

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 273 /10
5280080

BETWEEN HAORA HEWARE
 WILLIAMS
 Applicant

AND NIUE HONEY COMPANY
 NEW ZEALAND LIMITED
 Respondent

Member of Authority: K J Anderson

Representatives: S Scott, Counsel for Applicant
 M Rush, Counsel for Respondent

Investigation Meeting: 16 March 2010 at Hamilton

Submissions Received: 30 March for Applicant
 13 April for Respondent

Determination: 11 June 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Williams claims that he was constructively dismissed, effective from 29th June 2009. He also claims that there was a breach of good faith pursuant to s.4 of the Employment Relations Act 2000. The Niue Honey Company New Zealand Limited (“the Company”) refutes the claims and says that a mutual agreement was reached whereby Mr Williams left his employment.

Background Facts and Evidence

[2] Mr Williams commenced his employment with the Company on 25th February 2008, assisting with the processing of honey. The Company has two working directors; Mr Tim Oliver and Mr Andrew Cory. Mr Williams was initially working

“out in the field” travelling with two other employees carrying out general bee keeping / honey gathering duties.

[3] The evidence of Mr Cory and Mr Oliver is that because it became apparent, that the working relationship between Mr Williams and the other employees out in the field, was not working out, it was decided that Mr Williams should be relocated to work in the honey house (extracting honey), along with Mr Cory and another person named Carol.

[4] There was a verbal exchange on 25th June 2009 between Mr Williams and Carol and it seems that the foreman (Grant) felt obliged to defend Carol, to the extent that a physical threat may have been made by him towards Mr Williams. The evidence of Mr Oliver is that he spoke to Carol about the verbal incident between her and Mr Williams. Mr Oliver says that he was advised by Carol that she was unhappy about the “*disrespectful and demeaning way*” that Mr Williams treated her and that she was “*scared of him.*”

[5] On Friday, 26th June, a meeting took place between Mr Williams, Mr Cory and Mr Oliver. The incident between Mr Williams and Carol was discussed. The evidence of Mr Williams is that he was told that other employees no longer wanted to work with him and that: “*I needed to resign.*” The further evidence of Mr Williams is that Mr Cory told him that: “*we could go down the formal track*” but in any event, there would be no work available.

[6] Mr Cory acknowledges that the incident between Mr Williams and Carol was discussed and that Mr Williams was asked “*to consider resigning as there would only be occasional work available ...*” The evidence of Mr Oliver is similar in that Mr Williams was asked to consider resigning as the work he was doing was “*coming to an end.*”

[7] Mr Williams says that he was: “*offered four weeks’ notice and a forklift course*” if he resigned. His further evidence is that he told Mr Cory and Mr Oliver that he didn’t want to resign and it was suggested by them that go home and talk to his (then) partner, Ms Raewyn Sturm, about the situation. Mr Williams did this. Then, accompanied by Ms Sturm, he returned on Monday, 29th June, to a further meeting

with Mr Cory and Mr Oliver, where he informed them that he thought the situation was “*unfair*” and that he did not want to resign.

[8] Mr Cory and Mr Oliver concur that Mr Williams informed them that he did not wish to resign. Mr Oliver says that he explained to Mr Williams that the only work that would be available would be with Mr Cory and that the hours would be “*low and unpredictable*” as the honey extraction was virtually finished and would be nil when Mr Cory went to Niue.¹ Mr Cory and Mr Oliver say that when Mr Williams realised that any work that would be available, would be intermittent and unpredictable, then he accepted that resigning would be preferable to the greatly reduced hours of work.

