

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 557
3159641

BETWEEN KEVIN RICHARD BORLAND
Applicant

AND HIGGINS CONTRACTORS
LIMITED
Respondent

Member of Authority: Antoinette Baker

Representatives: Philip James Bellamy, counsel for the Applicant
Chloe Luscombe, counsel for the Respondent

Investigation Meeting: 30 and 31 May 2023 in Nelson

Submissions received: No submissions from Applicant
29 June 2023 from Respondent

Date of Determination: 27 September 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] From about 2015 Mr Borland worked for the respondent (HC) in its asphalt making plant and in 2019 he signed a variation to work full time as a health and safety coordinator. HC proposed to make this position (and others) redundant. Before that process was complete, the branch manager, Mr Dexter approached Mr Borland about issues relating to a leave application and timesheets. The interchange became heated. Mr Dexter went to retrieve further information about the issue relating to timesheets, during which time Mr Borland

decided he was being 'sacked' and when Mr Dexter returned and continued the discussion, Mr Borland resigned.

[2] Mr Borland says that he felt he had no option but to resign. HC says he chose to resign. Mr Borland claims he was constructively dismissed and claims compensation and lost wages. HC denies the claim.

The Authority's investigation

[3] An investigation meeting was held. Briefs of evidence were lodged before the meeting on behalf of Mr Borland and by two other witnesses who did not then appear at the investigation meeting. Their evidence is given no weight. Mr Borland was questioned about his evidence on oath. For HC, two briefs of evidence were lodged before the meeting from a current manager, Mr Dexter and a former manager, Mr Wilson. They were both asked questions under oath and affirmation.

[4] 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.

The issues

[5] The issues requiring investigation and determination are:

- a. Was Mr Borland unjustifiably dismissed because of a constructive dismissal?
- b. If so what of the following remedies are to be ordered:
 - i. compensation under s 123(1)(c)(i) of the Act
 - ii. lost earnings under s 123(1)(b) of the Act
- c. Did Mr Borland do anything that contributed to the situation that led to the grievance and if so, should any remedies be reduced accordingly?
- d. Should either party contribute to the costs of the other?

Was Mr Borland unjustifiably dismissed because of a constructive dismissal?

[6] When considering whether there has been a constructive dismissal the Court of Appeal¹ has said it is:

essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the border line which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.

[7] There are three non-exhaustive situations² where constructive dismissal might occur:

- a. The employee is given a choice of resignation or dismissal.
- b. The employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- c. The employer has breached a duty serious enough that the employer ought to have reasonably foreseen that the employee would resign as a result.

[8] I will deal with Mr Borland's claim under each of these three categories noting that Mr Borland's main claim appears to be that HC, through Mr Dexter, coerced his resignation in retaliation for Mr Borland's investigation of a work vehicle accident in Mr Dexter's work vehicle. Mr Borland chose to submit considerable information about the history of a workplace accident occurring in 2017 and various issues stemming from this. The reason for this has been explained based on it relating to compensation or in Mr Borland's oral evidence, to show his loyalty to HC. I do not find this evidence relevant to the issue I need to consider relating to whether there has been a constructive dismissal.

[9] I do not find that Mr Borland has shown that he was constructively dismissed. My reasons follow.

¹ *Wellington Clerical Union v Greenwich* [1983] ACJ 965 at 975

² Cooke J in *Auckland Shop Employees Union v Woolworths (New Zealand) Limited* (1985) 2 NZLR372 (CA) at 374 following an approach previously taken in the former Arbitration Court in NZ.

[10] The agreed events leading to Mr Borland's resignation on 24 July 2019 can be summarised as follows:

- a. Mr Borland went on holiday and returned three days earlier than the leave he had requested. Upon his return-to-work Mr Borland's manager, Mr Dexter, approached him and started to ask him about what he says were irregularities in Mr Borland's leave request for the leave he had just taken. At some point this conversation was outside but ended up back in Mr Dexter's office.
- b. Mr Dexter also included concerns about Mr Borland's recording of his time recorded on timesheets, against GPS records showing his car parked at his home.
- c. Mr Dexter left the office to retrieve more information including GPS records to show Mr Borland. During that time Mr Borland decided he would resign.
- d. Mr Dexter returned to the office and Mr Borland told him he would resign. Mr Dexter provided him with a pen and paper and Mr Borland wrote, 'I Kevin Borland resign from my position of HSE at Higgins Contractors Nelson Ltd effective immediately due to personal reasons [signature and date of 24/7/19].'

