

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 295/07
5081342

BETWEEN EMIEL CHITTY
 Applicant

AND HILLS HATS LTD
 Respondent

Member of Authority: Dzintra King

Representatives: Tony Kurta, Advocate for Applicant
 Peter Cullen, Counsel for Respondent

Investigation Meeting: 21 September 2007

Determination: 24 September 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Emiel Chitty, says he has been unjustifiably dismissed by the respondent, Hills Hats Ltd (“Hills”). He also says that Hills has not reimbursed him for expenses.

[2] In his previous employment with Charles Parsons (NZ) Ltd (“Parsons”) Mr Chitty met and had regular dealings with Simon Smuts-Kennedy, now the General Manager of Hills. The two men developed a good relationship and spoke about Mr Chitty moving to work for Hills. They talked about this over a period of three years before Mr Chitty accepted employment with Hills on 18 January 2006.

[3] Mr Chitty’s employment with Hills terminated in February 2007 as a result of a company restructuring resulting in his position becoming redundant.

[4] Unfortunately the respondent did not provide an employment agreement. Had there been an agreement many of the issues in contention would not have arisen. Hills did send Mr Chitty a letter of appointment but this did not cover some of the issues at all and lacked clarity about others.

[5] Mr Chitty said he made it clear that if he was to move from Parsons Hills would have to match most of his existing contract and better it in some respects. Mr Chitty believed he and Simon Smuts-Kennedy had agreed that his service with Parsons would be carried over for the purposes of redundancy and that the redundancy formula would apply.

[6] He also believed that he would get an additional two weeks' holiday that would have been due to him as long service leave had he continued working at Parsons.

[7] Simon Smuts-Kennedy said he had a number of discussions with his father, Pieter Smuts-Kennedy, the Managing Director, and Mark Robotham, who was engaged as a business consultant by Hills. It was agreed that a position of Sales Manager would be established in Auckland (Hills is a Wellington based company) and that Mr Chitty would be interviewed for the position.

[8] Mr Robotham and Mr Peter Crow of the Quarry Group interviewed Mr Chitty. Mr Robotham said that at the end of the interview he told Mr Chitty that the company would make him an offer and outlined the general content of the offer. There would be a base salary of \$52,000, a bonus scheme based on company sales and the company was looking at making him an equity stakeholder by giving him the option to purchase 15% of the company for \$36,000 if an annual revenue of \$4m was achieved within 2 years.

[9] After speaking to Mr Chitty Mr Robotham spoke to Pieter Smuts-Kennedy and wrote a letter to both Pieter and Simon detailing the verbal offer he had made on 21 October 2005. He said Mr Chitty had verbally accepted the offer of employment and that he had told Mr Chitty that Pieter Smuts-Kennedy would confirm the offer in writing.

[10] On 25 October 2005 Pieter sent a letter to Mr Chitty confirming the “details of employment terms as previously discussed”. As well as stating the salary would be \$52,000 and setting out the shareholding possibility, the letter said:

Other Remuneration includes

- *Company vehicle and Mobil petrol card*
- *Home Office expenses and mobile phone*
- *Travel and Entertaining allowance as agreed*
- *Company Visa credit card*
- *Opportunity to join Southern Cross Medical*
- *Annual Leave and Sick Leave as company policy.*

....

Should there be any other detail previously discussed and not included please don't hesitate to contact me by return.

[11] Mr Chitty phoned Simon Smuts-Kennedy and told him he had the job. He also said there was nothing in the letter about the two weeks' additional leave. He said Simon Smuts-Kennedy told him, not to worry about it, it would be ok. Simon Smuts-Kennedy said he had discussed the fact that Mr Chitty had arranged to take five weeks leave with his father and that there would be no problem accommodating that arrangement. Mr Chitty said he assumed the additional leave would be paid. Simon Smuts-Kennedy said there had been no discussion about payment and he assumed it would be unpaid.

[12] There was no reference in the letter to redundancy or the carrying over of service. Mr Chitty said he was unsure why he had not raised this when he spoke with Pieter Smuts-Kennedy. He did say that he thought redundancy was not an issue because he thought he was in it for the long haul.

[13] The parties agree that until Mr Chitty supplied a copy a Parsons' employment agreement (not Mr Chitty's own employment agreement) with his brief of evidence Hills had not seen a copy of the agreement.

[14] Mr Chitty cannot contend that an employer would agree to equal or better the terms of an employment agreement to which it had never been made privy.

[15] It was readily apparent that much of the agreement regarding terms and conditions of employment that Mr Chitty said had been made consisted in informal, friendly discussions held between him and Simon Smuts-Kennedy over a lengthy period before any offer of employment was even made.

[16] I have no doubt that Mr Chitty thought his informal conversations and discussions with Simon Smuts-Kennedy would constitute the terms of his employment. That is both unfortunate and inaccurate.

[17] After his employment terminated Mr Chitty claimed a number of office expenses. These included depreciation on his computer, rental of \$200 for using part of his bedroom and/or living room, and a claim of \$100 per week for 52 weeks for pens, fax paper, coffee, tea, water, phone and power. No invoices have been supplied to the company or to the Authority. Hills says that stationery was supplied.

