



New Zealand Employment Relations Authority Decisions

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Beatty v SKF New Zealand Limited [2011] NZERA 247; [2011] NZERA Auckland 186 (6 May 2011)

Last Updated: 16 May 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 186 5306154

BETWEEN

TONY BEATTY Applicant

AND

SKF NEW ZEALAND
LIMITED
Respondent

Member of Authority:

Robin Arthur

Representatives:

Applicant in person
Carolyn Peacock for Respondent

Investigation Meeting:

12 and 13 April 2011

Determination:

6 May 2011

DETERMINATION OF THE AUTHORITY

- A. **Tony Beatty has not established that any actions of SKF New Zealand Limited, or employees acting on its behalf, breached the terms of a settlement agreement (made under [s149](#) of the [Employment Relations Act 2000](#)) between the parties.**
- B. **Mr Beatty's application for a compliance order, a penalty and compensation for alleged damages is declined.**

Employment Relationship Problem

[1] Tony Beatty claimed he had lost or failed to be appointed to nine jobs over a five year period because his former employer SKF New Zealand Limited (SKFNZL) had not complied with the terms of a settlement agreement made in 2005.

[2] He said various SKFNZL managers had made negative comments about him to nine potential or actual employers. Mr Beatty said any such comments, about his work and how his employment with SKFNZL ended, breached a term of the settlement agreement that stated "*fbjoth parties agree the ending of the employment relationship was by mutual agreement*".

[3] Mr Beatty sought orders requiring SKFNZL to comply with the 2005 settlement agreement and for compensation for what he said were wages lost from jobs he would otherwise have got and for the distress to him and his family over that period.

[4] He also sought a penalty against SKFNZL for its role in a decision by SKF Australia Pty Limited (SKFAPL) not to appoint him to a job in October 2009. That event was within the 12 month period for which a penalty could be claimed, while the circumstances of the other jobs which Mr Beatty said he lost due to SKFNZL's actions were outside that period by the time he made his application to the Authority on 17 May 2010: [s135\(5\)](#) of the [Employment Relations Act 2000](#) (the Act).

[5] SKFNZL denied breaching the settlement agreement. It denied any responsibility for Mr Beatty not being appointed to seven jobs for which he had applied and being dismissed from two jobs which he alleged was due to comments by SKFNZL representatives.

The investigation

[6] Investigation of Mr Beatty's claims was difficult because of limits in the evidence he was able to provide in support of the many allegations made. He was asked to provide an amended statement of problem setting out the specific details of the negative comments he alleged were made, who made them, to whom and when, and how he knew of them. He was given an opportunity to provide witness statements from managers at the companies to which he had applied for jobs and whom he alleged had told him of negative comments made by SKFNZL representatives. He also had the opportunity to seek witness summonses for those people to give evidence. Two alleged instances also involved intermediaries whom Mr Beatty said had told him about what managers said they were told by SKFNZL representatives. He did not lodge any witness statements from those managers or intermediaries. He did not seek summonses for them. His evidence to the Authority investigation meeting was that he had not even approached those witnesses about the prospect of giving evidence.

[7] On the day before the investigation meeting (and again at the meeting) he sought permission for his wife and son to give evidence in support of his claims. Neither had provided a written statement in accordance with the timetable directions set much earlier by the Authority. The request was denied but Mrs Beatty nevertheless spoke for several minutes at the meeting in support of her husband's claim. Mr Beatty wanted me to hear evidence from his son that his son's health problems, for which he had recently been in psychiatric care, resulted from the stresses caused by how SKFNZL had treated Mr Beatty. Even if such evidence had been submitted in accordance with the timetable and was admissible and relevant, I would not have been able to take it into account without independent medical evidence supporting the alleged causal link to Mr Beatty's employment difficulties.

[8] Mr Beatty alleged the following SKFNZL personnel - none of whom presently work for the company - made negative comments about him to prospective or actual employers between 2005 and 2009:

- (i) Kulas Sergaran Murgiah, a team leader, now resident in Australia; and
- (ii) Glen Pepper, a manager, now resident in Australia; and
- (iii) Barry Shaw, a technician, now resident in Australia; and
- (iv) Arun Mascarenhas, a finance and human resources manager, now resident in Switzerland and employed in a senior role with another subsidiary of SKF AB, SKFNZL's parent company; and
- (v) Stephen Bodt, a finance and human resources manager; and
- (vi) Simon Whyte, the managing director; and
- (vii) Sentil Vel, a manager employed by SKF Australia Pty Limited, who had met Mr Beatty in Dubai before he migrated to New Zealand.

