

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Major Singh (Applicant)

**AND** Pedetentim Enterprises Ltd  
t/a Blade and Tool Services (Respondent)

**REPRESENTATIVES** Applicant in person  
Paul Wallace

**MEMBER OF AUTHORITY** Y S Oldfield

**INVESTIGATION MEETING** 6 September 2005

**DATE OF DETERMINATION** 10 October 2005

DETERMINATION OF THE AUTHORITY

**Employment Relationship Problem**

- [1] In February 2005 Mr Singh resigned after just two months in the employ of the respondent company. He says this was a constructive dismissal because the respondent's managing director, Mr Foote, changed his duties and subjected him to racist abuse. Mr Foote denies any abuse, racist or otherwise and says that Mr Singh's duties were agreed and were within the scope of what was set out in his employment agreement.
- [2] In November 2004 the respondent company purchased a small business which traded as Blade and Tool Services. It provided specialist sharpening services for tungsten carbide blades used in industrial cutting equipment. Prior to the purchase the business had been operated by the two former proprietors plus three employees. One proprietor and one employee ran the workshop, one employee was fulltime in sales, and one of the proprietors worked in the office and helped staff the counter adjacent to the office area. Mr Singh (the longest serving of employee) divided his time between sales, administrative work, and customer service. The proprietors left upon the sale of the business going through.
- [3] After the purchase Mr Foote re-employed the three staff and took over primary responsibility for the administrative side of the business himself. He told me he planned to employ two more staff (one in the office and one in the workshop) to handle the work that the owners had done before. The net result would be that the total workforce of the business would increase from five to six. Mr Foote told me the business needed to build up its customer base and so he wanted to free Mr Singh (a very competent salesperson) ) to spend more time on sales.

- [4] This did not all happen immediately however. From 1 November Mr Singh and Mr Foote shared the office and administrative work consistent with the previous arrangement in which he and one of the proprietors had staffed the office between them. Meanwhile as before Mr Singh spent only part of his time “on the road.” Then on 23 January a further employee started work in the office. Mr Singh says that Mr Foote instructed her to do most if not all of the office work he had done previously, leaving him with essentially a full time sales role. Mr Foote says this was consistent with his original plan which Mr Singh had agreed to at the outset. Mr Singh denies any prior discussion or agreement on his part. He said that two months had passed since the purchase and he had no expectation of any further change. He told me that he did not want to be occupied in sales full time. However, he did not say so to Mr Foote.
- [5] In any event, Mr Foote says the employment agreement permitted him to ask Mr Singh to spend a bigger proportion of his time on sales. Mr Singh had signed this on 25 November 2004. The duties clause was fully discussed before being agreed. It listed the duties as follows:

*“Office Support  
Sales/Purchasing/Marketing  
Dispatch/Van Deliveries/Collections  
Counter Sales”*

- [6] Mr Singh alleges that Mr Foote made racist comments to him on two occasions. The first was shortly before his employment agreement was signed on 25 November. Mr Foote increased the wages of all three staff when he entered into new employment agreements with them. Mr Singh had been, and continued to be, the highest paid. However, the gap between him and the next highest paid had narrowed. He challenged Mr Foote about this and says that Mr Foote responded by saying that Mr Singh should be happy with his job and that as an Indian he would not get a job anywhere else other than cleaning roads.
- [7] The second was on the day of the resignation. Mr Foote was away on Friday 28 January. On his return on 1 February (after anniversary weekend) he learnt that the mail had not been posted while he was away. It was customary for Mr Foote, Mr Singh or the other sales person to drop it off at the post office whilst out and about. Mr Foote asked Mr Singh why he had not posted it. Mr Singh found his manner aggressive. He also alleges that Mr Foote said: *“You bloody Indian, I am asking you why you didn’t do that job!”*
- [8] Later that day Mr Singh tendered his resignation by letter which read in its entirety as follows:
- “I hereby submit my resignation with a two weeks notice from today.  
Kind regards,  
Major.”*
- [9] Mr Foote agreed that there was an argument between him and Mr Singh on 1 February but strenuously denies any racist or other abuse.
- [10] After Mr Singh had presented his resignation he and Mr Foote agreed that he would leave that day with wages paid until 16 February. Mr Foote wrote to Mr Singh on 1 February confirming that payment. He also recorded his understanding that Mr Singh was planning to go and work for a competitor and drew his attention to the confidentiality and restraint provisions in the employment agreement. Then on 10 February he wrote again, confronting Mr Singh with an assertion that he was touting for business from some of the respondent’s customers and threatening litigation in the High Court.

