

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Darryl Vincent Buckley (Applicant)
AND Nimon and Sons Limited (Respondent)
REPRESENTATIVES Dinah Kennedy for Applicant
Annie King for Respondent
MEMBER OF AUTHORITY G J Wood
**INVESTIGATION
MEETING** Napier, 2 February 2006
FURTHER SUBMISSIONS Received by 16 February 2006
**DATE OF
DETERMINATION** 28 March 2006

DETERMINATION OF THE AUTHORITY

1. Nimon & Sons Limited (“Nimons”) is an old Hawke’s Bay family firm with a number of interests in the transport industry. For a long period it was run by its founder Mr John Nimon.
2. The applicant, Mr Darryl Buckley, began employment with a company associated with Nimons as an automotive mechanic apprentice in 1987. In 1997 that company went into receivership and Mr Buckley was appointed as Workshop Manager at Nimons, a bus company.
3. In 2003 Mr John Nimon died and Mr Bill Nimon, his son, took over running the company.
4. In 2004, Mr Graham Wilson, who had recently been appointed as Marketing Manager, was appointed General Manager of Nimons. He resigned in December of that year and left giving Mr Buckley an extremely positive reference.

5. On 14 December, Mr Peter Patterson was appointed as General Manager of Nimons. One of the first issues he had to deal with was cover for Mr Buckley in the workshop over Christmas as Mr Buckley was going on leave. Mr Buckley had a company vehicle and was paid a greater salary than many at Nimons as a result of his skills and experience and the fact that he covered bus breakdowns in evenings and at weekends.
6. Mr Patterson and Mr Buckley considered that all staff should assist in future in call out work rather than simply leaving it to Mr Buckley. There was a dispute, however, over how much other workshop workers would be paid for the call out work. Mr Patterson called a meeting of the workshop staff and told them that if there was no agreement on call outs it would not be a big step from using an outside company to do call outs to that company doing all of the workshop work. After hearing from some workers in the workshop that it was Mr Buckley who was allegedly behind their not agreeing to the call out process, Mr Patterson then apologised for making statements that might have led people to believe that their jobs could be in jeopardy. Mr Buckley thus incurred Mr Patterson's displeasure for not supporting the management line over this matter with his staff.
7. In the next day or so, Mr Patterson and Mr Buckley had a conversation where Mr Buckley alleges Mr Patterson told him that when a block gets in his way he removes it and that he hoped for Mr Buckley's sake he was not going to be a block. Mr Patterson's evidence was that he told Mr Buckley that his job as general manager was to remove any blocks to his achieving his goals. He then claims that Mr Buckley asked him if he would remove him if he thought that he was a block, a question which Mr Patterson did not reply to. I prefer Mr Buckley's evidence on this matter as Mr Nimon acknowledged Mr Buckley took this matter up with him soon afterwards. Mr Nimon told Mr Buckley that he had to support his new general manager, that Mr Patterson was a lot harder than Mr Wilson and that Mr Buckley had to get alongside him.
8. As part of his initiation, Mr Patterson also went through Nimons' files and met with key staff (including Mr Buckley) in order to ascertain how the company was operating. He saw a number of areas for immediate improvement, particularly in the workshop.

9. He also quickly became aware of a concern that Mr Buckley had about what he believed was improper charging for work done for another company owned by one of Mr Buckley's staff. Mr Patterson was assured by Mr Nimon that the work was all being properly invoiced.
10. Mr Patterson also became aware that Mr Buckley did not like the management of Mr Nimon and that he was very upset when the previous General Manager Mr Wilson had left, because this meant he had to deal more with Mr Nimon.
11. As part of his assessment of the operation of Nimons, Mr Patterson also spoke with all the workshop staff. A number told him that they were very concerned about Mr Buckley's management and were considering leaving if he was not replaced.
12. As a result of Mr Patterson's investigations, which also included reports from the previous manager and discussions with Mr Nimon, he decided in the New Year that a serious talk with Mr Buckley was required. This is what he told Mr Buckley the day he returned from his Christmas holidays. Mr Buckley was unaware of what the meeting was about despite asking. All he knew was that it was a serious talk.
13. The meeting was held on the next day, 19 January 2005. At the commencement of the meeting Mr Buckley was told that the meeting was a performance review, not a disciplinary meeting.
14. Mr Patterson outlined issues in relation to Mr Buckley's performance and in particular his attitude. A lot of discussion occurred over the call out issue. Mr Buckley accepted that he had told staff that if they were not happy they should not agree to Mr Patterson's proposals. Mr Buckley also linked this issue with that of the other transport company's use of Nimons' workshop facilities. Mr Buckley also noted that he thought that the workshop staff were not concerned about his actions.
15. Mr Patterson then raised an issue of whether or not Mr Buckley had spoken outside of the company about the workshop situation. This was because Mr Patterson was aware from correspondence from Mr Wilson that Mr Wilson knew about the latest details on the workshop issues. Mr Buckley admitted that he had told Mr Wilson about the workshop issues, but was not negative about it. Mr Buckley was shown a letter from

