New Zealand Employment Relations Authority Decisions

Birkett v Star Design Furniture Ltd AA 166/07 (Auckland) [2007] NZERA 564 (6 June 2007)

Last Updated: 16 November 2021

Determination Number AA 166/07
File Number: 5045813

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND OFFICE

BETWEEN Garth Birkett (Applicant)

AND Star Design Furniture Ltd(Respondent)

REPRESENTATIVES Simon Scott (for Applicant)

Julie Hardaker (for Respondent)

MEMBER OF AUTHORITY Janet Scott

DATE OF DETERMINATION 6 June 2007

DETERMINATION

Employment Relationship problem

[1] The applicant submits that he was unjustifiably dismissed from his employment with the respondent. Mr Birkett seeks reimbursement of lost wages from time of his dismissal to the time of reinstatement. He also seeks $10,000 pursuant to section 123(1)(c)(i) of the Act and he seeks legal costs.

[2] The respondent denies that the applicant was unjustifiably dismissed.

Background

[3] Mr Birkett had two periods of employment with the respondent. The second period of employment commenced on or about 19 February 2003. Mr Birkett was engaged as a machinist (edge band operator) and at the time he was dismissed he was paid $16 per hour with an additional payment of $1 per hour by way of bonus for good attendance.

[4] Evidence reveals that there was a pattern of poor attendance at work by Mr Birkett during his second period of employment. Between 9 June 2003 and 20 September 2005

Mr Birkett received six verbal and written warnings. These warnings reflected an ongoing concern by the respondent at his unauthorised absences and Mr Birkett's failure to give prompt advice regarding his absence from work.

[5] In February 2006 the respondent's manager, Mr Harry Nordberg, and Mr Jason Cottrell met with the applicant. That meeting was called to address concerns both parties had relating to the employment. The respondent was concerned about Mr Birkett's absences and his attitude (Mr Birkett would not help out on other machinery). Mr Birkett

was unhappy that employees who had commenced more recently were being paid more than he was and were allowed to

stand around talking. He also was concerned that they were allowed to leave the workplace early.

[6] The outcome of the February meeting was that Mr Birkett agreed to improve his attendance and flexibility and he was given a $2 per hour wage increase by the respondent.

[7] However, on 6 and 7 March Mr Birkett did not attend work due to sickness. No issue was taken with this by the respondent.

[8] Then Mr Birkett was absent on 6 and 7 April 2006 and again from 10 to 13 April. As I understand the evidence Mr Birkett did not advise the employer of his intended absence on the 7th or 13th of April.

[9] On his return to work Mr Nordberg and Mr Cottrell had a meeting with Mr Birkett to discuss his most recent absence. Mr Birkett was advised of his right to representation at the meeting but declined this offer. On 27 April) Mr Birkett was given a written warning regarding this absence.

[10] In the interim – on 24 and 26 April, the dates either side of ANZAC Day Mr Birkett had absented himself from work once again. On 27 April. Mr Nordberg and Mr Cottrell had a meeting with him regarding this absences At that meeting Mr Birkett asked to be put on a final written warning regarding absence. He did this he told the Authority because "*he wanted to prove to the respondent that he was not stuffing them around".* He also explained that he understood that the final written warning meant *"If you stuff up again you're gone".*

[11] On 15 May Mr Birkett was absent from work again. The evidence reveals that he rang the workplace three times that day. On the first occasion (6.45 am) he rang to say that he had not slept well the previous night and he could not come to work. He said that he would try to come in at lunchtime.

[12] Mr Birkett rang again at 11.45 am to say that he now thought there was something else wrong and that he would go to the doctor. He rang again at 2 o'clock to say that he had been given antibiotics for a kidney infection and that although he did not have a doctor's certificate he would bring in the medication to verify his visit to the doctor.

[13] Mr Birkett returned to work on 16 May. Mr Cottrell asked to see the medication as Mr Birkett had promised the previous day. Mr Birkett told Mr Cottrell that he had forgotten to bring it to work and he would bring it the next day. Mr Cottrell approached Mr Birkett on the 17th and repeated his request to see the medication. Mr Birkett advised again that he had not brought it in. Mr Cottrell reported the matter to Mr Nordberg.

[14] On the 17th May Mr Nordberg prepared a letter to give Mr Birkett asking him to attend a meeting to discuss his absence on the 15th. Mr Birkett was advised of his right to representation at that meeting. He was told that at the meeting he would be given an opportunity to provide an explanation for his absence and he was advised that he was on a final written warning and that if his explanation was not accepted he could be dismissed.

