

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 176
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| BETWEEN | JOHN WILLIAMS Applicant |
| A N D | AUCKLAND ACE MONOGRAMS LIMITED Respondent |

Member of Authority: James Crichton

Representatives: Applicant in Person
Peter Oliver, Counsel for Respondent

Investigation meeting: 30 April 2012 at Auckland

Date of Determination: 28 May 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Williams) alleges that he was constructively dismissed from his employment by the respondent (Ace Monograms) and subjected to unfair treatment and verbal intimidation which, although not pleaded, if proved, would amount to a claim of personal grievance by way of unjustified action causing disadvantage. Mr Williams also seeks “*a clear and concise*” employment agreement, enforcement of company policy on an equitable basis, an unconditional written apology, and payment of unpaid wages.

[2] Ace Monograms resists Mr Williams’ various claims and says that at all times Mr Williams was treated fairly, that Ace Monograms acted in good faith towards him, that there was no verbal intimidation, and that Mr Williams voluntarily resigned his employment.

[3] Mr Williams commenced employment with Ace Monograms as a machine operator. Mr Williams has specialist skills in the operating of machinery used in placing monograms, logos and the like on clothing. He was initially employed in September 2010 and was employed on a casual part-time basis at the hourly rate of \$14.

[4] Ace Monograms says that Mr Williams initially got on well with staff and management but would occasionally get aggressive. Even Mr Williams himself told the Authority that he was “*excitable*”.

[5] While the early part of the employment relationship seems to have proceeded without great incident, by the middle of 2011 the employment relationship had deteriorated. Mr Williams formed the view that he was being treated differently from other staff at Ace Monograms and complained about that. For its part, Ace Monograms had concerns about the “*numerous mistakes*” that Mr Williams was making. Mr Williams told the Authority that he would point out to Ace Monograms things such as a tripping hazard in the factory but instead of having the matter addressed by the employer, the employer’s attitude was to suggest that Mr Williams should walk somewhere else.

[6] Mr Williams raised a series of personal grievances during the employment, five while the relationship continued and the final one which this determination is particularly concerned with.

[7] The first personal grievance was raised by Mr Williams on 10 May 2011 when the employer remonstrated with him for walking off the job without giving the employer notification. Mr Williams’ position was that he was doing what other staff did, but that was not accepted by the employer.

[8] The second personal grievance was raised by Mr Williams on 22 July 2011 and involved a heated argument about embroidery on a tie. By this stage, Ace Monograms says that the rest of its staff were regularly upset by the confrontations between Mr Williams and the employer and that the workplace was not a happy one as a consequence.

[9] The third personal grievance was raised on 9 August 2011 and was Mr Williams’ response to the tripping hazard that the Authority referred to above.

Mr Williams was dissatisfied with the employer's response and raised the personal grievance as a consequence.

[10] A fourth personal grievance was raised on 18 August 2011, again involving the dispute over the alleged tripping hazard. Ace Monograms' managing director, Roger Treseder, characterised Mr Williams as being an individual who always knew best.

[11] There were a range of other disputes between the parties as well. Mr Treseder told the Authority that on one occasion Mr Williams brought a sword into work and that Ace Monograms considered that inappropriate. Mr Williams had an explanation for that behaviour which he gave to the Authority. There were other allegations that Mr Williams had brought other items and material into the workplace which Ace Monograms thought were inappropriate and said so. Again, Mr Williams had a different point of view.

[12] Matters came to a head in early October 2011. On 7 October 2011, there was an altercation between Mr Williams and Mr Treseder involving, amongst other things, a job that Mr Williams was then attending to. Mr Williams alleges that Mr Treseder was critical of the work that he was undertaking and he gave immediate notice of another personal grievance. He then followed that up with a written notification of the grievance later that same day. He alleged that he was being subjected to a "*constructive dismissal in progress*" and referred as support for that proposition to the fact that Mr Treseder had allegedly said to him "*I just want you to leave*".

[13] Mr Williams gave Ace Monograms until the close of business that day, which was a Friday, to address the issues and he announced that he would not be attending work again that day but would come back on Monday, 10 October 2011 when he expected Ace Monograms to deal with the matters he had raised in writing. He also told Ace Monograms that he would be "*filing a copy of this personal grievance with the Labour Department – Mediation Services*" and that in fact is precisely what he did.

