IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 191/10
File Number: 5301586

	BETWEEN	Ethian Briskie Applicant
	AND	Strawberry Homes Limited Respondent

Member of Authority:	Denis Asher
Representatives:	Ross Jamieson for Mr Briskie David Burton and Jenny Jermy for the Company
Investigation Meeting	Wellington 9 November 2010
Submissions Received	23 November 2010
Determination:	23 November 2010

DETERMINATION OF THE AUTHORITY

The Problem

[1] Was Mr Briskie unjustifiably disadvantaged by the respondent (the Company) and was he also unjustifiably dismissed? Is he owed outstanding commission payments and annual leave? Is the Company able to offset outstanding commission it accepts is owing to Mr Briskie by deduction for losses it says were caused by the applicant, and/or are damages payable by Mr Briskie to the Company for any breaches of his employment agreement?

[2] Each party seeks costs.

The Investigation

[3] During a telephone conference on 7 July 2010 the parties agreed to a one day investigation in Wellington on 9 November, timelines for providing witness statements and, if required, providing the Authority with two copies of an agreed bundle of documents.

[4] Issues arose in advance of the investigation about the Company making available relevant documents and the parties particularising their claims. However, by the time of the completion of the investigation I was satisfied both parties had properly particularised their respective claims.

Background

[5] Amongst other activities, the Company offers for sale a range of architecturally designed pre-fabricated homes. Ms Veronica Sheehan is one of its two managing directors.

[6] Mr Briskie was employed by the Company from 14 April 2009 until the termination of his employment on 11 March 2010.

[7] Mr Briskie's signed, minimalist employment agreement set out various terms and conditions of employment including a salary of $39,000 p.a. and an allowance of $20,000 p.a. that would be off-set against commission earnings which was a 2% payment on standard house prices (land not included).

[8] Mr Briskie was issued with a formal written warning dated 18 September 2009, following a complaint from a client arising out of the applicant's failure to turn up for a meeting. The Company did not accept Mr Briskie's explanation that he was *"giving the client a taste of his own medicine as he had neglected to show up for a meeting … the previous Saturday"* (warning attached to statement in reply). The letter recorded the respondent's view that it *"did not condone this type of behaviour and do not expect this to occur again in the future"* (above).

[9] While not agreeing at the time with the basis of the warning (Mr Briskie's oral evidence to the Authority) he did not formally contest it.

[10] Another formal warning followed by letter dated 9 November, in respect of Mr Briskie's *"non responsiveness to our customers …* (and) *… regarding you altering our standard plans and providing your own interpretations to our clients"* (attachment to statement in reply). In an effort to assist Mr Briskie's workload, most new enquires were directed to another employee.

[11] Again, while not agreeing with the basis of the warning, Mr Briskie did not formally contest it.

[12] By letter dated 17 February 2010 Mr Briskie was required to attend a formal meeting regarding *"unacceptable behaviour to Strawberry Homes"* (attachment to statement in reply). Examples of unacceptable behaviour were provided, including details of a client's request for a discount of $6,000 as compensation for dissatisfaction with their dealings with the applicant, Mr Briskie's alleged failure to provide assurances in respect of not covering off all relevant construction details and compensation of $2,500 being paid to other customers arising out of the incorrect colour of their roof (attributable, it was claimed, to the applicant).

[13] The letter alerted Mr Briskie to the serious nature of the allegations, the possibility of termination and his entitlement to have a support person present.

[14] A meeting was held on 17 February: Mr Briskie says his explanations were accepted. The Company does not agree.

[15] A further meeting took place on 25 February, during which the parties agree a fresh matter was raised. The outcome of that meeting was Mr Briskie's dismissal on two weeks notice.

Discussion

[16] Mr Briskie claims:

a. Unpaid commission earnings totalling $44,043.62;

b. Holiday pay of 8% of gross earnings originally calculated as $7,971.20 but amended to $969.30 in closing submissions received on 23 November;

c. Arising out of a claim of unjustified dismissal, lost earnings from 11 March to 5 July 2010 totalling $32,535.52 and compensation for hurt and humiliation of $10,000; and

d. Costs.

(pars 8, 11, 12 & 13 of his witness statement and oral and written evidence provided during the investigation)

[17] The applicant also alleges that the failures to pay him commission earnings and holiday pay amounted to a disadvantage.

[18] His claims for penalties for breaches of the Wages Protection Act 2003, the Holidays Act 2003 and the Employment Relations Act 2000 (the Act) were raised and then abandoned during the investigation.

[19] The Company denies it unjustifiably disadvantaged and similarly dismissed Mr Briskie, says all holiday pay owing to him was paid out at the time it terminated his employment, accepts some of Mr Briskie's commission earnings claim which it calculates as $16,600 but says that amount was exceeded by the allowance paid him of $18,846.38, and counter-claims for $66,350.00 for "*direct losses attributable to the actions and inactions of*".

