

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2014] NZERA Auckland 196
5403967**

BETWEEN NEVILLE BRADFORD
Applicant
AND EARTH CREST LIMITED
Respondent

Member of Authority: Eleanor Robinson
Representatives: Applicant in person
Nick Elsmore, Counsel for Respondent
Investigation Meeting: 30 April 2014 at Auckland
Submissions received: 30 April 2014 from Applicant and from Respondent
Determination: 19 May 2014

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Neville Bradford, claims that he has been unjustifiably constructively dismissed by the Respondent, Earth Crest Limited (Earth Crest).

[2] Mr Bradford further claims that he is owed outstanding unpaid wages and holiday pay in the sum of \$13,911.55 by Earth Crest.

[3] Earth Crest denies that it terminated Mr Bradford's employment which it claims ended by mutual agreement, and accepts that it owes Mr Bradford the sum of \$2,461.15.

Issues

[4] The issues for determination are:

- Whether or not Mr Bradford was unjustifiably unconstructively dismissed by Earth Crest

- The amount, if any, of unpaid wages and holiday pay owed to Mr Bradford by Earth Crest

Background Facts

[5] The Kingdom of Zion (the Park) is a privately owned zoo housing big cats of varying species which was acquired out of receivership by Zion Wildlife Kingdom Limited. Earth Crest manages the Kingdom of Zion on behalf of Zion Wildlife Kingdom Limited.

[6] Mr Ian Stephenson, a director of Zion Wildlife Kingdom Limited from 15 January 2012 until 24 January 2014, the accountant for Earth Crest, and also Mr Bradford's own personal accountant, said it had been agreed with Ms Suzanne Eisenhut, sole Director of Earth Crest, that Mr Bradford would work at the Park

[7] Mr Bradford said he had commenced working at the Park on 30 January 2012 in the capacity of full-time grounds man at an hourly rate of \$18.50, and that he lived onsite in a portocabin with the costs of rental, power and telephone costs being paid by Earth Crest.

[8] Mr Bradford had been provided with a job description, but had not been issued with an employment agreement.

[9] Initially Mr Bradford had reported to Mr Craig Busch, the Park representative, but subsequently he had reported to Ms Eisenhut, and then latterly to Ms Michelle Potter, who had been appointed as the Park Manager on or about March 2012, and between them they had directed him as to the work they required to be carried out on a daily basis.

[10] With effect from late March 2012 Ms Potter began to exercise control over the hours Mr Bradford worked, requiring him to reduce these to 40 hours per week, and to take tea and meal breaks, however Mr Bradford said that his responsibilities and workload expectations had started to increase.

[11] On 30 April 2012 Mr Bradford said that a meeting had been held with him by Ms Eisenhut and Ms Potter at which concerns regarding his contract expenses, his performance and the Park's health and safety protocols were raised with him, following which a verbal disciplinary warning had been issued relating to the health and safety issues.

Contract for Services

[12] Mr Bradford said he had been presented with a Contract for Services on or about mid to late May 2012 and had been told by Ms Potter that it was the contract he was expected to

sign. Mr Bradford said he had read the Contract for Services and made some notes on it, but he did not agree to it, or sign it.

[13] In particular Mr Bradford explained that as he had been subject to a 'No Asset Procedure' (NAP) he had been prohibited as an un-discharged person from being self-employed, therefore in accordance with the NAP he could work only as an employee.

[14] Mr Bradford said he had also understood that as a result of the proposed change in his status from that of employment to independent contractor, the costs of his rental, power and telephone costs would no longer be paid by Earth Crest but would devolve to him.

[15] These considerations had meant that he was not prepared to accept the change in status as proposed, and he did not sign the proposed Contract for Services.

Leave Requirements

[16] The intention of the parties at the outset of employment was that Mr Bradford would work a 40 hour week; however during the period March to June 2012 he had worked hours in excess of this, averaging 54.6 hours per week. As a result Ms Potter had met with him on several occasions to discuss the need for a reduction in the number of hours he was working.

[17] Mr Bradford said that three weeks prior to the Queen's Birthday weekend at the beginning of June 2012, he had been told to take the Queen's Birthday weekend as leave. However because he had realised that if he took the leave, the Park would not have staff available with the requisite heavy traffic and gun licenses, he had offered to work, and this offer had been accepted by Ms Potter.

[18] On 6 June 2012 Ms Potter sent Mr Bradford an email in which she had noted that he had been: '*advised formally on several occasions that all staff are to work a maximum of 80 hours per fortnight*', and stated:

It has become clear over the past few weeks that you are attempting to choose your own work days and hours is suiting no-one, and we will notify you next week of a meeting to address this, and any other issues.

