

**An order prohibiting publication of
the name of the parties and other
evidence identifying the parties
is made in this determination.**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 164
5531204

BETWEEN F
 Applicant

A N D G
 Respondent

Member of Authority: James Crichton

Representatives: Helen White, Counsel for the Applicant
 Philip Kotze, Advocate for the Respondent

Investigation Meeting: 9 March 2015 at Auckland

Date of Determination: 10 June 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr F) alleged in a statement of problem filed on 21 November 2014 that the respondent employer (G) had breached his employment agreement and created a hostile workplace for him. G denies those allegations. Indeed, G says that the incident that Mr F relies upon discloses inappropriate behaviour by him. Moreover, G say they proactively sought mediation as soon as the issues between the parties were raised by Mr F.

[2] G is a multi-media business generating significant intellectual property especially around the development of new and market-leading software.

[3] In December 2013, G acquired funding for research and development from E. The particular project for which this funding was provided was described rather colourfully by G as "*bleeding edge technology*".

[4] A number of G's staff (including Mr F) were involved in the new project, either in whole or in part. G says that staff would not necessarily have known when they were working on the new project and when they were not.

[5] E required an annual audit. Staff involved were briefed on that audit process. It is Mr F's contention that that briefing involved a statement that he (and other staff) should lie if they were called upon by the auditor to give evidence about the funded project. This was because it was suggested that staff should "*fudge*" the line between work that was required for the new project, and work that was not.

[6] The allegation that Mr F, or indeed any other staff member, was asked to lie was hotly denied by G and caused such significant controversy that the manager, Ms H, who is alleged by Mr F to have told him to lie offered to resign her role at G.

[7] G says that rather than address his concerns one-on-one to his manager or the managing director of G, Mr F behaved improperly by emailing the managing director to seek a staff meeting but copying that email to all staff members.

[8] As a consequence of the request for a staff meeting, G organised that at short notice and it took place on 18 November 2014. Mr F's position is that the evidence discloses that Ms H did confirm at that meeting that she had asked staff (including Mr F) to lie and that the meeting was much concerned with the employer seeking to shore up its position by talk of staff "*banding together*", "*not rocking the boat*", and "*how individual dissent could affect the whole company*".

[9] G denies that the evidence discloses that Ms H did tell staff to lie and denies that the dominant behaviour at the 18 November 2014 meeting was designed to bring staff into line.

[10] As it happens, Mr F was not asked by the auditors to speak to them (they selected an entirely random group of staff which did not include Mr F), but the following day (19 November 2014), Mr F made arrangements himself to see the auditors and his evidence is that he gave them a truthful account of matters including disclosure of his allegation that he was asked to lie to the auditors by a senior manager of G. In making that disclosure, he claimed to be reliant upon the provisions of the Protected Disclosures Act 2000.

[11] Then, the following day on Thursday, 20 November 2014, Mr F, after taking legal advice, wrote a letter raising a personal grievance to the management team raising the issues now before the Authority and a second letter to staff proposing a lunchtime meeting and allegedly summarising his legal advice received to date.

[12] As a consequence of the anxiety of some staff about the letter Mr F addressed to them, G called a further staff meeting at which Mr F was not present. That meeting took place on 20 November 2014 and subsequently the matter came before the Authority after the mediation requested by G did not successfully resolve the employment relationship problem.

[13] When the matter was first set down for hearing before me, I met with the parties at the beginning of the investigation meeting and urged them to once again seek to mediate their issues . I record that the parties made an earnest effort to resolve their differences in mediation, but in the result were not successful and the matter then proceeded to hearing at a later date.

[14] An application for urgency was filed on 12 December 2014 supported by Mr F's affidavit in which he indicated he had not attended the workplace since 20 November 2014 and was without funds as a consequence of G having ceased paying his salary. That application for urgency was filed in advance of the statement in reply which was filed and served on 16 December 2014.

[15] Because of the application for urgency, a case management conference was convened by me on 19 December 2014 and the matter was first set down for hearing on Monday, 19 January 2015.

[16] After directing the parties to attempt further mediation on the first day proposed for the investigation meeting and that mediation not successfully resolving matters, the investigation meeting was set down again for 29 January 2015 and because of issues around the admissibility of certain evidence, that date was also vacated.

