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Barboza v The Warehouse Limited (Auckland) [2011] NZERA 391; [2011] NZERA Auckland 262 (20 June 2011)

Last Updated: 30 June 2011

BETWEEN IVAN BARBOZA

Applicant

AND THE WAREHOUSE LIMITED

Respondent

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 262 5334457

Member of Authority: Representatives:

Investigation Meeting: Submissions received:

Eleanor Robinson Applicant in person

Penny Swarbrick, Counsel for Respondent

10. and 17 May 2011 at Auckland

11. and 17 May 2011 from Applicant 17 May 2011 from Respondent

Determination:

20 June 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Ivan Barboza, claims that he was unjustifiably dismissed by the Respondent, The Warehouse Limited ("TWL").

[2] Mr Barboza further claims that the Agreement for Settlement ("the Agreement") between the parties has been breached.

[3] TWL denies that Mr Barboza was dismissed, claiming that Mr Barboza resigned as part of the Agreement between the parties.

[4] TWL further claims that pursuant to the Agreement, there has been accord and satisfaction in that the parties have reached full and final settlement of all matters relating to Mr Barboza's employment, thus that Mr Barboza is prevented from raising a personal grievance in respect of unjustifiable dismissal in the Authority.

[5] The preliminary issue before the Authority is the status of the Agreement. If it is determined that the Agreement is binding and enforceable, Mr Barboza will be precluded by virtue thereof from pursuing the remedies he seeks.

[6] If the Agreement is determined to be binding and enforceable, and had not been honoured by either of the parties to it in

respect of any of the terms as outlined in the Agreement, it would be open to Mr Barboza or TWL to pursue compliance proceedings.

Background Facts

[7] Mr Barboza commenced employment with TWL as a Loss Prevention Officer at the Glenfield store on 4 March 2006.

[8] As a result of concerns by TWL about Mr Barboza's work performance he was placed on a Performance Improvement Plan on 14 September 2010 to cover the period until 14 December 2010. As Mr Barboza's performance did not improve, the plan was extended for a further period until 29 January 2011. Throughout the Performance Improvement Plan process there were weekly meetings between Mr Barboza and a member of the Glenfield store management team. A member of the National Distribution Union ("NDU") was also involved in the process at the request of Mr Barboza.

[9] At the conclusion of the initial Performance Improvement Plan, there were still concerns about Mr Barboza's failure to meet the required level of performance, and on 17 December 2010 Mr Barboza was issued with a Final Written Warning for poor performance. The Final Written Warning also incorporated the extension of the Performance Improvement Plan.

[10] The Final Written Warning did not resolve the issues regarding Mr Barboza's poor performance. On 18 January 2011 Mr Barboza was issued with a letter concerning a breach of confidentiality and bringing TWL into disrepute. On 27 January 2011 Mr Barboza was suspended on full pay pending an investigation of the matters raised in the letter of 18 January 2011, and asked to attend a disciplinary meeting to be held on 3 February 2011.

[11] The purpose of the disciplinary meeting on 3 February 2011 as outlined was to discuss Mr Barboza's performance level and also additional concerns TWL had about Mr Barboza having approached customers and fellow employees in connection with the performance concerns held by TWL, although he had been instructed not to do so.

[12] On the evening of 27 January 2011 Mr Barboza emailed Ms Wooding, Human Resources Manager of TWL. Ms Wooding had become acquainted with Mr Barboza in the latter stages of the Performance Improvement Plan. In the email Mr Barboza stated that he wished to "*spill the beans*" and that he had information about the conduct of fellow employees working in the Glenfield store. As a result of this email, Ms Wooding arranged to meet Mr Barboza on 2 February 2011.

[13] The meeting took place in the Birkenhead Mall on 2 February 2011, the day before the scheduled disciplinary meeting. During the meeting Mr Barboza gave Ms Wooding an envelope, stating that he had been planning to give it to her the next day at the disciplinary meeting but that he had decided to give it to her at this point.

