

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 131
5568640

BETWEEN ILA VAA
Applicant

AND HUHTAMAKI HENDERSON
LIMITED
Respondent

Member of Authority: Andrew Dallas

Representatives: Jerry Noble, Counsel for the Applicant
Peter Elder, Advocate for the Respondent

Investigation Meeting: 5 February 2016

Submissions Received: At the investigation meeting, with further information
received up to, and including, 22 February 2016

Date of Determination 2 May 2016

DETERMINATION OF THE AUTHORITY

- A. Ila Vaa’s resignation from her employment with Huhtamaki Henderson Limited (Huhtamaki) was not a constructive dismissal.**
- B. Huhtamaki had fairly investigated allegations about Ms Vaa’s conduct and had reasonably reached the findings put to her during a disciplinary process before she decided to resign.**
- C. Costs are reserved.**

Employment Relationship Problem

[1] Huhtamaki Henderson Limited (Huhtamaki) is part of a global packaging company headquartered in Finland.

[2] Huhtamaki's Henderson plant produces paper and rigid packaging products, including plastic cups, for the food industry. One of its key customers is McDonald's New Zealand Limited.

[3] Huhtamaki employed Ila Vaa from 22 July 1996 until 26 March 2015, when she resigned from her employment at the conclusion of a disciplinary process.

[4] Ms Vaa said she resigned from her employment after she was told she was going to be dismissed by Huhtamaki and upon taking advice from her union organiser, Nick Quirino.

[5] In the weeks after her dismissal, evidently having taken further advice, Ms Vaa resiled from her resignation and claimed Huhtamaki constructively dismissed her. A personal grievance was raised on her behalf and subsequently a statement of problem was lodged with the Authority. The parties attempted mediation but were unsuccessful.

[6] In settlement of her personal grievance with Huhtamaki Ms Vaa sought reimbursement of lost wages and compensation for humiliation, loss of dignity and injury to feelings.

The Authority's Investigation

[7] As a result of directions issued following a case management conference, the parties cooperated in the preparation of a limited agreed statement of facts.

[8] These facts were:¹

- (i) On June 2014, Ms Vaa was given a verbal warning by Huhtamaki for deliberately falsifying documents.

¹Re-drafted for tense and style.

- (ii) On 6 October 2015, Huhtamaki gave Ms Vaa a final written warning for speaking aggressively and behaving threateningly toward a staff member and failing to follow correct quality procedures following identification of faulty product and supplying incorrect information regarding corrective action taken;
- (iii) On 18 March 2015, Huhtamaki gave Ms Vaa a notice to attend a disciplinary meeting alleging that:
 - (a) on 13 March 2015 she failed to complete visual quality tests; and,
 - (b) on 18 March 2015, she had cups leaking on her test table and had not completed the necessary checks.
- (iv) Ms Vaa attended disciplinary meetings with her union representatives on 20 March 2015 and 23 March 2015. At the second meeting Nick Quirino, a Union organiser, attended.
- (v) With her Union representative, Ms Vaa met with Huhtamaki for a disciplinary meeting on 25 March 2015. At the meeting on 25 March 2015 Robyn Arnold on behalf of Huhtamaki told Ms Vaa “the company is proposing dismissal”.
- (vi) Ms Vaa returned to work on 26 March 2015.
- (vii) On 26 March 2015, Huhtamaki contacted Mr Vaa’s Union advisor, Mr Quirino. Kim Culpan of Huhtamaki and Ms Vaa and Mr Quirino met again on 26 March 2015 and Ms Vaa resigned and signed a written notice to that effect.

[9] In addition, I heard evidence during the investigation meeting from Ms Vaa and several current and former employees of Huhtamaki. These witnesses were paper forming engineer, James Spearing, (former) paper forming supervisor, Lance Rakuraku, human resources training and development advisor, Robyn Arnold and (former) human resources manager, Kim Culpan. Nothing turned on the fact that two of Huhtamaki’s witnesses had left its employ prior to the investigation meeting.