[17] Then there was an issue about the release of the draft audit report, the Serious Fraud Office having become involved in the matter. Accordingly, I spoke with the responsible officer at the Serious Fraud Office and established from him that the Serious Fraud Office had no issue about the release of the draft audit report because it was not their document but even if they did have concerns about its release (which

they did not have), it was already in the hands of others and so it could be released with impunity. Subsequently, E consented to the release of the draft audit report.

[18] Then, in an effort to highlight to both parties the difficulties I perceived in each of them receiving publicity as a consequence of this matter going to a full hearing, I met with both parties with a view to exploring whether there was a basis on which the matter could be resolved by agreement.

[19] Given the parties' inability to settle their differences in advance of the investigation meeting, I indicated to the representatives my intention to conduct the investigation meeting in camera and to issue this determination with the names of the parties and witnesses removed so as to protect both parties from the consequences of publicity in respect to the allegations each has made against the other.

[20] At the conclusion of the investigation meeting, I raised with the parties the issue of whether Mr F could ever return to active engagement at G. The position up to the point of the investigation meeting was that Mr F had been on the payroll but effectively on garden leave since 20 November 2014. My considered view, having heard the evidence of the parties, was that it would be impossible for Mr F to return to the employment and the parties agreed.

[21] That being the position, counsel for Mr F indicated that she would ask the Authority in closing submissions to investigate whether Mr F had suffered a constructive dismissal as well as the earlier allegations, which were advanced in the statement of problem.

[22] Accordingly, I convened a telephone conference with the representatives after the investigation meeting with a view to trying to get agreement about the basis on which Mr F could leave the employment. I had hoped that there would be agreement on a date that Mr F could cease the employment or be deemed to have ceased the employment, that G would assist Mr F appropriately to transit out of its employment, and that Mr F would continue to fulfil his contractual obligations (protection of intellectual property and confidentiality) to G.

[23] Regrettably, the parties were unable to agree to any arrangements in relation to the end of the relationship and both have made submissions to the Authority on their respective positions.

Issues

[24] It will be convenient if the Authority considers the following questions:

- (a) Was Mr F told to lie;
- (b) Was Mr F's behaviour covered by the Protected Disclosures Act 2000?
- (c) Did Mr F breach s.134 of the Employment Relations Act 2000;
- (d) Does Mr F have any grievance?

Was Mr F asked to lie to the auditors?

[25] I have not been persuaded that Mr F was asked to lie to auditors sent to G by E. The gravamen of Mr F's whole case against G is that he was asked to lie by a manager (ironically not his manager), Ms H. Evidence the Authority heard from Ms H was as clear as could be that she did not ask Mr F or indeed anybody else to misrepresent the position to the auditors.

[26] Moreover, at the conversation wherein Mr F says that Ms H told him to misrepresent the position to the auditors, there were only three people present, Ms H, Mr F and Mr F's colleague, Mr I. Mr I also gave evidence to the Authority and also denied that Ms H had told him and Mr F to lie. Mr I's evidence is important because, by common consent, Mr I and Mr F were friends and on that basis alone, one would have thought that if there was any prospect that Mr F had been asked to misrepresent the position, his friend would have supported him, but quite the reverse was the case.

[27] The circumstances in which it was Ms H who spoke to Mr F and Mr I are not material except to the extent that Ms H was not either Mr I' or Mr F's direct manager and in fact she spoke to the two men at the request of Mr K, G's chairman, simply because other senior managers were busy and Mr K wanted to ensure that all staff who might be asked to speak to the auditors were briefed about what was going on.

[28] What Mr F said in his evidence about the meeting that he and Mr I had with Ms H on 13 November 2014 is that Ms H:

... entered the (work area) where Mr I and I were working and requested we lie to auditors if we were called upon for interviews. Specifically we were asked to misrepresent our roles, what we had been working on, and what we had done the day before. In my case I

was asked to fabricate events around a client job that had been billed as a platform job (that is therefore qualifying for funding from [E]) and (not client) expense.

[29] Mr F then went on to say:

I was asked if I could claim that I was there (in Christchurch) for a design conference and was using the opportunity to do platform testing (which would qualify for [E]). I was in fact there for a job ...

