

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 249
5433996

BETWEEN JACOB MAYOM ABIAR
Applicant

A N D GLEN INNES FOOD
WAREHOUSE LIMITED trading as
PAK N SAVE GLEN INNES
Respondent

Member of Authority: Rachel Larmer

Representatives: Applicant in person
Max McGowan, Advocate for the Respondent

Investigation Meeting: 15 July 2015 at Auckland

Date of Determination: 17 August 2015

DETERMINATION OF THE AUTHORITY

Name of Respondent

[1] When Mr Abiar filed his Statement of Problem he named “*Foodstuffs Auckland Limited trading as Pak n Save Glen Innes*” as the Respondent.

[2] At the Authority’s investigation meeting Mr McGowan advised that the correct legal name for the Respondent is Glen Innes Food Warehouse Limited trading as Pak n Save Glen Innes (Pak n Save). Mr McGowan produced an individual employment agreement which identified the Respondent by its correct legal name.

[3] Mr McGowan’s statement about this was supported by Mr Bill Bradford, a Union delegate with First Union Incorporated (Frist Union) who confirmed that the correct legal name of Mr Abiar’s employer is as Mr McGowan advised. Mr McGowan told the Authority that the correctly named Respondent accepted it had received all of the relevant documentation and was in a position to proceed with the investigation meeting today.

[4] By consent, the name of the Respondent is changed from “*Foodstuffs Auckland Limited trading as Pak n Save Glen Innes*” to “*Glen Innes Food Warehouse Limited trading as Pak n Save Glen Innes*” (Pak n Save).

Employment relationship problem

[5] Mr Abiar commenced employment with Pak n Save on 01 February 2011 as a Produce Assistant in the Produce Department. In January 2012 Mr Abiar moved to work as Grocery Assistant in the Grocery Department. Mr Abiar’s employment ended on 23 September 2013 as a result of his resignation. Mr Abiar claims that his resignation was a constructive dismissal.

[6] Mr Abiar says he resigned because he believed Pak n Save failed to prevent him being harassed at work by another colleague. Mr Abiar claims he was harassed when a colleague (Mr Mobin Ansorali) greeted him when he arrived at work on 18 September 2013.

[7] Mr Abiar claims that as he walked into the Produce Department on the morning of 18 September 2013 Mr Ansorali said “*What’s up*” to him. Mr Ansorali and another employee who was present at the time say that Mr Ansorali said “*Good morning*” to Mr Abiar, which was the same greeting Mr Ansorali had been giving to other staff and customers.

[8] Mr Abiar considered that any greeting from Mr Ansorali was completely unacceptable. Mr Abiar believes that this greeting is an example of him being subjected to racial abuse and harassment at work. Mr Abiar believes Pak n Save should have taken action against Mr Ansorali to prevent this “*harassment*” and “*racial abuse*” occurring.

[9] Mr Abiar says he resigned because he believed Pak n Save was not serious about solving his difficulties with Mr Ansorali. Mr Abiar believes there was a conspiracy between Mr Ansorali and Pak n Save to “*abuse and harass*” him (Mr Abiar). I reject that notion which is completely unsupported by credible evidence.

[10] Pak n Save denies that Mr Abiar was dismissed. It considered he was a good hard working employee and it has been clear throughout that Pak n Save wanted to retain Mr Abiar as an employee. Although ultimately unsuccessful, I consider Pak n Save had worked hard to retain Mr Abiar as an employee.

[11] The Authority has only one legal claim before it to determine and that is a claim of unjustified dismissal. However I recognise that Mr Abiar has used highly emotive language to raise concerns with the Authority about other historical matters.

[12] These include Mr Abiar's perception that he has been subjected to "*continual verbal abuse and harassment*" "*apparent racial monkeying*" and "*harassment, mockery and intimidation.*" Mr Abiar's perception is that he has been subjected to "*well orchestrated tirades based on assumed racial superiority.*" Mr Abiar has made a subjective assumption that "*maybe everybody may not be happy with my appearance.*"

[13] I record that such allegations were not substantiated during the Authority's investigation. Pak n Save is a multicultural workplace employing some 34 different nationalities. It is sensitive to cultural and language issues and proactively takes steps to ensure that all employees feel comfortable, welcome and supported in the workplace.