Mr Wilson on another matter and reminded of his responsibilities to maintain confidentiality. Mr Buckley's response to the letter was that he did not see that it had anything to do with him and that he was the one who convinced Mr Wilson to resolve the major issue raised in the letter.

16. Mr Patterson then raised a matter that had been discussed in a health and safety meeting held in Mr Buckley's absence. General discussion on how safety could be best maintained then followed, including that Mr Buckley wanted strict guidelines on these issues.
17. The discussion then turned to general issues relating to Mr Buckley's competence. Mr Buckley suggested that Mr Patterson should refer to Mr Wilson's reference. Mr Patterson declined to do so, on the basis that he had little faith in Mr Wilson's opinions.
18. Mr Buckley went on to state that he had had little management training. Mr Buckley was told that he would have to improve his performance.
19. I accept that Mr Buckley, in the face of Mr Patterson's criticisms of his performance, asked him what his options were and whether one of them was to go back on the floor. I do so because going back on the floor was something that Mr Buckley had raised many times before with a number of staff at all levels at Nimons. Mr Patterson made it clear that that would require him to be confident Mr Buckley could work closely and harmoniously with the other mechanics. Mr Patterson then told him to think about the issues raised overnight and to talk to him the next day.
20. Mr Patterson reported his discussions with Mr Buckley to Mr Nimon, who told him that he did not want to lose Mr Buckley, as he was a very good diesel mechanic. Mr Nimon suggested that should Mr Buckley cease to be workshop manager another employee in the workshop could be considered for the manager's role. Mr Patterson met with that employee accordingly and received a positive response to his query about whether he would be interested in the job should Mr Buckley leave at short notice.

21. The pair did not meet again until two days later. The meeting took place at Mr Patterson's initiative. Mr Patterson asked Mr Buckley whether he had made a decision about whether he wanted to continue as workshop manager. Mr Buckley stated that he did want to stay on in the role. Mr Patterson then provided Mr Buckley with a performance plan that he had prepared earlier. The performance plan was a comprehensive document of five pages, setting out key performance indicators and measures for monitoring whether or not these had been met. The form concluded with room for Mr Buckley to sign it to confirm his understanding that performance improvement was required by a certain date and that he would try to achieve the targets set.
22. This was a highly sophisticated performance plan and Mr Buckley had never seen any performance plan before, let alone one of such sophistication. Mr Patterson explained that this was going to be required of all managers. In response to a question as to whether it was just about people leadership matters Mr Buckley was told that it covered all areas of management. Mr Buckley was also told that he had to make progress and to get up to speed, within a month if possible.
23. Mr Buckley started to read through the plan, but had difficulty in understanding many of the terms, such as "attrition" and therefore did not get far through it. He asked whether the option of working on the floor was still open. Mr Patterson responded that Mr Buckley needed to be pushed to improve as a manager and that he had to be satisfied that Mr Buckley would be a useful contributor to the workshop team before that option could be agreed to. Mr Buckley responded that it seemed that Mr Patterson was trying to push him out. Mr Patterson emphasised that Mr Buckley needed to improve quickly and asked for his agreement to the plan by 4pm that day. Mr Buckley stated that he was not prepared to continue the conversation any more. Mr Patterson then reminded him again of the 4pm deadline.
24. Mr Buckley's response to the meeting and the performance plan frustrated Mr Patterson greatly. Accordingly, he prepared a letter for Mr Buckley, which he presented to him soon afterwards.

25. The letter is dated 21 January 2005, is titled Workshop Management, and states:

“Your job performance has not been meeting the performance expectations and company work standards for someone holding the position of Workshop Manager. In order to improve your performance the company has issued you a Personal Performance Plan (PIP).

The purpose of this Personal Performance Plan is to provide you with a plan that will clearly identify measurable performance objectives and what the expected desired results should be. The intent of this plan is to assist you in improving your job performance to a satisfactory level.

This Personal Performance Plan is in effect for the next 30 days commencing on 21 January 2005 and ending on 21 February 2005. You and I will meet on a weekly basis to discuss performance issues that you have improved on as well as performance issues that still need improvement. These meetings will be documented and you will be provided a copy of this documentation.