[30] Mr F says that he was “astounded” but he did not register that he was being asked to misrepresent the position until he subsequently talked to other staff.

[31] As I have already noted, that account is not supported by the evidence either of Mr I or of Ms H. I think the evidence of Mr I is particularly significant as, given the friendship between the two men, if there was any hint of impropriety in what Ms H said, I would have expected Mr I to support his friend, but he did not.

[32] Moreover, I assessed Ms H as truthful and honest when she gave her evidence to the Authority and I thought it significant that when the issue first was raised, Ms H promptly offered G her resignation if it felt she had in any way contributed to the swirling controversy that developed. G absolutely rejected her offer of resignation and she remains employed to this day.

[33] A second basis on which Mr F maintains his position that Ms H told him to lie is the transcript (which is before the Authority) of the first staff meeting, the one held on 18 November 2014. Mr F says that that transcript contains an admission by Ms H that she did ask him to lie; Ms H denies any such implication can be drawn from the transcript. I prefer her view of it.

[34] Because it seems to me to be so significant, I set out the full extent of the exchange between Mr F and Ms H at the first staff meeting:

Mr F: (Do you feel) Ms H that you told me to lie, especially in relation to the trip to Christchurch, specifically?

Ms H: Um probably ... I asked you to talk about how that would be used on the platform or could be used on the platform [the platform is the shorthand expression for the work that is funded by [E]]

Mr F: Did you not specifically tell me that it was charged as a platform expense when it was not a platform expense?

Ms H: I think I probably did say it was charged as a platform expense.

Mr F: ... specifically tell me to say 100% of my time was spent on development of the platform?

Ms H: Not development, I said what we want you to talk about and how I'd like you to describe it is that the product that you're producing is used on the platform.

Mr F: 100% of my time?

Ms H: 100% of your time yeah.

[35] The message I discern from this exchange is not that Ms H is pleading to the allegation that she told Mr F to lie but rather that she told him to be aware of how the work that he did for any client could be used to inform the platform project. This impression is demonstrated by Ms H's last comment to the effect that she recalls asking Mr F to describe that the product he is producing is used on the platform. To be fair to Mr F, that last observation I have just referred to may be asking a bit much of Mr F or indeed of other staff, because it was clear to me on the evidence I heard that the staff were not aware of how their work fitted into the project being funded by research and development from E.

[36] Indeed, evidence for G by Mr K, G's chairman, is that "*only the top three executives in the company would know more than 5% of the project is part of that protection (of the intellectual property)*". Moreover, in answer to a question from me, Mr K confirmed that it followed from that principle that part of the *raison d'être* for the project was that staff had little or no understanding of what bits went where and indeed of what place their particular work played in the overall scheme of things.

[37] It is in that context then that I am satisfied that what Ms H was endeavouring to do was to provide Mr F and Mr I with a modicum of information about the relationship between E funded project and the run of the mill work done by G without infringing the basic protection that Mr K's evidence suggested was required by the funder.

[38] Moreover, I do not accept Mr F's contention that Ms H's observations at the 18 November 2014 meeting, properly constituted, can be seen as an admission that

she told Mr F or Mr I to lie. What she admits to doing is telling them to talk about how the work that they were doing could be used as part of the funded project, that they could confirm that that work was, in consequence, work that was properly funded by the project and that 100% of the employees' time was spent producing a product which was able to be used to develop the funded project.

[39] To my mind, that involves explaining to staff how their work fits into a wider scheme of things (which it is an article of faith cannot be fully disclosed to staff), and encouraging staff to talk about their work in the context of the wider project.

[40] It follows from the foregoing analysis that I have been persuaded that Mr F's central contention is made out.

Is Mr F's behaviour covered by the Protected Disclosures Act 2000?

[41] Having concluded that he was being asked to lie to auditors by his employer, Mr F took advice from a variety of lay sources and having not been asked to an interview by the auditors, made his own appointment with the auditors so that he could make the information that concerned him available to the auditors.

[42] In so doing, Mr F clearly felt he was doing the right thing, characterised his behaviour as that of "*a whistle blower*" and subsequently, having taken legal advice, he formed the view that he was covered by the terms of the Protected Disclosures Act 2000. Indeed, he said as much in his letter to staff of 20 November 2014.