Findings

[20] In determining the claims of unjustified disadvantage and dismissal, and in respect of s. 103A of the Act, I bear in mind the observation of the full Employment Court, set out at para [37] in *Air New Zealand Ltd v V* [2009] ERNZ 582, namely that the Authority is required to objectively review all the actions of an employer up to and

including the decision to dismiss, against the test of what a fair and reasonable employer would have done in all the circumstances.

[21] It is clear that, in respect of the meeting on 25 February, and unlike all previous disciplinary meetings, Mr Briskie was not fully forewarned as to its purpose, his entitlement to be represented and the risk of termination.

[22] It also cannot be said that the applicant was under a final warning arising out of the letter of 9 November 2009, as it is not stated to be such a warning.

[23] However, while significant, I do not accept that these procedural breaches result in Mr Briskie being unjustifiably dismissed. Mr Briskie knew he was under a warning as a result of the letter of 9 November. He knew shortly afterward of similar, ongoing concerns held by the respondent (see the email of 14 December 2009 attached to Ms Sheehan's second statement). He also knew, as a result of the letter of 17 February 2010, that he was facing the same complaints again, which could result in the termination of his employment. I therefore prefer the evidence of Ms Sheehan, that the meeting on 25 February was effectively a continuation of the 17 February meeting, over Mr Briskie's simply not credible claim that his explanations had been accepted by the respondent at the first of the two meeting – a claim based not (as the applicant accepts) on anything articulated by Ms Sheehan on 17 February to that effect, but rather because she had said nothing at the close of that meeting in response to his explanations. Because this was a continuation of a disciplinary meeting, the Company was not required to repeat those requirements alluded to in par 21.

[24] I also find, because of the unbroken thread of identical, ongoing performance issues previously raised with the applicant, and the generous opportunity Mr Briskie had enjoyed – but which he failed to take advantage of – to address and fix those shortcomings, that it was open anyway to the Company to dismiss Mr Briskie in respect of the matters put to him at the 17 February meeting.

[25] I reach these conclusions because the substantive basis of Mr Briskie's dismissal with two weeks notice was his failure to adhere to the Company's processes and requirements in respect of customer service (his non-responsiveness to customers) and to only alter standard plans with the authorisation of the respondent's factory

manager. These issues were common to all disciplinary processes initiated by the Company during the applicant's less than one-year employment, and were the reason for his dismissal. I also accept Ms Sheehan's evidence that she raised these concerns with the applicant on many other occasions, including her email of 14 December 2009 (above).

[26] I am satisfied Mr Briskie's performance shortcomings were not new, that they were clearly communicated to him and he was given a fair and reasonable opportunity to address and correct those shortcomings (including having his workload reduced), but because he failed to do – and despite the less than perfect investigation by the Company – his employment was fairly and reasonably terminated: s. 103A of the Act applied.

Unpaid Commission Claims and Counter-Claims

[27] The parties are in dispute as to the meaning of the words at par 3 of Mr Briskie's employment agreement,

*Commission of 2% will be paid on **standard house prices** (house only, land not included). This price includes standard Strawberry extras, piling, foundations and transportation.*

(emphasis added; attachment to statement in reply)

[28] Because of the plain meaning of the word 'price' I accept the respondent's interpretation, i.e. commission is payable only after full and final settlement of all monies owing for a house has been received, and not as I understood Mr Briskie's claimed interpretation that commission was payable on the complete and final sum once a deposit had been received.

[29] I am reinforced in this finding by the failure of Mr Briskie to produce any record of his claimed attempts from early on in his employment to address the respondent's differing interpretation of how commission earnings were payable.

[30] Ms Sheehan addresses all 14 particularised claims by Mr Briskie for unpaid commissions at par 19 of her first statement, under the heading ***"The Claim"*** (I note

here that the following paragraphs incorrectly renumber from 18). It is unnecessary for me to name the clients and I shall refer to them by the witness' paragraph reference, i.e. 19 a), or 19 h), etc.

[31] During the Authority's investigation Ms Sheehan confirmed that the first 9 of the 14 claimed have now been settled, i.e. 19 a) to 19 i). In other words, both the deposit and the final settlement had been paid by the client and commission was therefore payable to Mr Briskie.

[32] In three instances (19 a), 19 d) & 19 m)) the respondent accepts all of the applicant's claims; of the rest, one claim is partially accepted (19 i)) and all others are rejected in their entirety because of problems arising with the contracts that have resulted in claims against the Company (and in some instances compensatory payments) that in total exceed the amount otherwise payable to the applicant.

[33] Ms Sheehan did not accept the claims in respect of 19 j) & 19 l) on the ground another employee did the relevant work: Mr Briskie was unable to effectively challenge that defence. The claim under 19 k) was rejected as no contract was ever signed: Mr Briskie properly did not challenge that defence.

[34] Mr Briskie was unable to refute Ms Sheehan's evidence of claims brought against the Company by clients in respect of whom he seeks commission payments, of legal action underway or threatened in respect of some of those clients, and of mitigation efforts by the Company in respect of the claims of disaffected clients who dealt with Mr Briskie, including monies paid, and additional products, given to them.