[14] But the employer also took action in response to this letter. Ace Monograms convened a meeting with Mr Williams from 8 to around 9.30 on the morning of Monday, 10 October 2011 to discuss the issues and subsequently issued a memorandum to Mr Williams prepared by Mr Treseder which summarises the

conclusions the parties reached. To the Authority, it appears to suggest some progress, making suggestions for Mr Williams to follow and also making concessions on behalf of Ace Monograms.

[15] The evidence from Mr Treseder to the Authority was that he “... *thought we were moving forward*” as a consequence of the understandings reached at that meeting on the morning of Monday, 10 October.

[16] There was a further and final incident on Wednesday, 19 October 2011 when Mr Williams complained that other staff at the factory were not completing time sheets in accordance with company policy. This resulted in snide comments from other staff critical of Mr Williams. He immediately raised yet another personal grievance in relation to a particular comment from a colleague, referring to him as “*an arsehole*”.

[17] Mr Williams claims that Ace Monograms refused to deal with that issue and on that footing, Mr Williams indicated that he quit his job.

[18] Then, it seems that Mr Treseder had a meeting with three other staff (while Mr Williams was writing out his resignation) and at the end of the meeting Mr Treseder advised Mr Williams that Ace Monograms was going to treat the matter as “*a family dispute*” and that the statement which had provoked Mr Williams’ latest personal grievance had been withdrawn by the staff member who made it. Mr Williams insisted that Ace Monograms conduct an investigation and issue the staff member with a final written warning and Ace Monograms refused to take that step.

[19] Mr Williams then proceeded to work out his notice period and subsequently left the workplace.

Issues

[20] It will be convenient if the Authority considers two questions:

- (a) Was Mr Williams unjustifiably, constructively dismissed; and
- (b) Are there other breaches by Ace Monograms?

Was Mr Williams unjustifiably, constructively dismissed?

[21] The Authority is satisfied on the evidence it heard that Mr Williams was not unjustifiably, constructively dismissed from his employment. In order to satisfy the legal test of constructive dismissal, Mr Williams would need to satisfy the Authority that he fell within one of the accepted types of constructive dismissal. On the evidence the Authority heard, there is little to suggest that Ace Monograms told Mr Williams that he must resign or be dismissed. However, Mr Williams relies on a remark made by Mr Treseder which according to the latter, was “ *if that’s what you think then you should leave* “. But, on Mr Treseder’s evidence that remark was made in the heat of a lengthy argument, was said in frustration more than anything else and was fully a month before the employment came to an end on apparently different facts. In all the circumstances, the Authority is not persuaded that this single remark can ground a claim for constructive dismissal under this head. Nor is there evidence that Ace Monograms has undertaken a course of conduct with the dominant purpose of driving Mr Williams out.

[22] The only basis on which it could be contended that Mr Williams had been constructively dismissed was on the basis that Ace Monograms had committed a series of breaches of the employment agreement which entitled Mr Williams to repudiate the agreement. The correct approach to assessing a constructive dismissal was set out by the Court of Appeal in *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168 at p.172 when the Court identified that the first question the tribunal must ask is whether the resignation was caused by the employer’s breach of duty and if the answer to that question is in the affirmative, then the second question is whether it was reasonably foreseeable that the resignation would follow from the breach of duty. For the sake of clarity, the Authority will refer to those questions as, first the causation question and secondly the foreseeability question.

[23] Dealing with each of those in turn, the Authority’s considered view is that there is no sense in which Mr Williams’ resignation can be said to have been caused by any actions of the employer. In the Authority’s opinion, Mr Williams’ response to being insulted by a co-worker was simply precipitate. He failed absolutely to give Ace Monograms any chance to deal with the issue and despite the clear evidence before the Authority that Ace Monograms was intent on dealing with the issue,

Mr Williams persevered with his resignation. In those circumstances, he cannot be seen to maintain that his resignation was not simply one of his own choosing.

[24] Had Mr Williams been patient enough to allow the employer to work through the process which it had identified, he might well have achieved some measure of satisfaction. On the evidence before the Authority, Ace Monograms tried very hard to accommodate Mr Williams' various claims. Certainly, on the last two occasions when he raised personal grievances, on the first there was a formal meeting between the parties which Mr Treseder, for Ace Monograms, told the Authority he thought at the time was making some progress, and on the second occasion, which led to the dismissal, Mr Williams was called an "*arsehole*" by one of his colleagues and without waiting for the employer to go through its process, Mr Williams confirmed his resignation. That is not the action of an employee acting in good faith. Mr Williams must learn to be more patient and develop more flexibility so that he can allow other parties to have some flexibility of movement. One of the things that struck the Authority in hearing the evidence about the incident that led finally to Mr Williams' resignation was Mr Williams' insistence that the employer deal with the matter in a particular way.

