

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 73
5331667

BETWEEN

KEITH PARKS
Applicant

A N D

COMPASS GROUP (NZ)
LIMITED t/a MEDIREST
Respondent

Member of Authority: M B Loftus

Representatives: Phil Roberts, Advocate for the Applicant
Don Rhodes, Advocate for the Respondent

Investigation Meeting: 11 May 2011 at Cromwell

Submissions Received: At the investigation meeting

Date of Determination: 27 May 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Keith Parks, claims that he was unjustifiably dismissed, albeit constructively, from his employment with the respondent, Compass Group (NZ) Limited (Medirest).

[2] Mr Parks contends that comments made by his supervisor, Ms Louisa Coulter, both questioned his integrity and suggested that Ms Coulter distrusted Mr Parks to such an extent that the employment relationship no longer remained viable. The comments therefore, in Mr Parks' view, induced the resignation he subsequently tendered.

[3] Medirest considers Mr Parks' resignation to have been a gross over-reaction to an unfortunate comment(s) and refutes, absolutely, that Mr Parks' departure can be considered a constructive dismissal.

Background

[4] Medirest is a contractor providing ancillary support services to various organisations. One of those contracts sees Medirest provide services to Central Otago Health Services at its Clyde hospital. Mr Parks was engaged by Medirest as a handyman at the hospital. He has held the position since 1999 with either Medirest or previous contractors that Medirest subsequently replaced.

[5] On 10 November 2009 Mr Parks telephoned Ms Coulter and advised that he would be off work for four days due to severe diarrhoea. The four days would be followed by a weekend and Mr Parks therefore expected to return on 16 November.

[6] As a result Ms Coulter contacted Mr David Tily, a casual employee who was used as a replacement when the need arose, to ascertain whether or not he was available to cover Mr Parks' absence. He was.

[7] On the morning of Wednesday, 11 November, Mr Tily rang Mr Parks seeking advice on a work-related issue. During the conversation, Mr Parks mentioned that he had a doctor's appointment at 11.30am and, given his knowledge of the duties Mr Tily would be performing, suggested they may well see each other later that day. Later that morning, Mr Tily saw Ms Coulter. He mentioned he had spoken to Mr Parks, that Mr Parks still had diarrhoea and that he was going to see a doctor at 11.30am. Mr Tily says that Ms Coulter responded by stating that he (Mr Parks) uses that excuse all the time and he needed to change it (or words to that effect).

[8] On Sunday, 15 November, Mr Tily rang Mr Parks to ascertain whether or not Mr Parks was returning to work the following day. During the conversation, Mr Tily mentioned Ms Coulter's Wednesday comment.

[9] The following day, Monday, 16 November 2009, Mr Parks returned to work. He asked to see Ms Coulter as he says *I was concerned that she had been mouthing off to Dave about whether my illness was genuine.*

[10] He goes on to say:

[7] I challenged her about this and she said you must have been talking to Dave and that he had a big mouth and started to run down his work ethics.

[8] *I asked her if she thought I was lying over my illness and that if she didn't believe me then perhaps I should resign. I was upset that she had been bad mouthing me to another employee.*

[9] *She told me that I had used the diarrhoea excuse before and that she had visited one of my neighbours and my place looked locked up and she thought I was away on holiday.*

[10] *I told her that if she had called in or knocked on the door I had been too sick to get out of bed and my wife was away at work. I told her I'd been sick before and that it might be due to my work at the hospital handling dirty laundry.*

[11] *She said to me, well maybe its best you do resign but that I would have to give two weeks' notice and she would draw up the paperwork.*

[12] *Louisa drafted my resignation letter which I later signed and proceeded to work out my notice.*

[Extract from Mr Park's written statement of evidence].

[11] The notice period to which Mr Parks refers would have seen him work through to Friday, 27 November, but as events transpired, that did not occur.

[12] Mr Parks goes on to say that the following day, and having thought about the situation overnight, he telephoned Mr Neville Patrick, Medirest's Christchurch-based regional manager. Mr Parks states that he advised Mr Patrick that he had resigned before raising Ms Coulter's comments and that he thought them inappropriate. Mr Parks says Mr Patrick responded by saying *that's no good* before advising that he would speak to Ms Coulter and get back to Mr Parks. Mr Parks goes on to complain that he heard nothing further from either Mr Patrick or Ms Coulter.

[13] As it transpired, Mr Parks' last day at work was Wednesday, 25 November with his early termination being due to a recurrence of his illness. Here it should be noted that his illness was both real and severe. On Friday, 27 November, he was admitted to hospital with acute dehydration and diarrhoea which was subsequently attributed to salmonella and gastroenteritis. He was advised that it was apparent the cause of his illness had been with him for some time and that his recovery would be protracted.

