

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2020] NZERA 489
3055452

BETWEEN	JEROME DU PLOOY Applicant
AND	ASMUSS WATER SYSTEMS LIMITED Respondent

Member of Authority:	Marija Urlich
Representatives:	Allan Halse, advocate for the Applicant Tim Oldfield, counsel for the Respondent
Investigation Meeting:	14 September 2020
Submissions received:	17 September 2020 from the Applicant 18 September 2020 from the Respondent
Determination:	30 November 2020

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Du Plooy was employed by Asmuss Water Systems Limited (Asmuss) from 2 June 2015 until his resignation effective 26 July 2018. Mr Du Plooy says he was unjustifiably constructively dismissed following years of bullying which resulted in negative coping behaviour, behaviour for which he was judged, labelled and disadvantaged in his employment including being falsely accused. He says further that his status as a migrant worker was exploited. He seeks remedies to compensate him for hurt, humiliation and injury to feelings suffered as a consequence.

[2] Asmuss denies constructively dismissing Mr Du Plooy or that any remedies should be awarded. It says Mr Du Plooy resigned from his employment and worked out

his notice after he secured another position. Further, Asmuss says it employed Mr Du Plooy subsequent to the events he characterises as bullying and that in purchasing the business did not take on the previous employer's liabilities but says, at any rate, the issues were dealt with appropriately at the time. In respect of the issues proximate to Mr Du Plooy's resignation Asmuss says those issues concern a promotion opportunity for which, in the absence of contractual agreement, no disadvantage can arise and that Mr Du Plooy's training and pay issues had been considered and were being addressed. Asmuss denies it exploited Mr Du Plooy's migrant status.

[3] Since 2007 Mr Du Plooy had been employed as an extrusion operator by Asmuss and its predecessors at its PVC pipe manufacturing plant. With each successive sale of the business he was offered and accepted employment on identical terms and conditions. This was Mr Du Plooy's first employment after immigrating to New Zealand with his family. Over his years of employment with Asmuss and its predecessor's he worked on a number of different machines and shifts.

[4] By determination dated 21 May 2019 Mr Du Plooy was granted leave to bring his personal grievance for unjustified constructive dismissal out of time.¹ At paragraph [4] of that determination the Authority records the factual basis of the other personal grievance for which leave was sought and ultimately not granted, being the alleged bullying complaints, concluded in May 2014. This determination deals with the personal grievance for which leave was granted.

The Authority's investigation

[5] In the course of the investigation the Authority heard evidence from Mr Du Plooy and two witnesses for Asmuss, Mark Anderson and Sujit Bhorkar. Written closing submissions were subsequently filed by the parties though Mr Du Plooy did not file reply submissions.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received. In determining this matter the Authority has

¹ *Jerome Du Plooy v Asmuss Water Systems Limited* [2019] NZERA 295

carefully considered all the material before it, including all evidence of the parties and the submissions of their representatives.

The issues

[7] The issues requiring investigation and determination are:

- (i) Was Mr Du Plooy constructively dismissed?
- (ii) If so, was this justified?
- (iii) If Mr Du Plooy was unjustifiably dismissed what remedies should he be awarded considering compensation under section 123(1)(c)(i) of the Act.
- (iv) If any remedies are awarded, should they be reduced (under s 124 of the Act) for blameworthy conduct by Mr Du Plooy that contributed to the situation giving rise to his grievance?
- (v) Should either party contribute to the costs of representation of the other party?

Was Mr Du Plooy constructively dismissed?

[8] It is well established that an employee may be constructively dismissed by his employer when no explicit words of dismissal have been used. The Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* held that constructive dismissal includes, but is not limited to, cases where:

- (a) An employer gives an employee a choice of resigning or being dismissed.
- (b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- (c) A breach of duty by the employer causes an employee to resign.²

[9] Mr Halse submits Asmuss conducted itself in a manner that had a deliberate and dominate purpose of coercing Mr Du Plooy to resign. Alternatively, he submits the third category applies and it was Asmuss' breach of duty that caused Mr Du Plooy's resignation.