[25] That is not Mr Williams' role and nor does he have any right to tell the employer what it should or should not do in a disciplinary matter involving another employee. Mr Williams needs to understand that the employer has rights too, and in the particular circumstances of this case, the Authority's considered view is that this employer was remarkably tolerant in trying to work through Mr Williams' various concerns.

[26] Even if the Authority's conclusion on causation is mistaken, that is to say, it could be concluded that Mr Williams' resignation was directly caused by the behaviour of the employer, there is still, in the Authority's view, a problem because there is nothing on the facts that the Authority heard which would suggest that the employer committed any breach of duty. The proximate cause of the resignation was an insult by a co-worker to Mr Williams. Mr Williams demanded that Ace Monograms address the issue but gave it no reasonable time to address the issue before confirming his resignation. Ace Monograms did nothing wrong. Confronted with the evidence of the insult to Mr Williams, Ace Monograms immediately endeavoured to deal with the matter and proposed a course of action but Mr Williams

was determined that his course of action was the only right one and he was therefore dissatisfied with the action that Ace Monograms proposed. As the Authority has already mentioned, that is not Mr Williams' role; as an employee, he must learn that his employer has rights too and it is not his job to tell the employer what it should do about matters within the employer's remit.

[27] It follows from the foregoing analysis that there is no need to inquire into the second question, the foreseeability issue. Even if that were required, the Authority's view is that there was no foreseeability either about Mr Williams' action. He had already raised five personal grievances with the employer before the sixth one which led to his resignation. On the basis of that sequence, no reasonable employer could conclude that the arrival of a personal grievance was likely to also herald a resignation. After all, in the present case, Mr Williams had raised five grievances during the employment and continued to work in the workplace while those grievances were addressed. It follows that the Authority's view is that it was not reasonably foreseeable that the employee would resign his employment. Indeed, a fair and reasonable employer in Ace Monograms' position could justifiably have assumed that Mr Williams would simply keep on working because that is what had happened on the previous five occasions when he had raised a personal grievance.

Are there other breaches by Ace Monograms?

[28] Under this head, the Authority proposes to deal with all the other claims which Mr Williams made against Ace Monograms, most of which, if justiciable at all, could be subsumed under the head of an unjustified disadvantage grievance.

[29] There are also some claims which Mr Williams makes which are not justiciable at all and a further and final group related to unpaid wages.

[30] Dealing with those matters in reverse order, the issue of unpaid wages has been resolved. During the course of the investigation meeting, the Authority pointed out to Ace Monograms that whatever the basis on which the employment agreement commenced, and it was common ground that Mr Williams was employed on a casual part time basis to start, the practical reality thereafter was that he worked a normal span of hours on a regular basis over the whole period of the employment and thus could no longer be regarded as a casual part time employee.

[31] It followed from that conclusion, which the Authority made clear to the parties at the investigation meeting, that Mr Williams was owed holiday pay on the wages previously paid to him during the employment.

[32] Ace Monograms has speedily rectified that problem and between the date of the investigation meeting and the issue of this determination, the correct payment has been made to Mr Williams putting that particular matter to rest. Mr Williams seeks payslips and tax deduction certificates for the period of the employment. If those documents can be made available it will be useful for Ace Monograms to arrange that.

[33] Mr Williams also seeks a “*clear and concise*” employment agreement which is what he is entitled to by law. The evidence from the employer on this point is that no written employment agreement was produced until the last month of the employment when an attempt was made to get an employment agreement in place. Indeed, it is one of the matters which Mr Treseder addresses in his memorandum to Mr Williams after the two of them met on Monday, 10 October.

[34] Given the employment relationship has come to an end (and on the basis of a resignation by Mr Williams), there is nothing that can be done now to remedy the employer’s failure to provide Mr Williams with a proper written employment agreement. However, the Authority can commend to Ace Monograms the importance of a written employment agreement for all staff members, not only because the law requires it but also because it reduces the prospect of disputation or makes it easier to resolve disputation if there is any.

[35] The Authority is not asked to award a penalty against Ace Monograms and, in any event, declines to do so, the remedy being a discretionary one. Clearly what happened in this case was that the nature of Mr Williams’ engagement by Ace Monograms grew like topsy and the matter was simply overlooked. No doubt, Ace Monograms will regard this event as a teachable moment and ensure that all current staff and new recruits have a completed written employment agreement.

