

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 186  
5430628

BETWEEN NASH YAW ADOMAKO  
MENSAH  
Applicant

A N D WARD DEMOLITION  
LIMITED  
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Applicant in person  
Ben Molloy, Counsel for Respondent

Investigation Meeting: 15,16 April 2014, 9 May 2014 at Auckland

Submissions Received: 15 April 2014 and 9 May from the Respondent  
09 May from the Applicant

Date of Determination: 14 May 2014

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**DETERMINATION OF THE AUTHORITY ON THE SUBSTANTIVE ISSUE**

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- A. Mr Mensah resigned from his employment, he was not constructively dismissed.**
- B. Mr Mensah did not have any conditions of his employment affected to his disadvantage.**
- C. Accordingly, Mr Mensah does not have any employment relationship problems.**
- D. Costs are reserved.**

## **Preliminary Matters**

[1] In a determination of the Authority dated 18 December 2013<sup>1</sup>, the Authority granted the applicant, Mr Mensah leave to raise his claims of unjustified dismissal and unjustified disadvantage out of time.

[2] An investigation meeting to hear and determine Mr Mensah's substantive claims of unjustified constructive dismissal and unjustified disadvantage was held in Auckland on 15 and 16 April. During the course of the investigation meeting it became apparent that some of the notes taken by Mr Chris Harrison, the Operations Manager, and that Ward understood had been attached to its Statement in Reply, had not been. I accept the assurance given by Counsel for Ward that the omission was an oversight. However, it was necessary for the Authority and for Mr Mensah to be given sufficient opportunity to consider the notes.

[3] After reading the notes, Mr Mensah emailed the Authority and asked for Mr Stephen Caie, the Resources Manager to be present when the investigation meeting resumed to answer questions. Mr Caie made himself available by telephone to answer questions at the resumed meeting on 9 May and I was agreeable to this. It was not necessary to contact Mr Caie as Mr Mensah had no questions of him.

## **Background**

[4] Ward Demolition Limited (Ward) specialises in the residential, commercial and industrial demolition industry. Services are coordinated from its Head Office in Miami Parade, Onehunga and include demolition, resource recovery, salvage, dispatch transport.<sup>2</sup> Mr Mensah was employed by Ward as a truck driver based in Onehunga from 24 May 2012 until his resignation on 27 March 2013.

[5] In February and late March 2013, there were three incidents between Mr Mensah and Mr Tony Loretz, the dispatch supervisor, stemming from instructions issued by Mr Loretz to Mr Mensah. Mr Mensah says on these occasions he was bullied and harassed by Mr Loretz and Ward failed to take steps or to provide a safe working environment. This is Mr Mensah's disadvantage claim.

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<sup>1</sup> 2013 NZERA Auckland 580

<sup>2</sup> [www.ward-demolition.co.nz](http://www.ward-demolition.co.nz)

[6] Mr Mensah says during the third incident on 22 March, he was badly assaulted by Mr Loretz. Mr Mensah says during and after the assault, he was scared for his life, no one came to his aid and management did not intervene. Mr Mensah resigned on 27 March and claims this was forced upon him by Ward's breach of its duty to provide him with a safe workplace. Mr Mensah says he was constructively dismissed and the dismissal was unjustified.

[7] Ward says Mr Mensah was confrontational during his employment by it and had a number of "run ins" with Mr Loretz and other employees. Ward accepts there were three incidents between Mr Loretz and Mr Mensah but says these were the result of instructions being issued to Mr Mensah which he failed to follow. When Mr Loretz raised this with Mr Mensah, Ward says Mr Mensah became angry and abusive. Ward says it took steps to resolve issues between Mr Mensah and Mr Loretz and denies Mr Mensah has an unjustified disadvantage claim.

[8] Ward also disputes Mr Mensah's claim that he was assaulted by Mr Loretz on 22 March. Ward claims that it was Mr Mensah who was the aggressor towards his supervisor, Mr Loretz after Mr Loretz issued him with an instruction. Ward says Mr Mensah became physically violent toward Mr Loretz and this was witnessed by his colleagues. A fight ensued between Mr Loretz and Mr Mensah. Ward says Mr Harrison, began an investigation into the third incident but before it could be completed, Mr Mensah resigned. The first Ward was aware of a constructive dismissal claim was when it received a letter from the Waitakere Community Law Centre on 28 June, 3 months after Mr Mensah left.

[9] Ward says Mr Mensah was not constructively dismissed, he resigned of his own volition. Ward say Mr Mensah decided to leave because he knew he may be disciplined for his part in the fight with his supervisor on 22 March. Ward also says Mr Mensah only decided to bring a claim of constructive dismissal when informed by Work and Income New Zealand (WINZ) that there would be a stand down period before he would be eligible for the unemployment benefit unless he brought a personal grievance claim that he was dismissed.

