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Charlesworth v Tourism Holdings Limited AA421/10 (Auckland) [2010] NZERA 741 (23 September 2010)

Last Updated: 11 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 421/10 5160741

BETWEEN ANDREW CHARLESWORTH

Applicant

AND TOURISM HOLDINGS

LIMITED

Respondent

Member of Authority: Representatives:

Investigation Meeting: Submissions Received:

K J Anderson

J Watson, Counsel for Applicant S Langton and R Tomkinson, Counsel for Respondent

14 July 2010 at Hamilton

28 July 2010 for the Applicant 12 August 2010 for the Respondent

Determination:

23 September 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Charlesworth says that the issuing to him of a final written warning dated 13th February 2009, was an unjustified action by his employer, Tourism Holdings Limited ("THL"), which affected his employment to his disadvantage, pursuant to [s 103\(1\)\(b\)](#) of the [Employment Relations Act 2000](#). Mr Charlesworth also says that his resignation of 15th February 2009, was in reality, a constructive dismissal. Mr Charlesworth asks the Authority to find that he has two personal grievances and award him various remedies, including a penalty for breach of good faith.

[2] In addition to the evidence of Mr Charlesworth, there is evidence from Mrs Charlesworth. For THL there is evidence from: Mr Carl Herbst, Manufacturing Manager, Ms Cora Bowden, Human Resources Manager (Ci Munro), Duane Jenkin,

Business Analyst, Marianne Bachler, Human Resources Manager (THL) and Mr Kevin Fox, Process Engineering Supervisor. The parties have provided a number of relevant documents and closing submissions. All of the material has been closely considered, albeit not specifically referred to in this determination.

Background Facts and Evidence

[3] Tourism Holdings Limited ("THL") has three separate manufacturing operations in Hamilton. One of the operations is Ci

Munro, where caravans and motor homes for the rental fleet of THL are manufactured.

[4] Mr Charlesworth initially began working at Ci Munro in 2008 as a contracted employee, working through an employment agency. Via a letter dated 15th December 2008, Mr Charlesworth was offered fixed term employment with THL in the role of Kanban - Manufacturing Support. The purpose of the fixed term was to implement an efficient Kanban parts-movement system supplying parts to the production line. The term of employment was from 5th January with an expiry date of 5th July 2009: "... or by two weeks' notice if the project for which this employment is intended is completed or terminated earlier than anticipated." Mr Charlesworth accepted the terms and conditions of the fixed term employment agreement by affixing his signature on 18th December 2008.

[5] The notified hours of work are 40 each week to be worked between the hours of 7:30a.m. and 5:00p.m. each day, Monday to Friday. However, it is the general practice that the normal start time is 7:30a.m; finishing the day at 4:00p.m. It appears to be commonly accepted that Mr Charlesworth went about his role in an effective manner.

The incident of 28th January 2009

[6] The evidence of Mr Charlesworth is that near the end of the day, he was approached by Mr Brendan Graham, the Stores Supervisor, who raised an issue about the implementation of the Kanban system. It appears that Mr Graham made a suggestion, that, in the view of Mr Charlesworth; "... *did not make sense in terms of practice or cost.*" Mr Charlesworth says that he and Mr Graham became "*angry and frustrated.*" Mr Charlesworth believed that the conversation could "*get out of hand*" and so he decided to that it "*was best*" that he packed up and went home. Mr Charlesworth proceeded to the area where employees clock out at the end of the working day.

[7] The workplace has an established system whereby at 3:55p.m. each working day, a bell^[1] is used to signal to employees that they can clean up their work stations, and themselves, prior to a second bell ringing at 4:00p.m; to signal that employees can proceed to clock out and go home. Mr Charlesworth says that upon going to the check out area, he noticed that there were a number of other employees already gathered there as the first bell had rung and the workers were awaiting the second one so that they could check out. It seems that there were four other employees there: Matt Kilsby, Lee Standing, Pua Whitlow and James Raikena.

[8] The evidence of Mr Charlesworth is that when he attempted to clock out, Mr Paul Timberlake (Production and Planning Manager), told him that he could not clock out until the second bell had gone signalling it would then be 4:00p.m. There was an exchange of words relating to the wish of Mr Charlesworth to clock out before the second bell rang and the opposing view of Mr Timberlake that he should not clock out early^[2]. Mr Charlesworth recalls Mr Timberlake: "... *grabbing my right forearm to physically prevent me from clocking out.*" There was an exchange between the two men following which Mr Charlesworth clocked out and left the workplace.

