

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Adam Legge (Applicant)
AND Nordic Power Desiccants Ltd (Respondent)
REPRESENTATIVES Phil Butler and Joshua Lucas, advocates for applicant
Scott Bright, for respondent
MEMBER OF AUTHORITY James Crichton
INVESTIGATION MEETING Christchurch 20 November 2006
TELECONFERENCE 22 November 2006
DATE OF DETERMINATION 8 December 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Legge), in his statement of problem alleged that he had been unjustifiably dismissed by the respondent, Nordic Power Desiccants New Zealand Ltd (Nordic), when, after being offered a position as a salesman by a manager representing Nordic, Mr Legge was subsequently told, before commencing actual duties, that there was no position for him.

[2] Nordic resists Mr Legge's claims by contending that the offer of employment made to Mr Legge was made without Nordic's authority, that in consequence there was no legally binding agreement and thus no prospect that Mr Legge could be in an employment relationship with Nordic from which he might be unjustifiably dismissed.

[3] The matter came before the Authority on an urgent basis because Mr Legge, an Australian resident, was due to return to Australia urgently given the demise of the employment relationship in this country.

[4] Mr Legge gave evidence that on 13 September 2006 he received a telephone call in Australia from Michael Blacklow (Mr Blacklow) who was Mr Legge's aunt's partner. Mr Legge told me that he had known Mr Blacklow for about five years, essentially the period that Mr Blacklow had been Mr Legge's aunt's partner.

[5] Mr Legge told me that in the telephone discussion, Mr Blacklow gave a description of a job with Nordic in New Zealand, identified a start date of 1 November and a base of Auckland, but with training being provided prior to that date in Christchurch. Mr Blacklow asked Mr Legge whether Mr Legge was interested and Mr Legge told Mr Blacklow that he wanted to think about it. Mr Legge was clear that Mr Blacklow had offered him a specific salary of \$52,000 per annum plus a commission structure, a car and a phone. Mr Legge was adamant that he regarded the conversation as an offer of a position.

[6] Mr Legge indicated to me that Mr Blacklow told him that a quick answer was needed because of the looming start date and Mr Legge, after reflection, subsequently contacted Mr Blacklow back and although he cannot remember the details of what he said to Mr Blacklow, he confirmed that he would take the position and *move across* to New Zealand. He proceeded to notify his employer and make the necessary travel arrangements.

[7] Fortunately, as things turned out, Mr Legge did not resign from his Australian position. He had an ability under his Australian employment agreement to take three months' leave of absence and he chose to make that election rather than to resign. He told me in answer to a question that he did that because he assumed that the new position would be subject to effectively a three month probationary period of employment. Such arrangements are commonplace in Australia.

[8] Mr Legge deposed that there were various other telephone contacts between himself and Mr Blacklow to tidy up matters of detail and that amongst other things, Mr Blacklow agreed that Mr Legge could return to Australia to attend his sister's wedding which was in early December 2006. Mr Blacklow also indicated that there was a prospect that the company would want Mr Legge to return to Australia as they were looking to build their business there and Mr Legge would have been in an ideal position because of his extensive Australian experience.

[9] Mr Legge arrived by agreement in Christchurch on 16 October 2006.

[10] Amongst other things, Mr Legge met with two Christchurch-based salesmen of Nordic who he says talked with him about the role. Neither indicated to him that there was any difficulty in relation to his employment although based on written statements from these two salespeople which are appended to the statement in reply, each knew that there was some controversy about the appointment.

[11] At some point on 16 October, Mr Legge signed an employment agreement which had previously been prepared by Mr Blacklow and had earlier been signed by Mr Blacklow (on behalf of Nordic) on 10 October 2006.

[12] Mr Legge says that at 4.30pm he met with Mr Scott Bright who was the governing director of Nordic and another associated company, Interbloc Limited, in company with Mr Bright's son. Mr Legge's evidence is that Mr Bright asked him what he knew about the role and Mr Legge told him what he had been told. Mr Legge says that Mr Bright then said words to the effect that there was unfortunately no longer a position available.

Issues

[13] The first issue for determination is whether Mr Legge was in truth offered a position by Nordic which he subsequently accepted.

[14] If the answer to that inquiry is in the affirmative, then the second question that follows is whether there was indeed an unjustified dismissal from the position.

Was there offer and acceptance?

