

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Jeffrey Bootsma (Applicant)
AND South Island Gourmet (2000) Limited (Respondent)
REPRESENTATIVES Sarah Templeton, Counsel for Applicant
Rob Davidson, Counsel for Respondent
MEMBER OF AUTHORITY James Crichton
INVESTIGATION MEETING 9 February 2006
DATE OF DETERMINATION 30 March 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Bootsma) alleges that he was constructively dismissed by the respondent (South Island Gourmet). South Island Gourmet resists Mr Bootsma's claim.

[2] Mr Bootsma had worked for South Island Gourmet for about 12 years.

[3] The relationship seems to have been successful enough until the end of 2004 and the beginning of 2005 when matters took a turn for the worse.

[4] At that time, Mr Bootsma claims that there were three issues which led to his constructive dismissal. The first of these issues I will refer to as the Annie's Wine Bar issue, the second is an allegation that the governing director of South Island Gourmet (Mr Chris Smith) spoke in vulgar terms about Mr Bootsma's wife and the third is an allegation that Mr Smith criticised Mr Bootsma's work performance inappropriately.

[5] Mr Bootsma says that, taken together, these three episodes effectively destroyed the employment relationship and left him with no option but to terminate his employment. As such, the claim falls within the third category of constructive dismissal which relies on a breach of duty (or a succession of breaches of duty) by an employer.

[6] In the well known passage from the English decision *Woods v WM Car Services (Peterborough) Ltd* [1982] 1 CR 693, the Court said:

... There is implied in a contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee ... The Tribunal's function is to look at the employer's conduct

as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.

[7] Inconsiderate conduct causing some unhappiness or resentment is not enough and dismissive or repudiatory conduct must be found in order for the case to be made out: Williamson J in *Wellington etc Clerical IUW v Greenwich* [1984] ACJ 347.

[8] In the result, on Mr Bootsma's view of matters, after these three issues developed in the workplace, he indicated to Mr Smith of South Island Gourmet that he was minded to resign, subsequently confirmed that intention and concluded his service on 31 March 2005.

[9] Mr Smith says that he made it clear to Mr Bootsma that he did not wish him to leave and that his resignation was not accepted. Mr Smith thought that he had done enough to retain Mr Bootsma's services and was evidently surprised when Mr Bootsma did in fact leave South Island Gourmet.

[10] On the very day that Mr Bootsma finished his service, Mr Smith received a letter from Mr Bootsma's solicitors raising a personal grievance.

Issues

[11] In order to assess the constructive dismissal claim, I need to consider each of the bases on which Mr Bootsma claims the employer's repudiation rests.

[12] These events are:

- (a) The Annie's Wine Bar incident;
- (b) The vulgar language;
- (c) The criticism of work performance.

The Annie's Wine Bar incident

[13] Mr Bootsma alleges that there was a discussion between him and Mr Smith of South Island Gourmet in January 2005. Before I consider the evidence of what is actually supposed to have happened at this discussion, I need to decide when the exchange actually took place. South Island Gourmet acknowledges that there was a discussion about Annie's Wine Bar but deny that it happened in January 2005.

[14] Mr Bootsma says that the discussion would have happened *within a week of my returning from Christmas leave*. Conversely, Mr Smith says that the incident actually took place *during the last week of October 2004 or the first week of November 2004*. Mr Smith's evidence goes on to make the point that Annie's stopped buying fish from South Island Gourmet on 22 October 2004 although it continued buying other products until June of 2005.

[15] Fish sales are a significant part of South Island Gourmet's business and Mr Smith's evidence was that it was the loss of the fish account particularly that would have exercised his mind and encouraged him to have a discussion with Mr Bootsma. His evidence then is that the final purchase of fish by Annie's on 22 October 2004 is further evidence that the discussion which Mr Bootsma says happened in January actually happened much earlier.

[16] Ms Alison Betts also gave evidence for South Island Gourmet. Ms Betts is an independent contractor who acts as accountant for South Island Gourmet. Amongst other things, Ms Betts is responsible for payroll (including leave records) and of course debtors and creditors. Ms Betts was adamant that the Annie's Wine Bar incident did not occur when Mr Bootsma said it occurred and that it actually occurred in late October or early November as Mr Smith alleged. She too makes the point that the discussion between Mr Bootsma and Mr Smith was about fish sales. The last fish sales to Annie's Wine Bar she confirms was on 22 October 2004.