[14] Ms Coulter accepts that she made the alleged comment to Mr Tily. She states that it was a response to Mr Tily having asked *what was wrong with Mr Parks this time* and reflected a level of frustration she then felt. She accepts, in hindsight and given

Mr Partick's subsequent admonition (see 18 below), that it was not a sensible thing to do but questions whether it was the sole reason behind Mr Parks' resignation as is now claimed. She is of the view that if Mr Parks' resignation was wholly attributable to her comments (both to Mr Tily and during the discussion she and Mr Parks had on the 16th) the response was grossly excessive. She denies an insinuation that in visiting Mr Parks' neighbour she was checking up on him and states she was simply visiting a close friend.

[15] With respect to the conversation that occurred between herself and Mr Parks on 16 November, she says:

[8] *Keith ... came into the kitchen to see me. We went into my office and Keith said "Have you got something to say to me?" I replied, "No". Keith then informed me someone had said to him that I didn't believe he was sick with diarrhoea. I replied that he always said he had that when he calls in sick. Keith claims I scoffed at his explanation about having diarrhoea, but I did no such thing. I simply said that he had used that excuse each time he was off sick.*

[9] *I clicked who he was talking about and said "That bloody Dave Tily told you that". Keith agreed and then said he would be handing in his notice. I simply replied that if that was his decision then I accepted it. I definitely do not recall telling Keith I thought it was a good idea. I just thought that was what he wanted as he had always moaned about his hours and wages since I started working with him nine years earlier.*

[10] *We then went on to talk about what was wrong with him and he informed me that he had been unwell for some time and doctors didn't know what it was. I asked him why he hadn't told me this earlier as I would have felt different had I known. Keith said to me that maybe I should speak to David about his stirring. Keith then said he would still like to hand in his notice and I said I would get the correct form as it had to be sent to the area manager to be signed and then to Auckland.*

[11] *He then told me there were other things going on as well. I remember asking him if everything was okay at home and he said "Yes". He mentioned that he had a specialist appointment that was still awhile away.*

[Extract from Ms Coulter's written statement of evidence].

[16] Ms Coulter then printed off a form entitled *termination advice* and gave it Mr Parks for him to fill in later that day. He claims that he returned it forthwith; Ms Coulter says when she gave it to Mr Parks she advised him to take it home and think about it overnight which he did. She is adamant that the form was returned the next day. This is the document that Mr Parks portrays as a resignation letter prepared

for him by Ms Coulter [refer paragraph 12 of the extract of Mr Parks' brief – 10 above, and emphasised orally]. The document is a one page standard form notifying payroll of an imminent termination in order that cessation action may be taken. It records the name and position of the departing employee, along with the reason for leaving and whether or not they have returned company property. In this instance, the form was filled in by Mr Parks and not Ms Coulter. It notes that he resigned and that the reason was personal.

[17] Mr Patrick attributes Mr Parks' telephone call to some form of bond arising from the fact that it was he, Mr Patrick, who had initially interviewed and employed Mr Parks some years earlier. He says Mr Parks advised him he had resigned before adding that he was disappointed that Ms Coulter had commented that he always used the same excuse to cover his absences. Mr Patrick accepts that he responded by stating that that was not good enough or words to that effect. He states that he undertook to counsel Ms Coulter but denies any suggestion that he would get back to Mr Parks. Mr Patrick portrays the conversation as quite casual and states that nothing said by Mr Parks gave him any inkling the two issues (the resignation and the comments) were linked. He says that while Mr Parks said he was unhappy with Ms Coulter's comments he felt Mr Parks' comment was made in a passive manner and there was no obvious angst. He felt that the resignation was attributable to a general dissatisfaction Mr Parks had been voicing in recent times, particularly in regard to the fact that staff had recently felt compelled to accept a nil wage increase.

[18] Mr Patrick subsequently contacted Ms Coulter who, it should be noted, was at the time relatively inexperienced as a supervisor, and advised her that her comments were inappropriate and that she should avoid a similar recurrence in the future. That was, as far as Mr Patrick was concerned, the end of the matter.

Determination

[19] Mr Parks is claiming that he was constructively dismissed.

[20] In *Auckland etc Shop Employees etc Industrial Union of Workers v. Woolworths (NZ) Ltd* [1985] ERNZ Sel Cas 136; 2 NZLR 372 (CA), the Court of Appeal held that constructive dismissal includes, but is not limited to, cases where:

- (a) An employer gives an employee a choice between resigning and being dismissed;

- (b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign;
- (c) A breach of duty by the employer causes an employee to resign.

