

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 350
3133316

BETWEEN PAUL McIVOR
Applicant

AND ASL INDUSTRIES LTD
Respondent

Member of Authority: Peter Fuiava

Representatives: Simon Greening and Kylie Hudson, counsel for the
Applicant
James Warren and Charlotte Evans, counsel for the
Respondent

Investigation Meeting: 21 April 2022

Further information and At the investigation meeting and 26 and 28 April 2022
submissions received:

Determination: 28 July 2022

DETERMINATION OF THE AUTHORITY

- A. Paul McIvor resigned from his employment with ASL Industries Ltd. He was not dismissed.**
- B. ASL Industries to pay Mr McIvor \$1,100 in unpaid wages no later than 5 pm Thursday 18 August 2022.**
- C. Costs are reserved.**

Employment Relationship Problem

[1] Paul McIvor has requested the Authority to investigate claims that he was unjustifiably dismissed and is owed wages by his former employer, ASL Industries Ltd

(ASL). Both claims are denied by ASL who say that Mr McIvor resigned from his employment.

The Authority's investigation

[2] Mr McIvor was initially represented by another lawyer who drafted the statement of problem in which a claim for special damages for legal costs was pursued. Mr McIvor's present counsel, Mr Greening, confirmed that this part of the claim was no longer sought.

[3] For the Authority's investigation, Mr McIvor provided a written statement which he signed on the morning of the investigation meeting as being true and correct. For ASL, written statements were received from Karen Andrews, a director of ASL, Bruce Lickford, an employee of the business for the last eight years, and Connor Shaw, a now former employee. While the Authority was provided with a signed written statement from Mr Shaw (19 April 2022), he did not attend the hearing and, consequently, no weight can be given to his witness statement.

[4] All witnesses answered questions under oath or affirmation from the Authority and the parties' representatives. The representatives also gave oral closing submissions.

[5] 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. It has not recorded all evidence and submissions received.

The issues

[6] The issues requiring investigation and determination are:

- (a) Was Mr McIvor dismissed from his employment or did he resign?
- (b) Is Mr McIvor owed wages by ASL?
- (c) Should either party contribute to the costs of representation of the other party.

Background facts

[7] On 8 August 2016, Mr McIvor commenced working for ASL which is a family owned company the directors of whom are Ms Andrews and her husband, Nigel

Andrews. The business operates as an industrial saw and blade specialist, sharpening and maintaining industrial cutting tools mainly for large saw mills, printing works and plastic recyclers.

[8] Mr McIvor initially worked for ASL part-time in a role that included a mix of trade sales and customer service tasks. His individual employment agreement stated that either party could terminate the agreement with no less than two weeks' notice (clause 36.1) and that the agreement could only be amended or varied if agreed to in writing by the parties (clause 45.1).

[9] Mr McIvor was initially paid wages at the rate of \$20 per hour but this was later increased to \$25 per hour and then again on 14 August 2018 when he was paid a salary of \$60,000 per annum. At the material time of this employment relationship problem, he was paid a salary of \$65,000.

[10] Mr McIvor was one of seven staff who worked at ASL's office in Silverdale. Also working in that office was Ms Andrews, her husband, and four other employees, including Mr Lickford who worked out back in the work shop.

[11] On 27 February 2020, Ms Andrews made a file note of an incident where Mr McIvor had sworn and raised his voice at her on 25 February 2020. It is understood that the incident related to Mr McIvor being corrected on the correct protocol when he allowed a customer to take some goods without first checking with accounts. Ms Andrews' file note records:

“Asked Paul about the reason for his outburst on 25 Feb (swearing and raising his voice).

Didn't like being “told off” for not checking up on a payment being received, before letting customer take the goods.

“He stated I hate my job at the moment”

I suggested to Paul that he may need to seek out someone to talk about how he was feeling (maybe a counsellor) as I felt his feelings about the job were reflecting on others he was working with as well as himself.”

[12] On 25 March 2020, New Zealand moved to COVID-19 Alert Level 4 and remained at that level until the nation moved down to Alert Level 3 on 27 April 2020.

