

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 212
5548000

BETWEEN GRAEME LEE
 Applicant

A N D FRESH FOOD MANAGEMENT
 SERVICES (NZ) PTY LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Applicant in person
 Anthony Drake, Counsel for Respondent

Investigation Meeting: 27 June 2018 at Auckland

Submissions Received: 04 July 2018 from Applicant
 27 June 2018 from Respondent
 11 July 2018 from Respondent

Date of Determination: 12 July 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. The applicant, Mr Graeme Lee did not pursue his claim that there was a legally binding contract between Storeworks Limited, a company of which he is a director and shareholder, and Fresh Food.**
- B. Mr Lee raised issues which did not amount to personal grievance claims with the respondent, Fresh Food Management Services (NZ) Pty Limited (Fresh Food) during his employment. These issues were addressed as they arose by Fresh Food.**

- C. In the event the issues did amount to personal grievance claims, they were not raised by Mr Lee with Fresh Food within 90 days, beginning with the date on which the actions alleged to amount to a personal grievance occurred or came to the notice of Mr Lee as required by s.114 of the Employment Relations Act 2000 (the Act).**
- D. Mr Lee was not unjustifiably constructively dismissed.**
- E. Accordingly, Mr Lee has no employment relationship problems in respect of his employment by Fresh Food.**
- F. Costs are reserved**

Employment Relationship Problem

Mr Lee's claims

[1] The applicant, Mr Graeme Lee was employed as a sales executive by Fresh Food Management Services (NZ) Pty Limited ("Fresh Food") on 4 September 2000 and resigned on 15 September 2015.

[2] Mr Lee says that he raised a number of issues with Fresh Food during the course of his employment including that:

- he attempted to have his employment agreement reviewed during the course of his employment, but his requests were refused
- that his sales territory of operation was unilaterally varied by Fresh Food
- that his company Storeworks Limited was owed expenses by Fresh Food which have never been paid
- that representatives of Fresh Food bullied and harassed him when he raised the Storeworks invoices with them and;
- that he was forced to resign by Fresh Food and that the resignation amounted to an unjustified constructive dismissal.

Fresh Food's response

[3] Fresh Food denies Mr Lee's claims. Fresh Food says that during the course of his fifteen years of employment by it, Mr Lee raised issues with his managers from time to time which were discussed with him as they arose. Issues included his sales territory, the review of his employment agreement, use of his motor vehicle and similar type issues.

[4] At no stage did Mr Lee raise these issues as personal grievance claims in accordance with the Act.

[5] In March 2013, Mr Lee provided Fresh Food with invoices from Storeworks Limited, a company of which Mr Lee was director and shareholder. The invoices amounted to almost \$800,000. Mr Lee claimed Fresh Food owed this amount to Storeworks for office expenses associated with the home office he operated in order to carry out his role for Fresh Food.

[6] Fresh Food began making enquiries about Mr Lee's claims that Storeworks was owed significant amounts of money by Fresh Food and, in August 2015, invited Mr Lee to attend a meeting for the purposes of discussing this further.

[7] During the course of Fresh Food's investigation into issues concerning Storeworks and Mr Lee generally, Mr Lee resigned with effect on 15 September 2015. Fresh Foods says that Mr Lee's resignation was accepted and that it did not amount to a constructive dismissal. Mr Lee voluntarily resigned while Fresh Food was investigating various issues.

The Authority's investigation meeting

[8] The investigation meeting took a full day in the Authority. For the Authority's investigation meeting, Mr Lee filed a witness statement. For Fresh Food, witness statements were filed by Ms Thelma Tiongson, Country Manager for Fresh Food, by Mr James Verry, who was the National Sales Manager at Fresh Food and Ms Karen De Leeuw, Business Director of Fresh Food.

[9] Each of the witnesses giving evidence before the Authority confirmed either under oath or by affirmation that their evidence was true and correct. Each witness had the opportunity to provide any additional comments and information and did so.

[10] As permitted under s.174E of the Act, this determination does not set out all the evidence, which was significant. The determination states findings and relevant facts and legal issues and makes conclusions in order to deliver speedy, informal and practical justice.

The issues

[11] The issues for the authority to determine are:

- (a) Was there a legally binding contract between Storeworks and Fresh Food and does Fresh Food owe Storeworks almost \$800,000 in respect of its home office?
- (b) Were the issues raised by Mr Lee during the course of his employment personal grievances within the meaning of the Act?
- (c) If the issues were personal grievances, were they raised within 90 days as required by s.114 of the Act?
- (d) Was Mr Lee's resignation on 15 September 2015 a constructive dismissal? If so was it an unjustified constructive dismissal?
- (e) Is Mr Lee entitled to any remedies?

First Issue – Was there a legally binding contract between Storeworks and Fresh Food?

[12] Mr Lee was employed by Fresh Food in the position of sales representative from 4 September 2000. Mr Lee signed his employment agreement on 18 September 2000 and this was also signed by the National Sales Manager at the time, Mr Ian Regan.

