IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2014] NZERA Wellington 111
5470130

	BETWEEN	DALE BURNS Applicant
	AND	RANDWICK MEATS COMPANY LIMITED Respondent

Member of Authority:	P R Stapp
Representatives:	Barbara Buckett, Counsel for Applicant Fred Hills, Counsel for Respondent
Investigation Meeting:	1 and 17 September 2014
Submissions Received:	17 September 2014 at investigation meeting
Further documents and information	13 October 2014 (including amended statement of problem and statement in reply and written replies)
Determination:	30 October 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is an employment relationship problem arising out of Mr Burns' employment with Randwick Meats Company Limited in Lower Hutt. There are issues about Mr Burns' performance, position and role and duties, other terms and conditions of his employment, a final warning and allegations about him not being allowed to do his job, a claim that he has been demoted and an issue about an alleged suspension and the prospect of dismissal. There is conflict about the genuineness of the matters raised about Mr Burns and a claim that the final warning has more to do

with the uncovering of an affair that Raymond Fleetwood was having with another woman, and that Mr Burns knew about it and had kept it quiet.

[2] Mr Burns' claims that a final warning was unjustified and disadvantaged him in his employment.

[3] There is an ongoing disciplinary matter not yet completed. The matter is made complicated by that disciplinary matter, that this is an ongoing employment relationship and the escalating nature of his claims. Mr Burns has requested the Authority to consider various causes of action to resolve the employment relationship problem based on the following:

(a) Unjustified disadvantage in regard to the final warning;

(b) Unjustified disadvantage for him being prevented from doing his job, the claimed demotion and alleged threatened suspension and dismissal;

(c) Compliance on the terms and conditions of employment and anticipated suspension and dismissal;

(d) Compensation of $10,000 for hurt and humiliation under s.123(c)(1)(i);

(e) Costs.

[4] Since the statement of problem was lodged in the Authority Mr Burns' representative has lodged an amended statement of problem, which includes new claims for arrears of wages and more costs. In an amended statement in reply the respondent denies the claims and has objected to the change from the applicant. All new matters arising out of the amended statement of problem are reserved. This is to preserve the fairness to both parties as new claims have emerged that will require testing and more information.

The issues

[5] The following issues exist in the matter:

(a) What was Mr Burns' role and his duties in his employment; in other words was he a manager or a sales representative?

(b) What was the reason for the final warning and was the final warning justified?

(c) Was there a fair process in the issuing of the final warning?

(d) Has Mr Burns been allowed to do his job as per his employment agreement and arrangements?

(e) Have there been new terms unilaterally imposed on Mr Burns?

(f) What is the nature of the employment relationship problem; except for the claim of unjustified final warning? This includes:

(i) The claims for an alleged unilateral change to Mr Burns' terms and conditions of employment;

(ii) The claims as to him being suspended;

(iii) The claims of anticipated dismissal.

(iv) The claims for arrears of wages and costs.

(g) What are Mr Burns' personal grievance claims?

(h) Can the Authority make an order for compliance in anticipation?

(i) There are a number of factual differences between the parties which will be dealt with as necessary, and as the evidence will need to be assessed as to the witnesses' credibility.

The facts

[6] Randwick Meats is co-owned by Louise and Raymond Fleetwood. It started as a small butcher shop in Moera with five staff. The business was moved to Nelson Street in 1997. Later a building was purchased in Pharazyn Street. Mr and Mrs Fleetwood manage and work in the business. They use accountants and a lawyer. The business has up to 35 employees.

[7] Mr Burns has been an employee of Randwick Meats Company Limited for approximately 23 years. Initially and briefly he worked for Randwick Meats as a butcher, but he left after an argument with the owner Mr Raymond Fleetwood.