[21] Mr Parks' approach is two-pronged. The assumption underlying the concept of constructive dismissal is that actions or words of the employer induced a subsequently proffered resignation. Mr Park implies that Ms Coulter's response to his statement *if she didn't believe me then perhaps I should resign*, namely that it was best he did, forced the issue and that her desire to have him resign was confirmed by her preparing his resignation letter. The second, and predominant, thrust of Mr Parks' claim is that Ms Coulter's comments signified a lack of trust so significant that it totally undermined the viability of the employment relationship. As such, it constituted a breach of duty that caused him to resign.

[22] Mr Parks' first approach does not, in my view, have any chance of success. The evidence does not, I conclude, support it.

[23] There are, as is obvious from the outline above, disparate views about what was said between Mr Parks and Ms Coulter on 16 November. I prefer Ms Coulter's recollection. Her oral evidence remained consistent with her written brief and was not disturbed by cross-examination. The same cannot be said of Mr Parks' recollection. His evidence consisted of a written brief, notes taken around the time of the events complained of and oral evidence presented in answer to questions from both myself and the two representatives. There were a number of inconsistencies and one significant claim of Mr Parks' (namely that Ms Coulter prepared his letter of resignation) simply does not stand scrutiny. As was said in the narrative above, the document in question is a standard form notification to payroll and it was filled out by Mr Parks.

[24] The conclusion that I prefer Ms Coulter's evidence leads me to accept that after Mr Parks initially tendered his resignation, the two of them had a civilised conversation during which they canvassed Mr Parks' medical condition and the fact that it was both real and serious after which Mr Parks chose to reconfirm his resignation amidst advice that there were other influences upon him. I also accept Ms Coulter's evidence that she told Mr Parks to consider his actions overnight and that the

form was returned the next day. Those are not the actions of an employer seeking a resignation or giving an employee no choice.

[25] Similarly, there is the conversation of 17 November between Mr Parks and Mr Patrick. As was the case with Ms Coulter, Mr Patrick's evidence remained consistent throughout. He is adamant that the conversation was relatively casual and that at no stage did Mr Parks suggest that he regretted his decision to resign, that he wished the company to reconsider or allow him to resile from that decision, or clearly intimate that his resignation and Ms Coulter's comments were even linked. Again, Mr Parks' evidence was uncertain and, in places, contradictory. For example, and when directly asked whether or not the conversation was aimed at reversing his resignation, he initially said no (and quite forcefully so). When the question was later repeated, he gave a contrary answer: namely that he was looking for an explanation that would allow him to stay at work.

[26] That leads to the breach argument. The contended breach is, for want of a better description, an unreasonable failure to have trust and confidence in Mr Parks.

[27] The breach is founded in one sole event – namely, Ms Coulter's comments to Mr Tily which, in Mr Parks' view, were subsequently reiterated to him on 16 November.

[28] As said earlier, a commonly applied test for constructive dismissal is whether the initiative for the resignation has come from the employer (*NID Distribution Workers' etc IUOW v. Foodtown Supermarkets Ltd* [1988] NZILR 588 (LC)). The initiative need not be express or overt and a resignation which amounts to constructive dismissal may occur when the resignation has followed unfair or unreasonable conduct by the employer (*Neilson t/a Neilson & Associates v. Auckland Dental etc IUOW* [1989] 2 NZILR 304 (LC)). A breach of duty is such conduct, but it must also be recognised that for a claim of constructive dismissal to succeed, there must not only be a breach of duty on the part of the employer but one that was of such character and seriousness as to make the employee's resignation reasonably foreseeable (*Weston v. Advkit Paralegal Services Ltd* [2010] NZEmpC 140).

[29] I cannot conclude that such conduct occurred here.

[30] Ms Coulter's comment was insensitive, perhaps derogatory, but it was not so significant that it warranted the reaction seen here. As Mr Tily, a witness for the applicant, put it, *Louisa's comment was an innocent one.*

[31] Innocent and careless but not, in my view, warranting the resignation that followed, given the circumstances in which that resignation occurred. My preference for Ms Coulter's evidence leads me to conclude that whilst the resignation may initially have been tendered with some heat, there followed a reasonable discussion after which Mr Parks twice proffered a reasoned confirmation whilst, on one of those occasions, alluding to the fact that there may have been other issues influencing his decision. Equally, my preference for Mr Patrick's evidence leads me to conclude that notwithstanding an opportunity to reconsider his position, Mr Parks felt comfortable with it and failed to take the opportunity.

[32] In the circumstances, I conclude that Mr Parks' reaction was excessive and not justified by the circumstances that led to his tendering his resignation. His claim must therefore fail and is accordingly dismissed.

Costs

[33] I reserve the issue of costs. I ask that the parties try to resolve the issue but, failing that, and in the event Medirest wishes to seek costs, it is required to file an application within 28 days of the date of this determination. A copy shall be served on the applicant who is to file any response within 14 days of the application.

M B Loftus
Member of the Employment Relations Authority