



New Zealand Employment Relations Authority Decisions

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Keogh v Channor NZ Limited [2011] NZERA 49; [2011] NZERA Wellington 6 (26 January 2011)

Last Updated: 21 February 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2011] NZERA Wellington 6 5303884

BETWEEN JOHN PATRICK JOSEPH

KEOGH

Applicant

AND CHANNOR NZ LIMITED

Respondent

Member of Authority: Representatives:

Investigation Meeting: Submissions:

P R Stapp

Sean O'Sullivan and Sarah Coxhead, Counsel for the Applicant

Mark Beech, Amy Scott and Hesta Sutherland-Stacey, Counsel for the Respondent

27 July 2010 at Hamilton

23, 26 July, 25, 26 27 August, and 3, 6 and 8 September
2010

Determination:

26 January 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is a family employment relationship that broke down, and involved the applicant being suspended from his employment and dismissed. At all times the respondent dealt through its lawyers to give effect to its communications in respect of a number of allegations, suspension and the dismissal. The applicant engaged a lawyer who complained about not having enough time to respond and reply to the allegations at the time.

[2] The respondent has denied the claims for a personal grievance and any remedies.

The facts

[3] Mr Keogh was employed by Channor NZ Limited (Channor) from June 2005. Mr Keogh and the sole director of Channor, Mr Aiden Harrison, are first cousins so there was a close family link in the employment relationship. There was no employment agreement, and the parties' employment arrangements were flexible without any guidelines, policies or procedures in writing. Mr Keogh described the arrangements as casual. Mr Keogh was paid \$100,000 per annum; however, in May 2009 his salary was reduced to \$50,000 per annum because of challenges in the property market.

[4] On 23 February 2010, Mr Keogh received an email from Channor's solicitors, Sharpe Tudhope Lawyers, with a letter attached. That letter advised Mr Keogh that they acted for Channor and requested him to attend an investigation meeting on Thursday, 25 February 2010 to discuss four matters. These matters were, and I quote from that letter:

1. *The unauthorised transfer of \$267,940.32 from Channor NZ Limited account on 15 September 2009;*
2. *The unauthorised accessing of Aiden Harrison's (fellow director) telephone messages by you on 20 February 2010;*
3. *The undisclosed charging of commission by Devonport Apartments Limited in relation to the sale of an apartment which appears to have been authorised by you; and*
4. *Unauthorised expenditure charged to Channor NZ Limited (i.e. traffic infringement notices).*

[5] That letter also informed Mr Keogh that the matter had been referred to the New Zealand Police.

[6] Mr Keogh responded requesting an extension to the timeframe to enable him to get advice, given the matters that had been noted for discussion and because a complaint had been made to the Police.

[7] In a letter dated 26 February 2010 Mr Keogh was advised that he was suspended from his employment as follows:

5. *Given the very serious nature of our client's concerns, you are formally suspended from your duties, effective immediately pending the outcome of the investigation. Had you attended the meeting yesterday, you would have had the opportunity to comment on suspension, however, you declined to attend. Please be advised that our client will shortly take steps to have you removed as a Director from each of our client companies also, pending the outcome of the investigation.*
6. *In relation to the Police complaint, we can advise you will be contacted by the investigating officers in due course.*

[8] The letter dated 23 February 2010 outlining the matters that Channor wished to discuss with him made no mention of any consideration being given to suspending him. With regard to the request for explanations, Mr Keogh was informed that in the absence of a satisfactory explanation in relation to the matters specified in that letter, and if such conduct was established, it may amount to serious misconduct warranting summary dismissal from employment.

[9] On 2 March 2010, the applicant's solicitors wrote to the respondent's solicitors requesting the name of the Police officer or at least the location of the Police station where the complaint had been made against Mr Keogh. He wanted to understand the serious allegations that had been made and to ensure that any action or response taken with respect to the employment investigation did not prejudice him with regard to any criminal investigation. He wanted to talk to the Police prior to the employer's investigation meeting. Mr Keogh was informed by Channor's lawyers in a letter of the same date (i.e. 2 March 2010) of some further issues and advised that the complaint had been made at the Hamilton Police station. Mr Keogh asked for more details. Some time prior to 3 March, the locks on the premises were changed.

[10] On 6 March 2010 Channor's lawyer advised Mr Keogh's lawyers of more allegations. These allegations related to:

- (i) A questionable purchase and GST;
- (ii) Unauthorised withdrawals of money;
- (iii) Lease of car parking;
- (iv) Accommodation costs;
- (v) Two salary payments being made;

(vi)

Continuation of pay after a reduction in pay.

[11] Channor's lawyer advised Mr Keogh's solicitors that it was Channor's intention to proceed with an investigation meeting on 17 March 2010 and encouraged Mr Keogh to attend or, if he chose not to do so, Channor would proceed based on the information it had to hand.

