New Zealand Employment Relations Authority Decisions

Belliard v Adison Group Limited (Auckland) [2017] NZERA 245; [2017] NZERA Auckland 245 (21 August 2017)

Last Updated: 31 August 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2017] NZERA Auckland 245
3006831

BETWEEN SERGIO BELLIARD Applicant

AND ADISON GROUP LIMITED Respondent

Member of Authority:	Eleanor Robinson	
Representatives:	Andrew Steele, Counsel for Applicant	
	Ray Parmenter, Counsel for Respondent	
Investigation Meeting:	20 July 2017 at Auckland	
Submissions received:	14 & 20 July 2017 from Applicant Respondent	and from
Determination:	21 August 2017	

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Sergio Belliard, claims that he was unjustifiably dismissed by the Respondent, Adison Group Limited (AGL).

[2] Mr Belliard claims that he is owed monies in respect of the termination of his employment with AGL, specifically in relation to lost wages, holiday pay entitlement and bonus payment.

[3] AGL denies that Mr Belliard was unjustifiably dismissed or that it owes him any monies.

Issues

[4] The issues for determination are whether or not Mr Belliard:

• was unjustifiably dismissed

• is owed any monies by AGL

Background Facts

[5] AGL is a business which provides a financial and administrative service for a number of businesses which predominantly operate in the food retail sector.

[6] Mr Belliard was originally employed by Oporto New Zealand Limited to provide a bookkeeping service until he resigned in June 2011. Oporto New Zealand Limited was subsequently sold to AGL which employed Mr Belliard as Financial Controller with effect from 1 July 2011.

[7] Mr Belliard was issued with an individual employment agreement with AGL which he signed on or about 3 July 2011 (the Employment Agreement). The Employment Agreement contained the following clauses:

3.1 Individual Agreement of Ongoing and Indefinite Duration

*This Employment Agreement is an individual employment agreement entered into under the Employment Relations Act 2000. The employment shall commence on **1.7.11** and shall continue until either party terminates the agreement in accordance with the terms of this agreement. ...*

*7.1 **Annual Salary***

*The Employee's salary shall be **$45000** per annum, which shall be paid weekly on Thursday into a bank account nominated by the Employee.*

*7.2 **Bonus for achieving objectives***

The Employee shall be eligible to receive a bonus of 15% of the yearly profit provided a minimum of $130000 net profit is achieved for the Adison Group.

12.6 Notice of Termination due to redundancy

*In the event that the Employee's employment is to be terminated by reason of redundancy, the Employee shall be provided with **3 weeks'** notice in writing. This notice is in substitution for and not in addition to the notice period set out in the general termination clause.*

13.1 General Termination

The Employer may terminate this agreement for cause, by providing 3 weeks' notice in writing to the Employer. Likewise the Employee is required to give 3 weeks notice of resignation. The Employer may, at its discretion, pay remuneration in lieu of some or all of this notice period.

[8] Mr Belliard said his salary was increased to $46,400.00 on 1 August 2013 and to $49,400.00 with effect from 22 January 2014 when Mr and Mrs Arolkar moved to the United States and he was appointed as Chief Financial Advisor of AGL.

[9] Mr Belliard said AGL managed all the companies owned by Mr Arolkar and his wife Jasmine, comprising Oporto New Zealand Limited, Oporto Palmerston North Limited, Oporto Bayfair Limited, Urban Turban New Zealand Limited, and Raja Babu Trading Limited. As Financial Controller (subsequently Chief Financial Advisor) he maintained the financial accounts for all the businesses within AGL including accounts payable and receivable, payroll, and IRD compliance duties.

[10] Mr Belliard's own company SB Ventures acquired a shareholding in Urban Turban New Zealand Limited effective 14 January 2014 in respect of which he was paid a fee of $250.00 per week for the investment, and AGL was paid a management fee of $2,500.00 per week.

[11] Mr Arolkar said that he and Mr Belliard agreed that the investment by SB Ventures gave Mr Belliard a 10% shareholding in Urban Turban New Zealand Limited, and that SB Ventures would manage Urban Turban's affairs as a contractor, taking full responsibility for accounting and HR related work.

