

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 214
5395610

BETWEEN BRENDON MICHAEL
 ROLAND CAIRNS
 Applicant

A N D BIKE RETAIL GROUP
 LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Grant Slade, Representative for Applicant
 Rita Nabney, Counsel for Respondent

Investigation Meeting: 14 May 2013 at Auckland

Submissions Received 14 May from Respondent
 21 May from Applicant

Date of Determination: 24 May 2013

DETERMINATION OF THE AUTHORITY

- A Mr Cairns was not constructively dismissed.**
- B Bike Retail Group Limited’s counterclaim that Mr Cairns breached the restraint of trade clause in his individual employment agreement is dismissed.**
- C Each party is to bear their own costs.**

Employment relationship problem

[1] Bike Retail Group Limited (“Bike Retail”) owns a number of bike shops in New Zealand which sell bikes, accessories and undertake bike repair work. One of the shops owned by Bike Retail until it was closed in 2011 was Velo Bikes and

Cycles located at 60 Hobson Street, Auckland City Centre (“Velo”). Velo sold performance and multi-sport bikes, cycle accessories, clothing, Velo bikes and cycles and had a bike workshop to undertake repairs.

[2] The applicant, Mr Brendon Cairns, immigrated to New Zealand in September 2008 and is seeking permanent residence in New Zealand. Mr Cairns has a great deal of experience in the cycle industry, having raced bikes, qualified as a bike mechanic and having owned 3 bike shops in South Africa.

[3] Mr Cairns was initially employed in New Zealand by Full Cycle Limited (“Full Cycle”) at its bike shop in Avondale. In early 2010, Full Cycle began encountering financial difficulties and in June of that year went into liquidation. Mr Cairns became very concerned about his immigration status in New Zealand in the event he had no longer had a job at Full Cycle and decided to seek employment elsewhere.

[4] Mr Cairns approached Mr Glenn Smith, General Manager, Bikes International Limited (and subsequently a Director of Bike Retail) seeking employment. Mr Smith suggested Mr Cairns approach Mr Glen Gordon, director of Velo Cycles Limited which owned Velo Cycles shop at 60 Hobson St, Auckland. Mr Cairns was offered and accepted employment with Velo.

[5] Following the sale of Velo to Bike Retail, Mr Cairns was employed by Bike Retail as Retail Manager, Velo pursuant to an individual employment agreement (“employment agreement”) dated 28 May 2010 and reported to the National Retail Manager, Mr Brent Pascoe. The employment agreement was subject to a 3 month trial period.

[6] On the 31 August 2010, while Mr Cairns was looking at the shop computer, he saw an email to Mr Pascoe and thought his job was being advertised. Mr Cairns raised the matter with Mr Pascoe at a meeting with him on 2 September. Mr Cairns says Mr Pascoe did not respond and just asked that the email be forwarded to him. Mr Cairns says Mr Pascoe became personal and told him he had to improve the shop’s sales or he would be out of a job at the end of the month. Mr Cairns says he tried to explain to Mr Pascoe what was happening with sales and the initiatives he had in place to address the situation, but says Mr Pascoe was not interested and provided no support.

[7] Mr Pascoe says he met with Mr Cairns on 2 September to tell him he wanted to extend his trial period for a further month so he could address some minor issues in the shop. Mr Pascoe says he spoke with Mr Cairns about the email and told him there was nothing to worry about. Mr Pascoe says that Bike Retail regularly advertises for retail managers for its various stores. Bike retail was increasing the number of its stores in 2010 and was looking for more retail managers who could fill the positions when they arose. This was one such enquiry, it was not in respect of Mr Cairns' job.

[8] Mr Pascoe says he valued Mr Cairns as a retail manager and had sent him on an expensive management course in August just before the meeting in September at a cost to Bike Retail of \$4,000. Further, Mr Pascoe says Mr Cairns was paid bonuses in August. Mr Pascoe questioned why he would do these things if he was going to dismiss Mr Cairns the next month.

[9] A couple of weeks after the 2 September meeting, Mr Cairns heard a rumour that he was going to be dismissed. Mr Cairns did not raise this with Mr Pascoe or Mr Smith. Rather, Mr Cairns became very concerned about his immigration status and decided to look for another job. Mr Cairns approached Mr Nigel Priest, owner of Cranky Man Cycles Limited ("Cranky Man Cycles") who was interested in employing Mr Cairns because one of his employees had been offered a job and was about to leave. Cranky Man Cycles was a competitor of Bike Retail and the shop was located within 10 km of Velo. Cranky Man Cycles went into liquidation in November 2012.

