it to Kerikeri so it could be put on the lot and sold.

[17] Considerable attention was paid in the evidence to whether the vehicle was returned on 9 or 11 April. Because of the arrangements between the parties regarding the use of company vehicles there is nothing significant about the mere fact that the vehicle was returned, to be placed on the yard for sale. For that reason I have not found it necessary to decide whether the return was made on 9 or 11 April. The relevant question arising from the evidence concerns whether Mr McDonald commented to Mr Gorrie about the possibility that he would not be returning after his leave ended.

[18] In all of the circumstances, I consider it more likely than not that Mr McDonald made the comments Mr Gorrie attributed to him. This is particularly so in the light of Mr McDonald's attitude to Mr Tipene's continued employment.

[19] By Tuesday 12 April Mr McDonald had decided his position had become untenable. He said in evidence he gave the matter many hours of thought. He wrote a letter of resignation, expressing that view and some of the reasons for it. In particular he referred to what he considered was his lack of authority, the lack of a written job description, and his being on the receiving end of considerable unprovoked abuse from two staff members. He did not name the staff members concerned, but was referring at least to the incident with Mr Tipene. He ended by saying:

“With this in mind I must consider my health so regretfully I have to advise that I have no alternative but to resign my position of general manager ...”

[20] By letter dated 20 April 2005 Mr Allen accepted the resignation, and responded to some of the other matters raised in Mr McDonald's letter. When he accepted the resignation he was aware of the ultimatum Mr McDonald had given to Mr Bevan and of the comments Mr McDonald was said to have made to Mr Gorrie. Mr Allen had also received an email message from Mr McDonald, dated 9 April 2005, in which Mr McDonald described the exchanges of the previous few days as

well as a number of other disagreements with Mr Tipene. Finally, being uncertain of how to respond to the letter of resignation, he had taken legal advice.

[21] The resignation letter did not include a date of termination. Mr Allen opened his response by indicating he was not surprised by the resignation and saying:

“Although you do not state a termination date, I assume from comment attributed to having come from yourself, that termination has already occurred.”

[22] Mr McDonald received the 20 April letter on returning from his holiday a few days later. He said in evidence he was astonished by the letter, as he had expected to sit down with Mr Allen and discuss the situation. He said his own letter was intended to express his intention to resign, but he did not regard it as a full resignation because it did not include a statement of when his employment would end.

[23] Mr McDonald said he telephoned Mr Allen, seeking to initiate further discussion. He was unable to make direct contact, but said he left messages with ‘office staff in Whangarei’ asking Mr Allen to contact him. When asked to identify the staff members with whom messages were left, Mr McDonald named a sales consultant and a receptionist. He said he made it clear that he wanted to speak to Mr Allen.

[24] One of the staff members concerned had no recollection of being contacted. The other recalled being contacted, but did not recall the content of the conversation. Both said they would have passed on a message if they had been asked to, or alternatively would have suggested Mr McDonald contact Mr Allen on his cell phone.

[25] When asked why he did not attempt to contact Mr Allen on Mr Allen’s cell phone, Mr McDonald said he had decided to wait until Mr Allen returned to the business.

[26] For his part Mr Allen denied being asked to contact Mr McDonald. Since neither staff member made a clear statement to the effect that Mr McDonald asked

that a message be passed to Mr Allen, or that a message was actually passed to Mr Allen, I accept the denial.

Was there a dismissal

[27] There has not been any argument that the proffering of the resignation itself was the reasonably foreseeable consequence of a breach of duty on the part of Allen Motors. The question is whether in all the circumstances Allen Motors' purported acceptance of the resignation amounted to a constructive dismissal.

[28] The following passage sets out relevant principles:

“Cases in which an employee is, against his or her will, treated by an employer as having resigned are by no means rare. ... First there are cases where the employee gives an unambiguous resignation and later seeks to resile from it.

Another type is illustrated by **NZ PSA v Land Corp Limited** [1991] 1 ERNZ 741. That is where an employer seizes upon words neither intended to amount to a resignation nor reasonably capable of doing so, or takes advantage of words of resignation known to be unwitting or unintended and the employee promptly makes it plain that the employee's communication was not meant to be a resignation and should not be treated as if it were. In that kind of case the employer cannot safely insist on its interpretation of what the employee said or wrote. This is also the position where words of resignation form part of an emotional reaction or amount to an outburst of frustration and are not meant to be taken literally and either it is obvious that this is so or it would have become obvious upon inquiry made soberly once 'the heat of the moment' had passed and taken with it any 'influence of anger or other passion commonly having the effect of impairing reasoning faculties.' ...