Cessation of salary from AGL

[12] Mr Belliard said that his salary ceased to be paid by AGL in October 2015 when he received a final payment of $754.59. On 13 January 2016, in response to Mr Belliard's complaint about non-payment, Mrs Arolkar instructed him by email to pay himself weekly. In response he replied: "*I started posting ... 2 weeks arrears per week to myself*".

[13] He subsequently made 3 payments of arrears: $1,513.92 on 14 January, 20

January 2016 and 28 January 2016.

Position of AGL 2016

[14] In his written evidence Mr Belliard confirmed he had received an email from Mr Arolkar dated 24 January 2016 in which Mr Arolkar stated: "*OK, mate we are sucking air now – gasping, we cannot afford Adison payment, we discussed this, your work is only Urban Turban now. No other work for Adison Group.*"

[15] During the Investigation Meeting Mr Belliard denied receiving this email which is inconsistent with his written and

sworn evidence.

[16] Mr Belliard said that irrespective of the email dated 24 January 2016 Mr Arolkar continued to instruct him, and he continued to work for AGL. Although he had not been receiving any salary payments, he had received promises from Mr Arolkar to pay him in due course.

[17] He explained that as the directors of AGL were in the United States during

2016, it had been his role to manage the winding down of the various trading arms of the AGL companies. During 2016 he had continued to produce general ledger accounts for AGL companies including, Oporto New Zealand MKT Limited, Oporto New Zealand Limited, Raja Babu Trading Ltd, and Urban Turban NZ Limited.

[18] In addition AGL had received income from the sale of its office premises, GST refunds, and debtors during 2016 although there was no active trading activity other than in Urban Turban New Zealand Limited.

[19] Mr Belliard asserted that he had a reasonable belief that his employment with

AGL was continuing during 2016 and he would be paid retrospectively for his work.

[20] Mr Belliard said that he believed his employment was terminated on or about

26 February 2017 when he received an email from Mr Arolkar stating:

You have not only put my business in a mess but also put our relationship in a mess.

You are not thinking straight and I do not want to indulge with you anymore. I have heard enough insults from you.

Handover all my documents to John and I will take it from there. Once I settle the companies with John I will close out your share payout.

Urban Turban has been paying you for your work, so that is settled.

[21] Mr Arolkar said that he and Mr Belliard had agreed to end Mr Belliard's employment with AGL in a telephone conversation on or about 24 January 2016. The agreement had been made on the basis that Mr Belliard's employment would end immediately without notice because there was no money available to pay him.

[22] He had confirmed this position in the email he had sent to Mr Belliard on 24

January 2016 stating that AGL could not afford to pay him and his only work was with Urban Turban New Zealand Limited.

[23] Mr Arolkar said that Mr Belliard understood his employment had ended in January 2016 and that an email he (Mr Belliard) sent dated 31 March 2016 he had confirmed this understanding by stating:

I don't know why I am still here worrying for free for a business that is going towards bankruptcy. I guess the medications I'm taking are affecting my capacity to think rationally.

I think is time to call it a quit. It's time for you to find somebody else to look after your affairs in NZ as I'm completely burnt out: financially, physically and mentally.

Let me know who I have to hand over all the files to when you find it. In the meantime I will still work a couple of days a week to follow up with the most urgent things in UT.

[24] In that same email Mr Belliard had also referred to himself as a former employee stating: "*By the way, on May 16th someone with full authority for Adison NZ ltd will have to appear in front of the disputes tribunal in Albany.*

... I can attend as a former employee but I don't have any legal binding authority to act on behalf of the company."

[25] Mr Arolkar said he had sent the email dated 26 February 2017 to Mr Belliard after a heated conversation and explained that it had only referred to Urban Turban New Zealand Limited. He said that any work Mr Belliard had carried out on behalf of AGL after 24 January 2016 had been as a contractor working for Urban Turban New Zealand Limited.

Determination

Was Mr Belliard unjustifiably dismissed by AGL?

[26] Mr Belliard was employed by AGL subject to the terms and conditions of employment set out in the Employment Agreement. These included at clause 7.1 that he would be paid a weekly salary payment, at clause 3.1 that the employment would continue until terminated by either party in accordance with the terms of the Employment Agreement and at clauses 12.6 and 13.1 that this meant 3 weeks written notice of the termination of employment, either by way of redundancy (clause

12.6) or for cause (clause 13.1).