[17] Ms Betts also gave evidence that Mr Bootsma was back from holiday leave in the period from 19 January 2005 until 31 January 2005 which was the day his third child was born and so he went on leave again to assist his wife after the birth. So it is possible that the discussion took place between 19 January and 31 January 2005 as Mr Bootsma suggests.

[18] In his written brief of evidence, Mr Dion Woodfield, another employee of South Island Gourmet, gave evidence that he overheard the incident between Mr Bootsma and Mr Smith and that it was in January 2005. This of course is consistent with Mr Bootsma's recollection.

[19] However, when Mr Woodfield was questioned by me about his evidence, it became clear that he was far from certain that the incident he heard was actually in January 2005 and it could well have been earlier. He associates the episode that he overheard with his own delivery of a fish order to Annie's Wine Bar which was two hours late and it seems that this delivery was the straw that broke the camel's back for Annie's and resulted in it cancelling its fish orders.

[20] But we already know that the final fish order was on 22 October 2004 so Mr Woodfield must be mistaken in his written brief when he says that the episode he overheard was in January 2005, if his connection of that event with the final delivery to Annie's is itself accurate.

[21] There is one further piece of evidence which is relevant. Unchallenged evidence was proffered at the investigation meeting to the effect that no fish was caught for the fish market from the last week in December until around mid-January simply because the inshore coastal fishermen who serviced that market were on holiday. That piece of intelligence suggests again that Mr Bootsma's recollection of when this discussion took place is mistaken.

[22] On balance, I think the weight of evidence suggests that the Annie's Wine Bar incident took place in late October or perhaps very early November, around the time that South Island Gourmet became aware that it had lost the Annie's Wine Bar fish account. Mr Smith gave evidence that this was a significant account and he would have been angry about the loss of it.

[23] The importance of when this discussion took place is that Mr Bootsma's evidence was that he returned from annual leave at the beginning of calendar 2005 and a series of three events starting with this Annie's Wine Bar incident so destabilised him in his employment that he felt compelled to resign and he now invites me to agree with him that the effect of the employer's behaviour in these three events was to repudiate the agreement and give him the option to cancel by resigning.

[24] If the first of these three events did not happen when Mr Bootsma says it did, and indeed happened fully two months before, then in my view that weakens his claim that the three events, in quick succession, effectively destabilised the employment relationship irrevocably.

[25] I consider now the evidence as to what actually happened at the so-called Annie's Wine Bar discussion. All the evidence suggests there was a robust discussion between Mr Smith and Mr Bootsma. Mr Smith's evidence was that he was *very concerned and upset that the company had lost Annie's business*. He said that he held Mr Bootsma responsible because Mr Bootsma was branch manager. He said that he verbally remonstrated with Mr Bootsma.

[26] Mr Bootsma's evidence was that Mr Smith was *enraged* during the discussion, that he threw a chair across the room, punched walls and kicked doors. Mr Smith is alleged to have sworn and abused both staff and clients and then rushed out of the building and sped away in his car.

[27] Mr Woodfield says he overheard the discussion or at least the result of it. He said he heard a lot of shouting and a lot of bad language but only Mr Smith's voice and he heard what could have been a chair being thrown against a wall. He said he saw Mr Smith leave the office where the discussion had been taking place, slamming the door behind him. Mr Woodfield then went into the room and found Mr Bootsma who he describes as *clearly still upset* by the incident.

[28] Mr Woodfield then honestly indicated that Mr Bootsma (with whom he was friendly), told him what had happened. Even if we discount the prospect that Mr Woodfield's recollection of events has been coloured somewhat by the subsequent reciting of what Mr Bootsma thought happened, I thought Mr Woodfield's evidence was truthful and I accept what he told me.

[29] I am supported in that view by the fact that a number of witnesses confirm that Mr Bootsma was sufficiently shaken by this episode to ring Mr Smith at home that night (Mr Smith confirms this happened) to make sure Mr Smith was alright. Further, Ms Betts says that immediately after the incident in question, Mr Bootsma had rung her to describe what had happened and to say that he was concerned for Mr Smith.

[30] No doubt this was a dramatic incident and clearly Mr Bootsma's response to it (by ringing Ms Betts to describe it and by ringing Mr Smith to ensure he was alright) suggest that the incident itself was unusual rather than commonplace. But it also suggests that, as South Island Gourmet's witnesses were keen to tell me, Mr Bootsma seemed more concerned about Mr Smith than about any threat to him or his continuing livelihood.