[14] Ms Wooding said that she and Mr Barboza read the letter which the envelope contained. The letter was Mr Barboza's letter of resignation. Ms Wooding said that she had explained to Mr Barboza that if she accepted his resignation, the disciplinary meeting scheduled for the next day would not proceed.

[15] Ms Wooding explained that Mr Barboza, in light of this information, decided that he wanted the opportunity to explain his view of matters at the disciplinary meeting. Mr Barboza had then asked Ms Wooding for advice on how to proceed, and Ms Wooding had advised him to speak to Mr Dennis Maga, his NDU representative. Mr Barboza asked Ms Wooding to keep his resignation letter which she agreed to do, but only on the clear understanding that no action would be taken on it.

[16] Mr Maga explained that he had met with Mr Barboza before the start of the meeting on 3 February 2011. Mr Maga said that Mr Barboza had discussed his resignation with him on the basis that "*he didn't want to have a bad name*".

[17] Prior to the start of the disciplinary meeting on 3 February 2011, Ms Wooding had met with Mr Barboza and Mr Maga to check if they were ready to proceed. There followed a discussion between Mr Maga and Ms Wooding at which Mr Barboza was present. Ms Wooding said Mr Maga had enquired as to TWL's position with respect to Mr Barboza resigning, in the event that dismissal appeared to be an outcome during the progress of the disciplinary meeting. Ms Wooding said she advised Mr Maga and Mr Barboza that if matters proceeded to that stage, the option of resignation by Mr Barboza would then be addressed.

[18] Mr Maga confirmed that there had been a discussion with Ms Wooding prior to the meeting but that he did not recall discussing the possibility of Mr Barboza resigning.

However Mr Maga did confirm that in his previous dealings with TWL, he was aware that employees had been allowed to resign in circumstances where dismissal was otherwise inevitable.

[19] The meeting commenced, conducted by Mr Kevin Balding, TWL's Glenfield Store Manager. Mr Balding discussed the Performance Improvement Plan and TWL's performance concerns in respect of Mr Barboza, and Mr Barboza provided an explanation.

[20] At the conclusion of this part of the meeting, Mr Balding and Ms Wooding adjourned to consider Mr Barboza's

explanation and to verify some details arising therefrom. After approximately 20 minutes, the meeting was reconvened and Mr Balding explained that he considered Mr Barboza's explanation to be unsatisfactory and that his preliminary decision was that dismissal was the appropriate outcome. Mr Barboza and Mr Maga then adjourned to consider the preliminary decision.

[21] Mr Maga said that he and Mr Barboza considered the preliminary decision and that Mr Barboza adhered to his previously advised position that he wished to resign.

[22] When the meeting reconvened, Mr Maga asked if TWL would accept Mr Barboza resigning from his employment rather than his being dismissed. Mr Balding and Ms Wooding adjourned to consider this proposal. After approximately 20 minutes the meeting was again reconvened, and Mr Balding and Ms Wooding advised Mr Barboza and Mr Maga that they would accept Mr Barboza's resignation on the basis that it would be a full and final resolution of all matters.

[23] Ms Wooding said that Mr Barboza had asked her to explain what was meant by the expression 'full and final resolution', and she had told Mr Barboza that she would prepare the Agreement and then explain each part to him.

[24] At this point Ms Wooding said that Mr Barboza asked her if he would need to work out his notice period, and she had advised him that he would not need to do so.

[25] The meeting was adjourned while Ms Wooding prepared the Agreement. When the meeting reconvened Ms Wooding said, and both Mr Barboza and Mr Maga agreed, that she had read aloud each clause of the Agreement and then explained to Mr Barboza in colloquial terms what each clause meant. Mr Maga, who was present during this process, was given a copy of the Agreement.

[26] Clause 7 of the Agreement stated:

This is a final and binding settlement of all matters brought or raised by the applicant in the future in any way related to the employment relationship and the termination thereof apart from for the purpose of enforcement of this agreement.