[9] SKFNZL lodged written witness statements from each of these men. It also lodged witness statements from former SKFAPL HR officer Tracey Spencer and former SKFAPL human resources manager Megan Hosking (now residing in the United States and working for an American SKF subsidiary). The evidence of Ms Spencer and Ms Hosking related to the circumstances of Mr Beatty not being appointed to a job with SKFAPL in October 2009. A further statement was lodged for SKFNZL's present general manager Jim Evans confirming details of a conversation he had with Ms Hosking about Mr Beatty.

[9] In summary the witness statements lodged by SKFNZL made the following responses to Mr Beatty's allegations:

- (i) Mr Murgiah had not given a "*poor reference*" to members of a maintenance team interview panel at Fonterra Morrinsville in April 2005; and
- (ii) Mr Pepper has not given an "*adverse reference*" to Tom Middleton of

ABB in August 2005; and

- (iii) Mr Pepper had not given a "*poor reference*" to Martin O'Brien of Fonterra Hautapu in October 2005; and
- (iv) Mr Mascarenhas had not given a "*discreditable reference*" to Russell Crawford of Compressed Air Controls Limited in March 2006; and
- (v) Mr Shaw had not given a "*discreditable reference*" to Simon Mortimore and Ian Butler of CCI Pope (Queensland) in August 2006; and
- (vi) Neither Mr Bodt nor Mr Whyte gave a "*discreditable reference*" to Bryan Urquhart of Connell Wagner in October 2006; and
- (vii) Mr Vel had not given a "*discreditable reference*" to One Steel Manufacturing Pty Limited in Whyalla (South

Australia) in October 2008; and

(viii) Neither Mr Vel nor Mr Murgiah had given a "*discreditable reference*" to SKFAPL in October 2009.

[10] There was another instance - involving a job application by Mr Beatty in December 2006 - whether Mr Beatty did not identify any specific personnel but alleged Duncan Webb of Prelim Reliability Engineers (Mt Maunganui) told him of "*misconduct and interference*" by SKFNZL.

[11] In light of the limitations in Mr Beatty's evidence I considered the Authority need only make further inquiries about instances where SKFNZL accepted it had responded to queries from prospective employers about Mr Beatty. For that reason I had Mr Mascarenhas and Mr Bodt attend by telephone conference and Mr Whyte attend in person to confirm, under oath or affirmation, their written statements and to answer questions about those instances.

[12] I also had Ms Spencer (in Melbourne) and Ms Hosking (in Philadelphia) attend by telephone conference to answer questions, under affirmation, about the circumstances in which SKFAPL decided not to proceed with a job offer to Mr Beatty in October 2009.

[13] I spent several hours questioning Mr Beatty about the detail of his allegations and the circumstances of each job application and the two cases in which he had said actions of SKFNZL personnel resulted in him losing two jobs he had got.

[14] Ms Peacock and Mr Beatty each had the opportunity to ask additional questions of the witnesses attending in person or by telephone. While Mr Beatty took that opportunity, it was necessary for me to repeatedly intervene (and eventually end) his questioning of Mr Whyte, Mr Bodt, Mr Mascarenhas, Ms Spencer and Ms Hosking because Mr Beatty spent considerable time restating his view of his case rather than asking questions for the witnesses to answer.

[15] As allowed under [s174](#) of the Act this determination does not set out all the information and background canvassed by the witnesses in their written and oral evidence or the closing submissions. Rather than set out that material in detail, this determination is limited to necessary relevant findings of fact and law with conclusions on the issues the Authority considered required determination in order to dispose of the matter.

Determination

[16] I found, for reasons set out below, that Mr Beatty's application must be declined. His evidence did not reach the standard of the balance of probabilities necessary to establish SKFNZL or its representatives had breached the terms of the settlement agreement.

[17] The terms of the agreement were not as broad as he alleged, and, even if they were, he did not establish the losses he says he has suffered were caused by SKFNZL's actions. Accordingly his application for a compliance order, a penalty and damages could not be granted.

