

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 56/10
5136231

BETWEEN ANNA MIKOLAJCYK
 Applicant

AND PLUS PAC PACKAGING
 SOLUTIONS LIMITED
 Respondent

Member of Authority: Yvonne Oldfield

Representatives: Margaret Matthew for Applicant
 Trevor Allsebrook, Director, for Respondent

Investigation Meeting: 24 September 2009

Submissions received: 2 October from Applicant
 15 October from Respondent

Determination: 10 February 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The respondent company (Plus Pac) is a small business engaged in the manufacture of plastic packaging. Mrs Mikolajcyk went to work in Plus Pac's factory on a casual basis in 2006. After a short time she was offered full time permanent process work at the minimum wage. Mrs Mikolajcyk's husband, Pawel Mikolajcyk, also worked for Plus Pac which was supporting him in an adult apprenticeship in thermoforming.

[2] In May 2008 Plus Pac's Managing Director, Trevor Allsebrook, was on holiday travelling in Europe. In his absence the factory was being managed by production manager, Janus Kolmas. On 18 or 19 May 2008 Mr Mikolajcyk gave Mr Kolmas notice of his resignation. Mr Kolmas passed the information on to Mr

Allsebrook, who instructed him to question Mr Mikolajcyk about “*why he was resigning, who he was going to work for and if he had received legal advice.*”

[3] The next evening Mr Kolmas did so. Mr Mikolajcyk responded that he was going to work for an injection moulding company that had offered him more money. It is now accepted that this was indeed the case. He went to work with a company that makes large plastic items such as garden furniture. His new employer does not manufacture packaging and does not compete with Plus Pac. However, Mr Kolmas did not believe him, apparently because he did not consider it possible for someone with Mr Mikolajcyk’s level of skill and experience to get a job in plastic injection moulding.

[4] As well as questioning her husband, Mr Kolmas also called Mrs Mikolajcyk into his office and spoke to her. He did so in Polish, their native language. There was some dispute about exactly what was said in this exchange but it appears that he hoped to convey to her that her husband’s resignation had not been well received by Mr Allsebrook and elicit her help in talking him out of resigning. I accept that Mr Kolmas meant well by acting in this way, but the effect was that Mrs Mikolajcyk felt alarmed and intimidated.

[5] Later that same evening Mr Kolmas discussed what he had heard with Mr Allsebrook. Mr Allsebrook followed up with an email addressed to Mr Mikolajcyk via Mr Kolmas.

[6] On 21 May Mr Kolmas called Mrs Mikolajcyk to his office and showed her the email from Mr Allsebrook to her husband. In the email Mr Allsebrook expressed his disappointment at Mr Mikolajcyk’s resignation given the investment Plus Pac had put in to training him and also given his understanding that he was “*on a two year Employment Contract.*” The email went on:

“We understand that you are to take up employment with a competitor. Accordingly your services are now no longer required, with immediate effect...”

[7] The letter goes on to say that the resignation is regarded as a breach of contract and concludes:

“As a further consequence of your breach of contract, you will appreciate that we are unable to continue to employ your wife, Anna for commercial competitive reasons.

Accordingly her employment is also terminated.”

[8] After Mrs Mikolajcyk had read the email Mr Kolmas told her that she was to leave that day. Mrs Mikolajcyk became very distressed and asked why she was being dismissed. Mr Kolmas told her that it was Mr Allsebrook’s decision. Mr and Mrs Mikolajcyk collected their things and left.

[9] Mr Allsebrook told me that he terminated Mrs Mikolajcyk’s employment for good commercial reasons. He told me that Mr Mikolajcyk had not told him or Mr Kolmas who he was going to work for which left him no alternative but to assume that Mr Mikolajcyk was going to work for a competitor. He also told me that he believed Mr Mikolajcyk was manipulative and dominated his wife, leading Mr Allsebrook to believe that she would be pressured into colluding with her husband to pass customer, production, cost and pricing information to a competitor.

[10] Neither Mr Mikolajcyk nor Mrs Mikolajcyk was subject to a contractual restraint of trade provision. Nor had they agreed to any confidentiality provision beyond that which is implied into every employment agreement.