[12] On 16 March 2010, Mr Keogh's solicitors wrote to Channor's Lawyers outlining a response. This was described as a "fullresponse" in relation to all of the allegations raised in the letters of 23 February 2010, 26 February 2010, 2 March 2010 and 6 March 2010. Mr Keogh declined to attend the scheduled meeting because he claimed that he would be prejudiced given the Police complaint and because he needed more time.

[13] On 17 March 2010, Mr Harrison conveyed his decision in a letter through the lawyer to Mr Keogh's solicitors. The letter conveyed the decision that Mr Keogh had been dismissed. That letter reads as follows:

1. *Our client was disappointed that your client chose not to attend the investigation meeting that was held this morning, especially when it was made clear in our previous correspondence that the meeting would proceed and given the previous indulgences afforded to your client together with the fact that no proper reason for non-attendance was provided. Furthermore, in our client's view, it was simply unacceptable to be notified at the eleventh hour that your client would not*

be attending the meeting.

2. Our client carefully considered the explanations provided in your letter and discussed the explanations with us. While some of the explanations were accepted, some explanations required much further detail. **However, a number of the explanations were wholly rejected by our client. As such, our client has advised that based on the information available at the time of the meeting, all trust and confidence in your client has been lost due to serious misconduct and his employment has been terminated as from today. A full explanation of the reasons for termination will be sent to you in due course.** (emphasis added)
3. In the meantime, please immediately have your client arrange to return all company property, including but not limited to the computers (laptops and PC's), telephones, credit cards, security cards and office equipment.
4. Your client's final pay will be calculated and paid to him together with any statutory entitlements as soon as possible.

[14] On 20 March 2010, Channor's lawyer further wrote to Mr Keogh with the reasons behind the decision to terminate his employment and responded to the explanations provided from Mr Keogh's lawyers in their letter dated 16 March 2010. The letter responded reference for reference on each item, and accepted some of Mr Keogh's explanations, but on the matters where there were adverse findings it was concluded that Mr Harrison no longer could have any trust and confidence in Mr Keogh. The key findings were that Mr Keogh had made a number of unauthorised payments without Mr Harrison's approval, which should have reasonably been obtained. Money was withdrawn without approval. Mr Keogh had continued to pay his salary without reducing it. The Channor lawyer's letter in reply concluded with the following comment:

Therefore, while some of your client's explanations have been accepted by our client, a number of his explanations have not been accepted and have caused our client to lose all trust and confidence in your client.

Our client believes he has been misled and that there have been a number of instances where your client has acted in blatant self-interest to the detriment of our client and in clear conflict of his duties to act in the best interests of Channor. As such, our client has no trust and confidence in your client and believes his behaviour warrants summary dismissal for serious misconduct. With regard to final payment to your client, his holiday pay entitlements are currently being calculated and we will be in contact again as soon as this amount has been determined. We note that your client believes that he has never taken any annual leave, however, Mr Harrison has advised that he knows of several occasions when your client has taken leave, including a one month trip to Ireland in 2007 and summer holidays in Tauranga every year for three weeks. Our client is also aware of trips away with the Police Credit Union each year and various schooling and skiing trips throughout his employment...

[15] Mr Keogh's solicitors raised a personal grievance for unjustified dismissal. The parties attended mediation without settling their employment relationship problem, and it now rests with the Authority to provide a determination on the claims.

Determination

[16] Under s 103 A of the Employment Relations Act (the Act) I am required to determine whether the actions of the employer were what a fair and reasonable employer would have done in all the circumstances at the time the suspension and dismissal occurred. In this regard the circumstances would have included the casual way Channor operated without written policies procedures and without an employment agreement. Also Mr Harrison and Mr Keogh are related, Mr Harrison was overseas and he relied upon his lawyers acting on his behalf, and finally Mr Keogh's explanations.

The suspension

[17] Mr Keogh was not put on proper notice of the likelihood of being suspended, and there were no terms agreed between the parties on any provision for suspension. Even although such considerations would render a suspension unjustified Mr Harrison did have genuine concerns that led him to make his decision, and the matters were serious ones. Mr Keogh remained on full pay. Mr Keogh was also given an opportunity to respond on the substantive allegations and to obtain independent legal assistance. He was not prejudiced by the suspension, I hold. I hold that Mr Keogh was not disadvantaged.

The allegations and dismissal

[18] Channor reasonably concluded that the response from Mr Keogh's lawyer was a "full response" on the allegations because that is how it was presented. However, the difficulty in this matter was that Mr Harrison was dealing with the employment relationship from a distance (being in Ireland), and relying on his lawyers to follow a fair procedure and implement a decision for him.