[13] “Fresh Food NZ is a coffee merchant, providers of coffee (with leading brands such as Robert Timms) and products such as coffee grinders, makers and machines.”¹

[14] Mr Lee worked from home and carried out his duties as a sales representative in the Waikato/Bay of Plenty region. Mr Lee's employment agreement stated that he was part of the northern region sales team which is located at offices at 118 Carbine Road, Mt Wellington, Auckland. Mr Lee's responsibilities were set out in the

¹ Witness statement of Ms Tiongson.

employment agreement and it was specified that he was to comply with Fresh Food policies in force from time to time.

[15] Mr Lee was provided with a motor vehicle which was subject to Fresh Food's motor vehicle policy. This policy specified that "all agreed travel and business related expenses will be paid/reimbursed in accordance with the Fresh Food policy and procedures manual".

Storeworks

[16] Mr Lee says he entered into an arrangement with Mr Regan when he commenced employment at Fresh Food, in September 2000, which included payment of expenses for his home office. Mr Lee says he was informed by Mr Regan that he would be required "to supply an equipped home-based office facility, storage space and company vehicle parking for the Waikato based Fresh Food company vehicle"².

[17] Mr Lee says according to the arrangement reached with Mr Regan, he stored Fresh Food products and housed the Fresh Food motor vehicle. Mr Lee says that expenses incurred from the time he commenced employment in September 2000 until he raised the matter with Fresh Food in March 2013 amounted to approximately \$800,000. Expenses included monthly costs for alarmed home office space supply, computer hardware and upgrades supply, power supply and usage, internet charges, printing, office furniture, alarmed vehicle storage space and so on.

[18] Mr Lee said he had a contract with Fresh Food which had been agreed with Mr Regan and he sought payment under the contract accordingly.

[19] Fresh Food says it knew nothing of Storeworks nor the expense claim of some \$800,000 until March 2013.

[20] During the course of the Authority's investigation meeting, Mr Lee changed his position from claiming that there had been a binding legal contract between Storeworks and Fresh Food and that Storeworks was owed \$800,000 in expenses.

[21] Mr Lee's explanation for the change in his position was very difficult to understand. Mr Lee seemed to suggest that he issued the invoices by Storeworks to Fresh Food on the basis that they would be disputed and there would be a discussion

² Lee witness statement

with Fresh Food about payment of the invoices. This is an extraordinary explanation in my view.

[22] The claim against Storeworks, from the time Mr Lee filed his statement of problem in the Authority more than 2 years ago, had been a major plank of his claim. Fresh Food spent a considerable amount of time investigating and responding to Mr Lee's claim by Storeworks.

Production of Storeworks invoices – March 2013

[23] The claim by Storeworks and the provision of invoices in support of the amount of \$800,000 evidently incurred by Storeworks was not raised with Fresh Food until 26 March 2013. Nobody at Fresh Food had seen the contract Mr Lee said existed between Storeworks and Freshfood prior to 2013 even though Mr Lee had been supposedly relying on the contract for some thirteen years. Mr Lee could not adequately explain why he did not bring the contract and the invoices to the attention of any one at Fresh Food after Mr Regan, with whom he said the arrangement was entered, left Fresh Food. Mr Regan died in 2011.

[24] Upon receipt of the invoices, Ms Tionson began asking questions about the arrangement between Storeworks and Fresh Food. Ms Tionson says that she was concerned when she saw the invoices as they all looked the same and appeared to have been backdated. Ms Tionson was of the view that the invoices of approximately \$800,000 were not evidence of an agreement but rather "reflected Graeme's point of view and his request for payment".

[25] Ms Tionson says that upon receipt of the invoices she looked for a record of the alleged agreement between Fresh Food and Storeworks but was unable to find it. She requested Mr Lee to provide her with a copy so she could look in to the claim.

[26] Mr Lee did not produce a copy of the contract to Ms Tionson until August 2015, 2 years after she had requested it. Mr Lee could not adequately explain why it took so long for him to produce the contract, other than to say his office was stacked with numerous documents.

Contract between Storeworks and Fresh Food – September 2000

[27] The copy of the contract provided by Mr Lee was signed by Mr Lee on behalf of Fresh Food and by Mr Lee on behalf of Storeworks, in September 2000.

[28] Ms Tiongson says she had a number of concerns about the contract:

- It was signed by Mr Lee on behalf of Fresh Food as well as on behalf of Storeworks. “This was a conflict of interest, which Graeme’s employment agreement did not allow for”.³
- Mr Lee had no authority to enter into a commercial agreement on behalf of Fresh Food in his sales person role
- There was no limit to the agreement in terms of time or the amounts which could be claimed
- The document appeared to be dated 4 September 2000, which was Mr Lee’s first day of employment with Fresh Food. Ms Tiongson found it extremely unlikely that Mr Lee, on his first day of employment with Fresh Food would have entered into a commercial agreement and signed it on behalf of the company.