[14] I am told that Mr Abiar and Mr Ansorali come from troubled backgrounds and I am satisfied that Pak n Save was sensitive to that so wished to support both of them to integrate into their new life in New Zealand.

[15] Mr Abiar was a member of First Union for the duration of his employment. He did not raise a formal complaint about alleged harassment or intimidation or racial discrimination with his employer or with his Union. Nor did he raise a personal grievance claim in respect of those matters. Mr Abiar's only formal complaint was about the name tag issue (discussed below). I am satisfied Pak n Save dealt with that in a way that subsequently avoided difficulties for some 18 months.

[16] I have therefore treated the evidence that Mr Abiar has given about the historical matters he wanted to traverse in the Authority as background which I consider has influenced Mr Abiar's decision-making regarding the events of September 2013.

Problems with Mr Ansorali

[17] It appears that Mr Ansorali and Mr Abiar had a poor relationship resulting from Mr Ansorali's teasing of Mr Abiar. The main problem occurred in January 2012

when Mr Ansorali wrote “*I am gay*” on Mr Abiar’s name tag. Mr Abiar is not gay and was very upset about this.

[18] Mr Abiar complained to Pak n Save, who issued Mr Ansorali with a final written warning and required him to apologise to Mr Abiar. Mr Ansorali and Mr Abiar were subsequently separated when Mr Abiar was relocated at his request to the Grocery Department while Mr Ansorali stayed in the Produce Department.

[19] An agreement was also reached between the two men that they would not speak to each other to avoid any further potential problems. Although Pak n Save found that undesirable in terms of collegial workplace relations because it expected everyone to get along, it nevertheless agreed to accommodate that arrangement.

[20] This course of action seems to have alleviated any issues arising between the two men until September 2013 when Mr Abiar strongly objected to being greeted by Mr Ansorali. Prior to September 2013 the two men do not seem to have had any contact.

[21] As a result of Mr Ansorali greeting Mr Abiar on 18 September, the latter left the workplace without telling anyone. When Mr Abiar’s manager, Mr Chris Sheehan, discovered Mr Abiar was no longer at work he phoned Mr Abiar to find out what was happening. The Human Resources Manager, Ms Margaret Paterson, was present when Mr Sheehan and Mr Abiar spoke. She heard Mr Sheehan’s side of the conversation and corroborated Mr Sheehan’s evidence.

[22] Mr Abiar was highly agitated and clearly very upset when Mr Sheehan talked to him. Mr Sheehan says it took a few minutes for Mr Abiar to calm down sufficiently to enable him to understand what Mr Abiar was saying. Mr Abiar said he had had some sort of argument or disagreement with Mr Ansorali, but he did not provide details of what happened or what was actually said.

[23] Mr Sheehan asked Mr Abiar numerous times to come back to work so he could discuss the situation in person, but Mr Abiar refused to return. Mr Abiar allegedly told Mr Sheehan that he was so angry that if he came back into work he would get a knife and “*kill*” Mr Ansorali, so it was better for him to stay away. Mr Abiar denies saying that but I am satisfied on the balance of probabilities he did make a comment to that effect.

[24] Mr Abiar also repeatedly told Mr Sheehan he did not want to come back to work and he did not want to work for Pak n Save any more. Mr Sheehan urged Mr Abiar not to make any hasty decisions but instead to come in and discuss the situation with him and with Ms Paterson the next day so that they could try and sort out what had occurred and work out how to fix things.

[25] Mr Sheehan repeated a number of times to Mr Abiar that he was considered to be a good worker and that Pak n Save did not want to lose him. Mr Sheehan said to Mr Abiar that while he was clearly upset, after a good night's sleep he would have calmed down and he would see things differently in the morning.

[26] Mr Sheehan said he told Mr Abiar that it was silly to walk out on a job when he was angry and annoyed and that he should give Pak n Save a chance to try to fix things. Mr Sheehan also suggested to Mr Abiar that quitting would not be a good thing for him to do because he needed money to pay his rent and bills. Mr Abiar believed these comments amount to "*abuse*" of him by Mr Sheehan. I find they do not.