[43] However, G says in response that Mr F is not protected by the Protected Disclosures Act 2000 because, by the effect of s.20 of that Act, a disclosure can only be protected if the disclosure is believed to be truthful and is not activated by bad faith. G says that the allegation is false (the allegation that Mr F was asked to lie) and that Mr F was activated by improper motives.

[44] For the avoidance of doubt, while it is apparent from the conclusion reached in the last section of this determination that I do not consider that Mr F was told to lie and therefore if he said to the auditors that he was, that was untruthful, I am also not persuaded that Mr F acted in bad faith. All of the evidence I heard suggests that his whole approach was somehow designed to meet what he saw as his ethical obligations, notwithstanding the consequences which, based on the letter that he wrote to staff on 20 November 2014, he seems to have discerned for himself.

[45] It follows from that conclusion that, insofar as it is relevant, Mr F may enjoy the protection of the Protected Disclosures Act 2000 because while his disclosure was, I am satisfied, false, I do not think that he acted in bad faith and I am satisfied that he had a genuinely held belief that his disclosure was not false. What s.20 of the subject Act says is that the protections of the statute are not available to a person who makes a disclosure *“known to that person to be false or otherwise acts in bad faith”*.

[46] I do not consider that Mr F acted in bad faith but nor do I think that he knew the allegation was false; indeed, I think all the evidence suggests that he believed the allegation to be true notwithstanding my considered view that the evidence does not support that conclusion.

Did Mr F breach s.134 of the Employment Relations Act 2000?

[47] G claims Mr F incited other staff to breach their employment agreements: s. 134(2) of the Employment Relations Act (the Act). I think it arguable that Mr F not only breached sub section (2) by inciting others to breach their employment agreements, but also breached his own employment agreement : sub section (1).

[48] In my view, Mr F’s actions constituted a breach of his own employment agreement and indeed of the employment agreements of other employees by destabilising the workplace in his failure to adopt a proper process for dealing with his employment relationship problem. That same conduct is also a breach of s.4 of the Act in that his behaviour is not informed by good faith but rather seems to be calculated to do the maximum amount of damage to the employer’s business.

[49] I accept the submission made for G that a key objection to Mr F’s behaviour was the way that he engaged with G once he decided there was a problem, that is once he had decided that he had been asked to lie to the auditors. It is absolutely clear on the evidence that Mr F took no proper steps to raise his concerns. He says that he spoke to another manager, Ms L. He says that he did this on 17 November, four days after he says he was told to lie, and despite Mr F’s evidence that Ms L said she would deal with it, that is not what she told me at the investigation meeting and I much prefer her evidence. Ms L told me that she had referred Mr F to either Mr K or another manager Mr M.

[50] So while Mr F maintained that he told the company when he mentioned his concern to Ms L, that is simply not right because Ms L, I am satisfied, told Mr F that

she would not deal with it and that he needed to take the matter up directly with either Mr K or Mr M.

[51] Ms L explained to me in her evidence that the reason she took that stance (of refusing to deal with the matter) was because she had had previous difficulties in her relationship with Mr F, the evidence of which is before the Authority. In short, Mr F had yelled at Ms L to the extent that she felt really intimidated and she had complained to senior management about his behaviour.

[52] Mr F's employment agreement had a clear schedule attached to it setting out how to deal with employment relationship problems. While I concede that that schedule refers only to the employee's obligation to raise the concern with "*a representative*" of G, the fact that I am satisfied that when Mr F referred the matter to Ms L, she told him to talk to Mr K or Mr M, is sufficient to establish that Mr F did not take proper steps to raise the matter.

[53] Moreover, his letter of engagement makes it perfectly clear that Mr M is his manager, and it is difficult to understand why he would not have spoken to Mr M on the matter, especially as his evidence to me at the investigation meeting suggested that he and Mr M had a good working relationship, a view that Mr M's evidence also confirms.

[54] Even if it can be accepted that Mr F has taken proper steps to notify the employer of his concern, his behaviour in writing a circular letter to staff has to be seen as extraordinary and provocative.

[55] Put shortly, Mr F had an employment relationship problem with G and even if, as I accept, he had a reasonable but mistaken belief that he had been asked to lie, the appropriate course of action for him to take was to engage with his immediate manager in private so that the issue could be addressed and dealt with. What he did instead was to deliberately escalate the issue so as to seek to involve outside agencies (the auditor) and more particularly, all of his work colleagues who he wrote to and told what he was up to.