[19] In the email of 6 June 2012 Ms Potter also referred to Mr Bradford having worked the Queen's Birthday weekend, and instructed him to take substitute time off during that week:

... It would be remiss of me as Manager, to not heed these signs of an over tired employee, in a physically demanding, potentially dangerous workplace. You will be taking Thursday to Sunday (7th – 10th June) off work. If you wish to have extra days after this, (Monday, Tuesday)

please let me know and it will be accommodated..... If you still insist you want to work on Thursday, then I will have to enforce that stress leave be taken.

[20] Mr Bradford said that although Ms Potter had alluded to a meeting to address issues of concern, she had not specified what the concerns and issues were, nor did she set a date for the meeting to take place.

[21] Mr Bradford said he had taken leave with effect from 6 June 2012 and expected to return to the Park on 12 June 2012. However as he had been feeling tired and stressed he had asked Ms Potter if he could take some additional days. Her response had been an agreement to the proposal and for him to take as much time as he felt he needed.

[22] During the period following 6 June 2012, Mr Bradford said he had asked Earth Crest for relevant information relating to the proposed meeting to be held with him, however there had been no response. Further, although he had received a salary payment on 7 June 2012, he had received no further payments after that date.

[23] Mr Bradford confirmed that it was his own decision not to return to work during June/July 2012 stating: *“I elected to remain in Auckland until I received details of the meeting held. The meeting only eventuated in July 2012.”*

[24] On 30 June 2012 Mr Bradford had sent an email to Mr Noel King, a barrister acting for Earth Crest. In the email Mr Bradford had written:

I am however wishing to be fair, and mindful of the Parks financial position as has been made clear to all onsite, so my approach to the problem would be for the Park to lodge the wages as would have been due last Thursday for a 40 hour week, and I am now on record as agreeing for this to be deducted from the monies I am owed at this time pending a settlement and agreement of everything.

I would ask that this continue fortnightly until agreement is reached on terms of settlement.

Meeting held on 17 July 2012

[25] As a result of his communications with Mr King, a meeting was held on 17 July 2012. Present at the meeting were Mr Bradford, Mr Stephenson and Mr Busch who said he had been authorised to represent Earth Crest at the meeting.

[26] Mr Bradford said that Mr Busch had referred to the fact that there had been serious allegation made about him, but when questioned about the nature of the allegations, Mr Busch had provided no details.

[27] During the course of the meeting, Mr Bradford said he had reached the conclusion that Earth Crest no longer wanted him to work at the Park, and he had decided that he no longer wanted to work there. Accordingly he had entered into negotiations with Earth Crest which resulted in an agreement of the terms on which his employment would end.

[28] Mr Bradford said it had been agreed that Earth Crest would pay him all the monies to which he was entitled in terms of outstanding wages, plus his holiday pay entitlement, until 6 June 2012 with fortnightly periodic payments beginning from the date of the meeting until the total amounts due had been made in full.

[29] I note that there is no written record of the agreement, and both parties offer differing versions of what had been agreed. However what is clear is that a settlement amount was agreed upon and periodical payments did commence and then cease.

[30] Mr Bradford said that he had stipulated at the meeting that provided the agreed payments were made in full, there would be full and final settlement of all matters arising out of his employment. However if the agreed payments were not made in full, Mr Bradford said he had told Mr Busch that: "*all bets were off the table*" and the agreement would be "*null and void*". Mr Bradford said he had made it clear that this meant he would proceed by way of legal redress.

[31] Mr Stephenson confirmed the terms of the agreement as stated by Mr Bradford, and explained that there had been an advance payment of \$600.00 made in order that Mr Bradford could hire a trailer to remove his personal possessions from the Park.

[32] Mr Bradford said that he had received some fortnightly payments from Earth Crest, but although the final payment date should have been 28 February 2013, he had received no payments after 30 September 2012. Although he had sent emails requesting Earth Crest to explain why the payments had ceased, he had received no response.

[33] Ms Ward, Office Manager of Earth Crest, explained at the Investigation Meeting held on 11 September 2013 that the payments to Mr Bradford had been suspended due to concerns about the destination of payments which appeared to have been made to Mr Bradford through various entities and not to his personal bank account. Ms Ward said that Mr Bradford had been emailed asking for information in connection with the payments; however no response had been received.

[34] In early October 2012 Mr Bradford said he had contacted the Authority helpline and sought legal guidance, and on 30 November 2012 he had filed a Statement of Problem in respect of unjustifiable dismissal with the Authority.

Determination

Was Mr Bradford was unjustifiably unconstructively dismissed by Earth Crest?

[35] Mr Bradford claims that he was unjustifiably constructively dismissed by Earth Crest. Earth Crest claims that Mr Bradford's employment was ended by mutual agreement during the meeting held on 17 July 2012.

