

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 368  
3041578

BETWEEN                      TALHA JANJUA  
   Applicant  
  
AND                                AJAY HOLDINGS LIMITED  
   Respondent

Member of Authority:      Vicki Campbell  
  
Representatives:            Applicant in person  
   Erin Burke for Respondent  
  
Investigation Meeting:      20 June 2019  
  
Oral Determination:        20 June 2019  
  
Record of Oral  
Determination:              21 June 2019

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**RECORD OF ORAL DETERMINATION OF THE AUTHORITY**

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- A.      Ajay Holdings Limited’s application that Mr Janjua’s claim be dismissed is declined.**
  
- B.      Mr Janjua was not constructively dismissed.**
  
- C.      Costs are reserved.**

**Employment relationship problem**

[1]      Mr Janjua worked for Ajay Holdings Limited as a Supermarket Assistant from 1 February 2013 until he resigned and left his employment on 15 February 2016. Mr Janjua claims his resignation was in reality a dismissal and seeks remedies.

[2] Ajay Holdings says the Authority should dismiss Mr Junjua's alleged personal grievance on the basis that his application is frivolous and vexatious.

### **Issues**

[3] In order to resolve Mr Junjua's application I must determine the following issues:

- a) Is the application frivolous and vexatious?
  
- b) Was Mr Janjua unjustifiably constructively dismissed and if so what if any remedies should be awarded.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. It has not recorded all evidence and submissions received.

### **Frivolous and vexatious claim**

[5] Ajay Holdings says Mr Janjua's claim is frivolous and vexatious and has asked the Authority to have the proceedings dismissed. Clause 12A of Schedule 2 of the Act gives the Authority the power to dismiss a matter, or defence, it considers to be frivolous or vexatious.

[6] There must be extraordinary circumstances before the Authority should conclude that a case is frivolous.<sup>1</sup> There must be a significant lack of legal merit so that it is impossible for the claim to be taken seriously.<sup>2</sup>

[7] Mr Janjua claims his resignation was in law a constructive dismissal. A constructive dismissal is an apparent resignation which is, in reality, an employee's response to an act or omission of the employer of such significance that it amounts to a repudiation of the contract of the employment and entitles an employee to accept that repudiation by resigning the employment.

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<sup>1</sup> *Capuzan v Pratt & Witney Air New Zealand Services t/a Christchurch Engine Centre* [2014] NZEmpC 206 at [52].

<sup>2</sup> *Ibid* at [58].

[8] In deciding whether an employer's conduct amounted to a constructive dismissal it is essential to examine the facts of the case to see whether the conduct of the employer can fairly and clearly be said to have crossed the line between inconsiderate conduct causing some unhappiness from dismissive or repudiatory conduct reasonably sufficient to justify termination of the employment relationship.<sup>3</sup>

[9] I am satisfied this case does not fit the category of being frivolous. It is not clear on the face of it that Mr Janjua has brought a case which is entirely misconceived.<sup>4</sup>

[10] In considering whether Mr Janjua's claim can be said to be vexatious I have taken into account the following factors:<sup>5</sup>

- a) the fundamental importance of the right of access to courts which is to be balanced against the desirability of freeing defendants from the burden of groundless litigation;
- b) whether the proceeding has a reasonable basis and whether it has been conducted in a reasonable way;
- c) whether an attempt is being made to re-litigate issues already determined containing scandalous and unjustified allegations; and
- d) whether there is an improper purpose in commencing proceedings.

[11] It would be wrong to draw adverse conclusions on the merits of Mr Janjua's claims until they have been properly investigated. Ajay Holdings was critical of Mr Janjua for not lodging his statement in reply for two and a half years after raising his personal grievance.

[12] While the delay has not been explained adequately by Mr Janjua, the Act allows applicants up to three years in which to lodge their claims. Mr Janjua has met that obligation. Further, Ajay Holdings has not raised any concerns that it was

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<sup>3</sup> *Wellington etc Clerical Workers Union IUOW v Greenwich*

<sup>4</sup> *Creser v Tourist Hotel Corp of New Zealand* [1990] 1 NZILR 1055 page 1069.

<sup>5</sup> Above n 1 at [67].

prejudiced in its defence of Mr Janjua's claim as a result of the delay. Accordingly I am satisfied there has been no conduct by Mr Janjua that gives cause for concern to the extent that he should be refused the opportunity to have his matter investigated and determined.

[13] Mr Janjua's claims are neither frivolous nor vexatious and will not be dismissed. Consequently, I have continued to investigate and determine his claim.

### **Constructive dismissal**

[14] In *Auckland Shop Employees Union v Woolworths (NZ) Ltd*<sup>6</sup> the Court of Appeal listed three situations in which a constructive dismissal might occur, although the Court noted that these were not exhaustive. The three situations are:

- a) Where the employee is given a choice of resignation or dismissal;
- b) Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and
- c) Where a breach of duty leads a worker to resign.