The settlement agreement

[18] During the investigation meeting Mr Beatty raised a new argument about the settlement agreement. He argued the agreement that he and Mr Mascarenhas signed on 7 April 2005 could not be held to be full and final because he was too unwell on that day to have made such an agreement.

[19] Mr Beatty said he lapsed into a state of unconsciousness during the mediation as a result of the stress of losing his job and health problems of diabetes and a serious heart condition. As a result he said that he did not know what he was signing, so that if the terms do not bind SKFNZL to provide the references to prospective employers that he wants, the agreement should now be reviewed.

[20] I reject Mr Beatty's evidence on that point as quite implausible.

[21] He told me Mrs Beatty and Soraya Barker, a lawyer from the Hamilton Community Law Centre, accompanied him at the mediation. I consider it highly unlikely that his lawyer and the Department of Labour mediator (who conducted the mediation and certified the agreement under [s149](#) of the Act) would have allowed Mr Beatty to sign an agreement if he was suffering what would have been an obvious impairment. Mr Beatty had no medical evidence to support his allegation that he was so ill that day.

[22] The agreement had five clauses. The first stated the "*terms of settlement and all matter discussed at mediation shall remain confidential*". The second stated the agreement is "*a full and final settlement of all matters between the parties*". The third provided a compensation payment to Mr Beatty. The fourth required SKFNZL to provide a certificate of service within seven days. The fifth stated that "*both parties agree the ending of the employment relationship was by mutual agreement*".

[23] Mr Beatty's case - which I paraphrase - was based on his belief that those terms, taken together, required SKFNZL to provide him with a positive reference in response to any inquiries from prospective employers and to make no reference to how he did his work and got on with colleagues while employed by SKFNZL. He considered any such comments about his

work were covered by the phrase "*all matters discussed at mediation*" and could not be mentioned.

[24] I find the agreed terms did not require SKFNZL to answer queries from prospective employers in the manner that Mr Beatty suggested. Provided those prospective employers had Mr Beatty's authority to contact SKFNZL, SKFNZL representatives were free to give frank answers about their view of his work and how he had carried out his duties, if asked such questions. There was no clause requiring each party to only speak positively of the other if asked by any third party. Such a clause, not to make derogatory comments about the other party, are sometimes found in settlement agreements of this type, but was not in this one.

[25] There is, perhaps, a technical argument that SKFNZL could not even refer to the employment relationship ending "*by mutual agreement*" as they had agreed, because that term was in turn covered by the confidentiality provision. However, read purposively, I accept that the terms required SKFNZL representatives to use that phrase and not say that Mr Beatty was dismissed.

[26] SKFNZL had provided a one-line certificate of service but, at Mr Beatty's request, had provided a more detailed written statement confirming the length of his service, his duties, skills and training.

[27] I accept, from their evidence, that in answering queries from prospective employers of Mr Beatty, Mr Mascarenhas (in March 2006) and Mr Bodt (in October 2006) both reiterated the content of the service statement provided and did not refer to him as being "*kicked out*" of SKFNZL.

[28] There was no term requiring SKFNZL representatives to do more in providing references or other assistance to Mr Beatty in dealing with prospective employers.

The alleged breaches

[29] Even if there were a term about references of the type asserted by Mr Beatty, I would not have found such a term was breached. I reached that conclusion after hearing and considering his own evidence on each alleged breach.

Fonterra Morrinsville

[30] Mr Beatty said he attended a job interview at Fonterra Morrinsville in the week before the settlement agreement with SKFNZL was made. He initially said that the interview panel members told him that Mr Murgiah had given him a poor reference and given them "*personal details about me*".

[31] However, on questioning, he accepted that he was not told what Mr Murgiah had said but the interviewers "*hinted to me*" and had not actually mentioned Mr Murgiah's name. He said they referred to "*some personal remarks by people who knew me*".

[32] He accepted he had only assumed this meant Mr Murgiah because Mr Murgiah was responsible for SKF services provided to Fonterra Morrinsville.

[33] Mr Beatty's own evidence does not support the conclusion he reached about Mr Murgiah and, even if negative comments were made, they were made before the mediation in which the settlement agreement was reached.