[11] Mr Singh wrote back on 15 February, saying in part:

*“I was the leading sales person of your company ...[and] an up to date office administrator...*

*I resigned under mental duress...*

*I would be compelled to raise an Human Rights Issue in the event of your any such [sic] harassment henceforth, and seek compensation in the Employment Court for constructive dismissal...*

*I do hope however that you and I will be able to co-exist amicably. I had thought that we could part on friendly terms. I sincerely hope that we can still do that.”*

[12] This was the first mention Mr Singh had made of his resignation being forced or of any human rights concerns. However, the letter does not contain any details or mention that racist abuse was an issue. He stressed to me in the investigation meeting that he only decided to pursue a grievance because of the steps the respondent had taken against him. The racist comments were mentioned for the first time in the letter raising the grievance (on 16 March.)

### **Issues**

[13] In the materials he provided to me Mr Foote made his own allegations against Mr Singh, claiming that both before and after his employment ended he breached his duties of confidentiality, trust and confidence. Mr Foote notes that it was only after he raised these concerns with Mr Singh (after he had left the employment) that Mr Singh told him for the first time that he had an issue over the way he had been treated, and threatened to take a constructive dismissal case against the company.

[14] Mr Foote told me he was considering a counter claim but he has not yet lodged anything of this nature with the Authority. The scope of my investigation meeting (like this determination) was therefore limited to Mr Singh’s personal grievance. If Mr Foote should decide to proceed with a counter claim it will be investigated as a further part of the employment relationship problem and be the subject of a separate determination.

[15] The issues for me to consider are as follows:

- Whether the respondent company, through Mr Foote, made unilateral changes to Mr Singh’s duties which amounted to a serious breach of the employment agreement and made it foreseeable that Mr Singh would resign;
- Whether Mr Singh was the victim of racist comments from Mr Foote which amounted to a serious breach of the employment agreement and made it foreseeable that Mr Singh would resign.

### **Alleged changes to duties**

[16] Although sales work was always a key component of Mr Singh’s job (he stresses it himself in the letter of 15 February) it should not have been increased without consultation with him. Mr Foote’s assertion that he discussed these matters with Mr Singh was not convincing and I am not satisfied that full consultation took place.

[17] However, this failure need not have been fatal to the continuation of the employment relationship. Mr Singh did and said nothing to let Mr Foote know that he was unhappy doing increased sales work let alone to alert him to the risk that he might resign over the issue. Mr Foote did not have an opportunity to put right the lack of consultation. We will never know whether the employment could have been saved, but I consider that if Mr Singh resigned on account of the change to his sales work he did so prematurely.

[18] Neither the increase in the amount of sales work, nor the failure to consult over this, amount to a breach that was so serious that resignation was foreseeable. Nor do these actions meet the lower threshold of showing that there was an unjustified action to Mr Singh's disadvantage. There is no personal grievance arising out of the increase in sales work.

### **Alleged comments**

[19] The comments alleged are clearly racist and totally unacceptable in the workplace. If proven, they would amount to a breach that was sufficiently serious to make resignation foreseeable. They are however strenuously denied.

[20] For the respondent Mr Wallace suggests that I should resolve this conflict in Mr Foote's favour. He says that if there was any substance to the allegation of racist abuse they would have been mentioned in Mr Singh's letters of either 1 February or 15 February.

[21] This has been a difficult conflict to resolve. I have no doubt that Mr Foote and Mr Singh found it uncomfortable working at close quarters and having met both of them I must record that this is not altogether surprising. They demonstrated totally different personal styles and communicated very differently. Mr Foote was very blunt and abrupt (even to me) and bordered on what some might consider rude. Mr Singh is much more considered and formal in his manner. I accept that he found Mr Foote's approach offensive and that what passed for consultation in Mr Foote's mind would not have met Mr Singh's expectations in that regard.

[22] However, I do not feel able to find on balance that Mr Foote made the racist comments that have been alleged. Mr Singh did not have a clear and confident recollection of precisely what had been said. His evidence was that Mr Foote had used the words above or "words to that effect." However Mr Foote did not strike me as being foolish enough for the precise words alleged. I suspect that Mr Singh may have inferred a racist attitude from what he perceived as Mr Foote's lack of courtesy to him, and on reflection reconstructed something that fits his view of the spirit of the exchange.

[23] It follows that there is nothing more that I can do to assist Mr Singh with his problem. I note that after the investigation meeting he provided me with information of his post-termination earnings. Because his grievance has failed I have not referred to this material. It will be returned to Mr Singh.

Y S Oldfield  
Member of Employment Relations Authority