Determination Number: AA 83/01
File Number: AEA 36/01

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Melvin John Hadcroft (Applicant)
AND	Total Fire Protection Limited (Respondent)
REPRESENTATIVES	John Evan Wright, Advocate for Applicant Stephen Tee, Counsel for Respondent
MEMBER OF AUTHORITY	Y S Oldfield
INVESTIGATION MEETING	29 June 2001
DATE OF DETERMINATION	12 July 2001

DETERMINATION OF THE AUTHORITY

The investigation process.

Mr Hadcroft lodged his problem with the Authority in January of this year. The matter was referred to mediation but for a number of reasons, it took some time for the parties to arrange a mediation conference. In the end they were unable to reach agreement and the matter came back to me for investigation some time after it was first lodged with the Authority.

I need to record also that Mr Tee provided a written statement from a witness who did not come to the meeting. As it turned out, the contents of the statement were totally disputed by the applicant. I advised Mr Tee that I could not put any weight on the unsworn statement but, if he wished, would convene a further meeting in order to hear from the witness in person. I gave him until 5.00pm Friday 6 July to advise if this was necessary. Having had no such request from him I proceeded to determine the matter as follows.

The employment problem.

Mr Hadcroft says that he was unjustifiably dismissed from his employment. Mr Merwood, managing director of the respondent company, says that there was no dismissal. It is not disputed that Mr Hadcroft resigned from his Auckland based position as operations manager. Mr Hadcroft says that whilst he was working out his notice, he and Mr Merwood came to a fresh agreement by which Mr Hadcroft would stay with the company, but would relocate from Auckland to Tauranga to become the Bay of Plenty Regional Manager. Mr Merwood agrees that there was an offer of continued employment in the Bay of Plenty, but does not agree that an agreement was concluded. He says that following discussion of the proposed terms and conditions of the new position, he changed his mind about re-employing Mr Hadcroft and told him so. He says that this amounted to a withdrawal of an offer of employment, and nothing more, because Mr Hadcroft had not accepted the offer as it was made.

It is not in dispute that the applicant was informed in writing that there would no longer be a job for him in Tauranga, nor has the respondent sought to justify that decision. I put it to Mr Tee, and he conceded, that if a new agreement had in fact been concluded, then there would have been a dismissal and it would have been unjustified. From that point on, my investigation became focussed on the question whether there had been a concluded agreement between the two men. If there had been, then Mr Hadcroft would have made out his claim of personal grievance.

Chronology of events

The following are the facts as I have found them to be. In arriving at this summary of events I have had to resolve some differences between the two principal witnesses, Mr Hadcroft and Mr Merwood, but most of the evidence is not in conflict.

In March 1995 Mr Hadcroft was employed by the respondent to be Construction Manager, Bay of Plenty. (He lived in Tauranga.) In time he was promoted to Branch Manager. He continued in this role until June 2000 when he transferred to Auckland to take up the position of Operations Manager. Although his salary did not change, he saw this move as a promotion and he was provided with a house in Auckland at the company's expense. However the move was not a success, and on 24 August 2000 he gave two months' notice. At this point, he was dividing his working week between Auckland and Tauranga.

On September 5 Mr Merwood spent the day in the Bay of Plenty with Mr Hadcroft. It was a busy day involving a series of meetings with clients, but in between these meetings Mr Merwood asked Mr Hadcroft if he would consider taking back his old job in Tauranga. Mr Hadcroft expressed interest but said that he thought that the emphasis of the Branch Manager's position should change. Mr Merwood, in his evidence, described these changes thus:

'he wanted the opportunity to meet more with clients directly or to look for and arrange new work for the company and to have less of an involvement with on site supervision than had been the case previously."

In other words, Mr Hadcroft thought it would be useful for the branch manager to spend more time on sales and marketing. During his time in Auckland day to day supervision of the construction teams had been the responsibility of a foreman and Mr Hadcroft thought this could continue. There was little or no discussion of salary but at this stage, both men understood that Mr Merwood was thinking in terms of the salary remaining as it was.