[35] While the evidence by both parties in this area was generalised and less than ideal, I find that Mr Briskie's failure to contest earlier warnings is reliable evidence that responsibility for loss rests with him and not, as he asserts, as a result of omissions by the Company's factory or others, in accurately rendering his information into the final product for the client and providing adequate service to them. The credibility of the applicant's claims of fault by others is lessened when regard is had to his other claim that he raised from the outset his concern about commission earnings not being paid to him as he understood they would: as I have already made clear above, there is no evidence, such as emails or the like, to support his allegation.

[36] Mr Briskie can be held accountable for special damages for breach of the implied term that an employee will exercise due diligence and care in his work: *F* v *Attorney General* [1994] 2 ERNZ 62.

[37] He can also be held accountable for damages for breach of express terms: *Masonry Design Solutions Ltd* v *Bettany*, unreported, Colgan CJ, AC 30/09, 21 August 2009. Unlike *Bettany* (above), there were no specific terms in Mr Briskie's employment agreement by which he could be held directly accountable to pay the sums claimed by the Company.

[38] Having regard to the evidence provided the Authority by both parties, I find, on an balance of probabilities basis that the Company's assertion of loss arising out of Mr Briskie's performance, and non-performance is made out.

[39] Ms Sheehan calculates that direct losses attributable to Mr Briskie's actions and inactions total $66,350 (see statement provided on the day of the investigation). That figure is particularised in the following way:

19 a) $2,000 credit due to complaints of missed variations by the applicant; the flooring had to be pulled up.

19 c) $3,000 credit due to complaints about the applicant's service; the Company faces an ongoing claim for $34,000.

19 f) $2,500 credit to compensate for a missed roof variation that Mr Briskie had earlier agreed to.

19 g) $6,000 credit towards decking that the applicant represented would be included. Also $10,000 lost income from rent the Company would have received had the client not been staying in accommodation promised by Mr Briskie that was not approved by the respondent.

19 h) $850 credit after complaints about Mr Briskie's representations.

19 i) $2,000 to install a wardrobe for the customer after Mr Briskie advised it would be included.

19 n) $40,000 lost on the contract due to the complaints by the customer as a result of the applicant providing unrealistic expectations.

[40] The sum also includes $10,800 being Ms Sheehan's hourly charge out rate of $135 x 80 hours for what the witness calculated was the time taken up by her *"in sorting out client issues"* (above). I note here that some of this money would relate to Ms Sheehan's normal duties as a managing director, but decline – for reasons set out below – to quantify at this point what additional time requirements resulted from Mr Briskie's actions.

[41] I note also that further payments may have to be made to clients because of ongoing claims.

[42] The total sum is significantly greater than the $44,043.62 claimed by Mr Briskie at par 8 of his statement, as unpaid commission owing to him. As is made clear above, that figure is anyway clearly not reliable and should be reduced as it includes commissions claimed in respect of settlements that the applicant was not party to but which were effectively earned by other employees and another where there has been no settlement at all.

[43] Having regard to the above, and the particular difficulties of precise calculation of damages involving third party claims, I am satisfied that, in terms of overall justice, there is no merit in awarding commission earnings (some of which are already conceded by the Company) only to remove the benefit of those monies by way of a legitimate damages award in favour of the respondent. Instead, this matter is best resolved by declining Mr Briskie's claim for unpaid earnings as well as the Company's claim for special damages.

Claim for Unpaid Holiday Pay

[44] Resolution of this matter was not assisted by the late (after the investigation) production of records by counsel for the Company said to reflect holiday payments

made to Mr Briskie. I have yet to see the calculation of the applicant's final pay in which the respondent claims all outstanding holiday pay was paid to him. However, during the investigation, Mr Briskie did not refute the respondent's allegation he received holiday pay at the time of his final pay and that he had taken holidays over the Xmas period and, as noted in par 16 (b) above, the applicant has substantially reduced his claim in this area.

[45] Therefore, following my reasoning above, and after having regard to the respective amounts claimed by the parties, I am satisfied any holiday pay owed Mr Briskie would be recovered by way of the Company's legitimate claim for special damages and no benefit would therefore result from my ordering payment of the same to the applicant.

Delay in Determination

[46] This determination was delayed by the advocate for Mr Briskie not meeting his undertaking to provide final submissions on his client's behalf by Monday 15 November: Mr Jamieson's claims during the investigation of commitments necessitating delay did not withstand close scrutiny, and his subsequent resiling from his (reluctant) undertaking to provide submissions by 15 November contained no more detail of commitments unavoidably resulting in delay.

Determination

[47] The parties' respective applications are refused.

[48] While costs are reserved I suggest to both parties that, again, following the above and subject to their submissions, they are likely to rest where they fall.

Denis Asher
Member of the Employment Relations Authority