

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 384
5467604

BETWEEN KERRY BURROWS
 Applicant

A N D BUNNINGS LIMITED
 Respondent

Member of Authority: T G Tetitaha

Representatives: A Bendall/M Taumaunu, Counsel for the Applicant
 D France, Counsel for the Respondent

Investigation Meeting: 21 August 2014 at Gisborne

Submissions Received: 19 and 26 August 2014 from the Applicant
 19 and 26 August 2014 from the Respondent

Date of Determination: 15 September 2014

DETERMINATION OF THE AUTHORITY

- A. There is an implied term of Kerry Burrows' employment that she is provided with a healthy and safe work environment. This has been affected to her disadvantage by Bunnings Limited's failure to turn its mind to the hazard of the cold temperature and its effect upon Ms Burrows' performing her sedentary job.**
- B. The breach the duty of good faith claim is dismissed.**
- C. An order that Bunnings Limited pay compensation of \$5,000 pursuant to ss.123(c)(i) of the Employment Relations Act 2000.**
- D. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.**

Employment relationship problem

[1] The applicant, Kerry Burrows, was employed by Bunnings Limited (the respondent) as an administrator in 2007. Following alignment of her role with the respondent's Goods Inwards Receiving department (GIR) she moved from an internal office to the GIR warehouse area. Ms Burrows claims she was unjustifiably disadvantaged by this decision and it was been a breach of the respondent's duty of good faith.

Facts leading to dispute

[2] The parties entered into an individual employment agreement on or about 3 February 2007. At the time of her employment, Ms Burrows' primary duties were in accounts payable. These duties included general administrative work including accruals, claims, credit notes, stock transfers and account inquiries.

[3] In September 2012 her accounts payable duties were removed due to implementation of a new Accruals and PBS system. Her remaining duties were in GIR.

[4] For most of her employment she worked in an inside dedicated office shared with the banking and wages clerk.

[5] Ms Burrows suffers from back problems resulting from herniated vertebral disks. The respondent provided her with a chair to accommodate her back issues.

[6] In July 2013, the parties discussed moving Ms Burrows from her office to GIR. GIR is located in a large warehouse space to the side of the store. The warehouse is 6m wide by 10m in length with dexion racking on both sides, one being 53cm wide and other being 84cm. Against the rear wall is a large desk, filing cabinets, phone, printer and computer. There are two large doors in GIR. One is a rapid door and the other is a roller door which stays open throughout the day. There are two forklifts used in the yard. Trucks back up to the roller door that is open.

[7] Ms Burrows was unhappy and expressed her discontent with the proposed move.

[8] A further meeting occurred in October 2013. There is a dispute about whether the move was discussed again.

[9] During Easter 2014, Ms Burrows' desk and other personal items were moved from the interior office to GIR. Ms Burrows was advised the computer would need to be shared with the GIR team.

[10] At the end of April 2014, Ms Burrows complained about the wind coming through and it being cold. The respondent fixed the rapid door, gave Ms Burrows a heater and arranged for a "wind block" in the form of a 2m high and 1m wide piece of melamine propped inside a shelf covering the area where she sat at her computer.

[11] On 30 April 2014, Ms Burrows was approached about changing her chair. There was a disagreement and the chair remained the same. The disagreement resulted in a disciplinary process.

[12] On 12 May 2014 Ms Burrows raised a personal grievance of unjustified disadvantage.

[13] In June 2014 Ms Burrows required further sick leave.

[14] On or about 2 July 2014, a Statement of Problem was filed seeking urgency. At a teleconference on 4 July the matter was referred to urgent mediation together with timetabling directions in the event it was unable to be resolved.

[15] At a further teleconference on 21 July 2014 this matter was granted urgency due to the continuing relationship and the applicant's health problems. A two-day hearing including a site visit was set down in Gisborne on 21 and 22 August 2014. It is now before me for determination.

Issues

[16] The following issues arise:

- (a) Was Ms Burrows unjustifiably disadvantaged in her employment or one or more of her conditions of employment being affected to her disadvantage by some unjustifiable action by Bunnings; and
- (b) Has Bunnings breached its statutory duty to act in good faith by failing to consult Ms Burrows about changing the conditions of her employment and/or acting in a manner so likely to destroy the relationship of trust and confidence?

