

- a. Whether Ms Roosing was unjustifiably dismissed by APML as a result of a breach of duty owed to her;
- b. Whether APML acted unreasonably by accepting Ms Roosing's resignation;
- c. If Ms Roosing was unjustifiably dismissed, or if she resigned and APML unreasonably accepted such resignation, to what extent Ms Roosing contributed to the termination of her employment.

Background Facts

[4] Ms Roosing had been employed at APML since 1991, and was the Paint Supervisor.

Thursday 4 February 2010

[5] On the morning of Thursday 4 February 2010 Ms Roosing went to see Mr John McCann, the APML Production Manager, to discuss production job cards and other work related matters. During their discussion, Ms Roosing discovered that another employee, Mr Scott Bethune, had informed Mr McCann that he had shown some job development cards to Ms Roosing, and that she had agreed that the paint team could undertake the work involved.

[6] Ms Roosing said that this was untrue and she had been upset that Mr Bethune, who was a member of APML's sales team, had discussed the job development cards with Mr McCann. Mrs Roosing was upset, not only on the basis that Mr Bethune had falsely asserted that he had shown the job development cards to her and she had told him that the paint team could do the work; but also on the basis that this issue was something which she had been discussing with the client in question since the previous year. Accordingly she considered Mr Bethune to be inappropriately representing himself to Mr John McCann as having responsibility in a matter with which she was dealing.

[7] Ms Roosing took the job development cards from Mr John McCann with the intention of talking to Mr McWhirter, the APML General Manager, about them later in the day.

[8] At approximately 3 p.m. Ms Roosing went to see Mr McWhirter. Mr McWhirter's office was located up stairs. Mr McWhirter said that, as he had gone to make a cup of coffee, he was at this time in the mezzanine floor area outside his office. With him were Mr John McCann and Mr Bethune. Ms Roosing came up the stairs carrying the production cards and told Mr McWhirter that she was not going to do the work relating to the job development cards.

[9] Mr Bethune, overhearing Ms Roosing's comments to Mr McWhirter, made some comments to Ms Roosing, including a comment to the effect that Ms Roosing should do her job or she would get a warning. This comment initiated a heated altercation between Ms Roosing and Mr Bethune, both of whom became very agitated.

[10] Mr McWhirter stated that he tried to intervene. He said he told Mr Bethune to "*shut up*", and to allow Ms Roosing to tell him what was the problem. Mr McWhirter said that Mr Bethune did desist but that Ms Roosing did not. Mr McWhirter's view was that Ms Roosing did not hear him, with which view both Mr John McCann and Ms Roosing agreed.

[11] Ms Roosing said that Mr Bethune had made a comment to the effect that the painting team did not do good work which incensed her so that she continued to harangue Mr Bethune and the altercation again flared up. The parties agreed that the altercation terminated when Ms Roosing said "*You can stick it up your arse*" and went back down the stairs. Ms Roosing said that this remark was intended for Mr Bethune, but Mr McWhirter said he believed the remark had been addressed to him personally.

[12] Ms Roosing stated she had then gone into the cloakroom and told two of the other painters, Mr Gallagher and Ms Annan, and also Mr Hemi McCann, the frame production manager and her partner, what had happened and what had been said.

[13] Ms Roosing said that she was still upset and a few minutes later, she went back up the stairs. Mr McWhirter, Mr John McCann and Mr Bethune were still in the passageway. Ms Roosing announced that she was resigning.

[14] Ms Roosing went back down the stairs and into the cloakroom where she told Mr Hemi McCann and Mr Gallagher that she had resigned. As it was by then 3.30 p.m., she went home.

[15] Later that evening, at 5.19 p.m., Ms Roosing sent a text message to Ms Annan. The text message read "*I resigned today so ill only be back to get my thing and thank Scott for it [sic]*". Mrs Roosing said that Ms Annan's response to this message was a text message to the effect that she (Ms Roosing) was being stupid.