[27] Mr Maga said that Mr Barboza had asked Ms Wooding what was meant by the wording "*final and binding*" and that Ms Wooding explained that it meant that once the Agreement was agreed, that was the end of the matter.

[28] Mr Maga stated that after Ms Wooding had read and explained the Agreement terms, there was a break during which he and Mr Barboza discussed it. During that time Mr Maga said Mr Barboza had told him he was satisfied with the terms of the Agreement.

[29] Ms Wooding stated that at no time did either Mr Barboza or Mr Maga raise any queries or concerns about the content of the Agreement. Mr Barboza agreed that he had not raised any queries or concerns at that time as he had wanted "*to get the best out of the situation*".

[30] Mr Barboza and Mr Balding, as authorised signatory for TWL, then signed the Agreement.

[31] Ms Wooding said that after Mr Barboza had signed the Agreement, he told her that she had "*taken a load off his mind*" and that he was "*at peace*". Mr Barboza agreed that he had made these comments to Ms Wooding as he had been relieved it was all over. Mr Maga also confirmed that Mr Barboza was happy to sign the Agreement and that he had thanked TWL.

Determination

Status of the Agreement: binding and enforceable?

[32] During the course of the Investigation Meeting, Mr Barboza claimed that he had not understood what '*final and binding*' had meant. Mr Barboza claimed that he had signed the Agreement through ignorance of its implications as he believed that signing it was the only way in which he could obtain his final monies.

Accord and Satisfaction

[33] TWL claim that there has been accord and satisfaction and that as such, Mr Barboza is precluded from bringing a personal grievance.

[34] In *Cabletalk Astute Network Services Limited v Cunningham*^[1] Judge Shaw set out the classic definition of accord and satisfaction, defined in the case of *British Russian Gazette and Trade Outlook Ltd v Associated Newspapers Ltd*^[2] as:

Accord and satisfaction is the purchase of a release from an obligation, whether arising under contract or tort, by means of valuable consideration, not being the actual performance of the obligation itself.

[35] Chief Judge Colgan in *Graham v Crestline Pty Limited*^[3] explained that^[4]

whether accord and satisfaction has been made is a question of fact requiring a finding of a meeting of the parties' minds or that one of them must act in such a way as to induce the other to think that money (or other consideration) is taken in satisfaction of

the claim.

[36] I consider that at the time of his meeting with Ms Wooding on 2 February 2011, Mr Barboza, who was subject to a current Final Written Warning, believed that dismissal was a potential, indeed likely, outcome of the disciplinary meeting planned to take place the following day. I believe it was in anticipation of that eventuality that Mr Barboza came to the meeting with Ms Wooding on 2 February 2011 with a prepared letter of resignation. Following their conversation, Mr Barboza had decided to attend the disciplinary meeting the following day, but, significantly, had nonetheless requested that Ms Wooding retain the letter of resignation.

[37] Before and during the meeting on 3 February 2011 Mr Barboza was represented and advised by Mr Maga. Mr Maga is an experienced union officer, who said in his evidence that he was familiar with settlements in the course of disciplinary matters.

[38] Prior to the commencement of the meeting on 3 February 2011 Mr Barboza had raised the possibility of his resigning with Mr Maga. Mr Maga explained that Mr Barboza had told him that he wanted to resign in order to avoid the effect a dismissal would have on his professional reputation. During the adjournment to consider TWL's preliminary decision of dismissal, Mr Maga said that Mr Barboza reconfirmed his preference of resignation.

[39] It is common ground that Ms Wooding carefully and clearly explained the terms of the Agreement of Settlement to Mr Barboza. Mr Maga stated that Mr Barboza had no concerns about the terms of the Agreement.

[40] I find that resignation constituted 'valuable consideration' to Mr Barboza in a situation in which dismissal was the alternative outcome to ending his employment relationship with TWL, and provided him with the means of safeguarding his professional reputation.