[9] The oral evidence of Mr Williams is that once he and Ms Sturm realised that: “there was no job for me” there was discussion about the notice period and other entitlements. The offer made to Mr Williams was that he would be paid for two weeks notice that he would not have to work. Additionally, he would be paid two days’ sick pay and payment of the fees involved for Mr Williams to complete a fork lift course. Mr Williams countered that he required payment for a further two weeks’ notice. The evidence of Mr Oliver is that he and Mr Cory considered this and agreed; “*to finally resolve the situation*” and then Mr Williams and Ms Sturm were invited to go home and think about what was being offered before confirming that they would “*settle on this basis.*”

[10] Mr Oliver attests that later on 29th June, he received a text message from Mr Williams which read: “yes 2wks wage, hday pay, 2 sik days, 4wks notice & forklift course.” Mr Oliver says that he replied by text to Mr Williams thanking him for the confirmation and asked Mr Williams if he would like the payment on 1st July 2009, in order to spread the tax over the next month. Mr Williams affirmed by return text. The evidence of Mr Oliver is that he believed that the totality of payments agreed (and subsequently paid), including the payment for the forklift course (\$245), was in full and final payment for Mr Williams agreed resignation.² Mr Cory attests in a similar vein and adds that if they had known that Mr Williams would “*renege*” on the agreement reached, they would not have “*negotiated a settlement package.*”

¹ The oral evidence of Mr Cory is that he would be working in Niue for two months.

² It was also agreed that Mr Williams would be provided with a reference and he received a reference from Mr Oliver (dated 12th July 2009) and Mr Cory (dated 21st July 2009).

[11] Mr Williams does not accept that he was negotiating a full and final settlement package. Rather, he says that he was placed in a position where he was given no option but to resign and that the notice that he agreed to, was what he believed was reasonable in the circumstances. Mr Williams makes no mention of any entitlement (or otherwise) to the two days paid sick leave or the forklift course.

Analysis and Conclusions

[12] Mr Williams claims that his resignation was in reality, a constructive dismissal. Conversely, Mr Cory and Mr Oliver (“the Employers”) say that Mr Williams was presented with two options. He could resign, or continue in his employment. But if he opted for the latter, the hours of work would be intermittent and unpredictable. The Employers say that having decided to resign, Mr Williams then negotiated a full and final settlement package in exchange for his resignation. I accept that the Employers may have genuinely thought this was the situation at the time they discussed matters but I also accept that Mr Williams did not perceive it to be so.

[13] Any determination of what is most probable requires an objective analysis of all of the circumstances leading up to the departure of Mr Williams from his employment on 29th June 2009. It is reasonably clear that Mr Williams had some difficulty in regard to his working relationship with other employees, as firstly revealed, by the decision of the Employers to move him out of the field work because of complaints by the people he worked with. Then, having moved to the honey house, there was conflict between him and Carol, and at least by inference, with Grant (the foreman). Obviously, this all led to the Employers having to take steps to address matters. Unfortunately, the manner in which they did this was unfair and unreasonable in that Mr Williams was presented with what was effectively, “Hobson’s choice.” He could resign, or continue working, but with the probability of intermittent and unpredictable hours of work, or indeed no work at all, when Mr Cory went to work in Niue.³

³ The more reasonable alternative would have been to discuss with Mr Williams the complaints that had been received, with an opportunity to offer an explanation pertaining to the matters in question. Also, if it was a question of the work available coming to an end, then this should have been conveyed to Mr Williams along with the likely affects on his ongoing employment.

[14] I accept that the preference of Mr Williams was not to resign but I also accept that having reached the conclusion that there really was no tangible option, he sought to obtain the best deal he could, which was two more weeks pay in lieu of notice, being additional to what was being offered overall by the Employers. I do not think that Mr Williams intended that what he finally agreed would be in full and final settlement of the loss of his employment, rather it seems more likely that he was trying to make the best out the situation that he was faced with. While the submission for Mr Williams is that the circumstances that he was faced with, fall within the first of the three categories identified by the Court of Appeal in *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd* (1985) ERNZ Sel Cas 136, that is, where an employer gives the employee a choice between resigning or being dismissed, I conclude that Mr Williams' circumstances most probably fall within category two. That is, where the employer embarks on a course of conduct with the deliberate and dominant purpose of coercing an employee to resign. But it may be a step too far to conclude that the Employers engaged in coercing Mr Williams to resign. Rather, it is more likely that the Employers hoped that an amicable arrangement could be arrived at with Mr Williams, given the problems that had arisen in regard to his relationship with other staff, but unfortunately, their actions fell squarely within the legal framework pertaining to constructive dismissal.

