

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 229
5411228

BETWEEN KEVIN ANSLEY
 Applicant

A N D ELITE INNOVATION
 LIMITED
 Respondent

Member of Authority: T G Tetitaha

Representatives: R McNaughton, Advocate for Applicant
 A S Menzies, Counsel for Respondent

Investigation Meeting: 5 June 2013 at Hamilton

Submissions Received: 5 June 2013 from Applicant
 5 June 2013 from Respondent

Date of Determination: 7 June 2013

DETERMINATION OF THE AUTHORITY

- A. Mr Kevin Ansley was not constructively dismissed.**
- B. Submissions on costs are to be filed within 21 days of the date of this determination.**

Employment relationship problem

[1] Mr Kevin Ansley was employed by Elite Innovation Limited as a fitter/welder on 2 July 2012. He resigned from his employment on 20 December 2012 alleging he was constructively dismissed following a conversation with Elite's director, Mr Ryan Tautari, on 5 December 2012.

[2] On 5 November 2012 Mr Ansley was injured. He applied for accident compensation. He was told by the Accident Compensation Corporation (ACC) and

his foreman, Mr Matt Crosswell, there was doubt whether his injury was work-related. Elite was concerned there was no record of injury in timesheets or injury reports. It eventually accepted the injury was work-related, and Mr Ansley received compensation.

[3] During this period Mr Ansley consulted a lawyer about his concerns arising from his conversations with ACC and Mr Crosswell. The lawyer advised he record any future conversations.

[4] On 5 December 2012, Mr Ansley went to Mr Tautari's office bringing medical certificates. He did not have an appointment as this was an informal workplace where discussions would happen on a casual basis. Mr Ansley recorded his conversation with Mr Tautari on his cellphone, without Mr Tautari's knowledge or consent. Mr Matt Crosswell also attended.

[5] Mr Tautari had been on the phone with Inland Revenue Department and advised Elite had outstanding tax liabilities of \$480,000. He deposed to being upset and frantic, and worried about saving every penny.

[6] The parties discussed the concerns about Mr Ansley's injury being work-related. Mr Tautari then asked Mr Ansley to have an "off-the-record" discussion. Mr Ansley was surprised. He deposed at hearing he did not believe this was the time or place to have such a discussion, especially in the presence of Mr Crosswell.

[7] Mr Tautari asked Mr Ansley if he could "*stretch it out over Christmas*" referring to his compensation. It appears his projected return to work on 19 December 2012 coincided with a drop in work and the Christmas break. An extension of ACC would have resulted in a wages saving for Elite. Mr Ansley did not see how he could do that and stating it was dependent upon his medical advice.

[8] During the conversation, Mr Crosswell suggested Mr Ansley could extend the compensation if he was to "*say it's still sore*" to his doctor. Mr Ansley confirmed he could say that, but made no other comment.

[9] Mr Tautari then states "*I can't influence it. You can't influence it is what it is but if there is any way cause at the moment I've got no work for you until the new year so do you a favour and do me a favour.*" Mr Ansley replied that all he could do was ask.

[10] Mr Tautari further states “*I’m not asking you to put yourself in a position that will compromise your integrity or anything just that if there is any way we are busy now for another week then its dead until the 12th of January*”.

[11] Later Mr Tautari refers to his “*opportunity to veto a return plan*” because Mr Ansley’s took longer than three weeks to return to work. Mr Ansley replies “*so after three weeks you have the option to veto a return to work.*” He asks what date they return to work after Christmas and is told 14 January 2013.

[12] Mr Ansley at hearing asserted the reference to “veto” in the conversation was when he thought he was dismissed unless his doctor could extend his compensation beyond 19 December. His doctor failed to do so and believes he had no choice but to resign. Elite disagrees. It states there was no fraudulent action and Mr Ansley has not established he had no option but to resign.

