

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Olivia Corbett (Applicant)
AND Bendon Limited (Respondent)
REPRESENTATIVES Chris Patterson, Counsel for Applicant
Rachel Steel, Counsel for Respondent
MEMBER OF AUTHORITY Alastair Dumbleton
INVESTIGATION MEETING 1 March 2006
DATE OF DETERMINATION 30 May 2006 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] On 2 and 3 June 2005 the respondent Bendon Limited made enquiries into the conduct of the applicant Ms Olivia Corbett, an employee of the company. The outcome was the summary dismissal of Ms Corbett. A few weeks later her representative, Mr Patterson, wrote to Bendon and complained that for various reasons the enquiries had been carried out unfairly and that Ms Corbett's dismissal had been unjustified because there were no grounds for it and a fair procedure had not been followed.

[2] The various complaints raised on behalf of Ms Corbett and which comprise her employment relationship problem, were addressed by Bendon in correspondence with Mr Patterson. Later the parties attended mediation to try to resolve the problem, before proceeding to an investigation by the Authority. That investigation focussed on the way the employer conducted the disciplinary enquiry and on the conclusion Bendon reached that the activities of Ms Corbett amounted to serious misconduct and were such as to justify summary dismissal. The investigation also examined the justification for the brief suspension of Ms Corbett by Bendon and whether the employer had breached the duty of good faith it owed to her.

[3] Bendon is a lingerie manufacturer and retailer, trading in that name in New Zealand and overseas. The company had employed Ms Corbett as a consultant to sell Bendon garments in its Newmarket store. It concluded from the disciplinary enquiry that Ms Corbett had a conflict of interest because she had created her own range of lingerie, called 'Toushe,' and was planning to manufacture and sell garments under that label on a commercial basis. Bendon considered that this conflict put her in breach of an express provision in the parties' employment agreement.

Conflict of interest

[4] I consider that Bendon was presented with good reason for embarking on a disciplinary enquiry. Only about six weeks after Ms Corbett had commenced employment, on 1 June 2005 a community newspaper, 'Midweek,' published a story about her under the heading, "**Young lingerie designer huge step closer to her Big Break.**" The story included a picture showing Ms Corbett holding up items of lingerie from "her lingerie label – Toushe." The Midweek story referred to Ms Corbett's dream of expanding her label and it reported that she had been chosen as a semi-finalist in a Big Break programme. This was described as an opportunity which "will help her promote her brand."

[5] After receiving a copy of the Midweek story Ms Talei Kitchingman, Bendon's retail operations manager, searched for 'Toushe' on the internet and found a web-site for Toushe Limited. The site contained a description of Toushe as a New Zealand company established in 2003 and as a distributor/wholesaler of the Toushe range of lingerie in Oceania and New Zealand. The company was described as having less than five employees and a turnover annually of below US \$1Million. The site also gave the following information;

The first range of samples was produced in China this same year [2003] but the quantity was an issue so the sampling was finished in New Zealand. Toushe is now ready to be sold and distributed so I am in search of a reputable overseas manufacturer to produce the orders.

[6] When Ms Corbett was asked by Ms Kitchingman on 2 and 3 June 2005 to explain what her involvement was with Toushe, she readily admitted that she had designed a range of lingerie under that name which she said she had reserved the right to use by registering 'Toushe Limited' as company in 2003. She said she had had samples of her creations made up and that her goal was to start selling her label within about six to 12 months.

[7] During the disciplinary enquiry Ms Kitchingman discussed with Ms Corbett her concerns that the latter's involvement with Toushe breached the following provisions of the employment agreement;

CONFLICT OF INTEREST

19.1 *The Employee shall refer to the Company all business contacts, and opportunities of which she becomes aware and which relates to the business of the Company.*

19.2 *The Employee shall not engage in any other employment or retain an interest in any other business, which directly or indirectly, will place the Employee in competition with the Company. Except with the knowledge and consent of the Company, the Employee shall not engage in outside employment or business activity, which may affect the Employee's ability to discharge her duties and responsibilities to the Company.*

[8] From the time she entered into the employment relationship with Bendon, Ms Corbett had been alert to the potential for a problem to arise from her involvement with Toushe. In her evidence she said that when she had looked over her employment agreement with a friend he commented that clause 19 raised an issue because of the existence of Toushe.

[9] Ms Corbett explained to Ms Kitchingman that the 'Toushe Limited' web-site had been commissioned by her in 2003, although her company did not have its own web-site, and that

contrary to the impression that might be conveyed by the information given at the web-site, Toushe Limited was not trading or operating as an established business. She explained that it had not sold any product and had not made any profit or obtained any funding. She said she had simply designed some garments and had had samples of them made, in pursuit of her dream to establish a lingerie business. She also maintained that the market segment her garments would target was not the same as Bendon's.