[9] Mr Charlesworth visited Ms Cora Bowden (Human Resources Manager) the following day. The evidence of Ms Bowden is that Mr Charlesworth told her about the incident at the time clock and she requested that he document what had occurred. Mr Charlesworth says that he prepared the written complaint produced to the Authority, on the day of the incident and handed it to Ms Bowden on 29th January. That appears to be correct, but nothing of substance rests on this. In his letter to Ms Bowden, Mr Charlesworth complains that he had been subjected to "*physical assault and verbal abuse*" by Mr Timberlake. Mr Charlesworth also made a complaint of assault to the police.^[3]

The investigation

[10] Ms Bowden commenced an investigation into the complaint lodged by Mr Charlesworth. She attests that Mr Timberlake advised her that he believed that Mr Charlesworth had disobeyed a lawful instruction, being not to clock out before 4:00p.m. Mr Timberlake also believed that his authority had been undermined in the eyes of other employees. Statements were received by Ms Bowden from other employees that witnessed the conflict between Mr Charlesworth and Mr Timberlake at the time clock and there are brief notes recording Ms Bowden's interviews with employees. A divergence of views is revealed. Two employees^[4] confirmed Mr Charlesworth's statement^[4] that he was "*grabbed*" by the arm, while two others^[5] respectively stated that Mr Timberlake; "*lightly placed*" or "*put his hand*" on the shoulder of Mr Charlesworth. Mr Timberlake stated that he "*touched*" Mr Charlesworth on the arm.

[11] Via a letter from Ms Bowden, dated 30th January 2009, Mr Charlesworth was invited to an "investigative meeting" that same day, in relation to the incident. Mr Charlesworth was informed that the Company was considering (in accordance with clause 16.1 of the employment agreement) whether there was:

1. Failure to follow a lawful instruction and insubordination.
2. Conduct that affects or in the Employer's reasonable opinion is likely to prejudicially affect the Employer's interests.

Mr Charlesworth was further informed if the above two matters were proven, this would be considered as serious misconduct for which dismissal without notice was an outcome. Mr Charlesworth says that he was "*shocked*" to receive this letter as it was not the response he had anticipated to his complaint.

[12] A meeting took place on 30th January, followed by others on 4th and 10th February 2009. At the first two meetings Mr Charlesworth was represented by a union delegate; at the third meeting he was represented by his counsel, Ms Watson. It appears that Ms Watson had some discussions with Ms Bowden, following an indication that Mr Charlesworth would receive a final written warning.[6] as on 12th February, via an email to Ms Watson, Ms Bowden rejected an apparent proposal

whereby if \$10,000 was paid, Mr Charlesworth would leave the employment of THL.[7] Of particular relevance to Mr Charlesworth's claims regarding the reorganisation within Ci Munro, Ms Bowden writes:

Secondly, I do not see the current situation as necessitating Andrew to leave with a payment, and in any event there is a possibility that Andrew's role may no longer be required in any event. In that regard, you will be aware that the company's staffing requirements are currently under review. We need to cut costs. We are in the middle of a large restructure. It should be of no surprise to Andrew that his role is under review. We had asked him how far he is through long [sic] the project for which he was employed and from that information it would seem that this project is now complete. On that basis, the reason for his role would seem to have disappeared. In terms of next steps, we will need to discuss with Andrew the prospect (as contemplated in his employment agreement) of an early expiry of the fixed term agreement. I will write to him separately on that issue.[8]

The warning

[13] The outcome of the disciplinary investigation was that Mr Charlesworth received a final written warning, recorded in a letter to him dated Friday, 13th February 2009. In summary, it is recorded that:

- a. The allegations that Mr Charlesworth was required to respond to were:
 1. Failure to follow a lawful instruction and insubordination, namely an instruction given by Paul Timberlake, not to 'clock off as the siren for 4:00p.m. had not gone; and
 2. Conduct that affects, or is in the Employer's reasonable opinion, is likely to prejudicially affect the Employer's interests.
- b. The outcome of the disciplinary investigation was that THL concluded that Mr Charlesworth commenced clocking off in "*direct defiance*" of the "*clear instruction*" of Mr Timberlake and that this amounted to serious misconduct for which a final written warning was issued.

