

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 187
3028151

BETWEEN RICK WHITFIELD
Applicant
AND COFFEE DISTRIBUTORS LIMITED
Respondent

Member of Authority: Andrew Dallas

Representatives: James Pullar and Sam Hider, counsel for the Applicant
Adam Gallagher, advocate for the Respondent

Investigation Meeting: 9 August 2018 at Christchurch

Submissions and other
information received from
the parties up to and
including: 11 September 2018

Date of Determination: 12 December 2018

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Rick Whitfield was employed by Coffee Distributors Limited as sales manager on and from 7 December 2015. He was employed under the terms of an individual employment agreement.

[2] Mr Whitfield claims Coffee Distributors failed to negotiate a commission agreement with him in breach of the employment agreement. He said he was disadvantaged in his employment by the two unjustified warnings. Mr Whitfield also said he was unjustifiably constructively dismissed by Coffee Distributors. In settlement of his personal grievances, Mr Whitfield seeks an award of lost wages and compensation for hurt, humiliation and injury to feelings.

[3] Coffee Distributors denied all of Mr Whitfield's allegations and claims for compensation.

The Authority's investigation

[4] During the Authority's investigation meeting, I heard evidence from several witnesses including Mr Whitfield, his partner, Kate Whitfield, Coffee Distributors' director, Brian Soutar and managing consultant, Mike Button.

[5] Having regard to s 174E of the Employment Relations Act 2000 while I have not referred to all the evidence received from witnesses or the submissions advanced by Mr Whitfield in this determination, I record that I have fully considered this material. For reasons which are unclear Coffee Distributors did not lodge any submissions. The Authority was advised by the company's advocate that he had not received any instructions to lodge submissions.

Issues for investigation and determination

[6] These are:

- (i) Was Mr Whitfield constructively dismissed by Coffee Distributors?;
- (ii) If so, was Mr Whitfield's dismissal, and how the decision was made, what a fair and reasonable employer could have done in all the circumstances at the time?;
- (iii) Was Mr Whitfield subject to an unjustified action (or actions) during his employment;
- (iv) If Coffee Distributors' actions were not justified, what remedies should be awarded to Mr Whitfield, considering:
 - (a) Lost wages; and
 - (b) Compensation for hurt, humiliation and injury to feelings; and
- (v) Should either party contribute to the costs of representation of the other party?

What happened?

Failure to negotiate a commission agreement

[7] Mr Whitfield said Coffee Distributors breached the terms of his employment agreement by failing to negotiate a commission agreement with him. A review of cl 12 (salary) of his employment agreement discloses the following wording: “[a] commission agreement will be negotiated separately”.

[8] Mr Whitfield said the commission agreement was something that attracted him to seek employment with Coffee Distributors but it was never negotiated. While Mr Whitfield said he suffered monetary loss as a result of the failure to negotiate the agreement, he accepted there may be a problem with quantification and therefore sought compensation for the non-monetary loss he said had resulted, including stress and distress.

[9] Mr Whitfield said he asked to negotiate the commission agreement with Coffee Distributors on a number of occasions and over an extended period. Mr Whitfield said the failure to negotiate the agreement was an unjustified action to his disadvantage and he should be compensated with an award of compensation under s 123(1)(c)(i) of the Act.

[10] Coffee Distributors said while Mr Whitfield has raised the issue of the commission agreement on a number of occasions, it was never in a financial position to agree upon a bonus with him. Coffee Distributors also raised Mr Whitfield’s performance against his budget as another reason why an agreement was not negotiated.

Warnings

Written warning

[11] On 13 October 2017, Mr Whitfield was issued a letter by Coffee Distributors over the hand of Mr Button, who had become interim general manager after being brought in by the directors to undertake a review of the business. As general manager, Mr Button effectively became Mr Whitfield’s manager and had assumed many of his (managerial) duties.

[12] The letter alleged Mr Whitfield had made derogatory remarks about one of the company's directors to a client which was "totally unacceptable and grossly unprofessional". The letter advised Mr Whitfield that "[o]ver the next 14 days there will need to be a marked improvement in your attitude to both the Directors and Coffee Distributors Ltd".

[13] Mr Whitfield said the letter came as quite a shock because he had never been spoken to about the allegation, let alone been subject to an investigation about it. Mr Whitfield said he could not recall saying anything akin to what was alleged but believed any comments made were also taken about of context.

Second warning

[14] On 3 November 2017, Mr Whitfield was asked by Mr Button via email to attend a meeting later that day. Mr Whitfield said he had no idea what the meeting was about. From the outset of the meeting, Mr Whitfield said he felt uncomfortable and asked if he needed representation. In response to this enquiry, Mr Button said: "I am going to give you a second written warning, do you feel you need representation for that?".

[15] Mr Whitfield said he no idea why he was going to be given a second written warning. He said he left the meeting extremely distressed.

[16] Coffee Distributors denied it gave Mr Whitfield any warnings. However, during the investigation meeting, Mr Button conceded he may have said the quoted words reproduced in paragraph [14] above.