Subsequently Mr Burns returned when he accepted a role in 1991 that required him visiting customers and creating new business. It is common ground that he did not return as a butcher because he and Mr Fleetwood could not work closely together without arguing. Instead it is common ground that they reached an agreement that the employment involved him creating and maintaining sales off site for much of the time, and that over time his role evolved into *fixing* various matters that arose in the business and at the premises. It is also common ground that he acted up as the manager in instances where the owners, Louise Fleetwood and Ray Fleetwood, were on leave. They trusted him. For example they went on leave in August 2013 and Christmas and New Year 2013-2014. There has been no written employment agreement signed off by the parties. Apparently a written agreement was left for Mr Burns much earlier in his employment when a new accounts manager tried to put one in place (and was successful with other employees), but Mr Burns' allegedly never returned it when other the employees signed theirs off.

[8] Although Mr Burns referred to himself as a manager it is consistent that this was more in the role of a sales/accounts manager that involved sales, than a manager in the true sense of the word. I accept Mr Burns had responsibility and was relied upon, especially by Ray Fleetwood, to act up when the owners were on leave and that he was allowed to fix problems when he could. Mr Burns confirmed in his evidence that prior to the arrival of a new account manager he was responsible for sales. He referred to his duties in the following way:

> *I was following up, I would visit customers for menu changes, prices, complaints, accounts overdue, but it was physically impossible for me to go and see everyone on a regular basis. The only way customers can now be visited more regularly is because Randwick Meats hired Peter and Phil purely as salesmen, and they took over sales areas that I previously had to cover all by myself.*

[9] Mr Burns says that Louise Fleetwood *had no idea about sales and that the whole customer base was originally mine.* I hold that his role was primarily to attract business including sales and only to manage when he was acting up when the owners were on leave.

[10] There was also one instance where Mr Fleetwood gave his permission for Mr Burns to deal with an employment issue involving another employee (the account manager). This was because Mr Fleetwood had some difficulty with the employee on

a personal basis. Mr Burns was required to deal with the matter and sign off on the employment relationship problem with that employee (the account manager) and on behalf of the business. The permission for this one off matter cannot lead to a conclusion that Mr Burns was permanently in such a position to carry out this type of work. Nor can I accept that his attendance to security matters meant that he was a manager. Mr Burns was obviously relied upon and considered to be dependable to do the tasks required, (and indeed when asked to act up). After he dealt with the employment matter with the accounts manager he was provided with a work vehicle and given a pay rise. There still remained no written terms signed off in writing.

[11] In the background (and prior to the arrangement made for Mr Burns to act up on the account manager's employment relationship problem) Louise Fleetwood discovered that her husband had been having an extramarital affair, which had been going on for a number of years. The affair was known to Mr Burns and to at least one other sales representative and the accounts manager. Mr Burns claims that when Louise Fleetwood discovered Mr Burns' involvement in allegedly covering up the affair from her, he says her attitude towards him noticeably soured. Mr Burns claims that Mr Fleetwood also then tried to distance himself and the consequence was that the Fleetwoods commenced threatening his job security in retaliation over the part that he was required to play in the affair. He claims that his final warning appears to have come from nowhere. I will return to the sequence of events with regard to the warning shortly.

[12] I have to say that the timing of the discovery of the affair means that it is improbable that the affair has any connection and/or causal link in regard to the matters that Louise Fleetwood and Raymond Fleetwood later took up with Mr Burns and the actions that have been claimed to have caused any disadvantage to Mr Burns. This is especially as the affair came to light many months earlier in January 2013 when Raymond Fleetwood told Louise Fleetwood about it. Indeed later Mr Burns was asked to deal with the employment relationship problem with the account manager, so they still trusted him and had confidence in him.