[15] Nordic contended that Mr Blacklow had no actual or implied authority to hire Mr Legge. It contended, amongst other things, that Mr Blacklow was at no stage working for Nordic and had never been given authority by Mr Bright to recruit Mr Legge. Nordic also contended that Mr Blacklow had no general authority to hire or fire staff and accordingly it could not be implied in this case that he had intrinsic authority to hire Mr Legge.

[16] These contentions need to be analysed in turn. First, the question of whether Mr Blacklow had a relationship with Nordic needs to be addressed. The evidence at the

investigation meeting was clear that Mr Blacklow was employed by Interbloc Limited. Mr Bright handed Mr Blacklow a summary wage sheet which disclosed that Mr Blacklow was in fact on the payroll of Interbloc. Mr Blacklow said that that was the first detailed pay information that he had seen and he had not been clear about the actual payroll situation until the investigation meeting. Whatever the position in terms of Mr Blacklow's knowledge, it is clear to me that Mr Blacklow was employed by Interbloc.

[17] However, that is not an end of the matter because the evidence is equally plain that Mr Blacklow had authority to work for Nordic as well as for Interbloc. Mr Blacklow's evidence was that he was recruited to the group of companies by a Mr Stephen Greer who was the sales manager of Nordic. Mr Blacklow told me that Mr Greer had said to him that he was to work for both companies essentially in a selling role. His employment agreement referred to a relationship with both companies. That employment agreement applied at the time of Mr Legge's employment relationship problem.

[18] Mr Blacklow deposed that he and Mr Bright had travelled to Jakarta on a selling trip for Nordic and Mr Bright's evidence did not challenge this assertion.

[19] In March 2006, there was discussion between the employer party and Mr Blacklow about a new employment agreement for him, the effect of which was that he was to become a sales executive for both Interbloc and Nordic. The employment agreement, which was never concluded, refers to both companies on the cover page, Nordic as the employer in the parties clause and Interbloc in the execution clause. The duties are as per a job description which was not available to the Authority.

[20] Then Mr Blacklow gave evidence that in April 2006 he was provided with a double-sided business card, one side referring to Nordic and one side referring to Interbloc.

[21] Mr Blacklow told me that he was issued with two credit cards for business purposes, one in the name of Nordic and one in the name of Interbloc, and the same arrangement applied in respect of fuel cards.

[22] All of this evidence clearly settles beyond any reasonable doubt that, notwithstanding that Mr Blacklow appears to have been paid by Interbloc, he was effectively working for both legal entities and was being encouraged by his employer to hold himself out as representing both entities. There can be no other possible conclusion from the raft of evidence to support that dual role.

[23] Next, I must consider whether the evidence discloses that Mr Blacklow had any authority generally in respect of staff matters. Mr Blacklow gave evidence that he had employed one of the Christchurch salespeople, started employment negotiations with two others, that he had employed two yard workers for the Christchurch operation and that he had been responsible for dismissing one employee.

[24] Mr Bright contended that Mr Blacklow's job description precluded him from being involved in recruitment and dismissal matters. The job description does no such thing. It is simply silent on the issue. There is certainly no prohibition on Mr Blacklow attending to those duties assuming they were required of him.

[25] Mr Bright contended that he had been responsible for the final decisions in relation to the employment matters that I have just referred to and he says that he *made the final decision* in each case.

[26] That may well be so, but Mr Bright does not quarrel with Mr Blacklow's contention that he was intimately involved in many employment-related matters before the issue with Mr Legge arose.

[27] On the question of whether Mr Blacklow had specific authority or not for the approach to Mr Legge, there is a straightforward conflict of evidence. Mr Blacklow is adamant that he

raised Mr Legge's name with Mr Bright when the Auckland sales representative then employed by the employer was seen to *not be doing his job*. Mr Blacklow said he had a conversation with Mr Bright and that Mr Bright told him to ring Mr Legge and *see if he is interested*.

[28] Mr Blacklow was absolutely adamant that *I was to make an offer of employment* and that Mr Bright had instructed him on the package that was to be offered.

[29] Mr Bright, in his evidence, said *we were under the understanding that Adam [Mr Legge] was coming here [to New Zealand] on holiday and that while here, he was to have an interview with Mr Bright with a view to the possibility of subsequent employment*.

[30] Mr Bright acknowledged that he had asked Mr Blacklow to contact Mr Legge to see if he might be interested in the position, but only on the basis that an interview was being set up. Mr Bright's evidence on the offer of employment is clear: *no way was Mike [Mr Blacklow] to make an offer. No way would I have agreed to \$52,000 – that's more than any of our other salespeople get. No way would I have agreed to the vehicle. I said the existing vehicle for the Auckland salesperson had to be sold because it was too expensive*.