ABB Hamilton

[34] Mr Beatty said Mr Pepper had told Tom Middleton of ABB that Mr Beatty

was "*kicked out*" by SKFNZL. He said Neelam Chandra, the principal of an English language school, told him this. Ms Chandra was asked by Work and Income New Zealand to help Mr Beatty find a job. She telephoned Mr Middleton to ask about the prospect of a job for Mr Beatty with ABB.

[35] Mr Beatty's oral evidence was that the reported conversation between Ms Chandra and Mr Middleton was on 19 August 2005 although his written statement said that it was May 2006 when Ms Chandra was asked to help him and phoned Mr Middleton.

[36] There is nothing to corroborate Mr Beatty's evidence of what he says Ms Chandra told him of what Mr Middleton told her about what was said to him by Mr Pepper. At best Mr Beatty's account is double hearsay and inherently unreliable.

Fonterra Hautapu

[37] Mr Beatty's oral evidence was that he asked Mr Pepper to provide a reference for a job with Fonterra Hautapu because the manager responsible there - Martin O'Brien - knew Mr Pepper. However Mr Beatty reported that Mr Pepper replied he could not give a reference as he had been told not to by Mr Mascarenhas. Mr O'Brien told Mr Beatty a few days later that Mr Pepper had told him that he could not provide a reference. That accorded with Mr Pepper's written statement that Mr Mascarenhas had directed any requests for references for Mr Beatty be referred to Mr Mascarenhas as human resources

manager.

[38] There is nothing to support Mr Beatty's allegations that Mr Pepper told Mr O'Brien that Mr Beatty was "kicked out" due to conflict with Mr Murgiah. Rather Mr Pepper appears to have taken care not to say anything to Mr O'Brien.

Compressed Air Controls Limited

[39] Mr Beatty alleged that he had contacted Mr Mascarenhas about acting as a referee for his job application with Compressed Air and Mr Mascarenhas had agreed. He said Mr Crawford later told him that Mr Mascarenhas "did not say a word about you". Pressed on what he believed Mr Mascarenhas had told Mr Crawford, Mr Beatty said: "He said something funny but I don't know what he said. I'm not sure what his remarks were". It was an answer a long way short of his allegation that Mr Crawford advised him that Mr Mascarenhas had given a "discreditable" reference.

CCI Pope

[40] Mr Beatty signed an employment agreement with CCI Pope in May 2006 and travelled to Mackie in Queensland for training in June 2006. He said he had arranged for Mr Mascarenhas to be a referee but he understood that he was offered the job without Mr Mascarenhas being contacted.

[41] He said he was abruptly dismissed by CCI on 14 August 2006. He said the dismissal followed a query from his manager about where he had worked previously.

He had replied: "Hamilton". He said he was interviewed soon after by the CCI operations manager and the human resources manager who asked why he had left SKFNZL. He said those two managers had "obviously rung Hamilton and talked to [Mr Shaw] and [Mr Murgiah]". However there was nothing in Mr Beatty's evidence about CCI Pope managers having revealed a source or name from SKFNZL as the basis of their concerns about his capabilities after six weeks of training and work with the company. His naming of Mr Shaw and Mr Murgiah was nothing more than assumption.

[42] Mr Beatty said he did nothing to challenge CCI Pope's dismissal through the relevant employment dispute procedures in Queensland. Neither could he explain anything more of the reasons given by CCI Pope for his dismissal. He said he was given a letter on the day of the dismissal but lost it on his return journey to New Zealand.

Connell Wagner

[43] When Mr Beatty applied for a job with Connell Wagner in October 2006 he again contacted Mr Mascarenhas about being a referee. Mr Mascarenhas, who was about to leave SKFNZL and had transferred his human resources responsibilities to Mr Bodt, referred the query to Mr Whyte. Mr Whyte told Mr Beatty that Mr Bodt would deal with any queries. Mr Beatty later received an email from Mr Urquhart which advised that he was not successful in his application. Mr Beatty said that, while nothing specific was said in the email, he considered there was something "odd" about it and "obviously [Mr Bodt] said something rude about me. I don't know what he said but it reflects on me personally". He said Mr Urquhart had told him that the information from Mr Bodt "didn't tell me anything about you or your duties". Again, there is nothing to support Mr Beatty's allegation that Mr Bodt gave a "discreditable" reference.