[10] On the basis of his discussion with Mr Priest, Mr Cairns resigned from Bike Retail on 27 September 2010, giving four weeks notice of resignation effective from 24 October. Mr Cairns was not required to work out the entire 4 weeks notice, his last day of work was on 8 October. Bike Retail paid Mr Cairns the balance of his notice. Mr Cairns says he was constructively dismissed and his dismissal was unjustified. Bike Retail denies constructively dismissing Mr Cairns. Bike Retail says Mr Cairns resigned and went to work for one of its competitors in breach of the restraint of trade clause in his employment agreement.

Issues

[11] The Authority must determine the following issues:

- (a) Was Mr Cairns constructively dismissed?

- (b) If Mr Cairns was constructively dismissed, was it unjustified?
- (c) Did Mr Cairns breach the restraint of trade clause contained in clause 21 of his employment agreement?

First Issue – Was Mr Cairns constructively dismissed?

[12] Mr Cairns claims he was constructively dismissed. Mr Cairns says at the meeting on 2 September he was told his probationary period was to be extended by one month and that he would not have a job at the end of September if sales in the shop did not improve. Mr Cairns claims he received no support to improve the shop's performance. Mr Cairns says the email he saw to Mr Pascoe was evidence Bike Retail was looking to replace him and this was confirmed by the rumour he heard subsequently. This is denied by Mr Pascoe and Bike Retail.

[13] A constructive dismissal is where an employee is forced to resign because of an employer's action. Constructive dismissal cases generally fall into the following 3 categories:

- Where an employer gives an employee a choice between resigning and being dismissed.
- Where an employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- A breach of duty by the employer which causes an employee to resign.¹

[14] Mr Cairns appears to rely on the second and third categories of conduct referred to above to claim he was constructively dismissed by Bike Retail.

[15] It is not every breach of a duty or every unjustified action by an employer that can entitle an employee to cancel their contract of employment.

It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the border line which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.²

¹ *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA)
² *Wellington Taranaki and Marlborough Clerical etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95(AC) at 104

[16] The Court of Appeal considered the correct approach to constructive dismissal cases as follows³:

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all of the circumstances of the resignation have to be examined, nor merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing; in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[17] Mr Cairns' individual employment agreement (employment agreement) which was signed by Mr Cairns and Mr Pascoe on 28 May 2010, contains a probationary period as follows:

8. Probationary period

The Employee will start work on the date set out above. The Employee is initially employed on a probationary basis for the first three months. The purpose of the probationary period is to allow the Employer to assess the Employee's performance.

During the probationary period the Employer will discuss with the Employee any concerns that it has about the Employee's performance or conduct. The Employee will be offered a chance to respond to any such concerns. The Employer will provide the Employee with reasonable time, support and guidance to meet the Employer's performance and conduct standards. If the Employee fails to make the required improvements the Employer may

- (a) *End the employment at the end of the probationary period by giving one week's notice or pay one week's salary in lieu of notice. Before the Employer makes this decision the Employee will be advised of the way in which the performance or conduct is considered unacceptable, and given an opportunity to take advice and make representations to the Employer.*
- (b) *Extend the Employee's probationary period at the Employer's discretion for up to another three months. During the probationary period the Employer can terminate the Employee's employment without notice for serious misconduct, breach of this agreement, redundancy or medical reasons.*

³ *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168 at p.172

[18] The three month probationary period was due to expire on 28 August 2010. Mr Pascoe extended the probationary period for a further one month to allow for some improvements in the shop. While Mr Cairns did not agree that this was open to Mr Pascoe, Mr Cairns did not take the matter further and continued to work at Velo.

[19] The application of the probationary period by Bike Retail was unlawful. Section 67A of the Employment Relations Act 2000 (the Act) makes it clear that a trial period in an employment agreement cannot exceed 90 days. Mr Pascoe by extending the probationary period for one month was acting in breach of s.67A(2)(a) of the Act. This was not an issue which was raised with me by Mr Cairns and Mr Cairns himself did not challenge the extension of the probationary period, he continued to work as normal.