Mr Charlesworth was informed that:

"If there are any further instances of misconduct or breaches of Company Policy and Procedure, further disciplinary action may be taken including termination of your employment."

[14] Mr Timberlake was "counselled" by Ms Bowden and Mt Herbst not to touch any employee in future.

The organisational change proposal

[15] As previously mentioned, at the time of the investigation of the incident between Mr Charlesworth and Mr Timberlake, THL were giving consideration to changes within Ci Munro due to the current economic circumstances. Staff received notification of such via a letter from Mr Herbst dated 11th February 2009; the most relevant content being:

Given the current performance and the outlook for Ci Munro further change is needed to ensure its future viability. With regret, we will need to reduce the number of staff to reflect the economic climate and reorganise the factory to achieve necessary productivity gains. It is proposed to reduce the number of operational staff by 26 and to let go temporary staff currently employed.

The staff were provided with information regarding the intended process, including the selection criteria to be used for the impending redundancies. A time line for the process was also provided, being from 11th February (the announcement to staff) to 20th February 2009, where affected staff would receive support from a consulting group. In particular, the key date was 19th February, when the employees who lose their positions (or are voluntarily made redundant) would be advised.

[16] However, Mr Charlesworth did not wait to ascertain what the outcome of the reorganisation might be for him. Rather, on Sunday, 15th February 2009 he forwarded his resignation; effective immediately. Hence his final day of employment was 13th February, the same day that he received the final warning. The letter of resignation informs that:

It is no longer tenable for me to stay at CI Munro. I have been subjected to an unjustified warning, which I believe was punishment for me complaining about a manager's actions. In that incident I was assaulted and it was never shown that I actually committed the misconduct I was accused of. Since then it has been clear to me that the [sic] CI Munro has been on a course of dismissing me. In recent days I was asked how much work I had done with Kaban and how much more was left to do, even though I was never trained or given a definite programme. I explained that within CI Munro, Holiday Homes and Repairs there is still an enormous amount to do, in conjunction with Kanban re-supply and changing over to Barcode. In my

experience the Stores Supervisor and Production and Planning Manager not only have no idea really of what I am doing but also cannot help or direct me either.

On Wednesday February 11th, 2009, as with other staff I was given an information pack about a Company Restructure. That pack includes a 'Production Line Staff -Stores' that is essentially my current job. Therefore, CI Munro is now offering my job as an option for staff affected by the restructuring. It is clear by CI Munro's actions that they want me out before the expiry of my Fixed Term Agreement. I can no longer trust CI Munro to treat me fairly or reasonably and feel forced to leave. I will not be returning to work and I understand that these circumstances constitute constructive dismissal.

Analysis and Conclusions

[17] There are two substantive issues for determination.

1. Was the final warning issued to Mr Charlesworth an unjustified action by his employer that affected him to his disadvantage?
2. Was Mr Charlesworth constructively dismissed and if so, was the dismissal unjustified.

I also understand that Mr Charlesworth says that the receipt of the warning was also a factor in his decision to resign and hence, part of the "factual matrix" regarding the constructive dismissal claim. I will address this in due course.

[18] The test that applies to both claims is provided by s 103A of the Act in that the question of whether a dismissal or an action was justifiable, must be determined on an objective basis, by the Authority considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in the circumstances at the time the dismissal or action occurred.

Was the final warning issued to Mr Charlesworth an unjustified action by his employer that affected him to his disadvantage?

[19] It is submitted for Mr Charlesworth that the warning was unjustified in that it was "... *an excessive disciplinary sanction*" in all the circumstances that existed regarding the incident in question. On the other hand, the submissions for THL refer to clause 16 of the employment agreement where there are provisions for summary dismissal. At subclause 16.1 is the following:

In the event of serious misconduct, serious non-observance of the terms of your employment or serious neglect of your duties you may be dismissed without notice. Examples of serious misconduct include (but are not limited to):

- -
- Conduct that affects or in the Employer's reasonable opinion is likely to prejudicially affect the Employer's interests.
- Insubordination or failure to follow a lawful instruction

THL say that they were lenient in that rather than dismiss Mr Charlesworth for serious misconduct, a lesser sanction of a final written warning was applied. I accept that, depending on the circumstances, insubordination or a failure to follow a lawful instruction would generally constitute serious misconduct, for which dismissal may be an option open to an employer. However, given the evidence in this case, including there being some doubt as to what actually occurred at the scene of the clocking out, the actions of Mr Charlesworth could not be seen as serious misconduct warranting dismissal, and this appears to be the conclusion reached by THL.

