IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 229/10
5282446

	BETWEEN	JACQUELINE SYDOW Applicant
	AND	PIERRE LE NOEL First Respondent
		EXECUTIVE RECRUITERS INTERNATIONAL LIMITED Second Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	John Appleby, counsel for Applicant Garry Pollak, counsel for Respondents
Investigation Meeting:	4 May 2010
Determination:	17 May 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Ms Jacqueline Sydow began working under an employment agreement for the second respondent Employment Recruiters International Ltd (ERI) on 19 January 2009.

[2] Eight months later she handed the first respondent Mr Pierre Le Noel, who is a director of ERI, a letter from her solicitor. It advised that in the circumstances outlined Ms Sydow considered herself to have been constructively dismissed. Mr Le Noel was also given a copy of a statement of problem prepared for the purposes of commencing an investigation by the Authority into Ms Sydow's personal grievance.

[3] The letter given to Mr Le Noel said that Ms Sydow was leaving her employment immediately. He was surprised at this and the reason given for her sudden departure. Mr Le Noel wrote immediately to Mr Appleby, Ms Sydow's solicitor, saying that he had been completely stunned by her action and by the contents of the letter and statement of problem given to him. He noted that Ms Sydow had given no notice of resignation and that the letter had not stated she was resigning.

[4] Mr Le Noel advised Mr Appleby that Ms Sydow's resignation was not accepted and asked for her to reconsider and discuss it with him after the weekend. Mr Le Noel said that he wanted to attend mediation.

[5] Subsequently mediation did take place as a necessary step before the Authority's investigation proceeded, but the dispute was not resolved by that process.

[6] Ms Sydow's personal grievance is a claim that she was constructively dismissed by ERI. As remedies she seeks reimbursement of lost remuneration for 15 months following the termination in her employment, compensation of $40,000 for distress, humiliation and discrimination, and the recovery of payments due to her as salary for three months during her employment.

[7] Mr Le Noel is named as a party in this investigation because his mind is regarded as having been that of ERI at material times, but no remedies have been sought against him.

[8] Ms Sydow's departure on 25 September 2009 from the employment occurred after attempts had been made from August by her and Mr Le Noel to resolve a dispute about the terms and conditions under which she had become employed in January 2009.

[9] In that dispute Ms Sydow contended that her employment agreement had provided for remuneration by base salary of $55,000 per annum and a bonus of 40% of net revenue billed in excess of annual budget. Mr Le Noel on the other hand maintained that her remuneration was to be entirely from commission earnings, which were to be advanced to her by way of a monthly payment equivalent to $55,000 per annum with minimum revenue of $11,500 required to be achieved. If not sustained at that level for a two month period the advance payments would be reduced and if no revenue was generated in two consecutive months there would be no advances of commissions at all until the revenue shortfalls had been made up.

[10] Ms Sydow's concern about the differences between her and Mr Le Noel over the remuneration payable was partly that she wanted the certainty of a base income, at least as a buffer against inability to generate commissions in any period, but mostly her concern was that she wanted to present a strong application for permanent residency in New Zealand.

[11] When applying for residency she had advised the New Zealand Immigration Service that under a term of her employment agreement her remuneration would include a base annual salary of $55,000. She believed that if her remuneration was entirely commission based her application would not meet the qualifying criteria for permanent residence.

[12] Information in an Immigration Service booklet presented during the investigation meeting suggests that her belief was correct, although it is not necessary for the Authority to determine the question.

[13] A salary of $55,000, as Ms Sydow believed she was entitled to under the terms of her employment, had been offered by Mr Le Noel on 14 November 2008. ERI had then offered permanent employment to her as an Associate Consultant with the recruitment firm. The offer was expressly made on the basis that Ms Sydow would need to apply for and be granted a work visa or permit. The written offer was also expressed to remain open for a period of three months. ERI predicted that the work permit would be obtained within that period and she would be able to start on or after 19 January 2009.

[14] Mr Le Noel's 14 November letter of offer had concluded with the following:

> *Please acknowledge your acceptance of our initial offer and a copy of our employment contract will be forwarded to you on receipt of a signed copy of this letter.*

[15] Ms Sydow started with ERI on 19 January 2009 once she had obtained the necessary permit allowing her to be employed for two years.

[16] After attending work for two or three days Ms Sydow was presented by Mr Le Noel with an employment agreement dated 18 January 2009. An express term of it was that remuneration would be by way of commissions only. This was clearly inconsistent with the offer made on 14 November 2008.

[17] It was not seriously suggested to the Authority on behalf of ERI that Ms Sydow had never accepted the 14 November 2008 offer. Although she did not sign the offer letter or return it to Mr Le Noel and receive an employment contract as contemplated in his letter, it does seem to the Authority that Ms Sydow had evinced an intention to become employed under the 14 November terms. While the offer remained open Ms Sydow had advised Mr Le Noel the work permit had been granted, and he had agreed that she could start work on 19 January.