[20] It is my finding that Mr Pascoe erroneously relied on the provisions in the employment agreement which provided that Bike Retail could extend an employee's probationary period for up to a further three months. However, there was no intention by Mr Pascoe to dismiss Mr Cairns, he was seeking improvements at the shop and thought he was able to rely on the terms of the employment agreement to extend the probationary period to allow for those improvements to occur. Extending Mr Cairns probationary period in those circumstances was not dismissive or repudiatory conduct by Bike Retail.

[21] I do not accept that there was such a breach of duty by Bike Retail or that Bike Retail followed a course of conduct with the deliberate and dominant purpose of coercing Mr Cairns to resign. It is my finding that Mr Cairns made some incorrect assumptions about his ongoing employment following the meeting with Mr Pascoe on 2 September. He assumed the email he saw to Mr Pascoe was someone applying for his job, he assumed that the extension of his trial period for a month meant he would not have a job at the end of the month and he believed a rumour that he was going to be dismissed. Mr Cairns did not ask Mr Pascoe or Mr Smith if his assumptions or the rumour were correct, he acted on them as if they were.

[22] Mr Cairns was quite happy to work out his notice period because he had found another job and so his immigration status was no longer in jeopardy. It is unusual for an employee to happily remain in employment and work out his notice while claiming

his employer has fundamentally breached its contract with him and has forced him to resign.

[23] I find that Mr Cairns assumed wrongly that he was going to be dismissed. Mr Cairns thought if he was to be dismissed, his application for residency in New Zealand would be in jeopardy. To avoid that risk, Mr Cairns sought employment elsewhere. When it seemed highly likely that Mr Cairns had obtained another job, he resigned. The risk to his immigration status in New Zealand was the primary motivation for Mr Cairns' resignation, not any alleged breach of duty or course of conduct on the part of Bike Retail.

[24] Mr Cairns was not constructively dismissed by Bike Retail.

Second Issue

If Mr Cairns was constructively dismissed, was it unjustified?

[25] As I have found Mr Cairns was not constructively dismissed, I do not need to deal with the second issue.

Third issue

Did Mr Cairns breach the restraint of trade clause contained in clause 21 of his employment agreement?

[26] Mr Cairns' employment agreement contained a restraint of trade clause in the following terms:

21. Restraint of Trade

The Employee agrees that he or she will not during the term of this Agreement and for a period of 12 months after termination of this Agreement engage in (as director, partner or in any other capacity) any business or be employed by any business that is similar to or in competition with the Employer within the Auckland area. This clause shall not apply where the Employee's employment with the Employer is terminated as a result of redundancy. Should the Employee fail to comply with this restraint of trade, then the Employee agrees to indemnify the Employer against all costs, losses and expenses that may be incurred by the Employer in enforcing the Employee's obligations under this clause.

[27] Bike Retail in its amended statement in reply filed in the Authority on 18 January 2013 included a counterclaim that Mr Cairns "left to work in another

competing bike shop less than 10 kilometres away and subsequently Velo was closed due to a drop in sales” in breach of the restraint of trade clause in his employment agreement.

[28] Bike Retail asserts that by resigning from his employment as retail manager of Velo and commencing employment with a competitor, Mr Cairns was in breach of clause 21 of his employment agreement. Bike Retail further alleges that Mr Cairns “*was aware of strategic and confidential information relating to Bikes International Limited*” and was in breach of s.4 of the Act.

[29] Bike Retail took no steps to enforce the restraint until some 15 months after the 12 month restraint period had expired, on 8 October 2011. Mr Smith, on behalf of Bike Retail, says that no steps were taken to enforce the restraint of trade clause because the industry is a small one and he thought it may be possible that Mr Cairns would at some stage in the future be employed again by Bike Retail.

[30] Whether or not the restraint of trade clause is reasonable and enforceable is a moot point because the restraint period had expired well before Bike Retail took any steps to enforce it. Bike Retail made an assertion that it had suffered damage as a result of Mr Cairns breach of the restraint but there was no evidence of losses or damages produced.

[31] Bike Retail’s counterclaim alleging a breach of the restraint of trade clause by Mr Cairns is dismissed.

Costs

[32] Mr Cairns’ claim and Bike Retail’s counterclaim have been declined. In those circumstances, each party is to bear their own costs.

Anna Fitzgibbon
Member of the Employment Relations Authority