[13] I return to the events. Towards the end of 2013 the Fleetwoods became concerned about anecdotal evidence from customers that Mr Burns had not been seen by them for quite some time. As a result the Fleetwoods decided to install a GPS system in Mr Burns' work vehicle. This was done without Mr Burns' knowledge and

secretively. The first reports related to 23 and 24 December 2013 when the Fleetwoods were away. Mr Fleetwood noted the time that Mr Burns went home on both days during the busiest time of the year when Mr Burns could have been helping. This upset Raymond Fleetwood considerably. Mr Burns has been critical that the Fleetwoods put the GPS in his vehicle. I accept that they had no reason to put a system into the other two salespersons' vehicles, one of whom used his own car. There has been no personal grievance of unjustified action based on the GPS brought by Mr Burns. Randwick may well be open to criticism for acting secretively, but in the context of running its own business and on the basis of the information it had received about Mr Burns' hours and the agreement they say they all reached, any breach of good faith was not fatal in the context of the issues. Also, there can be no disparity of treatment because of the situation.

[14] As an outcome of a meeting held at the Felix café in Wellington in October 2013 arrangements were put in place for Mr Burns, Peter Cooper and another salesperson to cover the businesses' customers that involved them crossing over into each other's territories and sometimes dealing with each other's customers. The territories were allocated to each of the sales people, although there was an overlap of work dealing with different customers. Issues raised by Mr Burns about this are not material, except for him to explain what he was doing at Wellington airport, I hold.

[15] There were no set hours for Mr Burns (and the other sales people) at this time and hours were required to suit the needs of the business. The evidence supports that Mr Burns started work at 7am in the morning as his role evolved. That start time was moved to 6am when Mr Burns would take down early morning orders from the telephone and carry out and/or arrange deliveries. Mr Burns seemed to have no problem with the arrangements.

[16] During the 2013-2014 Christmas/New Year period Mr Burns sustained a personal injury and he was prevented from attending work for approximately three months. Upon his return to work the meeting of 28 March 2014 was arranged. This was arranged to discuss a variety of matters including informing Mr Burns that the GPS device had been installed in the work vehicle on the basis of the information about his work. At that meeting the following occurred:

(i) Mr Burns was handed a copy of an employment agreement to consider because it was still outstanding. He was told to return it with any comments;

(ii) There were issues about Mr Burns leaving work early on 23 and 24 December 2013. Mr Burns did not dispute the times and he did not provide an explanation. Instead I was informed that however he managed the business when the owners were away was his decision and that he was entitled to make such a decision. The point is that he had been left in charge and the owners had a reasonable expectation that he would be at work at least to help out on the busy days prior to Christmas. The employer was entitled to raise this matter for an explanation, I hold.

(iii) There was a discussion on the hours of work and the Fleetwoods say that Mr Burns agreed to work from 7.30am to 3.30pm. The evidence is that Mr Burns was leaving work early, and the employer was entitled to have concerns about that, I hold. Given that the Fleetwoods understood that there had been an agreement on the hours they were entitled to come to the conclusion that Mr Burns' failure to work his hours was a serious matter, especially without any adequate explanation.

(iv) The Fleetwoods requested Mr Burns to fill in a daily call cycle report on customers that he had seen, including the date and time and any other relevant information. The fact that he did not continuously fill out the forms meant that he was not following the owners' instructions.

(v) It was agreed to have monthly meetings so any issues could be discussed. These do not appear to have occurred.

[17] At the meeting (on 28 March 2014) I accept that Mr Burns agreed with Raymond and Louise Fleetwood to commence work at 7.30am and finish at 3.30pm, yet afterwards an issue about his hours emerged again. The agreement was confirmed in a file note provided to Mr Burns (Doc.1, Volume 1 of the respondent's bundle of documents). Indeed GPS reports on the movement of Mr Burns' vehicle, obtained by the Fleetwoods later, support that Mr Burns invariably began work at approximately

7.30am. Initially he started to finish work at 3.30pm (Doc.38, Volume 2 of the respondent's bundle of documents), but it emerged that this was not consistent and he sometimes finished work much earlier. In light of the evidence I cannot find that any hours were unilaterally changed. I accept the Fleetwoods' evidence that this meeting occurred and an agreement was reached at the time with Mr Burns.

