

BETWEEN

JACQUELINE PRESTON
Applicant

AND

COMTEC COMMUNICATIONS
LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Tony Shaw, Counsel for Applicant
Brian Nathan, Counsel for Respondent

Investigation Meeting: 17 April 2007 at Timaru

Determination: 22 June 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

- [1] The applicant (Ms Preston) alleges that she was constructively dismissed by the respondent (Comtec) and Comtec resists that claim.
- [2] The parties attended mediation but were unable to resolve their differences in that forum.
- [3] Ms Preston commenced working for Comtec on 15 February 2005 but from 1 April 2005 she undertook the role within Comtec of a Vodafone Business Consultant.
- [4] Mr Kevin Earl, who gave evidence for Comtec, is Comtec's sole director and shareholder and it was the relationship between Ms Preston and Mr Earl which led to the alleged breakdown in the employment relationship between the parties.
- [5] Ms Preston says that throughout the employment relationship, "*Mr Earl treated me in a rude aggressive and intimidating manner which got progressively worse the longer I was working there*".
- [6] Certainly there were difficulties in October 2005 when Ms Preston raised with Mr Earl her concerns about the "... *constantly angry manner*" in which he dealt with her verbally and in

writing. Her evidence was that, after raising the matter with him, things got worse rather than better.

[7] There was a Vodafone sales course scheduled for early December which Ms Preston was to attend. Ms Preston received the registration forms from Vodafone and completed them. She emailed Mr Earl on 1 December 2005 to check on accommodation arrangements for the course, which was in Christchurch.

[8] Mr Earl appeared in Ms Preston's office on Monday, 5 December 2005 without warning. Ms Preston describes him as "*angry and in a bullying mood*". She says that Mr Earl told her that he was going to tape record the conversation. While Mr Earl agrees that he did say that he was going to tape record the conversation and that there was "*a dispute between the two of us*", he does not accept that he was angry or bullying in tone.

[9] This was clearly a significant exchange between the principal protagonists; Ms Preston describes this meeting as "*the absolute worst*". Mr Earl says that he was angry because Ms Preston had not adequately communicated with him the dates of the proposed course. She says that she had no idea that she was required to do so, given that she understood Mr Earl had volunteered her for the course.

[10] Ms Preston says that Mr Earl accused her of booking herself on the course without his authority but it is perfectly clear from the evidence that Comtec registered Ms Preston for the course, although the logistics details were arranged by Ms Preston when she received the documentation in advance of the course.

[11] Ms Preston says that, during this conversation on 5 December 2005, Mr Earl also threatened to confiscate her work computer so that he could establish an audit trail of emails in relation to the booking of the course and to avert that possibility, she gave Mr Earl a copy of all the relevant emails and it appears that that action satisfied Mr Earl that there had been no impropriety by Ms Preston.

[12] Ms Preston's evidence is that this discussion with Mr Earl really upset her and she made some notes about the discussion that night at home. Those notes were put into evidence during the investigation meeting.

[13] Ms Preston duly went to the sales course and found it very helpful. However, on her return to the workplace, she found herself deluged with requests for "*a wide variety of reports*" which took her away from her principal duties of selling. Mr Earl agreed that he had asked Ms Preston for

a wide variety of reports during this mid-December period because “*I was getting pressure from above*”.

[14] Mr Earl’s evidence was that Ms Preston was not an able salesperson and that his firm was missing business and failing to make appropriate connections because of that.

[15] As a consequence of Ms Preston feeling unable to make use of her newfound skills from the training course because of this inundation of report writing that she complained about, she sought legal advice and as a consequence of that her lawyer wrote to Comtec by letter dated 19 December 2005. The letter essentially seeks a commitment from Mr Earl to stop his bullying behaviour and proposes that there be a meeting between the parties with an independent third party as mediator to try and repair the relationship. Ms Preston’s evidence was that she sought to continue in the role but without the intimidating behaviour that she says she was confronting.

[16] Ms Preston’s evidence was that the letter was carefully timed to effectively coincide with her absence on annual leave. She was on annual leave from 29 December 2005 and did not return to duty until 4 January 2006. When she did return on that date, there was a letter from Mr Earl requiring her to remain on paid leave until 18 January 2006. No explanation was offered for this decision.

[17] When Ms Preston returned to duty as instructed on 18 January 2006, there was a further letter in similar terms waiting for her which put her off again until 1pm on Monday, 23 January 2006. Ms Preston says that she rang Mr Earl and sought an explanation after the second letter but got none.

[18] When Ms Preston returned to work on 23 January 2006, she found yet another letter from Mr Earl seeking her completion of a report about a function that had been held on 17 August 2005 and with an explicit instruction that she was to do no other work apart from that. When she finished that report (which on her evidence was a supplementary report to one that she had done at the time), she contacted Mr Earl for further instructions but on her evidence, got none.