Mr Whitfield raises personal grievances

[17] On 10 November 2017, Mr Whitfield's solicitor wrote to Coffee Distributors and raised three personal grievances covering the failure to negotiate the commission agreement and the two warnings. The solicitor also characterised the removal of Mr Whitfield's managerial duties in favour of Mr Button as a fundamental breach of his employment agreement. The letter concluded by seeking urgent mediation in an attempt to resolve the employment relationship problem now clearly existing between the parties.

[18] In response, Coffee Distributors' solicitor advised via email on 15 November 2017, Mr Whitfield's letter was "timely" because his firm had been instructed to assist with his

performance management. Mr Whitfield said this was the first time he was aware that Coffee Distributors had concerns about his performance. The email did not otherwise address Mr Whitfield's claims.

[19] Mr Whitfield denied there were grounds for concerns with his performance. He said he had both arrested declining sales and managed to increase sales. Mr Whitfield also said he was undermined in improving sales by board and management decisions over the use of expenditure.

Constructive dismissal

[20] Mr Whitfield's employment came to an abrupt end in December 2017, when, in addition to the fundamental breach, three further adverse events occurred.

Request to return car and mobile phone

[21] On 18 December 2017, Mr Button emailed Mr Whitfield and requested "in line with company policy" he return his mobile phone and car during the Christmas period. Mr Whitfield said as far as he was aware there was no such company policy and he believed he had unlimited use of both the phone and the car.

[22] Mr Whitfield said he believed Coffee Distributors wanted the car and phone back because they thought he was going to leave. Coffee Distributors said return of these items was necessary so the company could continue to receive client orders and deliver them. The company also said Mr Whitfield previously left them at the office. However, Mr Whitfield said this was when he had gone overseas for an extended period.

New employee

[23] On 21 December 2017, Mr Whitfield was asked to collect the mail. He had previously undertaken this task on a daily basis prior to Mr Button's appointment as a general manager. When sorting the mail, he discovered a signed agreement for a new commission based sales representative. The contract stated that the new sales representative, who was professionally known to Mr Whitfield, was to undertake sales in a large part of Mr Whitfield's current sales territory. Mr Whitfield said he felt "completely sick" in finding the agreement.

[24] Coffee Distributors said the new sales representative's role was designed to support Mr Whitfield in his role, although he was not aware of this, and that the person never actually commenced because Mr Whitfield left his employment.

No details in the payroll system

[25] Mr Whitfield said at or about this time, he also noticed that his details had not been loaded into the payroll system for the period after Christmas 2017. He said the details of all other employees were, however, loaded.

[26] Mr Whitfield said the cumulative effect of the following:

- (i) Mr Button taking over many of his management functions;
- (ii) the appointment of a commission sales representative for most of his territory;
- (iii) the failure to negotiate a commission agreement;
- (iv) being given a written warning without notice or process;
- (v) the failure to resolve his grievances;
- (vi) being subject to performance management without notice;
- (vii) being asked to return his car and phone; and
- (viii) not having his payroll details entered post-Christmas 2017

meant that he had been constructively dismissed by Coffee Distributors.

[27] The conclusion reached by Mr Whitfield about Coffee Distributors' conduct towards him was confirmed by his solicitor in a letter to the company's solicitor dated 21 December 2017. Coffee Distributors denied Mr Whitfield had been constructively dismissed and the veracity of his other claims.

[28] In settlement of his constructive dismissal claim Mr Whitfield sought an award of lost wages and compensation for hurt, humiliation and injury to feelings.

The Authority's view

Failure to negotiate a commission agreement

[29] The language of cl 12 of his employment agreement is very straightforward and unambiguous. In fact it is hard to imagine how it could be more straightforward or any less

unambiguous, Coffee Distributors were required to negotiate a commission agreement with Mr Whitfield and failed to do so for a period of over two years.

[30] Even if, for the sake of argument, Mr Whitfield's performance did not warrant payment of a commission (which was disputed by him) or Coffee Distributors could not afford to pay him one (which he also disputed), the express wording of clause 12 meant it was required to negotiate one with him regardless. In doing so, I accept Mr Whitfield's submission that it was entirely within Coffee Distributors' rights to negotiate a figure it was comfortable paying him or one which may have been challenging for him to achieve. However, for whatever reason, it did neither of those things nor anything else in furtherance of its legal obligations under the clause.

[31] Coffee Distributors actions (or inactions) here were unjustified and I find Mr Whitfield's personal grievance to be made out.

Warnings

Written warning

[32] I am satisfied on the evidence that Mr Whitfield received a written warning from Coffee Distributors on 13 October 2017. In doing so, I reject Mr Button's written evidence the letter was, in effect, a record of a discussion (which was otherwise undermined by his concession during his oral evidence that this "discussion" either did not actually take place or he could not remember it taking place).

[33] Objectively assessed the letter was a written warning – which although not explicitly characterised as such – designed to make Mr Whitfield more vulnerable to dismissal.¹ The letter was given without warning, in the absence of any process and without justification.