[31] The contention advanced by Mr Bright that Mr Legge was already coming to New Zealand on holiday and that it was simply proposed that Mr Legge have an interview with Mr Bright while he was here is unsupported by any other evidence. Mr Legge said that it was completely untrue that he was planning to come to New Zealand on holiday. Mr Blacklow said it was completely untrue and indeed none of the evidence supports Mr Bright's contention. Even Mr Legge's evidence that he had a farewell from his Australian firm is hardly consistent with the suggestion that he was simply going off on a holiday.

[32] Mr Bright goes further than simply alleging that Mr Blacklow misunderstood his instructions; Mr Bright alleges that there was *a set up* in relation to the recruitment of Mr Legge on the basis of the family connection and because Mr Blacklow's relationship with the company was, by the time that Mr Blacklow made the offer to Mr Legge on 13 September 2006, already deteriorating significantly.

[33] Mr Legge and Mr Blacklow adamantly deny the suggestion that there was any *set up*. The offer of employment made by Mr Blacklow to Mr Legge was on 13 September 2006; Mr Blacklow was dismissed on the grounds of redundancy on the same day that Mr Legge was also dismissed, 16 October 2006, and there was no evidence whatever to support Mr Bright's contention that the relationship between the parties was deteriorating prior to that date except for an intemperate email which Mr Blacklow sent to Mr Bright dated 26 September 2006 wherein Mr Blacklow expresses some rather trenchant objections to Mr Bright's wife interfering in what Mr Blacklow regarded as his area of authority.

[34] Even if that email was the beginning of the end, it post-dates the offer made by Mr Blacklow to Mr Legge so there can be no reasonable suggestion that Mr Blacklow was motivated by malice because of a deteriorating employment relationship, because, with the exception of some tension around Mr Blacklow's email, Mr Blacklow had, on the evidence I heard, no reason to think his own position was in jeopardy. Accordingly I absolutely reject the suggestion by Mr Bright that the recruitment of Mr Legge was *a set up*.

[35] Having given earnest consideration to the issue, I am inclined to prefer Mr Blacklow's recollection of events to Mr Bright's. There are, however, inconsistencies in what each of them says. Clearly Mr Bright believed (without any evidence that was presented to the Authority) that Mr Legge was coming to New Zealand on a holiday anyway. Conversely, Mr Blacklow believed he had authority to recruit at a level which Mr Bright says was far in excess of the level applying to any of his other salespeople. I think there must have been a genuine misunderstanding between Mr Blacklow and Mr Bright as to what each intended in terms of the ultimate contact between Mr Blacklow and Mr Legge.

[36] Even if I am mistaken about that issue, it seems to me most difficult for Mr Bright to contend that Mr Blacklow did not have the apparent authority to make the offer to Mr Legge,

an offer which Mr Legge subsequently accepted and then changed his position to his disadvantage in order to take up the position including moving from one country to another to do so.

[37] I am satisfied, based on a careful examination of the relevant case law and the standard texts on the law of contract that even if I am mistaken in my preference for Mr Blacklow's evidence over Mr Bright's, the doctrine of ostensible authority must apply in the present circumstances. It is clear from the evidence that Mr Blacklow was a senior sales executive with authority to do work for the company. Nothing that Mr Blacklow would have said to Mr Legge, who after all was in another jurisdiction when the telephone communication happened, would have put Mr Legge on notice that he was dealing with somebody who was in any way unable to make him an offer which he could reasonably accept. By its very nature, Mr Blacklow's position would suggest to third parties that he was in a position to represent the company.

[38] In effect, Mr Blacklow is holding himself out as a person capable of making the offer which he in fact made: *Broadlands Finance Ltd v. Gisborne Aero Club Inc (in liquidation)* [1975] 2 NZLR 496.

[39] It follows from the foregoing discussion that I conclude that Mr Blacklow did in fact make an offer of employment to Mr Legge, or that Mr Blacklow held himself out as being in that position, that nothing put Mr Legge on notice that Mr Blacklow was not capable of making the offer he in fact made and that in consequence Nordic is estopped from now claiming that no such offer was actually made.

[40] I am satisfied the offer was accepted by Mr Legge on the evidence before me.

[41] I reached preliminary conclusions similar to those just referred to, at the investigation meeting. I gave the parties an indication of the provisional views that I had formed but indicated that, because Mr Bright was not represented at the investigation meeting having previously instructed an able and experienced representative, I wished to give Mr Bright's representative the opportunity to be heard before I issued my determination. That opportunity was provided in a teleconference on 22 November 2006.