Issues

[11] Mrs Mikolajcyk claims that her dismissal was unjustified and that she has been subjected to discrimination on the basis of family status (her association with her husband.) She also claims breach of good faith.

[12] Section 32 of the Human Rights Act 1993 provides:

“Exception in relation to family status

Nothing in section 22 of this Act shall prevent restrictions imposed by an employer-

...

(b) On the employment of any person who is married to...an employee of another employer if there is a risk of collusion between them to the detriment of that person's employer."

[13] Mr Allsebrook's reason for dismissing Mrs Mikolajczyk was that he believed her husband to be going to work for a competitor and felt that this exposed him to a risk that commercially sensitive information might be passed to that competitor. All Mrs Mikolajczyk's claims therefore fall to be determined on the basis of whether Mr Allsebrook can demonstrate that he formed a genuine belief, on reasonable grounds, that there was a risk of collusion between Mrs Mikolajczyk and her husband to the detriment of Plus Pac. If not, then the question of remedies will fall to be determined.

[14] At Mr Allsebrook's request I record his protest at the fact that I heard only from him and Mr Kolmas and not from five other staff members whose written statements Mr Allsebrook had provided to the Authority. Although they had no involvement in the dismissal, Mr Allsebrook wished these individuals to give evidence on Mr Mikolajczyk's character which he said went to the question of the risk of collusion between him and his wife.

[15] The statements provided were couched in almost identical terms. Consistent with the evidence provided by Mr Allsebrook and Mr Kolmas, they contained assertions that Mr Mikolajczyk was domineering in his manner and expressed a belief that he had been unfaithful to Mrs Mikolajczyk. These assertions added nothing further to what I had already been told by Mr Kolmas and Mr Allsebrook and were of very marginal relevance to the matter before me. For those reasons I did not require to hear from the individuals concerned.

[16] For the same reasons, at the investigation meeting, I restricted Mr Allsebrook's questioning of Mr Mikolajczyk. Before I stopped him, Mr Allsebrook had already put a number of questions to Mr Mikolajczyk (who attended the meeting in support of his wife.) The questions related to Mr Mikolajczyk's current work, his personal life, and his character but none had anything whatsoever to do with Mrs

Mikolaczyk's grievance. At the very least, this was a waste of the Authority's time. At worst it was an abuse of the investigation process.

(i) The risk of collusion and the justification for the dismissal

[17] The first crucial point in relation to this issue is that there was no reliable basis for the belief that Mr Mikolajcyk was going to work for a competitor of Plus Pac. To the contrary, the evidence is that he went to an injection moulding company.

[18] Mr Allsebrook takes the view that it was reasonable for him to assume as he did, given the limited information he received from Mr Mikolajcyk. He told the Authority that:

“when Pawel resigned, he could have told us who he was working for and satisfied us that it was not a competitor... when he eventually told us the next day that it was an injection molder he could have told us who it was so we could check it out...”

...Anna admits she was aware of Pawel's intentions to resign...Anna had a duty of good faith to ensure that we were informed as to the correct position in respect of Pawel”

[19] Mr Allsebrook is firmly of the opinion, not only that Mr Mikolajcyk was obliged to tell him who his new employer was, but that Mrs Mikolajcyk also was under an obligation to do the same and should have volunteered the information to Mr Kolmas. This is simply incorrect. The true position is that while Mr Mikolajcyk could have chosen to do so, he was not obliged to pass this information to Mr Allsebrook. As for Mrs Mikolajcyk, it was not her place to do so at all.

[20] There was no reasonable basis for Mr Allsebrook's belief that Mr Mikolajcyk was going to work for a competitor.

[21] I find, also, that there was no basis in fact for his belief that there was a risk that Mr and Mrs Mikolajcyk would collude to uplift commercially sensitive information. My reasons are as follows.

[22] When I asked Mr Allsebrook what he feared she might do, he told me that (as a process worker) Mrs Mikolajcyk had access to the daily job sheets located in the production area. These sheets identified the materials and time to be used in relation to the job for the day in question, as well as the identity of the customer for whom the job was being done. He considered there was a risk that she might take notes of these job sheets and pass this information to a competitor. In addition Mr Allsebrook told me that Mrs Mikolajcyk could have entered the office area, which was not locked, from the factory floor where she worked. There he said she could have accessed other commercially sensitive information.