² [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA)

[10] Specifically Mr Halse submits Mr Du Plooy's job with Asmuss was made untenable by:

- subjecting him to workplace bullying that resulted in negative coping behaviour;
- judging and labelling him consequent to the negative coping behaviour and withholding opportunities;
- believing false allegations and failing to investigate complaints against him; and
- exploiting Mr Du Ply's status as a migrant worker.

[11] The conduct Mr Du Plooy described as bullying centres on his interactions with a particular co-worker and the response of Asmuss and its predecessors to issues Mr Du Plooy raised around those interactions. On Mr Du Plooy's evidence much of this conduct ceased in 2014 when the co-worker changed shifts and they no longer worked together.

[12] Given the significant period of time between the behaviour Mr Du Plooy characterises as bullying and his resignation (four years) he is faced with a considerable challenge to establish any causative link between these events. The first challenge is Asmuss is not liable for the actions or failings of another employer in the absence of acceptance of such and there is insufficient evidence it did. The second challenge is, if Mr Du Plooy thought Asmuss was liable, remaining in its employment in the face of the alleged conduct suggests:

- (i) Mr Du Plooy, in effect, accepted the alleged breaches of employment duties and affirmed the employment agreement by continuing his employment; and/or
- (ii) he did not consider the conduct so serious as to repudiate the contract.³

[13] I do pause to consider whether the impact of the alleged bullying conduct on Mr Du Plooy and the significant and challenging personal circumstances he faced in 2014

³ *New Zealand Amalgamated Engineering etc IUW v Ritchies Transport Holdings Ltd* [1991] 2 ERNZ 267.

were such that the residue of such events may have tainted Mr Du Plooy's employment in subsequent years. However, the evidence does not support such a finding:

- Mr Du Plooy told the Authority he appreciated his employer's sensitive management of the circumstances arising from his negative coping mechanism behaviour which directly impacted on his ability to perform duties required under his employment. He readily accepted the specific arrangements put in place by Asmuss' predecessor meant he kept his job.
- Mr Du Plooy was able to raise his concerns about the co-worker's behaviour with his employer which, the Authority is satisfied, were taken seriously, raised with the co-worker, steps put in place to manage that worker's behaviour and Mr Du Plooy told about the steps that had been taken.
- at all relevant times health and safety policies were in place as were active programmes to support employee workplace and personal wellbeing;
- Mr Du Plooy's claim that the workplace events were causative of the negative coping mechanisms he developed is not supported by medical evidence.⁴ This is significant on two grounds firstly, the claim is a serious one and to succeed would need to be supported by evidence of equally probative value and secondly, medical evidence would have assisted the Authority to understand and assess some of the issues raised by Mr Du Plooy including providing an objective view of how other contributory factors could be appropriately weighed and assessed against any workplace factors.⁵

Labelling Mr Du Plooy and withholding opportunities

[14] In his written evidence and in answer to questions from the Authority Mr Du Plooy gave one example of a snide reference being made by a co-worker which could

⁴ Mr Du Plooy had indicated at the Authority's timetabling case management conference he would be providing medical evidence to support his claim but later advised the Authority no such evidence would be provided.

⁵ Refer statement of problem 11 December 2019 paragraph refers to the long-term adverse psychological and physiological effects of constant harassment and attack.

be considered labelling. While it is accepted such a comment would be unwelcome and unpleasant that instance, on Mr Du Plooy's evidence, must have occurred at least two years before his resignation. No causative link is established.

[15] With respect to the withholding opportunities claim, the evidential basis of this claim is not clear. Mr Du Plooy's evidence was in 2014 he chose to move from the weekend shift supervisor position to which he had been promoted in 2011 to a dayshift operator role. He said the purpose of the move was to improve his skills. The events concerning the nightshift supervisor role in 2018 are addressed below.

Believing false allegations and failing to investigate complaints

[16] Again, the evidential basis of this claim is unclear. The evidence before the Authority demonstrates Mr Du Plooy was capable of raising concerns about co-workers' and Asmuss' conduct and that when issues were raised they were seriously considered by Asmuss and addressed.