[10] Ms Corbett and her representative maintained to Ms Kitchingman that there was no conflict of interest in the circumstances. This they said was because there were no funds, and no manufacturers, retailers, suppliers or distributors for her creations, and therefore no "business" was in existence competing with Bendon in designing, producing and selling lingerie. Ms Kitchingman did not accept that explanation and concluded that Ms Corbett was in breach of Clause 19 of the employment agreement. The breach of duty was considered serious enough to justify summary dismissal.

Substantive justification

[11] Bendon has sought to justify Ms Corbett's dismissal by pointing to Clause 19, a term of the employment agreement she had accepted as binding on her and which prohibited her from engaging in certain conduct. It is the precise wording of that term which is important insofar as substantive justification for the dismissal is concerned. In using the particular words of the clause, Ms Corbett and Bendon had chosen their own definition of what constituted a conflict of interest. It is the second part of Clause 19, and the second sentence in particular, which is relied upon by Bendon. That part requires two elements to be present before there is a conflict of interest;

1. engaging in business activity (the alternative of engaging in outside employment was not an issue), and
2. the risk that such activity, if engaged in by Ms Corbett, may affect her ability to discharge her duties and responsibilities to Bendon.

[12] There has never been any suggestion that Toushe was merely a hobby or only a small family and friend's pastime carried on by Ms Corbett for fun rather than profit. Toushe was intended to become a business in the normal sense of that word and the search for manufacturers "to produce the orders" was I find an activity in relation to a present or future business. Engaging in business activity and being in business are distinguishable situations, the former covering a wider range of conduct than the latter. I find it was a reasonable conclusion for Bendon to reach on the information it had obtained, that during her employment Ms Corbett had engaged in business activity with Toushe. Through the web-site she maintained, Ms Corbett had kept alive an invitation to prospective business partners or agents, to make contact with her about Toushe and its product.

[13] The two elements to the second part of Clause 19 must be read in conjunction with each other. Activity in relation to a future business will not constitute a conflict of interest if it presents no risk to the employee's ability to discharge the duties and responsibilities as required under the employment agreement. I consider that if potential manufacturers or other backers had contacted Ms Corbett about Toushe during her employment with Bendon, as she had invited them to do, her ability to discharge her employment duties and responsibilities "may" have been affected. In that situation there would be at least a risk that she would compromise her duty of fidelity owed under an implied term of every employment agreement.

[14] In considering the application of a 'Conflict of Interest' clause in another employment

agreement, the Court of Appeal in *Tisco v Communication & Energy Workers Union* [1993] 2 ERNZ 779 at page 782, said the following:

Any conduct by an employee which is likely to damage the employer's business, for instance by impairing its good will, or to undermine significantly the trust which the employer is entitled to place in the employee, could constitute a breach of duty. The duty of fidelity and good faith carries with it a duty not to undermine the relationship of trust and confidence.

[15] I find that it was reasonable for Bendon to conclude that Ms Corbett's activity in her business Toushe, compromised her ability to discharge her responsibility to maintain Bendon's trust and confidence in her as an employee. That essential trust extended to frequent occasions of contact between Ms Corbett and Bendon customers, when opportunities could arise for a sales assistant to interest the customer in another brand of the type of product the customer was looking to buy. Most if not all retailers of products are likely to find it unacceptable to have their customers attended by sales staff who have an interest in selling and promoting a rival product.

[16] Because the existence of Toushe and Ms Corbett's involvement with it came to the notice of Bendon early on in the employment, there was no opportunity for any harm to be caused to Bendon, but the potential for damage existed and this has been held to be sufficient to constitute a breach of duty.

[17] I find it was reasonable for Bendon to conclude that the kind of activity Ms Corbett had engaged in for Toushe presented a risk. There was also a risk that if Ms Corbett found and signed up with a manufacturer who commenced production of the Toushe range to compete in the lingerie market, she would not disclose this to Bendon but would try to remain in Bendon's employment until her own enterprise had grown enough to be able to start supporting her. Whether legally obliged to or not, she had not revealed to Bendon her involvement with Toushe or her plans for her own company when interviewed for the job, so there was every reason for Bendon to think that she would push the boundary of her duty of fidelity once Toushe had started manufacturing on a commercial scale. A further risk in her employment was that for the advancement of her brand Toushe, she would use ideas and information acquired while working for Bendon.

[18] In final submissions Mr Patterson referred to observations made by the Employment Court in *Walker v Aitken* [1993] 2 ERNZ 240, where an employee of a hairdressing salon was held not to have breached the duty owed to her employer by setting up her own salon while she remained employed. This was held to be an action preparatory to entering into competition but not an act of competition itself. The case I find is distinguishable, as the decision turned on the content of a term generally to be implied rather than on an express term having its own particular wording as agreed to by the parties in this case. Seeking venture partners or backers as Ms Corbett did, may have been an act of preparation to later on entering into competition, but like setting up a salon it was a 'business activity' – an activity in relation to business - and therefore fell within the prohibition of clause 19. Working on her designs as Ms Corbett said she had done in the evenings, was also a business activity in the circumstances.

[19] On 3 June when her explanation was sought, Ms Corbett and her representative had tried to downplay the state of her plans for Toushe. They said she had 'ambitions' to develop her own brand and that it was a 'dream' of hers to do so, or a matter of future aspiration. I consider that Bendon was justified as viewing her activities of seeking a manufacturer to produce orders as crossing the line to reach a stage where she was in conflict with her employer. I find that following its disciplinary enquiry Bendon was left with reasonable grounds for believing that Ms Corbett was guilty of misconduct by breaching a term of her employment agreement, the conflict of

interest provisions at clause 19. I find that the breach was sufficiently serious to justify summary dismissal. Objectively, a fair and reasonable employer would have taken that action in the circumstances.

[20] Bendon was entitled to protect itself as far as possible from all competition, even 'David and Goliath' competition. No doubt like any other fashion, lingerie has its potential for unknown new designers and their labels to rise from obscurity and capture a share of the market. Production is an important step to be taken along the way to that success. It can be expected that Ms Corbett would have been trying to win over prospective backers by presenting herself as a designer of serious intent, not just a dreamer. The lack of commitment to her job she expressed during the disciplinary enquiry, showed Bendon where her interest lay and where she was directing her energy. Ms Corbett tried to downplay the information given at the Toushe web-site as containing exaggeration, but the purpose of exaggeration is usually to attract attention, in this case that of potential business partners.

Procedural justification

[21] Ms Corbett also complained that her dismissal was procedurally unjustified. In this regard a raft of complaints was presented on her behalf. Although still within the probation period under her employment agreement, she was just as much entitled to be treated fairly and reasonably as any confirmed employee.

[22] I find that Ms Corbett was given notice of the misconduct alleged against her and given an opportunity to obtain representation before attending the meeting of 3 June at which the allegations were enquired into. She was told, I find, that dismissal was a possible consequence of any findings made by the employer adverse to her. She was suspended from work, but this was only for a day and was on pay, and the suspension was in any event in conformity with an express term of the employment agreement. No material disadvantage was suffered by Ms Corbett.

[23] Much was made of the location at which the enquiry took place. Although it was unsatisfactory to have it conducted in a public place (a food hall) I am satisfied this came about partly because Ms Corbett and her representative were unable to meet at Bendon's head office, as the company had reasonably requested of them. Meeting there would have avoided the criticisms made - with a good deal of hindsight - about this aspect of the enquiry. I do not consider the disadvantages in the location materially detracted from the fairness of the enquiry, and Ms Corbett and her representative seem not to have been deterred from putting up a spirited defence to the allegations of misconduct.

[24] Neither is any unfairness evident in the circumstances in which Ms Corbett sought to resign her employment during the disciplinary enquiry on 3 June. She offered to resign on her own terms which were a departure from the employment agreement and therefore required the consent of Bendon. Her proposal was not acceptable to Bendon which did not, I find, purport to prevent her resigning in accordance with the employment agreement if she wished. Bendon made it clear that the disciplinary enquiry would be continued to conclusion while she remained in its employ.

[25] I find that the disciplinary enquiry was truncated on the afternoon of 3 June after Ms Corbett and her representative left and did not return to hear Bendon's conclusions, as it had reasonably expected they would do. Bendon acted then with unnecessary haste, by ringing Ms Corbett up at her home to tell her she was dismissed. Better attempts should have been made to communicate with her at another meeting held in person, the following week if need be. This lapse must be put in perspective however. As grounds for dismissal have been established and as a substantially fair process had otherwise been followed, it would be out of all proportion to hold the dismissal to be

unjustified only because of the mode Ms Kitchingman used to communicate that decision to Ms Corbett.

Determination

[26] For the above reasons I determine that Bendon did not dismiss Ms Corbett without justification. I find that the employer was reasonably able to conclude that she had breached the express provisions of the conflict of interest clause in the employment agreement. She had done so in such a way or to such an extent as to amount to conduct that justified dismissal. The test of justification at s.103A of the Employment Relations Act 2000 has been met by Bendon, I find.

[27] I also find that the disciplinary enquiry conducted by Bendon on 2 and 3 June 2005 was a substantially fair and reasonable one in the circumstances. Ms Corbett's suspension in the circumstances was not unjustified and caused no material disadvantage in her employment. There was no breach by Bendon of the employment agreement and no breach of the duty of good faith imposed by the Act. The employment relationship problem is resolved in favour of Bendon. Consequently no orders are required to be made against that company.

Costs

[28] The parties through their representatives Ms Steel and Mr Patterson, are to confer with a view to resolving by agreement any question of costs arising from this investigation. If any issue remains an application in writing may be made to the Authority asking it to fix costs.