[11] The parties gave varied evidence about when their above exchange became heated. Mr Dexter recalls Mr Borland became agitated and started pacing the office when Mr Dexter returned with the GPS material. He says he had to ask Mr Borland several times to calm down.

[12] Mr Borland's evidence is that Mr Dexter 'started the conversation in a confrontational way and with each allegation he became more angry. We clearly got into an argument'. Mr Borland's evidence is that he had previously been stressed because while he tried to work back at the asphalt plant it wasn't working out due to his historic injury. He says he understood his health and safety coordinator job would be going and so was stressed about his future employment at HC.

[13] Mr Borland's evidence is also that he resigned before Mr Dexter 'sacked' him. His evidence reflects a somewhat muddled thinking about this in my view, but overall, I accept

that he became stressed when Mr Dexter started to put issues to him about the GPS records not matching his timesheets.

[14] While Mr Borland accepted in cross examination that an employer can reasonably ask questions about timesheets or irregularities, I find a likelihood that the approach Mr Dexter took was one that had caught Mr Borland unprepared and on edge. Mr Dexter gave oral evidence that he knew enough about Mr Borland to know that he got stressed. That said, there is also evidence to support that Mr Borland was not afraid to speak his mind in the workplace. I accept that Mr Dexter wanted answers to questions but I consider that these were not as straight forward as he suggested to me in his oral evidence, such as that he just wanted Mr Borland to tell him what the leave process was. The discussion topics were wider than this and included Mr Dexter pointing out that the signature of the leave request was not his. I find some likelihood that Mr Borland felt under pressure with these questions. In short, these issues could have been approached more carefully rather than in the apparently ad hoc fashion that they were.

[15] I find the above likely occurred, and that it is likely that the whole interchange became heated. I therefore first need to consider the resignation within this ‘heated’ context.

Heat of the moment resignation

[16] While the Employment Court has considered it reasonable that an employer could allow an employee a ‘cooling off’ period after an employee resigns in the ‘heat of the moment³,’ more recently the Court has considered that the starting point is to ask whether the employee has clearly and unequivocally resigned:⁴

...the key question is whether the employee resigned. This is an objective assessment and will likely be informed by the relevant circumstances. A resignation given in clear and unequivocal terms is more likely to satisfy an objective assessment than words of resignation expressed in an equivocal manner, or which are plainly not meant to be taken seriously.

³ *Boobyer v Good Health Wanganui Limited* EmpC Wellington WEC3/94, 24 February 1994

⁴ *Mikes Transport Warehouse Limited & Modern Transport Engineers Limited v Wayde Vermuelen* [2021] NZEmpC 197 [17 November 2021] at [37] and [38].

[17] If Mr Borland's resignation was clear then it would be for HC to decide whether to accept it. For the sake of brevity, HC clearly did accept it.

[18] While Mr Borland says that he was escorted off the premises, Mr Dexter's evidence is that it was Mr Borland who wanted to leave immediately and that he handed in his work car keys. Mr Dexter says he arranged for another employee to drop him home. Mr Dexter's evidence includes that he told Mr Borland that he did not have to resign and that given the suddenness of the situation he tried to call Mr Borland twice the next day. I accept Mr Dexter's evidence as likely. I note here that Mr Dexter did not leave a message when he called the next day, and he called on a landline so the number would not have been evident to Mr Borland. However, Mr Borland himself did not make any further approach to HC until he raised a grievance two months later. Usually, 'heat of the moment' resignations include the employee coming back to the employer soon after 'cooling down' to ask to retract their resignation. This clearly did not happen here.

[19] Standing back from the above, I find that Mr Borland unequivocally resigned, and it was open to HC to accept the resignation, which it did.

A course of conduct to coerce resignation.

[20] Mr Dexter's manner in talking to Mr Borland on 24 July 2019 appears to have been robust and could likely have been handled better. However, I accept Mr Dexter's evidence that he had not known anything about Mr Borland reporting on his previous work vehicle accident and that his employer did not take issue with him about it. I do not accept then that Mr Dexter deliberately tried to get Mr Borland to resign. Previous issues raised by Mr Borland relating to him investigating (in his health and safety role) issues with a previous manager also have no causal link. That manager, Mr Wilson, gave evidence. I am satisfied that he had well left by the time of the 24 July 2019 and that he had limited time with Mr Dexter who effectively took over from him as Mr Borland's manager.

[21] It is further submitted for HC that in any event, Mr Borland's health and safety role was by that time identified as affected under a restructure proposal and it would not seem

logical for Mr Dexter to then deliberately attempt to get a resignation from Mr Borland. I accept this submission further supports that Mr Dexter did not deliberately target Mr Borland as some form of retaliation.