[10] Ms Vaa was a member of the New Zealand Amalgamated Engineering, Printing and Manufacturing Union (the Union). During the disciplinary process her Union organiser, Mr Quirino, represented her. Huhtamaki proposed that Mr Quirino provide a witness statement. I advised the parties that in the absence of Ms Vaa granting a

waiver, this evidence would be inadmissible.² No waiver was given. I did not hear evidence from Mr Quirino.

[11] A number of relevant documents were provided to the Authority in advance of the investigation meeting in the form of agreed common bundle of documents and subsequently, documents relating to the hybrid production role of packer/machine minder that Ms Vaa held at the time of her dismissal.

[12] Having regard to s 174E of the Act, while I do not refer in this determination to all the evidence received during my investigation of Ms Vaa's employment relationship problem.

[13] While I have not explicitly referred to the submissions of the parties' representatives in this determination, I have fully considered these.

The Issues

[14] The issues identified for determination were:

- (i) Has there been a constructive dismissal of Ms Vaa by Huhtamaki by Ms Vaa being given a choice to resign or be dismissed and/or a breach of duty by Huhtamaki that led her to resign?
- (ii) If (i) is answered in the affirmative, was the dismissal justifiable in terms of the statutory test of justification under s 103A of the Employment Relations Act (the Act)?
- (iii) If Huhtamaki's actions were not justified, what remedies should be awarded, considering:
 - a. Reimbursement for lost wages; and
 - b. Compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act.
- (iv) If any remedies are awarded, should they be reduced under s 124 of the Act for blameworthy conduct by Ms Vaa that contributed to the situation giving rise to her grievance?
- (v) Should either party contribute to the costs of representation of the other party?

²*Lloyd v Museum of New Zealand Te Papa Tongarewa (No.2)* 2 ERNZ 685 at [78]

Constructive dismissal

[15] The leading cases on constructive dismissal are decisions of the Court of Appeal. In *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd*³, the Court of Appeal found there were effectively three situations in which a constructive dismissal may arise:

- (1) Where an employee was given a choice between resigning and being dismissed; and
- (2) There has been a course of conduct followed by the employer with the dominant purpose of inducing the employee to resign; and
- (3) Where there was a breach of duty by the employer that caused an employee to resign.

[16] In *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers Industrial Union of Workers*,⁴ Court of Appeal observed:

... we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[17] In *Wellington Clerical Workers IUOW v Greenwich*⁵, the Arbitration Court also examined the nature of the inquiry to be conducted:

It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the borderline which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.

To amount to a constructive dismissal the employee's resignation must be a proportionate and reasonable response to a sufficiently serious breach of duty by the employer, made in circumstances where he or she had no other option.

³(1985) 2 NZLR 372 (CA)

⁴[1994] 1 ERNZ 168 (CA)

⁵[1983] ACJ 965

[18] Counsel for Ms Vaa referred the Authority to the decision of the Court in *NCR (New Zealand) Ltd v Jones* [1998] 3 ERNZ 222 and the decision of the Court of Appeal in *Marshall Cordner and Co v Canterbury Clerical Workers IUOW* [1986] ACJ 893. These decisions were not particularly helpful, other than as further examples of constructive dismissal cases, as they appeared very much determined by their own facts.

[19] In essence the inquiry into an allegation of constructive dismissal comes down to: has there been a breach of duty on the part of the employer which has caused the resignation, and if so, was the breach sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation - that is, would there be a substantial risk of resignation?

[20] In a disciplinary matter such as this, the inquiry focuses on the disciplinary investigation conducted by the employer under s 103A of the Act.

Employment Investigation

Letter of 18 March 2015

[21] On 18 March 2015, Huhtamaki issued Ms Vaa with a letter inviting her to attend a meeting on 20 March 2015.

[22] The letter said the purpose of the meeting was to discuss a failure to complete a visual quality test on 13 March 2015 and a failure to conduct checks on plastic paper cups, which had begun leaking on her test table, on 18 March 2015. Another employee was also alleged to not have completed quality tests on 13 March 2015. Huhtamaki dealt with this employee separately. He had not been subject to previous disciplinary action in relation to quality checks.

