

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 62A/08
5106327

BETWEEN BRUCE CAMERON,
 MATTHEW BREWSTER,
 VICKI CAMERON AND
 KATIE BREWSTER
 Applicants

AND PRIDEX INDUSTRIES (NZ)
 LIMITED
 Respondent

Member of Authority: Paul Montgomery

Representatives: David Goldwater, Counsel for Applicants
 Clayton Williams, Counsel for Respondent

Investigation Meeting: 13 and 14 May 2008 at Christchurch

Submissions received: 4 June, 18 June 2008 from Applicant
 5 June, 18 June 2008 from Respondent

Further memoranda of 8 August 2008 for applicants
counsel received: 21 August 2008 for respondent

Determination: 31 October 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This matter arose as a result of the attempt to salvage Fox Kitchens Limited and the intended purchase of its assets, liabilities and operations by the respondent company. The four applicants allege they were employed by the respondent to operate a manufacturing and distribution operation in the South Island and to maintain the former Fox Kitchen franchise operation.

[2] The applicants each seek payment of outstanding remuneration including holiday pay, three months lost remuneration until s.123(1)(b) of the Act, compensation for hurt and humiliation and costs.

[3] The respondent declined the remedies sought and further denies any liability. It says it was never the employer but that the four were employed by an entity called Pridex Kitchens South Island (PKSI). It says PKSI was to be a *business combination* between Pridex Industries (NZ) Ltd (PINZL) and Fox Kitchens Limited (Fox). It says this entity lasted 19 days from 1 to 19 July 2007 before being disbanded.

[4] The parties attended mediation with the Department of Labour's Mediation Service. However, they were unable to resolve their differences.

Issues

[5] To resolve this matter the Authority needs to make findings on the following issues:

- Was the objective to establish an entity separate from PINZL known to any of the applicants;
- Was the Heads of Agreement conditional on the completion of due diligence;
- What was the employment status of each of the applicants vis a vis the respondent between 1 July and 19 July 2007;
- In the event they were employees as defined in the Act, were their positions disestablished by the respondent;
- If so, was an appropriate consultation process undertaken;
- Were the applicants unjustifiably dismissed;
- If so, did any of them contribute to the circumstances giving rise to his or her grievance;
- What, if any, remedies are due to the applicants.

[6] There are elements in this case which relate to employment and other significant elements which relate to business transactions based on opportunities perceived by the parties to be in their best financial interest. The Authority is aware that matters relating to this case have been or are the subject of proceedings in other jurisdictions.

[7] As an employment problem resolution jurisdiction, the Authority acknowledges its role is restricted to resolving such problems. The parties to this matter before the Authority are to understand that its investigation relates solely to the alleged employment relationship said to exist between the parties.

[8] Much of the evidence before the Authority necessarily relates to business dealings which form the backdrop to the employment issues. All the participants are familiar with those dealings and have staunchly held views on them. This determination refers only to those facts which relate to the employment status of the four applicants in the period between 1 and 19 July 2007.

Key documents

[9] The key documents in this case are the Heads of Agreement (conditional upon completion of due diligence), documents surrounding the opening of the ANZ Bank account in the name of PKSI, the correspondence with the Department of Inland Revenue requesting the registration of a separate operation for GST purposes, a number of emails between the parties and the individual employment agreements presented to and signed by Mrs Cameron and Mrs Brewster. Also relevant is the list of employees the respondent agreed were transferred to the new Christchurch manufacturing and distribution operation.

The investigation meeting

[10] At the investigation meeting the Authority heard evidence in person from each of the four applicants. For the respondent evidence was given in person by Mr Steve Channing-Pearce and Mr Chris Prier. The former Human Resources Manager for PINZL, Mr Michael Clark, gave evidence by teleconference call.

[11] The meeting was not without its difficulties at times, particularly in the course of the respondent presenting its evidence. However, by and large the meeting proceeded without any undue difficulties.