The two men parted without having come to an agreement. Mr Hadcroft went home and thought about the proposal. He decided it was what he wanted, although he anticipated some further discussion to clarify the alterations to the job description. The next day, he and Mr Merwood were scheduled to meet with a major client who had expressed concern about Mr Hadcroft (with whom he had a good relationship) leaving the company. Mr Hadcroft opened the meeting by telling the client that there was no further need for concern about who would be handling his account because he, Mr Hadcroft, was staying with the company. The client was pleased and the meeting moved quickly on to discuss other issues. After the client had left, Mr Hadcroft shook hands with Mr Merwood and expressed his pleasure at being back on board.

Nothing more was said about the new position and on 20 September Mr Merwood went overseas for three weeks. He met with his management team upon his return on 12 October. Following the general meeting he and Mr Hadcroft had a brief meeting alone together. They discussed matters to do with business in the Bay of Plenty and then moved on to talk about Mr Hadcroft's proposed

position there. Mr Hadcroft raised the question of salary and suggested that as he had not had a rise for three years, it was timely to review his package. Mr Merwood did not agree, indeed he took some offence at the suggestion as he felt he was already going out of his way to assist Mr Hadcroft. Mr Merwood had intended to discuss the additional sales and marketing work involved in the position, but after the brief discussion about a salary review, the conversation ended with Mr Hadcroft leaving abruptly.

Meanwhile, Mr Merwood had decided that the sooner Mr Hadcroft re-located to Tauranga the better. He told the Authority:

*"During October [*Mr Hadcroft*] was travelling between Auckland and Tauranga and those arrangements did not suit the company. It was our preference that he relocate to Tauranga."*

Mr Merwood had also decided that once Mr Hadcroft had moved out, he would not keep the property Mr Hadcroft was living in. He therefore wanted it vacant in order to get it ready for sale. The company was to meet the cost of Mr Hadcroft's removal back to Tauranga so with Mr Hadcroft's consent it was arranged (on 19 October) that Mrs Merwood would bring a removal company to the house on 20 October to price the job. Upon her arrival Mrs Merwood went inside and found Mr Hadcroft's dog in the living room. It bit her so badly that she was taken to hospital by ambulance and required several stitches. Later that day Mr Merwood, very angry about the dog bite, rang Mr Hadcroft and told him the new job in Tauranga was off; he no longer wanted Mr Hadcroft working for Total Fire Protection Ltd.

Mr Hadcroft decided to carry on with the move to Tauranga, and the company honoured its undertaking to pay his removal expenses. The move took place on 25 October. That same day Mr Merwood faxed Mr Hadcroft as follows:

"We confirm verbal advice of the 20th October that we no longer require your services, effective 3rd November 2000.

In accordance with your employment contract we confirm it is the Company's intention to pay the two months in lieu of notice.

During your final period with the company we would expect you to perform your usual duties in a professional and constructive manner.

We take this opportunity to thank you for your efforts during your employment with the company and will meet with you prior to the 3rd November 2000 to settle this agreement and a formal handover of the position to your replacement."

Mr Hadcroft responded with a further fax requesting reasons for his dismissal. Mr Merwood refused to supply reasons, and has since explained that this is because he does not consider that he dismissed Mr Hadcroft.

Mr Hadcroft duly finished up on 3 November and found another job, in Tauranga, in the following January. He received the promised two months' in lieu plus holiday pay. Total Fire protection Ltd replaced him with someone based in Tauranga.

The positions of the parties.

As I have explained above, the question for determination here is whether the parties came to a fresh employment agreement subsequent to the applicant's resignation. Although the respondent initially argued that the discussions on 5 November amounted simply to an invitation to treat, Mr Merwood has now confirmed that he made an offer of employment. He says that the offer continued to be open for acceptance until 20 October, when he revoked it following the dog bite incident. The respondent says that Mr Hadcroft never accepted the offer, having responded instead with a counter-offer. This, in its turn, was not accepted. In support of its position the respondent relies on the following points:

- that it is a good employer and did everything it could to assist Mr Hadcroft during almost six years with the company.
- that if it were to have reached a binding agreement with Mr Hadcroft, such agreement would have been recorded in writing, because the respondent had in place a number of ISO 9001 quality systems and was meticulous about recording changes to terms of employment and to job descriptions. (It is accepted that over the years, Mr Hadcroft's changing terms and conditions had been fully recorded in writing.)
- this did not occur this time because specific terms had not yet been agreed. At the meeting of 12 October Mr Hadcroft himself raised the issue of salary, and no contract can be concluded until agreement is reached on the fundamental issue of consideration.

