

Determination Number: WA 143/05

File Number: WEA 134/05

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Douglas Prince (applicant)
AND	Masterton Supermarkets Limited t/a Pak'N Save (respondent)
REPRESENTATIVES	Gregory Lloyd for the applicant Michael Gould for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Wellington, 25 August 2005
SUBMISSIONS	30 August and 1 September, 2005
DATE OF DETERMINATION	2 September 2005

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. Mr Douglas Prince says the Company unjustifiably dismissed him – statement of problem received on 18 April 2005. He seeks lost earnings and compensation for humiliation, etc and costs.

2. The Company says it did not constructively dismiss Mr Prince but that he resigned his employment – statement in reply received on 9 May.
3. The parties underwent mediation but their employment relationship problem remained unresolved. They subsequently agreed to a one-day investigation in Wellington on 25 August. Witness statements and an agreed chronology and bundle of relevant documents were usefully provided in advance. Efforts by the party during the investigation to settle the matter on their own terms were not successful. At the conclusion of the investigation agreement was reached on a schedule for closing comments.

Dismissal

4. Some background details are not in dispute and the key events can be set out as follows.
5. The Company is a member of a well-known retailing co-operative and operates a store in Upper Hutt.
6. Mr Prince started working for the Company as a security guard in June 2002.
7. In April 2003 Mr Prince took up the position of grocery buyer.
8. In mid-2004 the Company commenced restructuring its operations following consultation and agreement with the co-operative.
9. The Company communicated details of the resulting changes to Mr Prince and other managers in a meeting held on 28 July. It is agreed by the parties that, at that point, there was no suggestion the changes would impact on the applicant's role and duties.
10. Mr Prince took annual leave from 1 August.
11. On his return to work on 10 August the applicant says he was advised by the store manager, Mr Christopher Gleeson, that he – Mr Prince – was being “reassigned” (par 10 of the applicant's statement). The applicant says Mr Gleeson articulated two

reasons for the reassignment: first, that the store owner – Mr Michael Kelly – wanted to fire Mr Prince unless he took up the reassigned role. And, second, that there had been complaints about the applicant's conduct. Following the meeting Mr Prince promptly sought advice from his union in respect of the situation he now found himself in.

12. Mr Gleeson agrees he met with the applicant on 10 August. He says he proposed to Mr Prince that he, the applicant, move from his existing position of grocery buyer to that of project managing the restructure. He says his reasons for offering the applicant the new position were, firstly, that he was not performing as a buyer to the level the Company wanted and, secondly, it was the respondent's view that Mr Prince would be quite good for the restructure project. He denies presenting the reassignment as a *fait accompli* or threatening the applicant that Mr Kelly would dismiss him if he did not accept the reassignment.
13. It was his impression that Mr Prince left their meeting in agreement with the proposal. He was therefore surprised to have reported to him comment that the applicant was not happy with the change. He sought a second meeting with the applicant, on 13 August.
14. At the second meeting Mr Prince says that Mr Gleeson expressed personal disappointment that the applicant had approached his union. He claims that Mr Gleeson said both he and Mr Kelly were or would take the applicant's actions personally. Mr Prince says Mr Gleeson repeated the threat that Mr Kelly was concerned with his – the applicant's – performance and the applicant would be "*booted out*" if he did not accept reassignment (par 20 of the applicant's statement).
15. Mr Prince says he was also told by the store manager that his overall performance was not up to scratch and if he were to pursue the matter they would bring up all the dirt they had on him. Finally, he says, he was told there were a number of complaints about his behaving in a sexually inappropriate manner: no details were provided to Mr Prince.

16. Mr Gleeson's version of what happened is again very different from that of the applicant's. He says he asked Mr Prince if he had a difficulty with the new role and explained to him the three reasons for putting him into that position. They were:

- a. *That he would do it well;*
- b. *That he wasn't doing particularly well at the grocery buying role;*
- c. *That he was moving into dangerous territory in the way he was dealing with and talking to Reps, especially the females.*

(par 9 of Mr Gleeson's statement)

17. On 16 August the Company received from Mr Prince's union a letter advising, amongst other things, that he was "*seeking compensation for his constructive dismissal*" (document 5). The Company set out its refusal of that claim in a reply dated 17 August (document 6).