[36] In the Court of Appeal case *Auckland Shop Employees Union v Woolworths (NZ) Ltd*¹ Cooke J listed three situations in which a constructive dismissal might occur, although noted that these were not exhaustive. The three situations were:

1. Where the employees is given a choice of resignation or dismissal;
2. Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and
3. Where a breach of duty leads a worker to resign.

Choice of resignation or dismissal

[37] There is no evidence that Mr Bradford had been given a choice of resignation or dismissal prior to or at the meeting held on 17 July 2012. Nor do I find that there was a breach of duty on the part of the employer resulting in Mr Bradford having been suspended following 6 June 2012, since it was agreed by Mr Bradford during the Investigation Meeting that he had been on authorised annual leave.

[38] The third situation in which a constructive dismissal might occur is where the employer follows a course of conduct with the deliberate and dominant purpose of coercing the employee to resign.

Course of Conduct

(i) Contract for Services

[39] In May 2012 Mr Bradford had been presented with a Contract for Services which he did not sign on the basis that he was unable to agree to the proposal that he become an independent contractor as he was subjected to a No Asset Procedure, and because he did not

¹ [1985] 2 NZLR 372

want to accept the costs of rental, power and telephone costs which were paid on his behalf as part of his employment agreement.

[40] There is no evidence that Earth Crest pursued this matter with him, rather that Earth Crest accepted that Mr Bradford would continue as an employee as indicated in Ms Potter's email dated 6 June 2012 in which she refers to Mr Bradford as an employee about whose well-being she is concerned: "*It would be remiss of me as Manager, to not heed these signs of an over tired employee, in a physically demanding, potentially dangerous workplace.*"

[41] Further evidence of the light in which Earth Crest regarded Mr Bradford is indicated by Ms Potter's concern over the long hours which Mr Bradford had been working which she considered were posing a concern in respect of his health and well-being. Mr Bradford agreed at the Investigation Meeting that he had been working very long hours and had been feeling very tired and stressed prior to taking leave from 6 June 2012.

[42] An employer who has concerns about the effect the long hours an employee is working are having on his well-being, and who requires that employee to take time off from work I consider to be acting in good faith.

[43] There is no evidence that Earth Crest had any motivation in requesting that Mr Bradford take leave on 6 June 2012 other than concern about his well-being. Moreover the period of leave had been extended at the request of Mr Bradford himself, and at no time had Mr Bradford requested to return to work and been refused, in fact Mr Bradford confirmed at the Investigation Meeting that he had been: "*happy to have the break*".

[44] Additionally Mr Bradford had left some of his property and personal possessions at the Park and there is no evidence that Earth Crest had requested that he should remove them.

[45] On this basis I do not find that Earth Crest had tried to pressurise Mr Bradford into agreeing to the Contract for Services, nor is there any evidence that it tried to pressurise Mr Bradford into making payments in respect of rental, power and telephone costs after May 2012.

[46] Moreover I find that the period of leave may have been initiated at the instigation of Earth Crest on health and safety grounds, but it had been extended by Mr Bradford himself with the agreement of Earth Crest.

[47] On this basis I do not find that these circumstances constitute a course of conduct with the deliberate and dominant purpose of coercing Mr Bradford to resign.

(ii) *Matters of Concern*

[48] Ms Potter had advised Mr Bradford in the email dated 6 June 2012 that she wished to meet with him to discuss matters of concern to Earth Crest to take place at some date after he returned to the Park; however no details had been provided of either the concerns or the date of the proposed meeting.

[49] Despite requests for clarification by Mr Bradford, none had been received, nor had Mr Busch been able to clarify the situation for him when they had met on 17 July 2012.

[50] In the email sent by Ms Potter to Mr Bradford dated 6 June 2012 Ms Potter addressed at some considerable length Mr Bradford's working hours and referred to the fact that he had been advised on several occasions that Earth Crest employees were to work a maximum of 80 hours per fortnight. Ms Potter states in the email: "*It has become clear over the past few weeks that you are attempting to choose your own work days and hours is suiting no-one (sic), and we will notify you next week of a meeting to address this, and any other concerns.*"

[51] I consider that Mr Bradford was aware from this email that the proposed meeting was specifically to address his working hours, and whilst there is no detail provided as to what would constitute: "*any other concerns*", the email states that further notification is to follow.

[52] Whilst I consider that Earth Crest did not act in good faith by not clarifying the nature of the issues it wished to raise with Mr Bradford after he subsequently sought further details, an employer is entitled to seek to raise issues of concern with an employee and there is no suggestion that termination of his employment was intended.