Friday 5 February 2010

[16] The following day, Friday 5 February 2010, Ms Roosing said she was feeling emotionally drained and decided not to attend work. Mr McWhirter said he was not surprised that Ms Roosing had not come into work, although he was surprised that she did not telephone him. Mr McWhirter said he was made aware of the text message which had been sent to Ms Annan, and as a result he considered that Ms Roosing had been serious about her resignation.

[17] Mr McWhirter stated that he had spoken to Mr Hemi McCann and told him that he considered Mr Bethune had been wrong to speak to Ms Roosing as he had, and that he considered both Mr Bethune and Ms Roosing to have behaved badly. Mr Hemi McCann stated Mr McWhirter had said he would ring Ms Roosing '*to sort it out*' and asked for her telephone number. Mr McWhirter agreed that he had requested Ms Roosing's telephone number but explained this was in case he needed to contact Ms Roosing at some stage. However Mr McWhirter denied that he told Mr McCann that he would '*sort it out*', as he considered "*the ball to be in Ms Roosing's court*".

[18] Mr Hemi McCann sent a text message to Ms Roosing following his conversation with Mr McWhirter, informing her that Mr McWhirter had spoken to him. Ms Roosing said that she subsequently telephoned APML before midday, but connected with the answer phone and did not leave a message. Ms Roosing said that she made no further attempt to call APML that day.

[19] When Mr Hemi McCann returned home that evening, Ms Roosing said he discussed the details of the conversation that had taken place with Mr McWhirter. Mr Hemi McCann explained that he had told Ms Roosing Mr McWhirter had informed him he (Mr McWhirter) considered Mr Bethune to have been in the wrong, and that Mr Bethune, who was of the same status as Ms Roosing, had no authority to give Ms Roosing a warning.

Monday 8 February 2010

[20] On Monday 8 February 2010 Ms Roosing stated she felt too ill to go to work. Mr Hemi McCann said he went to work and had informed the paint team that Ms Roosing was ill, and Ms Roosing said that she also sent Ms Annan a text message to that effect. Ms Roosing explained that informing the company of sickness absence by means of a text message to another employee was a common practice in APML.

[21] Mr John McCann said that he gone into the paint department at approximately 7 a.m. to see if Ms Roosing was at work. As Mr Hemi McCann was there, he had asked him if Ms Roosing was intending to attend work, and on being informed that she was not, had asked if she had telephoned Mr McWhirter. Mr John McCann said he had not informed Mr McWhirter of Ms Roosing's absence, as in the circumstances, he had expected Ms Roosing to do so.

[22] Ms Roosing said she had telephoned APML at approximately 9.30 a.m. and connected with the answer phone. Ms Roosing said she had not left a message, and did not try again.

[23] Mr McWhirter stated he had gone to the paint department that morning where he found that Ms Roosing was absent, and the paint team speculating on the situation concerning her. Mr McWhirter spoke with Ms Annan and Mr Gallagher, who said they unsure if Ms Roosing was sick, or had resigned. Ms Annan and Mr Gallagher explained that Mr Hemi McCann would not help them and that they were frustrated with the situation. Mr McWhirter said he realised at this point that he needed to finalise the situation.

[24] Mr Hemi McCann stated that Mr McWhirter had passed him when he (Mr McWhirter) had met with the paint team, but that Mr McWhirter had not spoken to him, nor did he speak to Mr McWhirter as he did not consider it appropriate that he do so.

[25] Mr McWhirter said that he then checked the answer phone but there was no message from Ms Roosing; so at approximately 10.00 a.m. he had telephoned Ms Roosing and told her that he accepted her resignation. Ms Roosing stated that she had told Mr McWhirter she had not meant what she had said and that she was sorry. Ms Roosing said she explained she was sick, which was why she had not come to work that day but that Mr McWhirter had replied to the effect that Ms Roosing feeling sick was as a result of her resignation. It was agreed that Ms Roosing could come into work to collect any belongings, and the conversation terminated.