Prelim Plant, Mt Maunganui

[44] Mr Beatty's oral evidence was that Mr Webb remembered him from a visit to SKF in Hamilton and asked why he left there. Mr Beatty said he told Mr Webb that he did not want him to ask SKF for a reference and "they talked badly about me". He alleged that Mr Webb reported those comments to Mr Shaw and Mr Pepper who then sent "boy racers" to harass him at his home. He said cars had driven past him when he was walking along the street and the occupants had shouted at him and flashed their lights at him. He also said that graffiti put on a wall at a neighbouring school was also directed at him. Asked what connected those events to Mr Pepper and Mr Shaw, Mr Beatty replied: "I know by the law that I can't connect those events".

One Steel Whyalla

[45] In March 2007 Mr Beatty got a confirmed job offer to work for One Steel in South Australia. He had given Mr Mascarenhas as a referee and believes getting the job must have resulted from getting a positive reference from him.

[46] It took some months to make the necessary arrangements to start work there and he had just completed one year's service when he was laid off on 14 April 2009.

[47] However Mr Beatty alleges that a "poor" reference was sent to One Steel in October 2008. He says a reference was sought by One Steel from SKFNZL because of comments made by Mr Vel to another One Steel employee. Mr Beatty did not hear the comments but was in a work office when he heard a colleague talking on the telephone with Mr Vel. He said his supervisor showed him a letter, so he could see it was from SKFNZL in Auckland, but it was taken off him before he read it.

[48] Mr Beatty accepted the end of his job with One Steel had nothing to do with the letter. He said he was one of 1400

workers laid off by that company as a result of the recession. Mr Beatty's manager at One Steel manager had given him written references (November 2008 and April 2009) describing him as very capable in his field of expertise, diligent and responsible.

SKFAPL

[49] In April and May 2009 Mr Beatty unsuccessfully applied for two jobs with SKFAPL. In October 2009 he applied for a third position for which he was interviewed. For all three positions he supplied a resume which did not identify SKFNZL as his employer between 2003 and 2005. Instead the resume referred to working as a reliability engineer on Fonterra sites. Entries for other years on his resume directly named his employers in those years.

[50] Ms Spencer conducted the interview and asked Mr Beatty whether he knew anyone in SKFNZL. She did so because the Fonterra sites mentioned in his resume were places where SKFNZL personnel worked and she wondered what contact he might have had with them. Mr Beatty replied that he did not know anyone.

[51] That was untrue. He admitted during the Authority investigation that he had deliberately omitted his previous employment with SKFNZL because he did not want SKFAPL to ask the New Zealand company for a reference for him.

[52] Shortly afterwards Ms Spencer discovered that Mr Beatty had worked for SKFNZL. Meanwhile SKFAPL managers had also become concerned that Mr Beatty would not have permanent residence status in Australia. He was told orally by Ms Spencer, and then in writing by Ms Hosking, that his application for employment was unsuccessful. Two reasons were given - firstly, information from the Immigration Department suggested that his work status would be subject to three monthly checks rather than the permanent status required for the position, and, secondly, concerns that he deliberately misled SKFAPL by not disclosing his previous employment with

SKFNZL.

[53] Mr Beatty insisted that he had told Ms Spencer and that Mr Vel (another SKFAPL manager) already knew about his SKFNZL employment anyway. He also insisted Ms Spencer him made an oral employment offer which he had accepted before SKFAPL said it was not going to employ him. He said the oral offer was made despite a SKFAPL letter to the Immigration Department - written at his request - stating that he "would" be offered employment, subject to his eligibility to work in Australia. The evidence of Ms Spencer and Ms Hosking emphasised that use of the word 'would' showed no offer had yet been made or could yet be accepted.

[54] Whether Mr Beatty did have an employment agreement with SKFAPL is not a matter for this Authority in the New Zealand jurisdiction. If he had such a case, it would have been a matter for the appropriate tribunal in Australia.

[55] What is relevant in this case is Mr Beatty's allegation that he lost that job or job opportunity due to comments made about him by Mr Murgiah and that SKFAPL had no more right to information about him from SKFNZL than any other prospective employer. The evidence does not support either proposition.

