

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Wilhelmina Vankan (Applicant)
AND James Pascoe Limited (Respondent)
REPRESENTATIVES Margaret Robins, Counsel for Applicant
Richard Harrison, Counsel for Respondent
MEMBER OF AUTHORITY Vicki Campbell
INVESTIGATION MEETING 7 June 2005 and 9 June 2005
FURTHER INFORMATION RECEIVED 8 and 24 June 2005
SUBMISSIONS RECEIVED 8 July 2005 and 25 July 2005
DATE OF DETERMINATION 1 August 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Wilhelmina Vankan was employed by James Pascoe Limited (“Pascoes”) as a part-time sales assistant from 5 December 1994 until she resigned her employment in September 2004. Ms Vankan says her resignation was caused by bullying and abusive behaviours she experienced from her Manager Ms Sandra Gillard and the failure of Pascoes to manage the issues between the two employees. Ms Vankan has asked the Authority to find that her resignation was a constructive dismissal and that the dismissal was unjustified.

[2] Pascoes denies Ms Vankan’s resignation was a dismissal.

[3] Issues for determination:

- Was the resignation caused by a breach of duty on the part of the respondent?
- If there was a breach, was it sufficiently serious to make it reasonably foreseeable that there was a substantial risk that Ms Vankan would resign (*Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168; [1994] 2 NZLR 415 (CA))?

Was the resignation caused by a breach of duty on the part of the respondent?

[4] Ms Vankan was subject to a written individual employment agreement which also included the Company Standard Terms and Conditions of Employment (“Standard Terms”). The Standard Terms document provided an entitlement for all employees to fair and reasonable treatment.

[5] In 1999 Ms Gillard became the Store Manager at Pascoes in Henderson. Until then the relationship between Ms Vankan and Ms Gillard had been good. Ms Vankan says Ms Gillard’s behaviour toward her changed, in that she became bullying and abusive and used discriminatory language toward her and this caused her to resign. Ms Vankan says she raised her concerns about Ms Gillard’s behaviour with the Regional Manager, Mr Roy Turner, but he failed to rectify the problem. She says that his failure constitutes a breach of duty on the part of Pascoes. This is the third of the three non-exhaustive categories of constructive dismissal referred to by the Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372.

[6] The conduct amounting to a breach must be substantial enough to destroy or at least seriously undermine trust and confidence (*New Zealand Institute of Fashion Technology v Shannon Aitken*, unreported, AC 57A/04, Goddard CJ, 25 November 2004).

[7] Ms Vankan was employed part time and worked on Mondays, Thursdays and Fridays. It was common ground that Ms Vankan raised issues about holiday and sick pay entitlements regularly with Ms Gillard and the pay office. Ms Gillard told the Authority that she had left it to the Pay office to sort out. Ms Vankan’s leave entitlement issues continued to be unresolved and were a source of frustration to her.

[8] In October 2002, Ms Vankan asked to meet with Mr Tuner to discuss concerns she had at work. Before their meeting, Ms Vankan made notes of the issues she wished to discuss with Mr Turner. The notes indicate the two areas of concern were the unacceptable behaviours she was subjected to by her manager and the issue around her holiday and leave entitlements.

[9] The issues raised by Ms Vankan and relating to Ms Gillard included:

- Ms Gillard failed to respond to Ms Vankan’s concerns about her leave entitlements, called Ms Vankan a “stirrer” for questioning her leave entitlements and yelled at Ms Vankan when she questioned her commencement date with her.
- Ms Gillard regularly criticised Ms Vankan’s work, ripped items out of her hands, demanded that she redo displays or screamed at her to not to touch anything.
- Ms Gillard would ignore Ms Vankan and would not speak to her for days at a time.

