

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 11
5531735

BETWEEN DALE BURNS
 Applicant

AND RANDWICK MEAT COMPANY
 LIMITED
 Respondent

Member of Authority: P R Stapp

Representatives: Barbara Buckett, Counsel for Applicant
 Fred Hills, Counsel for Respondent

Investigation Meeting: 16 December 2014 at Wellington

Submissions Received: At the investigation meeting and in writing by 26
 January 2015¹

Determination: 9 February 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Burns claims that his suspension on 21 November 2014 was unjustified and that he has been disadvantaged by the respondent, Randwick Meat Company Limited (Randwick). Mr Burns has also made a claim for arrears of wages that has been denied by Randwick.

¹ Submissions were made orally by the parties' representatives at the Authority's investigation meeting held on 16 December 2014, but the respondent's representative requested more time to file revised written submissions to reflect the evidence from the meeting and the oral submissions. This necessitated a written reply from the applicant's representative, but the Christmas New Year holiday period intervened and the last submissions were received on 26 January 2015..

[2] Randwick claims that the suspension was justified based on an on-going investigation into Mr Burns's conduct in the workplace. It considers that the allegations involving Mr Burns's conduct are serious and that the employment relationship could not function effectively while the investigation process is ongoing.

Issues

[3] Mr Burns does not have a written employment agreement. There is no mutually agreed term on suspension. This raises the question as to whether or not there is good cause for the decision and that it was appropriate for such a decision to be made.

[4] There is an issue about what remedies apply, if Mr Burns is successful with his claim.

The facts

[5] Mr Burns is a longstanding employee of Randwick. He has been employed since February 1991. The business is co-owned by Louise and Raymond Fleetwood. Mr Burns does not have a written employment agreement and there is no term that has been mutually agreed between the parties as to suspension. For the balance of Mr Burns' time with Randwick, there has been no issue with his work. However, on 5 June 2014 Mr Burns was issued with a final warning in regard to misconduct. This involved the following matters:

- (a) That he was required to work between the hours of 7.30am and 3.30pm on each day at work;
- (b) That he was to perform his duties in his assigned areas during his working hours; and
- (c) That he was to complete call cycle reports each week.

[6] Mr Burns has (without prejudice) agreed to undertake these requirements. This matter has been the subject of an earlier determination from the Authority². The determination is the subject of a challenge in the Employment Court.

² *Burns v. Randwick Meat Company Ltd* [2014] NZERA Wellington 111

[7] Mr Burns was issued a letter dated 15 July 2014 from Randwick's lawyer that outlined Randwick's concerns. It included a proposal to suspend Mr Burns while an investigation addressing further concerns was ongoing. The letter which was sent by Randwick's lawyer reads as follows:

Proposed suspension

Given the seriousness of the allegations against you, we are concerned that the employment relationship cannot function effectively while the above allegations are being investigated. The seriousness relates to the concern about how you may be using your time at the workplace to gather intelligence about customers and pricing which is not related to the carrying out of your duties. It also relates to whether you are using your time in a manner inconsistent with your fundamental duty of fidelity to your employer.

While we have not formed a view about these matters, we propose to suspend you on full pay until such time that the investigation is completed.

Until the investigation is completed, you would not be required to return to the office or make contact with any of the staff. If you need material from the office to respond to our concerns, then you would liaise with myself or Ray. If your request is reasonable, we would facilitate that request.

Suspension would also allow you time to prepare for the investigation and to liaise with any support or representation you may choose to rely on.

We invite you to respond on our suspension proposal. You can do this in person today or in writing up to 4.30pm today. In the meantime, you are directed not to attend to your usual duties until such time as we can consider any response you may wish to make to our proposal to suspend you.

[8] Notwithstanding this, Mr Burns's position is that he wanted to return to work and indeed on the morning of 16 July 2014 he did report to work. He was informed by one of the owners that he was to go home to use his working time to prepare a response on the proposal to suspend him and also for the investigation meeting.