18. The applicant says that, by that time, it was very clear that he could no longer work for the Company and he handed in his resignation on 19 August (document 8).

19. The Company then met with the applicant for a third time, on 27 August. At that meeting, and in his letter of 31 August (document 10), and amongst other things, Mr Kelly expressed his disappointment in Mr Prince's decision to resign.

20. Mr Prince did not change his position and subsequently worked out his notice.

Applicant's Position

21. Counsel for Mr Prince, Mr Gregory Lloyd, says the Company unilaterally varied the applicant's terms and conditions of employment by way of a demotion, made unsubstantiated claims of poor performance in respect of him and, similarly, made repeated and unsubstantiated allegations of sexual harassment.

22. The respondent's conduct was sufficiently gross to amount to a repudiation of the employment agreement. As the repudiation was at the Company's initiative, there

was no obligation on Mr Prince to follow the dispute resolution provisions provided in his employment agreement.

23. In the alternative, if Mr Prince was not constructively dismissed, there can be no doubt he was unjustifiably disadvantaged as a result of a unilateral demotion and unsubstantiated allegations of poor performance and sexual harassment.
24. The applicant claims remedies of 3-months lost remuneration, being \$9,000, compensation of \$10,000 for humiliation etc and legal costs of \$1,500.

Respondent's Position

25. In advancing his client's claim that Mr Prince was not constructively dismissed and that he resigned on his own account, counsel for the Company, Mr Michael Gould, refers to the well-settled tests for constructive dismissal set out in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers' IUOW* [1994] 1 ERNZ 168 and *IHC Northern Vocational Services v Jordan* [2004] 1 ERNZ 421. In the latter, at 430/431, the Court set the following test:

1. *Did the employee resign?*
2. *Was the resignation caused by a breach of duty on the part of the employer?*
3. *If it was, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.*

26. Because I find against the respondent's key claims for the reasons set out below, and in favour of the applicant's claim that the Company's conduct was repudiatory such as to justify his reasonably foreseeable decision to resign, I am satisfied it is not necessary to summarise any more of the respondent's submissions.

Discussion and Findings

27. The relevant law in respect of constructive dismissal claims is correctly set out by the Company in its submissions. The applicant's grievance rests on a claim that there

was a breach of duty by the Company of such seriousness that there was a reasonably foreseeable, substantial risk of resignation. An application of law to facts is required. Before doing so, some key fact findings are required.

28. I find in favour of Mr Prince's overall accounts of his meetings with Mr Gleeson on 10 & 13 August, in particular that he was confronted with a *fait accompli*, i.e. that reassignment was a requirement and not a genuine topic of consultation. I make this finding because of Mr Gleeson's evidence to the Authority that the Company had performance issues with the applicant as well as concerns that Mr Prince's conduct amounted to sexually inappropriate behaviour, and admissions made by him during the Authority's investigation. In particular, Mr Gleeson admitted he had only spoken informally about these concerns to the applicant before the meetings on 10 & 13 August: crucially, I find, he accepted he had not previously raised his concerns to the point where Mr Prince could have appreciated his employment was in jeopardy.
29. Mr Prince therefore had every reason to be blindsided by the reasons put to him by Mr Gleeson, at their two meetings, as to why he was required to take up a different position. Even if I accept Mr Gleeson was only proposing a change in position, Mr Prince would still have had reason to feel profoundly shocked as to the reasons the change was abruptly being encouraged on him. Not only was he hearing of a reassignment for the first time, but he was also being similarly advised his performance and conduct were not acceptable to the extent of putting his employment at risk. These developments would have been all the more shocking because, as recently as 12 August, Mr Prince had been given by Mr Kelly a certificate of excellence (document 3). Also, prior to taking his annual leave on 1 August, Mr Prince had been commended by Mr Kelly for reducing the debt owed to the Company: the parties agree the applicant was, at that time, offered a bonus of \$1,000 by Mr Kelly if the debt was reduced by a similar amount.
30. Mr Prince's concerns about his employer's intention and motives were, I find, deepened by the comments made by Mr Gleeson at their second meeting, on 13 August. These comments can only be interpreted as further pressure as Mr Gleeson was clearly aware of the applicant being concerned to the extent that he was seeking professional advice. During the Authority's investigation, the latter admitted to saying – at the second meeting – that the Company would “*dig up the dirt*” on the applicant if