[31] Taken on its own then, my assessment of the Annie's Wine Bar incident is that it is not enough to ground a constructive dismissal particularly when we have now established that it took place, at best we can estimate, over four months before there was any talk of the employment relationship coming to an end. In my opinion, the Annie's Wine Bar incident was, looked at on its own, neither proximate to the conclusion of the employment relationship nor, on all the evidence, viewed by Mr Bootsma at the time as being anything other than an issue about the emotional stability of his boss.

The vulgar comments

[32] Mr Bootsma says that he received a telephone call on 10 February 2005 from a work colleague, Bridget Venning. In this telephone discussion, Mr Bootsma says that Ms Venning told him that Mr Smith had been making a *foul verbal attack* directed at Mr Bootsma himself and his wife, Ngawai. The suggestion that Ms Venning made was that these observations which Mr Smith is supposed to have made were being offered to Mr Bootsma's work colleagues.

[33] Mr Smith's evidence on this point is absolutely clear. He denies making these observations and casts doubt on Ms Venning's testimony as a whole.

[34] Again, there is a date problem. Ms Venning's evidence is that she met with Mr Smith on 18 February 2005 during which Mr Smith is alleged to have made the observations referred to. Mr Smith accepts that he met Ms Venning on that date. There is an email which was put into evidence which is dated 22 March 2005 in which Ms Venning sets out in writing exactly what she can remember about the discussion with Mr Smith. That email also refers to the date of the meeting as 18 February 2005.

[35] The problem with all this evidence about the date of the meeting is that Mr Bootsma, in his evidence, says that Ms Venning rang him at home on Thursday, 10 February to tell him about what was said at a meeting which on the face of it had yet to happen.

[36] Ms Venning accepted in response to a question from me that it was possible that she had got the date of the meeting with Mr Smith wrong and that it was in fact earlier which would make it possible for Mr Bootsma's recollection of when he had the conversation with Ms Venning accurate.

[37] However the difficulty with that is that Ms Venning's evidence, supported by the subsequent email and Mr Smith's own verification of the date, suggests with some certainty that that date was right. If that date is correct, then Mr Bootsma is mistaken about the call he had from Ms Venning or at least about the date of the call.

[38] Again, there are difficulties with the other view because Mr Bootsma's evidence was that, having received this call from Ms Venning on 10 February, he had attended at work on Friday, 11 February and sought information from his colleagues about what they had been told. Mr Bootsma says that his colleagues told him that they had indeed been told hurtful things about him and his wife by Mr Smith. Only Mr Woodfield and Ms Venning gave evidence of Mr Smith's alleged indiscretions and both said it was common knowledge amongst the staff that Mr Smith was, to put it at its most charitable, verbally indiscreet. Conversely, Ms Betts said that she had never heard Mr Smith say anything inappropriate about Mr Bootsma and Mr Smith's own evidence was to deny that he had ever done anything inappropriate in this regard.

[39] Again, as with the Annie's Wine Bar incident, I need to separate the timing problems from the actuality of the event. On the timing issue, I am inclined to the view that the most likely explanation for the differences between the parties as to when these events actually happened is that Mr Bootsma's evidence is wrong and that the call that he received from Ms Venning took place not on 10 February as he alleges but 14 days later on 24 February. This would mean that Mr Bootsma went into the office on Friday, 25 February to talk to his colleagues about the allegations about which he had just heard, and that he had a meeting with Mr Smith on 28 February (which Mr Smith says is the date they met) and not on 14 February which is the date Mr Bootsma claims they met. In the next section, I will discuss the meeting and the follow up meeting.

[40] This *re-jigging* of the dates upon which Mr Bootsma seeks to rely, is also consistent with South Island Gourmet's records of when it understood Mr Bootsma to be physically present at the workplace. Over this period, Mr Bootsma was on parental leave and was not physically at work. South Island Gourmet has no record of him being physically present (as he claimed in his evidence) on Friday, 11 February 2005 although it was aware that he was physically present on Friday, 25 February 2005 which is consistent with the revised timeline that I have suggested is the most likely.

[41] Having reached some conclusions about the dating of the various episodes in question, I now need to consider whether, on the balance of probabilities, it is more or less likely that Mr Smith made the hurtful comments that he is alleged to have made.

[42] If Mr Smith did in fact make objectionable and vulgar observations about Mr Bootsma and his wife, then that is not the action of a good employer acting in good faith towards a senior employee, no matter how frustrating the circumstances then were.

