

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 14/09
5108783

BETWEEN LENA TE AMO
 Applicant

AND REWORKS NZ LIMITED
 Respondent

Member of Authority: Paul Montgomery

Representatives: Andrew McKenzie, Counsel for Applicant
 Peter Zwart, Advocate for Respondent

Investigation Meeting: 2 July 2008 and 30 September 2008 at Christchurch

Submissions received: 30 October and 21 November from Applicant
 13 and 28 November from Respondent

Determination: 13 February 2009

DETERMINATION OF THE AUTHORITY

[1] Ms Te Amo claims she was constructively, unjustifiably dismissed from her position as a weighbridge operator with the respondent company which operates the Christchurch Municipal Refuse and Recycling Centres. The company at the relevant time was jointly owed by Concut Skips Limited (Concut) and Meta NZ Limited (Meta). Ms Te Amo's father was a shareholder in Concut and it was he who managed the respondent company's operations. The respondent also employed the applicant's mother and her partner up until a share purchase and transfer effective 10 October 2007.

[2] The applicant says that in the course of negotiations regarding the sale and purchase of the shares, negotiators for Meta had stated it was preferable that no member of the Te Amo family should be employed under the new ownership. Ms Te Amo says she, her mother, her father and her partner were employees of the

respondent. As a term of the sale and purchase agreement Mr and Mrs Te Amo withdrew and Ms Te Amo contends the incoming management had drawn a bead on her, and as a consequence had no alternative but to resign, the resignation amounting to a constructive dismissal. She seeks reimbursement of lost remuneration, \$10,000 compensation for hurt and humiliation and costs. A claim for compensation for loss of paid parental leave was withdrawn.

[3] The respondent strenuously denies the applicant's resignation amounts to a constructive dismissal. It says that Concut initially insisted Ms Te Amo be made redundant in the transfer of shares but later changed its view and promoted her being retained by the respondent. Further, it says none of the incoming management had any axe to grind with the applicant and that the retention of Ms Te Amo with the respondent was simply not an issue. The respondent says there was no breach of its obligations to the applicant and certainly none so serious as to justify her resignation. On that basis it declines the remedies the applicant claims.

[4] The parties attended mediation but were unable to resolve their differences.

Relevant facts

[5] The change of the ownership of the business took place at noon on Wednesday 10 October 2007 and prior to that handover Mr Rod White, who was the new site manager, attended mid-morning at the workplace. Mr Te Amo, the outgoing site manager took Mr White for a tour after the Te Amo's had shouted morning tea for the staff.

[6] Soon after Mr and Mrs Te Amo left the site and Mr White spoke to the staff about himself and then Ms Te Amo introduced him to each staff member in turn. The applicant says Mr White told the staff that despite the management change it was to be *business as usual*. She also says he told the staff *Lena won't be here for much longer*. Ms Te Amo also says that when she informed Mr White that he had taken a tour of the site without wearing a high visibility vest he had incurred a fine of a dozen beer per worker, that Mr White replied *you fucking bitch*.

[7] Mr White in his evidence, denied saying either of these things. He says that he never raised the issue of Ms Te Amo staying or going in the course of this interchange with staff and says that his explanation when told of the fine he had incurred was to

say *Ah fuck*. Ms Te Amo says that after this comment she left somewhat stunned and returned to the office.

[8] Ms Te Amo also says that Mr White approached her later in the afternoon and told her that on the following day Darrell Higson *would be making me redundant and would I please stay on and train up a new staff member*.

[9] The following morning the applicant turned up to work at 7am and at 8am she says Mr White introduced her to Lisa who was, in his words, *the new weighbridge operator* and says Mr White asked her to train her up immediately. Mr White challenges the accuracy of this account. He says that when Ms Lisa Rakatau was introduced to the applicant he referred to Ms Rakatau as *one of the weighbridge operators from Meta*. Mr White explained to the Authority that Ms Rakatau had operated a recycling plant in Huntly, that she was not a replacement for Lena but because he had to have a day to day supervisor on site due to his frequent absences in Huntly at the Metro Refuse Centre, she was in essence going to be his second in command.