[27] I find that clause 7.1 of the Employment Agreement was first breached during October 2015 when AGL ceased making weekly salary payments to Mr Belliard, and the breach became absolute when payment completely ceased after the last arrears payment was made on 28 January 2016.

[28] I find that it is more likely than not that Mr Belliard did receive the email dated 24 January 2016 as set out in his written witness statement.

[29] I find that this email sent by Mr Arolkar to Mr Belliard on 24 January 2016 which stated: "*... we cannot afford Adison payment, we discussed this, your work is only Urban Turban now. No other work for Adison Group"* confirmed the event of the non-payment of salary to Mr Belliard and that his employment relationship with AGL had been terminated.

[30] The Employment Agreement contemplated the employment relationship ending either by way of redundancy or: *"for cause".* There has been no evidence presented that AGL terminated Mr Belliard's employment *"for cause"* or that Mr Belliard resigned in writing pursuant to clause 13.1. I therefore consider that the position of Chief Financial Advisor was effectively redundant with effect from 24

January 2016 as Mr Arolkar indicated in his email that there was no work for Mr

Belliard in AGL.

[31] A dismissal for redundancy must be justifiable. Justification for dismissal is stated in the Employment Relations Act 2000 (the Act), which at s 103A sets out the Test of Justification as being:

S103A Test of Justification

i. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

ii. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[32] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. An employer must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[33] In *Michael Rittson-Thomas T/A Totara Hills Farm v Hamish Davidson1 (Rittson),* Chief Judge Colgan considered that the Court cannot impose or substitute its business judgment for that of the employer taken at the time, however:

[54] ... the Court (or the Authority) must determine whether what was done and how it was done, were what a fair and reasonable employer would (now could) have done in all the circumstances at the time. So the standard is not the Court's (or the Authority's) own assessment but rather, its assessment of what a fair and reasonable employer would/could have done and how. Those are separate and distinct standards.

[34] I therefore examine whether or not the decision to dismiss Mr Belliard by reason of redundancy was one a fair and reasonable employer could have made. In a redundancy situation a fair and reasonable employer must, if challenged, be able to establish that he or she has complied with the statutory obligations of good faith dealing pursuant to s.4 of the Act.

[35] The duty of good faith is set out in s.4 of the Act:

s.4 Parties to employment relationship to deal with each other in good faith

(1) *The parties to an employment relationship specified in subsection (2) –*

(a) must deal with each other in good faith; and

(b) without limiting paragraph (a), must not, whether directly or indirectly, do anything-

(i) to mislead or deceive each other, or

(ii) that is likely to mislead or deceive each other

1 Unrep [2013] NZEmpC 39 20 March 2013

(1A) The duty of good faith in subsection (1)-

...

(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative

[36] The Chief Judge in *Simpsons Farms Limited v Aberhart2* noted that this compliance with good faith dealing includes consultation "*as the fair and reasonable employer will comply with the law*" .

Consultation

[37] The Employment Court in Vice Chancellor of *Massey University v Wrigley3* stated4 that: "T*he purpose of s 4(1A)(c) is to be found in paragraph (ii) which requires the employer to give the employees an opportunity to comment before the decision is made. That opportunity must be real and not limited by the extent of the*

information made available by the employer".

[38] The duty of good faith applies to both the employer and the employee in an employment relationship. The duty of good faith required AGL to consult meaningfully with Mr Belliard.

[39] There is no evidence that Mr Arolkar met with Mr Belliard to discuss a proposal to terminate his employment by way of redundancy, to allow him with an opportunity to provide feedback on such a proposal or to consider that feedback before making a decision to implement the proposal. Instead the email dated 24

January 2016 constituted a *fait accompli*, announcing to Mr Belliard a decision which had been made without his input.

[40] I determine that Mr Belliard was unjustifiably dismissed by AGL on 24

January 2016.

Remedies

2 [2006] NZEmpC 92; [2006] ERNZ 825

3 [2010] NZEmpC 37

4 Ibid at [55]

[41] From the financial information provided to the Authority Mr Belliard was paid the weekly gross amount of $950.00 reducing to a net figure of $756.96. This information is used in the calculations relating to wages.

