

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 29
5470752

BETWEEN KENNETH BRIDLE
Applicant

A N D UPRITE LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Allan Silberstein, Counsel for the Applicant
No appearance for the Respondent

Investigation Meeting: 5 January 2015, 21 January 2015 and 28 January 2015 at
Auckland

Date of Determination: 30 January 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Bridle) alleges that he was unjustifiably dismissed from his employment with the respondent (Uprite) and seeks reimbursement of lost wages, compensation, outstanding holiday pay and costs.

[2] There has been almost no engagement from Uprite in the Authority's process. Indeed, when I convened the first investigation meeting concerning this employment relationship problem, I had understood (erroneously as it turned out) that Uprite was no longer trading.

[3] I was swiftly disabused of that view by the evidence of Mr Bridle who was very clear that the business was still trading and that the directors and managers of the entity were still very much part of the community.

[4] As a consequence of that evidence, and notwithstanding the failure of Uprite to engage in any particular with the Authority's investigation of the employment

relationship problem, I determined, against the representations of Mr Silberstein, that Uprite should have a further opportunity to be heard.

[5] Given the failure of Uprite to attend the investigation meeting of 5 January 2015, that first investigation meeting proceeded exclusively with the taking of Mr Bridle's evidence on oath.

[6] I directed that there be a second investigation meeting to give Uprite the opportunity of providing me with its evidence on the issues before the Authority for investigation, and to ensure that Uprite was aware of the second investigation meeting, I directed my Authority officer to arrange personal service of the notice of investigation meeting and a notice of direction from me in which I set out the nature of the Authority's inquiries, and indicated what sort of level of response I required from Uprite.

[7] The affidavit of service of the notice of hearing and the notice of direction are before me as I write this determination and I am satisfied that the documents were handed to a director of Uprite, Kim Margaret Child, on 7 January 2015 at 12.55pm.

[8] The second investigation meeting of the Authority proceeded in accordance with those arrangements at 10am on 21 January 2015 but there was no attendance from Uprite at the appointed time. Later that day, I was advised Ms Child had left a voice message indicating she could not attend because of a sick child but wished to be heard.

[9] Accordingly, I gave Uprite a further and final opportunity to be heard (again in the face of protests from Mr Silberstein), this hearing being set for 28 January 2015 at 2pm. Ms Child telephoned again, said she could not attend because of issues with her children but still wanted to be heard.

[10] In a direction I issued in response to this last mentioned request, I indicated I was satisfied Uprite had had more than sufficient opportunities to give its evidence and that I needed to fulfil my obligation to conclude the investigation and issue a determination.

[11] In effect, Uprite have demonstrated, by their behaviour, that dealing with Mr Bridle's claim is just not a priority. Even if one were to give Ms Child some latitude because of her obligations to her children, she is one of two directors and there are

two managers in the business in the business as well, it seems, any one of whom could have dealt with the Authority's investigation.

[12] I am satisfied in consequence that Uprite has chosen not to engage in the Authority's process and that there is nothing further that the Authority can do to progress the obtaining of Uprite's evidence. It would be an affront to justice to allow the matter to simply run on unresolved and I am satisfied that the proper course is for me to now determine the matter on the basis of the evidence I have before me; that evidence is exclusively the evidence of the applicant, Mr Bridle.

[13] In making that decision, I note that I specifically referred in my notice of direction served on Uprite, that the Authority had power to make a decision on the evidence before it even if that evidence was only from one of the parties to the employment relationship problem.

[14] Mr Bridle was employed by Uprite from 13 August 2012 as a sales manager. There was a written individual employment agreement signed by both parties on 23 July 2012. Mr Bridle's evidence is that he was especially involved in the marketing of a new kind of charcoal for barbecues which had properties which were saleable in the New Zealand marketplace. The charcoal was imported from Malaysia by Uprite.

[15] Because of the need for Uprite to order and pay for significant volumes of the product, Uprite sought to establish sales contracts for the charcoal.

[16] Mr Bridle told me that he had sustained a hernia in late 2011, about 12 months before the employment with Uprite started, but that the hernia was exacerbated by the requirement that he lift bags of the charcoal product. Mr Bridle's evidence is that notwithstanding his designated role of sales manager, he was effectively physically managing the product as well as trying to sell it and he says that as a consequence of the lifting of these large bags of charcoal, the hernia that he had earlier sustained (unrelated to the employment) became strangulated and that this medical event resulted in surgical intervention in hospital in late August 2012.

[17] Mr Bridle's health status is relevant because the events just described were part of a deterioration in Mr Bridle's physical health which has made it difficult for him to obtain employment since the termination of his employment with Uprite. As I

write this determination, Mr Bridle is again in hospital receiving treatment as a consequence of apparent damage to his bowel by the effect of the strangulated hernia.