[12] I would record the thanks of the Authority to counsel for each of the parties for their resistance in the meeting and also for their well researched and considered closing submissions.

Analysis and discussion

[13] It has to be said that the circumstances in which the Heads of Agreement was composed and signed by the relevant parties was done with undue haste and, as I understand it, under considerable pressure from Mr Cameron to have the document in place. What is astonishing is without completing a due diligence process, staff of Fox were offered employment agreements, and on the basis of a list recomposed by Mr Cameron involved two of the applicants who were not previously on the agreed list.

[14] It was not agreed between the parties that the list comprising those employees to be transferred was to include Mrs Brewster nor his wife Mrs Cameron. While accepting Mr Clark issued offers based on what Mr Cameron had placed on this list, this does not rectify a wrong. On the evidence of the respondent Mrs Cameron was to be offered a position with the intended franchise operation, not with the operational side of PKSI.

[15] For that reason, I do not accept it was ever agreed that these two people were intended to be employed by PKSI.

[16] Fox was a family owned business. There is no criticism of that. However, when difficulties arise it is not unusual to expect family loyalties to be supportive in the face of adverse conditions. Mr Cameron was intent on securing the best outcome for his family following adverse trading conditions, with better prospects afoot with PINZL. In seeking to protect that outcome, he seeks to rely on a different interpretation of the Heads of Agreement and an attempted manipulation of the roles of his wife and daughter in PKSI. While understanding that blood is thicker than water, I cannot accept Mr Cameron's actions on this issue were entirely honest.

[17] Mr Brewster was a credible witness, at times conceding that he may have been mistaken and ready to concede a point if his recall was poor. It is interesting that in spite of the difficulties between the major protagonists, PINZL offered him employment in its own operation. Mr Brewster declined. While that is unsurprising given his relationship to the Camerons, it does not necessarily follow that Mr Brewster is dishonest. The Authority gained the impression in the course of the

investigation meeting that Mr Cameron was the driver behind the enterprise and that as his son-in-law, Mr Brewster left the majority of the structural decision making to Mr Cameron.

[18] The imbroglio regarding the alleged theft of the dongel (memory stick) loaded with PINZL designs has now, belatedly, been resolved. It was found where Mr Brewster said it was. The respondent handled this matter in a particularly clumsy fashion although it must be recorded that Mr Brewster did not initially cooperate with the respondent's agent on this issue. The respondent says that having declined its offer to employ Mr Brewster, no matter the bad blood between the parties, he was deliberately obstructive. It also says Mr Brewster in declining the offer failed to mitigate his loss. Upon consideration I believe the respondent has made this submission on the basis of a contingency element should the Authority determine Mr Brewster was an employee of PINZL.

[19] Standing back and considering the evidence I am strongly of the view that PINZL, consistent with its structural arrangements in the North Island, was setting up a subsidiary operation in Christchurch named PKSI. The documents setting up the ANZ Bank account, the correspondence with the Inland Revenue Department, a considerable number of emails between Messrs Cameron, Brewster and replies from Messrs Channing-Pearce and Prier make it very clear to me that all four were clear that the South Island operation was to be independent structurally from PINZL. The bank documents are significant because they were signed by both Mr Cameron and Mr Brewster as signatories to the account, and clearly at the top of the first page is the name Pridex Kitchens South Island.

[20] In relation to the transfer of Fox personnel to PKSI, the waters were considerably muddied by the presentation by Mr Clark to those employees and the use of employment agreements clearly identifying the respondent company as the entity offering engagement to the Fox staff.

[21] In considering this closely, I accept Mr Clark's evidence that the agreements are generic in nature in order to be able to be employed in a range of employment settings.

[22] I am also firmly of the view that when the arrangement between the two organisations was beginning to disintegrate, it was Mr Cameron, keen to continue the

Fox operation in the event the merger failed, who initiated the return of staff to Fox Kitchens. It follows that those staff ceased their employment with the Pridex group of companies and PKSI on 19 July 2007.