Was Ms Burrows unjustifiably disadvantaged in her employment or one or more of her conditions of employment being affected to her disadvantage by some unjustifiable action by Bunnings?

[17] The applicant submits she has been disadvantaged because she was moved into an environment which is unsafe, too cold and too exposed to the elements. She also submits the work environment makes performance of her duties considerably more difficult than before. She also raised concerns about safety arising from the use of forklifts in the GIR and submitted the sharing of a computer and other equipment created disadvantage.

[18] The respondent submits the location of the applicant's work station is not a condition of the applicant's employment. She has no contractual right to work in any particular area of the Bunnings Gisborne complex. Although it accepted there is a condition of employment that the applicant is provided with a healthy and safe work environment, it denies the location of her work station in GIR breaches this or any term of her employment. In particular the respondent points to the wind block, provision of clothing and offer of an appropriate heater to ensure her work area was warm. It denies this is a hazardous working environment. Having to share computers and other equipment does not breach any contractual right nor is it a necessary requirement of her job that she have sole use of a computer or other equipment.

[19] This is an application to determine a personal grievance arising from alleged unjustified disadvantage. The law requires proof "*that the employee's employment, or 1 or more conditions of the employee's employment ... is or are or was ... affected to the employee's disadvantage by some unjustifiable action by the employer ...*"¹

[20] I do not accept there was disadvantage arising from sharing equipment such as a computer. There is no express or implied term of employment this applicant has exclusive access to a computer or other equipment. Ms Burrows' evidence was she required use of a computer for 2 hours per day at most. The remaining equipment was used infrequently. My impression of the evidence was she could do her job and share the equipment with the other staff with better time management. The evidence does not meet the required standard of proof to show disadvantage by the respondent's action requiring she share this equipment. This claim is dismissed.

¹ s103(1)(b) Employment Relations Act 2000

[21] I do not accept there was disadvantage arising from forklifts operating in and around GIR. It was accepted by Ms Burrows' the forklifts primarily worked outside GIR. An internal forklift type machine was used to move items around the GIR warehouse, but Ms Burrows told me at hearing this did not create any safety issues for her. In the circumstances the evidence does not meet the required standard of proof to show disadvantage by the respondent's action. This claim is dismissed.

[22] The principle issue is whether the implied term that Ms Burrows is provided with a healthy and safe work environment has been affected to her disadvantage by some unjustifiable action by the respondent.

[23] The starting point for an unjustified disadvantage claim is the parties' individual employment agreement² to identify the term of employment alleged to have been affected to Ms Burrows' disadvantage. The relevant terms are her duties (clause 2), Team Handbook (clause 7), hours and location (clause 8), safety (clause 12), clothing (clause 16) and employment problem procedures (clause 17).

[24] Ms Burrows' duties involved "*any work related to the administration and service of customers with products the company stocks*" (clause 2). Her tasks and duties were to be outlined in a job description. Ms Burrows denies she received or signed any job description. No job description has been produced.

[25] The respondent "Team Handbook" set out additional conditions of employment not in the agreement. I return to the "Team Handbook" later in the decision.

[26] Ms Burrows' place of work is recorded as "*Bunnings Gisborne*". No specific area of the store is recorded. There is no express contractual right for Ms Burrows to work within an interior office.

[27] Clause 12 dealing with safety refers to Section 4 of the Team Handbook. This part of the handbook was not filed in evidence. However it does make reference to the "Health and Safety Act" which appears to be a reference to the Health and Safety in Employment Act 1992. This Act sets out statutory duties upon employers including:

² Individual waged employment agreement between Bunnings Limited and Kerry Burrows dated 3 July 2007

“Every employer shall take all practicable steps to ensure the safety of employees while at work; and in particular shall take all practicable steps to provide and maintain for employees a safe working environment; and... ensure that while at work employees are not exposed to hazards arising out of the arrangement, disposal, manipulation, organisation, processing, storage, transport, working, or use of things ... In their place of work, near their place of work and under the employer's control ... ”³

[28] The Act also requires a method of identification of hazards (section 7) and where there are “significant hazards” the employer shall take all practicable steps to eliminate it (section 8). “Significant hazards” are defined in section 2 as:

“a hazard that is an actual or potential cause or source of ... serious harm; or ... harm (being harm that is more than trivial) the severity of whose effects on any person depend (entirely or among other things) on the extent or frequency of the person's exposure to the hazard; ... ”

[29] The Act sets out a scheme for identification of hazards then a requirement for employers to take all practicable steps to provide and maintain a safe working environment. Significant hazards were to be eliminated immediately.