[43] Mr Bootsma did not hear the observations complained about at first hand, but only heard about them. So the only first hand evidence of the existence of these unfortunate observations comes from Ms Venning and Mr Woodfield, both of whom gave evidence.

[44] The first question for determination is whether Mr Smith made the comments that he is alleged to have made or not. The second question is whether, if the Authority finds that, on the balance of probabilities, Mr Smith did make the observations complained of, whether those observations are sufficient to assist the applicant in his contention that he has been the victim of a constructive dismissal.

[45] The evidence of the offending remarks is finely balanced. Mr Bootsma never heard them himself but was told about them by Ms Venning who gave evidence at the investigation meeting over the telephone. Mr Woodfield also gave evidence that he heard the offending material. Mr Woodfield acknowledged that he was a friend of Mr Bootsma.

[46] Conversely, Mr Smith denied making the remarks complained of and while he remembers having a robust discussion with Ms Venning, he absolutely denies the kind of language directed at Mr Bootsma and his wife which Ms Venning recalls. Ms Betts said that she had never heard any of the language complained of although she continues to serve the respondent company as an independent contractor and would of necessity have a close working relationship with Mr Smith.

[47] I have reached the conclusion that, on balance, Mr Smith may well have made some intemperate observations about Mr Bootsma which, on the basis of the evidence I have heard, would likely have been borne of frustration more than anything else. The circumstances in which Mr Smith found himself were that his manager had departed for an indeterminate period of parental leave, without making any arrangements with his employer for that and without taking any proper steps to advise his employer on a regular basis of when he would return to the workplace.

[48] No doubt those factors do not of themselves justify intemperate language, but one can perhaps understand the frustration of an owner of a business under pressure to get orders out and really completely reliant on his manager, having his manager depart for an indeterminate period of leave without making any arrangements so to do and without keeping in touch with the employer about his intentions.

[49] Having determined that I think it more rather than less likely that Mr Smith may have made some inappropriate observations, I need to now consider whether the nature and extent of those observations was such as to constitute a breach of the employer's duty to the extent necessary to form part of the matrix required for proving a constructive dismissal.

[50] I do not believe that that is the position here. I incline to the view that what Mr Smith may have said was probably less colourful than the more graphic reports that I was invited to believe, but even if I am wrong about that and Mr Smith did in fact make the more colourful observations that are attributed to him, I am not persuaded that that fact, taken alone, constitutes a breach of the employer's duties that are so serious as to put the continuation of the employment relationship in jeopardy.

[51] I reach this conclusion in part because the evidence strongly suggests that Mr Smith, while never acknowledging that he had done anything improper, readily offered to apologise to Mr Bootsma and his wife if anything that he had done or said caused offence. That does not seem to me to be the action of an employer who is cavalier or reckless about the continuation of the employment relationship. While it is clear that the law in breach of duty cases does not require the employer to actually wish for a termination of the employment relationship, it is nonetheless relevant in this context that Mr Smith very clearly wanted the employment relationship to continue, made it absolutely clear that he regarded Mr Bootsma as an important member of the team and was active in attempting to redress any wrong which he may inadvertently have done.

Mr Bootsma's work performance

[52] Mr Bootsma alleges that the third aspect of the constructive dismissal on which he seeks to rely is an allegation that South Island Gourmet improperly hijacked meetings between Mr Bootsma and Mr Smith to turn them into disciplinary meetings alleging poor performance.

[53] The facts relied on to support this particular allegation include further confusion about dates. Mr Bootsma's evidence is that he sought to meet with Mr Smith on Monday, 14 February. This date is identified because Mr Bootsma's evidence is he had had the conversation with Ms Venning on Thursday, 10 February, then attended at work on Friday, 11 February to establish the truth of the allegations that Ms Venning was making about Mr Smith's alleged comments and then sought to meet Mr Smith the following Monday, 14 February.

[54] As I indicated earlier in this determination, I do not accept that those dates are factually accurate. I think it much more likely, and I have found that Ms Venning probably rang Mr Bootsma on Thursday, 25 February, that Mr Bootsma attended at work on Friday, 26 February to talk to his work colleagues and that the meeting with Mr Smith took place on Monday, 28 February.

[55] The meeting which I have found took place on 28 February 2005, I will call the first meeting.

[56] In this first meeting, Mr Bootsma was intent on establishing from Mr Smith whether Mr Smith had in fact made the observations that Mr Bootsma was concerned about. Mr Smith, during the course of the meeting, denied making those allegations.