[10] The parties have attempted mediation on more than one occasion but were unable to resolve the matters between themselves. Therefore, the claims were brought before the Authority for determination.

## Issues

[11] The Authority must determine the following issues:

- (a) Was Mr Mensah constructively dismissed?
- (b) If Mr Mensah was constructively dismissed was it unjustified?
- (c) If Mr Mensah was not constructively dismissed did he suffer an unjustified disadvantage?

## First Issue

### Was Mr Mensah constructively dismissed?

[12] Mr Mensah claims he was constructively dismissed and refers to three incidents which occurred in early February, on 26 February and finally on 22 March 2013 which he says made it unsafe for him to remain at work. Mr Mensah went to work on 25 March and spoke to Mr Harrison that afternoon about the incident of 22 March. Mr Mensah did not return to work on 26 March and resigned on 27 March.

[13] The Court of Appeal considered the correct approach to constructive dismissal cases as follows:<sup>3</sup>

*In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered their resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing; in other words, whether a substantial risk or resignation was reasonably foreseeable, having regard to the seriousness of the breach.*

[14] Mr Mensah claims that Ward, as his employer had an obligation to provide him with a safe workplace but that it failed to do so and he was subject to bullying and harassment by Mr Loretz, the dispatch supervisor and the person to whom he reported. Mr Mensah claims the final incident which he says was an assault by Mr

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<sup>3</sup> *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW* [1994] 1 ERNZ 168 at p.172

Loretz on 22 March 2013 was the one which led to his decision to resign. Mr Mensah says Ward seriously breached its duty to him to provide a safe workplace and his resulting resignation was reasonably foreseeable and amounted to a constructive dismissal which in all the circumstances was unjustified.

### **Conflicts of Evidence**

[15] There are numerous disagreements between Mr Mensah and the witnesses for Ward as to what was said and done during Mr Mensah's employment and particularly regarding each of the 3 incidents. I have followed the approach taken by Chief Judge Colgan in *The Salad Bowl Limited v Amberleigh Howe-Thornley*<sup>4</sup>. In that case, Judge Colgan states:

*Rather than rehearse the controversial versions of these, I will set out my findings which have been reached by applying conventional evidence conflict resolution techniques.*

*These have included:*

- *assessing which of two contradictory accounts is the more probable;*
- *taking account of corroborative documentary records generated at the time or otherwise before the spectre of litigation arose; and*
- *the commonsense that a specialist court can bring to assessing the probabilities of interactions between human beings who are not lawyers or other relevant experts, leading to what was hoped by both to be mutually beneficial employment.*

### **Employment relationship problem**

[16] Mr Loretz was Ward's dispatch supervisor at the relevant time and interviewed Mr Mensah for the truck driver role. Mr Mensah was subsequently employed by Ward on 24 May 2012. Mr Loretz says within a few months of starting with Ward, there were issues about the way in which Mr Mensah was doing his job and with Mr Mensah's repeated failure to follow his instructions.

[17] Other employees at Ward claim that during his employment, Mr Mensah was often difficult and argumentative. When instructed to undertake a duty or when

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<sup>4</sup> [2013] NZEmpC 152 at para [4].

spoken to about the way in which he was performing a duty Mr Mensah would challenge the instruction and become angry, abusive and at times physically aggressive.

[18] Mr Matthew Sweeney who was a dispatch supervisor for Ward when Mr Mensah was employed says on one occasion at Waterview, he was supervising Mr Mensah reversing a truck and trailer. Mr Mensah was having difficulty reversing the vehicle and ignored Mr Sweeney's directions. Mr Sweeney, who was on friendly terms with Mr Mensah, says that he asked Mr Mensah to get out of the truck so that he could reverse it and have the truck loaded. Mr Sweeney says Mr Mensah jumped out of the truck, abused him and when Mr Sweeney spoke to him about it, Mr Mensah became very aggressive and attempted to head butt him. This incident was immediately reported by Mr Sweeney to Mr Caie. Mr Caie confirmed receiving the phone call after the incident and the contents of the phone call as described by Mr Sweeney.