[41] As far as TWL was concerned, in the circumstances of Mr Barboza's resignation and the consequent Agreement, consideration constituted avoidance of the possibility of Mr Barboza making a personal grievance claim about his dismissal.

[42] As a question of fact, I find that there was accord and satisfaction. Such a finding acts to preclude Mr Barboza bringing a claim that he was unjustifiably dismissed.

[43] However for the sake of completeness I comment on the claim by Mr Barboza that he did not understand what "*final and binding*" meant, and that he believed signing the Agreement was the only way in which he could obtain his final monies.

Final and Binding

[44] I find it significant that Mr Barboza was represented at the meeting on 3 February 2011 by Mr Maga, an experienced union officer who was familiar with Mr Barboza and his employment history with TWL. Mr Maga had also had experience of employment relationships being finalised through the process of Agreements of Settlement.

[45] Both Mr Barboza himself and Mr Maga confirmed at the Investigation Meeting that Ms Wooding had clearly explained in colloquial language for Mr Barboza's benefit, what the expression "*final and binding*" meant.

[46] If Mr Barboza had had any doubt as to the implications of signing the Agreement, in particular any doubt as to the meaning of "*final and binding*", he had the opportunity to discuss these doubts with Mr Maga in the adjournment following Ms Wooding's explanation. Mr Maga's evidence was that Mr Barboza had not done so.

[47] On the contrary, what Mr Barboza's own evidence confirms is that he willingly signed the Agreement and even thanked Ms Wooding at the time, saying it had "*taken a load off his mind*" and that he was "*at peace*".

[48] I find no grounds for concluding that Mr Barboza was misled as to the meaning of "*final and binding*" or that he did not understand the meaning of the expression.

Final monies

[49] As a union member Mr Barboza would have been issued with a copy of the Collective Agreement between TWL and the National Distribution Union, clause 15 of which concerns the termination of employment, and specifically at clause 15.2 refers to the payment of final monies at termination:

15.2 Dismissal

15.2.1 If a team member is dismissed after receiving two previous written warnings, he/she will be paid in lieu of the notice period.

15.2.2 If a team member is dismissed due to serious misconduct, the dismissal would be effective immediately without notice. The team member would be paid up to his/her last day/hours of work.

15.2.3. All holiday pay and outstanding days in lieu will be paid at the time of termination.

[50] Mr Barboza gave no explanation pertaining to his belief that he would not be paid in accordance with this clause, and agreed when questioned at the Investigation Meeting that he knew what clause 15.2 stated about final monies upon termination.

[51] Had Mr Barboza believed that signing the Agreement was the only method of obtaining his final monies, I would have expected him to have, at the very least, mentioned this to Mr Maga. However Mr Maga confirmed that Mr Barboza had not discussed the issue of final monies with him, nor that this was his reason for signing the Agreement. Mr Maga stated that it was his understanding that Mr Barboza's motivation for signing the Agreement was to avoid the stigma of dismissal.

[52] Ms Wooding and Mr Balding also gave evidence that Mr Barboza did not raise the issue with them at any stage during the meeting, or during Ms Wooding's explanation of the terms of the Agreement.

[53] I do not find that the evidence supports the claim by Mr Barboza that he believed that signing the Agreement was the only way in which he could obtain his final monies.

[54] I determine that Mr Barboza is precluded from raising a personal grievance as a result of a full, final and binding Agreement for Settlement, which he freely and willingly entered into in full awareness of what it entailed.

[55] I am unable to assist Mr Barboza further.

Costs

[56] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson

Member of the Employment Relations Authority

[1] [\[2004\] NZEmpC 43](#); [\[2004\] 1 ERNZ 506](#)

[2] [\[1933\] 2 KB 616](#), at 643-644

[3] [\[2006\] NZEmpC 93](#); [\[2006\] ERNZ 848](#)

[4] *Ibid* at para [49]

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