[15] The Court of Appeal elaborated on the third category of constructive dismissal in the case of *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* and stated:<sup>7</sup>

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing; in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[16] The nature of a claim for constructive dismissal is dependent on the events that preceded the employee leaving their employment; the focus of such claims is on the employee's motivation for their decision to leave, and whether the motivation arises from a breach or breaches of the employer's duty or other actions by the employer.<sup>8</sup>

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<sup>6</sup> [1985] 2 NZLR 372.

<sup>7</sup> *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* [1994] 1 ERNZ 168; [1994] 2 NZLR 415 (CA) p172; p 419.

<sup>8</sup> *Commissioner of Police v Hawkins* [2009] NZCA 209.

[17] At the investigation meeting Mr Janjua confirmed he was relying on the second and third of the three situations set out in the *Woolworths* case. That is that Ajay Holdings followed a course of conduct with the deliberate and dominant purpose of coercing him to resign and/or that Ajay Holdings breached a duty owed to him.

[18] Where the conduct of the employer or breach of duty causes an employee to resign the conduct and/or breach must be serious enough to make it reasonably foreseeable that the employee would resign rather than put up with the situation.

[19] In his statement of problem Mr Janjua claims he had no option but to resign because Ajay Holdings misinformed him of his entitlement to parental leave. There is no dispute that Mr Janjua enquired about his entitlement to parental leave under the Parental Leave and Employment Protection Act 1987 in December 2015.

[20] Mr Janjua says he was told he was not entitled to any parental leave at all because his partner was not working. He told me he was advised he could apply for annual leave instead and told Ms Bhavna Desai, HR Manager, that he may need the annual leave for later stages as his partner was experiencing complications at which time he says he was told he would have to resign.

[21] Ms Desai disputed Mr Janjua's recollection of events. Ms Desai told me when Mr Janjua enquired about his entitlement to parental leave she told him he was not eligible for parental leave but was eligible for partner leave of two weeks' continuous unpaid leave. The difference being that parental leave attracts a payment and requires the person in receipt of the payment to be the primary care giver of the child.

[22] Ms Desai advised Mr Janjua he could avail himself of annual leave. Mr Janjua had accrued 12 weeks annual leave at that time. Ms Desai told Mr Janjua that if he wished to take either the partner leave or annual leave he would need to fill out an application form.

[23] For the reasons that follow I have preferred the evidence of Ms Desai as being, on balance, the more accurate summary of the December discussion. In reaching that conclusion I have carefully evaluated the evidence and have considered how reasonable, plausible and probable the evidence is in respect of the discussion in December.

[24] In his email resigning from his employment Mr Janjua does not record his belief which he now holds, that he had been told to resign. He does refer to the discussion and the advice that he was not eligible for parental leave.

[25] Further, in his letter raising a personal grievance dated 11 April 2016 Mr Janjua refers to being "...wrongfully refused Parental leave forcing him to resign." He then sets out a summary of the discussion in December. There is no reference in this summary of Mr Janjua being told to resign.

[26] Mr Janjua met with Ms Denise Dowd, Office Manager, in January 2016. During this meeting Mr Janjua inquired about his annual leave balance. Mr Janjua and Ms Dowd also discussed entitlements under the PLEP Act. The Office Manager reiterated what Mr Janjua had been told in December, that is, that he could take two weeks unpaid partner leave.

[27] Ms Dowd told me it seemed to her that even though Mr Janjua's wife was not working he seemed to hold the view that he should be entitled to any payments his wife would have received if she had been working. Ms Dowd explained to Mr Janjua that it didn't work like that but he could take the two weeks unpaid partner leave.

[28] During their discussion Mr Janjua did not make any reference to being told by Ms Desai that he had to resign if he did not wish to take the unpaid two weeks leave or his annual leave.

[29] I find it is more likely than not that Mr Janjua wanted to be paid for a period of time leading up the birth of his second child while at the same time protecting his accrued annual leave to be used at a later date. I am satisfied Mr Janjua was provided with two options. Two weeks unpaid leave or paid annual leave. This conclusion is supported by Mr Janjua's evidence that he was advised he could apply for annual leave "...instead...".

[30] Having examined all of the circumstances Mr Janjua has not established that the end of his employment should be regarded as a constructive dismissal. There was no course of conduct or breach of duty on the part of Ajay Holdings that was sufficiently serious to make it reasonably foreseeable that Mr Janjua would not be prepared to work under the prevailing conditions.

### **Work and Income New Zealand payments**

[31] At the investigation meeting it was common ground that Mr Janjua applied for and was granted a WINZ benefit in February 2016 following a one week stand-down period.

[32] When answering questions during the investigation meeting Mr Janjua acknowledged that he received payment of his outstanding holiday pay amounting to about 12 weeks after he started receiving his benefit payments. It is not clear whether he has fully disclosed to WINZ the payment he received for this outstanding holiday pay.

[33] That is a matter between Mr Janjua and WINZ. In order to assist in that discussion I have directed that a copy of this determination be provided to WINZ.

### **Costs**

[34] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Ajay Holdings shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Mr Janjua shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[35] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell  
Member of the Employment Relations Authority