- Ms Gillard frequently made negative comments about Ms Vankan to other staff and in front of customers.
- In relation to an application for leave, Ms Gillard told Ms Vankan that she was selfish.
- Ms Gillard, referring to a supplier, told Ms Vankan that the supplier must be “*Dutch and stupid like you*”.
- Ms Gillard when answering a question about where a ring came from told Ms Vankan that if the ring came from Holland then “*...it would be rubbish like you...*”
- That Ms Gillard had told Ms Vankan that she should spray some perfume on herself because she smelt.

[10] During the meeting Mr Turner took the opportunity to also outline some concerns Ms Gillard had raised with him in relation to Ms Vankan’s performance. Ms Vankan was surprised when Mr Turner raised performance issues with her as they had never been raised by Ms Gillard with Ms Vankan. Mr Turner told the Authority that he had been told of these issues in his regular meetings with Ms Gillard and assumed that she was dealing with them.

[11] Ms Vankan advised Mr Turner that she had written to the Department of Labour in relation to her leave entitlements. Mr Turner disapproved of her approach to the Department and was unhappy about it. Ms Vankan’s leave entitlements were eventually resolved (some five months later) in her favour after an investigation by the Department of Labour.

[12] On 29 November 2002 Ms Vankan attended a further meeting with Mr Turner. This time Ms Gillard also attended. The purpose of the meeting was to try and resolve the issues between Ms Vankan and Ms Gillard. The meeting ended unsatisfactorily for Ms Vankan as no outcomes or resolutions were arrived at.

[13] Ms Vankan wrote to Mr Turner on 12 December 2002 and reiterated her concerns about Ms Gillard’s treatment of her. In her letter Ms Vankan says her manager had treated her with contempt, had humiliated, insulted and yelled at her and advised Mr Turner that the situation serious. Ms Vankan also responded to the issues that had been raised in relation to her own performance.

[14] In answer to questions at the investigation meeting Mr Turner told the Authority that when he received Ms Vankan’s letter it was clear things were not resolved but he wasn’t getting the impression that the branch was out of control. Mr Turner’s impression, after talking to other employees, was that while Ms Gillard seemed to be trying to improve things, Ms Vankan was not.

[15] Mr Turner undertook to discuss the allegations in more detail with Ms Vankan in January 2003 following the busy Christmas period. Mr Turner also sought permission to copy the letter of 12 December to Ms Gillard, to enable her to respond to it.

[16] Ms Vankan agreed to meet with Mr Turner in the New Year but did not agree to allow a copy of the letter to be sent to Ms Gillard. Ms Vankan asked Mr Turner to speak with the other employees first. Mr Turner did not copy the letter to Ms Gillard but he did discuss the issues with her. Mr Turner did not speak with any of the other staff in relation to the allegations made by Ms Vankan.

[17] The agreed meeting went ahead in February 2003. At this meeting Ms Gillard apologised to Ms Vankan for any offence caused by comments she had made. Ms Gillard also advised Ms Vankan that she would be attending some courses to assist her in developing her management skills. Mr Turner believed that at this point both employees should be able to move on. Notes made by Mr Turner at the time of the meeting show that Mr Turner believed the apology by Ms Gillard was genuine. Ms Vankan however, was disappointed that after raising her specific issues with Mr Turner he had failed to investigate her complaints or to deal with them in a constructive manner.

[18] Ms Vankan says that nothing changed for her in the shop, except that while Mr Turner was in the shop Ms Gillard would be friendly towards her.

[19] In April 2003 Ms Vankan was still unhappy about the treatment she was receiving from Ms Gillard. Ms Vankan conveyed her unhappiness during a meeting with Mr Turner where she also told Mr Turner that she could not put the past 18 months behind her.

[20] In May 2003 Ms Vankan suffered a workplace accident when she fell off a step at work. While on ACC Ms Vankan went into the store to provide Ms Gillard with her medical certificate. When Ms Vankan initially arrived in the store Ms Gillard was busy with a customer. However, after the customer had been dealt with Ms Vankan says Ms Gillard completely ignored her, even though she had walked directly past her twice. Eventually Ms Vankan left the certificate with another employee and left the store.