[9] Despite correspondence between both parties' lawyers, the matter of the suspension and Mr Burns's status to return to work was not resolved. The time for a response was extended by Randwick until 17 July 2014. Mr Burns then reported unwell and the question of a suspension was put on hold. In an email dated 17 July 2014 from Randwick's lawyer, further particulars and details were provided to

Mr Burns of Randwick's concerns. In particular, one of the matters included the following:

- *Kimberly Bowden reported to her employer that recently she heard the printer printing off for a prolonged period. This was peculiar, as typically such volume of printing does not occur in the morning. She went to the printer and recognised what was being printed out as the customer reports usually printed out on the weekend. The report lists what all customers have spent and what they owe. After Kimberly returned to her desk she saw your client collect the printing and place it on his desk.*
- *On 11 July 2014, Louise Fleetwood noticed your client print off material in the morning. Upon inspecting the information she discovered two pricing lists for customers not within your client's allocated areas. She destroyed the information.*

[10] Subsequently, Mr Burns learned that Kimberly Bowden provided a written statement dated 17 July 2014 to her employer about the matters that had been orally discussed between her and Raymond Fleetwood, and included in the above details.

[11] The parties continued to debate the merits of the proposal to suspend Mr Burns. Mr Burns's lawyer's position was that any suspension would be unlawful. Randwick replied as follows:

With respect to the reason for our client considering the option of suspending your client we again refer to the relevant section of the investigation letter of 15 July 2014 and also to Judge Couch's statements in Singh v. Sherildee Holdings Ltd t/a New World Opotiki³.

[12] Mr Burns, throughout this period, elected to take sick leave instead of taking up a proposal for special paid leave if he was able to return to work. His sick leave was exhausted on 22 July 2014, although he remained on sick leave from that date, albeit that he was unpaid. This was confirmed via an email dated 25 July 2014 (respondent's bundle of documents 13). As he was unwell, Randwick's investigation on the ongoing employment matters was postponed, including the option for him to take special leave.

[13] The dispute as to the lawfulness of the suspension continued between the parties and their representatives.

³ *Singh v. Sherildee Holdings Ltd t/a New World Opotiki* (unreported) Couch J AC53/05, ARC 111/04 22 September 2005

[14] On 6 August 2014, Mr Burns provided a medical certificate dated 31 July 2014 for Randwick, and it raised issues about Mr Burns's health. Randwick raised concerns about the nature of the information provided in the medical certificate that required clarification. Randwick stated that it would require Mr Burns to undergo a medical examination by a suitably qualified medical practitioner. Mr Burns's lawyer stated that such a demand was "*highly inappropriate and unhelpful as well as unlawful*".

[15] On 22 August 2014, Randwick replied to Mr Burns in relation to a return to work and stated in an email:

The company has invited Dale to respond to its proposal to suspend him (for the reasons set out in the letter). Dale should respond to that if he is well enough before expressing an intention to return. In the absence of his response the company will make a final decision on its proposal to suspend.

However, as an alternative, we propose that Dale agrees to prepare for the disciplinary meeting at home (for which he will be paid).

[16] There was confirmation from Mr Burns through his lawyer that no further submissions were to be made, that they had already been made and that Mr Burns' position was clear that the employer had no right or entitlement to suspend him. Randwick continued to request that a medical certificate be provided.

[17] Mr Burns returned to work on 27 August 2014 without another medical certificate and was instructed to obtain a certificate prior to returning to work. Mr Burns's lawyer claimed that he was being dismissed and Randwick replied that this was not the case and suggested special leave, or for Mr Burns to make any other suggestions in regard to what could happen.

[18] Throughout this time, the parties were dealing with the matter of the final warning.

[19] On 2 September 2014, Randwick provided Mr Burns with statements from staff and customers in relation to the 15 July 2014 allegations. The offer of special leave continued for the period until the conclusion of the employment investigation. The offer was rejected and a counter-offer of 10 September 2014 was not accepted by Randwick.

[20] On 11 September 2014, Mr Burns was placed on further sick leave, without any confirmation that he wished to be placed on special leave. His entitlement to paid sick leave remained exhausted.