The evidence and arguments to support the contention that Mr Hadcroft accepted Mr Merwood's offer can be summarised thus:

- The words Mr Hadcroft spoke at the meeting of 6 September, albeit not directed at Mr Merwood, were in Mr Merwood's presence and signified a clear acceptance of the offer Mr Merwood had made. This was not simply an exercise for the client's benefit, at least not in Mr Hadcroft's mind, and Mr Merwood did nothing to indicate, even after the meeting, that he did not consider his offer had been accepted.
- The way in which Mr Hadcroft offered his hand to Mr Merwood straight after the meeting was a further clear gesture that signified acceptance.
- The changes Mr Hadcroft proposed to the job description were not sufficient to amount to a counter-offer, being about the aspects of the role which should receive greatest attention, rather than a re-write of it.
- The time that elapsed between the offer and what Mr Merwood alleges was its revocation was lengthy. Meanwhile there was no indication from Mr Merwood that he was, as he alleges, still considering a counteroffer.
- On 12 October, Mr Hadcroft was seeking an overdue salary review (as provided for in his existing contract) not to negotiate a complete new agreement. The discussion came after he had already accepted the offer to go back to the Bay of Plenty.
- The company initiated arrangements to have Mr Hadcroft's personal effects moved to Tauranga, itself an acknowledgement that there was a concluded agreement.
- Mr Hadcroft originally resigned on two month's notice that he would finish on Friday 27 October. When Mr Merwood told him he would not be keeping him on, he told him to leave on 3 November. Mr Hadcroft relocated to Tauranga, as planned and continued to work for the company until 3 November. In other words, the respondent continued the employment relationship beyond 27 October, and Mr Hadcroft performed in the Bay of Plenty role for a brief period.
- Mr Hadcroft received two months "pay in lieu of notice" upon leaving.

Conclusions

The factors indicating a concluded employment agreement (as summarised above) are all applicable and well supported by the evidence. I am of the view that they outweigh the arguments raised in support of the respondent's position.

It is accepted that the respondent had been a good employer to Mr Hadcroft over the years, but it was also clear that the point came (with the dog bite) when Mr Merwood's goodwill towards the applicant (formerly a very valued employee) had completely run out. The respondent was thorough about written contracts and job descriptions but the evidence was that new terms, conditions, and duties were not always immediately reduced to writing. This is not uncommon in a small enterprise and no great significance can be placed on the fact that there was nothing in writing as at 20 October, particularly as Mr Merwood had recently been away for three weeks. Finally, I accept that the discussions at the meeting of 12 October came after acceptance had already been signalled, and simply constituted a request for a salary review pursuant to the terms of Mr Hadcroft's contract.

Overall, the evidence is more than sufficient for me to find that an offer of employment was made on the 5 September and accepted on 6 September and the employment relationship was back on foot from that date.

Remedies

As I indicated at the outset of this determination, it was conceded for the respondent that if I concluded that the parties had come to a fresh employment agreement, then it would follow that there was an unjustified dismissal. Since that has been the finding, I must now turn to the question of remedies. Mr Tee has argued that any remedies awarded to Mr Hadcroft must be minimal, since he has sustained no loss of earnings. It is correct that his pay in lieu of notice covered his period of unemployment. In addition, Mr Tee notes that there was no evidence of hurt and humiliation. He argues, to the contrary, that there is evidence that Mr Hadcroft was lukewarm about remaining with the company.

I accept both these submissions. In all the circumstances, including the fact that Mr Hadcroft was pretty much set on going to Tauranga whatever happened, I believe this to be a case where remedies should lie at the lower end of the range.

The respondent company is ordered to pay to the applicant the sum of $2,000.00 pursuant to s.123 of the Employment Relations Act.

Costs

The parties are invited to attempt agreement on the question of costs. In the event that they cannot do so, they have fourteen days in which to make submissions on the issue.

Y S Oldfield
Member of Employment Relations Authority