

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 183  
5307654

BETWEEN                      LOGAN ANDERSON  
   Applicant  
  
AND                                PROMAX COMPUTERS  
   LIMITED  
   Respondent

Member of Authority:      Vicki Campbell  
  
Representatives:            Anamika Singh for Applicant  
   Wayne Davies for Respondent  
  
Investigation Meeting:      2 March 2011  
  
Submissions Received:      9 March and 11 April 2011 from Applicant  
   11 April 2011 from Respondent  
  
Determination:                6 May 2011

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**DETERMINATION OF THE AUTHORITY**

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- A      Mr Anderson does not have a personal grievance for unjustified constructive dismissal.**
- B      Costs are reserved.**

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[1] Mr Logan Anderson was employed by Promax Computers Limited (PCL) as a computer programmer on 1 October 2009. On Friday 26 February 2010 and again on Tuesday 2 March 2010, Mr Anderson says Mr Davies, a Director and Manager of PCL, approached him and enquired as to whether he had taken any money out of the till on 25 February 2010. Mr Anderson told Mr Davies he had taken no money out of the till except in the course of serving customers.

[2] Even though he denied taking any money Mr Davies handed Mr Anderson a letter alleging serious misconduct and inviting him to a disciplinary meeting on 4

March 2010. At the meeting, which was recorded, Mr Anderson maintained that he had not taken any money from the company. Mr Anderson says Mr Davies advised him that dismissal was likely but that he would offer Mr Anderson the opportunity to resign rather than be dismissed.

[3] Mr Anderson did not want a dismissal on his record and chose to resign rather than be dismissed. Mr Anderson says his resignation was actually a constructive dismissal and that the dismissal was unjustified.

[4] To be successful in his claim for constructive dismissal Mr Anderson must establish that PCL gave Mr Anderson a choice between resigning or being dismissed. This is the first of the three main categories of constructive dismissal as established in *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd*<sup>1</sup>.

[5] As stated in *Wellington etc Clerical etc IUOW v Greenwich*<sup>2</sup> a useful test in constructive dismissal cases is to look at whether the initiative for the resignation came from the employer. If it did not, then no constructive dismissal will be made out.

[6] The issue for the Authority is to determine whether Mr Anderson was given a choice of resigning or being dismissed, or whether PCL embarked on a course of conduct designed to elicit a dismissal or otherwise breached the employment agreement between the parties and that such a breach would make a resignation reasonably foreseeable.<sup>3</sup>

[7] Section 103A of the Employment Relations Act 2000 requires the Authority to stand back and consider objectively, whether PCL acted as a fair and reasonable employer would have in all the circumstances.

## **Background**

[8] PCL employs three employees. Mr Davies, Mr Andrew Nesham who works in the same area as Mr Anderson, and Mr Anderson. Mr Anderson had been in the habit of leaving work early without seeking approval or advising either Mr Davies or Mr Nesham, and been given clear instructions on what to do in the event that he needs to leave early. Mr Anderson had also taken food from a food box without paying.

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<sup>1</sup> [1985] 2 NZLR 372 (CA).

<sup>2</sup> [1983] ACJ 965.

<sup>3</sup> Supra n 1.

[9] On 25 February 2010 Mr Davies left the work premises at or about 3.10pm. He removed his iphone from the docking station under his desk and was offsite for the remainder of the day. He returned to his office the following day Friday 26 February 2010.

[10] Prior to leaving the office Mr Davies had taken a customer payment of \$100 in \$20.00 denominations and had put it in the till. He had not done the banking that day and was surprised, when he counted the money again on Friday 26 February 2010, to find the till contained only \$60.00 in \$20.00 denominations.

[11] PCL has CCTV security camera's with one camera focused on Mr Davies office. On reviewing the video footage Mr Davies noted that Mr Anderson had entered his office twice during the afternoon at or about 5.20pm. The second time Mr Anderson entered the office the video footage showed Mr Anderson doing something in the till area and putting something in his pocket as he left the office. Mr Davies says Mr Anderson then left work early at 5.22 without seeking permission or advising Mr Davies that he was leaving early.

[12] Mr Davies approached Mr Anderson on 26 February 2010 and asked him why he had been in his office. Mr Anderson's response was, he could not remember. On Sunday 28 February 2010 Mr Anderson requested the day off on Monday 1 March 2010. He returned to work on 2 March 2010.