[21] In July 2003, following her accident Ms Vankan left for a pre-arranged overseas holiday without returning to work. Ms Vankan returned to work, following her ACC and holiday absences, on 16 October 2003. On her return Ms Vankan says Ms Gillard completely ignored her, and she was asked by Ms Zenona Pak, the Assistant Manager, to attend a meeting with Mr Turner to discuss rosters for the October/November months.

[22] I interviewed Ms Zenona Pak on 8 June 2005 separately from the other witnesses. Ms Pak continues to work for Pascoes and was concerned about providing evidence to the Authority. Mr Turner

provided undertakings that Ms Pak's employment would not be jeopardised or disadvantaged in any way if she was to speak to the Authority. These undertakings were very important to her.

[23] Ms Pak told me that she had a good relationship with Ms Vankan and that Ms Vankan had taught her a lot. Ms Pak also told me that she got on well with Ms Gillard to start with, however, when Ms Vankan was absent from July to October 2003, she experienced a completely different side of Ms Gillard.

[24] Ms Pak says Ms Gillard harassed and picked on her. Ms Pak has made a formal complaint to Pascoes about the behaviour she experienced at the hands of Ms Gillard. Ms Pak told me that while Ms Vankan was absent discussions were taking place about the possibility of changing Ms Vankan's days of work. Ms Pak told me she advised Ms Gillard of a need to act cautiously about shifting times and days of work.

[25] Ms Pak says she took Ms Vankan to one side on 16 October 2003 and advised her of a possible roster change and told her to take a copy of the roster with her to the meeting with Mr Turner. The new draft roster had Ms Vankan working on Friday nights and weekends. These were days and times that were outside the stipulated hours and days of work set out in Ms Vankan's employment agreement. Ms Vankan believed the change of rostered times and days of work were to accommodate Ms Gillard's future daughter-in-law. Ms Vankan refused to alter her days and times of work.

[26] Friday's were the only day of work that Ms Vankan was required to work directly with Ms Gillard. On Mondays and Thursdays either Ms Gillard was on her usual rostered day off or Ms Pak was in attendance and Ms Vankan would deal directly with her as assistant manager.

[27] Ms Vankan and Mr Turner discussed and agreed to a proposal by Ms Vankan that she no longer work at the Henderson store on Fridays. Following the meeting there was some discussion about whether it would be better for the business for Ms Vankan to reduce her days to Thursday and Friday, however, Ms Vankan would not agree to this and therefore the original agreement for Ms Vankan to not work Fridays was confirmed.

[28] On 18 November 2003 Ms Vankan confirmed to Mr Turner in writing that the reason for not wishing to work on Fridays was as a result of her finding it difficult to work with Ms Gillard without the support of the assistant manager. Ms Vankan says that as a consequence of Pascoes trying to change the original arrangement around not working Fridays, she became extremely anxious and upset and attended her Doctor. Ms Vankan proceeded on sick leave from 24 November 2003 to 5 December 2003.

[29] On 26 November 2003 Mr Turner wrote to Ms Vankan and invited her to meet with him on her return to work on 8 December 2003. Mr Turner told Ms Vankan that he was confident they would address and resolve the issues Ms Vankan raised in her letter on 18 November.

[30] Ms Vankan sought legal advice during her absence. Her sick leave was extended to 12 December 2003.

[31] The meeting on 8 December 2003 went ahead as planned. At that meeting Mr Turner advised that he would interview all of the staff at the store and obtain their views of the situation. Mr Turner undertook to do so that day. Mr Turner did speak with all the other employees, and discovered that they also had concerns over Ms Gillard's state of mind and behaviours. Mr Turner spoke to Ms Gillard about his discussions with the staff members, and received reassurances from her that she was on top of it, and took no further action. Ms Gillard herself was experiencing serious health problems during this period of time.