You must demonstrate immediate, sustained and consistent improvement in all areas outlined in the attached Personal Performance Plan. Failure to demonstrate immediate, sustained and consistent improvement may result in dismissal as an employee of Nimon & Sons Ltd.

Although the timeline for this Personal Performance Plan is for 30 days, the company is not restricted from acting on further unsatisfactory performance, particularly if serious misconduct is displayed. Your dismissal may occur at anytime during or after the timeframe of this Personal Performance Plan.

If at any time you feel you are not being provided a fair opportunity to demonstrate improvement in your performance, you are encouraged to consult with either the General Manager or Managing Director.”

26. Mr Patterson was of the view that the seriousness of the situation had to be made clear to Mr Buckley and that is what he intended to do with the letter and the personal performance plan. He accepted the letter should have been written in a more positive way but that Nimons urgently needed an effective workshop manager.
27. Mr Buckley was extremely shocked when he read the letter. Mr Patterson emphasised the need for Mr Buckley to improve his performance if he was going to continue in the role of workshop manager. He also emphasised the need for the plan to be signed by 4pm. Mr Buckley indicated that he was going to seek legal advice on that matter.
28. Next, Ms Kennedy rang Mr Patterson on Mr Buckley’s behalf, that same afternoon, suggesting mediation. Mr Patterson sought advice from Ms King and agreed to the mediation, which took place on Monday, 24 January. It was not successful in resolving Mr Buckley’s concerns.

29. On 27 January, Ms Kennedy wrote to Nimons stating that Mr Buckley could not return to the workplace because of Mr Patterson's treatment of him. Mr Buckley returned his company vehicle that day and a week later was paid his final pay, with Nimons deciding to deduct one month's salary because they considered Mr Buckley had not given proper notice under the employment agreement.
30. Before leaving, Mr Buckley had applied for a job with a competitor, but did not consider that the remuneration offered was sufficient. He had also approached one other, with no discernable result. He decided soon afterward to change career and enrolled in early February on a training course to become a real estate agent. He successfully passed the course and is currently employed as a real estate agent. His taxable income for the period 1 April 2005 to 31 January 2006 was \$35,324.72.
31. The parties returned to mediation again but were unable to resolve matters. This was also the case in relation to attempts made during the course of the investigation to settle matters, so it therefore falls to the Authority to make a determination.

The Law

32. This is a case about constructive dismissal, a term well explored in employment relations jurisprudence. All these cases must also be analysed in the light of the new test for justification of dismissals, s.103A, and the new requirements on the parties to display good faith behaviour requiring the parties to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are responsive and communicative, s.4 (1A).
33. In this case, Mr Buckley claims under two of the three standard heads for constructive dismissal, namely that Nimons followed a course of conduct with a deliberate and dominant purpose of coercing him to resign and/or that a breach of duty by Nimons led Mr Buckley to resign. The leading case on constructive dismissal where breach of duty is alleged is *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUW (Inc)* [1994] 1 ERNZ 168. There the Court of Appeal held:

“... the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of

the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.”

34. While an employer is entitled to pursue performance issues with staff (*Auckland Shop Employees IUW v. Woolworths (NZ) Ltd* [1984] ACJ 41), there is a clear process for dealing with performance issues. Failure to behave as a reasonable employer by storing up a list of matters causing dissatisfaction and then confronting an employee with them is a very serious breach of trust and confidence likely to lead to a constructive dismissal; *Donaldson & Youngman (t/a Law Courts Hotel) v. Dickson* [1994] 1 ERNZ 920.

Determination

35. I conclude that Nimons, through Mr Patterson, was not following a course of conduct with a deliberate and dominant purpose of coercing Mr Buckley to resign. Mr Patterson was a new general manager who believed that he was required to make significant changes. He genuinely concluded that the workshop under Mr Buckley was an area where significant change was required quickly. He then sought to ensure that these changes occurred. Even although he himself accepts that the way he approached this, at least in terms of his letter, could have been done better, that does not mean that his purpose was wrong in law.
36. I do accept, however, that Nimons did breach its duties to Mr Buckley in a significant way and that these breaches were of sufficient seriousness to make it reasonably foreseeable by Nimons that Mr Buckley would not be prepared to work under the conditions prevailing.
37. Mr Buckley had been the workshop supervisor for seven years. He had just been given an extremely positive reference by the general manager who had recently left. Therefore he had no reason to consider that his performance was substantially below par or that his employment was under threat. All that changed with Mr Patterson's arrival, however.