[53] I do not find that raising matters of concern with Mr Bradford constitutes a course of conduct with the deliberate and dominant purpose of coercing him to resign

Basis of the employment coming to an end

[54] Mr Bradford stated that he had received no salary payment after 7 June 2012. I note that Mr Bradford had agreed at the outset of his employment to defer wages payments as he knew the financial position of Earth Crest was poor.

[55] There is no evidence that Mr Bradford had requested payment after 7 June 2012 prior to his email to Mr King on 30 June 2012. I consider this to be attributable to Mr Bradford being aware of the Park's precarious financial position throughout his period of employment.

[56] I consider that during the period of absence following 6 June 2012 Mr Bradford reached the view that he wished to conclude his employment at Earth Crest. It is clear from his email to Mr King on 30 June 2012 that Mr Bradford had concerns about health and safety at the Park, referring to: "*The ship will keep sinking at a great rate, possibly beyond salvage*

...”, and he indicates in the email that he anticipated reaching “*terms of settlement*” with Earth Crest.

[57] In that same email Mr Bradford states: “*If all is terminated then I am wishing to collect and remove all of my possessions from the site ASAP, as it can be put to use down here in Auckland in a productive manner for me instead*”.

[58] At the meeting held on 17 July 2012 I find that Mr Bradford had voluntarily entered into negotiations with Mr Busch which resulted in an agreement of the terms on which his employment would end. I find support for this finding Mr Bradford’s submission to the Authority received on 17 July 2013 in which he refers to: “*the mutually agreed final settlement on that day*”.

[59] I determine that Mr Bradford was not unjustifiably unconstructively dismissed by Earth Crest, but rather that his employment was terminated by mutual agreement on 17 July 2012.

Remedies

[60] Although I have determined that Mr Bradford’s employment was terminated by mutual agreement, Mr Bradford has a claim for outstanding unpaid wages and holiday pay.

[61] Mr Bradford said it had been agreed that on 17 July 2012 Earth Crest would pay him all the monies to which he was entitled in terms of outstanding wages, plus his holiday pay entitlement until 6 June 2012, with fortnightly periodic payments beginning from the date of the meeting until the total amounts due had been made in full. Earth Crest confirmed that payments were commenced and then ceased due to their concerns about the accounts the payments were being made to, albeit that Mr Bradford accepts that he did receive the payments made.

[62] Mr Bradford provided a detailed breakdown of the hours he worked during the period 31 January until 6 June 2012. The hours he claimed to have worked are not contested by Earth Crest, and I use these figures together with the rate of \$16.00 per hour (for the first 13 hours per week) and \$18.50 per hour (for the balance) to calculate Mr Bradford’s gross wages entitlement which is a total of \$17,313.75 (\$3,744.00 plus \$13,569.75)

[63] From that amount must be deducted payments made to Mr Bradford from the Earth Crest bank account during the period from 30 January 2012 until 7 October 2012 totalling \$8,962.50 gross. Although these payments were made to various named entities in addition to Mr Bradford himself, Mr Bradford confirmed that he had received these amounts.

[64] In addition Mr Stephenson confirmed that there had been an advance payment of \$600.00 made to Mr Bradford made to Mr Bradford at the conclusion of the 17 July 2012 meeting.

[65] Accordingly I find that Earth Crest owes Mr Bradford the sum of \$7,751.25 gross in respect of unpaid wages.

[66] Mr Bradford is also entitled to unpaid accrued annual leave entitlement for the period from 30 January until 6 June 2012 in the sum of \$1,385.10 gross (calculated as 8% of \$17,313.75).

[67] Mr Bradford also worked on the statutory holidays. I find that Earth Crest owes Mr Bradford the sum of \$1,375.00 gross in respect of 5 statutory holidays worked and not paid at the rate of time and a half and no alternative holiday was provided (calculated as 5 days, average 11 hours per day at \$25.00 per hour) .

[68] Mr Bradford is also entitled to interest on the outstanding sums owed to him by Earth Crest.

Summary

[69] Earth Crest is ordered to pay to Mr Bradford the following amounts:

- the sum of \$7,751.25 gross in respect of unpaid outstanding wages
- the sum of \$1,385.10 gross in respect of unpaid annual leave entitlement
- the sum of \$1,375.00 gross in respect of 5 statutory holidays worked and not paid
- the sum of \$442.50 as interest pursuant to clause 11 of the Second Schedule of the Act at the rate prescribed by the Judicature Act 1908, which is currently 5% per annum².

Costs

[70] Costs are reversed. While costs are reserved, I note here that, subject to his submissions, Mr Bradford represented himself, and unless he incurred legal costs, it is therefore unlikely that he has grounds to claim a contribution to any fair and reasonable costs

Eleanor Robinson
Member of the Employment Relations Authority

² Judicature (Prescribed Rate of Interest) Order 2011 (SR2011/177)