[27] On 19 September 2013 Mr Sheehan sent a text to Mr Abiar saying he (Mr Sheehan) hoped he (Mr Abiar) felt better and asking if he (Mr Abiar) was coming in to work that day. Mr Sheehan also rang Mr Abiar when he (Mr Abiar) did not respond and Mr Abiar told Mr Sheehan that he (Mr Abiar) intended to come in that day to meet with Ms Paterson, but that he would not be doing his usual shift.

[28] Mr Sheehan was subsequently told that Ms Paterson would be dealing with the matter and he was not required to be involved.

Ms Paterson's involvement

[29] On 19 September 2013 Mr Abiar contacted his Union representative, Mr Bill Bradford, who visited Mr Abiar at his home, gave him advice and took instructions regarding Mr Abiar's concerns.

[30] Mr Bradford subsequently had a telephone discussion and email communication with Ms Paterson. Ms Paterson confirmed that Mr Sheehan had been encouraging Mr Abiar to return to work and she advised Mr Bradford that Pak n Save wanted to understand Mr Abiar's concerns so they could address them. Mr Bradford

told the Authority that Pak n Save indicated it wanted to support Mr Abiar to return to work so he advised Mr Abiar of that.

[31] Mr Bradford identified three concerns that Mr Abiar had;

- a. Experienced indifference from his manager;
- b. Complained to the Night Manager who did not follow the complaint up;
- c. That Mr Ansorali had spoken to him contrary to the agreement made in January 2012.

[32] Ms Paterson told Mr Bradford that Mr Abiar could stay off work on pay to enable his concerns to be investigated. Ms Paterson spoke to witnesses to the exchange between Mr Ansorali and Mr Abiar. She also obtained security video footage to see what had happened.

[33] Ms Paterson then proceeded to speak to the people identified by Mr Abiar. She established that the Manager who Mr Abiar had complained was indifferent was due to finish his employment at Pak n Save within a couple of weeks. Ms Paterson reminded that person be courteous and respectful in relation to all engagements with colleagues.

[34] In terms of the complaint to the Night Manager which Mr Abiar felt was not progressed, that person had not realised Mr Abiar wished to make a formal complaint and just thought he was having a grumble. Ms Paterson made it clear that all complaints needed to be properly investigated and a response given to the person making the complaint. The Night Manager assured Ms Paterson that would occur.

[35] Ms Paterson also spoke to Mr Ansorali and to Mr Sheehan to tell them that Mr Ansorali must not talk to Mr Abiar again. Ms Paterson said that whilst the company did not approve of that, they were prepared to make an exception in this case only to ensure workplace harmony so both individuals concerned would be able to keep their jobs.

[36] Ms Paterson emailed Mr Bradford later that day to assure him that Pak n Save had actioned all of the points he had raised on Mr Abiar's behalf. Ms Paterson also mentioned that Mr Abiar appeared to have made a "*heat-of-the-moment comment*"

which she was sure was not intended to be serious but which involved Mr Abiar threatening to kill Mr Ansorali.

[37] Ms Paterson said that they wanted to discuss that comment at the meeting with Mr Abiar because it was important to ensure that everyone was clear that such things should not be said. It was not being treated as a disciplinary matter but merely as an opportunity to outline expectations about appropriate standards of behaviour.

The issues

[38] The following issues are to be determined:

- (a) Was Mr Abiar dismissed?
- (b) If so, was dismissal justified?
- (c) If not, what if any remedies should be awarded?
- (d) What if any costs should be awarded?

Was Mr Abiar dismissed?

[39] Mr Abiar bears the onus of establishing on the balance of probabilities that he was dismissed. A genuine resignation by an employee is not a dismissal. For there to be a dismissal there must in effect be “*a sending away*” by the employer.

[40] If Mr Abiar establishes that he was dismissed then the onus passes to Pak n Save to establish on the balance of probabilities that his dismissal was justified in accordance with the s.103A justification test of the Employment Relations Act 2000 (the Act).

[41] I find that Mr Abiar is unable to discharge the onus of establishing to the required standard that he was dismissed. I am satisfied that Mr Abiar resigned voluntarily. I find that none of the recognised *Woolworths* categories of constructive dismissal apply in this case. Pak n Save did not fundamentally breach a duty to Mr Abiar. Nor did it engage in a concerted course of conduct designed to induce Mr Abiar’s resignation. Quite the contrary.