[20] While I accept that Mr Timberlake was entitled to instruct Mr Charlesworth not to clock out until the second bell had sounded, there was no valid reason for Mr Timberlake to have physical contact with Mr Charlesworth, notwithstanding that there is also conflict in the evidence about the extent of that contact; and I suspect that Mr Charlesworth has exaggerated his perception of that somewhat. However, I conclude that given the overall conflict in the evidence and the unwarranted action of Mr Timberlake, the issuing of a final warning was an excessive disciplinary sanction. On the other hand, while I accept that Mr Charlesworth was in an agitated state following his clash with Mr Graham, this does not excuse Mr Charlesworth from refusing to obey the lawful instruction (or instructions) from Mr Timberlake that he was not to clock out until the time permitted. I must add that I did not find the arguments advanced by Mr Charlesworth about his right to clock out when he did to be convincing. Rather, I conclude that the regular hours of work appear to well established; with 4:00p.m. being the accepted finishing time.

[21] I conclude that given the overall circumstances that existed at the time and the refusal of Mr Charlesworth to obey a lawful and reasonable instruction, a fair and reasonable employer would have been entitled to issue a written warning, but not a final warning. Therefore, I find that that the issuing of a final warning in the circumstances was an unjustified action by the employer.

[22] That takes us to the second arm of the criteria set out in s 103(b): did the unjustified final warning affect the employment of Mr Charlesworth to his disadvantage? I conclude that the answer to this question must be no. This is because Mr

Charlesworth received the warning on Friday 13th and then resigned on Sunday 15th February 2009. Therefore, his employment was not affected to his disadvantage, quite simply because he elected to terminate his employment with THL. The last day of employment for Mr Charlesworth was the same day as he received the written warning. There is of course, legal precedent for an unjustified final warning affecting the employment of an employee to their disadvantage^[9] in that the existence of a final warning renders the employee's employment less secure, and more vulnerable to dismissal, in the event of a possible further transgression. But that is not the case here due to the almost immediate resignation by Mr Charlesworth. It follows that he does not have a personal grievance or a remedy available.

Was Mr Charlesworth constructively dismissed and if so, was the dismissal unjustified?

[23] The evidence of Mr Charlesworth is that THL were "*gunning for me.*" He points to two matters in particular that indicate that THL was going "to *get rid of*" him. Firstly, Mr Charlesworth attests to the failure to provide him with a logon/password. He says that after he made the complaint regarding Mr Timberlake, he was told by Mr Duane Jenkins, Business Analyst, that he would not be getting a logon "*now*" But Mr Jenkins denies that he ever said this to Mr Charlesworth and also says in his brief of evidence that he cannot recollect any specific conversation with Mr Charlesworth about the logon arrangement. However, upon being questioned by Ms Watson, Mr Jenkins did not dispute that Mr Charlesworth may have approached him but says if that did happen; he would have directed Mr Charlesworth back to his supervisor or manager. Mr Jenkins says that the logon was set up by the company's IT department on 23rd January 2009 and if he had received an instruction to withhold a logon, he would have escalated this to either the manager of Mr Charlesworth, or his own manager. I accept that this is most probably so and if difficulties did arise in regard to the provision of a logon facility for Mr Charlesworth, there is nothing tangible to suggest that this was related to any thought on the part of THL to terminate his employment.

The proposed restructuring

[24] The second and more substantive argument advanced by Mr Charlesworth in support of his claim that he was constructively dismissed, relates to the information that he received pertaining to the proposed restructuring within Ci Munro. Mr Charlesworth draws attention to the list of "Essential Staff" that THL identified as being employees that; "assuming that this process proceeds as documented" would not be part of the restructure process. Mr Charlesworth's name was not on the essential staff list and I understand that he assumed that because of this, his employment was going to be terminated. Mr Charlesworth also refers the Authority to the list of vacancies that is a further part of the overall information provided to employees. Mr Charlesworth says that he believed that the role that he was then engaged in was included on that list. He says that the position that he was employed in was "Production line staff/stores"^[10] and that the job description was "*almost identical*" to his job description. Furthermore, Mr Charlesworth says that THL were going to use the restructuring process to "get rid" of him by claiming that the Kanban implementation (and his fixed term employment) had come to an end, albeit his view was that there was still work to be done. But in any event, Mr Charlesworth says, his job description was wider than just the implementation of the Kanban project.