[18] I therefore must find that the employer had purported to unilaterally vary the 14 November 2008 terms and conditions, when Mr Le Noel presented the 18 January 2009 agreement to Ms Sydow.

[19] As requested, Ms Sydow took the January agreement away and read it. She felt strongly opposed to it, particularly the commission-only remuneration provided. She did not however express any disagreement or objection about the agreement to Mr Le Noel during the next five or so months that she continued working for ERI, all the while receiving advances on commissions and commission payments in accordance with the January agreement. Upon receiving the 18 January contract she had however immediately complained to another director of the employer, Mr Eustace Lobo, who she regarded as approachable.

[20] Mr Lobo said in evidence that he had been aware from Mr Le Noel of the remuneration changes and had agreed they were needed. Mr Lobo, I accept from his evidence, did not relay to Mr Le Noel what Ms Sydow had complained to him about but advised Ms Sydow to avoid making an issue out of the commission based remuneration and work to find a solution to her problems.

[21] It was not until August 2009 that Ms Sydow instructed Mr Appleby who took up her case through correspondence and in meetings with Mr Le Noel.

[22] On 31 August 2009 an email was sent by Mr Appleby to Mr Le Noel advising:

> *My understanding of the outcome of our meeting today was that we had agreed you were to amend the contract provided in January* [2009] *to reflect the 14 November* [2008] *offer, and that you were to make up the salary arrears for June and July.*

[23] Mr Le Noel wrote back to Mr Appleby on 2 September, outlining his view of what had been discussed on 31 August. He maintained that Ms Sydow, when she started work in January 2009, had accepted that by then the firm could only afford to

pay an advance on commissions for the first three months and that a contract reflecting this had been given to her within a day or two of commencement after discussion about its contents. He said:

> *I would point out that the contract we are working to is the one provided on the 19 February 2009* (sic). *The advance/retainer is at the same level and this is what has been paid to Jacqueline over the first four months.*

[24] Mr Le Noel concluded:

> *As I see it we can either agree that the contract dated January 19 is acceptable and Jacqueline can continue on that basis in the future but temporarily operate as our Research Manager for the next two months. Under this arrangement we could continue to support her PR application. Alternatively if she finds this unacceptable she is able to terminate her employment arrangement whenever she wishes to. We would in turn need to inform the Labour Department that she is no longer employed by us.*
>
> *So, either one of the two options is agreed to. If it is the former then the January 19th contract must be signed forthwith to avoid any continuing uncertainty.*

[25] Mr Le Noel wrote again to Mr Appleby on 18 September 2009, saying:

> *The original letter of offer was also neither signed nor returned to us. Furthermore Jacqueline also hasn't signed the January 19 contract. We have assumed that she accepted the terms of the January 19 contract as she has continued to turn up and accept the remuneration that has been paid to her.*
>
> *We are honouring the January 19 contract in all regards as Jacqueline is and believe we have agreed employment terms.*
>
> ……
>
> *We are happy for Jacqueline to remain with us on the basis of the January 19 contract, and see no need to change those agreed terms. But we would like her to confirm formal acceptance by signing and returning it, as previously requested.*

[26] The response a few days later was the letter given to Mr Le Noel by Ms Sydow advising of her immediate departure and raising the personal grievance claim that she had been constructively dismissed by ERI. At the same time Ms Sydow advised of her intention to file the statement of problem with the Authority.

[27] There is no dispute in this case that in seeking to change Ms Sydow's remuneration from what had been agreed, the employer held genuine concerns about its ability to afford to pay a base salary as it had offered in November 2008. There was clearly a risk that in the increasingly recessionary times and deteriorating market conditions Ms Sydow would not be able to generate returns sufficient to cover ERI's overhead of that remuneration.

[28] In that regard, I accept, Mr Le Noel's intentions had been to forestall or pre-empt an imminent redundancy situation, which was likely to arise if the employment was performed under the 14 November terms providing for a base salary of $55,000.

[29] However that is no justification for a breach of contract, if there was such in this case. I find there was a breach and a serious one.

[30] The issue is whether the breach that I find did occur in January 2009, with the changing of the terms of employment unilaterally, provided any basis for the claim of constructive dismissal.

[31] I do not consider this to be on its facts a case where the employer gave the employee an ultimatum of resigning or being dismissed. The weight of the evidence shows clearly that the employer wished to continue the employment, although on the terms of the 18 January agreement. ERI as an employer did no more than point out the reality of what is obvious in any employment relationship; employees may terminate the agreement if they wish. There was no attempt by ERI to coerce Ms Sydow's resignation, I find.

[32] Neither do I consider that there was any course of conduct followed by ERI with the intention of forcing Ms Sydow to leave.