[19] Mr Keith Moshieim, the salvage manager at Ward says he had occasion to speak to Mr Mensah about spray painting salvage items he wished to reserve for himself to purchase. When Mr Moshieim told Mr Mensah he was unable to sell the salvage items to him because they had already been sold to somebody else, Mr Mensah became very angry and Mr Moshieim thought he was going to punch him. Mr Moshieim says to avoid a fight with Mr Mensah he went back into his office and locked the door. Mr Moshieim says there was a further argument with Mr Mensah about buying salvage items about two weeks later. Mr Moshieim reported the incidents to Mr Caie who then met with both Mr Mensah and Mr Moshieim. Mr Mensah was requested by Mr Caie to apologise to Mr Moshieim for his actions. Mr Caie confirmed being made aware of these issues by Mr Moshieim and asking Mr Mensah "*to pull his horns in and behave.*"

[20] By February 2013, issues with Mr Mensah had become an increasing problem for Mr Loretz. On one occasion in early February, Mr Loretz says he spoke to Mr Mensah about failing to cover the load on his truck while driving on the motorway which was a serious safety issue. Mr Loretz says after receiving a phone call from a woman who had almost been hit by flying debris and who had taken a note of the truck's number plate, he raised the matter with Mr Mensah. Mr Loretz says Mr Mensah refused to listen, became angry and argumentative, told him he was not his

boss and they had a screaming row. Mr Mensah says Mr Loretz raised the matter with him, hit him hard and abused him.

[21] On 26 February Mr Mensah was driving a Bowen truck and Mr Loretz says he failed to secure the cover on the truck. Mr Loretz was made aware of this by Mr Caie who had seen the uncovered truck and had called him about it. Mr Loretz says he questioned Mr Mensah about it when he returned to work and Mr Mensah's response was to get angry, swear and push into Mr Loretz's personal space. Mr Mensah claims being abused and hit by Mr Loretz. Mr Loretz denies this and says he did put his hand on Mr Mensah's chest so as to keep space between them, but did not hit Mr Mensah.

[22] Mr Caie saw the angry exchange between Mr Loretz and Mr Mensah but did not see Mr Loretz hit Mr Mensah as claimed by him. Mr Caie asked Mr Mensah and Mr Loretz to meet in his office where they talked about the issues and at the end of the meeting shook hands. Mr Caie understood that Mr Loretz and Mr Mensah had resolved their issues, unfortunately this was not the case.

[23] On 4 March, Mr Mensah wrote a letter to the "*Ward Demolition Group Big Boss and the Other Bosses*" complaining about the incidents that occurred with Mr Loretz in early February and on 26 February. When he received the letter Mr Caie talked to the other employees about Mr Mensah's allegations. Mr Caie formed the view that there was no harassment as alleged, and that Mr Mensah was aggressive and did not like to take instruction. A meeting was held on the 7 or 8 March between Mr Caie, Mr Mensah and Mr Loretz and Mr Mensah and Mr Loretz agreed to work together and improve their relationship. However, Mr Caie decided to keep a close eye on the situation between Mr Mensah and Mr Loretz.

[24] On 22 March, the third and final incident occurred between Mr Mensah and Mr Loretz. Mr Mensah says he was *beaten up* by Mr Loretz following a discussion about *clocking off*. Mr Loretz says after requesting Mr Mensah to *clock off* so that the rest of the team could knock off, Mr Mensah became angry and started to *get into his face*. The argument became heated and Mr Mensah punched Mr Loretz in the mouth. Mr Loretz immediately rang and reported the incident to Mr Caie. Mr Caie confirms receiving the phone call after Mr Loretz claims being hit by Mr Mensah. Mr Loretz says after getting off the phone, Mr Mensah made a derogatory comment about his wife and a fight ensued.

[25] Mr Gordon Howe was at the scene and saw Mr Mensah punch Mr Loretz. When Mr Loretz went into the office to make a phone call, Mr Howe says he told Mr Mensah to go home but he refused. Mr Howe says Mr Mensah appeared to want a fight and when Mr Loretz came out of the office was *egging* him on to have a fight.

[26] When the fight broke out between Mr Loretz and Mr Mensah, Mr Howe attempted to break it up. Mr Howe saw Mr Mensah knee Mr Loretz in the groin and then bite his thumb.

[27] The Police were called by Mr Mensah. Both Mr Mensah and Mr Loretz were spoken to as were the other employees present at the time, namely Mr Howe, Mr Carl Petersen and Mr Willy Thompson. The police took no steps and no charges were laid.

[28] On Monday 25 March, Mr Mensah met with Mr Harrison about the incident that had occurred on 22 March. Mr Mensah asked Mr Harrison if he should resign and was told by Mr Harrison that he would be undertaking an investigation into the incident and he should wait for that process to conclude.

[29] Mr Harrison spoke to Mr Mensah about the events of the 22 March and also interviewed the other employees present. Mr Harrison took notes of his meetings. Mr Harrison's notes of 25 March, record Mr Mensah complaining of verbal abuse by Mr Loretz, that he had had enough and so punched Mr Loretz and a fight ensued. The notes record Mr Mensah saying no one came to help him, he was afraid of being beaten again by Mr Loretz and so kicked Mr Loretz in the groin and bit his thumb.