[25] However, THL says that Mr Charlesworth is wrong in his assertion that the vacant role of Production line staff/stores is identical to the role that that he held. Rather, Mr Charlesworth was employed in the role "Full Time Kanban" and that this was a fixed term role that was created as a result of the December 2008 restructure, and the purpose of the role was to implement a Kanban system. When that had been completed, there would no longer be a role for Mr Charlesworth. The evidence of Ms Bachler, Human Resources Manager for THL, is that only production staff were affected by the restructure and Mr Charlesworth was in the stores area. Ms Bachler says that there was no reference to the role of Mr Charlesworth in the consultation document. The evidence of Mr Herbst is that the "Production line staff/stores" role was a "General stores" position that had been recently vacated by Mr Lee Standing. Mr Herbst says that the company had delayed filling this role in order to give an opportunity to some other employee potentially affected by the restructure. The further evidence of Mr Herbst is that Mr Charlesworth never expressed any concerns to him about the possibility of an early termination of the fixed term contract. Mr Herbst also says that following the resignation of Mr Charlesworth, the fixed term role was "disestablished" because the Kanban process had been implemented and the project was complete. He also acknowledged that there may have been employment available for Mr Charlesworth until May 2009 as the situation was changing from week to week.

[26] In her evidence, Ms Bowden addresses the concerns raised by Mr Charlesworth in his letter of resignation, namely; how the proposed restructure would apply to him and the prospect of an early expiry of his fixed term role. Ms Bowden says that: *None of these concerns were raised with me (or to my knowledge, with anyone else on behalf of Ci Munro) before his resignation.* Ms Bowden also refers to other staff approaching her about the restructure, but Mr Charlesworth never raised any concerns with her.

[27] While Mr Charlesworth has made much of his concerns regarding the prospect of an early termination of the Kanban project and the anticipated effect of the proposed restructure, it is established that he never discussed these concerns with any of the managers involved. Nor did he take the opportunity to provide any feedback during the consultation period that was provided.

Determination

[28] I conclude that Mr Charlesworth made an extremely hasty decision to resign from his employment without discussing or

giving any consideration to any other options that may have emerged regarding the continuity of his employment. That was a decision he was entitled to make but I find that there is no evidential substance to his argument that THL had decided to remove him via the restructuring process. I also find that the receipt of a final written warning, combined with the restructuring proposals and the possible early completion of the Kanban project, do not constitute grounds for a valid claim of constructive dismissal.

[29] In summary, for the reasons set out above, I find that the final warning issued to Mr Charlesworth on 13th February 2009 was unjustified but it did not affect the employment of Mr Charlesworth to his disadvantage; because of his almost immediate resignation. And I find that the resignation of Mr Charlesworth cannot be seen as being caused by a breach of duty, or any other action on the part of THL, that would convert the resignation into being a constructive dismissal. For completeness, it follows that there was not a breach of good faith. The claims of Mr Charlesworth cannot be upheld and they are dismissed.

Costs: Costs are reserved. The parties are invited to resolve the matter of costs if they can. In the event they cannot, the Respondent has 28 days from the date of this determination to file and serve submissions with the Authority. The Applicant has a further 14 days to file and serve submissions.

K J Anderson

Member of the Employment Relations Authority

[1] The term siren has also been used.

[2] Albeit it seems that there were only a few minutes in it.

[3] A police officer attended the workplace and apparently cautioned Mr Timberlake and it appears that the police viewed the physical contact with Mr Charlesworth by Mr Timberlake, as relatively minor.

[4] Mr Kilsby and Mr Standing.

[5] Mr James Raikena and Ms Pua Whitlow.

[6] Probably conveyed to Mr Charlesworth at the meeting on 10th February 2009.

[7] The correspondence is not marked 'without prejudice.'

[8] The evidence of Ms Bowden is that Mr Charlesworth resigned before she had an opportunity to write to him about whether he was nearing the completion of the Kanban project and about possible options regarding his future employment with Ci Munro.

[9] For example: *Alliance Freezing Company (Southland) Ltd v NZ Amalgamated Engineering etc IUOW* [1989] 3 NZLR 785.

[10] Also referred to as "Stores person - Picking/Posting."

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