[10] At around about 10am Darrell Higson, the Human Resource Manager for Meta New Zealand Limited arrived for a meeting. The applicant says that in his words the purpose of the meeting was *to negotiate my employment*. Ms Te Amo says she attended the meeting with Anthony Bergman as her support person and that Mr Higson and Mr White were present on behalf of the company. The applicant had made some preparation for the meeting. Her evidence was *suspecting that matters were going to turn unfavourably for me, I secretly recorded the meeting. I have since obtained a transcript of that meeting which I attach to this statement*.

The meeting

[11] Mr Higson says his goal at the meeting was to reassure Ms Te Amo that in contradiction to what she had been told earlier by her father, she had a job at the company and that her job was largely unchanged. He said in evidence *I wasn't sure whether she was trying to be made redundant or whether she was concerned that we were trying to dismiss her*.

[12] Mr Higson says he made it thoroughly clear that he and respondent could see a future for the applicant with ReWorks and that he was not attending the meeting to remove her. He also says that once this was made clear to the applicant her support

person raised the argument that Ms Te Amo was in fact redundant. Again, Mr Higson says he made it clear that the applicant was not redundant and there was no intention to make her so. To clarify the position Mr White asked Mr Higson *so what you are saying is we can't make Lena redundant, you can't make her redundant because she is a weighbridge operator because we have still got a weighbridge that needs to be operated. Is that what you are saying?* Mr Higson replied *yes*.

[13] Once this was clarified Mr Higson says the applicant then returned to the issue that the company did not want her due to the conflict arising from her immediate family connection; *I'm family. I'm a conflict of interest*. The HR Manager went on to reassure the applicant that both men who were involved in the sale and purchase negotiations were aware Mr Higson was confirming her employment and accepted that course of action. Further, Mr Higson told Ms Te Amo that if difficulties arose or she believed a conflict of interest existed she could move to another weighbridge position.

[14] Following an adjournment Mr Bergman confirmed that Ms Te Amo would be staying on the respondent's staff. He further said she was *happy to stay*. On this point Mr Higson's evidence was *at this stage I believed that the matter was fully resolved. Lena wanted to stay and we wanted her to stay*.

[15] Soon after this the applicant's mobile phone rang and she left the meeting. Upon her return Ms Te Amo told the meeting she was going to see her doctor and take stress leave, and then left the premises.

[16] The applicant tendered a doctor's certificate giving her stress leave until 29 October 2007. On 16 October she tendered her resignation stating *it is also clear to me that the new management doesn't want me there as an employee and this has been made clear for several weeks now*.

[17] The letter of resignation, accompanied by a notification of personal grievance of the same date arrived from Mr McKenzie alleging an unjustified constructive dismissal.

Issues

[18] To determine this matter the Authority needs to resolve the following issues:

- Was the respondent responsible for a breach sufficiently serious to provide the applicant grounds for resignation; and
- Was the applicant's resignation foreseeable in the context of that breach; and
- If constructively dismissed, what remedies is the applicant entitled.

The investigation meeting

[19] At the investigation meeting the Authority heard evidence from Ms Te Amo, her father John and Mr Taylor Dickman, a former work colleague of the applicant. On behalf of the respondent evidence was presented by Mr Higson and Mr Marsh, the General Manager of Operations for the respondent.

[20] The investigation meeting was adjourned to enable the Authority to issue a witness summons to Mr White who, at the time of the meeting, was no longer employed by the respondent. On receipt of the Authority's summons this witness agreed to answer the Authority's questions and those put to him by the party's representatives and the investigation was reconvened.

Discussion and analysis

[21] As both representatives submit, the leading cases in considering a claim of this type are *Auckland Shop Employees Union v. Woolworths (NZ) Limited* [1985] 2 ACJ 963 and *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Offices IUOW* [1994] 1 ERNZ 168.

[22] For Ms Te Amo Mr McKenzie submits that the applicant's case falls under Situation C of the *Woolworths* case, namely:

Where a breach of duty by the employer leads an employee to resign;

or possibly Situation B where the employer has followed a course of conduct with the deliberate and dominate purpose of coercing an employee to resign.

[23] For the respondent Mr Zwart contends there was no coercive behaviour in this case and further, that Ms Te Amo's relying on statements made in the course of negotiations for the purchase of shares to which she was not party, is unsustainable.