[18] The Fleetwoods intended the meeting to be low key where issues could be aired and the employment relationship could continue in a constructive way. A written summary of the meeting was provided and given to Mr Burns (on 1 April 2014).

[19] After 28 March 2014 fresh concerns came about that Mr Burns was not attending to his duties from the other sales staff, that he was leaving work early, and that he was not following the instructions to fill in and submit the daily call cycle reports. The Fleetwoods decided to investigate these concerns further and wrote to Mr Burns on 20 May 2014 (20 May investigation letter) requesting another meeting. Instead of meeting in a neutral place the Fleetwoods decided to use the office of their lawyer in Wellington, with their lawyer present. This was open to the employer, but as it transpired it escalated the matter, I hold. The response from Mr Burns when he decided to have his lawyer present at the meeting was not surprising.

[20] Mr Burns' lawyer responded on 21 May 2014 requesting a postponement of the meeting and made a Privacy Act request for information on 22 May 2014. Information was provided on 23 May 2014 including the draft employment agreement.

[21] On 23 May 2014 Mr Burns' lawyer requested more details in regard to the matters referred to for investigation by the respondent.

[22] On 23 May 2014 Randwick Meats replied through the Fleetwood's lawyer confirming the allegations set out in the investigation letter dated 20 May 2014.

[23] An investigation meeting was held on 27 May 2014. The meeting was recorded, and there is a transcript of it. The meeting deteriorated and primarily became a meeting between the parties' representatives making their issues and taking set positions on the law and inviting various responses from each other, with the parties involved only incidentally. This distracted the parties' attention from the underlying issues that the Fleetwoods requested explanations from Mr Burns about.

[24] In summary, Mr Burns took the view through his lawyer that the employment agreement was not operable and that this meant without any job description that the process that the employer was following was flawed. This is because there were no terms and conditions of employment signed off by the parties and in writing. In this regard arguments arose as to the absence of an written employment agreement and a job description, there being no reference to a contract or job description and a refusal to accept that the respondent could ask Mr Burns any questions if it could not show that there was an agreement in regard to the start and finish times for work. Further, Mr Burns claims that in the absence of any written employment agreement the employer had no basis to try and discipline him.

[25] The Fleetwoods say they simply wanted to talk to Mr Burns in regard to the various matters about his employment and that they were being prevented from doing so, because Mr Burns would not answer and his lawyer was raising a new range of issues.

[26] The decision by both parties to engage their lawyers meant that it became virtually impossible for the parties to speak directly with each other (or the parties were overwhelmed by the involvement of the lawyers). Subsequently there was no decision as to what the next step of the process would be, except that any response in reply to the allegations would be done through the lawyers and in writing.

[27] Subsequently, Mr Burns has presented a medical certificate and although he has attempted to return to work and Randwick Meats has requested a work clearance, there has been no resumption of work and Mr Burns remains on sick leave.

[28] There was correspondence between counsel addressing the allegations and submissions made for Mr Burns by his lawyer. These have become entrenched in regard to both lawyers' views of the law and what the parties are or are not allowed to do.

[29] On 5 June 2014 Randwick Meats wrote to Mr Burns confirming its findings and issuing a final warning (5 June 2014 letter). The respondent found:

(i) That Mr Burns agreed to change his hours in the 28 March 2014 meeting;

(ii) That following the 28 March 2014 meeting Mr Burns commenced work around 7.30am and there were examples where he appeared to comply with the 3.30pm finish time. There is also their evidence that Mr Burns' started to finish much earlier.

(iii) That the expectation of the Fleetwoods was for Mr Burns to visit existing customers and cold-call on new customers;

(iv) That Mr Burns did not provide a response to the concerns about the time he started leaving work early and what he was doing and thus in the absence of any reasonable information, Randwick Meats was unable to reach any other conclusion than that Mr Burns was visiting areas on non-work related matters during work time;

(v) That Mr Burns was aware of the requirement to provide call cycle reports, but failed to do so.