Tuesday 9 February 2010

[26] On Tuesday 9 February 2010, Mr Hemi McCann had gone to see Mr McWhirter but as Mr McWhirter was not in the office that day, he had seen Mr Peter Batten, APML Accountant, and told him that he wished to see Mr McWhirter. Mr Batten suggested that Mr Hemi McCann arrange a meeting with Mr McWhirter. On being informed of this by Mr Hemi McCann, Ms Roosing telephoned APML and a meeting was arranged to be held with Mr McWhirter on Thursday 11 February 2010.

Thursday 11 February 2010

[27] At the meeting on Thursday 11 February 2010 at which Ms Roosing, Mr Hemi McCann, Mr Batten and Mr McWhirter were present, Ms Roosing apologised for resigning and requested her job back. Mr McWhirter refused this request.

Determination

Did Ms Roosing resign or was she unjustifiably dismissed as a result of a breach of duty owed to her by APML?

[28] Ms Roosing's claim that she was unjustifiably constructively dismissed by APML is based upon an alleged breach of duty by APML. The leading case in this type of constructive dismissal is *Auckland Electric Power Board v Auckland*

*Provincial Local Authorities Officers IUOW*¹. The Court of Appeal in examining the question of constructive dismissal observed:

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 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.

[29] The employer’s traditional common law duty to provide a safe workplace and protect the health and safety of employees is given statutory expression in the Health and Safety in Employment Act 1992, which states at s.6:

S6. Employers to ensure safety of employees

Every employer shall take all practicable steps to ensure the safety of employees while at work; and in particular shall take all practicable steps to –

(a) provide and maintain for employees a safe working environment

[30] The resignation arose in circumstances in which there had been an altercation between two employees of equal status. In examining the resignation, I must first determine causation: whether the resignation was caused by a breach of duty on the part of the employer. Secondly, if there was a breach of duty, whether it was of sufficient seriousness to make a substantial risk of resignation reasonably foreseeable by APML

[31] At the time the altercation took place, I find there were no prior indications on which Mr McWhirter might have anticipated an altercation between Mr Bethune and Ms Roosing. Mr McWhirter regarded the relationship between Ms Roosing and Mr Bethune as a “normal” relationship between two colleagues of equal status. That this was a reasonable opinion for Mr McWhirter to hold was supported by the evidence of Ms Roosing that she normally enjoyed a good relationship at work with Mr Bethune, and that they also met socially.

¹ [1994] 2 NZLR 415; [1994] 1 ERNZ 168 (CA)

[32] It is also relevant that at the point at which the altercation occurred, Mr McWhirter was unaware of the earlier incident relating to the job development cards and had consequently had no reason to anticipate the altercation which eventuated.

[33] Once the altercation began, I find that Mr McWhirter attempted to put an end to the altercation, as attested to by Mr John McCann who was present at the time of the altercation. That Mr McWhirter was unsuccessful in doing so was attributable to Ms Roosing's own inability to pay any heed to his instructions, due to her incensed emotional state.

[34] Following the incident, Mr McWhirter told Mr Hemi McCann that he held both Mr Bethune and Ms Roosing to have been at fault in the altercation and that he had taken appropriate disciplinary action in respect of Mr Bethune, who had apologised for his behaviour.

[35] I find that there was no reason for Mr McWhirter, on the basis of the pre-existing relationship between the Ms Roosing and Mr Bethune, to anticipate the altercation which ensued on the afternoon of 4 February 2010, nor was there any reason for him to foresee that the altercation was so serious that it might result in Ms Roosing resigning from her employment on the basis of it.

[36] Once the altercation began I find that Mr McWhirter took all practicable steps to defuse the situation and stop the altercation as soon as it arose, and that he subsequently took appropriate disciplinary action regarding Mr Bethune for his part in the altercation. A fact which was made known to Ms Roosing via Mr Hemi McCann.