[15] It follows that I find that the actions of the Employers were not those of a fair and reasonable employer in all the circumstances⁴ and that the resignation of Mr Williams was in fact an unjustified constructive dismissal. Mr Williams has a personal grievance for which he is entitled to remedies under s.123 of the Employment Relations Act 2000 ("the Act").

Remedies

(a) *Reinstatement*

[16] Mr Williams has indicated that "*ideally*" he would like to be reinstated to his previous position. But given all the circumstances, particularly the breakdown in the working relationship with other staff and the seasonal nature of the work, I conclude that reinstatement is not a practicable option.

⁴ Section 103A, Employment Relations Act 2000

Reimbursement of wages

[17] Under the provisions of s.128(2) of the Act, having found there is a personal grievance and an associated loss of wages, the Authority must award the equivalent of 3 months' ordinary time wages, and there is a discretion to award more than this under s.128(3). Mr Williams seeks reimbursement of wages from the date of his dismissal up to the date of the investigation meeting (16th March 2010). However, given that it is highly probable that the work available for Mr Williams was of a limited duration, I conclude that there are no valid grounds for awarding more than 3 months' wages. From this must be deducted one month's pay for the notice paid to Mr Williams and also the two days' sick pay for which there was no contractual entitlement.⁵ An order follows.

Compensation

[18] Mr Williams seeks an award of \$15,000 but I conclude that such a sum is not warranted in the circumstances. Mr Williams has given evidence about the affect on him due to the loss of his employment. I also take into account mitigating factors such as the two useful references that were provided to him, as well as the payment for the forklift course, enabling him to improve his skill base for future employment. It is also seems likely that Mr Williams' employment would have come to an end quite soon, due to the impending lack of work available. In all the circumstances, I consider an award of \$2,000 is appropriate. An order follows.

Contribution

[19] Being cognisant of s.124 of the Act, I have given consideration to whether the remedies awarded to Mr Williams should be reduced due to any contributing behaviour by him, in regard to the situation that gave rise to the personal grievance. While it seems that there were some problems with the working relationship between Mr Williams and other employees of the Company, there is no tangible evidence available in regard to where any fault may lie, hence I conclude it is not appropriate to reduce the sum of the remedies awarded.

⁵ Mr Cory referred the Authority to a generic *Employee Contract 2009 -10* that he says applied to Mr Williams. But the agreed evidence is that Mr Williams only received this on the last day of his employment (29th June 2009) and there is no evidence that the content of the contract was ever discussed with Mr Williams and it is not signed by him. Indeed, I understand that the personal reference to Mr Williams were only added on 29th June.

[20] Mr Williams has also asked that a penalty be awarded for the failure of the Company to provide him with an employment agreement but I do not accept that this is appropriate. There is no evidence that this matter was ever discussed or that there was ever a refusal on the part of the Company to provide an agreement. The evidence is that a generic two page agreement was available for all staff to view, but as discussed with Mr Cory and Mr Oliver (and I think, accepted by them), at the investigation meeting, this is not satisfactory and fails to meet the requirements of the Act. One would envisage that having now sought appropriate advice, future arrangements in regard to employment agreements will ensure compliance with s.65 of the Act. I also conclude that while the actions of the Employers were unjustified, I do not find that there has been a breach of good faith warranting a penalty, as the criteria under s.4A of the Act is not satisfied.

Determination

[21] For the reasons set out above, I find that Mr Williams was constructively dismissed and that the dismissal was unjustified.

[22] Pursuant to s.123(1)(b) of the Act, Niue Honey Company New Zealand Limited is ordered to pay to Mr Williams three months' loss of wages at his usual rate of pay: less one month for the paid notice, and less two days sick pay, for which there was no contractual entitlement.

[23] Pursuant to s.123(1)(c)(i) of the Act, Niue Honey Company New Zealand Limited is ordered to pay to Mr Williams the sum of \$2,000.

Costs

[24] Costs are reserved. The parties are invited to resolve this matter if they can. In the event that a resolution is not possible, the applicant has 28 days from the date of this determination to file and serve submissions with the Authority should it wish to do so. The respondent has a further 14 days to file and serve submissions in response.

K J Anderson
Member of the Employment Relations Authority