[13] In a group meeting on 24 March 2020, Ms Andrews and her husband informed staff, including Mr McIvor, that as a non-essential business, ASL would be shutting down for a minimum of four weeks. Apart from another site that would remain open to supply medical oxygen, all other sites including the Silverdale office would be closed. As for wages, these would continue to be paid as normal, but as of the following week, agreement was sought from staff that they would temporarily be paid 80 percent of their wages. With the exception of Mr McIvor, it is understood that consensus had been reached regarding the temporary reduction of wages.

[14] On the morning of 4 May 2020, by which time staff had returned to work post-lockdown, there was an incident between Mr McIvor and Ms Andrews concerning a customer's account. It appeared that the customer, who was known to pay only if it was provided with a purchase order number, had not been provided with one.

[15] While there is a dispute as to whether Mr McIvor or the van driver was responsible for obtaining the purchase order, it is common ground that Mr McIvor either dropped or threw a piece of paper towards Ms Andrews as an emphatic statement (the paper incident). Later that same day, at approximately 4 pm, Ms Andrews called Mr McIvor into her office for a meeting in which no one else was present. Mr McIvor assumed that the meeting was about the paper incident earlier in the day but that was not raised. Instead, Mr McIvor stated that Ms Andrews talked about a 30 percent reduction in revenue and asked if he had any other ideas how sales could be increased. If he did not have any ideas, Mr McIvor stated that his role would be made redundant.

[16] Mr McIvor further stated that he asked Ms Andrews whether she was making him redundant and she said that she was. As it would not be pleasant for him to be at work knowing that he would no longer have a job, it was suggested that he finish work immediately. The pair went on to discuss Mr McIvor's redundancy pay but as this was not provided for in the employment agreement, it was agreed that he would be paid two weeks' notice and his outstanding holiday pay which Ms Andrews stated was 108 hours.

[17] After collecting his belongings, Mr McIvor left work and returned home visibly upset. At approximately 6.30 pm that evening, he wrote down in a notebook the following:

“She (Ms Andrews) proceeded to say they were looking at a 30 percent loss in revenue due to COVID-19 and were looking at redundancies, and my role was one of them unless I could come up with ideas to increase revenue.

I asked when this was going to come into effect and she said it wasn't going to be pleasant coming to work any more knowing I don't have a job and they would pay me 2 weeks' notice and my holiday pay which, I asked how much I had accrued she stated 108 hours.

Distressed at this news I was told I could grab my things and finish up, which I did.

* I have received no redundancy letter

* Pay slip is just to lump sum amounts not detailing anything”

[18] During the investigation meeting, it so transpired that Mr McIvor had in front of him a second page to his notebook which had not been provided to the Authority or Mr Greening. A copy of this page was provided to Mr Warren to consider during the morning adjournment. He did not object to the document's admission into evidence submitting that it was a question of weight in the end.

[19] Ms Andrews had a different account of the 4 May 2020 meeting. She described it as an informal discussion with Mr McIvor as a member of the sales team as to how sales might be increased in light of information from government and industry leaders of a likely 30 to 50 percent reduction in business across the industry because of the pandemic. Ms Andrews and her husband felt that they needed to be “up front” with staff, including Mr McIvor, that ASL was heading into an “uncertain” period of trade. While she had asked Mr McIvor for his ideas, she was not expecting anything “big” from him but she stated that some of the best ideas came from outside the head of a company.

[20] However, during the meeting Mr McIvor was on his mobile phone which Ms Andrews found “off-putting” and was caught off guard by. Further, he was “totally disengaged from the conversation.” When asked for ideas, he made no attempt to respond other than saying “no”. He then asked if the company had a redundancy or severance package but when he was told there was no such provision in his employment agreement, he asked Ms Andrews how many holidays he had left which she had to look up. When told how many hours there were, his immediate response was “pay me out”.

[21] Ms Andrews took from Mr McIvor's response that he wanted to leave. While she was taken by surprise, she knew from the previous incident on 25 February 2020

that he hated his job. Given the circumstances, she suggested that it would probably be best that ASL waived its notice period and that he be paid out. She was concerned that if Mr McIvor worked out his notice period that he would be disengaged from his job. He agreed with the suggestion.