[57] Mr Smith's evidence was that Mr Bootsma then went on to indicate that he was contemplating resigning his employment. Mr Smith's evidence was that he was *shocked and disappointed to receive that advice*. Mr Smith said that he told the applicant that he did not want him to resign and he indicated further to him that he would not accept his resignation.

[58] Even on Mr Smith's evidence though, it is clear that the meeting became tense with Mr Smith trying to establish when Mr Bootsma was planning to return to work. On the basis that I am correct that this meeting took place on 28 February (as Mr Smith alleges) rather than 14 February as Mr Bootsma claims, 28 days would have passed since Mr Bootsma last attended at work and it is not unreasonable for an employer to become frustrated about the absence of a senior employee in those circumstances.

[59] Mr Smith sought assurances about when Mr Bootsma would return and on his evidence Mr Bootsma failed to give those assurances.

[60] Mr Bootsma's evidence is that Mr Smith criticised his work performance.

[61] Mr Smith says that he did not criticise Mr Bootsma's work performance but simply sought to know when Mr Bootsma was proposing to return to the job. Mr Smith's evidence is that he endeavoured to constructively discuss with Mr Bootsma some of the problems with the company's operations and Mr Bootsma's part in that, but that because Mr Bootsma would not engage with him, he terminated the meeting rather than have it continue.

[62] Mr Bootsma says that he did not feel that Mr Smith had heard his issues in this first meeting and accordingly sought a second meeting which Mr Bootsma says was held on 16 March and Mr Smith says was held on 15 March. Nothing turns on this difference of dates.

[63] At this second meeting, Mr Bootsma says that he told Mr Smith that he felt *that our relationship had been so damaged by the events since January that I felt I should resign*. He says that he tendered his verbal resignation at that meeting to be effective from 31 March 2005.

[64] Mr Bootsma says that Mr Smith continued to refuse to believe that Mr Bootsma was resigning and reiterated that he would not accept his resignation.

[65] Mr Smith has a different recollection of the same meeting although he does confirm that Mr Bootsma advised him that he still intended to resign. Mr Smith says he tried to convince Mr Bootsma to stay on, offered the apology which I referred to earlier, and made some observations to him about the future that Mr Bootsma might have with the company which Mr Smith seems to have genuinely believed had the prospect of changing Mr Bootsma's mind about resignation. Mr Smith said in his evidence *he advised me that he would consider and reflect on what I had told him and that he would confirm his intentions in due course.*

[66] In the result, there was no further contact between Mr Bootsma and Mr Smith until Mr Smith received a letter from Mr Bootsma's solicitors on 31 March confirming that he had resigned and alleging constructive dismissal.

[67] I need to decide whether the process that Mr Bootsma complains about is a breach of the employer's duty to him. I do not think it is. I do not accept that Mr Bootsma was ambushed by Mr Smith and that a meeting that Mr Bootsma says he asked for with Mr Smith was taken over by Mr Smith for disciplinary or performance management purposes.

[68] I think Mr Smith was justified in endeavouring to obtain some information from Mr Bootsma about what his intentions actually were. I accept as truthful the following passage from Mr Smith's evidence at the investigation meeting:

The applicant had not applied for parental leave during the period in question and it was always expected that the actual time off work would have been minimal. This had not occurred and the extended time he took off as well as his inability to be straight about his plans, placed additional stresses on a number of key people in the company.

[69] In my opinion, all Mr Smith was endeavouring to do in the first and second meetings was to find out what Mr Bootsma's intentions actually were. I do not think that unreasonable. Indeed, I think it unreasonable of Mr Bootsma to simply disappear from the workplace without even the barest of discussions about his intentions, and then be less than explicit with the employer about his intentions when asked.

Determination

[70] I do not consider that Mr Bootsma has made out his claim for a constructive dismissal from his employment on the basis of a breach of duty by the employer. I do not think that any breaches of duty by the employer have been sufficient enough to ground a claimed repudiation of the employment agreement. I consider that the evidence supports the conclusion that once Mr Bootsma started talking about the possibility of resigning at the first meeting, Mr Smith did everything in his power to avoid that consequence which, on his evidence (which I accept), was an unwelcome one for South Island Gourmet.

[71] It follows that Mr Bootsma's claim fails in its entirety.

Costs

[72] Costs are reserved.

James Crichton
Member of Employment Relations Authority