[15] There is no dispute between the parties that Mr Birkett declined to accept the letter that was given to him, or to read it. He requested that the meeting take place immediately rather than to wait for the meeting the next day as had been notified. Mr Birkett confirmed

to the Authority it was his choice not to read the letter prepared by the respondent and he said *"he knew how Harry worked".*

[16] The meeting took place on 17 May after lunch. There is no dispute between the parties that the respondent advised Mr Birkett it would pay for him to either go home and return with the medication he had been given, or it would pay for him to go to the doctor to obtain a medical certificate for his absence on the 15th. Mr Birkett declined both options.

[17] Mr Birkett's evidence was that he told the respondent at the meeting he would get another job and that he would resign. It was his evidence that the respondent agreed to this. Mr Nordberg and Mr Cottrell agreed that Mr Birkett made the suggestion, but they denied there was any agreement reached between them on the point.

[18] On 18 May having considered Mr Birkett's explanation and the discussions on the previous day, Mr Nordberg prepared another letter setting out his conclusions. He had decided that he was at the *"end of his tether"* with Mr Birkett's absences and he did not believe that Mr Birkett had been sick on the 15th. He met with Mr Birkett and put this to him. He asked Mr Birkett if he had anything to say prior to him making a final decision on the matter.

[19] Mr Birkett says that he said to Mr Nordberg "What about our meeting yesterday?" meaning the alleged agreement reached whereby he would get another job and would resign. Mr Nordberg and Mr Cottrell both deny this and they both say that prior to Mr Nordberg making his final decision Mr Birkett advised that he had nothing more to say. Mr Nordberg and Mr Cottrell both state that following the communication of the decision to terminate his employment Mr Birkett did ask about his suggestion of the previous day that he would get another job and then resign. It was the respondent's position there had been no agreement on this point and in any event the termination had already been communicated to Mr Birkett.

Issues for determination

• Was Mr Birkett unjustifiably dismissed from his employment?

• If so, what remedies should be awarded to Mr Birkett?

Discussion

[20] In determining this matter I must make an objective assessment of the employer's

actions and weigh those actions against the actions a fair and reasonable employer would have taken in all the circumstances at the time (section 103A test).

[21] The only issue in dispute between the parties is whether or not an agreement was reached on 17 May that Mr Birkett would find a new job and then resign his employment with Star Design Ltd and whether or not he reminded the respondent of this "agreement" prior to his dismissal on the 18th.

[22] Mr Birkett was not a credible witness. To illustrate this finding I need go no further than to point to Mr Birkett's own evidence that a former company CEO, Margaretann Steiner had no problem with his absences *"she knew where I was coming from"*. When it was pointed out that Ms Steiner had authored a number of recorded warnings given to him Mr Birkett acknowledged Ms Steiner did not find his absences acceptable. On the other hand I found that Mr Nordberg and Mr Cottrell were credible witnesses. They deny that such an agreement was reached. I find too the respondent kept careful records of

meetings with Mr Birkett – records which Mr Birkett accepted were accurate overall. There is no record of any agreement been reached with Mr Birkett on 17 May that he would find another job and then resign. In all the circumstances then I find there was no agreement reached between the parties on the 17th that Mr Birkett would look for and obtain other alternative employment and would then resign his employment with the respondent.

[23] Taking the evidence overall, I find that there was a long history on Mr Birkett's part of unauthorised absences from the workplace and failures by him to advise his employer of his intending absences. Mr Birkett was repeatedly warned by the respondent that this is unacceptable.

[24] In February 2006 there was a "cleaning of the slate" between the parties. Following a frank discussion between the parties Mr Birkett agreed to improve his attendance record and work more flexibly. And in return the respondent gave him an increase of $2 per hour.

[25] Unfortunately Mr Birkett did not keep his side of the bargain. Between the meeting late in February and 15 May 2006 Mr Birkett was absent from the workplace for 9 working days. The employer took no issue regarding the first 2 days in respect of which it had been advised that Mr Birkett was ill.

[26] Then Mr Birkett was absent for 6 days in April – apparently because his girlfriend was ill. Over some of those days Mr Birkett did not call to advise his failure to attend work, and on 27 April, following discussions between the parties, he was given a verbal warning in relation to his absence and failure to notify the respondent.