[34] I am satisfied that this unjustified action by Coffee Distributors was to Mr Whitfield's disadvantage in his employment and he has a personal grievance as a result.

¹ See, *NZ Amalgamated Engineering etc IUOW v Alliance Freezing Co Ltd* [1998] NZILR 1287

Second warning?

[35] I am not satisfied on the evidence that Mr Whitfield actually received a further warning from Coffee Distributors on 3 November 2017. However, the actions of the company here in ambushing Mr Whitfield with a proposed further warning did further damage the employment relationship and no doubt contributed to how he viewed the situation when he believed himself to be constructively dismissed.

Constructive dismissal

[36] There were several components to Mr Whitfield's claim of constructive dismissal by Coffee Distributors:

- (i) the fundamental breach of his employment agreement which saw most of his managerial duties removed in favour of Mr Button (Mr Whitfield said this, of itself, gave rise to his constructive dismissal through breach of duty²);
- (ii) the requirement, without precedent or company policy, to return his car and mobile phone for the Christmas 2017 period;
- (iii) the failure to load his details into the payroll system beyond the Christmas 2017 period; and,
- (iv) the appointment of another person – without his knowledge and only discovered by him inadvertently – to take over other significant aspects of his job, was a clear sign to him that his job no longer existed.

[37] I find even if the fundamental breach of Mr Whitfield's employment agreement identified above was insufficient to support a claim for constructive dismissal, this together with the additional three elements also identified above were sufficient. In many ways, these elements whether viewed separately or cumulatively can be seen as "the final straw" which broke the employment relationship.

[38] In my view it was reasonably foreseeable that Mr Whitfield would resign in circumstances where (i) two other people were employed or engaged to take over significant

² *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA) at 374

aspects of his job, (ii) three personal grievances had been raised and not remedied, (iii) he was required to return his car and mobile phone and (iv) his details were not loaded into the payroll system post the Christmas period. I find Mr Whitfield was unjustifiably constructively dismissed by Coffee Distributors.

What remedies should Mr Whitfield receive?

[39] Having found Mr Whitfield was subject to an unjustifiable constructive dismissal by Coffee Distributors, the Authority must under s 123(2) of the Act, even if it awards no other remedies, order payment of the lesser of a sum equal to lost wages or three months ordinary time wages.

[40] Mr Whitfield sought the amount of \$30,313.15 gross, or roughly five months lost wages, as his actual loss after obtaining temporary employment. In order to award Mr Whitfield this figure, however, I need to exercise my discretion under s 128(3) of the Act. Mr Whitfield said the discretion should be exercised in his favour due to the “egregious nature” of his constructive dismissal, his age and limited prospects for future employment in similar managerial roles.

[41] Having regard to those submissions, and in the absence of any submissions to the contrary from Coffee Distributors, I exercise my discretion in Mr Whitfield’s favour and award him \$30,313.15 gross as lost wages.

Compensation for humiliation, loss of dignity and injury to feelings

[42] As a remedy for his personal grievances, Mr Whitfield sought compensation for humiliation, loss of dignity and injury to feelings. However, as the personal grievances arose out of a course of conduct which ultimately saw Mr Whitfield constructively dismissed, I intend to award him a global compensatory sum.

[43] Having found Coffee Distributors actions were unjustified, I accept Mr Whitfield’s evidence, supported by that of his partner, about the impact these had on him. I specifically accept their evidence that Mr Whitfield experienced panic attacks, fear, anxiety and periods of breathlessness as a direct consequence.

[44] Subject to any consideration of contribution under s 124 of the Act, I award Mr Whitfield \$25,000 as compensation for that humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act.

Contributory behaviour by Mr Whitfield?

[45] Having found that Mr Whitfield is entitled to remedies for his personal grievances, I am required by s 124 of the Act to consider whether his actions were causative and blameworthy of the situation he found himself in.

[46] Mr Whitfield said there should be no deduction for contribution. As Coffee Distributors did not lodge any written submissions or otherwise make submissions on the day, it is not clear what its position as to contribution is.

[47] Having considered all the evidence and Mr Whitfield's submission and on the balance of probabilities, I find there was no contribution and as such, there should be no deduction to the remedies awarded.

Summary of Mr Whitfield's remedies

[48] The remedial orders made are for Coffee Distributors to settle Mr Whitfield's personal grievances by paying him the following amounts:

- (i) \$30,313.15 gross as reimbursement for lost wages; and
- (ii) A global figure of \$25,000 as compensation for humiliation, loss of dignity and injury to feelings.

Costs between the parties are reserved

[49] The parties are invited to resolve the matter of costs. If they are unable to do so, Mr Whitfield has 28 days from the date of this determination in which to file and serve a memorandum on costs. Coffee Distributors has a further 14 days in which to file and serve a memorandum in reply.

[50] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.³

Andrew Dallas
Member of the Employment Relations Authority

³ This approach has been endorsed by two Full Courts of the Employment Court: see, *PBO Ltd v Da Cruz* [2005] ERNZ 808 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135