[21] On 30 October 2014, the Employment Relations Authority issued a determination that the final warning was justified.

[22] On 13 November 2014, Randwick addressed the issue of Mr Burns' returning to work following a medical clearance and to consider whether the proposed suspension would be appropriate. Mr Burns was offered special leave in the event that he was well enough to return to work. A medical certificate was provided on 18 November 2014, but was qualified with the words "*he is fit for work in a supportive non-toxic work environment*". Randwick had misgivings about the information provided in the medical certificate and wrote to Mr Burns stating:

The implication of the purported medical certificate is unclear. It does not confirm whether in the circumstances, as your client understands them to be, Dale is fit for work and/or intending to return to work and when.

... The information provided does not provide satisfactory clearance for Dale to return to work tomorrow.

We also remind you that at the same time of providing any medical clearance, Dale is to confirm whether he accepts a period of paid special leave. If he chooses not to, Randwick Meats will need to decide whether it is appropriate to suspend him while the investigation is ongoing.

[23] In addition, Randwick requested Mr Burns to attend an investigation meeting in regard to the ongoing employment matters, which essentially were unfinished matters between the parties following the final warning, the Authority's determination and Mr Burns being on sick leave. There was no confirmation from Mr Burns and his representative that they would attend any investigation meeting. Instead, Mr Burns provided a new medical certificate (on 21 November 2014). The new medical certificate removed the reference to a toxic work environment. Again, Randwick asked Mr Burns to agree to a period of special leave and in the event that he did not, it would need to consider whether suspension was appropriate. Mr Burns responded that he would not accept any special leave.

[24] Randwick was not satisfied that the medical certificate provided was satisfactory clearance for Mr Burns to return to work. On 21 November 2014, Randwick suspended Mr Burns from his employment. The reasons for the suspension were provided in an email dated 21 November 2014, namely that

Our client is disappointed that the medical certificate is light on detail, but in the circumstances it provides satisfactory clearance for Dale's return to work.

As Dale has not agreed to paid special leave, our client has considered whether it is appropriate to suspend him [Emphasis added].

The reason Randwick Meats is considering suspension is because the relevant allegations are serious, and it is concerned that the employment relationship cannot function effectively during the investigation. The seriousness relates to how Dale may be using his time in the workplace to gather intelligence about customers which is not related to the carrying out of his duties. It is also relevant to whether he is using his time in a manner inconsistent with his fundamental duty of fidelity to his employer. (Emphasis added)

Our client has considered all the submissions provided including:

- *That there is no entitlement to suspend;*
- *That the employment relationship has functioned without the need to suspend; and*
- *Suspension would be punitive.*

The right to suspend is confirmed in Singh v. Sherildee Holdings Ltd. Given the nature of the concerns, our client considers that this is an unusual case. Until the allegations are resolved, our client considers that there is a significant risk that confidential and sensitive information may be uplifted from its business.

Dale left the workplace on 15 July 2014 prior to receiving the investigation letter. The following day he was told to prepare submissions and not to work. Since that time he has not been at work, save for a premature return to work without medical clearance.

Any suspension would be on full pay and not punitive.

Having considered all matters, our client has decided to suspend Dale on full pay effective Monday 24 November 2014 ... (Emphasis added)

The parties' submissions

[25] Mr Burns's position is that:

- (a) He has not been given a fair opportunity to return to work following the final warning and the Authority's determination dated 30 October

to show Randwick that he is willing, able and will carry out the work required of him;

- (b) His suspension is unjustified in regard to the reasons given by the employer and that the suspension is unfair.

[26] Randwick's position is that the circumstances provide good cause and are significant in the absence of a written employment agreement with a mutually agreed term for suspension to suspend Mr Burns from his employment while there is an ongoing investigation. It contends that this is linked to the relevant allegations being serious and a concern that the employment relationship cannot function effectively during the investigation. Randwick's concerns related to how Mr Burns may have been using his time in the workplace to gather intelligence about customers that was not related to the carrying out of his duties.