[27] There was also a meeting with Mr Birkett on the 27th in relation to his absence from work on 24 and 26 April. I find Mr Birkett well knew he was pushing it – he asked for a final written warning and he signed for that warning.

[28] On 15 May Mr Birkett rang to say he had not slept well. Mr Birkett rang twice more that day to say that he was unwell and going to the doctor and to advise that he would bring in the medication to prove he had been unwell.

[29] Mr Birkett failed to comply with his own promise to show his employer that he was absent from work for acceptable reasons on 15 May 2006. On 17 May the employer wrote to him setting out its concerns and requesting a meeting with him. Mr Birkett was advised he would have the opportunity to explain. He was also advised of his right to representation and that his employment could be terminated if the explanation for his absence was not accepted by the respondent. Mr Birkett refused to accept the letter and insisted the proposed meeting be held immediately. The meeting went ahead after lunch the same day.

[30] It was Mr Birkett's choice not to read the notice of the employer's concerns and be advised as to his rights. I note he makes no complaint on this point and I find without doubt in any event that he did know when he attended the meeting on 17 May what its purpose was and what his rights in the matter were.

[31] I find that by 17 May, Mr Birkett knew his time was up in accordance with the knowledge he had from 27 April (when he received a final written warning at his own request) that if he stuffed up again he was gone.

[32] The respondent still had an open mind on this. Mr Nordberg was leaving a door open to Mr Birkett to demonstrate in some practical way that he had genuinely been ill on

15 May 2006. He asked Mr Birkett to bring in his medication (as Mr Birkett had previously

promised to do), or a medical certificate to show he had been ill. Mr Nordberg even offered to pay Mr Birkett to obtain the proof sought. On this I find the submission made for Mr Birkett that the respondent did not comply with the provisions of s.68(1)A of the Holidays Act when it offered to pay for him to obtain a medical certificate to be something of a red herring in this matter. Neither Mr Birkett nor the respondent purported to be relying on rights to paid sick leave under the Act and the absence in question was one day only. The respondent was simply offerring to pay Mr Birkett's costs to obtain a medical certificate in reliance on his offer to provide proof he had been genuinely ill. In the circumstances Mr Birkett had a good faith obligation to demonstrate he had been ill and it was in his interests to do so given he was on a final written warning relating to absence from work.

[33] Mr Birkett declined to obtain the proof sought and I find that when the parties met on

17 May he was well aware he had pushed the respondent's goodwill to breaking point. He suggested that he would get another job and resign. However there was no agreement on this point. By 17 May the respondent was looking for an acceptable and proven explanation for the applicant's absence from work and in the light of there being no such explanation serious consideration was to be given to terminating the applicant's employment. When Mr Birkett declined to take the simple steps that would have proven that he was ill on 15 May, Mr Nordberg came to the conclusion that Mr Birkett had not been ill and, being at his wit's end regarding Mr Birkett's absences from his employment, concluded the only option available was to terminate his employment. This was put to Mr Birkett the next day and he was asked if he had any further comment to make prior to the employer making a final decision on the matter. Even at this late time Mr Birkett was offered an opportunity to obtain representation. He declined representation and made no submissions on his own behalf before the final decision was made and communicated to him.d

[34] It was argued for Mr Birkett that the employer had no right to consider the history of the employment in making the decision to dismiss him because the slate had been wiped clean at the February meeting. I don't accept this submission. The conduct being complained of was on all four legs with the respondent's historical concerns – conduct which continued despite the agreements reached between the parties which included a significant increased to Mr Birkett's hourly rate. I note too, that Mr Birkett had had nine days absence, a verbal warning and a final written warning for absence since the slate had been wiped clean. This alone provided justification for terminating his employment following his unexplained absence on 15 May.

Conclusion

[35] Weighing the respondent's actions against those of a fair and reasonable employer in the circumstances at the time I find Mr Birkett's termination to have been justified. Indeed I would go so far as to say the respondent's conduct/actions towards the applicant personify those of the archetypal *"fair and reasonable employer"* described in section 103A of the Act.

Determination

[36] The applicant's claim is declined and the Authority can be of no further assistance to him.

Costs

[37] Costs are reserved. The parties are directed to attempt to resolve costs between them. If that is not possible they may file further submissions and the matter will be determined by the Authority.

Janet Scott

Member of the Employment Relations Authority