he persisted with a grievance. Significantly, I find, his employer was effectively saying it would resort to previously unspecified performance issues and claims of sexually inappropriate behaviour to achieve its wishes, in the face of Mr Prince's obvious concerns and to counter his efforts to exercise his rights. No details in support of these claims were ever put to the applicant. This was not good faith in action, nor was it the conduct of a fair and reasonable employer. It was instead a serious threat to Mr Prince's fundamental rights. It is substantial evidence, if not overwhelming proof, that Mr Prince was denied genuine consultation in respect of the proposed reassignment: he was instead confronted by an ultimatum. Efforts by him to legitimately exercise his rights (to obtain advice) resulted in even greater pressure. It is hard to imagine what might cut deeper into the heart of an employment relationship.

31. A comment is required in respect of the allegation of sexually inappropriate behaviour: Mr Kelly says he has written complaints from one of his client's sales representatives. He also seemed to give evidence to the effect that had the complaint come from an employee it would have been acted on: as the complaint was from a non-employee it therefore was treated less seriously. The Company admits no details were ever put to the applicant, who any way denies the allegations. Mr Gleeson says that, before the 10 & 13 August meetings he had told the applicant to "*tone down*" his behaviour and comments. A witness for the Company gave evidence of what he said he overheard Mr Prince say on one occasion to a sales rep. and of his reporting the same to Mr Gleeson.
32. Regrettably, this is evidence of the Company applying two standards in respect of what it regards as sexually inappropriate behaviour: conduct that it said it would not tolerate were it directed toward female staff is seemingly condoned (by inaction) when directed toward women who are non-staff. That situation is made worse by the Company cynically reserving to itself the right to caution staff about the same for the purpose of achieving its (restructuring) ends. The Company's conduct is reprehensible on all counts.
33. The Company's conduct went to the heart of the parties' employment relationship and grossly breached its good faith obligations: as a result Mr Prince's resignation was, I find, wholly foreseeable.

Remedies

34. The remedies sought by Mr Prince are lost wages and compensation for humiliation, etc as well as costs. I am satisfied from the evidence before the Authority, as to Mr Prince's efforts to find work and the effect the unjustified constructive dismissal had on him, that the first two claims are fully made out: ss 123 (1) (b) & (c) and 128 (2) & (3) of the Act applied.

Contributing Behaviour

35. I am satisfied that there is no evidence to support a conclusion that Mr Prince's conduct contributed to the respondent's unjustified actions or that the remedies awarded him should be reduced accordingly: s. 124 of the Act applied.

Determination

36. For the reasons set out above I find in favour of Douglas Prince's claim that he was unjustifiably constructively dismissed by Masterton Supermarkets Limited t/a Pak'N Save. The respondent is therefore directed to pay to Mr Prince the following monies:

- a. All of the salary he would otherwise have received were it not for his unjustified constructive dismissal for a period of 3-months following the termination of his employment, less any wages or salary earned during that period: leave is reserved to the parties if they are unable to reach agreement on the relevant amount; and
- b. Compensation for humiliation, etc of \$10,000.00 (ten thousand dollars).

37. The amount of costs sought by the applicant, on its face, appears entirely fair and reasonable and being comfortably within well-established guidelines and awards. The observation is of course subject to any submission the Company may wish to make.

38. The parties are therefore to attempt to reach agreement on the matter of costs. Leave is reserved for this matter to be put to the Authority if agreement is not forthcoming.

Denis Asher
Member of Employment Relations Authority