[22] Ms Andrews did not make a file note of the 4 May 2020 meeting because her administrator was stuck in South Africa and was unable to return to New Zealand. In her absence, Ms Andrews was performing her administrator's role as well as her own.

Issue One: Was Mr McIvor dismissed or did he resign?

[23] In the recent case of *Mikes Transport Warehouse v Vermuelen*, the Employment Court summarised the law relating to resignations as follows:¹

[37] Resignation is a unilateral act. It does not involve the employer's agreement or disagreement. An employer cannot, for example, decline to accept a resignation and require the employee to continue to work for them. It follows that the key question is not whether advice of resignation was given by the employee in a moment of distress, anger or frustration. Nor is the key question what a fair and reasonable employer would do in response to a resignation given in the heat of the moment. Rather the key question is whether the employee resigned. This is an objective assessment and will likely be informed by the relevant circumstances.

[38] A resignation given in clear and unequivocal terms is more likely to satisfy an objective assessment than words of resignation expressed in an equivocal manner or which are plainly not meant to be taken seriously.

...

[40] Second, while an employer's decision to dismiss must be justified and meet the standard of what a fair and reasonable employer could do in all the circumstances, an employee does not need to justify their decision to resign; nor does the decision need to be demonstrably sensible or well thought through. And where a resignation has, on an objective assessment, occurred it remains open for the employer to reengage an employee on the same terms if that is what the parties choose to do after a period of reflection.

[24] It is observed that on 25 February 2020, some two months before the 4 May 2020 meeting, Mr McIvor had sworn and raised his voice at Ms Andrews. The incident prompted Ms Andrews to make a detailed file note of what took place which Mr McIvor accepted during the investigation meeting was correct particularly his comment about hating his job.

¹ *Mikes Transport Warehouse v Vermuelen* [2021] NZEmpC 197.

[25] At the time of the 4 May 2020 meeting, Ms Andrews' administrator was unable to re-enter New Zealand because of the pandemic. It is noted that the timing of Mr McIvor's departure would not have been ideal for Ms Andrews who was already under staffed.

[26] It was Mr Lickford's evidence that after Mr McIvor returned to work after the lockdown, he noticed a change in his attitude with respect to work in that Mr McIvor did not seem to care. While I would not describe Mr Lickford and Mr McIvor as close friends, they were friendly enough to "chit chat" about work including fishing which Mr McIvor was particularly knowledgeable of and was willing to share with Mr Lickford. In my view, Mr Lickford knew enough of Mr McIvor to notice that he was no longer happy with his job.

[27] It is noted that the only written record of the 4 May 2020 was a notebook entry by Mr McIvor that was apparently made some two and a half hours after the meeting. However, I do not consider the notebook entry to be a reliable contemporaneous record when Mr McIvor acknowledged during the investigation meeting that he had added to his notes. This is evident from the asterisked portion noted above (*I have received no redundancy letter *Payslip is just to lump sum amounts not detailing anything) which appear out of place from the rest of the narrative. Indeed, the second page of the notebook that was admitted into evidence by consent clearly showed notes Mr McIvor had taken after speaking with his previous lawyer. The additions to the file notes create in my view a chain of custody problem for Mr McIvor which undermines the integrity and reliability of these documents. As such, no weight can be given to them.

[28] In addition, there was inconsistency with Mr McIvor's evidence. In his statement of problem and in his witness statement to the Authority, which he confirmed was true and correct, he stated that he had dropped the piece of paper onto Ms Andrews' desk. However, at the investigation meeting, Mr McIvor stated that he was sitting at his desk when Ms Andrews came to him and that he emphatically dropped the piece of paper in front of her.

[29] While the paper incident was not discussed during the 4 May 2020 meeting, Mr McIvor has given two separate and contrasting accounts of an event earlier that day.

When the inconsistency was put to him, Mr McIvor stated that his story had stayed the same the whole way through, but that is clearly not so.