[18] Pieter said that the company had offered to supply a computer and fax machine but Mr Chitty had said he already had that equipment and there was neither the room nor the need for duplicates.

[19] It is clear that there was no agreement regarding reimbursement of the items claimed. Mr Chitty accepted that such specifics had not been discussed and it is clear that he did not expect to be paid what he is now claiming or he would have rendered invoices during the course of his employment.

[20] Had I found that the parties had agreed that office expenses included the specified items I would have needed documentation to make any award.

[21] The opportunity to join Southern Cross was the opportunity to take advantage of the discounted rate Hills had as a result of its membership of the EMA. The ability to join and to have the fees paid are two different things.

[22] During his employment he billed the company for phone line rental. That had been agreed and was reimbursed.

The Redundancy

[23] In September 2006 the company's accountant raised concerns regarding the financial position. Hills raised the matter with Mr Robotham and Mr Chitty was flown to Wellington to have discussions, which took place on 5 October, regarding the matter.

[24] Mr Robotham recommended a restructuring and drafted a Business Realignment Project document together with an Employee Information Kit in December. This was sent to the four potentially affected employees of whom Mr Chitty was one.

[25] A reply form was attached and employees were encouraged to seek representation. This was emailed to Mr Chitty on 6 December together with an attached email saying there would be a conference call at 3.45. He said he had only just received the document and was not in a position to be able to comment. A time of 9am on 9 December was set for another conference call.

[26] On 11 December Mr Chitty replied acknowledging that "drastic measures" were needed. He also said that he was unlikely to be able to spend much time with his lawyer as he was very busy but that would have to happen before he was able to respond further. Mr Chitty, however, had not consulted a lawyer although he had endeavoured to contact one. Mr Chitty was given additional time to make a response.

[27] His further response of 15 December said that as the company was going through hard times he was willing to take a pay cut but in return asked that the "shares that have been promised be brought forward in compensation for the sacrifice need to

make". He also said there could be other better solutions and was receptive to other proposals.

[28] On 18 December he received an acknowledgement of his second response. A report was attached which summarised the responses received and stated that the restructure would proceed as planned on 17 January 2007. He was asked whether he wanted to be considered for any of the new positions.

[29] After he had telephoned Simon Smuts-Kennedy on 20 December and confirmed that the positions were all in Wellington he said he did not wish to be considered. Later that day he received an email from Pieter Smuts-Kennedy asking him to wait by the phone the next between 11 and 11.15am. At 11.30 on 20 December Anthea Griffin, the Operations Manager, phoned to ascertain whether he had received the email and to check that he would be available for the call the following day.

[30] On 21 December he took part in the conference call and was told his position was redundant.

[31] Mr Chitty says that the process followed by Hills was at odds with that set out in the Employee Information Kit forwarded together with the Business Realignment Project document. The Kit says that feedback would be collated and discussed at a meeting at a time to be mutually confirmed but no meeting took place. The company says the meeting took place via conference call as Mr Chitty was the only employee in Auckland.

[32] The Kit also states that after the feedback has been collated and discussed at a meeting a decision would be made and the impacts would be discussed with affected employees. The impacts were identified as being confirmed in the existing position or the existing position being disestablished. If the employee's position was disestablished the employee was able to express an interest in any available position or elect not to be considered for an alternative position. The company says this discussion took place via conference call.

[33] The Kit goes on to say that if the employee elects not to be considered for an available position, he would be asked to attend a meeting at which he would be advised of the final outcome of the decision regarding his position. It says:

We will discuss any other options or suggestions you may have in relation to your position including any reasonable redeployment within the company. The company will give any such suggestion genuine consideration. You will also have an opportunity to ask any questions you may have.

In the event of no other realistic options, you will be given notice of redundancy in accordance with your employment agreement and invited to participate in appropriate transitional arrangements.

[34] No meeting took place but there was a conference call on 21 December during which he was advised that his position was redundant.

[35] This call was Mr Chitty's opportunity to raise the fact that he understood one of the Auckland commission sales agents (who are not employees) was due to retire shortly and to explore the possibility of some arrangement being reached regarding a contract for services.

[36] A major complaint of Mr Chitty's is that the Kit refers to meetings but that only conference calls took place. While it may be understandable that a company in financial difficulties does not wish to expend further money on airfares it would certainly have been much more humane for Mr Chitty to have been told he could have a meeting if he preferred a face to face encounter. The company says Mr Chitty did not ask for one. It is however the employer that controls the process and there was reference to meetings not conference calls in the Kit.

[37] That said, the failure to meet in person does not vitiate the process. The employer was entitled to reorganise its business and it did consult with Mr Chitty.

[38] Mr Chitty does not have a personal grievance

Costs

[39] If the parties are unable to resolve the issue of costs the respondent should file a memorandum within 28 days of the date of this determination. The applicant should then file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King

Member of the Employment Relations Authority