[30] In the meantime the parties remained in dispute in regard to the employment agreement that had been proposed by the Fleetwoods for Mr Burns' employment with Randwick Meats.

[31] The next development was that on 2 July 2014 Mr Burns raised a personal grievance challenging the final warning. This has been resisted by the respondent. In essence that matter has interrupted any return to work by Mr Burns and there has been no settlement of the parties' differences, including getting agreement on a written employment agreement; and with the matter escalating to include further allegations and the prospect of further disciplinary action. The parties attended mediation. It now falls to the Authority to make a determination to resolve the employment relationship problem.

Determination

[32] First Mr Burns was an accounts manager (sales representative), and he had a range of other responsibilities and duties to fix things, do accounts and deliveries and to act up when the Fleetwoods were away. Beyond this he could not be called a manager in the usual sense. Next I hold that in light of the absence of any signed off written employment agreement it can hardly be the case that he had been demoted as

claimed. Third the evidence makes it more likely than not that there was an agreement about the hours of work and for call reports to be provided.

[33] As I have already found there has been no causal link between Louise Fleetwood finding out about Raymond Fleetwood's affair and the matters that have been brought to Mr Burns' attention. It was open to a fair and reasonable employer to raise with Mr Burns his attendance, his work and the completion of the daily call cycle report on customers. Subsequently (after the meeting on 28 March) Mr Burns knew there was a GPS system in his vehicle, and he did not complain. I hold that there was an agreement about the hours and that Mr Burns would complete the daily call cycle report on customers because there was no document to the contrary and Mr Burns' never replied to the Fleetwoods' memo of 28 March, until his lawyer took up the issues and only after the next issues were raised by the Fleetwoods. Indeed his actions support the agreement being reached when he started to work the new hours and did provide call reports for a week. The call reports stopped contrary to the owners' instructions. I hold that a fair and reasonable employer could issue a final warning given the gravity of the allegations relied upon (not explaining his hours, not following the owners' instructions).

[34] Second, Mr Burns was put on notice of the employer's concerns and how serious they viewed them. He had the opportunity to comment and reply. It was his decision to do this through his lawyer and have his reply made in writing.

[35] I have dealt with the issue of the hours and Mr Burns' duties and responsibilities in his role and the underlying matters about the GPS. It is not necessary to take that any further, although I note that there were some issues raised during the investigation meeting about the collection and use of the GPS information. There was no adequate response from Mr Burns to the concern about what he was doing in the time he was required to be working. I am satisfied that Mr and Mrs Fleetwood decided that Mr Burns had not followed instructions by not completing the customer call cycle reports as requested. This was about the number he had completed and that he did not continue with them. There was another issue that emerged about this during the investigation meeting. That issue is that he was being treated differently to the other sales staff in regard to what they were providing in the reports. Indeed the evidence is that the other sales staff regularly provided their reports, albeit the detail in the reports from them was different. This is a completely

new issue brought up during the Authority's investigation meeting and as a matter of background it may be that the parties need to talk more about the detail required in the forms.

[36] This is a situation where Mr Burns has no written employment agreement as such. Section 242 of the Employment Relations Act 2000 applies, because Mr Burns' employment had commenced before 2 October 2000. He commenced work at Randwick in 1991. He did not have to have a written employment agreement. Section 242 of the Act reads as follows:

> ***242 Enforcement of existing individual employment contracts***
>
> *(1) Every individual employment contract within the meaning of the Employment Contracts Act 1991 that is in force immediately before the commencement of this Act continues in force according to its tenor and is enforceable in the Authority or the court.*
>
> *(2) Part 6 does not apply in relation to any individual employment contract to which sub section (1) applies.*

[37] Randwick Meats is not prevented from taking disciplinary action where there is no signed off employment agreement. It has justified its reasons for the disciplinary action, and they do not relate to retaliation over the uncovering of the affair, I hold. Indeed the Employment Relations Act 2000 provides the test to justify any action and the procedural requirements that have to be met to justify the action, and this applies in the absence of an agreed written employment agreement. I am satisfied that the employer did consider the reply and decided to issue a final warning based on the information they had. A fair and reasonable employer could do so, I hold.