[23] According to Huhtamaki's training records Ms Vaa had been trained in standard operating procedure (SOP) for visual inspections in March 2013 and November 2014. Mr Rakuraku said he took Ms Vaa through the SOP again on 17 March 2015.

Previous warnings: quality assurance

[24] Huhtamaki had previously identified issues with Ms Vaa's performance around quality assurance issues. On 26 June 2014, Ms Vaa was given a verbal warning for

deliberately falsifying documents. On 6 October 2015, Huhtamaki gave Ms Vaa a final written warning because it found she spoke aggressively and behaved threateningly toward another staff member and failed to follow correct quality procedures following identification of faulty product and supplied incorrect information regarding corrective action taken. Paper and engineering manager, Greg White, issued both warnings.

[25] The warnings were still “live” on Ms Vaa’s employment file at the time of her dismissal. Ms Vaa confirmed in her oral evidence she did not dispute the warnings nor were they disputed on her behalf by the Union. Ms Arnold stated Huhtamaki had a “no surprises” policy with the Union about discipline and other matters.

Meeting on 20 March 2015

[26] During the meeting on 20 March 2015, which was conducted by Ms Arnold and Mr Rakuraku, Ms Vaa was represented by a Union delegate. Ms Vaa denied she had not followed correct procedures and claimed she was receiving inconsistent messages from management about whether she could stop her machine to conduct her inspections and the intervals at which these checks were to occur. The visual checks had initially been undertaken hourly but Mr Rakuraku had increased these to half hourly.

[27] After the meeting Ms Arnold decided that as Ms Vaa was already on a final written warning, she needed higher level advice for further meetings.

Meeting on 23 March 2015

[28] A further meeting took place on 23 March 2015 where Ms Vaa was represented by a Union organiser, Mr Quirino. Ms Vaa was asked about the leaking cups on her test bench. Ms Vaa claimed she had already identified the cups were leaking when they were examined on the test bench by the quality assurance inspector, Richa Bhalla. She said she had asked a co-worker, Raul Peredo to assist with the leak test, but he had not done so. Ms Vaa said she had turned the paper-forming machine off and had organised, after talking with Mr Spearing, for the return of three boxes of cups, so they could be repacked or dumped.

[29] Ms Bhalla’s account was different. Ms Bhalla had discovered the cups were leaking at 1.13pm and Ms Vaa told her the cups had been on the test table for more than 15 minutes - Ms Vaa would subsequently say her reference to “15 minutes” was a

rough indication of time, as she did not use a stopwatch. A review of the check sheet suggested the last check undertaken by Ms Vaa was at 1.06pm. When Ms Bhalla asked Ms Vaa about this, she changed the tick to a cross on the check sheet and it became apparent the check had not been performed. The paper-forming machine was then stopped and three boxes of cups were returned to the department. Upon inspection, one of the boxes, which Ms Vaa had ticked as having passed the leak test was found to contain leaking cups. Mr Richa directed that these cups were then dumped.

[30] In her evidence, Ms Vaa raised three other matters. She said Mr Rakuraku was at times aggressive towards her. He denied this in his evidence. Ms Vaa said the quality of the paper segments – the components of the cups - imported from Australia were inferior. Mr Spearing gave evidence to the effect that while some paper segments was being imported from Australia, they were manufactured from the same stock used in New Zealand. Ms Vaa also raised concerns about the timing of her machine as it impacted on the times being printed on the bottom of the cups. However, Mr Spearing said there were no times printed on the cups manufactured on 18 March 2015.

[31] Ms Arnold said Ms Vaa claimed she had made a mistake with the check sheet and had been under a lot of pressure. Mr Quirino suggested that Ms Vaa would be willing to take a pay cut to get a less pressured job or swap with someone else.