[20] It is submitted for HC that Mr Borland formed his own independent narrative to inform his decision to resign and it had nothing to do with Mr Dexter trying to coerce a resignation. I find some merit in this submission. I find Mr Borland may well have regretted resigning, but the cause may fall more likely into the category referred to by the Employment Court when it said that ‘... an employee does not need to justify their decision to resign; nor does the decision need to be demonstrably sensible or well thought through.’⁵

A choice of resignation or dismissal

[23] Mr Borland says that in about June 2019 he was given an ultimatum by Mr Dexter that if he wanted to stay with HC he would have to work back in the asphalt plant because his health and safety role was at risk. The problem with returning to the asphalt plant was that Mr Borland had ongoing issues from prior shoulder injuries. Medical information suggests he was not cleared for this heavy work. Mr Dexter seemed not to be aware of this at the time. Either way, Mr Dexter does not agree he gave this ultimatum to Mr Borland. He says that the conversation was started by Mr Borland in June 2019 when he asked to go back to the asphalt plant after discussing the same with his wife. At the time the plant had an abatement notice over it and Mr Dexter explained to me that it was the oldest in the country and needed upgrading. Mr Dexter says he was open to Mr Borland assisting with the work to get the plant operational again, but it was only to be supervising and may have included writing a procedure manual. Both Mr Dexter and Mr Wilson gave evidence that Mr Borland had valuable expertise in this area.

[24] Mr Borland is adamant that Mr Dexter told him he had to go back to the asphalt plant. Either way I am satisfied that the plant was not operational and that the official proposal to disestablish Mr Borland’s role was not communicated until 17 July 2019, just days before he

⁵ *Mikes Transport Warehouse Ltd v Vermuelen* [2021] NZEmpC 197 at [404]

resigned. This means that while Mr Borland says he heard about job losses there was no formal proposal in June 2019 about his health and safety role.

[25] Standing back from all of this, I am not satisfied there was an ultimatum given to Mr Borland such that he had to work in the asphalt plant or resign. There is no evidence this was discussed during the 24 July 2019 interchange. Mr Borland's evidence is that he considered that Mr Dexter was going to 'sack him' over the time sheets and leave request issues and not about the asphalt plant. He refers to struggling at the asphalt plant and being stressed about the future of his employment, all weighing into the mix of his decision to resign. In part this appears to have been guided by the 'gossip' he says he had heard about the Nelson branch's future. I accept the submission for HC that fear of a future event happening is not an adequate ground for constructive dismissal.⁶

[26] Accordingly, I find no causal nexus between whatever discussions were had about the return (albeit very brief) to the asphalt plant and Mr Borland deciding to resign on 24 July 2019.

Breach of duty serious enough to be foreseeable

[27] Finally, I consider whether there was a breach of duty by HC serious enough that it should have been reasonably foreseeable to it that Mr Borland would resign as a result. While I have commented on the way that Mr Dexter approached Mr Borland on 24 July 2019 and while I might consider this could have been a breach of good faith⁷ in the way the communication occurred, I do not find that the evidence supports a situation where it would have been reasonably foreseeable to a reasonable employer that by the time Mr Dexter returned to the office, that Mr Borland would then have decided to resign. I find it reasonable to interpret that Mr Dexter was at the time making inquiries only, albeit in a robust way, and I accept HC was entitled to make those enquiries as did Mr Borland in his oral evidence.

⁶ *Costa v Opawa Properties Ltd* NZERA 75, para 33.

⁷ Employment Relations Act 2000, s4(1) and s4(1A)(a) and (b).

[28] In summary of the above, I find that Mr Borland unequivocally resigned, that he was not coerced by Mr Dexter for HC to resign, nor was there a likely link to Mr Borland's previous investigations about prior management, that he was not given an ultimatum of resign or work in the asphalt plant because his role was to be disestablished, and there was no apparent duty breach serious enough that it would have been reasonably foreseeable that Mr Borland would have resigned as a result.

[29] Accordingly, Mr Borland's claim that he was constructively dismissed by HC is dismissed and I will not proceed to consider remedies.

Should either party contribute to the costs of the other?

[30] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[31] If they are not able to do so and an Authority determination on costs is needed Higgins Contractors Limited may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Kevin Richard Borland would then have 14 days to lodge any reply to memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[32] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless circumstances require an adjustment of that tariff.⁸

Antoinette Baker
Member of the Employment Relations Authority

⁸ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].