

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Leul Mengistu (Applicant)
AND All Pak & Print Limited (Respondent)
REPRESENTATIVES In person
Grant Smurthwaite,
MEMBER OF AUTHORITY Marija Urlich
INVESTIGATION MEETING 28 March 2006
DATE OF DETERMINATION 4 May 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Leul Mengistu was employed by All Pak & Print Limited (“All Pak”) from 4 April 2005 until 22 September 2005 as an accounts administrator. He says he was unjustifiably constructively dismissed from his employment and seeks compensation for hurt and humiliation and reimbursement of wages lost as a consequence of his dismissal. Mr Mengistu says the events which precipitated his constructive dismissal were All Pak’s failure to provide him with a written employment agreement, his poor wage rate, All Pak’s failure to increase that wage rate at his request, its preference for his predecessor and insulting and unacceptable conduct towards him by directors of the company, Grant Smurthwaite and Colin Blackmore. Mr Mengistu also seeks payment of outstanding holiday entitlement he says was due when his employment ended.

[2] All Pak denies Mr Mengistu’s claim that he was unjustifiably constructively dismissed. It says Mr Mengistu signed a written employment agreement when his employment started, that he never requested a wage increase and was treated with respect throughout his employment. All Pak says that during his employment Mr Mengistu received holiday pay in excess of his accrued holiday entitlement.

[3] I record that the parties have attended mediation in an attempt to resolve this employment relationship problem. At the investigation meeting I received evidence from Mr Mengistu, Mr Smurthwaite, Mr Blackmore and Karin King, an All Pak employee.

Issues

(i) was Mr Mengistu constructively dismissed?

[4] Mr Mengistu’s last day of employment with All Pak was 22 September 2005. He left without advising All Pak that he did not intend to return. On 27 September 2005 Ms King emailed Mr

Mengistu:

“Hi Leul
Where are you? Have you finished?
Please give me a call, because if you are done I need to (sic) password for the payroll for Printcost.
You know the number – thanks, Karin”

[5] Mr Mengistu replied to that email:

“Hi Karin
How are you? You are really missed; of course the other staff members too.

Yes, I have finished will All Pak. It’s sad. Isn’t it?
I have studied for five years, so as to get a decent pay. I have already had two interviews, one of them with 99% sure (you can’t be 100% sure). At All Pak I was everyperson, ranging from an office boy searching everyone for phone calls, covering your duties when you are absent to doing the accounts...too busy really.

What pass word are you talking about Karin? The payroll doesn’t have a password. For controlling purpose I blocked everyone from having access to payroll data. This is one of the accounting function of doing things. So, you can use my computer, it doesn’t need a password.

Any how I may come in tomorrow just to clean up the mess I left behind.

Pass my greetings to Grant and the other staff.

Take care

Luke (my new name)

[6] Mr Mengistu gave the Authority these emails at the investigation meeting.

[7] The Court of Appeal¹ has held that claims of constructive dismissal may include cases where:

- (a) an employer gives an employee a choice between resigning or being dismissed;
- (b) an employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and/or
- (c) a breach of duty by the employer causes an employee to resign.

[8] Mr Mengistu’s claim should be considered in the third category of breach. The Authority must consider:

- (a) the terms of the employment agreement;
- (b) whether there was a breach of those terms serious enough to warrant the employee treating the agreement as at an end.

[9] The parties were unable to provide a written employment agreement. Mr Mengistu says this is because there never was a written employment agreement and that he asked repeatedly for one without success. Mr Smurthwaite says a written employment agreement was entered by the parties on the first day of Mr Mengistu’s employment, that an executed copy was given to Mr Mengistu and another filed in All Pak’s central employment agreement file, which was located in Mr Mengistu’s area of the office. Mr Smurthwaite says he has been unable to locate the file copy, which he looked for when Mr Mengistu left his employment with All Pak.

[10] Mr Smurthwaite says that notwithstanding that the written employment agreement cannot be located, Mr Mengistu’s terms of employment were based on the All Pak standard form individual employment agreement personalised to Mr Mengistu’s position and rate of pay. He says further that Mr Mengistu was familiar with the terms of this standard form employment agreement because

¹ *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd* (1985) ERNZ Sel Cases 136; [1985] 2 NZLR 372 (CA)

he had prepared an opinion based on that document.

[11] That no written employment agreement has been produced does not mean that no employment agreement existed between the parties. Mr Mengistu did not say and there was no evidence that the failure to provide a written employment agreement had contributed to any uncertainty over the terms of his employment. There was no evidence that the parties were in dispute over the terms of the employment agreement. Putting aside whether an agreement had been provided or not, I do not believe, in these circumstances, that a failure to provide a written employment agreement at the outset of employment would amount to a breach six months later serious enough to warrant Mr Mengistu treating his employment as repudiated.