Issues

[13] The parties agreed the sole issue for determination was whether Mr Ansley was constructively dismissed due to an alleged attempt by Elite to induce Mr Ansley to commit a fraudulent act giving rise to the resignation.¹

Legal framework

[14] Constructive dismissal includes cases where a breach of duty by the employer causes an employee to resign². The essential questions are³:

- (a) What were the terms of the contract?
- (b) Was there a breach of those terms by the employer that was serious enough to warrant the employee leaving?

[15] When considering the first question above, the Authority must examine “*all the circumstances of the resignation*”, not merely the terms of the notice or other communication whereby an employee has tendered the resignation. If there was a

¹ Teleconference with parties 22 April 2013.

² *Auckland Shopworkers’ Union v. Woolworths (NZ) Ltd* [1985] 2 NZLR 372

³ *Wellington etc Clerical etc IUOW v. Greenwich (t/a Greenwich & Associates Employment Agency and Complete Fitness Centre)* (1983) ERNZ Sel Cas 95 (AC) at 112-113.

breach, the next question is “*whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.*”⁴

[16] There is a substantial conflict of evidence. This requires express findings of credibility. The relevant factors here in assessing credibility are inconsistencies and contradictions of all kinds, prevarication, concessions made where due despite any perception of the risk to credibility in giving that evidence and an assessment of the evidence within the context of all other evidence such as undisputed facts or facts unknown to the witness.

[17] The Authority may draw inferences and fill in gaps in evidence by application of commonsense, knowledge of human affairs and the state of the industry and any matter that seems capable of being taken into account as indicating the probabilities of the situation.

Determination

[18] Having considered the above evidence, the Authority determines Mr Ansley was not constructively dismissed. This is because:

- (a) The alleged conversation which gives rise to the personal grievance was unexpected. There was no evidence of pre-planning of the conduct that occurred at the meeting. This was a “one off” conversation which occurred unexpectedly.
- (b) There was some dispute about the conversation, especially the genuineness of the statements by Mr Tautari regarding set out in paragraphs [9] and [10] above. Mr Ansley alleged they were “fillers” and/or “sarcastic” commentary. This was denied by Mr Tautari.
- (c) The recording was played at the end of the hearing. After listening to the recording, the Authority formed the view these comments were not fillers or sarcastic commentary.
- (d) The conversation appears to be a frank discussion about the company’s financial position and possibilities for dealing with it. The suggestions by Mr Tautari to “*stretch it out*” and Mr Crosswell to “*say its sore*”

⁴ *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168 (CA).

were completely unwise. It infers less than above board behaviour by Elite towards ACC.

- (e) However, the Authority accepts the submission of respondent counsel. Even if a dim view is taken of this conversation, there was no evidential basis to suggest that Mr Ansley was given no choice but to resign.
- (f) The reference to “veto” relates Mr Ansley’s return to work plan not his dismissal. The evidence was there were no light duties for him to perform and even if the veto was exercised, he would have continued to receive compensation but returned to work at a later date.
- (g) Mr Ansley’s evidence at hearing was he waited until 20 December to see whether his doctor would have allowed him further time off on ACC. If the extra time had been allowed, he says he would not have resigned at all and would have continued working. Even when he knew his doctor’s opinion he did not check with Mr Tautari whether he was dismissed or not. Mr Tautari expected his return to work on 19 December, but received a resignation instead. There may have been a misunderstanding by Mr Ansley about dismissal which he accepted at hearing. This could have been clarified (and resignation avoided) if he had taken steps to inform Mr Tautari of his beliefs.
- (h) There is an implied term in employment contracts that employers ought not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence.⁵ This conversation, although extremely unwise, was not on its own, conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence.

⁵ *Review Publishing Co Ltd v Walker* [1996] 2 ERNZ 407 (EmpC), applying *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW (Inc)* [1994] 2 NZLR 415, [1994] 1 ERNZ 168 (CA)

Costs

[19] Given the above determination, costs are reserved. Submissions on costs are to be filed within 21 days of the date of this determination.

T G Tetitaha
Member of the Employment Relations Authority