[56] Mr Beatty admitted in his oral evidence that he did not know if Mr Murgiah had given SKFAPL any information. I accept the evidence of Ms Hosking that she found out Mr Beatty had worked for SKFNZL only by chance. The New Zealand general manager Jim Evans attended a management dinner in Sydney where he overheard Mr Vel and Ms Hosking mention "*Tony Beatty*". He asked if that was the Tony Beatty who used to work for SKFNZL. It was that information which Ms Hosking then passed to Ms Spencer who then realised that Mr Beatty had not given her an accurate answer on whether he knew anyone in SKFNZL and had omitted the fact of his previous employment with SKFNZL from each of the resumes he had submitted with applications for three positions with SKFAPL.

[57] I do not accept SKFAPL personnel were not entitled to that information about Mr Beatty's service. It would require a highly artificial distinction of the commercial reality of joint operation of two separate legal entities in the Australasian market. At the time Ms Hosking found out about Mr Beatty's previous connection with SKFNZL, and then made further inquiries by checking that company's personnel records on him, she held a position designated 'Human Resources Manager - Australasia'. She had human resources responsibilities for both SKFNZL and SKFAPL. Other senior management positions - such as the managing director and the financial controller - had similar responsibilities in both companies.

No admission

[58] Neither do I accept Mr Beatty's submission that there were a number of breaches admitted by SKFNZL in its formal pleadings and from which it could not then resile.

[59] It is true that in its first statement in reply SKFNZL admitted giving "*a negative evaluation of [Mr Beatty] to prospective employers*". However this needed to be read in context of SKFNZL initially arguing a defence of fair comment rather than responding to specific allegations. Mr Beatty's first statement of problem was light on particulars of the allegations he made. The Authority accepted SKFNZL had difficulty replying fully without more details and had directed Mr Beatty to be more specific about the "*who what, to whom and when*" of his allegations. As a result of an amended statement of problem, SKFNZL

then lodged an amended statement in reply and I accept cannot fairly be bound to earlier, generalised admissions.

Causation of alleged loss

[60] Even if Mr Beatty had established that SKFNZL's actions in one or more instance did breach the terms of the settlement agreement, his own evidence failed to establish the necessary causal step in his claim for damages. Simply put, he did not show that 'but for' what SKFNZL or its representatives had said or done, he would have got those jobs.

[61] In respect of each job application I asked Mr Beatty who got the job that he applied for. He did not know. Neither did he know anything about the successful candidates' skills, qualifications, experience or other attributes which may have made them a better choice for the employer than him. His answers on this point included: "I'm *certain I was better than the person who did*"; "I was *confident I would get it*"; and "I'm *almost certain they wouldn't have got someone more qualified than me*".

[62] Mr Beatty had no evidence that he would otherwise have got those jobs. He would have needed considerably more information about the reasons that those prospective employers chose someone else and not him.

[63] I note two further points from the evidence which are relevant in response to Mr Beatty's allegation that SFKNZL managers have deliberately set out to undermine his job prospects.

[64] Firstly his own evidence, supported by the evidence of Mr Mascarenhas, confirmed Mr Mascarenhas had agreed to requests from Mr Beatty for references several times after Mr Beatty had left SKFNZL and when - I have found - there was no real obligation on Mr Mascarenhas to do so.

[65] Secondly Mr Whyte met with Mr Beatty in 2006 and discussed his concerns about finding a new job. As a result of that discussion Mr Whyte offered Mr Beatty further access to personal and job counselling at SKFNZL's expense. Mr Whyte had no legal obligation to do so at that time but had extended a helping hand to a former employee who he saw as struggling with the vicissitudes of life. Mr Beatty emphatically rejected that offer of help.

Costs

[66] Costs are reserved. The parties are encouraged to resolve any issue on costs between themselves. If they are not able to do so, SKFNZL may lodge and serve a memorandum on costs within 28 days of the date of this determination. Mr Beatty would then have 14 days in which to lodge and serve his reply. The relevant principles on costs in the Authority were described by the Employment Court in *PBO Ltd v Da Cruz* [\[2005\] NZEmpC 144](#); [\[2005\] 1 ERNZ 808](#).

Robin Arthur

Member of the Employment Relations Authority

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