[42] Pak n Save made it very clear to Mr Abiar that they considered that he was a valued employee. They reiterated this advice to Mr Bradford and it is clear from the

evidence I heard that Pak n Save took steps to address Mr Abiar's concerns and to encourage him to return to work.

[43] The Pak n Save witnesses made it clear that none of them wanted to lose Mr Abiar as he was seen as a good employee. The evidence also established that Mr Abiar was quite determined to resign. When Mr Sheehan was encouraging him to return to work and not make any hasty decisions to resign, Mr Abiar reiterated numerous times that he did not want to continue working for Pak n Save.

[44] Mr Bradford advised Mr Abiar not to resign. Mr Bradford explained that Pak n Save saw him as a valued employee and did not want to lose him. Mr Bradford also explained that Pak n Save wanted to work through any concerns Mr Abiar had so that he felt comfortable returning to work. Mr Bradford's view was that Pak n Save had proactively addressed all of the issues that Mr Abiar had raised.

[45] Mr Bradford said his advice to Mr Abiar was that he should return to work because he would not have a successful constructive dismissal claim if he decided to resign. Mr Bradford told the Authority that First Union declined to support Mr Abiar's wish to bring a dismissal grievance against Pak n Save because it did not consider it had prospects of success.

[46] During the meeting which was held on 23 September 2013 Ms Paterson outlined the steps that she had taken to investigate and address Mr Abiar's concerns. She also encouraged Mr Abiar to return to work. However notwithstanding that Mr Abiar was adamant that he wanted to resign.

[47] It was Mr Abiar that brought up the option of resigning and Ms Paterson's response to that was that he should not rush that sort of decision and she encouraged him to take some time to reflect on what was in his best interests. Mr Bradford also encouraged Mr Abiar to take some more time to reflect on his repeatedly stated wish to resign.

[48] It was agreed at the conclusion of the meeting that Mr Abiar would think about the situation overnight. However, he did not do so. Later that day he returned to Pak n Save and handed in his resignation to the Night Manager.

Other matters

[49] Mr Abiar sought to rely on other matters (complaints or concerns) he had which were historical. From his perspective these had not been adequately addressed by Pak n Save so Mr Abiar says that failure lead to his resignation. However Mr Abiar did not file formal complaints about these matters, nor did he involve the Union at the time these concerns arose. These matters were not raised as personal grievances and were not discrete claims pursued in these Authority proceedings.

[50] Although I realise Mr Abiar does not agree with me, my objective view based on the evidence I heard is that Pak n Save did support Mr Abiar in the workplace and it did take concerns he raised seriously.

[51] I also find that the historical matters which Mr Abiar wanted to rely on were not only too far removed from his decision to resign on 23 September 2013 but were also unable to be proved to the required standard. These historical matters do not enable Mr Abiar to establish that his resignation was in fact a constructive dismissal.

[52] I consider that Mr Abiar was ill disposed to Mr Ansoralı because of what had occurred in January 2012. Mr Abiar therefore took umbrage when he was greeted by Mr Ansoralı in September 2013 so decided he (Mr Abiar) wanted to resign.

[53] I am satisfied that Mr Abiar's resignation was a genuine voluntary resignation. Despite many attempts to convince Mr Abiar to the contrary he was resolute in his wish to resign.

[54] I therefore find that Mr Abiar has been unable to establish that he was dismissed. Accordingly Mr Abiar's unjustified dismissal claim does not succeed.

What if any costs should be awarded?

[55] Pak n Save as the successful party is entitled to a contribution towards its actual costs. Pak n Save has seven days within which to file a costs application and Mr Abiar has seven days within which to respond. Pak n Save has a further three working days within which to reply.

[56] This timetable will be strictly observed and any departure from it requires the prior leave of the Authority.

[57] The Authority is likely to adopt its usual notional daily tariff based approach to costs. The parties are invited to specifically identify any factors they say should warrant an adjustment being made to the notional daily tariff which is currently \$3,500.

Rachel Larmer
Member of the Employment Relations Authority