

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 370  
5391231

BETWEEN TUI VAAI  
Applicant

A N D MOANA PACIFIC FISHERIES  
LIMITED  
Respondent

Member of Authority: James Crichton

Representatives: Malcolm Dreaneen, Counsel for Applicant  
Penny Swarbrick, Counsel for Respondent

Investigation Meeting: 14 August 2013 at Auckland

Date of Determination: 20 August 2013

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant (Mr Vaai) alleges that he was unjustifiably constructively dismissed by the respondent (Moana Pacific) on 30 April 2012 and that Moana Pacific failed to behave in good faith towards him.

[2] Moana Pacific resists those claims and significantly alleges that Mr Vaai's employment came to an end as the consequence of a voluntary resignation and that Mr Vaai's proceedings are estopped by virtue of the legal principle of accord and satisfaction.

[3] Mr Vaai had been employed by Moana Pacific since 2002 and at the time the employment came to an end, Mr Vaai was a fish filleter with Moana Pacific's processing factory at Pukekohe.

[4] Mr Vaai's employment was covered by the relevant collective employment agreement and he was a long serving and experienced union delegate.

[5] On Friday, 20 April 2012, Moana Pacific's factory manager was advised that fillets of fish had been removed from the production line and placed into a plastic bag.

[6] The factory manager took advice from the Group Human Resources Manager and decided to conduct a locker search which resulted in the subject fish fillets being discovered in Mr Vaai's locker.

[7] A disciplinary meeting was arranged for 30 April 2012. In the intervening 10 day period, Moana Pacific conducted an investigation as to the circumstances of the event on 20 April 2012.

[8] In attendance at the 30 April 2012 meeting was Mr Syd Keepa, a union official for First Union who assisted in the representation of Mr Vaai together with one other union delegate.

[9] After the initial exchange between the parties where the allegations had been put to Mr Vaai and responded to by him, the employer representatives retired to consider their conclusions in the matter. During that retirement, Mr Keepa, without prompting from Moana Pacific, proposed to Moana Pacific that Mr Vaai be allowed to resign his employment rather than risk the prospect of being dismissed for serious misconduct.

[10] Moana Pacific considered this proposal for some little time and in the result accepted it. Mr Keepa then facilitated Mr Vaai's resignation and the matter was concluded on that basis.

[11] Mr Vaai subsequently appears to have thought better of those arrangements and raised the present proceeding. It is the essence of Moana Pacific's position that the resignation was entirely voluntary, was made in the context of a disciplinary process which might have resulted in a finding of serious misconduct and therefore the risk of dismissal and that, in particular, the proposal that Mr Vaai be allowed to resign his employment was never suggested by the employer and was entirely at the initiative of Mr Vaai's own advisers, First Union.

[12] Conversely, Mr Vaai maintains that he felt bullied into resigning his employment and he stoutly maintained throughout the Authority's investigation meeting that he had been told he would be dismissed before the employer had even considered the matter. He implied, albeit faintly, that he had been badly advised during the disciplinary process and alleged various deficiencies in Moana Pacific's investigation of his alleged wrongdoing.

### **Issues**

[13] The Authority must first turn its attention to the question whether Mr Vaai did in fact resign his employment and whether the nature of that resignation was such as to satisfy the Authority that it was truly a voluntary resignation and not a resignation forced by circumstance.

[14] If the Authority is satisfied that the resignation was indeed voluntary and not a product of duress, then that must conclude the matter because Mr Vaai, if he has voluntarily resigned his employment, has had a benefit from having his employment ended by resignation rather than the stain of dismissal so the pleading of accord and satisfaction by Moana Pacific must have force and effect.

[15] Conversely, if the Authority is not persuaded that the resignation was in truth a voluntary one, then the Authority must consider whether the investigation conducted by Moana Pacific met the legal tests, whether Mr Vaai in terms of his good faith obligation provided sufficient particulars in a timely fashion to enable Moana Pacific to reach proper conclusions and also whether Mr Vaai contributed in any way to the circumstances giving rise to his constructive dismissal.