[29] At the Authority’s investigation meeting, Mr Lee decided not to pursue this claim. In his closing submissions, Mr Lee submitted that:

“The Employment Relations Authority has the statutory power and jurisdiction for the claim of reimbursement of business expenses incurred by the applicant presented to the Authority contained in the applicant’s year 2000 contractual employment agreement/s between Fresh Food Services (NZ) Pty Ltd and Graeme Lee. The employment does not in any way what so ever specify that as an employee of Fresh Food Services (NZ) Pty Ltd , the applicant could not own his own company or sue his company to supply business related services to his employer from his own home...”⁴.

[30] It appears that despite his statements to the Authority at the investigation meeting that the contract between Storeworks and Fresh Food was not binding, Mr Lee is making a submission that the arrangement is enforceable and he is seeking reimbursement of the sum of \$800,000 for expenses. This goes to Mr Lee’s credibility.

[31] I am not prepared to entertain this claim, it was not pursued by Mr Lee during the Authority’s investigation meeting. It is my view there was no such arrangement

³ Tiongson witness statement.

⁴ Lee closing submissions

between Storeworks and Fresh Food. I do not accept such an arrangement was entered in to between Mr Regan and Mr Lee as suggested by Mr Lee.

[32] Mr Lee did not send invoices on behalf of Storeworks to Fresh Food for a period of 13 years. When he finally did so, Mr Regan had died so Fresh Food could not check whether Mr Lee's version of events was correct. The invoices were all produced at the same time by Mr Lee and appear to have been prepared by him at the same time.

Second Issue

Were the issues raised by Mr Lee during the course of his employment, personal grievances within the meaning of the Act?

[33] During the course of the Authority's investigation meeting, Mr Lee was questioned about the issues which he claimed amounted to personal grievance claims. Mr Lee said that he tried on a number of occasions to speak with a representative at Fresh Food about his employment agreement so that it could be reviewed. This was a matter which was discussed with Mr Lee. Mr Lee was perhaps not happy with Fresh Food's response but he did not raise the matter as a personal grievance claim.

[34] Mr Lee told the Authority that he raised other issues from the time he commenced employment with Fresh Food in September 2000. In my view Mr Lee was a difficult employee who was dissatisfied with some of the decisions made by Fresh Food which he says impacted upon him. However, these matters were discussed with him as they arose and he did not raise the matters as personal grievances within the meaning of s.114 of the Act.

Third Issue

If the issues were personal grievances, were they raised within ninety days as required by s.114 of the Act?

[35] This issue does not need to be answered given the finding above.

Fourth Issue

Was Mr Lee's resignation on 15 September 2015 a constructive dismissal? If so was it an unjustified constructive dismissal?

[36] When Mr Lee brought to the attention of Fresh Food, that he had a company named Storeworks which was owed \$800,000, he was requested by Ms Tionson to produce the supporting contract.

[37] Mr Lee did so, two years later. Unsurprisingly, Ms Tionson was concerned about the claims and informed Mr Lee in a letter of 31 August 2015 that she believed the agreement between Fresh Food and Storeworks was unreliable.

[38] Ms Tionson also told Mr Lee she believed there was a conflict of interest due to his involvement with Storeworks and Fresh Food. Ms Tionson stated that by placing himself in a conflict situation, Mr Lee may have breached his duty of loyalty and fidelity to Fresh Food. Mr Lee was informed the matter was serious and Mr Lee's employment with Fresh Food was at risk.

Disciplinary process

[39] Mr Lee was asked to attend a meeting and was informed of his right to obtain advice. During the course of this process, the parties attended mediation which was not successful. On 7 September 2015, Mr Lee wrote to Fresh Food customers about issues with his employment and his intention to resign. This was of concern to Fresh Food who did not consider approaches by Mr Lee to its customers to be appropriate.

[40] During the course of the investigation process, Ms Tionson says that Mr Lee acted in a belligerent manner and made threatening remarks to her. The correspondence was provided to the Authority.

[41] On 7 September 2015, Ms Tionson wrote again to Mr Lee stating that there appeared to be a breakdown in their working relationship and invited him to attend a meeting to discuss this further. The meeting was rescheduled on a number of occasions and finally a date of 15 September 2015 was agreed upon.

[42] Mr Lee did not attend the meeting and resigned during the course of a disciplinary process.

[43] It is my view that Mr Lee's resignation was voluntary, it was not an unjustified constructive dismissal. Accordingly, Mr Lee has no employment relationship problems for resolution by the Authority. There is accordingly no issue as to remedies.

Costs

[44] Costs are reserved. Fresh Food has fourteen days within which to file a memorandum as to costs. Mr Lee has fourteen days within which to respond.

Anna Fitzgibbon
Member of the Employment Relations Authority