

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 188/10
5166947

BETWEEN LOUIS BOTES
 Applicant

AND ENGINEERING RECRUITERS
 LIMITED
 Respondent

Member of Authority: Marija Urlich

Representatives: Max Whitehead, Advocate for Applicant
 Ray Parmenter, Counsel for Respondent

Investigation Meeting: 15 February 2010

Determination: 26 April 2010

DETERMINATION OF THE AUTHORITY

[1] Immediately prior to his immigration to New Zealand from South Africa Mr Botes secured a consultant position with Engineering Recruiters, a Parnell based specialist recruitment business. Events prior to and subsequent to his arrival in New Zealand form the basis for the issues before the Authority.

[2] The issues before the Authority to determine are:

- (i) Is Engineering Recruiters liable to reimburse “Expo” expenses incurred by Mr Botes prior to the commencement of his employment?
- (ii) Was Mr Botes given notice of redundancy on 11 May 2009 and if so does this give rise to a personal grievance?
- (iii) Does Mr Botes suspension give rise to a personal grievance?
- (iv) Was Mr Botes’ dismissal for serious misconduct unjustified? and
- (v) Are there grounds for orders concerning the return of and access to personal information?

[3] I record the parties' advice at the investigation meeting that the arrears of wages and holiday pay claim is resolved.

Expo expenses

[4] There is no dispute Mr Botes incurred expenses of 9,538.07 Rands (approximately \$2000). The dispute concerns whether Engineering Recruiters has any obligation to reimburse those expenses.

[5] The parties entered two written agreements on 26 June 2008. The first is an agreement governing Mr Botes' representation of Engineering Recruiters in South Africa ("the agreement"). The second is an employment agreement to govern the parties' employment relationship in New Zealand ("the employment agreement").

[6] The agreement contains the following provision:

- *Unless otherwise agreed, the parties will meet all of their own costs as incurred by them.*

[7] Mr Botes says this provision does not apply to the Expo expenses because he entered a verbal agreement with Keith McConnell, a director of Engineering Recruiters, on 23 or 24 June 2008 that Engineering Recruiters would meet the costs of the Expo. The costs were incurred in July/August 2008.

[8] Mr McConnell said in evidence that he had no recollection of the verbal agreement Mr Botes seeks to rely on. He said Engineering Recruiters was very careful to separate Mr Botes representation of the business in South Africa from his employment in New Zealand.

[9] The evidence does not support Mr Botes claim for reimbursement. There is no contemporaneous record of the asserted agreement to reimburse or amendment to the general provisions of the agreement. The first written reference made to the Expo expenses is contained in an email dated 18 May 2009 from Mr Botes to Mr McConnell where he (Mr Botes) describes the payments as having been made *out of*

his own pocket and done in goodwill; descriptions which support Engineering Recruiters position that there was no agreement to reimburse these expenses.

[10] Mr Whitehead advances an argument that the expenses must be reimbursed because Mr Botes was an employee intending to work¹ at the time they were incurred. This argument cannot stand in the face of the parties' careful separation of the rights and obligations owed under the express agreement governing Mr Botes activities on behalf of Engineering Recruiters in South Africa and the employment agreement.

[11] For these reasons the reimbursement of Expo expenses claim is declined.

Notice of redundancy

[12] Mr Botes commenced employment with Engineering Recruiters on 1 February 2009. As stated above the terms of that employment are set out in the employment agreement executed on 26 June 2008.

[13] On 11 May 2009 Mr Botes and colleagues received an email from Mr McConnell recording a meeting held earlier that day. The email concluded:

*You have a number of options-
Firstly you can take redundancy and finish work at 31st May.
Secondly you can take it as unpaid leave of an indefinite period. When matters recover sufficiently you could re-start.
Thirdly you may want to discuss with us entering into a fee sharing arrangement.*

Sue and IO will meet with each of you individually to discuss your thoughts tomorrow afternoon.

[14] Mr Botes said a meeting to discuss the options was held on the afternoon of 12 May, he indicated his preferred option was the fee sharing arrangement and understood Engineering Recruiters would return with something in writing. Such a letter was never provided because the events leading up to Mr Botes dismissal for serious misconduct overtook this process.

[15] On the clear wording of the 11 May email and Mr Botes evidence of subsequent discussions I make the following findings. The 11 May email sets out options available to Mr Botes arising from a discussion about the future of his

¹ Section 5 Employment Relations Act 2000

position with the business. That discussion was never concluded. The 11 May email is not notice of redundancy. For the avoidance of doubt, Engineering Recruiters did not give Mr Botes notice of redundancy.

Events leading up to the dismissal

[16] On Monday 18 May Mr Botes was given a letter advising Engineering Recruiters had commenced an investigation into allegations concerning his actions, outlining the allegations and the basis of those allegations and advising dismissal could be an outcome of the disciplinary process. The letter also advised Mr Botes that he was suspended and suggested a meeting in 2 days time to discuss the allegations further. Supporting material was attached.

[17] The allegations against Mr Botes were very serious and concerned unauthorised downloading of recruitment database software, an intention to load the existing recruitment database onto this software, loading candidate details into this software and not the existing recruitment database and operating a competitor business.

[18] I accept Mr McConnell's description of the database as the business' *life blood*.

[19] Mr Botes replied to Mr McConnell's letter later that day advising there was a reasonable explanation for the issues raised, raising concerns that Engineering Recruiters had improperly accessed private correspondence, suggesting mediation and requesting access to all correspondence in order to address the allegations.