### **Was Mr Vaai's resignation voluntary or not?**

[16] The Authority is satisfied on the evidence it heard that Mr Vaai volunteered his resignation through his union official during the course of a disciplinary process which had yet to conclude and that having extracted himself from the situation which might well have resulted in a finding of serious misconduct and thus bring the prospect of a dismissal, Mr Vaai had acquired a benefit from the resignation which enabled Moana Pacific to successfully plead accord and satisfaction.

[17] The first reason that the Authority takes the view that it does is that the resignation, on the evidence the Authority heard, emanated from a suggestion by

Mr Keepa, Mr Vaai's union advocate, and there is simply no evidence at all that that proposal was influenced in any way by Moana Pacific.

[18] The factual position was that, after the initial exchange between the parties at the initial disciplinary meeting, Moana Pacific's representatives retired to consider what was to be done and during that retirement, Mr Keepa, of his own motion, approached the employer representatives, and suggested to them that as dismissal must be within their contemplation, they might consider whether they would allow Mr Vaai to resign his employment so as to avoid the stain of a dismissal on his work history.

[19] The evidence is that the employer representatives considered that suggestion for some little time and then indicated that they were prepared to deal with the matter on that basis and that being the position, Mr Keepa then facilitated a written resignation from Mr Vaai which was provided to Moana Pacific and concluded matters between the parties.

[20] There is simply no evidence whatever that the idea of the resignation was in any way influenced by Moana Pacific and in the absence of evidence of that kind, the Authority has difficulty in taking Mr Vaai's claim any further.

[21] Mr Vaai now says that he was badly advised but that claim lacks credibility. Mr Vaai was an experienced union delegate and had a longstanding relationship with Mr Keepa. Mr Vaai told the Authority that he had been with Mr Keepa in a number of disciplinary matters during his career as a union delegate and so it is difficult for the Authority to understand why Mr Vaai would now say that Mr Keepa was somehow not the appropriate person to provide him with advice.

[22] Furthermore, because Mr Vaai is hardly a novice at union matters given his delegate status, it is difficult to see why he would have accepted Mr Keepa's involvement at the time but now seeks to cast doubt upon it. Clearly, given his experience, Mr Vaai could have indicated a preference for a lawyer or other advocate if he had felt that one was appropriate. There is no evidence of that before the Authority.

[23] Furthermore, Mr Vaai maintains that Mr Keepa was somehow foisted on him by the employer. Again, the evidence for that is slight indeed. What is true is that Moana Pacific's Mr Glaysher who is Group General Manager Human Resources, had

a conversation with Mr Keepa, with whom he is on good terms, immediately after the 20 April 2012 incident, and asked Mr Keepa to intervene on Mr Vaai's behalf so that Mr Vaai could be persuaded to remain on paid suspension away from the workplace while the employer was doing its investigation.

[24] Mr Glaysher decided to take this step because of the intimation of the factory manager that Mr Vaai was disinclined to accept the indication of suspension and was proposing to turn up at work the following Monday as usual.

[25] The Authority questioned Mr Glaysher about whether he sought to influence Mr Keepa in any way when he had the single telephone discussion he had with the union official. Mr Glaysher told the Authority that all he told Mr Keepa was what he knew about the incident on 20 April 2012, that there would be an investigation, and that if Mr Keepa could ensure that Mr Vaai remained away from the workplace while that investigation was under way, that would be in both parties' interests. For the record, the Authority is satisfied that Mr Glaysher did not improperly influence Mr Keepa to involve himself in the matter, to facilitate a resignation or in any other way to unduly influence proceedings in an inappropriate manner.

[26] Indeed, the Authority must observe that it seems the height of commonsense for an employer to use its best endeavours to have its workers properly looked after by their union when they are in difficulty.

[27] The Authority trusts that First Union would not object to the Authority making it plain that it has no reputation for being a "patsy" union. Nor does Mr Keepa, who appears to give evidence in the Authority from time to time, have any reputation for being anything other than entirely straightforward in his dealings.

[28] Accordingly, the Authority is satisfied that Mr Keepa acted for Mr Vaai because Mr Vaai was a union member in trouble and Mr Keepa was the obvious person to assist and Mr Keepa had the requisite knowledge and experience to do that, together with the useful attribute of having a good working relationship with a senior manager at Moana Pacific. There is nothing improper in managers and union officials working together in a collaborative fashion to resolve issues of this kind. That is part of what the modern industrial relations landscape involves.