[18] In any event, Mr Bridle returned to work after the surgical intervention in August of 2012 and his evidence is that he continued to make progress in selling the charcoal product. He sold the product to Countdown, the supermarket chain, but in relatively small volumes. Mr Bridle explained to me that Countdown was less interested in non-food lines than its competitor, Foodstuffs, and accordingly was less inclined to take significant volumes of the charcoal product.

[19] It follows that a contract with Foodstuffs had to be the “*jewel in the crown*” and Mr Bridle’s evidence is that he had made significant progress in engaging with Foodstuffs and had sold half a container of the charcoal to Foodstuffs as a trial sale.

[20] In consequence, Mr Bridle told me that Foodstuffs had agreed to stock the charcoal product regularly across its stores, subject to continuity of supply.

[21] Mr Bridle’s evidence is that there were a succession of meetings between himself and the managers and directors of Uprite, all conducted in intemperate terms by Uprite, and all apparently designed to elicit from Mr Bridle where he was at precisely in getting the Foodstuffs contract. Mr Bridle’s evidence to me was that Foodstuffs was ready, willing and able to sign an agreement with Uprite but only on the footing that it could be guaranteed supply and that, of course, was outside Mr Bridle’s hands because it was a matter for the employer.

[22] Mr Bridle’s evidence to the Authority suggests a succession of engagements between himself and Uprite as examples of the “*Catch 22*” principle where Uprite was complaining that Mr Bridle had not secured Foodstuffs’ signature on a document and Mr Bridle was retorting by saying that unless and until he could guarantee Foodstuffs supply of the product (because Uprite had secured that arrangement with the Malaysian suppliers) the matter could go no further.

[23] The evidence is that there were meetings between the parties on 6 March 2013, 4 April 2013 and 1 May 2013. I have Mr Bridle’s evidence of those meetings and he describes each of them as intemperate and unpleasant. My focus must be on the final meeting which Mr Bridle discussed in detailed terms at my investigation meeting. In the context of this impasse over the securing of the Foodstuffs contract that I have just identified, Mr Bridle says that one of the Uprite managers, Tim

Rudsdale, said to him words to the effect *“I’ve drawn a line in the sand on this. We can’t keep paying you a salary. We’ll pay you on commission”*.

[24] Mr Bridle says that Mr Rudsdale appeared to be speaking for himself initially when he made this observation because the other directors and managers of Uprite were also present at the meeting and they did not appear initially to be involved in this statement by Mr Rudsdale.

[25] However, Mr Bridle says that immediately after making that statement, Mr Rudsdale said something to the effect that he would talk to the other three later to ensure that they were all on the same page.

[26] In any event, at the end of the 1 May 2013 meeting, Mr Rudsdale told Mr Bridle to go away and think about the *“commission option”*. Mr Bridle said that he indicated immediately that they should simply make him redundant if they could not afford to pay him, noting that there was a redundancy provision in his individual employment agreement. Mr Rudsdale dismissed that suggestion out of hand, according to Mr Bridle.

[27] Mr Bridle says that Mr Rudsdale then phoned him up a couple of days later and asked Mr Bridle if he had made his decision. Mr Bridle’s retort was that there was no decision to make and that he regarded himself as continuing in the employment.

[28] Then, by letter dated 7 May 2013 which Mr Bridle received on 10 May 2013, Mr Bridle was dismissed from his employment. The letter purports to dismiss Mr Bridle on the footing that he had abandoned his employment and it required him to return company property to the employer. Pay was stopped immediately and the effect of that was that Mr Bridle was not paid for the final week that he was employed.

[29] I also note for the sake of completeness the day before the employer’s letter is dated, Mr Bridle wrote to Mr Rudsdale complaining about the disconnection of his work iPad and iPhone and seeking *“written clarification ... signed by you of my employment status”*.

[30] A personal grievance was promptly raised and the matter then proceeded to the Authority for investigation.

Issues

[31] The only issue in contention here is whether Mr Bridle was unjustifiably dismissed from his employment or not.

Was Mr Bridle unjustifiably dismissed?

[32] I have no hesitation in concluding that Mr Bridle was unjustifiably dismissed from his employment. It is clear on the evidence before the Authority that there was an intemperate meeting on 1 May 2013 at which Mr Bridle was confronted with a unilateral demand that he accept a commission-only basis for remuneration, that he made clear at the time that he was not interested in such an arrangement, but despite that, the employer made various more or less veiled threats to bring the employment to an end, including for instance suggesting that Mr Bridle return all company property to the employer.

[33] Then, within a day or so of that meeting, Mr Bridle received a telephone call from Mr Rudsdale in which the latter asked him again to commit to the commission-only basis for employment and Mr Bridle again refused.

[34] Then, when Mr Bridle found that his tools of trade (the iPhone and iPad) had been disconnected, he wrote to the employer by letter dated 6 May 2013 seeking an explanation as to his employment status. There was no reply to that letter but by letter dated the following day (7 May 2013), and received by Mr Bridle on 10 May 2013, the employer maintained that he was dismissed for abandonment of employment.