[32] At the meeting on 8 December 2003 Mr Turner also undertook to find out if Stewart Dawson's, Pascoes St Lukes or Pascoes New Lynn needed any assistance on Fridays. Mr Turner told the Authority that he did check out these options but he never advised Ms Vankan of the outcome.

[33] As a result of her health problems it was agreed that Ms Gillard should take some extended leave following Ms Vankan's return to work. Ms Vankan returned to work on 12 January 2004, but Ms Gillard's leave was not able to be arranged to coincide with Ms Vankan's return.

[34] On 21 January 2004 Ms Gillard's Doctor wrote to Mr Turner expressing concerns for Ms Gillard's health and urging Pascoes to allow Ms Gillard leave in February.

[35] Ms Vankan worked with Ms Gillard on three days only in January 2004. Ms Gillard then proceeded on leave. Both Ms Vankan and Ms Gillard say that each of them was avoiding the other and no communication on a personal level took place. There is no evidence that any abusive or other unacceptable behaviour was exhibited by either employee during these three days.

[36] Mr Turner says that during February 2004 Ms Pak was the Acting Manager and the store settled down with a good atmosphere. Given that, he felt it was best not to discuss matters with Ms Vankan any further. Ms Vankan's expectations however, was that Mr Turner would have a further discussion with her after her return to work. Mr Turner never explained to Ms Vankan that he felt this discussion was unnecessary.

[37] Ms Vankan raised a disadvantage personal grievance on 3 March 2004 at which time Ms Vankan was suffering from migraines and sleeplessness. As a resolution to her grievance Ms Vankan sought to have Ms Gillard removed from the Henderson store.

[38] As a result of Ms Vankan raising her grievance, Pascoes enquired as to whether Ms Vankan would agree to attend counselling sessions. Both Ms Gillard and Ms Vankan attended counselling during April and May 2004. On 13 May Ms Vankan proceeded on leave and returned on 5 July 2004. On her last day of work, before her holiday, Mr Turner contacted Ms Vankan and enquired how the counselling sessions had gone. Ms Vankan told Mr Turner that she didn't think they had been beneficial.

[39] On Ms Vankan's return in July, she noticed that the watch display in the store window had not been changed in the seven weeks she had been away. Ms Vankan discussed this with Ms Pak and it was agreed that Ms Vankan would change the display to take into account that it was the school holidays and in an effort to attract school students. On Ms Gillard's next rostered day at work, she apparently expressed annoyance to other employees that Ms Vankan had changed the display. Ms Gillard felt Ms Vankan should have discussed it with her first. Ms Pak told the Authority that she explained to Ms Gillard that she [Ms Pak] had given Ms Vankan the authority to change the display.

[40] Ms Vankan says that when Mr Turner came into the store Ms Gillard took all the credit for the displays, Ms Gillard says she did not, she made it clear to Mr Turner that it was Ms Vankan who had put the displays together. Notes made by Mr Turner of his visit to the store on 22 July show that when he arrived Ms Gillard and Ms Pak were both congratulating Ms Vankan on a job well done in the watch department. I am satisfied that it is more likely than not that Ms Vankan was given full credit for the watch displays.

[41] On 15 July 2004 Ms Gillard told Ms Vankan to sort out the watches. Ms Vankan did as she was instructed and worked for 2 days (19 and 22 July) cleaning, re-pricing and rearranging about 350 watches. On 27 July Ms Gillard changed the displays by taking stock out of the displays made by Ms Vankan and putting them into a "Managers special". Ms Vankan felt that her work had been wasted. "Managers Specials" are managed by Head Office directing stores to use specific stock in a promotion which is then referred to as a "Managers Special". I am satisfied that Ms Gillard did not make the decision regarding the use of the stock in this instance, but was instead following instructions from Head Office.