[12] Did All Pak breach Mr Mengistu's employment agreement by failing to provide a pay increase? Mr Mengistu said he spoke with Mr Smurthwaite on three occasions about a pay increase and that his request was brushed-off or flatly declined on each occasion. He did not say that he and All Pak had agreed on a pay increase which was then reneged on. Mr Mengistu is not saying All Pak breached any duty to him to fairly consider a request for a pay increase or that the parties had agreed a wage review would be held and this did not occur. Mr Mengistu's claim is that he was not paid what he thought the job was worth. I record that the evidence given on behalf of All Pak was that Mr Mengistu had not made any request for a pay increase.

[13] Terms of employment may be altered by agreement. There was no evidence that Mr Mengistu and All Pak agreed that he would receive a pay increase. If I accept Mr Mengistu's version of events, declining a request for a pay increase, in the circumstances described, is not a breach of any term of employment because no such term existed.

[14] Mr Mengistu said he felt sidelined on the return of his predecessor and that she was favoured by the directors. During Mr Mengistu's employment she was not reemployed on a permanent basis. On three occasions in August she performed some casual work for All Pak and Mr Mengistu was asked to vacate his computer so she could use it. While I can appreciate that if this occurred without any discussion and he was unable to perform his duties because no alternative workstation was provided that this would be upsetting. However, the evidence was that these requests were made at the end of the working day, when Mr Mengistu was due to leave and that he did not raise any concerns directly with his employer about these incidents. By the time his employment ended this was a stale issue and could not reasonably be considered a serious breach warranting Mr Mengistu treating his employment as at an end.

[15] Mr Mengistu said the directors behaved in an insulting and unacceptable way towards him:

- (i) Mr Smurthwaite made him pronounce "Southern" a number of times; and
- (ii) Mr Blackmore relayed a conversation with a supplier who had told him she was unable to understand Mr Mengistu over the telephone and that Mr Blackmore had told her Mr Mengistu's first language was Swahili.

[16] Mr Smurthwaite denies that the "Southern" incident ever occurred. Mr Mengistu is a well educated and assertive individual. It is not consistent with the tenor of his evidence that he would repeat the word "Southern" if he found the situation insulting. Mr Mengistu's email to Ms King of 27 September does not support his claim that Mr Smurthwaite's conduct towards him caused him to leave All Pak; he asked Ms King to send his regards to staff and in particular Mr Smurthwaite. Why would he make such a request if Mr Smurthwaite's conduct towards him had caused him to leave? I think it is likely that Mr Mengistu has cast this situation as insulting in retrospect.

[17] Mr Blackmore said he told Mr Mengistu about the conversation with the supplier because Mr

Mengistu asked what they had discussed. Mr Mengistu had first taken the call from the supplier, they had some discussion and then he put her through to Mr Blackmore. Mr Mengistu said that when Mr Blackmore relayed the conversation with the supplier to him he was insulted by Mr Blackmore's reference to his language and told him that it was unacceptable to him. Mr Blackmore said Mr Mengistu made no such comment and that they laughed together about the incident.

[18] That Mr Blackmore told the supplier that Mr Mengistu is a first language speaker of Swahili may have been an awkward way to explain her failed conversation with Mr Mengistu but this does not amount to a breach of the employment agreement. Mr Mengistu's evidence was that it not usual for him to speak directly with suppliers and it was Mr Mengistu who transferred the call to Mr Blackmore rather than Mr Blackmore taking over the call. There was no evidence that Mr Blackmore undermined Mr Mengistu's authority or criticised his dealings with the supplier.

[19] Having considered all the evidence I find that Mr Mengistu resigned from his employment, without notice, and that he was not constructively dismissed.

Holiday pay

[20] There is no dispute that Mr Mengistu did not receive any holiday pay with his final pay.

[21] All Pak says he was paid out holiday pay during the course of his employment and has provided the Authority with Mr Mengistu's timeclock records. Handwritten on these records are weekly totals for hours paid for work and leave. I advised the parties at the investigation meeting that I was not satisfied that these handwritten notes amounted to an accurate record of the annual leave paid to Mr Mengistu because the author was not present to explain them.

[22] At the investigation meeting I directed that All Pak provide the Authority with Mr Mengistu's wage and time records and payslips as soon as practicable. By minute dated 6 April 2006 I directed All Pak to provide copies of Mr Mengistu's pay slips and section 81 Holidays Act 2003 holiday and leave records. All Pak has not complied with this direction.

[23] I have received no satisfactory evidence that Mr Mengistu has received his holiday pay entitlement. He is entitled to receive that payment without deduction for annual holidays taken in advance.

[24] All Pak & Print Limited is ordered to pay Mr Mengistu 6% of his gross earnings pursuant to section 25 of the Holidays Act 2003.

Costs

[25] Mr Mengistu's claim for holiday pay has succeeded. He is entitled to be reimbursed for the filing fee incurred in bringing this application.

[26] Accordingly, All Pak & Print Limited is ordered to pay Mr Mengistu \$70.

Costs

Marija Urlich
Member of Employment Relations Authority