Was there an unjustified dismissal?

[42] There can be little doubt that the dismissal of Mr Legge by Mr Bright was an unjustified dismissal within the meaning of the law. Mr Legge was summoned to a meeting with Mr Bright, without a support person or any representation, and told within a very short space of time that he was dismissed.

[43] According to Mr Legge's evidence, Mr Bright said words to the effect that *unfortunately there was no longer a position*.

[44] Even on Mr Bright's recollection of events, as set out in some detail in the statement in reply, there is no claim that Mr Bright told Mr Legge that Mr Blacklow had no authority to offer a position and indeed the statement in reply alleges that Mr Bright told Mr Legge that *he was sorry that they had already employed a salesperson and therefore the job was no longer available*. This version of events raises the important question of why Mr Bright would not refer to the alleged impropriety of Mr Blacklow's behaviour if that indeed was the basis for letting Mr Legge go.

[45] Mr Legge's representative invited me to consider whether the motive for the dismissal might not actually be a desire to remove persons associated by family with Mr Blacklow given that that very day was the day that Mr Blacklow himself was dismissed. The evidence before the Authority was that Mr Blacklow was dismissed around 2.30pm on the afternoon of 16 October and of course the discussion between Mr Legge and Mr Bright at which Mr Legge was dismissed happened around 4.30pm. In my view it is not necessary for me to decide what the employer's motive was; I am satisfied that whatever version of events actually transpired

at the first and only meeting between Mr Bright and Mr Legge, that the circumstances in which Mr Legge was dismissed were plainly unjustified, there being no warning of the impending meeting or the nature of it and no opportunity for Mr Legge to get representation or even a support person, so even if the decision can, to the limited extent possible, be substantively justified by reason of restructuring, assuming that is indeed the motive, the process is so far short of what a fair and reasonable employer would do that the decision cannot be left unchallenged.

[46] A final footnote on the issue of motive is worth recording for the sake of completeness. The evidence before the Authority suggested that Mr Bright knew several working days before the fateful interview on 16 October that Mr Blacklow had employed Mr Legge on behalf of the company and yet Mr Bright took no steps to address the issue with Mr Legge. For instance, Mr Legge actually left Australia on Friday, 13 October 2006, several days after the evidence discloses that Mr Bright knew that Mr Blacklow had engaged Mr Legge. Had Mr Bright urgently contacted Mr Legge, he could have prevented Mr Legge from leaving Australia and to some extent anyway mitigated some of the damage that subsequently was caused to Mr Legge. Again, one is left with the conclusion that Mr Bright did not behave the way that a fair and reasonable employer, acting in good faith, would behave.

Determination

[47] I am satisfied that Mr Legge has made out his claim of an unjustified dismissal. I am required to consider whether anything that Mr Legge has done contributed to the circumstances giving rise to his personal grievance. I am satisfied that Mr Legge's behaviour made no contribution whatever to the facts giving rise to his personal grievance.

[48] The evidence before me amply demonstrates Mr Legge's hurt, humiliation and injury to his feelings. He elected to remove himself from Australia to New Zealand in pursuit of a job opportunity which he accepted in good faith and which was taken from him even before he had commenced duties.

[49] The evidence suggests that Mr Legge has lost the opportunity to generate income and the cost of his travel from Australia. As to the latter, Mr Legge also claims the cost of travel New Zealand/Australia return which he had previously booked and paid for in anticipation of attending his sister's wedding, having relocated to New Zealand. I am satisfied in the circumstances that Mr Legge is entitled to reimbursement of the total cost of his air fares in those particular regards.

[50] I make the following awards against Nordic in favour of Mr Legge:

- (a) Compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of \$5,000;
- (b) Reimbursement of three months' lost wages being the amount of money which Mr Legge could reasonably have been expected to earn in his Australian position had he not left it to take the New Zealand position in the sum of \$13,000;
- (c) Reimbursement of three months' holiday pay in the sum of \$1,040;
- (d) Reimbursement of travel costs in the sum of \$854.71.

Costs

[51] Mr Legge seeks full representative/client costs in the sum of \$4,000. The parties are to engage with each other to resolve the matter of costs.

[52] In the event that costs issues have not been resolved 30 days after the date of this determination, the parties may revert to the Authority for the matter to be determined.

James Crichton
Member of Employment Relations Authority