[27] It is common ground that the email dated 21 November 2014 implemented the decision to suspend Mr Burns on full pay effective from Monday, 24 November 2014. Indeed he has been on full pay since that time.

Determination

[28] First Randwick was entitled to make a proposal to suspend Mr Burns given the allegations made against him on 15 and 17 July 2014, in regard to entirely separate matters to the matters considered by the Authority in its determination dated 30 October 2014.

[29] Second, Mr Burns was given an opportunity to respond to the proposal to suspend him, when he knew what the allegations were. There is a trail of emails that support this, even though Mr Burns and his representative have disputed throughout that any suspension would be unlawful. They never sought to test it, but relied instead on their own understanding of the law.

[30] Third, Mr Burns went on sick leave and his leave had been exhausted. This is the defence that Randwick has advanced in regard to its decision not to pay Mr Burns. As he was sick Randwick postponed pursuing the investigation and the proposal to suspend him until he had been cleared to return to work. When he was cleared to return to work, which Randwick accepted (with the second medical certificate), it decided it needed a decision on how to treat him. It offered paid special leave, which

Mr Burns rejected. It saw its only remaining option was to suspend him. It did this on 21 November 2014. This development addresses the submission that Mr Burns has not had an opportunity to prove himself after the Authority's determination. The issues are evolving and the employer was entitled to make a decision on what it was proposing, which Mr Burns had an opportunity to respond to, I hold.

[31] A scrutiny of Randwick's reason for the suspension must be considered alongside all the relevant evidence to assess whether there is good cause and significant issues existing between the parties (Singh applied). It does seem that Randwick suspended Mr Burns because he declined to take special leave. I hold that his decision not to take special paid leave was his decision and it was not the reason for the suspension. It was merely one of the alternative options. The reasons for the suspension were related to the on-going allegations about his work that were separate to the matters associated with the final warning. Randwick's concerns were related to matters raised on 15 and 17 July 2014 that were unresolved when the warning was given for three other matters. I am satisfied there is no overlap of the issues with Randwick using the same matters to retry Mr Burns.

[32] I have balanced that Mr Burns and Randwick have no written employment agreement and that there has been no mutually agreed term for suspension. I accept that Randwick's decision has been made with good cause and there are significant issues involving an on-going investigation into employment matters. This is supported by the emails of 15 and 17 July 2014. Also the letter of suspension dated 21 November supports the conclusion. Another factor is that Randwick accepted it had to pay Mr Burns while the suspension applied. This addresses Mr Burns's concern about being paid and any financial impact on him. There is at least one serious allegation about the use of sensitive information, amongst on-going performance issues that are alleged, and whether or not the proof of that serious allegation will meet the threshold of the evidence having to be convincing involves a decision to be made by Randwick. The one serious allegation is enough to meet the threshold to consider the suspension was justified for the on-going investigation, I hold, because it has a concerning report that Mr Burns allegedly breached his duty of fidelity to Randwick which is fundamental to trust and confidence in him as its employee. On the procedure relating to the proposed suspension Mr Burns was consulted. He knew Randwick's concerns. He had an opportunity to respond and submissions were made through his representative. I am satisfied that when the

submissions were exhausted that Randwick genuinely considered the submissions and decided to suspend Mr Burns as the remaining option because Mr Burns decided to reject special paid leave.

[33] I uphold the suspension as a justified action that a fair and reasonable employer could make. Mr Burns's claim of unjustified disadvantage action is dismissed. By implication the remedies for compensation and penalties associated with this claim are also dismissed.

[34] In the statement of problem there has been a claim for arrears of wages. There is simply not enough evidence for me to determine that matter. There needs to be a proper reconciliation undertaken with the employer's wage time and holiday and leave records from its accountants to assess the sick leave entitlement and any wages owing. Leave is reserved in regard to this matter.

[35] Costs are reserved, including the claim for "full indemnity costs".

Conclusion

[36] Mr Burns's claims are dismissed. The wage arrears claim based on sick leave is reserved. Costs are reserved.

P R Stapp
Member of the Employment Relations Authority