[33] It is the third of the main categories of constructive dismissal often referred to in case law which may apply in the present case. That category is where there is a breach of the employment agreement of such seriousness as to make it foreseeable to the employer that the employee will not tolerate the breach but leave.

[34] There was a serious breach of the employment agreement I find, in January 2009, when Mr Le Noel imposed the 18 January remuneration terms on Ms Sydow without obtaining her consent.

[35] I accept that objectively it was not reasonably foreseeable, and was not foreseen by Mr Le Noel before the employment terminated, that Ms Sydow might leave because of dissatisfaction with her employment terms.

[36] Of critical importance to the determination of this personal grievance claim is the subsequent conduct of the parties over a period of five or more months, between January and August 2009. In that time Mr Le Noel was given no reason by Ms Sydow to believe that she had not accepted the 18 January terms under which she received her remuneration. Ms Sydow worked on without protest or objection to those terms. While Mr Lobo was made aware in January 2009 of Ms Sydow's dissatisfaction with the terms of her employment, he did nothing to address her complaint and he heard nothing more from her about it after January.

[37] I have considered whether Ms Sydow is to be regarded as having affirmed the breach of her employment agreement and therefore cannot be heard to complain that she was constructively dismissed.

[38] In *New Zealand Amalgamated Engineering & Related Trade Industrial Union of Workers v. Ritchies Transport Holdings Ltd*, unreported, 12 June 1991, ALC 70/91, Travis J, the Labour Court discussed the question of acceptance by an employee of a breach of duty by an employer under an employment agreement leading to resignation.

[39] The issue before the Court was whether a repudiation, or breach of duty, had been accepted by the employee and had led to his resignation, thereby terminating the contract of employment. If so the situation was capable of giving rise to a constructive dismissal. Alternatively, if the employee had acquiesced in or accepted the unilateral alteration of the terms of his contract or employment, by continuing to work he could be regarded as having affirmed the altered contract, thereby preventing his later resignation from being regarded as a constructive dismissal.

[40] The Labour Court distinguished cases in which the employee has protested clearly to the employer, making the employer understand that the worker had neither accepted nor agreed to the unilateral changes.

[41] In my view Ms Sydow's is not such a case. Although initially, in January 2009, she had expressed her dissatisfaction to Mr Lobo, there was then a five or more month period in which she did nothing to suggest that she had not accepted the terms

and conditions which provided for her remuneration to be on a commission only basis.

[42] Ms Sydow, I find, knew from when Mr Le Noel presented her with the 18 January terms of employment that ERI was going to employ her and pay her under those terms. She did not protest to Mr Le Noel for several months, out of fear that her application for permanent residence might be adversely affected in some way but also because she viewed Mr Le Noel as unapproachable and a person unlikely to tolerate opposition.

[43] As a matter of degree I find that her initial objection was slight and not communicated to Mr Le Noel at all. In so far as she raised her dissatisfaction with Mr Lobo, he was given no reason to think that she had not taken his advice to avoid making an issue out of it. Then followed a long period, five or more months, over which any objection first expressed could be seen to have evaporated with the repetitive payment and receipt of commissions.

[44] I find that Ms Sydow by her conduct in this regard affirmed the breach. In doing so she lost the right to accept the repudiation of the 14 November terms by ending her employment within a reasonable period thereafter and invoking her remedies available under the Employment Relations Act.

[45] For that reason I find that Ms Sydow resigned freely, although unhappily, from her employment and the claim of constructive dismissal does not succeed. I find that Ms Sydow was paid in accordance with the remuneration provisions under the 18 January contract and has no claim for that reason.

[46] Although there was, I have found, a breach by the employer of the employment agreement in January 2009 no remedy has been sought by way of penalty against the employer ERI, or against Mr Le Noel as an alleged party to a breach.

[47] Had Ms Sydow in January or February 2009 applied for an order under s 137 of the Act requiring ERI to comply with the 14 November 2008 terms of employment she could well have been successful in obtaining one, although the likelihood of an impending redundancy situation may have led the Authority to exercise its discretion against making that order in the circumstances.

[48] As Mr Le Noel personally was not the employer of Ms Sydow he has no liability as a party to her employment agreement. A non-party may only have liability under s 134 of the Act for aiding, abetting, inciting, or procuring a breach by a party to an employment agreement, but no remedy has been claimed against Mr Le Noel on that basis.

Determination

[49] For the above reasons I find that Ms Sydow does not have a personal grievance. She was not dismissed, constructively or in any other way.

Costs

[50] Costs are reserved. If counsel for the parties are unable to resolve the issue, application may be made in writing within 28 days of the date of this determination for an order from the Authority. Ms Sydow shall have a further 14 days in which to respond in writing if an application is made.

A Dumbleton
Member of the Employment Relations Authority