[19] The following day, Ms Preston participated in a meeting with representatives from a dealer network for Vodafone which, it is common ground, Mr Earl had set up. Mr Earl says this meeting was his response to the 19 December letter from Ms Preston’s lawyer. Ms Preston acknowledges that she had received notice of this meeting some days previously by cellphone. The meeting, which took place in a motel, involved the Vodafone representatives talking separately to Ms Preston and to Comtec.

[20] Mr Earl's evidence was that the meeting resulted in a "*useful agreement*"; Ms Preston remained discouraged by the relationship between her and Mr Earl and contended that nothing of use had been achieved.

[21] Ms Preston was supposed to recommence work the following day, but heard nothing from Mr Earl. On 26 January, Mr Earl rang Ms Preston with a progress report on her recommencing her duties but by this time she says she had "*had enough*" and she tendered her resignation that day.

Issues

[22] It is useful to analyse the factual matrix by looking first at the meeting between Mr Earl and Ms Preston on 5 December 2005, next the letter from Ms Preston's lawyers of 19 December 2005 and Comtec's response, and finally the meeting with the Vodafone representatives on 24 January 2006 and its aftermath.

The 5 December 2005 meeting

[23] Ms Preston describes this meeting as "*the absolute worst*". She says that Mr Earl's shouting could be heard in the retail store below and while there was no evidence to support that view, or indeed to collaborate her subsequent statement that the store manager came up to comfort her immediately after the meeting concluded, there was evidence from former colleagues of Ms Preston that Mr Earl adopted a truculent and aggressive stance in talking to Comtec's employees.

[24] For his part, Mr Earl denied that he spoke inappropriately to Ms Preston or indeed to anyone else, sought to cast doubt on the veracity of the evidence of former workmates of Ms Preston and even seemed quite sanguine about saying that Ms Preston's evidence was "*all made up*". When pressed as to why Ms Preston and her supporting witnesses would make evidence up, Mr Earl could offer no explanation.

[25] Mr Earl thought that Ms Preston "*interpreted things differently from the way they were intended*", but on the whole seemed satisfied with the nature of the relationships that he had with staff working for Comtec.

[26] In assessing the relative credibility of the two principal protagonists, I was drawn to the conclusion that Ms Preston's evidence about the 5 December meeting was to be preferred more by the nature of Mr Earl's denials than by the quality of the supporting evidence offered by Ms Preston's other witnesses.

[27] Nowhere in Mr Earl's brief of evidence filed in the Authority did he deny Ms Preston's core allegations of bullying, rudeness and intimidation by him of her. As that is a central feature of Ms Preston's claim, it does seem significant that Mr Earl has chosen not to comment on those matters in his written brief.

[28] Certainly, in his oral evidence, he denied each claim in turn, but I must say that I found his bare denials quite unconvincing.

[29] I was further encouraged to doubt Mr Earl's accurate perception of events when, at a critical point in his responding to questions, he denied in answer to a question from Ms Preston's counsel, a proposition he had previously affirmed in answer to a question from the Authority. When I interrupted counsel to point out the discrepancy, Mr Earl recanted and reverted to his original testimony which was consistent with the written brief of evidence that he had filed.

[30] I find then, on the balance of probabilities, that Mr Earl's behaviour on 5 December 2005 was consistent with the description offered by Ms Preston and inconsistent with Mr Earl's blanket denials. I consider the 5 December meeting must have been a distressing and debilitating experience for Ms Preston and I am satisfied that in behaving in the way that he did, Mr Earl was not behaving as a fair and reasonable employer would.

The 19 December letter and response

[31] When Ms Preston decided to act on her disquiet about the unpleasant relationship with Mr Earl, she had her lawyers write the 19 December 2005 letter to which I have already referred.

[32] I am satisfied that the effect of that letter was to encourage Mr Earl that he needed to address the relationship.

[33] Mr Earl gave evidence that he was "*surprised*" by the letter but it is difficult to see why he should have been. He acknowledged in his written brief and initially in oral testimony responding to my questions, that since the meeting between himself and Ms Preston on 19 October 2005, he had known that there was a problem in the relationship between him and Ms Preston and that he was unable to point to any steps that he had taken since 19 October 2005 to address those problems.

[34] Notwithstanding that, Mr Earl acted properly in endeavouring to establish a meeting of the sort suggested by Ms Preston's counsel in his letter of 19 December, and this was the meeting organised for 24 January 2006 at which the Vodafone representatives were, in effect, playing the role of the independent party.

[35] While I am satisfied that Mr Earl acted properly and as promptly as he could, given the time of year, I do not think that Mr Earl's treatment of Ms Preston after her return from annual leave on 4 January 2006 was in any way appropriate. In the period from 4 January 2006 down to the meeting between the parties on 24 January 2006, a period of very nearly three working weeks, Mr Earl gave Ms Preston no less than three letters, each of which effectively instructed her not to fulfil her usual duties and none of which contained any explanation whatever of why Ms Preston was to be excluded from the performance of these duties.