Findings

[23] Returning to the issues set out above I find:

- Both Mr Cameron and Mr Brewster were aware from documents they signed, emails they composed and received that the overall proposal was for PKSI to operate as a stand alone business within the wider Pridex group;
- The Heads of Agreement were conditional on the satisfactory completion of due diligence by the respondent. The unauthorised banking of deposits into the Fox bank account alerted PINZL management to serious irregularities and led, I find to the mutual agreement to postpone and then abandon the project;
- Mrs Cameron and Mrs Brewster were employees of PKSI from 1 to 19 July. Both received offers from PKSI and both accepted those offers. While accepting their names were added to the list without discussion with PINZL, I am not convinced either woman was aware they were not on the original list under the Heads of Agreement;
- Neither Mr Cameron nor Mr Brewster had signed employment agreements as discussions were still in train when the agreed transfer of staff back to Fox was undertaken. I accept both were performing work relating to the establishing of PKSI, continued to be directors of Fox and had the merger proceeded, would have been employed by PKSI. On the basis of the evidence before the Authority I am of the view they were not employees of PKSI during the relevant period;
- I find the entity PKSI was dissolved with the mutual agreement of the parties involved. I do so on the basis that in the preamble of an email sent to Mr Channing-Pearce and Mr Prier on 21 July 2007, Mr Cameron wrote *The merger of the two businesses has concluded with the parties*

failing to reach agreement on fundamental terms and conditions of the merger. This view is repeated in a notice sent to the creditors of Pridex South Island by Mr Cameron that the discontinuance was because both parties agreed to part ways from this date;

- I find, on the balance of probabilities that Mr Channing-Pearce instructed Mr Cameron to consult with the Christchurch staff of PKSI regarding their transferring back to Fox, and that Mr Cameron failed to undertake this essential process;
- I find that PKSI employees were not made redundant by the respondent company's actions but by the failure of the merger to proceed.

[24] I note that following a letter from Fox's then solicitors and discussions with its own solicitors, PINZL agreed to a without prejudice meeting at the offices of Lane Neave in Christchurch. That meeting was scheduled for 11am on 26 July 2007. Among other matters, it was to address outstanding wages due to the transferred employees. At the exact time the meeting was to begin, Fox's solicitors contacted PINZL's solicitors advising them the meeting had been cancelled.

[25] I am of the view that the willingness of Mr Channing-Pearce to come at short notice to this meeting is indicative of his goodwill and his intention to address issues between the parties. In his evidence this witness told the Authority *I believe that had that money not been diverted from the PKSI ANZ account there would have been enough money to pay outstanding wages and holiday pay to employees for the 19 day period before they were transferred back to Fox, and accordingly, no ERA proceedings would have been filed against PINZL.*

Remedies

[26] Having found that Mrs Cameron and Mrs Brewster were employees of the PKSI operation I need to address the matter of remedies. In regard to Mr Cameron and Mr Brewster I have found they were not employees of PKSI in the relevant period and consequently am unable to assist them further.

Mrs Cameron

[27] Mrs Cameron was a commissioned sales person from 1 to 19 July 2007. She is entitled to the then minimum wage for that period, plus holiday pay at 8%. Having found her redundancy from PKSI was not due to the actions of the respondent company I am unable to consider compensation.

Mrs Brewster

[28] As an employee of PKSI Mrs Brewster is entitled to be paid her wages from 1 to 19 July 2007. To that is added her entitlement to holiday pay of 8%.

[29] Counsel for the parties are to calculate the sums owed to these applicants and arrange for their prompt payment. Leave is reserved to return to the Authority in the event they are unable to agree.

Costs

[30] Costs are reserved. The parties are required to attempt to resolve the issue of costs between themselves. If this is not achievable Mr Williams is to lodge and serve his memorandum 28 days from the date of issue of this determination. Mr Goldwater is to have a further 14 days in which to lodge and serve his memorandum in response.

Paul Montgomery
Member of the Employment Relations Authority