

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 391/08  
5054816

BETWEEN                      LESLIE ALLAN STOKES  
   Applicant  
  
AND                                IMEX IMPORTS LIMITED  
   Respondent

Member of Authority:        Marija Urlich  
  
Representatives:              In person, Applicant  
   Darryl McConnell, for Respondent (Gerard Dewar,  
   Counsel for the Respondent)  
  
Investigation Meeting:        17 October 2008  
  
Determination:                13 November 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Imex Imports Limited operates a tyre importing and wholesaling business based in Tauranga. Les Stokes was employed by Imex as a warehouseman in March 2006 in its Auckland branch. Shortly after his employment he was made business development manager, upon the resignation of the incumbent. This is the position he held until his resignation on 29 August 2006.

[2] Mr Stokes says his resignation amounts to an unjustified constructive dismissal; he believed his position was being undermined by firstly, the treatment of a newly appointed sales representative and secondly, the behaviour of visiting staff from the Tauranga office. He also says a written warning issued to him amounts to an unjustified disadvantage in his employment.

[3] Imex says it fairly and reasonably drew performance issues to Mr Stokes attention and tried to discuss those issues with him.

[4] Mr Stokes' claim raises two questions<sup>1</sup> for the Authority to determine:

- Did Mr Stokes resign as a consequence of a breach of duty by Imex?  
and
- If so, was that breach sufficiently serious as to make Mr Stokes' resignation reasonably foreseeable?

[5] The claim of unjustified action causing disadvantage concerns the following questions:

- Were Imex's actions in issuing the warning unjustified? and
- If so, did those actions disadvantage Mr Stokes in his employment?

### **Was the written warning unjustified?**

[6] Dealing with the warning first. There is no dispute between the parties that Mr Stokes received a written warning by way of memorandum dated 23 August. The memorandum details specific issues with Mr Stokes performance, states that improvement is sought by the end of September and the consequence of failing to improve performance would be the removal of Mr Stokes business development role. None of these issues came out of the blue; Mr Stokes readily accepted that Mr McConnell had raised these issues with him prior to the warning being issued.

[7] In early July 2006 Mr McConnell had meet with Mr Stokes to make his expectations of his (Mr Stokes') performance clear. Mr McConnell followed the meeting up with a written summary and Mr Stokes replied with a letter of response. On 22 August Mr McConnell meet with Mr Stokes to put to him that he had heard he (Mr Stokes) was not happy in the job and had said he was going to leave. Mr Stokes said it was not his intention to leave and he raised concerns about the recently employed sales representative. Mr McConnell said the sales representative was necessary and the staff in the Auckland branch had to get along. Mr McConnell followed this meeting up with a written summary. The written summary also

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<sup>1</sup> *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd* [1985] ACJ 963

recorded that Mr Stokes had telephoned Mr McConnell later that day to advise he had spoken with his barrister and wanted to know if he was still employed. Mr McConnell confirmed he was still employed.

[8] The written employment agreement provides a detailed process for issuing disciplinary warnings for non-performance (clause 17). This process was not followed. Mr Stokes should have been fairly put on notice that Imex wished to escalate the performance issues to a disciplinary process. There was no disciplinary meeting convened to put the concerns to Mr Stokes in a disciplinary context. This issue is significant because the warning placed Mr Stokes' employment in jeopardy – he would be demoted if his performance did not improve.

[9] In addition to the process issue around the disciplinary meeting the threatened disciplinary sanction was unjustified. It was beyond the parameters of the employment agreement to remove duties by way of disciplinary sanction; that would be a unilateral variation of the employment agreement.

[10] For these reasons I find the written warning was unjustified. **Mr Stokes is entitled to compensation of \$500 pursuant to section 123(1)(c)(i).**

[11] I have set the award at this modest level given the impact the warning had on Mr Stokes. Mr Stokes was well aware of Imex's performance concerns and accepted the fairness in these issues being drawn to his attention.

### **Does Mr Stokes resignation amount to a constructive dismissal?**

[12] The Court of Appeal discussed resignations consequent to breaches of duty in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* [1994] 1 ERNZ 168, at page 172:

*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.*

[13] The day after the written warning was issued Mr McConnell telephoned Mr Stokes and asked to meet him to discuss it. Mr Stokes said he did not feel like coming to work and he was going to meet his lawyer the following Tuesday. The meeting was arranged for that day.

[14] At about midday on 29 August Mr McConnell met briefly with Mr Stokes and the warehouseman (who, along with Mr Stokes, had expressed dissatisfaction with his work circumstances). The meeting was adjourned until 3pm, after Mr Stokes and the warehouseman had attended a further meeting with their lawyer.

[15] At 3pm the meeting went ahead. It was conducted outside the premises in a shared driveway. The meeting was heated. Mr Stokes raised his voice and the warehouseman threw a tyre across the yard in frustration. There is no evidence that Mr McConnell behaved inappropriately. Mr Stokes advised Mr McConnell that he was resigning with immediate effect and that he wished to be paid until Christmas.

[16] Mr Stokes' resignation does not amount to an unjustified constructive dismissal. Mr McConnell wished to discuss the warning with him. Mr Stokes should have taken that opportunity to raise his concerns about the warning with Mr McConnell. If that meeting had occurred and Mr McConnell persisted with the proposed disciplinary sanction then any subsequent resignation of Mr Stokes may have amounted to an unjustified constructive dismissal. However, Mr Stokes resigned before any such meeting could be held and in such circumstances his resignation was not reasonably foreseeable.

### **Costs**

[17] Mr Stokes is entitled to reimbursement of then \$70 filing fee. If there is any further issue as to costs then Mr Stokes should file and serve a memorandum within 14 days of the date of determination. Mr Dewar should file any reply within a further 14 days.

Marija Urlich

Member of the Employment Relations Authority