[32] At the end of the meeting, Ms Arnold and Mr Rukuraku agreed to a request from Mr Quirino to talk to Mr Spearing to ascertain his version of events.

Meeting on 25 March 2015

[33] Ms Vaa was offered time off by Huhtamaki after the meeting on 23 March 2015 and a further meeting was convened on 25 March 2015. Mr Quirino again represented Ms Vaa at this meeting. Mr Rukuraku was also present.

[34] Ms Arnold informed Ms Vaa that Mr Spearing had said when he went to Ms Vaa's machine it was stopped and he did not know what had happened prior to it stopping. On Ms Arnold's evidence, Mr Peredo's check sheets, which had also been requested by Mr Quirino, did not disclose anything of interest but these were shown to Ms Vaa and Mr Quirino.

[35] Mr Quirino called for a short break. When he and Ms Vaa returned to the meeting he said it was the Union's preference that Ms Vaa remained employed. On Ms Arnold's evidence, Ms Vaa said that she "would do the right thing" and make a commitment to her job.

[36] Ms Arnold and Mr Rukuraku then adjourned the meeting and met with operations manager, Geoff Dines, and human resources manager, Kim Culpan. Ms Arnold said she explained to Mr Dines and Ms Culpan what had occurred and that the company would propose to dismiss Ms Vaa. Ms Arnold said in making this decision she had particular regard to Ms Vaa's disciplinary record including unexpired warnings directly relating to quality assurance, to which the current misconduct also related.

[37] The meeting reconvened with Ms Vaa and Ms Arnold advised her "the company is proposing dismissal". Ms Arnold and Mr Rukuraku then left the room to allow Ms Vaa and Mr Quirino to talk. Mr Quirino said he would get back to Ms Arnold about the proposed dismissal but did not on 25 March 2015.

[38] After the meeting, Ms Arnold advised Ms Culpan where the process was up to. She said she was on annual leave between 26 March 2015 and 7 April 2015 and when she returned to work, Ms Culpan informed her Ms Vaa had resigned.

Events of 26 March 2015

[39] On 26 March 2015, Mr Rukuraku said two members of his team advised him that Ms Vaa was on the factory floor operating a machine. He said he approached Ms Vaa and asked her what she was doing. Ms Vaa said Mr Spearing had contacted her.

[40] Ms Vaa claimed that a friend told her that Mr Rukuraku had told other employees he was worried that Ms Vaa would put a bomb in the machine. Mr Rukuraku denied this.

[41] Ms Culpan contacted Mr Quirino and advised him that Ms Vaa had attended for work and asked him about the response to the proposal to dismiss Ms Vaa.

[42] Ms Culpan established that Mr Spearing who was not aware where the disciplinary process was up to, had contacted Ms Vaa to ask her where she was and whether she was coming to work.

Ms Vaa's resignation

Huhtamaki's view

[43] Ms Culpan said Mr Quirino approached her and advised her of the options he considered available to Ms Vaa. Ms Culpan said Ms Vaa had indicated to her that her preference was to resign if Huhtamaki would accept it.

[44] Ms Culpan met with Ms Vaa and Mr Quirino. They discussed Ms Vaa's decision to resign. Ms Vaa said she had discussed resigning with members of her family, her family would support her and she would visit Australia.

[45] Ms Culpan said based on this discussion she satisfied herself that Ms Vaa had fully considered her decision to resign. She accepted Ms Vaa's resignation on behalf of the company. Ms Culpan said Mr Quirino and Ms Vaa then drafted a resignation letter and this was presented to Ms Culpan.

[46] Having received Ms Vaa's resignation letter, Ms Culpan organised Ms Vaa's final pay including payment of one week's wages in lieu of notice. Ms Culpan said Ms Vaa did not leave the factory straight away. She said she saw her at lunchtime in the staff cafeteria talking to colleagues.

Ms Vaa's view

[47] Ms Vaa's account of her resignation was different. She said she was asked by Mr Rukuraku to go to the training room. Mr Quirino and Ms Arnold were in the room, as was Mr Rukuraku. Ms Vaa said Ms Arnold and Mr Rukuraku told Mr Quirino that Huhtamaki had decided on dismissal.