[13] Mr Davies was not satisfied with the response he had received from Mr Anderson on 26 February and on 2 March 2010 when he returned to work he invited him to attend a disciplinary meeting to discuss an allegation of serious misconduct. Mr Davies alerted Mr Anderson to the fact that in Mr Davies opinion, the CCTV footage shows him accessing the till and leaving work early.

[14] Mr Davies offered Mr Anderson the opportunity to go home until the meeting two days later, however, Mr Anderson chose to remain at work.

#### **4 March 2010 Meeting**

[15] At this point I think it is helpful if I make a comment about credibility. Where evidence is at odds between Mr Davies and Mr Anderson, it is Mr Davies evidence I have preferred. This is because Mr Anderson's evidence was sometimes vague and he changed his evidence in a number of important areas. For example in his written

statement Mr Anderson told the Authority: “Although I denied the allegation of theft Wayne advised me that it was likely that I would be dismissed or that I could resign”. In answer to questions from the Authority Mr Anderson conceded that Mr Davies did not use those words but rather told him that if he was dismissed he [Mr Davies] would have to say something about the reasons for the dismissal.

[16] Further, Mr Anderson told the Authority in his written evidence that Mr Davies had told him “it must have been you”. However, in his oral evidence Mr Anderson accepted that Mr Davies had never said that, rather it was implied.

[17] The meeting on 4 March 2010 was recorded and a copy of the recording and a transcript was provided to the Authority. At the meeting Mr Anderson tabled a written response to the allegations which he provided to Mr Davies. Mr Anderson claimed to have been checking out stock and then returning to retrieve his iphone which he says had been plugged into Mr Davies recharger.

[18] According to Mr Davies there was no reason for Mr Anderson to have entered his office at all other than to place money in the till if he had served a customer. Mr Anderson could have recharged his iphone at his own workstation. Also, the video footage reviewed by Mr Davies does not show Mr Anderson entering his office at all between 3.00pm and 5.20pm and it was Mr Davies uncontested evidence that until he left the office at about 3.00pm Mr Davies had his own phone plugged into the charger.

[19] Whether Mr Anderson was guilty of taking the \$40 from the till or not is not a question the Authority has to answer. Having reviewed the footage however, I am of the opinion that Mr Anderson’s responses about what he was doing in Mr Davie’s office seem unlikely to be entirely accurate.

[20] The Authority is required to determine whether Mr Davies gave Mr Anderson an ultimatum. That is, resign or be dismissed. Mr Davies denies telling Mr Anderson that if he did not resign he would be dismissed. The transcript of the meeting shows no record of such a conversation. When this was put to Mr Anderson at the investigation meeting he told the Authority that the conversation took place after the tape had been turned off. Mr Davies acknowledges that he did mention that resignation was an option but that was by way of advice and not a threat.

[21] At the end of the meeting Mr Anderson’s support person (a man known to the Authority only as “Murray”) asked what would happen if Mr Anderson chose not to

resign. In his oral evidence Mr Anderson agreed that Mr Davies response was that he had to take Mr Anderson's letter and would make a decision.

[22] I accept Mr Davies' evidence that at no time did he actually tell Mr Anderson he would be dismissed. The meeting ended with Mr Davies advising Mr Anderson that he would be in touch with the outcome. However, before Mr Davies could make a decision in the matter, Mr Anderson had provided his letter of resignation.

[23] I am satisfied that the discussion Mr Davies had with Mr Anderson was to the effect that if the matter concluded with his dismissal then he would have to tell others of the circumstances, but that if he resigned he would not do that. This was not intended to be coercive of a resignation. I am also satisfied that Mr Davies did not act in a way which was designed to extract a resignation from Mr Anderson, nor has any breach of duty been established.

[24] I find there has been no constructive dismissal of Mr Anderson. I am also satisfied that PCL acted as a fair and reasonable employer would have acted in all the circumstances.

### **Costs**

[25] Costs are reserved. I note that the respondent was not represented by a professional representative. Therefore it is unlikely it will have any costs. However, in the event that I am wrong and the respondent has costs which it seeks a contribution towards, the parties are encouraged to resolve that question between them. If they are not able to reach agreement PCL may lodge and serve a memorandum as to costs within 28 days of the date of this determination. Proof of the costs sought is required to be lodged at the same time. Mr Anderson will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Vicki Campbell  
Member of Employment Relations Authority