[30] Mr Howe's statement was that he saw *Nash hit Tony in the mouth* and subsequently *Nash hit Tony in the balls*. Mr Petersen's statement was that he tried to break the fight up between Mr Mensah and Mr Loretz and that he saw Mr Mensah punch Mr Loretz in the groin, and subsequently bite his thumb. Mr Thompson concurred with Mr Petersen's version of events.

[31] The statements taken by Mr Harrison including Mr Mensah's own statement on Monday 25 March confirm in my view that Mr Mensah was the aggressor on 22 March. While Mr Loretz may have sworn at Mr Mensah to clock off, Mr Mensah angrily and violently responded.

[32] I do not accept Mr Mensah's claim that he was subject to ongoing harassment and bullying by Mr Loretz which culminated in an unprovoked beating by Mr Loretz

on 22 March. On a number of occasions during his employment Mr Mensah came into conflict with other employees usually when spoken to about a work issue. Mr Mensah became angry and aggressive on these occasions. Mr Loretz, as Mr Mensah's immediate supervisor was responsible for supervising Mr Mensah's work and issuing him with instructions. Mr Loretz found on many of these occasions Mr Mensah became angry and aggressive and arguments developed between them. Mr Caie became involved and tried to resolve the issues between Mr Loretz and Mr Mensah. After receiving Mr Mensah's letter of 4 March complaining of harassment, Mr Caie made enquiries and found no such harassment occurring. Mr Caie convened a meeting between Mr Mensah and Mr Loretz and understood agreement had been reached they would work together and improve their working relationship.

[33] Following the fight on 22 March, Mr Harrison undertook an investigation but before it was completed, Mr Mensah resigned on 27 March.

[34] I find that there was no breach by Ward of its duty to provide Mr Mensah with a safe work environment and therefore his resignation on 27 March was not foreseeable. Further, Mr Mensah resigned during the course of an investigation into the events which led to his resignation. Ward had not concluded its investigation, Mr Mensah was told by Mr Harrison to wait until this process was finalised but Mr Mensah chose to resign in any event. The resignation was not foreseeable in such a circumstance.

[35] There is no mention by Mr Mensah in his letter of resignation of being forced to resign. It is my view that Mr Mensah decided to resign while an investigation was being carried out into not only his behaviour but that of Mr Loretz's behaviour on 22 March. Mr Mensah's action in resigning pre-empted a possible finding of misconduct by him which may have resulted in discipline of him by Ward. It is also relevant in my view that Mr Mensah did not raise a personal grievance claim until after he became aware that because of his resignation there would be a "stand down" period before he would be eligible for the unemployment benefit. To avoid the stand down period it was necessary to bring a personal grievance claim that he had been unjustifiably constructively dismissed.

[36] It is my view that Mr Mensah was not constructively dismissed, he resigned from his employment. Given this finding, I do not need to determine the second issue.

### **Third Issue**

#### **If Mr Mensah was not constructively dismissed did he suffer an unjustified disadvantage?**

[37] For the reasons above, I find Mr Mensah did not suffer an unjustified disadvantage. Section 103A of the Employment Relations Act 2000 states:

- (1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- (2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred."*

[38] Mr Mensah came in to conflict with a number of employees when given instructions or directions about aspects of his work. The conflicts with his immediate supervisor, Mr Loretz on 2 occasions in February became angry arguments which Mr Caie attempted to resolve and believed had been resolved. Mr Caie met with both Mr Mensah and Mr Loretz to discuss issues between them, matters were discussed and he believed resolved.

[39] Following receipt of Mr Mensah's letter of complaint on 4 March about Mr Loretz, Mr Caie investigated the matter and concluded no bullying or harassment had occurred. Mr Caie again met with Mr Mensah and Mr Loretz, the issues were discussed and agreement was reached that they would work together and improve their relationship. These were the actions of a fair and reasonable employer in all the circumstances in my view.

[40] This was not a case of Mr Mensah being bullied and no steps being taken by Ward to protect him and provide a safe environment. Rather, this was a case of Mr Mensah being aggressive and coming into regular conflict with his fellow employees, particularly his supervisor Mr Loretz.

[41] I do not accept Mr Mensah suffered an unjustified disadvantage. Mr Mensah's claims are dismissed. Even if I am incorrect and Mr Mensah does have a claims of unjustified constructive dismissal and unjustified disadvantage, under s124 of the Act any remedies would be reduced by 100% by me because of Mr Mensah's contribution to the situation.

### **Costs**

[42] Ward as the successful party has 14 days from the date of this determination to file a memorandum as to costs and Mr Mensah has 14 days to reply.

**Anna Fitzgibbon**  
**Member of the Employment Relations Authority**