

Attention is drawn to the order in paragraph [2] prohibiting publication of certain information in this determination.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 455
5382324

BETWEEN

KOLINIASI TUPOU
Applicant

A N D

WAIKATO MILKING
SYSTEMS NZ LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Paula O’Sullivan, Counsel for Applicant
Rob Towner and Susannah Maxfield, Counsel for
Respondent

Investigation meeting: 04 December 2012 at Hamilton

Date of Determination: 13 December 2012

DETERMINATION OF THE AUTHORITY

- A. Mr Tupou was not dismissed so his personal grievance claim for unjustified dismissal does not succeed.**

Non-publication order

[1] On 18 October 2012, after receiving written submissions from the parties, the Authority made an interim non-publication order regarding identifying details of an individual referred to as “Witness A”.

[2] By consent of the parties, under clause 10 of the Second Schedule of the Employment Relations Act 2000 (the Act), I order that the name, position, qualifications and convictions of Witness A are not to be published. The final order is

made for the same reasons the interim order was made and because I consider it in the interests of justice to protect Witness A's privacy.

Employment relationship problem

[3] Mr Tupou was employed for six years by Waikato Milking Systems NZ Limited (Waikato Milking) as a Warehouse Stores Person based in the Hamilton warehouse. Waikato Milking is one of four manufacturing divisions within the overall Waikato Milking group. Waikato Milking prides itself on having a positive workplace culture with low staff turnover and long serving employees.

[4] Mr Tupou resigned by letter dated 20 February 2012. His employment ended on 24 February 2012. Mr Tupou claims his resignation was a constructive dismissal because he was unilaterally demoted on 20 February 2012. Mr Tupou alleges his supervisor told him he was being demoted because he had too much time off work sick.

[5] Waikato Milking denies Mr Tupou was demoted. It says Mr Tupou's supervisor took steps on 20 February to limit Mr Tupou's access to a work computer he had been using to access pornography. Waikato Milking denies Mr Tupou was dismissed. It says he resigned freely and voluntarily and that he resisted attempts to convince him to rethink his resignation.

[6] Waikato Milking suggests the likely reason for Mr Tupou's sudden and unexpected resignation was that he had been caught for the second time using a work computer to access pornographic websites during work hours. Mr Tupou denies accessing pornographic websites at work.

Issues

[7] The following issues need to be determined:

- (a) Was Mr Tupou dismissed?
- (b) If so, was dismissal justified?
- (c) If not, what if any remedies should be awarded?

Was Mr Tupou dismissed?

[8] Mr Tupou says he resigned because he was demoted. Ms Sullivan submits Mr Tupou resigned because Waikato Milking breached its duty to consult him before instructing him to work predominantly in the domestic warehouse. Waikato Milking denies Mr Tupou was dismissed and says he resigned after being caught for the second time accessing pornography at work.

[9] In order to determine whether Mr Tupou was dismissed I need to consider the following issues:

- Was Mr Tupou demoted?
- Was there a duty to consult with Mr Tupou before he was instructed to work predominantly in the domestic part of the warehouse?
- Why did Mr Tupou resign?

Was Mr Tupou demoted?

[10] Mr Tupou claims he had no option but to resign when the Warehouse Supervisor Mr Aaron de Jong¹ told him on Monday, 20 February 2012 he was “demoted” with immediate effect because of the number of sick days he had off work.

[11] I find Mr Tupou was not demoted. I accept Mr de Jong’s evidence he never used the word demoted and that he did not intend to demote Mr Tupou. On 20 February Mr de Jong confronted Mr Tupou for the second time about accessing pornography on the export computer during work hours. Mr de Jong told Mr Tupou he was going to be moved from working mainly in the export part of the warehouse to instead work mainly in the domestic part of the warehouse to limit his access to the export computer.

[12] Mr de Jong told Mr Tupou he would explain the change to management on the basis Mr Tupou’s recent absences made him too unreliable to work in exports. I accept Mr de Jong’s evidence he made it clear to Mr Tupou the real reason for the change was to limit Mr Tupou’s ability to access the export computer but that he did not intend to share that information with management to avoid getting Mr Tupou in trouble.

¹ Mr de Jong was Mr Tupou’s immediate supervisor.

[13] Mr de Jong also told Mr Tupou that another staff member was going to be put in charge of exports. That person would have control over access to the export computer so they could ensure Mr Tupou was not using it to look at pornography.

[14] I find the only real change Mr de Jong implemented was to limit Mr Tupou's access to the export computer by moving Mr Tupou to do mainly domestic warehouse duties. Mr Tupou had no contractual right to access the export computer so it was not a breach of contract or a demotion for Mr de Jong to limit his access to the export computer in this way.