[56] The consequences of those actions were far reaching; G now face a negative audit report which it is having to deal with and the possible intervention of the Serious Fraud Office. Mr F's former work colleagues have suffered as well and there is

evidence before the Authority of various staff being concerned about their futures given Mr F's behaviour.

[57] Of particular concern to both staff and G's owners is the effect of Mr F's actions on G's cashflow; E research and development funding was obviously a budget item for G and its sudden suspension has created liquidity difficulties which have resulted in an inability to meet the wages bill from time to time, when it falls due.

[58] In those circumstances, it is hardly surprising that Mr F is not regarded positively by either the former employer or indeed his former colleagues and I am not persuaded by Mr F's argument that the opprobrium of his former colleagues can be sheeted home to G. Indeed, I think Mr F is the architect of his own misfortunes; whatever the appropriate action vis-à-vis the auditors, it would be self-evident to any reasonable person that the proper process for addressing an employment relationship problem was to engage with the employer and not to seek to involve all and sundry in the dispute.

[59] I conclude then that while Mr F may be protected from suit by the Protected Disclosures Act 2000, he has certainly incited a breach of the employment agreements of his various colleagues, amongst other things by threatening industrial action, by causing anxiety and distress because of his mistaken behaviour and by contributing to the diminution in the business's cashflow with the consequence of reducing G's ability to pay the wages bill. Those behaviours, I am satisfied, not only constitute an incitement to breach of employment agreements as between G and staff, but also constitute several and serious breaches of good faith by Mr F against G and breaches of Mr F's own employment agreement, the dispute resolution process of which he has simply chosen to ignore.

Does Mr F have any personal grievance?

[60] For reasons which I have already made clear, I am not persuaded that Mr F has any viable personal grievance. I am satisfied that the breach of employment agreement and the creation of a hostile workplace which he attributes to the employer is in fact of his own making as a consequence of his complete mismanagement of a genuine employment relationship problem. Had he dealt with that employment relationship problem properly and in accordance with the requirements in his own

employment agreement, the matter may have been able to be resolved appropriately or at least the dispute would have been a simple dispute involving employer and employee. As it is, Mr F has managed, by his own behaviour, to get offside with not just his employers but also with his colleagues and I am satisfied that is entirely of his own making.

[61] I am not persuaded there is any evidence whatever of any actions taken by G which disadvantaged Mr F and which were themselves unjustified. Certainly, Mr F was one of the staff whose wages were not able to be paid from time to time as a consequence of liquidity issues; that is a disadvantage but it is not created by an unjustified action of the employer. Indeed, there is an argument for the view that if any unjustified action is responsible, it is Mr F's behaviour in contributing to the creation of that situation.

[62] Moreover, now that it is apparent that the employment relationship cannot continue because it has irretrievably broken down, I am also not persuaded by Mr F's submission that he has suffered an unjustified dismissal, either constructively or otherwise. The factual position is that Mr F left the workplace finally on 20 November 2014 and never returned to duty despite G continuing to pay him while he was on garden leave and the Authority was working with the parties' excellent representatives to either get the matter settled or bring the matter on for hearing.

[63] Mr F himself created the situation which led to the workplace being untenable for him; he required no assistance whatever from G in that regard.

[64] Looked at properly, there is just no evidence of the "*sending away*" that the law requires to establish a dismissal. Indeed quite the reverse is the case; G, despite its difficulties with Mr F, has endeavoured to keep him on the payroll while the Authority's engagement with the parties has been on foot. Mr F withdrew himself from the workplace and by distancing himself from his work colleagues, himself ensured that he could never return. There is no culpability on the employer.

Determination

[65] I am satisfied Mr F does not have any personal grievance. G has successfully demonstrated its claims that Mr F has incited breaches of the various employment agreements between staff and G and in the same factual matrix has committed breaches of the statutory good faith obligation and of his own employment agreement.

[66] However, G has not quantified any particular penalty it seeks and I decline to award a penalty.

Costs

[67] Costs are reserved.

James Crichton
Member of the Employment Relations Authority