

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 188/09
5121090

BETWEEN BRIAN SAMUEL BATES
 Applicant

AND ADEN ELECTRICAL
 LIMITED
 Respondent

Member of Authority: Paul Montgomery

Representatives: Jenny Guthrie, Counsel for Applicant
 Chris Eggleston, Counsel for Respondent

Investigation Meeting: 25 May 2009 at Dunedin

Submissions received: 8 June 2009 from Applicant
 5 June 2009 from Respondent

Determination: 5 November 2009

DETERMINATION OF THE AUTHORITY

[1] Mr Bates was employed as the respondent's Dunedin branch manager. The statement of problem says that his employment commenced in *February or March 2005*. The individual employment agreement put before the Authority is dated 28 June 2005.

[2] The applicant claims he was subjected to an unjustified disadvantage, subsequently unjustifiably constructively dismissed and further the respondent breached its obligation of good faith towards him. Mr Bates seeks remedies of nine weeks' lost remuneration, \$10,000 compensation for hurt and humiliation, a penalty against the respondent for its breach of its good faith obligations and a contribution to his legal costs.

[3] The respondent, in its statement in reply, denies liability for any of the applicant's claims. In essence, it says Mr Bates resigned by email on 22 January 2008, the respondent verbally accepted his resignation and advised Mr Bates on

24 January 2008 it did not require him to work out the contractual notice period. The respondent says, by agreement, the applicant's accrued annual leave would be paid to Mr Bates in regular weekly instalments. This appears to have been agreed to ensure Mr Bates was not disadvantaged in a taxation setting as he may have been had the payment been made in a lump sum. The applicant complains the final two leave payments were late. The respondent says this was due to a bereavement, affecting the payroll person and that these payments were made immediately it was brought to the company's notice.

[4] The statement in reply also lodges a counterclaim against Mr Bates, the respondent asking the Authority to investigate and determine whether, during the course of Mr Bates' employment, he had behaved in a manner which, if it had been known to the respondent at the time, would have constituted serious misconduct and thus justify the applicant's dismissal.

[5] A second ground for counterclaim is the allegation Mr Bates acted in breach of his employment agreement by soliciting clients and soliciting employees to join him in his newly established venture.

[6] The respondent claims that as it has been unable to employ suitable replacement employees for those lured away by Mr Bates, it has been obliged to source labour through hire contractors resulting in increased labour costs in the region of \$22,500.

[7] The parties were unable to resolve their differences in mediation.

Essential facts

[8] At 8.33am on 22 January 2008, Mr Bates received an email from Mr Greg Froude, the respondent's managing director. In that email, Mr Froude issued instructions to the applicant on some issues of concern regarding the Dunedin branch operation. He said:

Hi Brian, morning.

I have just been told you are not in the office today. It is company policy that if anyone is not at work or on company business during company time that their superior is informed prior to the event. If you are going to be off sick or for any other reason in the future please ring me before 7.30am the day you want off.

If you have any personal business to do during company time can you also get my approval first. I see from the timesheets that Ben Gillanders has heaps of workshop time again and has put time down to quoting last week. We have spoken about this. All quoting is to be done by either Blair or yourself. If you do not have enough work to keep Mr Gillanders 100% productive he is to go to Christchurch immediately or take redundancy. Mr Rollo has a day in lieu requested. What was this for and have we charged the lieu day?? I will need the job number for his timesheet ... Mr White has job numbers missing and time to workshop. Nowhere near as much as the other guy though. Mr Clark has heaps of job numbers missing.

Smith and Bradley appear the best of a bad bunch. Give them a pat on the back please. Please provide all missing job numbers by 10am tomorrow to Sharon so that we can pay these guys.

[9] At 8.42am that same day, Mr Bates replied. In respect of the absence from the office on the day, Mr Bates said: *I was ill. I did not know in advance that I was going to be ill.*

[10] In respect of the other matters, Mr Bates replied:

I was going to answer each of these points in order but I can't be fucked. Please ask Maureen about the timesheets as per your instructions she is running the service guys now.

As it appears you now have a problem with my time keeping, please accept this email as my resignation. Let me know how much notice it is company policy to give.

*Regards,
Brian Bates
Aden Electrical (Dunedin)*

[11] Later that day, Mr Bates rang Mr Froude who advised him his resignation had been accepted.

[12] On 24 January 2008, Mr Froude advised Mr Bates he was not required to work out his notice and would be paid in lieu. The pair spoke to each other several times during the notice period yet at no time did the applicant advise he wished to withdraw his resignation nor did he indicate that he believed the company was in any way responsible for his resignation.

[13] On 20 February 2008, Mr Bates incorporated a company, Sparkies Limited. Mr Bates is the sole director and the registered office is at his home address.