[15] It was very clear Mr Tupou had not been demoted - his pay rate remained unchanged, his reporting lines remained unchanged, his days and hours of work remained unchanged, his basic day to day duties remained unchanged. Mr Tupou's move to the domestic part of the warehouse did not result in any material, fundamental or substantial changes to his job or duties.

[16] Mr Tupou could not identify any clause in his employment agreement which had been changed or breached. Mr Tupou also stated he resigned partly because he was unhappy his colleague who he did not rate highly had been promoted to look after exports when Mr Tupou felt he should have got the promotion because he had worked there the longest.

[17] Mr Tupou's view was that the promotion of his colleague meant Mr Tupou had been demoted. That is misguided. Mr Tupou had no contractual entitlement to be promoted. It is entirely within Waikato Milking's management prerogative to decide who to promote. The promotion of a colleague did not mean Mr Tupou had been demoted. I find Mr Tupou was not demoted because his contractual terms and conditions of employment remained unchanged.

Was there a duty to consult with Mr Tupou before he was instructed to work in the domestic part of the warehouse?

[18] Mr Tupou claims his position was an "Export Storeman" so he was employed to work solely in the export warehouse. He relies on the notation on his payslip which says "Export Storeman" to support his claim that his position and employment was restricted to the export warehouse.

[19] Ms Sullivan submits Mr de Jong's instruction to move Mr Tupou from working predominantly in the export part of the warehouse to the domestic part of the

warehouse was “a breach of the duty to consult” about a change to the applicant’s duties. She says it was foreseeable Mr Tupou would resign when he was not consulted before being moved to domestic warehouse duties.

[20] I find Mr Tupou was not employed as an “Export Storeman.” That term was the internal accounting code used to allocate labour expense within the business. Mr Tupou’s employment agreement records his position as “Warehouse Stores Person” and his department as “Warehouse Hamilton”. He was responsible to Mr de Jong.

[21] Mr Tupou had no contractual right or entitlement to work solely in the export warehouse undertaking export-related duties. I accept the evidence given by Mr Dean Bell, Chief Executive Waikato Milking, that none of the storemen were allocated to a particular area of the warehouse, but moved around the export, domestic and internal parts of the warehouse as required.

[22] The evidence satisfied me that the storeman workforce was fluid between the different warehouse areas. Each storeman is responsible for wherever in the warehouse they are allocated on a particular day and may be moved to different areas from day-to-day depending on the demands of the business. Mr Tupou was no exception to this normal practice.

[23] Mr Tupou’s employment agreement also contained an “other duties” clause which allows his employer to allocate him any work provided he had the appropriate skills and/or qualifications to do it. This clause gives Waikato Milking a contractual discretion to move Mr Tupou around the different parts of its warehouse in order to meet the needs of its business.

[24] Waikato Milking’s discretion to change Mr Tupou’s duties was expressed as an unfettered contractual right. There was no procedural overlay which imposed on Waikato Milking a duty to consult with Mr Tupou before it allocated him duties he had the appropriate skills to do.

[25] I find that Waikato Milking was not restricted to only providing Mr Tupou with work in the export warehouse. There was also no contractual or statutory obligation on Waikato Milking to consult with Mr Tupou about Mr de Jong’s decision to allocate him duties in the domestic part of the warehouse.

[26] I find Mr de Jong’s instruction to Mr Tupou on 20 February that he was going to be predominantly undertaking duties in the domestic warehouse area was a

reasonable instruction consistent with the position of warehouse storeperson and the terms and conditions of Mr Tupou's employment agreement, including the "other duties" clause.

[27] Even if there had been a duty to consult, at no time did Mr Tupou say he resigned because he had not been consulted about being moved to domestic warehouse duties. There was no evidence at all to support Ms Sullivan's submission (raised for the first time in closing submissions) that Mr Tupou left his job because he had not been consulted. The reason Mr Tupou gave for resigning does not support the constructive dismissal argument made by counsel on his behalf.

When did Mr Tupou resign?

[28] There was a conflict in the evidence about when and how Mr Tupou resigned. Mr Tupou says he handed the Warehouse Manager, Mr Allan Wallace his letter of resignation on 23 February 2012. Mr Bell says Mr Tupou came to see him on 21 February 2012 and handed over his letter of resignation. I prefer Mr Bell's evidence because he had a very clear recollection of events and Mr Tupou did not. Mr John Anderson, the Managing Director was made aware of Mr Tupou's resignation on 21 February, which could not have happened if Mr Tupou did not resign until 23 February 2012.