[38] The problem now arises as to where the parties go from here. This is an on-going employment relationship which is being made more difficult and complicated by both parties' decision as to the manner in which they are engaging with each other. This has resulted in an evolving number of issues that are being built upon and causing both parties to lose sight of the significance of the requirement to communicate with each other in terms to make their employment relationship successful. It seems that a problem solving approach is needed here instead of the unrelenting legal approach that is unfolding. The employment relationship problem has been made even more complicated because of the employer's right to raise more concerns for investigation and possible discipline and alongside this the attempts to finalise an agreed employment agreement. Also, there is an issue about both parties

even agreeing to a resumption of normal work and when this can occur and on what terms.

[39] I am not willing to interfere in these matters on the terms put to me. As such the amended statement of problem and the statement in reply raise more issues that all I can do is to reserve in the meantime. It is entirely unsatisfactory for claims to be allowed to evolve without very good reason and to escalate an employment relationship problem when the actual problem is founded on a few significant matters that should be resolved with appropriate communication and the appropriate remedy resulting from the original statement of problem. It is most unusual for matters in an investigation meeting to be used as new claims (although this is an on-going employment relationship), especially while the parties are waiting on a determination. The statement of problem must be able to be relied upon to set out the employment relationship problem with some certainty and how the parties want the matter resolved, and it has not been helpful to have the amended statement of problem escalating the matter further during the investigation. Suffice to note that Randwick Meats denies the claims and opposes the statement of problem as amended. As I said earlier all I can do is to reserve such claims for a proper response and more information.

[40] There is no basis for me to enter penalties for alleged breaches of the Act (and indeed such an approach is not a practicable way to deal with the communications problem in this case and to support a successful employment relationship as this is an on-going one); and there has been no details provided of any arrears of wages. Also, I am very unclear as to what Mr Burns is seeking for compliance. It is not my role to set his terms and conditions of employment and especially so where they are subject to negotiation since there is no agreed written employment agreement. His duties and title hardly fit a need for enforcement when he knows what he is required to do. In any event the differences are in the background of the employment relationship problem and the strategies the parties have decided to resort to.

[41] The matters relating to an alleged suspension and any threat of dismissal are not able to be dealt with by compliance in anticipation of what might happen. The processes open to both parties are still to be worked through. The employer is entitled to follow the process as is Mr Burns entitled to have a written employment agreement, subject to it being agreed. I am not satisfied that this employment relationship

problem has anything to do with compliance yet. These matters will have to be dealt with in the fullness of time if they cannot be sorted once the party concerned has the opportunity to comply over a disputed matter such as the hours and duties, including the right of the employer to require call reports.

[42] I cannot emphasise more than what I have been saying that the parties need to talk to each other. During the Authority's meeting, although it was tense and difficult, Mr Fleetwood and Mr Burns showed signs that they could still work together and talk to each other. Their communication needs to be framed in a problem solving setting, not necessarily a legal one, unless they are committed to the current course action. Mediation is a cheap and cost effective way to talk directly. Since Messrs Fleetwood and Burns have such a long relationship working together, then surely they can talk to each other properly, and could be assisted by an independent third party.

[43] I conclude by dismissing Mr Burns' claim that his final warning was unjustified. Thus any disadvantage cannot form the basis of a personal grievance. The evidence does not support the claim that he was demoted, that there was a unilateral change in the terms; and enforcing the terms for agreed hours and the provision of call reports are within what the employer is entitled to do to run its business.

[44] The residual matters in the amended statement of problem and the respondent's reply are reserved.

Costs

[45] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority