IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 503
5470622

	BETWEEN	JASON HARDING Applicant
	A N D	RICOH NEW ZEALAND LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Mike Harrison, Advocate for the Applicant Mark Kamphorst, Advocate for the Respondent
Investigation Meeting:	23 October 2014 at Auckland
Date of Determination:	8 December 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Harding), alleges that he was unjustifiably dismissed by the respondent (Ricoh) on 21 May 2014.

[2] Mr Harding began as an account manager with Ricoh in January 2012. It is common cause that Mr Harding was a successful salesperson. Beyond that, however, there is limited consensus. Amongst other things, there is no agreement even about the dates on which significant events happened with the parties disagreeing about the date the dismissal was effected for instance, disagreeing about the succession of meetings leading up to the dismissal, disagreeing about what happened at those meetings, and even disagreeing about the span of time over which those meetings took place.

[3] It is agreed that Mr Harding was on annual leave during the week of 11-16 May 2014 and during that time, he says he was in Australia where he was offered an alternative position to the one that he occupied at Ricoh in New Zealand.

[4] Mr Harding says that on 20 May 2014, the Tuesday of his first week back at work after his Australian holiday, he had a conversation with Ms Surjit Anderson, the human resources manager for Ricoh, that that conversation took place at approximately 2.30pm and that in that conversation, Mr Harding told Ms Anderson that he had been offered a new position in Australia and that he might accept that position. His own evidence goes so far as to say that the Australian offer was *"tempting"* and that he was leaning towards accepting it.

[5] However, a complicating factor was that, by virtue of his sales success, Mr Harding was entitled to take an incentive trip with Ricoh and that trip was coming up quickly. Mr Harding says that he told Ms Anderson that he could consider resigning after the incentive trip (which was to Rarotonga) but that he considered such behaviour to be unethical. Mr Harding went on to say that he told Ms Anderson that the right thing to do would be to resign as soon as he had made a final decision. He said in his evidence that he had not made that final decision and he was seeking Ms Anderson's advice as to how best to progress the matter. He says Ms Anderson referred him to his immediate manager, Mr Bycroft, the sales manager.

[6] Ms Anderson's account of the meeting is different in every respect. First she says the meeting with Mr Harding, which both agree was an informal meeting, took place on Wednesday morning, 21 May and not Tuesday afternoon, 20 May 2014. Ms Anderson says that what she was told by Mr Harding was that he had had a job offer in Australia and that he would most likely accept. He then asked her about the incentive trip that he was entitled to and Ms Anderson referred him to his manager, Mr Bycroft, to progress that discussion.

[7] Ms Anderson says that she asked Mr Harding if he was likely to accept the new position and she remembers him saying it was less hours and more money and that he would be crazy to turn the offer down. Mr Harding is then said to have indicated to Ms Anderson that he would talk to Mr Bycroft about leaving and the incentive trip and the conversation concluded after about 20 minutes.

[8] According to Mr Harding, he then met with Mr Bycroft and on his account, that discussion took place at 3.30pm or thereabouts on 20 May 2014. He says he had the same general discussion with Mr Bycroft that he had had with Ms Anderson and told Mr Bycroft broadly the same things. He said he was *"careful to explain that I had not made any decisions and was merely looking at alternatives"*. He says that

during the discussion with Mr Bycroft, a number of options were identified and canvassed. These included:

(a) Mr Harding remaining at Ricoh permanently and enjoying the incentive trip with his family; and

(b) Mr Harding accepting the position in Australia and either resigning from Ricoh before, or after.

[9] However, on Mr Harding's evidence, the issue of the incentive trip was still front and centre because he says that the discussion with Mr Bycroft included posing the question of whether, if he resigned before the trip, he would be allowed to take the trip and/or whether he might expect compensation of a financial nature instead of taking the trip or resign after taking the trip.

[10] Mr Harding says that Mr Bycroft was unsure of the position but undertook to get some advice from other senior colleagues. Mr Harding was adamant that he had not resigned to Mr Bycroft.

[11] Mr Bycroft's evidence is different. He says the discussion that he had with Mr Harding took place later in the morning of 21 May 2014 after Mr Harding had had his conversation with Ms Anderson. Mr Bycroft gave evidence that Mr Harding looked uncomfortable and awkward. He says Mr Harding told him he had been presented with an opportunity in Australia that was *"too good to refuse"*, and that he wanted to take it. They discussed what the role was, according to Mr Bycroft, and Mr Bycroft's evidence is that he asked Mr Harding specifically if Mr Harding was going to take the job. Mr Harding said that he would be crazy not to. Mr Bycroft says he asked again if it was *"a done deal"* and Mr Harding said *"yes it was"*. Mr Bycroft appears to have been genuinely disappointed at Mr Harding's decision, because Mr Harding was a good salesperson, but he accepted that people have the right to change positions.

[12] According to Mr Bycroft, there was then general discussion about the logistics of the move to Australia and the discussion remained amicable and constructive.

[13] Then, Mr Harding asked about the incentive trip and said something to the effect that he had qualified for it, by meeting or exceeding his sales targets, was looking forward to it with his family, and felt that he should still be allowed to go.

Mr Bycroft's evidence is that he was *"taken aback"* by those observations and thought that it was both unlikely and inappropriate for a salesperson who had just resigned, to be on a promotional trip, whether part of it was incentive or otherwise, for the company.

[14] According to Mr Bycroft, Mr Harding pointed out that he could have said nothing about the Australian opportunity, taken the incentive trip, and then resigned and it is clear from Mr Bycroft's evidence that he accepted the force of that argument.

[15] However, Mr Bycroft pointed out that these trips were not just incentives for salespeople to sell well but also a promotional opportunity and a team building exercise for the Ricoh sales team and it would be odd to have a salesperson who was not remaining part of the team to participate in such an event. Mr Bycroft said that Mr Harding appeared to understand the logic of those observations and asked if he could get some financial compensation instead. Mr Bycroft said he would talk to the managing director. There was then a discussion, according to Mr Bycroft, about what the trip was worth with Mr Harding maintaining it was worth $10,000, Mr Bycroft saying it was not worth anything like that, and Mr Bycroft also making the point that the trip was within the company's discretion rather than an automatic right of the employee.

[16] According to Mr Bycroft, the meeting then terminated, he promptly saw the managing director who agreed to an ex gratia payment of $1,000, and Mr Bycroft then found Mr Harding again later that same morning, and conveyed the decision. Mr Bycroft's evidence is that Mr Harding was agitated by the $1,000 offer and said that he wanted at least $8,000.

[17] Mr Bycroft says that Mr Harding then said that he would not resign and Mr Bycroft responded by saying that he already had. There was an argument about the fact that the resignation (if any) had not been put into writing but Mr Bycroft maintained that a verbal resignation was both acceptable and in fact had been accepted.

[18] Mr Bycroft says that at this point Mr Harding had become increasingly agitated and upset and in the course of trying to get a solution, he suggested at this point that if Mr Harding went on the trip he might consider staying with Ricoh and

Mr Harding said he might but Mr Bycroft did not think that intimation could be relied upon.

[19] Again, Mr Harding's account is different. He says that after the discussion which was held at 3.30pm or thereabouts on 20 May 2014 with Mr Bycroft, Mr Bycroft had sought time to consult with his senior management colleagues and that they met again the following morning, 21 May 2014, at approximately 9.30am. According to Mr Harding, this was the occasion when Mr Bycroft said that it was not possible for Mr Harding to go on the incentive trip and that his resignation had been accepted the previous day.

[20] According to Mr Harding, he was then asked to join Mr Bycroft in a meeting with Ms Anderson and that meeting took place at approximately 10am on 21 May 2014. Mr Harding says this was in effect an exit interview but according to Mr Harding, Mr Bycroft then proposed that, as an alternative to the exit package which he had suggested to Mr Harding in the one-on-one meeting the two men had had earlier that morning (21 May 2014), Mr Harding might agree to sign a 12 month contract with Ricoh and on that basis could take the Rarotonga trip.

[21] Mr Harding says that he asked for 24 hours to consider that proposal and he thought he was being given that 24 hour window, to look at the options of either resigning and accepting the exit package proposed by Mr Bycroft earlier that day, or remain with Ricoh for a 12 month contract and go on the trip. Then, according to Mr Harding, while that 24 hour period was still running, he was advised by Ricoh that his employment had in fact been terminated.

[22] The recollection of the Ricoh witnesses is again different. According to Ms Anderson's evidence, there was a brief meeting between her, Mr Bycroft and Mr Harding at which she is adamant the 12 month fixed contract idea was discussed briefly and rejected by all parties (including Mr Harding). According to Ms Anderson, that meeting took place at approximately 10.30am on 21 May 2014 and it is appropriate for me to note that this is the only meeting for which the time and date roughly agrees between the parties. Ms Anderson and Mr Bycroft are both adamant that this meeting was in fact an exit interview and both deny Mr Harding's contention that he was given time (24 hours) to consider the one year contract idea because, according to Ricoh, the die was already cast.

[23] Mr Harding raised a personal grievance by letter dated 27 May 2014 and it is acknowledged that there was a meeting between the parties on 1 July 2014 at which Ricoh was invited (but declined) to withdraw the termination of the employment.

Issues

[24] I need to first consider whose factual account is to be preferred. Clearly issues of credibility arise. Each party has a quite distinct recollection of the principal defining events and there is precious little common ground. Both parties cannot be right.

[25] While the timing of the various formative meetings may not be of great moment, what happened at those meetings is highly critical to the outcome. Moreover, if I am to believe one party over the other, the Authority's conclusion in that regard may also impact the credibility of that party in respect of other issues in dispute.

[26] Determination of that first issue will also identify the central question of whether Mr Harding did in fact resign his employment.

[27] Accordingly, I propose to address the following questions:

(a) What happened in the meetings between the parties;

(b) Does Mr Harding have a personal grievance as a consequence?

What happened in the meetings?

[28] It is the essence of the evidence before the Authority that the parties differ not only about when the significant exchanges between them happened but also what the nature of those significant exchanges were. It is of no assistance to the Authority whatever that there were no notes kept of these various exchanges by either party and no evidence presented to the Authority about when the various protagonists could conceivably have been engaged in meetings with each other.

[29] In that latter regard particularly, Mr Harrison, the advocate for Mr Harding, astutely pointed out in cross-examination that Ricoh would have had swipe card access or some alternative technological variant of that to its premises which would have provided some information about when the various actors were physically

present in the building. Similarly, electronic records of when meetings took place with unrelated parties could have been used to narrow down when meetings took place between Ricoh and Mr Harding. None of that material was before the Authority although, as Mr Harrison correctly pointed out, Ricoh would have been able to produce it.

[30] It is also the case as I noted in the last paragraph, that there are no records of any of the discussions between the parties so not only can we not be sure when things happened but we also have no basis for making conclusions about precisely what people said to each other save for their oral testimony which is of course in fundamental conflict.

[31] I begin my analysis with the final meeting between the parties, about which there is more agreement than any of the earlier engagements. Both parties agree this meeting took place in the morning on 21 May 2014; one says the meeting started at 10am and the other said that it started at about 10.30am but at least there is a measure of agreement about the timing of this meeting.

[32] However, there is no agreement about the dominant purpose of the meeting; the employer says that this was an exit meeting and Mr Harding says that while it may have started out as such, it ended with a proposal which he claims gave him 24 hours to consider two options. He also says that while he was considering those two options, he got formal notification of the end of his employment.

[33] It seems to me that that very fact gives the lie to his evidence on the point; it would be a very odd situation indeed for a reputable employer with in-house human resources management to give a successful and valued employee an opportunity to consider two options concerning the future direction of the relationship and then to terminate the relationship before the end of the period in question.

[34] By common consent, during the period that Mr Harding says he was granted to consider the two options of remaining for a 12 month contract and going on the incentive trip on the one hand, or resigning and taking the exit package on the other, the termination of his employment was confirmed.

[35] I am satisfied then that concerning the final meeting between the parties, Mr Harding's recollection is mistaken, that there was no option given him to consider resignation with an exit package or a 12 month contract with access to the incentive

trip, and that the meeting was simply an exit interview where the mechanics of the termination of the employment were canvassed.

[36] That being my conclusion about the final meeting, it follows inexorably that Mr Harding's behaviour and remarks in the earlier engagements with the employer must have been sufficient for it to believe that he was resigning his employment because there is no evidence before the Authority that it wanted him to go. Indeed, quite the reverse is the case; it is apparent particularly on the evidence of Mr Bycroft, that Mr Harding was a valued salesperson, that he achieved excellent results for Ricoh and that Mr Bycroft in particular, as his manager, was keen to retain him if that was at all possible.

[37] It follows from those conclusions that the only possible way in which the employment relationship could have been terminated was at the behest of Mr Harding rather than at the behest of Ricoh and that leads me to conclude that Mr Harding did in fact make observations which were sufficiently explicit to result in Ricoh's witnesses severally concluding that he was resigning his employment.

[38] Whenever they happened, it is apparent that Mr Harding spoke privately (that is on a one-on-one basis) with both Mr Bycroft and Ms Anderson. Each of them gave evidence on affirmation that they had concluded in those separate one-on-one discussions, that Mr Harding was resigning his employment with Ricoh to take another opportunity in Australia.

[39] There was no suggestion from Mr Harding that the Ricoh witnesses were colluding in the conclusion they reached and the evidence they gave severally that it was considered he had resigned to each of them. Accordingly I am satisfied on the balance of probabilities that whatever he thought he had said to both Ms Anderson and Mr Bycroft, their conclusion, genuinely reached based on what he had told them, was that he had resigned his employment with Ricoh.

[40] As Mr Kamphorst, the advocate for Ricoh, correctly points out in his submissions, it is difficult to see how the Ricoh witnesses would have concluded that Mr Harding wanted to resign his employment unless he convinced them of that fact himself. This was not a situation, as I have already indicated, where Ricoh was keen to let him go. Indeed, quite the reverse is the case. It sought to retain him. In those circumstances, Mr Harding has not been able to persuade me that what he said to the

Ricoh managers fell short of indicating an intention on his part to bring the employment relationship to an end.

Does Mr Harding have a personal grievance then?

[41] Having established, on the balance of probabilities, that Mr Harding resigned his employment, it is still necessary to consider whether the way in which Ricoh dealt with that advice was what a fair and reasonable employer could do in the particular circumstances of the case.

[42] I start my analysis of this question by a reference to the employment agreement. Clause 20.1 of the employment agreement provided to the Authority by Ricoh requires *"one month's written notice"* if either party terminates the employment. It is common ground that there was no written resignation and that Ricoh relied on the various observations made by Mr Harding in the meetings that he had with Ms Anderson and Mr Bycroft, observations which I have concluded are more likely than not to have been made by Mr Harding.

[43] There are other factors relevant to this question. First, Mr Bycroft maintained in his evidence that he received a letter from Mr Harding on the final day of the employment in which Mr Bycroft says Mr Harding stated that he had not resigned. Mr Bycroft's evidence is that he did not accept the letter because by then he was satisfied that Mr Harding had resigned and that in attempting to give him the letter, Mr Harding was *"not being genuine"*.

[44] Mr Bycroft was unable to produce to me a copy of the letter (presumably because he did not retain it if he refused to accept it at the time). Even more extraordinarily, Mr Harding denied ever writing the letter and that is so notwithstanding the fact that existence of the letter might, on one construction of events, tend to support his claim.

[45] On the assumption that Mr Harding did write the letter he denies, and did tender it to Mr Bycroft, given my factual finding that Mr Harding had earlier resigned his employment to Ricoh, the letter is an almost contemporaneous withdrawal of the resignation, remedying any confusion left in the mind of the employer about Mr Harding's true intentions and arguably bringing the case within the principle in cases such as *Boobyer v. Good Health Wanganui Ltd* WEC 3/94 and *NZ Public Service Association v. Land Corporation Ltd* [1991] 1ERNZ 741 where, in the latter case, the

Court held that once the employer became aware that the resignation was not intended *"…it ceased to be entitled to act on (it)…"* .

[46] Moreover, if Mr Bycroft is right in his recollection of being tendered a letter purportedly saying that there was no resignation, then on the basis of the conclusions I have already reached that Mr Harding had resigned his employment verbally in the earlier exchanges, both with Mr Bycroft and with Ms Anderson, the letter must be construed as an attempt to withdraw a resignation already received, albeit that the original notification of the resignation was not in writing.

[47] But even that conclusion can only be advanced tentatively since the putative author of the letter denies having written it and no one can produce a copy of the letter to me.

[48] I was impressed with Mr Bycroft as a witness and put generally, preferred his evidence to that of Mr Harding but on this particular point, I think I must express some caution in placing any particular weight on the withdrawal letter, first because Mr Harding denies having written it (notwithstanding that it might help his case), and second because no copy of the letter has been produced to me and it is difficult to interpret a letter that one has not seen, even if one were to choose to place reliance on the recollection of someone who maintains they have seen it. So far as the withdrawal letter is concerned then, I take that matter no further.

[49] However, Mr Harding clearly achieved the same effect by making it clear at the meeting between the parties on 1 July 2014 (post-termination and post-the raising of a personal grievance concerning the termination) where Mr Harding gave Ricoh the opportunity to withdraw the termination of the employment. Ricoh denied that request.

[50] Mr Harding relies on *Boobyer* where the Employment Court held that an employer must act with considerable caution if it relies upon words that were not intended to or capable of amounting to a resignation as evidencing that resignation and the employee makes it clear the resignation was not intended.

[51] But of course in the present case, I am satisfied on the facts that Mr Harding did enough in two separate encounters with two separate Ricoh managers on either 20 May 2014 or 21 May 2014 to satisfy them that he had resigned his employment

and I do not consider that subsequent notification five weeks later can undo the conclusion earlier arrived at.

[52] Moreover, *Boobyer* was a case where the words the employer relied upon were as it were concocted into a conclusion that a resignation was proffered. *NZ PSA* was another case where the Court considered material from the employees (letters, in this case) as doing no more than condoning a termination; in the present case, I am satisfied the words relied upon by two witnesses for the employer were more explicit and less capable of having any other meaning than I one I have ascribed to them.

[53] Here, even on Mr Harding's evidence, he spoke about a new job opportunity in Australia, and the prospect that he might accept it. So in the context of *Boobyer*, this was not a situation where words were manufactured to fit a conclusion; rather, even on Mr Harding's evidence, there was an intimation that he might leave because he had a new opportunity.

[54] Of course, I have found as a fact that Mr Harding went far further than that in separate discussions with Ms Anderson and Mr Bycroft, satisfying each of them that he was in fact bringing the employment relationship with Ricoh to an end.

[55] Notwithstanding the failure of Ricoh to get a written resignation from Mr Harding, and therefore achieve compliance with the terms of the employment agreement, I am satisfied on the evidence that I heard that what Ricoh did was one of the responses that a fair and reasonable employer could have made in the unusual circumstances of this case: *Taylor v. Milburn Lime Ltd* [2011] NZ EmpC 164 applied.

[56] I mention one final matter for the sake of completeness. Mr Harding claimed he was entitled, as of right, to take the incentive trip which might be said to have created this dispute, because he had earned the trip by his selling efforts. In effect, Mr Harding was claiming that it was a contractual right and he was entitled to take the trip or , in the alternative, have money value. I do not accept that submission.

[57] First, there is no provision for the incentive in the employment agreement signed by the parties, although it is mentioned in the so called Individual Statement under the heading " Other Benefits". That mention is general and unspecific and gives no detail of how the entitlement is earned or even what the benefit is.

[58] Second, I prefer the evidence of the employer to the effect that this incentive was in the gift of Ricoh, was a discretionary award made to sales staff who excelled and was not a mandatory entitlement which was triggered on the achievement of a certain target.

[59] Were it to be a mandatory entitlement of that kind, of necessity the arrangements for the awarding of the incentive would need to be spelt out in the employment documentation, and they are not.

Determination

[60] For reasons that I have already canvassed, I have not been persuaded that Mr Harding has a personal grievance, and in consequence, is not entitled to any remedies.

Costs

[61] Costs are reserved.

James Crichton
Member of the Employment Relations Authority