[35] I have to say that that claim, in the context of what had gone before, is simply extraordinary. There is not a shred of evidence that Mr Bridle abandoned his employment. Indeed, all the evidence is that he was trying to keep working after the 1 May 2013 meeting and that when he found that his tools of trade had been disconnected without any notification to him, he wrote to the employer seeking an explanation.

[36] It is the case that Mr Bridle never worked on the company's premises. That was because the company never provided him with an office. Mr Bridle's evidence is that he was explicitly told that he was to base himself from his home and he was provided with a company iPad and iPhone and all the other necessary accoutrements in order to make that possible. Given his role as a sales manager required him to be

on the road selling for large periods of time, and recognising as well that his employment package contained a car allowance which reflected the business use of his private vehicle, the arrangement to work from home made sense.

[37] But in fact, by the time the employer's letter was written, Uprite had already disconnected Mr Bridle's iPhone and iPad making it virtually impossible for him to carry out his duties so it is risible for the employer to claim, as it does in its letter of 7 May 2013, that it is Mr Bridle who has brought the employment relationship to an end.

[38] The fact is that the employment relationship was brought to an end by Uprite when Mr Bridle refused its demand that he cease being paid a salary and allowances and go onto a commission basis of payment. Having received Mr Bridle's refusal of that proposal, Uprite simply terminated his access to the tools of his trade so that he could not work, it stopped his pay immediately and it wrote to him alleging that he had abandoned his employment.

[39] Given that by the time Uprite had written to Mr Bridle alleging that he had abandoned his employment, it had already cancelled his access to the tools of his trade, there is no doubt in my mind that the employment relationship was brought to an end by it and not by Mr Bridle and accordingly, Mr Bridle was unjustifiably dismissed from his employment.

[40] The effect of the dismissal on Mr Bridle was significantly greater than might have been the case for a younger man in robust health. Mr Bridle told me about his struggle to get his health back and the devastating effects on him personally of losing his ability to provide for his family. His wife left him for a period because of his inability to provide for them, as he had always done, and the collapse of his health which was certainly exacerbated by the work requirements at Uprite has made it difficult for him to obtain fresh employment.

[41] He continues to struggle emotionally and physically with the consequences of the dismissal and those consequences must be visited on Uprite which I am satisfied has treated Mr Bridle poorly, both during the employment and in its clumsy process of terminating his employment. As Mr Bridle himself pointed out, Uprite could easily have made him redundant if its circumstances were such that Uprite was

unable to continue to meet the salary obligations to Mr Bridle and the job he was doing could no longer be sustained within the business structure.

[42] But instead, it chose to purport to dismiss him for abandonment of employment when there was not a shred of evidence that that was the case and indeed all the evidence is that it was determined on being rid of Mr Bridle and had already taken steps to bring the employment to an end before it even had the courtesy of telling Mr Bridle that he was no longer employed.

Determination

[43] Mr Bridle has satisfied me that he has sustained a personal grievance because he has been unjustifiably dismissed from his employment. The dismissal has caused him significant hurt and the consequences of it continue to be felt by him both emotionally and physically. Despite his talents, his health has precluded him from obtaining alternative employment and the overall consequences of those effects of the dismissal need to sound in compensation.

[44] Before considering the quantum of compensation, I must direct myself to the question whether Mr Bridle contributed in any way to the circumstances giving rise to his dismissal; I find that he was blameless.

[45] I direct that Uprite is to pay to Mr Bridle the sum of \$12,500 as compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act) to right the wrong that it has done to him by its callous dismissal of him.

[46] Mr Bridle also claims lost salary, unpaid car allowance, any holiday pay due and owing to him and payment of his legal costs. Because I have not had the benefit of hearing any evidence from the employer, and have not been provided with any calculations by Mr Bridle's representative, I can only deal with these matters on a global basis. I direct that Uprite is to pay to Mr Bridle as a contribution to these payments a further sum of \$5,000 such payment to be made pursuant to s.123(1)(c)(ii) of the Act.

[47] In respect to Mr Bridle's claim for lost ongoing remuneration, as I have already noted earlier in this determination, Mr Bridle has not kept good health since the employment and while that is at least in part a consequence of the employment, it is nonetheless a fact that Mr Bridle has not been able to work since the dismissal and on that footing I am unable to award him any further sum or sums for ongoing wages

that he might have lost as a consequence of the dismissal because it is plain that he could not offer himself for work since the dismissal, by reason of his ill health.

Costs

[48] Rather than reserve costs, given the failure of Uprite to engage in any of the Authority's process, I think the proper course is to fix costs at the Authority's usual daily rate. There were two attendances by Mr Silberstein before the Authority and the usual attendances prior to that. In all probability, Mr Silberstein's attendances would amount to rather more than the usual attendances for a half day Authority fixture.

[49] I direct that Uprite is to make a contribution to Mr Bridle's legal costs in the sum of \$2,000.

James Crichton
Member of the Employment Relations Authority