[14] After receiving Mr Bates' resignation, Mr Froude despatched the Christchurch branch manager, Mr Grant Wengler, to Dunedin. This witness says Mr Froude

telephone him and told him he was *gobsmacked* at Mr Bates' resignation. When Mr Wengler saw the Mr Bates' email he said he could not believe Mr Bates' response to Mr Froude was so disrespectful and unprofessional. He says he has received *much sterner emails from Greg, generally when circumstances warrant it.*

[15] Mr Froude told Mr Wengler he had authority to take whatever action was needed, including not requiring Mr Bates to work out his notice. On his arrival in Dunedin, Mr Wengler said he had hoped it might be possible to have Mr Bates work through the transition to the appointment of a replacement. Further, Mr Wengler says he had hoped to spend only a day or two in Dunedin. However, he discovered a dysfunctional operation and described the office and reception area to be *a shambles.*

[16] Mr Bates strenuously denies the situation was as dire as Mr Wengler has painted it. On evaluating the position, Mr Wengler told Mr Bates there was no need for him to stay on site and to work out the balance of his notice period at his home.

[17] There is no need, in the present circumstances, to detail the deficiencies Mr Wengler discovered in the operation, but he needed to stay a week longer than intended to put things back into order. There were, he says, indications Mr Bates was hosting another company's email and internet accounts through the Aden server without authority and there was a major backlog in the processing of invoices for the branch.

[18] In respect of the counterclaims, Mr Froude raises the contract to perform work at Dunedin Hospital, a contract which was under way at the time Mr Bates resigned. Following his departure, Mr Froude discovered the contract price with the head contractor failed to include certain work that Mr Bates had agreed to undertake. Without going into the financial details, Mr Froude told the Authority this error resulted in a cost to the respondent of \$69,000. Mr Froude said *Brian should have realised this before he signed the contract and I consider that this oversight must either have been deliberate or, at the very least, grossly negligent.*

[19] Mr Froude also advised that both Stephen Martin and David Gillanders were both open that they were resigning to go and work for Mr Bates. He says he recalls speaking to Mr Gillanders attempting to persuade him not to leave. However, he says he was unsuccessful in this and Mr Gillanders finished with the respondent on 28 March 2008. Mr Martin finished on 25 April 2008. However, Mr Froude also told

the Authority he was annoyed at the time and he knew their actions were in breach of their employment agreements however decided not to take any action against them at the time as he had enough work trying to salvage the Dunedin operation without having to worry about these issues at the same time. He views Mr Bates' breaches less charitably.

[20] In respect of the alleged breach of contract regarding non-solicitation of clients, the respondent says it has suffered loss and seeks an inquiry as to what damages it is entitled to as a result of this breach which the respondent estimates to be not less than \$102,500, general damages of \$5,000 and legal costs.

[21] In respect of the second alleged breach, that is the non-solicitation of employees, the respondent says it has suffered loss and seeks an inquiry as to what damages it is entitled to as a result of the applicant's breach of contract which it estimates to be not less than \$22,500, general damages of \$5,000 and legal costs.

The issues

[22] To determine this matter, the Authority needs to make findings on the following issues in respect of the applicant's claim:

- Did the email of 22 January 2008 from Mr Bates to Mr Froude constitute an unequivocal notification by the applicant of his terminating the employment relationship; and
- Did the applicant attempt to retract the resignation or allege the email had been misconstrued by the respondent; and
- Was the applicant constructively or summarily dismissed; and
- Does the applicant have a personal grievance and, if so, of what type; and
- Is the applicant entitled to remedies, and in what sums; and
- Did the applicant contribute to the circumstances which gave rise to the grievance(s)?

[23] In respect of the counterclaims:

- Was the applicant in breach of the non-solicitation of clients clause in his agreement; and
- Was the applicant in breach of the non-solicitation of staff clause in his agreement; and
- Has negligence by the applicant caused loss to the respondent in respect of the Dunedin Hospital contract; and
- Is the applicant responsible for the costs to the respondent in hiring staff through a labour supply company following the loss of two employees to the applicant's new business; and
- To what, if any, damages is the respondent entitled?

The test

[24] In matters alleging unjustified dismissal or action, the test for justification is set out in s.103A of the Employment Relations Act 2000 and its amendments. It requires the Court or Authority, in determining whether an action or dismissal was justified, to determine, on an objective basis, by considering whether the actions of the employer, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

The investigation meeting

[25] At the investigation meeting the Authority heard evidence in person from the applicant and from his partner, Ms Kerry Robbins. It also heard evidence in person from Steve Martin, Dave Gillanders and received statements from Robert Gillanders, Graham Copeland and Sean Stephens.

[26] On behalf of the respondent, evidence was presented in person by Mr Greg Froude and Mr Grant Wengler.

[27] The Authority records its appreciation to those who provided evidence at the investigation meeting and in particular wishes to thank counsel for their assistance and their submissions which have been considered in coming to this determination.

[28] The atmosphere at the investigation meeting was professional if at times somewhat strained between the parties' main players. However, the meeting was able to be completed within the day rather than the two allocated.

Analysis and discussion

(a) Dismissal or resignation?

[29] Some confusion was engendered by the statement of problem claiming the applicant had been constructively dismissed on p.1 (1)(ii) and that the dismissal was summary on the following page (2)(f).