[23] I do not find these concerns to be of substance. The respondent's machinery was not customised and information about its capacity could be obtained from its manufacturer. The names of customers would be of limited use to a competitor without additional information. As for what might have been obtained in the office, Mrs Mikolajcyk did not have computer passwords, was not particularly computer literate, had never worked in a sales role, knew nothing about Plus Pac's clients and did not speak fluent English. Even if she had wanted to, she had little ability to identify and uplift sensitive information from the office area.

[24] Mr Allsebrook was unable to give any reason why he might have cause to mistrust Mrs Mikolajcyk except to say that he did not trust her husband and believed her to be under his influence. There is no evidence that she had previously misconducted herself in any way during her employment with Plus Pac.

[25] Nor, during his employment with Plus Pac, had Mr Mikolajcyk ever been the subject of any sort of performance or disciplinary concerns. Mr Allsebrook told me that he mistrusted Mr Mikolajcyk because of the way he believed him to have conducted his personal life, because he had once asked that his job title be changed in a way that Mr Allsebrook felt would be misleading, and because Mr Mikolajcyk had resigned without repaying Plus Pac costs incurred in relation to his adult apprenticeship.

[26] The existence of a dispute about who should bear the cost of training is no basis for a conclusion that Mr Mikolajcyk was likely to engage in theft of commercially sensitive information. Neither is Mr Allsebrook's belief that Mr

Mikolajcyk had had an affair (whether or not that belief had substance.) Finally, even if Mr Mikolajcyk had sought to overstate the nature of his job, that is a relatively trivial issue which cannot reasonably be said to call his fundamental honesty into question. I do not accept that Mr Allsebrook has established a reasonable basis for his mistrust of Mr Mikolajcyk, let alone Mrs Mikolajcyk. It is therefore unnecessary for me to embark on any assessment of whether Mrs Mikolajcyk might have been unduly influenced by her husband, but I note that the only evidence to support such a conclusion is the highly subjective view expressed by the respondent witnesses. I observed nothing in the conduct of either Mr or Mrs Mikolajcyk to support any such conclusion.

[27] Plus Pac has not established that there was a risk of collusion between Mr and Mrs Mikolajcyk to the detriment of Plus Pac. It follows that the dismissal was substantively unjustified. The facts also support findings that it was procedurally unfair and that Mrs Mikolajcyk was discriminated against on the basis of family status. I therefore now turn to remedies.

(ii) Remedies

[28] Mrs Mikolajcyk has claimed lost wages of \$20,088.00 arising out of the fact that it took her until March 2009 to find other work. She spoke of her difficulty in finding a new job as a relatively recent immigrant whose only employer in New Zealand had been Plus Pac. This was compounded by the fact that Mr Allsebrook did not give her a reference when he dismissed her. She also claims compensation of \$15,000 for hurt and humiliation associated with the dismissal.

[29] She also seeks further remedies in relation to the claims of discrimination and breach of good faith. Mrs Mikolajcyk cannot be remedied more than once for what is essentially the same employment relationship problem. The claims of discrimination and breach of good faith do not therefore attract additional remedies.

[30] I am satisfied that Mrs Mikolajcyk has made out her claims for lost earnings and compensation related to the dismissal. I accept her evidence of deep distress at the termination of her employment. It was not disputed by Mr Kolmas who testified to her desperate response to the news.

[31] Given the circumstances of her dismissal there can be no question of contributory conduct. I accept that Plus Pac should be liable in full for the sums claimed in relation to lost earnings and compensation.

[32] **I therefore order Plus Pac to pay to Mrs Mikolajcyk the following:**

i. \$20,088.00 gross lost earnings, and

ii. \$15,000.00 compensation for hurt and humiliation.

Costs

[33] Counsel for the applicant has signalled an intention to claim costs. This will need to be supported by a full memorandum and should be lodged in the Authority no later than 28 days from the date of this determination. Upon receipt the respondent will have a period of 14 days in which to respond to costs submissions.

Yvonne Oldfield

Member of the Employment Relations Authority