[42] Mr Belliard has been unjustifiably dismissed and he is entitled to remedies.

Lost wages

[43] Mr Belliard received no weekly salary payment pursuant to clause 7.1 of the

Employment Agreement from 28 October 2015 when he received a net payment of

$756.96, however he received 3 further payments each of $1,513.92 on 14 January, 20

January and 28 January 2016 which represented 6 weekly net payments of $756.96.

[44] I order that AGL pay to Mr Belliard salary payments representing the 13 weeks from 28 October 2015 to 24 January 2016 (the date of dismissal) in the sum of

$5,298.72 net (calculated as $9,840.98 net, less $4,541.76 net already paid as arrears of salary) in respect of wage arrears. I also order that AGL shall pay any taxes due in respect of the amount of $9,840.00 to the Inland Revenue.

[45] Mr Belliard is also to be reimbursed for lost earnings for a period of 3 months pursuant to s 128(2) of the Act. This amount is calculated as $12,350.00 gross less any other earnings received by Mr Belliard during this period. Mr Belliard has not produced any evidence that he took steps to mitigate his loss, other than confirming that that he received earnings from SB Ventures Limited either as a contractor or an employee.

[46] I order that AGL pay to Mr Belliard the amount of $12,350.00 less the earnings received by him from SB Ventures Limited during the 13 weeks commencing 25 January 2016.

Holiday Pay

[47] Mr Belliard claims outstanding holiday entitlement from 27 June 2011 the commencement date of his employment with AGL, and has provided documentary evidence to this effect. AGL, other than stating Mr Belliard has no outstanding holiday

entitlement, has not produced evidence to support that statement.

[48] I therefore accept Mr Belliard's claim for outstanding holiday entitlement for the period 27 June 2011 to the date of his dismissal on the 24 January 2016. Calculated as 37 days plus 12 days in respect of the period 27 June 2015 to 24 January

2016 at $190.00 per day.

[49] I order that AGL pay to Mr Belliard the amount of $9,310.00 gross, in respect of his outstanding holiday pay entitlement.

Bonus Payment

[50] In accordance with clause 7.2 of the Employment Agreement Mr Belliard was eligible to receive a bonus of 15% of the yearly profit: "*provided a minimum of*

$130000 net profit is achieved for the Adison Group".

[51] With respect to Mr Belliard's claim for the bonus not paid, I note the

following:

(i) He does not identify the financial year to which his claim relates;

(ii) It would normally be a requirement that a director of the company approve such a bonus, however a relevant board minute has not been produced;

(iii) If such a bonus was payable it would appear as an accrual in the financial accounts of the relevant year, no such evidence has been produced to the Authority; and

(iv) Mr Arolkar states in his written evidence that *"I have always paid him his share"* referring to the bonus claim. However there is no evidence of any such payment.

[52] I find that Mr Belliard's claim for unpaid bonus is unsubstantiated, however if the correct documentation can be produced leave is reserved to return to the Authority.

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[53] Mr Belliard is entitled to compensation for humiliation and distress.

[54] It is clear that Mr Belliard and Mr Arolkar enjoyed a close personal and working relationship initially, however the changes in the nature of the companies involved with AGL, their discontinuance and the conclusion of his role in AGL resulted in stress and had an adverse effect on his health, although no medical evidence of this has been provided.

[55] I order that AGL pay Mr Belliard the sum of $10,000.00 as compensation pursuant to s.123(c)(i) of the Act.

Contribution

[56] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded. Mr Belliard did not contribute to the situation which resulted in his dismissal and there is to be no reduction in the remedies awarded.

Penalty

[57] The Applicant is claiming a penalty in respect of breaches of s 81(2) of the Holidays Act 2003 which states that: "*An employer must at all times keep a holiday and leave record showing, in the case of each employee employed by the employer*" the information contained in s 81(3) of the Holidays Act 2003.

[58] Mr Belliard submitted that he requested this information from AGL but it was not forthcoming.

[59] I note the following: firstly that Mr Belliard was responsible for compiling such information on behalf of AGL, and secondly that a document was provided which fulfilled Mr Belliard's need to establish his claim.

[60] On that basis I decline to award a penalty.

Costs

[61] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The

Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[62] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson

Member of the Employment Relations Authority