[30] The applicant's reply to Mr Froude's email speaks for itself. The question is, did Mr Bates reconsider his resignation and ask for agreement to its withdrawal? When this was put to Mr Bates, his reply was *No. They did not want me back*. Such a response clearly indicates Mr Bates saw no point in trying to retain his position.

[31] The claim he was summarily dismissed when Mr Wengler arrived at the branch has little weight either. Mr Bates' evidence was that he was prepared to help sort the branch out during his notice period but Mr Froude's *abrupt* manner on the telephone calls convinced him Mr Froude was *keen to see me go*.

[32] At the time Mr Wengler told Mr Bates he was not required to work out his notice, his resignation had already been tendered and accepted. The decision taken by Mr Wengler cannot amount to a dismissal of any type. The employment agreement establishes notice can be paid in lieu of attending the workplace.

[33] There is no probative or corroborating evidence to support the applicant's contention he was constructively dismissed. Nor is there any supporting a case of summary dismissal.

[34] At the time Mr Bates telephoned Mr Froude on the afternoon of 22 January 2008, Mr Froude had not seen the reply to his email. In that call, Mr Bates asked if Mr Froude had seen it and was told he had not. Mr Froude's evidence was:

Brian then stated that he was resigning and asked me how much notice he was required to give. I was not sure exactly what Brian's notice period was. I was also unsure at that stage whether I would require Brian to work out the full notice period. ... I didn't want to make that decision on the spot and so I told him I would have to get back to him regarding his notice. I am clear that this related to the

notice period, not to whether his resignation had been accepted or not.

[35] What is significant here is the gap in time between the despatch of Mr Bates' reply to Mr Froude which was 8.42am and his later telephone call. Given Mr Froude's evidence that he took a call from Mr Bates on the afternoon of 22 January, it is clear that several hours had elapsed yet Mr Bates is still telling his employer that he was resigning and requested how much notice he was required to give. I think that confirmation of his resignation clearly establishes the applicant had not resiled from the position he had taken earlier in the day and repeated his resignation to Mr Froude. It is also clear that the initiative for the termination of the relationship came from Mr Bates.

Determination

[36] Returning to the issues set out above, I find:

(a) The alleged grievances

- The applicant's email of 22 January 2008 was an unequivocal resignation.
- The applicant confirmed his resignation in a telephone conversation that day. No effort was made to retract it.
- There is no evidence to support the applicant's contention the respondent was following a course of action to have him resign.
- There is no evidence of any breach by the respondent of its good faith obligations in respect of Mr Bates.
- The applicant resigned and was not dismissed.
- The applicant does not have a personal grievance.

(b) Counterclaim

- The applicant was in breach of the non-solicitation of clients clause in his agreement but to what extent needs to be determined subsequently.

- The applicant was in breach of the non-solicitation of staff clause in his agreement.
- The issue of negligence is tortious and thus falls outside the jurisdiction of the Authority.
- The issue of whether the applicant is responsible for the costs incurred by the respondent in hiring staff through a labour supply company is debatable and at this stage the Authority makes no finding on the matter.
- The issue of damages is discussed below.

Counterclaims

[37] Counsel for the respondent lodged counterclaims when lodging the statement in reply.

[38] In respect of the applicant's breach of the non-solicitation clause in the agreement, the respondent says it has suffered *loss and inconvenience* as a result of this breach. The respondent *claims an inquiry as to what damages it is entitled to as a result of the applicant's breach of contract, which it estimates to be not less than \$102,000, general damages of \$5,000 and legal costs.*

[39] In respect of the applicant's breach of the non-solicitation of employees clause, the respondent says it has suffered *loss and inconvenience as a result of the breach.* It claims an inquiry as to what damages it is entitled to, which damages *it estimates to be not less than \$22,500, general damages of \$5,000 and legal costs.*

[40] Evidence placed before the Authority in respect of the counterclaims was insufficiently precise and detailed to support the inquiry sought by the respondent, nor to allow a reasoned response from Mr Bates. The matter is complicated by what appears to be a conscious decision to pursue counterclaims against the applicant but not against the other two former Aden employees who later joined Mr Bates. It is further complicated by the assertion that much of the work undertaken by Sparkies Limited, Mr Bates' company, was from customers who had placed it with Aden only because of those customers' association with the three men concerned.

[41] The matter of the counterclaims is directed to mediation. In the event the respondent wishes to pursue its application for inquiries, it needs to quantify in detail by supporting documents each aspect of its claims. Copies of all documents are to be served on Mr Bates who is to respond in detail with supporting documentation. Once each party has complied with this direction, the respondent or its counsel are to arrange a mediation conference with the Department of Labour's Dunedin Mediation Service office.

[42] In the event the matter remains unsettled, leave is reserved for either party to have the counterclaim matters returned to the Authority for determination.

Costs

[43] Costs in respect of the applicant's substantive claims are reserved. Mr Eggleston has 28 days from the date of issue of this determination to lodge and serve his memorandum. Ms Guthrie is to have a further 14 days to lodge and serve her memorandum in response.

Paul Montgomery
Member of the Employment Relations Authority