38. After the issues relating to cover for call outs, Mr Patterson in effect threatened Mr Buckley by stating that he removed blocks in his way and he hoped that Mr Buckley was not going to become such a block. He then summonsed Mr Buckley to a performance review meeting where Mr Buckley was not aware that that was the purpose of the meeting. During this meeting, Mr Patterson reviewed Mr Buckley's employment in quite negative terms, criticising many aspects of his performance. Mr Patterson had clearly concluded by then that Mr Buckley was deficient in many aspects of his role, but he had not involved Mr Buckley in that assessment, or shared it with him, in any meaningful way before then. Mr Patterson gave Mr Buckley no assurance that even if he wanted to return to simply being a mechanic on the floor that Nimons would agree to it.
39. Mr Buckley was then given a day to think over his future options. When the meeting was reconvened a couple of days later, Mr Buckley was issued with a performance plan that he could not reasonably have been expected to have understood, especially as he had never been given any training in the management performance indicators to be required of him. Furthermore, he was pressured to accept the plan within an unreasonable time frame.
40. The most serious failure of Nimons, however, occurred with Mr Patterson's letter of 21 January, which was issued with advice that Mr Buckley's performance would have to improve if he was going to remain the workshop manager. While the letter states that the intent of the plan was to assist him in improving his job performance, the plan was only to be in effect for 30 days. In the course of that period, there were to be weekly meetings, which is quite a reasonable expectation were it not for the statement that failure to demonstrate immediate, sustained and consistent improvement may result in dismissal. This is exacerbated even further by the statement that Nimons was not restricted from acting on further unsatisfactory performance during the 30 day period, particularly if serious misconduct was displayed. Here it was noted that dismissal could occur at any time before or after the timeframe of the personal performance plan.

41. Here it is clear that the focus has moved beyond mere performance management to also a threat of dismissal at any time. Combined with Mr Patterson's previous treatment of Mr Buckley, this threat constituted a serious breach of duty to him.
42. I accept that Nimons properly tried to deal with matters through mediation when requested to do so. Unfortunately nothing resulted from the mediation that the Authority has been made aware of that changed the position set out in Mr Patterson's letter of 21 January. It therefore follows that Mr Buckley was entitled to resign on the basis of the events to that date.
43. While the resignation may well have come out of the blue, an objective analysis of events and in particular the letter of 21 January leads me to the conclusion that it was reasonably foreseeable that Mr Buckley would not put up with this sort of treatment. Mr Patterson, on behalf of Nimons, had a duty to be constructive in maintaining a productive employment relationship with Mr Buckley and the letter was an antithesis of that.
44. I do not accept that Mr Buckley left for any other reason. Issues relating to Mr Nimon's treatment of him and concerns over his partner's leaving Nimons were not key reasons for Mr Buckley deciding to leave at that time, I find. I so conclude on the basis of Mr Buckley's evidence and the fact that they had occurred some time in the past. It is important in this respect that Mr Buckley had worked for companies associated with the Nimon family virtually since leaving school. He would not leave simply on a whim or in a tiff, I find.
45. I therefore conclude that Mr Buckley was constructively dismissed. Given the serious breach of duty, there can be no justification for this dismissal, nor any contributory fault (*Dickson* applied).
46. Mr Buckley provided detailed evidence in support of his loss of remuneration, which I accept. While he was in training for one month and thus did not mitigate his loss for that period, this must be offset against the one month's pay deducted for failure to give proper notice. Given the fact that Mr Buckley was constructively dismissed it follows that he was not required to give notice in the manner envisaged by the employment agreement.

47. There is no reason to restrict Mr Buckley's loss to the period of three months only (*Telecom NZ Ltd v. Nutter* [2004] 1 ERNZ 315). I accept that the losses claimed have been losses as a result of the constructive dismissal. I therefore find that lost remuneration for 12 months is appropriate, namely \$24,956.72.
48. Mr Buckley also claimed \$10,000 in compensation. He gave cogent evidence, supported by his partner, of the impact on him. In particular, he noted that the financial pressures had been very demoralising and that he was given medication to deal with the stress from which he was suffering. The sum sought of \$10,000 is a reasonable claim in all the circumstances of this case and I award it in full accordingly.
49. I therefore order the respondent, Nimon & Sons Limited, to pay to the applicant, Darryl Vincent Buckley, the sum of \$10,000 compensation under s.123 (1)(c)(i) of the Act and \$24,956.72 gross under s.123(1)(b).

Costs

50. Costs are reserved.

G J Wood
Member of Employment Relations Authority