[36] Mr Williams seeks an unconditional written apology. The Authority is by no means clear what Ace Monograms should apologise for. As the Authority has already indicated, the Authority’s view is that Ace Monograms has done its very best to manage Mr Williams’ various concerns appropriately and the Authority is satisfied

that it has done nothing wrong in the management of Mr Williams' various complaints.

[37] However, even if that were not true, the Authority has no power whatever to require a party to apologise to another party.

[38] Mr Williams complains about the inequitable enforcement of company policy. Amongst other things, he noted down the start and finish times of his workmates and kept that information recorded in a small book which he provided to the Authority. He says this information proves that the employer, Ace Monograms, was inequitable in its enforcement of company policy. Presumably, this is the basis of Mr Williams' claim of "*unfair treatment*" which the Authority has subsumed within the general category of a personal grievance of unjustified action causing disadvantage.

[39] It is true that Mr Williams' little book discloses that some of his co-workers were not perfect timekeepers, but then on the evidence, neither was he. The real issue is that it is the job of the employer to maintain timekeeping by proper supervision and guidance and only if those fail by disciplinary action. The evidence is clear that Mr Williams and Ace Monograms had a difference over his timekeeping in May 2011 and the thrust of the evidence the Authority heard from Ace Monograms was that it resented Mr Williams effectively "*keeping a book*" on the clock in and clock out times of co-workers. Not surprisingly, the co-workers resented it as well.

[40] The Authority heard nothing that would lead it to conclude that Mr Williams was subjected to unfair disparate treatment by Ace Monograms. It is trite law that, in order for there to be an unjustified action causing disadvantage, there must be evidence both of the unjustified action and of the disadvantage. In this case, the Authority is not persuaded there is evidence of either, but even if it were to be conceded that the employer had not dealt equitably with, for example, issues of timekeeping as between its small staff, the fact remained that Mr Williams was not in any way penalised as a consequence. There were no disciplinary warnings against him, no adverse findings, and no financial or other penalties.

[41] The allegation that Mr Williams was subjected to verbal intimidation is also not made out as a ground for an unjustified action personal grievance. First, there is no evidence of verbal intimidation by Ace Monograms. There were some altercations between Mr Williams and other staff members, but that, in the Authority's view, was

because Mr Williams made himself very unpopular with the rest of the staff. In the circumstances, it is not surprising that other staff would take an umbrage.

[42] The nearest that Mr Williams can get to an allegation that he was subjected to verbal intimidation by Ace Monograms is his objection to an observation which he said Mr Treseder made to him on 13 September 2011 when Mr Williams claims that Mr Treseder said that *“I don’t want you here”*. This was in the context of a heated verbal exchange between Mr Treseder and Mr Williams and Mr Williams uses that alleged remark as a basis for claiming constructive dismissal as well.

[43] But the Authority rejects the contention that that remark has any particular significance and also rejects the idea that there was any sense that Mr Williams was verbally intimidated. As to that particular remark first, Mr Treseder (whose views and recollection of the matter the Authority much preferred) said that what he actually said was *“if that’s what you think then you should leave”*, but either way, the Authority is not persuaded that the remark (which clearly was made) has any particular significance. It is certainly not, by itself, a basis for a finding of constructive dismissal nor does it represent an example of *“verbal intimidation”*.

[44] As to the latter point, if Mr Williams can successfully plead verbal intimidation, it seems to the Authority that exactly the same claim could be made by Mr Treseder. The truth of the matter was that, by virtue of Mr Williams’ approach to matters in the workplace, the relationship between him and the managing director of the employer was always going to be fraught. The Authority’s observation is that Mr Williams was perfectly capable of giving as good as he got and so if there was any verbal exchange between the parties (as both parties concede) then that, in the Authority’s view, is not a ground for complaint by either of them.

Determination

[45] The Authority is not persuaded that Mr Williams has made out any of his claims and accordingly his case fails. However, if Ace Monograms can provide pay slips and tax deduction certificates to Mr Williams, they should do so.

Costs

[46] Ace Monograms, as the successful party, might, in the normal course of events, seek an award of costs. The Authority would commend to it the notion that it lets costs lie where they fall, given the particular circumstances of this case.

[47] However, if Ace Monograms insists on costs being fixed and is unable to obtain the agreement of Mr Williams to make a contribution to its costs, then an application can be made to the Authority for costs to be fixed.

James Crichton
Member of the Employment Relations Authority