[37] I determine that there was no breach of duty on the part of APML that caused Ms Roosing's resignation. I determine that Ms Roosing's resignation was not an unjustifiable constructive dismissal.

Did APML act unreasonably in accepting Ms Roosing's resignation?

[38] An employee is usually entitled to resign from their employment on a unilateral basis. The Individual Employment Agreement ("employment agreement") under which Ms Roosing was employed made provision for this at clause 14.1, which

states: “*Either party may terminate this agreement by the giving of two weeks written notice of termination*”

[39] The employment agreement also makes provision for the situation in which the agreed notice is not provided: “*In the case of employment being terminated by either party without the requisite notice, one week’s pay shall be paid or forfeited in lieu of such notice.*”

[40] The agreement of the employer to such unilateral notice is not required, the employee responsible for the unilateral act, in this case resignation, is simply telling the employer what is going to happen. As observed by Goddard CJ in *Stiffe v Wilson & Horton*:²

Where either party to an employment agreement gives notice, it is well settled that the contract will terminate according to the tenor of that notice. It is not open to either party to withdraw or vary that notice without the consent of the other.

[41] There is no obligation on the employer to dissuade the employee from leaving, although they may choose to do so in some cases. An employee who has resigned has not been dismissed.

[42] In this case Ms Roosing resigned verbally after an altercation with another employee and her claim is that she has been treated, against her will, by her employer as having resigned when she did not intend to do so. The Employment Court commenting in *Boobyer v Good Health Wanganui Ltd*³ on cases which fall into this category said:

First there are cases where the employee gives an unambiguous resignation and later seeks to resile from it. In such a case ...the resignation cannot be withdrawn without the employer’s consent, at any rate where there has been no breach of duty by the employer giving rise to a reactive resignation amounting to a constructive dismissal. This is because the contract provides a mechanism for its termination by the employee and once that has been invoked by the employee giving the prescribed period of notice the contract comes to an end automatically when the notice give expires unless both parties agree to revive or renew it.

² 5/12/00 AC 94/100, AEC 106/00 at para 21

³ (unreported) WEC 3/94

[43] In this case, Ms Roosing did not provide notice but as the employment agreement made provision for this situation and Mr McWhirter did not expect Ms Roosing to provide notice in line with common practice in APML, I do not believe this fact to be significant. However as I have found that there was no breach of duty by APML, the resignation could not be withdrawn without Mr McWhirter's consent, which he did not give.

[44] Ms Roosing resigned after an emotional scene. In *Boobyer v Good Health Wanganui Ltd* the Employment Court said of that in this type of case that the employer cannot safely insist on what the employee may have said:

This is also the position where words of resignation form part of an emotional reaction or amount to an outburst of frustration and are not meant to be taken literally and either it is obvious that this issue or it would have become obvious upon inquiry made soberly once "the heat of the moment" had passed and taken with it any "influence of anger or other passion commonly having the effect of impairing reasoning faculties".

[45] Ms Roosing may be held to have had an emotional outburst on Thursday 4 February 2010 and in that situation, the employer acts reasonably in allowing the employee a 'cooling down' period. Mr McWhirter had expected Ms Roosing to return to work on the Friday but was not unduly surprised when she did not do so.

[46] However Mr McWhirter stated that he had expected Ms Roosing to make contact with APML that day and that upon her doing so, he would have asked her to meet with him to discuss her resignation. Had Ms Roosing made contact with Mr McWhirter on Friday 5 February 2010, I believe it reasonable to assume that her resignation would not have been acted upon, and she would have subsequently returned to work.

[47] Moreover, on the Friday, the day after the resignation, there were indications made on which Ms Roosing could base a conclusion that the door had not closed upon her. Significantly, Mr Hemi McCann's text message in the morning and his report that evening of the discussion between him and Mr McWhirter in which Mr McWhirter had stated that Mr Bethune had been at fault.