[42] On 16 July 2004 Mr Turner contacted Ms Vankan at home to see how things were going in the store for her. Ms Vankan said she felt uncomfortable in the store but could give no specific details. Mr Turner tried to make it clear to Ms Vankan that Ms Gillard was trying hard to make the environment at the shop better for all concerned. Mr Turner advised Ms Vankan that he would be at the store on Monday if Ms Vankan wanted to meet for a coffee and have a discussion with him. Ms Vankan did not wish to take up that opportunity. Mr Turner then left the door open for Ms Vankan to discuss matters with him at any time.

[43] By 22 July 2004 Mr Turner had received a copy of a report by Mr Kevin Mist regarding the counselling sessions held earlier that year. A copy of the part of the report pertaining to Ms Gillard was provided to her that day. In his report Mr Mist states:

...management/leadership style was raised as a major contributor to occupational stress. There appears to exist an 'autocratic' style of management at the Henderson branch, which appears to have created pressure for those employees spoken to.

[44] On that same day Mr Turner took Ms Vankan to one side and apologised to her for not dealing earlier with the issues around Ms Gillard and commented that the atmosphere in the store seemed much better.

[45] In August, following a request by Ms Vankan for a copy of the report, Mr Turner released a copy of the general statements made in the report but did not provide the specific recommendations relating to Ms Vankan.

[46] On 6 August 2004 Pascoes wrote to Ms Vankan (through her representative) and asked if she would attend further counselling sessions. This was done on the premise that the previous counselling sessions had apparently improved the relationship between Ms Gillard and Ms Vankan. In that letter Pascoes outlined their expectations that both Ms Vankan and Ms Gillard would use their best endeavours to work harmoniously together, have appropriate communications and continue towards improving their relationship.

[47] Ms Vankan did not agree that further counselling would be of assistance. This is unfortunate as it was Ms Pak's evidence that she found the second series of counselling sessions to be beneficial. The parties attended mediation on 31 August 2004 but could not resolve their differences. Ms Vankan proceeded on sick leave on 2 September and resigned from her position on 29 September 2004.

[48] At the investigation meeting I asked Ms Vankan what more Pascoes could have done to prevent her resignation. She was unable to identify any effective way Pascoes could have retained her in her employment.

[49] Ms Vankan will succeed in her claim if she can show a breach of duty causative of her resignation and of sufficient seriousness as to render it reasonably foreseeable that she might resign in protest at it. There is no doubt that Ms Vankan resigned as a direct result of her perception of how she was treated by Ms Gillard. However, much of the content of her unhappiness relates to matters arising in 2002.

[50] In March 2004 when Ms Vankan raised her personal grievance for disadvantage Pascoes acted positively and provided counselling for Ms Vankan, Ms Gillard and Ms Pak. Pascoes also took steps to provide training and reading materials for Ms Gillard to assist her with developing her management and interpersonal skills. In August, Ms Vankan was offered further counselling which would include meeting with Ms Gillard, to assist in the resolution of their relationship problems. Ms Vankan refused this offer.

[51] It seems to me that this employment relationship problem has arisen as a result of differences in personalities. While I accept Ms Gillard may have behaved inappropriately during 2002, those behaviours were not repeated after Ms Gillard apologised in March 2003. The payroll issue was also resolved in early 2003. Ms Vankan's complaint is that during 2004 Ms Gillard only conversed with her on work related matters. This does not constitute a breach of duty sufficient to hold a constructive dismissal exists.

[52] I find that Ms Vankan's resignation was not brought about by any established breach of duty serious enough to cause a reasonable employee to resign.

[53] For completeness I have considered whether or not Ms Vankan may have a claim for unjustified disadvantage. I have concluded that she does not. My reason for reaching this conclusion is that while Ms Vankan's hours of work were reduced in 2003 they were reduced at her request and at a time when she had only worked on about 3 occasions with Ms Gillard. Also the behaviours complained of by Ms Vankan all relate to the period before October 2002. Ms Vankan raised a personal grievance in March 2003; this is outside the 90 days provided for in the Employment Relations Act 2000.

[54] I am unable to assist Ms Vankan further.

Costs

Costs are reserved.

Vicki Campbell
Member of Employment Relations Authority