[30] Although this is not a health and safety in employment prosecution, these sections impose health and safety duties upon employers. These duties must form part of an employee’s terms and conditions of employment.

[31] Ms Burrows identified ongoing concerns through May, June and July 2014 about the cold temperature in the GIR warehouse. It was accepted her job is primarily a sedentary one involving 2 hours at a computer and other administrative work carried out on the desk adjacent to the computer. At hearing she produced evidence of temperatures within GIR she has taken at various times during the day. These range from 6 to 14 degrees for the period July/ August 2014.⁴

[32] Some steps were taken to address those concerns. Prior to the move, Ms Burrows’ manager Miriama Keno-Strong, arranged to have the rapid door fixed so it was not constantly open. She provided a melamine wind block for the computer area. She ensured Ms Burrows had access to appropriate clothing and a heater. She made

³ Section 6 Health and Safety in Employment Act 1992

⁴ Attachment B3 Applicants Witness Statement in Reply

enquiries with other employees working in and around the GIR warehouse but they had no concerns about the temperature. After the personal grievance was raised efforts by the respondent to address her concerns stopped. Ms Keno-Strong's evidence was these matters were left to the human resources department to address from then on.

[33] I undertook a site visit with the parties of her work area. The area where the computer sits is approximately 1 ½ metres wide partially bordered by a shelf, with a concrete wall to the side and a desk against the rear wall. The melamine wind block only partially covers the area where Ms Burrows works namely where the computer is located. A temperature thermometer used to record the GIR temperatures by Ms Burrow's was located on the outside of the wind block. The remainder of the desk is exposed to the outside by the open roller door at the rear of the warehouse. The roller door is located approximately 6 meters from her desk and spans the length of the wall. The rapid door took one third of the wall to the immediate left of the desk. There was a noticeable draft when the rapid door rises and closes. Only Ms Burrows sits in the GIR warehouse for the entirety of her working day. Other GIR employees primarily work outside or inside the main store. They occasionally use her desk and computer and file paperwork in filing cabinets located at the end of the desk. Otherwise they appear to be moving around and not stationed in one area. The interior of the store has large overhead heating. The GIR warehouse has no heating or cooling facilities. GIR employees are expected to regulate any temperature issues by removal or addition of clothing. Ms Burrows was also given use of a small plug in heater. It appears at the time she acquired the heater a larger more appropriate one was not available.

[34] This matter came to a head since the onset of winter. Besides the cool temperatures, Ms Burrows produced evidence of continued ill health since moving to GIR.⁵ There was no other reasonable explanation for her ill health than that set out in her evidence. Ms Burrows was also concerned about the rise in temperature in summer but there is no evidence to support that proposition at this stage.

[35] What is clear is there has been no proper consideration of the temperature and the potential hazard to Ms Burrows since Ms Keno-Strong took the above steps. In particular the respondent has failed to turn its mind to the effect of the cold

⁵ Attachments C1 to D Applicants Witness Statement in Reply; Witness Statement Dr F Aitcheson in support of Applicant sworn 21 August 2014.

temperatures upon Ms Burrows' given the sedentary nature of her job. She does not have a similar job to other GIR employees moving around inside the store and outside the GIR warehouse. I accept it took some steps through Ms Keno-Strong's efforts in April 2014. However the inaction since the personal grievance was raised in May 2014 has worsened the problem. Ms Burrows subsequently suffered illness in June 2014 linked to the temperature and her pre-existing back problems. The temperature may now be a significant hazard in the circumstances, requiring immediate action.

[36] There has been no further investigation of Ms Burrows' concerns. There was evidence the respondent could access advice from other stores such as Hamilton about their GIR setup for administrators. It also has a human resources team and access to health and safety advice. The only advice sought appears to be from human resources to address the legal aspects of the application. Advice on practical steps to eliminate the hazard does not appear to have been sought. Having regard to its positive statutory duty to eliminate workplace hazards, it is surprising no further steps were taken.

[37] These are not the actions of a fair and reasonable employer in all the circumstances. These defects were not minor and did result in unfairness to the applicant. Ms Burrows was unjustifiably disadvantaged.