[48] Ms Vaa said she then had a discussion with Mr Quirino about the difference between dismissal and resignation. She said Mr Quirino told her it would be easier to find a new job if she resigned. Ms Vaa said Mr Quirino asked her if she wanted to sign a resignation letter and she signed it. She said while she drafted the letter, Mr Quirino told her what to write. Ms Vaa said they then went and gave the letter to Ms Culpan.

[49] Ms Vaa said it was not correct she had overnight to decide whether she wanted to resign. She said she only had about ten minutes. Ms Vaa stated she immediately left the factory after resigning.

Ms Vaa's ultimate view

[50] In her oral evidence, Ms Vaa accepted she had overnight to think about the option of resigning – that is, the evening of 25 March 2015 - and she discussed her resignation with her family. She said one of her children was a law student. She also accepted she did not immediately leave the factory after resigning.

[51] It is not clear why Ms Vaa merged some of the events of 25 and 26 March 2015 in her witness statement into the same day. Unfortunately, this significantly undermined her credibility as a witness.

Conclusion re disciplinary process

[52] Huhtamaki denied Ms Vaa's claim of constructive dismissal. It said it had complied with its obligations under s 103A of the Act, carried out a fair and reasonable investigation in the alleged misconduct and formed a view that dismissal was an appropriate sanction.

[53] I accept this submission. The disciplinary process was appropriate in the circumstances. Huhtamaki put specific allegations to Ms Vaa about non-compliance with quality assurance standards. It arranged for her to have representation during the investigation process and then organised more experienced representation for her. It gave her an opportunity to comment and respond to the allegations. It gave her paid leave during the investigation process. It interviewed witnesses and reviewed documentation suggested by her and her representative. It put a proposed disciplinary sanction to her and asked her for comment.

[54] The decision made by Huhtamaki to dismiss Ms Vaa was within the range of what a fair and reasonable employer could have done in all the circumstances at the time.

[55] There was no breach of duty by Huhtamaki to Ms Vaa through a failure to carry out a proper disciplinary process. Huhtamaki's actions in respect of Ms Vaa satisfied the test of a fair and reasonable employer under s 103A of the Act.

Conclusion re resignation

[56] In response to the proposal to terminate Ms Vaa's employment, her Union organiser, Mr Quirino proposed a resignation as an alternative to dismissal on the basis, on Mr Vaa's evidence, she would find it easier to obtain alternative employment. There is no evidence Huhtamaki proposed a resignation. Mr Quirino was a professional Union advisor and Ms Vaa was entitled to accept or reject his advice. Ms Vaa considered the option of resigning overnight and discussed it with her family. Ms Vaa decided she would resign. Having accepted Mr Quirino's advice, the consequence of that rested with Ms Vaa and not Huhtamaki.

[57] Huhtamaki said it allowed Ms Vaa to resign of her own accord. There is no evidence Huhtamaki induced it from her. Indeed, Ms Culpan said she satisfied herself that Ms Vaa had fully considered her resignation by directly discussing it with Ms Vaa before she accepted it.

[58] I find that Ms Vaa resigned of her own accord. As Ms Vaa was not constructively dismissed it is not necessary to consider the other issues identified above except costs.

Costs

[59] Costs are reserved. I understand that Ms Vaa had a grant of legal aid to bring her claim in the Authority. Consequently, the question of costs is subject to the requirements of s 45 and s 46 of the Legal Services Act 2011.

[60] If a determination of the Authority is required on costs, Huhtamaki may lodge a memorandum with 28 days of the date of this determination and Ms Vaa would then have 14 days from the date of service to lodge a memorandum in reply. No submission on costs will be considered outside this timetable, unless prior leave has been sought.

A handwritten signature in dark ink, consisting of a vertical line on the left that curves into a horizontal line extending to the right.

Andrew Dallas
Member of the Employment Relations Authority