[20] By return email Mr McConnell gave Mr Botes an assurance no conclusions had been reached and that his explanation was awaited, that personal data could be copied and deleted on advice of directory or file names, requesting a practical way to provide that personal data and that it was premature to consider mediation.

[21] Mr Botes replied the following day – that he believed the decision to dismiss him had already been made, asserting rights to personal information contained on the work provided laptop, he was continuing to discharge personal business obligations,

requesting no more emails other than to advise a date for access to his data in order to respond to the allegations and a date for mediation.

[22] Mr McConnell provided an email reply later that day setting out the reasons for suspending Mr Botes and an earlier reference to Engineering Recruiters immigration obligations as a sponsoring employer, that Mr Botes' privacy assertions were overstated given the material was stored on a work provided laptop, that a "dump" of all personal data was not practical because the business needed to be sure what was personal and what not, that information had been provided to Mr Botes to make a response, if there was anything else he needed then that should be specified and, finally, that Mr Botes' explanation about one allegation was accepted.

[23] By 20 May Engineering Recruiters had decided an impasse had been reached – Mr Botes refused to provide responses to the key allegations for reasons which were unclear; he said he needed all the personal data but would not specify what data or why.

[24] On 22 May Mr McConnell wrote to Mr Botes advising, I find on the clear words of the letter, that he was dismissed for the following reasons:

- (i) processing CVs outside the approved system;
- (ii) loading unauthorised software onto the company laptop; and
- (iii) using an unauthorised email address contrary to specific instructions.

(i) Suspension

[25] There is no dispute Mr Botes was suspended in the absence of contractual authority and without due consultation. The Authority may find such a suspension justified on an assessment of the facts².

[26] In *Hamilton* the Court found while there were *prima facie* grounds for suspension those grounds were not so strong as to justify suspension without consultation nor the circumstances such as to mitigate the inherent unfairness of the

² B&D Doors Limited v Hamilton CC 28/07 18 December 2007

failure – when the decision to dismiss was made Mr Hamilton was not aware of the disciplinary investigation. The suspension was held to be unjustified.

[27] In Mr Botes situation grounds existed for suspension but, as in *Hamilton*, those grounds and the circumstances were not so strong as to justify dispensing with the fundamental requirements of a fair process. Mr Botes was no longer in possession of his laptop and the observed deleting of material from the laptop, which I accept caused genuine concern, had already occurred.

[28] For these reasons I find the suspension was unjustified.

(ii) Dismissal

[29] Was this dismissal objectively fair and reasonable in all the relevant circumstances?³

[30] Mr Botes did not provide a full response to the allegations. The first question for the Authority is whether he had a fair opportunity to do so.

[31] I find he did. I am satisfied, having carefully read the relevant email correspondence between the parties that Mr Botes was not acting in accordance with his good faith obligations, as a party to an employment relationship, to be *active and constructive...responsive and communicative*⁴.

[32] The disciplinary allegations were specific and supported by sufficient material to allow Mr Botes to identify what further information was necessary to provide an explanation. He provided no explanation other than to assert a general request for all personal data. This was unreasonable.

[33] My view that Mr Botes was not conducting himself in accordance with his good faith obligations is further enforced by his refusal to suggest a practical way to separate his personal information from business information held on the company laptop, despite Mr McConnell's specific request, his assertion of privacy rights

³ Section 103A Employment Relations Act 2000

⁴ Section 4(1A)(b) Employment Relations Act 2000

concerning unspecified material stored on a company lap top (akin to asserting a privacy right to unspecified personal items stored in a company filing cabinet) and the repeated request that the parties attend mediation in the face of his refusal to provide a response to the specific allegations.

[34] I am of the view Mr Botes sought to detract attention from himself to avoid providing an explanation to the allegations.

[35] The next question is was it fair and reasonable for Engineering Recruiters to call a halt to the disciplinary investigation?

[36] Mr McConnell had engaged in lengthy and detailed correspondence with Mr Botes over a number of days. He provided explanations and reasons where requested and suggested solutions to Mr Botes concerns without success. I find it was fair and reasonable to call a halt to the disciplinary process.

[37] Was the decision to dismiss fair and reasonable in all the circumstances?

[38] The allegations are supported on the material provided. Mr Botes was advised of the seriousness with which Engineering Recruiters viewed this matter and that he could be dismissed as a result of this disciplinary investigation. Mr Botes, as I have found above, had a fair opportunity to provide a response. The allegations were very serious and, I find, would amount to serious misconduct warranting dismissal.

Remedies

[39] I have found Mr Botes' suspension was unjustified entitling him to a consideration of the remedies sought.

[40] I set the award at \$250, a modest sum to reflect my assessment of the minor impact of the suspension on Mr Botes.

[41] Mr Parmenter has urged the Authority to set contribution at 100% in recognition of Mr Botes' blameworthy conduct which gave rise to personal grievance for unlawful suspension.

[42] I decline to order any reduction for contribution to remedies set. The failure to comply with a lawful suspension process was no fault of Mr Botes.

[43] Mr Botes seeks orders for the return of personal data he stored on the company laptop. I decline to make such orders for failure to detail with the necessary specificity the material for which the orders are sought.

Costs

[44] The matter of costs is reserved. The parties are invited to attempt to resolve this issue themselves. If they are unable to then costs memoranda should be filed with 21 days of the date of this determination with a reply filed in a further 7 days.

Marija Urlich

Member of the Employment Relations Authority