[29] Mr Vaai's next point is that he says he was effectively forced to resign because he had been told he would be dismissed. Again, the Authority is absolutely

satisfied on the evidence it heard that Mr Vaai was not told that by Moana Pacific. Moana Pacific was very clear in its evidence that it told Mr Vaai that dismissal might be an outcome but equally clear that at no time did it tell him that he would be dismissed.

[30] Mr Vaai told the Authority that he had been told he would be dismissed by Mr Keepa and that Mr Keepa had advanced that view before the disciplinary meeting. That may well have been Mr Keepa's view based on his extensive experience as a union official and he may well have been right, but complaints about Mr Keepa's judgment of what Moana Pacific might have done if the disciplinary investigation had continued to its ultimate conclusion, cannot be sheeted home to Moana Pacific. Put another way, Moana Pacific is not responsible for what Mr Keepa may have said to Mr Vaai prior to the disciplinary meeting on 30 April 2012.

[31] Finally, the Authority must note that the resignation furnished to Moana Pacific was written in Mr Vaai's own hand, signed by him and witnessed by Mr Keepa. This was not a situation where Mr Keepa, having come up with the idea of his own motion, wrote out the resignation and stood over Mr Vaai while he signed it. Indeed, Mr Keepa's email exchange with Mr Glaysher of Moana Pacific in anticipation of the Authority's investigation was to the extent that he (Mr Keepa) had recommended the resignation approach because of his conviction that, given the seriousness of the allegations Mr Vaai was facing (and perhaps by implication, the extent of the evidence against him), the best outcome for Mr Vaai was a resignation.

[32] It follows from the foregoing analysis that the Authority is not persuaded that Mr Vaai is able to demonstrate any reason for concluding that his resignation was not anything other than absolutely voluntary. It follows from that conclusion that notwithstanding Mr Vaai's attack of a complaint analogous to "buyer's remorse", he cannot now resile from the promise that he made.

[33] The law is settled that accord and satisfaction arguments in relation to employment matters require a genuine dispute, a meeting of minds in resolution of that dispute, and a reliance on that resolution by both parties. That reliance is valuable to each of the parties; each gets a resolution and arguably each gets a benefit which might not have been available if the matter had continued down the disciplinary trail. First, Moana Pacific is able to truncate its disciplinary process and resolve

matters more expeditiously and secondly, Mr Vaai gets the benefit of a resignation rather than a dismissal in his personal history.

[34] Moana Pacific says that Mr Vaai is estopped from pursuing his claim. The normal principles of estoppel act to prevent a party from reneging on a promise freely made. In the present case, Mr Vaai resigned his employment, giving a written resignation. Moana Pacific accepted that resignation and believed that that brought matters to an end. It is said it would inequitable of the Authority to unpick the resignation, and allow proceedings on that resignation, having found that the resignation was given voluntarily.

[35] The Authority agrees. This is a clear case where Mr Vaai has voluntarily resigned his employment, got a benefit from that process which precluded the distinct possibility of dismissal and Moana Pacific got a conclusion of the matter which might otherwise have occupied it in more time. More particularly though, Moana Pacific was entitled to rely on the resignation as bringing matters to a close and the Authority's considered view is that Mr Vaai is estopped from bringing this claim because of the Authority's conclusion that his resignation was voluntarily given thus establishing the elements of accord and satisfaction as well.

### **Determination**

[36] For the reasons set out in the foregoing analysis, the Authority has not been persuaded that Mr Vaai has any justiciable claim. In addition to his fundamental claim of constructive dismissal which the Authority dismisses, he also pleads breach of good faith but there is nothing in the evidence that he advanced to suggest any breaches of good faith so that claim is also rejected.

[37] It follows that Mr Vaai's claim fails in its entirety.

### **Costs**

[38] Costs are reserved but Moana Pacific is reminded that Mr Vaai is legally aided and any costs application made in this regard will need to take account of the Legal Services Act.