[24] The evidence before the Authority supports the contention that coercive behaviour by the respondent cannot form the basis of the applicant's claim. Firstly, prior to her departing the meeting on 11 October, Ms Te Amo had been under the new management for approximately one working day. The only significant incident she points to as a basis for her claim are the allegations that Mr White called her *a fucking bitch* and the alleged statement by Mr White at the same meeting that *Lena won't be here for much longer*. A third possibility was the allegation that Mr White told the applicant that Darrell Higson would be making her redundant the following day. Mr White strenuously denied these three allegations. The context, says Ms Te Amo, was in a meeting with all site staff. One staff member present at that meeting Mr Dickman gave evidence to support the applicant in respect of the first two allegations. His evidence was that Mr White had indeed called the applicant *a fucking bitch* and that his tone was aggressive not as though it was said in jest. He further confirmed that he heard Mr White say during smoko that *Lena won't be here for much longer*.

[25] What is clear from the transcript of the meeting is that both Mr Higson and Mr White wanted the applicant to stay and, in the event she felt under any pressure due to her family connections, she could be transferred to another site to operate a weighbridge.

[26] On returning to the meeting after an adjournment, Ms Te Amo, through Mr Bergman made it clear she wished to stay. At that point Mr Higson said he believed the matter had been resolved to mutual satisfaction. What is missing from the transcript is any reference to the matters the applicant now seeks to rely on, specifically, the name calling and the statement that she would not be with the company for very much longer. I think this quite remarkable given that the events the applicant says form the basis of her resignation occurred fewer than 24 hours earlier.

[27] I think it also significant that the allegation regarding Mr White telling her that Mr Higson would be making her redundant the following day does not appear in the statement of problem nor in any other correspondence between the parties until Ms Te Amo's statement of evidence was lodged and served. There would appear to have been no witnesses to this alleged encounter and Mr White denies saying anything of the kind.

[28] In reviewing these conflicts and the evidence, I am mindful that Mr Dickman acknowledged, as did the applicant herself, the copulatory adjective is frequently employed in the respondent's work sites as is its expletive form. I think in the circumstances of having been tricked into not wearing a high visibility jacket and then being informed by the applicant that he needed to pay a penalty of several dozen beer to other staff led to Mr White employing the phrase complained of. In that setting I think it more likely the remark was an exclamation rather than personal invective.

[29] I have certain reservations about the evidence of Mr Dickman in that his evidence came by way of a statement of evidence in reply to those lodged by the respondent's witnesses. That in itself is not a concern but the language he uses to describe the two incidents which are central to his evidence, is identical with those used by the applicant herself. On the matter of whether or not the applicant was to remain with the respondent, Mr Dickman quotes the applicant's evidence verbatim. I am of the view that this witness was genuine in his efforts to assist the Authority. However, I cannot rule out the possibility of some coaching or at least memory jogging on the part of the applicant.

[30] In her statement in reply Ms Te Amo speaks of the motivation behind her wanting to stay. She says:

I knew that I had to stay for my baby's sake and was prepared to do so if it was a happy environment.

[31] She goes on to say that after being told by her support person that she would be *happy to stay – more than happy to stay*, Mr Higson, in reply to a question from Mr Bergman who asked *so what you are saying is that it may be made harder for her*, replied *I am not admitting it but it is a valid concern, that's one she should be concerned about.*

[32] Ms Te Amo says she took this as an admission that life would be made hard for her and that she could not risk her baby's health with the stress of this pressure.

[33] I am satisfied that the respondent through Mr Higson had addressed this matter thoroughly and had reassured her that in the event that the atmosphere became difficult he would offer her a transfer to another weighbridge site. What is also of interest is that up until this matter came before the Authority the respondent was unaware that the applicant was pregnant. Of course, the applicant had every right to

keep this matter to herself. However, when it forms a significant element in her decision to tender her resignation, and to claim that resignation is equivalent to a dismissal, I think it not unreasonable to appraise the employer of that fact.

[34] What is also clear from the transcript is that at the time of the second and final adjournment Ms Te Amo telephoned her father *to let him know how things were unfolding and to seek his advice*. In the course of that conversation she asks her father *how long do I ask them to put me off – a week? ... okay, all right. ... thanks Dad ... okay, bye*.

[35] Upon returning to the meeting Ms Te Amo says:

I am actually going to end this hearing now. I am going home for the rest of the day, I am going to the doctor. I will let you know this afternoon, I am going on stress leave. I can't take much more of this, this is doing my head in – it has been for several weeks now and quite frankly I don't think we are going to get anywhere today. I need to clear my head, I need to go the doctors, and I will be taking advice on it.

[36] The applicant's resignation and medical certificate followed shortly thereafter.

[37] So, to summarise the meeting, the respondent accepted Ms Te Amo had some valid concerns regarding potential displeasure by senior company executives at her remaining employed. Those concerns were put to rest by Mr Higson confirming that Messrs Marsh and Hay were aware that he was reaffirming the applicant's employment. Indeed, Ms Te Amo told her father *I still have a job here and they are more than happy to keep me on and I am not a conflict of interest and Ian Hay and Adrian Marsh are aware that Darrell is here to keep me employed*.

[38] Further, Mr Higson also put the applicant's mind to rest in respect of Ms Rakatau. She told her father *Lisa's here only to learn the system in case I want time off, that's the only reason that she is here*.

[39] It is also apparent that it is during the second conversation with her father that Ms Te Amo raises with him the issue of stress. What is significant in my view is that this matter has not been a subject discussed with the respondent's representatives. Upon re-entering the meeting the applicant immediately plays the stress card and when challenged by Mr Higson who observed that she appeared quite relaxed, Ms Te Amo replied that that was his opinion and that was fine.

[40] Turning finally to the matter of foreseeability it was quite clear from the evidence of Mr Higson that the respondent had no reason to expect her resignation at that time. Mr Higson also told the Authority that in hindsight he could see the issues was applicant was considering, in particular in the light of her pregnancy but, being unaware of that situation at the time, was unable to consider that in his dealings with Ms Te Amo.

[41] I think it also clear from the evidence that Mr White told the Authority that the purpose of the meeting with the applicant was to discuss with Ms Te Amo the way forward and that he had no major concerns at all about her remaining in the respondent's employment.

[42] The influence of Mr Te Amo on the events surrounding this matter require some comment. It was Mr Te Amo who advised his daughter and her partner that the incoming management wanted all personnel with family connections gone from the work site. He suggested and arranged the equipment for the clandestine taping of the 11 October meeting and it was he who prompted his daughter to exit the meeting and claim she was suffering work related stress.

[43] The applicant was capable of requesting that the meeting be recorded openly and that each party have a copy of that recording. Mr Te Amo could have acted as his daughter's support person at the meeting but his evidence was he asked Mr Bergman to fulfil that role. Rather than adopt such an open approach Mr Te Amo chose to influence the meeting by use of cellphone contact with his daughter and Mr Bergman. It is clear from the transcript he was shaping the issues for discussion.

[44] Another concern is Ms Te Amo's application for parental leave. On the evidence Mr Te Amo signed a declaration stating that the applicant had been employed by the company (Becon) for six months. It is evident that the handwriting employed to fill out the IR880 is that of Ms Te Amo including the section headed "Employer to Complete". This section and the declaration are signed by the same person who signed Mr Te Amo's statement of evidence lodged with the Authority.

[45] That statement that Ms Te Amo had been employed by Becon for six months was patently untrue and known to be untrue at the time it was entered on the form. When evaluating issues of credibility where evidence was in conflict, I have had regard to these matters.

The determination

[46] Returning to the issues set out above in this determination I find:

- The respondent was not responsible for any breach of its obligations towards Ms Te Amo. In fact, as made clear in the clandestine transcript, it was at pains to discuss any matters she raised thoroughly, and to reassure her of the value the company placed on her services.
- The applicant's resignation was not foreseeable as the employer had reassured her of its support and assistance in retaining her in her current role. Ms Te Amo was entitled to resign. She did so.
- Ms Te Amo does not have a personal grievance. Her resignation was simply that and does not equate to a constructive dismissal.

Costs

[47] Costs are reserved. The parties are to attempt to resolve the matter of costs between themselves. Failing that Mr Zwart is to lodge and serve his memorandum 14 days following the issue of this determination. Mr McKenzie is to have a further 14 days following receipt of the respondent's memorandum to lodge and serve his memorandum in reply.

Paul Montgomery
Member of the Employment Relations Authority