[30] While Ms Andrews did not make a file note of the 4 May 2020 meeting, her file note of 27 February 2020 shows her to be a person who is collected and calm under pressure. That is also my impression of Ms Andrews as a witness who spoke calmly and with precision even under cross-examination. This gives me confidence in her account of the 4 May 2020 meeting.

[31] It was reasonable of her to seek ideas from Mr McIvor as to how ASL could increase sales in a time of uncertainty. He was at that time a member of the sales team and there was an advertising component to his job description. However, when cumulatively considered and knowing that Mr McIvor hated his job, that he was on his mobile phone and was largely disengaged throughout the meeting, declined to offer any ideas, inquired about redundancy pay, wished to know how much annual leave he had, and then asked to be “paid out” – it was clear that he wanted to leave.

[32] Finally, not that Ms Andrews knew this at the relevant time, there was evidence that Mr McIvor had applied for a territory account manager position on Monday 9 March 2020 while he was still at work at ASL. It is clear that well before the lockdown, Mr McIvor was looking to exit the business.

[33] After tendering his resignation, Mr McIvor left Ms Andrews office and the workplace calmly. While he was known to have outbursts at work, there was nothing to indicate that there was an angry or heated exchange of words between Mr McIvor and Ms Andrews during the 4 May 2020 meeting. Put differently, this was not a heat of the moment resignation which required Mr McIvor to be given a cooling off period or time to reflect.

Conclusion

[34] My objective assessment after looking at all the relevant circumstances is that Mr McIvor resigned from his employment. Although the words ‘I quit’ or ‘I resign’ or such similar words were not said, this is of no moment. His comment ‘pay me out’ when contextualised into what Ms Andrews already knew about Mr McIvor as noted above, the final analysis points to an employee who intended to leave his employment.

[35] While it was never pleaded or argued by Mr McIvor, I record here that the evidence and information does not establish that he was constructively dismissed. This was not a pressured resignation or an employer's misconduct or breach of a duty.

Issue Two: Is Mr McIvor owed wages by ASL?

[36] During the first COVID-19 Alert Level 4 lockdown from 25 March to 27 April 2020, it is common ground that ASL paid Mr McIvor 80 percent of his salary. Mr McIvor states that the reduction was made without his agreement, verbal or otherwise. ASL contends otherwise and states that on 24 March 2020, Ms Andrews had a meeting with Mr McIvor in which the reduction was discussed and tacitly agreed to by him. He had not previously objected to the reduction and went along with it until now.

[37] It is acknowledged that Mr McIvor signed a Ministry of Social Development privacy form on 24 March 2020 which allowed ASL to share his personal information with the Ministry for the purposes of the COVID-19 wage subsidy. However, the document does not establish that Mr McIvor consented to the temporary reduction to his salary.

[38] In the absence of written evidence of Mr McIvor's consent, which ASL could have obtained at the material time, and which was required by his employment agreement for it to be legitimately varied, I find the claim of wage arrears to have been made out.

[39] In terms of quantum, it was submitted that the shortfall in Mr McIvor's weekly wages was \$250 (gross) per week. The total amount sought over the five-week period of the lockdown was therefore \$1,250 (gross).

[40] On 28 April 2022, ASL advised that Mr McIvor's actual loss was \$1,000 (gross) as he had received 100 percent of his pay for the five public holidays which occurred during the above period. However, there were three public holidays during the relevant period and as such I find Mr McIvor's actual loss to be \$1,100 (gross) which ASL is ordered to pay by 5 pm 18 August 2022.

[41] Under cl 11 of the Second Schedule to the Act, the Authority, if it thinks fit, can order interest on any judgment sum. However, given that Mr McIvor failed to be more

explicit with his objection to the reduction of his wages and went along with it, I do not consider this an appropriate case for interest, or a penalty for that matter, to be awarded.

Issue Three: Costs

[42] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[43] If they are not able to do so and an Authority determination on costs is needed Mr McIvor may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum ASL would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[44] On 2 May 2022, Practice Note 2, Costs in the Employment Relations Authority, came into effect.² The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.³

Peter Fuiava
Member of the Employment Relations Authority

² See www.era.govt.nz/assets/Uploads/practice-note-2.pdf.

³ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].