Each case turns on its own facts but it is at least clear that 'an apparent resignation can also amount, notwithstanding the words used, to a dismissal....'¹

[29] There was no dispute that Mr Allen was aware Mr McDonald was very distressed as a result of the incidents with Mr Tipene. However there was nothing inappropriate in his suggestion that Mr McDonald take the period of leave that was

¹ **Boobyer v Good Health Wanganui Ltd** Chief Judge Goddard, 24 February 1994, WEC 3/94

then imminent, at the same time making use of an opportunity to calm down before the problem was addressed on his return.

[30] If Mr McDonald had said on 8 April, to Mr Allen or Mr Bevan, that he was resigning there would have been some force in an argument that the resignation should not be taken at face value. Both Messrs Allen and Bevan recognised, anyway, that a cooling-down period was desirable.

[31] However it was another three days before Mr McDonald gave his ultimatum to the effect that either Mr Tipene left, or he did. The suggestion was again made that Mr McDonald enjoy his leave, and the matter would be addressed on his return.

[32] Again Mr McDonald chose to ignore the suggestion. He took another day before writing his letter of resignation. More importantly, he said in evidence that he gave the matter a great deal of thought.

[33] I do not believe that course of conduct amounts to an outburst of frustration not intended to be taken literally. Mr McDonald thought about the letter before he wrote it and I do not accept it was not intended to be taken literally. If I am wrong in this, then given the passage of time and urgings to make good use of the period of leave in particular, I do not consider it obvious that the letter was not intended to be taken literally. Nor do I accept this would have become obvious on inquiry. By then Mr McDonald had already twice given his ultimatum regarding Mr Tipene's continued employment.

[34] Mr McDonald says, in effect, that the lack of reference to a termination date should have made it obvious that he sought further discussion. I do not accept that is so. Again, by the time he wrote the resignation letter the suggestion had been made to him several times that his concerns could be discussed on his return from leave. Rather than expressly agreeing to that suggestion, or even simply waiting and seeking a meeting as soon as he returned, he wrote the letter of resignation. I find nothing in the surrounding circumstances which is reasonably capable of conveying to Allen Motors that Mr McDonald did not mean to resign and sought a discussion on his

return. If anything, Mr McDonald's conduct suggested he had no intention of discussing the matter on his return.

[35] As for the contents of the letter, it was submitted for Mr McDonald that they should be read as an invitation to discuss the matters listed. I do not accept the letter can be read that way. There is no express or implied invitation to meet to discuss the points it addresses, and it reads more as a list of the reasons why Mr McDonald has decided to resign. It ends with the clear and unequivocal statement I have quoted.

[36] If he had a change of heart after writing the resignation letter but before his expected date of return, Mr McDonald should have attempted to contact Allen Motors. When he received the letter of acceptance of the resignation, he should have been considerably more proactive in seeking to draw to Mr Allen's attention his concern about the acceptance than he was.

[37] For his part Mr Allen did not seize on the opportunity to accept the resignation. He was aware the Mr McDonald had at least signalled a disposition to resign on the day before he did so, and sought advice.

[38] The significance of the lack of a notice provision in the letter is that, had the prescribed period of notice been included, the circumstances would have fallen into another of the categories Chief Judge Goddard identified in **Boobyer**. Being an unambiguous resignation, containing the requisite notice, and not being prompted by a breach of the employer's duty, it could not be withdrawn without the employer's consent. The lack of notice did not render the letter incapable of being treated as a binding resignation, rather it raised a question of whether in all of the circumstances it could reasonably be treated as one.

[39] I have considered those circumstances, and conclude that it could. I therefore conclude there was no dismissal.

Costs

[40] Costs are reserved.

[41] The parties are invited to agree on the matter. If they seek a determination from the Authority they shall have 28 days from the date of this determination in which to file and serve memoranda setting out their positions.

R A Monaghan

Member of the Employment Relations Authority