[36] Mr Earl readily accepted, in answer to a question from the Authority, that he was mistaken in failing to make it clear to Ms Preston during that three week period that he was endeavouring to pull together the meeting which Ms Preston's own lawyer's letter of 19 December 2005 had proposed. If Mr Earl had been straightforward about that being the reason for Ms Preston effectively being excluded from her workplace, then the action which Mr Earl took might be more defensible.

[37] However, this action of Comtec was, in effect, an unlawful suspension of Ms Preston, there being no provision in the employment agreement provided to the Authority to allow the employer to suspend the employee in any circumstances. Certainly the process used by Comtec gave Ms Preston no opportunity to be heard on the suspension, and on the face of it, given that part of her income was derived from commissions on sales, and in fact the employment agreement gives Comtec the right to consider termination of the agreement if there is a failure to generate certain sales, it seems doubly reprehensible that Ms Preston was excluded from the workplace.

The 24 January 2006 meeting and its aftermath

[38] The 24 January 2006 meeting was intended by Mr Earl to pick up the proposal contained in the 19 December 2005 letter from Ms Preston's counsel. I am satisfied that in endeavouring to arrange this meeting, Mr Earl acted in response to the 19 December letter.

[39] However, the real question is whether the January meeting did anything to reassure Ms Preston and, in particular, whether Mr Earl's arrangements for the meeting properly briefed the third party of the extent of the difficulties that were to be confronted and, hopefully, addressed.

[40] In that latter regard, I am satisfied on the balance of probabilities that Mr Earl did not properly brief the third party. Mr Earl's evidence is that he read to the Vodafone representatives the 19 December letter, but Ms Preston, whose evidence on this point I prefer, said that the Vodafone representatives had an entirely different understanding of the purpose of the meeting from Mr Earl, than the one that they got from Ms Preston herself. Given Mr Earl's admission in his oral evidence,

that he had taken no earlier steps at all to address the relationship difficulties that he had with Ms Preston, despite being advised about them by her in the 19 October 2005 meeting, it seems to me more likely than not that Mr Earl continued to minimise the extent of the difficulty that existed between him and Ms Preston.

[41] This is particularly so when one turns to the nature of the limited exchange between Ms Preston and Mr Earl at the 24 January meeting when, on Ms Preston's evidence (which on this point I accept), Mr Earl "*continued his hostile and aggressive manner towards me ...*" and, as a consequence, Ms Preston "*... left the meeting in tears*". Consistent with his responses in respect of the earlier events, Mr Earl denied that he had been "*hostile*" and "*aggressive*" in his exchanges with Ms Preston at the 24 January meeting. As I say, I prefer Ms Preston's recollection.

[42] It seems to me that the exchange between Mr Earl and Ms Preston at the 24 January 2006 meeting, limited though it was, was enough to, as it were, push Ms Preston over the edge such that her resignation was filed with the employer 48 hours later.

Determination

[43] For the reasons I have articulated in this determination, I am satisfied on the balance of probabilities that Ms Preston has made out her claim for a personal grievance on the grounds of a constructive dismissal. I think the course of conduct undertaken by Comtec was so gross and insulting of Ms Preston that she literally had no option but to resign. I am satisfied Comtec so grossly breached their duty to act fairly and equitably towards Ms Preston as to create an untenable environment for her which led to her resignation. It follows that this case falls into the third category of constructive dismissal: *Auckland Shop Employees IUOW v. Woolworths (NZ) Ltd* [1985] 2 NZLR 372 applied.

[44] I am required to consider whether Ms Preston contributed to her own misfortunes and I am not persuaded that the evidence discloses that she did. This was a situation where there were clearly, on both parties' evidence, performance deficits, but the reasons for those deficits might well be found in the toxic and unhealthy relationship between Mr Earl and Ms Preston so I am not persuaded anything turns on that.

[45] Ms Preston seeks a significant award of compensation and lost wages over a nine month period. I think this is a case where a substantial award is appropriate, and I award Ms Preston the sum of \$12,500 as compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 as compensation for hurt, humiliation and injury to her feelings. I am satisfied, on the evidence I heard, that the damage to Ms Preston by way of this non-economic loss was grave indeed.

[46] I am also satisfied that this is a case where an award of lost wages for the total period out of work is appropriate. In Ms Preston's case, she was unfit to work as a consequence of the dismissal for about nine months and lost a total of \$28,500 gross. I think it appropriate that Ms Preston receive that sum from Comtec. I note Ms Preston's obligation to repay a sickness benefit from that sum which will rebate the amount somewhat.

Costs

[47] Costs are reserved.

James Crichton
Member of the Employment