[48] On Friday 5 February 2010 Ms Roosing stated that she had telephoned APML before 12.00 noon, and that she connected with the answer phone. Ms Roosing said that she had not left a message as the messages were never checked. Mr McWhirter explained that customers left orders on the answer phone and consequently it was regularly checked and that he expected Ms Roosing to be aware of this fact. I accept the explanation that the answer phone was regularly checked given the context of a small business dependent on customer orders. I would also expect Ms Roosing to be aware of this circumstance.

[49] Ms Roosing was aware from the text sent by Mr Hemi McCann that morning that there had been a conversation with Mr McWhirter. In the prevailing circumstances, I find it surprising that Ms Roosing neither left a message nor tried to make another call to speak to Mr McWhirter later that same day.

[50] When Mr Hemi McCann returned home on the Friday evening, he discussed in detail the conversation that morning with Mr McWhirter. Ms Roosing at this point knew that Mr McWhirter held Mr Bethune to be at fault in the altercation the previous day, and Ms Roosing now had the weekend in which to recover from the emotionalism of the previous Thursday and to consider the information from Mr Hemi McCann.

[51] By the morning of Monday 8 February 2010 Mr McWhirter said that he considered that there had been ample time for Ms Roosing to reconsider her resignation but in light of the lack of contact, reached the conclusion that Ms Roosing had decided to “*carry through with her resignation*”. Factors he held to be determinative included:

- a. The text message sent on the evening of Thursday 4 February 2010 to Ms Annan which confirmed Ms Roosing’s decision to resign and of which Mr McWhirter was made aware.
- b. That by Monday 8 February 2010 there was no contact from Ms Roosing to indicate that she wished to change her mind and withdraw her verbal resignation.

[52] I find that Mr McWhirter had reasonable grounds for his conclusion. In the case of the text message, although sent on the day of the resignation, I find it significant that it was not sent in the first heated moments following the altercation, but some two hours later. It was therefore reasonable for Mr McWhirter to conclude that it had not been sent in ‘the heat of the moment’ but after a period of reflection.

[53] In the case of the telephone contact, I find it significant that Ms Roosing, in the circumstance where she had tendered her resignation, made no other effort to contact APML and Mr McWhirter to explain that she had changed her mind, other than to telephone APML once on Friday 5 February, and once on Monday 8 February, but when answered by the answer machine, to fail to leave a message on both occasions and further to fail to make any attempt to call again.

[54] I consider that it was also open to Ms Roosing to ask Mr Hemi McCann to speak to Mr McWhirter on her behalf, but that she chose not to avail herself of this opportunity.

[55] I find that Ms Roosing by her subsequent lack of action confirmed Mr McWhirter in the view that her verbal resignation on 4 February 2010 was intentional. In *Boobyer v Good Health Wanganui Ltd* it was observed that: “*In such a case the employee must suffer the adverse consequences of passively standing by and letting the employer think that a resignation has taken place.*”

[56] There is no obligation on the employer to dissuade the employee from resigning. I consider that Mr McWhirter was initially open to discussing the issue with Ms Roosing, but that by 10.00 a.m. on Monday 8 February 2010 he rightly considered that ‘the heat of the moment had passed’. I find that the opportunity to resile from the consequences of her resignation had passed through no other fault than that of Ms Roosing’s own.

[57] I determine that APML did not act unreasonably in accepting Ms Roosing’s resignation.

Contribution

[58] As I have not found that Ms Roosing was unjustifiably dismissed or that APML unreasonably accepted her resignation, the question of her contribution to the termination of her employment does not arise.

Costs

Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The applicant 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.

[59] In order to assist the parties with resolving costs themselves, I can indicate (subject to any submissions) that a tariff based approach to costs is likely. In which case the usual starting point would be around \$3,000 (GST inclusive) per day. That figure would then be adjusted in light of the particular circumstances of this case.

Eleanor Robinson
Member of the Employment Relations Authority