Exploiting Mr Du Plooy's migrant worker status

[17] While it is wholly accepted migrant workers are vulnerable to exploitation Mr Du Plooy was not in that category of worker at the time of his resignation. As the holder of a permanent residence visa Mr Du Plooy's immigration status was not temporary and he was not vulnerable to the exploitative practises workers in that category of visa holder may face.⁶

[18] It is accepted that in 2007 when Mr Du Plooy first started working in New Zealand he had to adapt to different cultural norms in the workplace and that at times this was challenging. However, it is not accepted any causative link has been established between the challenges he experienced then and the issues leading up to his resignation in mid-2018.

Events mid-2018

[19] On 4 July 2018 Mr Du Plooy attended a meeting with Mr Anderson, Mr Bhorkar and another Asmuss employee. Mr Du Plooy had asked for the meeting to discuss a

⁶ *Labour Inspector v Parihar* [2019] NZEmpC 145 at [30].

number of concerns including his job title and the scope of his role, recognition and responsibility for training new staff, his pay rate including why he was not paid at a supervisor rate, his short and long term goals, and why he had not been offered a recently vacant nightshift supervisor role. The nightshift supervisor role was the catalyst for the meeting. Mr Du Plooy was disappointed not to have been offered the role and was critical of the person to whom Asmuss offered the role. Mr Du Plooy said Asmuss' actions made him feel undervalued.

[20] There is a suggestion in the evidence that Mr Du Plooy understood the nightshift supervisor role had been offered to him and he had accepted it. This is not consistent with the record of the parties' discussion of the nightshift supervisor role recorded in the detailed minutes of the 4 July meeting. If Mr Du Plooy had understood he had accepted Asmuss' offer of the nightshift supervisor role he would have said that in the meeting and it would be recorded in the minutes. I find it is more likely the events concerning the nightshift supervisor role are as recorded in the minutes – Mr Du Plooy had expressed interest in the role to Mr Anderson and told him he would be happy to cover it if needed and that after the role was offered to someone else Mr Du Plooy wanted to know why he had not been offered the role when he believed he had the skills and experience.

[21] Such a belief does not give rise to an unjustified constructive dismissal. Mr Du Plooy did not have a contractual right to the night shift supervisor role. Or, on the evidence before the Authority, this is not a situation where Mr Du Plooy was offered and accepted the new role and the role was later denied him because Asmuss decided to offer it to another worker. No breach of the parties' employment agreement has been established in respect of the night shift supervisor role.

[22] Also in July 2018 Mr Du Plooy applied for a job with another business which he was offered. He told Mr Anderson about the offer including that the remuneration was substantially more than he was paid at Asmuss and was a supervisor role. Mr Anderson said he understood Mr Du Plooy, in mentioning the details of the job offer, was requesting a pay increase which he was unable to provide. Not providing a pay rise in the circumstances outlined is not grounds for a claim of unjustified constructive dismissal. The evidence shows Mr Du Plooy had questions about his pay rate and whether it was commensurate with his role which were raised and discussed at the 4

July meeting. The evidence also shows Asmuss had gone some way to addressing those concerns and was continuing to do so. No breach of the parties' employment agreement has been established in respect of Mr Du Plooy's pay rate.

[23] On 23 July Mr Du Plooy tendered his resignation from Asmuss in writing. Mr Du Plooy worked out his one week notice period. His last day of employment with Asmuss was 26 July 2018. He gave Mr Anderson a thank you card signed on behalf of himself and his family. The resignation letter and card do not give any reasons for Mr Du Plooy's resignation and do not communicate Mr Du Plooy did not communicate to Asmuss he was resigning because of its actions. On balance the Authority is satisfied Mr Du Plooy resigned to pursue a new job opportunity.

Outcome

[24] Mr Du Plooy was not unjustifiably constructively dismissed. He has not established any breach of his employment or course of action by Asmuss caused him to resign.

Costs

[25] Asmuss is entitled to a consideration of costs. The parties are encouraged to attempt to resolve the issue of costs themselves. If this is not possible and Asmuss seeks a contribution to costs, it should file and serve a costs memorandum within 14 days of the date of this determination. Mr Du Plooy should file any reply memorandum within 7 days of receipt of such.

Marija Urlich
Member of the Employment Relations Authority