Why did Mr Tupou resign?

[29] Mr Tupou's evidence to the Authority is that he resigned because he was demoted. I did not find that evidence credible.

[30] Upon receiving Mr Tupou's resignation letter Mr Bell immediately tried to talk Mr Tupou out of resigning.² Mr Bell was concerned because Mr Tupou's resignation was completely out of the blue and because Mr Tupou wanted to leave work so quickly.³

[31] Mr Tupou told Mr Bell he was resigning to show his sons he could make something of himself on his own because he intended to pursue his own business opportunities. Mr Tupou did not say anything to Mr Bell about a demotion or a

² Mr de Jong was the only manager aware of the concern Mr Tupou had been accessing pornography on the exports computer. Mr Bell and Mr Anderson did not find out about that until 23 February 2012, after they had already each tried to talk Mr Tupou out of resigning.

³ Friday of that same week.

constructive dismissal or express any concerns about his work. Quite the contrary, Mr Tupou was positive about the company and his employment history.

[32] Mr Bell suggested that Mr Tupou take time to consider whether he really wanted to resign. Mr Bell told Mr Tupou that if there was a particular issue in the warehouse that meant he did not want to work there any more, then Waikato Milking's broader organisation was big enough that Mr Tupou could be moved into another division or area of the business that may be of interest to him. Mr Tupou was also offered the opportunity to move to a different work site, if he no longer wanted to work at the Hamilton warehouse.

[33] The Managing Director, Mr John Anderson found out about Mr Tupou's resignation on 21 February 2012 and he also took immediate steps to personally address it with Mr Tupou.

[34] Mr Anderson went to see Mr Tupou in the warehouse to ask him why he was resigning because it did not seem to make sense. Mr Tupou told Mr Anderson that he did not like working in the warehouse. Mr Anderson's response to Mr Tupou was that if working in the warehouse was the issue then there were lots of different places within the business that Mr Tupou would be able to work instead.

[35] Mr Anderson suggested the production area, but Mr Tupou was dismissive of that suggestion. Mr Anderson also told Mr Tupou that there were four companies within the Waikato Milking group and that he would be able to go and work for one of those if he wanted to. Mr Anderson told Mr Tupou that before he made such a big decision as resignation he needed to be aware that there were other alternatives which did not involve working in the warehouse, assuming he did not wish to do so, that Mr Tupou may not have thought through.

[36] I accept Mr Anderson's evidence he tried to slow Mr Tupou down and suggested that whatever had happened to cause him to resign he should not be hasty in making such a decision.

[37] Mr Tupou accepts he did not tell Mr Anderson he was resigning because he believed he had been demoted or that he believed he had been constructively dismissed. Mr Tupou told Mr Anderson he was resigning to "prove to his boys" (his sons) he could be successful and take charge of his own life. Mr Tupou told Mr Anderson he was intending to set up his own business.

[38] Mr Tupou admits he had a good relationship with Mr Bell and Mr Anderson and thought highly of both of them. Mr Bell had previously assisted Mr Tupou with personal matters. Both of them had tried to get Mr Tupou to stay, if not in the Hamilton warehouse then at least within the company group. They were both individually proactive about trying to retain Mr Tupou's services.

[39] Mr Tupou was unable to explain why he did not raise any concerns with either Mr Bell or Mr Anderson. Nor could he explain why he had deliberately concealed what he claims were his real reasons for resigning from both of them. This fundamentally undermines his claim he was constructively dismissed.

[40] Both Mr Bell and Mr Anderson were concerned about Mr Tupou's unexpected resignation. It is a small close knit business and one or both of them would normally expect to hear rumblings if there were problems in a particular area or between staff. In this case there had been no suggestion that Mr Tupou was anything other than a happy and committed employee.

[41] Mr Anderson was determined to get to the bottom of why Mr Tupou had resigned with such haste. He made further inquiries of the operations manager, the warehouse supervisor and the purchasing manager to find out what had been going on in the warehouse which may have caused Mr Tupou to resign.

[42] The upshot of these inquiries was that Mr de Jong disclosed to Mr Anderson that he had confronted Mr Tupou for the second time about accessing pornographic websites on the export computer the same day Mr Tupou had drafted his resignation letter. Mr de Jong said Mr Tupou admitted accessing pornographic websites when confronted in October/November 2011 and had apologised and committed to not doing it again.