[38] There is an implied term of Kerry Burrows' employment that she is provided with a healthy and safe work environment. This has been affected to her disadvantage by Bunnings Limited's failure to turn its mind to the hazard of the cold temperature and its effect upon Ms Burrows' performing her sedentary job.

Has Bunnings breached its statutory duty to act in good faith by failing to consult Ms Burrows about changing the conditions of her employment and/or acting in a manner so likely to destroy the relationship of trust and confidence?

[39] Ms Burrows submits she ought to have been consulted about the move to GIR pursuant to the statutory duty of good faith in s4 of the Act. The respondent denies the move to GIR required consultation and even if it did, there were two meetings where this was discussed. Further, the evidence did not support imposition of a penalty under s4A.

[40] With respect I agree with the respondent. There is no statute or contractual term requiring consultation prior to a change in Ms Burrow's work area. There were some discussions in July and October 2013 about the move to GIR. The applicant made her objections known in July. Ms Keno-Strong noted her objections and made changes to her GIR work area. The decision to move her to GIR was subsequently implemented. I accept the respondent's evidence the delay in implementing the decision to move was due to other business factors.

[41] There was no evidence of a breach of term requiring consultation. There was no evidence the respondent's actions failed to meet the duty of good faith in s4(1A) of the Employment Relations Act 2000.

[42] Even if there was a breach of the duty of good faith by failing to consult, it would be an empiric victory at best. The remedy for a breach of good faith is in s4A. To justify imposition of a penalty for a breach of the duty of good faith, the applicant must show the breach was deliberate, serious and sustained (s4A(1) or that it was intended to undermine the employment agreement or employment relationship (s4A(2)(ii) and (iii)). There is no evidence before me which meets the tests for imposition of a penalty.

[43] In the circumstances, the breach of the duty of good faith claim is dismissed.

What remedies should be awarded?

[44] The applicant seeks a compliance order for her personal grievance of unjustified disadvantage. This is not a remedy for a personal grievance. The remedies for a successful personal grievance are set out in s123 of the Act.

[45] There is no separate action for breach of an employment agreement. This application has been framed as a personal grievance, evidence provided and the decision made based upon that premise. A new action for breach of the employment agreement cannot be proposed by way of final submission or buried within remedies in a statement of problem.

[46] I am also uncertain of exactly what the terms of the compliance order would be other than to comply with the above implied term as to health and safety. A draft compliance order setting out its terms including the period of time for compliance ought to have been filed.

[47] The matter may be adjourned “*without imposing any penalty or making any final determination, to enable the compliance order to be complied with while the matter is adjourned*” (s138(5)). The parties accept the respondent is already attempting to remedy the situation. In the circumstances, I decline to make a compliance order.

[48] There are sufficient remedies for the personal grievance application to meet what is required to remedy this matter. No remedies for lost wages under s123(1)(b) are sought because Ms Burrows remains employed.

[49] Ms Burrow’s seeks compensation for hurt and humiliation under s 123(1)(c)(i). Any loss of dignity and injury to feelings must be causally related to the unjustified disadvantage arising from the employer’s inactivity in relation to her concerns about the cold temperatures. There is evidence the respondent’s failures resulted in illnesses including depression and distress to the point where she did not wish to go to work at all. The evidence justifies more than a nominal award. This is especially having regard to the statutory duties upon employers to address hazards within the workplace. An award of \$5,000 is appropriate in the circumstances.

[50] There are no contributory factors justifying a reduction in the award made under s124. There was an allegation Ms Burrows failed to access warmer clothing and a larger more appropriate heater. I accept Ms Burrows evidence her existing clothing was warmer than the proffered Bunning’s clothing and no larger appropriate heater was available at the time.

Costs

[51] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

[52] A party seeking costs must ensure they file copies of their actual invoices including a breakdown of fees incurred for mediation and preparation and attendance at hearing. If more than one counsel’s fees are sought to be recovered, justification for the recovery of both counsels’ fees and separation of the work undertaken by each counsel is required.

[53] Parties must provide justification for costs sought in excess of the Authority's daily notional tariff (currently \$3,500).

[54] Failure to provide adequate information in support of a costs award may result in the refusal of a costs application.

T G Tetitaha
Member of the Employment Relations Authority