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Borrill v Elite Fitness Equipment Limited (Auckland) [2011] NZERA 520; [2011] NZERA Auckland 331 (26 July 2011)

Last Updated: 23 August 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZ ERA Auckland 331 5319290

BETWEEN

AND

GRANT BORRILL Applicant

ELITE FITNESS EQUIPMENT

LIMITED

Respondent

Member of Authority: Representatives:

Investigation Meeting: Submissions Received:

Vicki Campbell

Richard Harrison for Applicant Adam Gallagher for Respondent

13 June 2011

20 June 2011 from Applicant 30 June 2011 from Respondent

Determination:

26 July 2011

DETERMINATION OF THE AUTHORITY

A Mr Borrill's dismissal was justified.

B Mr Borrill's claim for outstanding commission payments was resolved on 2 September 2010.

C The counter claim for a breach of good faith is successful. Mr Borrill is to pay a penalty of \$2,000 within 28 days of the date of this determination.

D Costs are reserved.

[1] Mr Grant Borrill was employed by Elite Fitness Equipment Limited (Elite Fitness) as commercial manager on 2 June 2009. His primary responsibilities included selling fitness equipment to commercial operations including gyms and organizations providing gym facilities. Mr Borrill was subject to a written employment agreement dated 29 May 2009. Mr Borrill reported to Mr Gary Burke, the Managing Director of Elite Fitness.

[2] Mr Borrill and his wife purchased an Auckland gym on 1 August 2010. Mr Borrill purchased equipment for the gym from Elite Fitness. The invoice for the equipment was dated 30 July 2010 and was in the amount of \$2,055.94.

[3] The money to purchase the equipment was transferred to Elite Fitness via internet banking on Saturday 31 July 2010. Mr

Borrill picked up the equipment from two separate retail outlets of Elite Fitness on Sunday 1 August 2010.

[4] On 6 August 2010 Mr Borrill was invited to attend a disciplinary meeting concerning two allegations. The first was that the purchase of the gym may be a conflict of interest and in breach of the employment agreement. The second was with regard to the uplifting of the equipment which Mr Borrill had been instructed to leave at Elite Fitness until such time as the funds had cleared in the bank account.

[5] Mr Borrill was dismissed on 18 August 2010 and claims the dismissal was unjustified. He claims remedies including reimbursement of lost remuneration and compensation for hurt and humiliation. Mr Borrill also claims arrears of wages being outstanding commission payments in the amount of \$800.00.

[6] Elite Fitness denies the claims and makes a counter-claim for a penalty to be awarded against Mr Borrill alleging that he breached his obligations of good faith during his employment.

Purchase of the gym

[7] Mr and Mrs Borrill set up a company called Healthkicks Limited which was incorporated on 8 June 2010. On 15 July 2010 Mr Borrill and his wife incorporated a second company called Body Language Fitness Limited.

[8] Unbeknown to Mr Burke, Mr Borrill had decided to set up a commercial gym business in the Auckland CBD.

Purchase of the gym equipment

[9] On 27 July 2010 Mr Borrill placed an order to purchase equipment for his new gym. He requested that the equipment be released even though he had not paid for it. This request was declined. On 28 July 2010 Mr Borrill again sought permission to have the equipment released. He was advised to speak with Ms Helen Carter, Finance Manager. He did not do that.

[10] On 30 July 2010 Mr Borrill advised the warehouse staff that payment had been made and had cleared and that the stock could be released. It was clear from the evidence at the investigation meeting that this information was totally incorrect. Mr Borrill had not made any payments at this time. Mr Borrill instructed a warehouse employee to release the stock and deliver it to him.

[11] Ms Carter became aware that the equipment had been picked up and instructed the sales person to return it to the warehouse as it had not been authorized for release. Ms Carter spoke to Mr Borrill and advised him that the funds had not cleared and the product was not to be released.

[12] Notwithstanding this instruction, on Sunday 1 August 2010 Mr Borrill attended two retail stores and uplifted the equipment which he loaded into a company vehicle and delivered to his new business.

[13] On Tuesday 3 August 2010 the funds were cleared and the equipment authorized for release from the Warehouse. At the time neither Mr Burke nor Ms Carter were aware Mr Borrill had picked up the equipment on the previous Sunday.

[14] Mr Burke was informed for the first time via email on Saturday 31 July 2010 that Mr Borrill was setting up a new business in the Auckland CBD. Mr Borrill advised Mr Burke that he had had to make a quick call on whether to purchase the business over the previous two weeks and that it would primarily be run by his wife. Mr Borrill advised Mr Burke that he had no intention of leaving Elite Fitness and he accepted that he was out of line when he undermined Ms Carter's call not to release the stock.

[15] A meeting was arranged with Mr Borrill on 3 August 2010 to discuss the issues arising from the release of the stock and Mr Burke's concerns surrounding the purchase and set up of a gym in the CBD. When this meeting was set up Mr Burke was still in the dark about the fact that Mr Borrill had picked up the equipment on Sunday 1 August 2010.

The dismissal

[16] Mr Borrill claims his dismissal is unjustified because there was no fair or unbiased enquiry into the allegations made against him, that his responses were not considered properly or investigated, that substantively there was no good reason to dismiss him, and Elite Fitness was influenced by irrelevant and/or undisclosed issues in reaching the decision to dismiss.

[17] Elite fitness says Mr Borrill was in breach of clause 15.3 of his employment agreement which states:

The employee agrees that there are no contracts, restrictions or other matters which would interfere with their ability to discharge their obligations under this agreement. If, while performing their duties and responsibilities under this agreement, the Employee becomes aware of any potential or actual conflict between their interests and those of the Employer, then the Employee shall immediately inform the Employer. Where the employer forms the view that such a conflict does or could exist, it may direct the Employee to take action(s) to resolve that conflict, and the Employee shall comply with that instruction. When acting in their capacity as Employee, the Employee shall not, either directly or indirectly, receive or accept for their own benefit or the benefit of any person or entity other than the Employer any gratuity, emolument, or payment of any kind from any person having or intending to have any business with the Employer.

[18] The issue before the Authority concerns the application of the first part of clause 15.3 relating to conflicts of interest.

[19] Mr Borrill was responsible for selling fitness equipment, products and services to Elite Fitness customers who are predominantly gyms. All customers were required to sign and comply with the terms of the commercial sale and purchase agreement.

[20] On 6 August 2010 Mr Gary Burke, the managing director of Elite Fitness wrote to Mr Borrill setting out his understanding of the purchase of the gym and the equipment Mr Borrill had purchased from Elite Fitness. He set out the following five concerns he had about Mr Borrill's actions:

- Your actions in setting up a business may potentially or actually bring you into conflict with your duties as an employee of Elite Fitness, in breach of clause 15.3 of your employment agreement which relates to conflicts of interest;
- You have failed to immediately inform us that you were proposing to set up a business in the fitness industry or that you had in fact set up a business with your wife which may bring you in to conflict with your duties as an employee of Elite Fitness;
- Your conduct may be in breach of company policies relating to the payment of accounts for release of stock;

You appear to have acted in direct defiance of a lawful and reasonable instruction from the company; and

- You may have misused company property in breach of clause 10 of your employment agreement - that is you have used the company vehicle to transport equipment to your business.

[21] Mr Borrill was advised that due to his senior role in the company trust and confidence was at issue and that if concerns remained after the meeting, dismissal was a possibility. Mr Borrill was invited to seek advice and to bring a representative to the meeting.

[22] Following a meeting on 11 August 2010 at which Mr Borrill chose to be unrepresented, Mr Burke wrote to Mr Borrill outlining his conclusions that Mr Borrill had failed to follow the direction not to pick up the stock until the funds had cleared and that his explanations in this regard were not accepted.

[23] Mr Burke was satisfied a conflict between Elite Fitness clients and Mr Borrill's gym did exist and used the example of an email Mr Borrill had sent to an employee of a client of Elite Fitness, offering the employee work at Mr Borrill's gym. Mr Borrill had previously sought and been granted permission to run a private personal training business from his domestic premises at Farm Cove. He was therefore aware of the need to advise his employer and to seek permission to operate businesses which had the potential to conflict with the business of Elite Fitness.

[24] Mr Burke was satisfied Mr Borrill had failed to immediately notify him of the potential conflict of interest as required by clause 15.3 of the agreement. Mr Burke had 180 emails sent and received by Mr Borrill on Elite Fitness email system between May and August 2010 where Mr Borrill discussed the sale and purchase of the gym and the financial arrangements to support the purchase.

[25] On 25 May 2010 Mr Borrill emailed a client of Elite Fitness expressing an interest in purchasing the client's business. On 1 June 2010 after being advised by the client that another party was interested in the purchase, Mr Borrill advised the client that he was on for the purchase and the client should take the gym off the market. Another email dated 4 June 2010 confirms that Mr Borrill will be purchasing the gym. At no stage did he discuss the purchase with Mr Burke or advise him that there may be a potential conflict.

[26] It was not until the issues over the purchase of the equipment from Elite Fitness that Mr Borrill, on 31 July 2010, advised his employer that he had purchased the gym.

This disclosure was made only as a result of not being able to take possession of the equipment he had ordered on 27 July 2010.

[27] Mr Borrill explained to Mr Burke that he was committed and loyal to Elite Fitness and was there for the long term. However, Mr Burke had emails address by Mr Borrill which stated that he did not see himself staying with Elite Fitness for the future and that he considered the role to be a "dead end".

[28] Given the conflicts between Mr Borrill's statements at the meeting and the statements contained in the emails, Mr Burke concluded that he could not have the requisite trust and confidence in Mr Borrill and was considering terminating his employment. Mr Burke provided Mr Borrill with an opportunity to add anything further before a final decision was made and set a meeting time on 18 August 2010. Mr Burke reiterated the right of Mr Borrill to have a representative with him at the meeting and also provided him with the opportunity to make any submissions he wished to make, in writing.

[29] Following a further meeting on 18 August Mr Burke considered all Mr Borrill's responses and made a decision to terminate his employment. The reason for Mr Borrill's dismissal included a conclusion by Mr Burke that Mr Borrill had failed to follow a lawful and reasonable instruction not to pick up the equipment until his funds had cleared and he had lost trust

and confidence in Mr Borrill.

[30] On 2 June 2010 Mr Borrill emailed an employee of a customer of Elite Fitness seeking information about the number of customers that Elite Fitness's client was to lose from its business once Mr Borrill opened his gym. He also discloses commercially sensitive information about Mr Burke's business at the same time. Mr Borrill was actively seeking to draw customers away from a client of Elite Fitness, during his normal working hours and through his work email address. In his email Mr Borrill encourages the recipient to send potential new gym members from her current employer to Mr Borrill's business.

[31] Mr Borrill's actions in releasing stock in direct defiance of a lawful and reasonable instruction from the Finance Manager, his actions in setting up the gym and especially approaching the staff and members of a client of Elite Fitness demonstrates that Mr Borrill was potentially in conflict with his obligations as an employee of Elite Fitness.

[32] Mr Burke was entitled to take a dim view of Mr Borrill's actions with respect to the release of the equipment. Further, Mr Borrill's inconsistent and misleading responses to his employers enquiries were such that Mr Burke was entitled to conclude that Mr Borrill's actions were serious enough to warrant his summary dismissal.

[33] As to process, I am satisfied Mr Burke undertook a fair and full investigation into the allegations and provided Mr Borrill a full opportunity to provide explanations and considered those explanations.

[34] I find Mr Borrill's dismissal is justified. The decision to dismiss Mr Borrill was a decision an employer acting fairly and reasonably would have made in all the circumstances of this case. I can be of no further assistance to Mr Borrill in relation to this claim.

Arrears of wages claim

[35] Mr Borrill claims he is still owed \$800 being commission payments he earned during his employment. Mr Burke says that on 2 September 2010 the parties met and agreed on the terms of the payment of commission to Mr Borrill. Elite Fitness says that on 2 September 2010 the terms of the agreement were met.

[36] I am satisfied the parties have resolved the issue of the outstanding commission payments and I can be of no further assistance to Mr Borrill in relation to this claim.

Counter Claim - Breach of good faith

[37] Mr Burke claims Mr Borrill breached his obligations pursuant to s 4 of the Employment Relations Act to not mislead or deceive his employer or do nothing that was likely to mislead or deceive his employer.

[38] Mr Borrill decided on 1 June 2010 to purchase the gym in the Auckland CBD. He advised Mr Burke on 31 July 2010 that he had had to make a call in the last two weeks. He later told Mr Burke that the purchase had been on the cards for only 4 weeks.

[39] Mr Borrill lied to the warehouse staff member on 30 July 2010 when he told him he had paid the money for the equipment and that it had cleared. Mr Borrill did not make the bank transfer until Saturday 31 July 2010.

[40] I find Mr Borrill was in breach of his obligations of good faith. Mr Borrill's responses to Mr Burke throughout the disciplinary process were both misleading and deceptive. I am satisfied that Mr Borrill acted deliberately and that his actions were serious and sustained. Mr Borrill is liable for a penalty pursuant to s 4A of the Employment Relations Act, which I set at \$2,000.

Mr Borrill is ordered to pay a penalty of \$2,000 pursuant to s 4A of the Employment Relations Act within 28 days of the date of this determination.

Costs

[41] Costs are reserved. Mr Borrill is legally aided. Section 40(2) of the [Legal Services Act 2000](#) provides that no order for costs may be made against a legally aided person in civil proceedings unless the Authority is satisfied there are exceptional circumstances. In the absence of any exceptional circumstances it would be usual for costs to lie where they fall.

However, in the event that costs are sought, the parties are encouraged to resolve that question between them. If they are not able to reach agreement on the matter of costs, Elite Fitness may lodge and serve a memorandum as to costs within 28 days of the date of this determination. Mr Borrill 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.

[42] In order to assist the parties with resolving costs themselves, I can indicate (subject to any submissions) that a tariff based approach to costs is likely. In which case the usual starting point would be around \$3,000 (GST inclusive) per day. That figure would then be adjusted in light of the particular circumstances of this case.

Vicki Campbell
Member of Employment Relations Authority

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