[43] Mr Tupou denies previously admitting he had accessed porn at work. I prefer Mr de Jong's evidence about that on the basis it is more likely to be correct. The actions of Mr de Jong and Mr Tupou were consistent with Mr de Jong's version of events but inconsistent with Mr Tupou's account. Mr de Jong's evidence was also to a large extent corroborated by Witness A. Mr Tupou was also observed deleting the many pornographic website addresses off the export computer. I consider it unlikely he would have accepted responsibility for doing so had he not been responsible for accessing those sites.

[44] Mr Anderson says he realised after Mr de Jong's disclosure Mr Tupou had resigned over the pornographic website issue out of embarrassment and fear his actions would become known within the company or be reported to management. Mr Anderson also believed Mr Tupou might have been concerned about people in his church finding out so he had decided to remove himself from the situation before that information had become known.

[45] Mr Tupou's denial that he was the person who had accessed the pornographic websites on the export computer from October 2011 to February 2012 is not credible. It is inconsistent with the documentary evidence. The internet history printouts of the dates and times of access can be compared with the time that each warehouse stores person clocked out and left the building on the relevant day.

[46] A number of pornographic websites were accessed on 11 dates between 13 October 2011 and 27 January 2011 from the computer that Mr Tupou mainly used. On every occasion the pornographic websites were accessed shortly after all other staff apart from Mr Tupou had clocked off work and left the building. All of the website accessing occurred when Mr Tupou was the only person left working in the warehouse. The viewing of pornographic websites always stopped a few minutes before Mr Tupou clocked off work and left the building.

[47] I consider on the balance of probabilities Mr Tupou resigned because he was confronted for the second time in a few months about continuing to use the export computer to look at porn during work hours.

Outcome

[48] I find there was no demotion, no breach of duty and no constructive dismissal. The evidence strongly indicates Mr Tupou resigned voluntarily of his own free will and not as a reaction to some fundamental breach of duty by his employer. In particular:

- (a) The terms of Mr Tupou's employment agreement contradict his allegation he had been demoted;
- (b) Warehouse store persons are expected to work in any three areas of the warehouse;

- (c) Mr Tupou's employment agreement gave Waikato Milking a wide discretion to allocate him to different duties, and the direction given by Mr de Jong was consistent with that discretion;
- (d) Mr Tupou's title, pay, terms and conditions, location of work and the supervisor to whom he reported were not changed as a result of one of his colleagues being promoted. The only change was a practical (rather than contractual) consequence in that Mr Tupou would no longer be able to access the export computer as freely as he had done in the past;
- (e) Mr Tupou's resignation letter was in an appreciative tone and therefore inconsistent with someone who believed he had been forced out of his job;
- (f) Both Mr Bell and Mr Anderson genuinely sought to dissuade Mr Tupou from resigning. Mr Tupou deliberately hid the real reasons he has alleged to the Authority he was resigning from Mr Bell and Mr Anderson who were both in a position to assist him to address any matters of concern that might have arisen.
- (g) Mr Bell and Mr Anderson both separately asked Mr Tupou to reconsider alternative positions within the company or within the Waikato Milking group in the face of Mr Tupou's firm view he no longer wished to continue working in the warehouse. It is therefore clear Mr Tupou had a number of other options available to him and that he was in no way forced or coerced into resigning;
- (h) I consider Mr Tupou's failure to disclose what he claims was the real reason for his resignation to either Mr Bell or Mr Anderson is consistent with him being embarrassed in case that disclosure may have led to them becoming aware of the pornographic website issue.
- (i) If Mr Tupou believed he had been poorly treated, then he had opportunities to have raised any concerns so they could be addressed. As a matter of commonsense, it is more likely Mr Tupou was embarrassed his accessing of pornography on the export computer would be found out and he did not want to face the consequences of that;

- (j) Waikato Milking treated Mr Tupou extremely well. It gave Mr Tupou a large farewell morning tea. He received a generous leaving gift and card and around \$750 of clothing. Mr Tupou was spoken about highly at his farewell function and he responded warmly with no hint that there had been any problems at work which had caused his resignation.

[49] Mr Tupou resigned of his own free will. Waikato Milking was not in any way culpable for Mr Tupou's voluntary decision. I find Mr Tupou has not discharged the onus of establishing on the balance of probabilities his employment ended as a result of a dismissal. Accordingly, Mr Tupou's unjustified dismissal personal grievance claim does not succeed.

Costs

[50] Although Mr Tupou is legally aided Mr Towner seeks an opportunity to address the Authority regarding costs. Waikato Milking has 14 days from the date of this determination to file its costs memorandum and Mr Tupou has 14 days from then to file his own costs memorandum in response. Waikato Milking has a further 7 days to respond to that, should it wish to do so.

Rachel Larmer
Member of the Employment Relations Authority