[19] The decision to dismiss was made without the respondent providing Mr Keogh with the detail of the employer's findings at the time and the reasons were followed up later. An explanation for this relates to Mr Harrison being overseas and relying on his lawyers to complete the written work. This is not fatal (although it was unusual), I hold, because:

- I am satisfied that Mr Harrison made the decision and instructed his lawyers to convey it to Mr Keogh and then to follow up the reasons in writing more fully.
- I accept that Mr Harrison attended a conference call with his lawyers, first in deliberating on the information available

to him including Mr Keogh's full response, and secondly, making his decision to dismiss Mr Keogh.

- The issues remained focussed on the matters that had been raised with Mr Keogh. There was nothing new added to that information and nothing new relied upon by the employer.
- Channon accepted some of Mr Keogh's explanations.

[20] I hold that it was sufficient that Mr Keogh was put on notice of the all the matters at issue and the seriousness of them which if proven, could lead to his dismissal.

[21] I find that Mr Keogh had a reasonable opportunity to attend the meetings offered to him. He decided not to do so at his own risk, I hold. I do not accept that Mr Keogh's explanation for a delay was plausible. My reason is that the employer was not relying on a Police complaint to establish the proof for the allegations. It was proceeding in its own investigation independently of the Police complaint. Furthermore there had been no response from the Police and finally Mr Keogh through his lawyer did volunteer a reply to the allegations. Mr Keogh was put on notice that any failure to attend could mean that the employer would proceed and make a decision on the information it had at hand. I am satisfied that Mr Harrison and his advisors considered Mr Keogh's "*full response*" before deciding on an outcome based on the information available at the time. This is supported by Mr Harrison accepting some of Mr Keogh's explanations.

[22] However, where this matter has gone astray, is that a fair and reasonable employer would have provided its findings and a tentative decision to Mr Keogh before delivering the final conclusion that there had been a loss of trust and confidence. This was especially so given the employer decided to proceed in Mr Keogh's absence and it had accepted a number of Mr Keogh's explanations on some of the allegations. The sequence and content of the letters supports this conclusion, I hold.

[23] A fair and reasonable employer would have provided its findings based on the "full response" to the allegations as a separate step. After that a fair and reasonable employer would have provided at least a last chance opportunity for Mr Keogh to comment and to have an opportunity for input on any alternatives to dismissal. Mr Harrison does not say that he gave Mr Keogh the opportunity for any input into possible alternatives and that there were no practicable alternatives. This was unfair. The fact that Mr Harrison says he had no other choice was never put to Mr Keogh for input and or any comment, I hold. This was also unfair, especially as he raised an issue about the seriousness amounting to a loss of trust and confidence, even though he had accepted some of Mr Keogh's explanations.

The Police complaint

[24] I hold that the Police complaint was an entirely separate matter and independent of the employer's enquiry. Mr Keogh's decision to use this matter to try and delay the employer's enquiry was his decision, but given the information available Mr Keogh should have reasonably concluded they were entirely separate matters. Certainly that is how the employer approached them.

Conclusion

[25] I conclude that Mr Keogh has a personal grievance because of the employer's deficiencies in the process of the dismissal which is more than a mere technicality. The claim for a personal grievance on the suspension is dismissed because there was no disadvantage to Mr Keogh, I hold.

Remedies, contribution and blameworthy conduct

[26] The respondent has denied any remedies based on a claim that Mr Keogh has contributed to the situation giving rise to the personal grievance.

[27] I must consider contribution once I have determined the amount of the loss claimed and the assessment of compensation sought. Mr Keogh has claimed one year's salary of \$50,000. The issue is to what extent if any Mr Keogh contributed to his personal grievance?

[28] Mr Harrison has relied on his personal knowledge of various matters he concluded amounted to serious misconduct involving Mr Keogh. He rejected a number of Mr Keogh's explanations. There was the unauthorised access by Mr Keogh to Mr Harrison's phone messages, which Mr Keogh explained were inadvertent. Mr Keogh charging a commission payment and how he treated the GST portion on the sale and purchase of an apartment. There were issues about unauthorised payments such as a speeding ticket incurred by Mr Keogh. Also there was a payment towards the 10 New Zealand Rugby sevens tickets. Next there was a payment for a pair of shoes without authorisation. Mr Harrison was not requested by Mr Keogh to authorise these costs. Although there was no formal policy and the practice in the business was casual Mr Harrison would have rightly expected Mr Keogh to apply prudent and responsible behaviour. These were all matters going to the heart of trust and confidence in the parties' employment relationship. Furthermore although nothing was hidden from Mr Harrison, Mr Keogh accepted that Mr Harrison would not have been able to ascertain from the bank records what transactions related to, and Mr Harrison would be left to check up on the spending. It appears Mr Harrison had reason to do so, given the examples of

spending cited above and detail in a letter dated 26 February 2010 (refer to document JP JK 4 applicant's 26 April 2010 statement). I accept that Mr Harrison explained to Mr Keogh during the employment that his spending was significant and costing the company to which an employee would reasonably be expected to be transparent and open, which was not the case here, I hold. This was supported by the reduction in the salary because of the challenging market situation Channon found itself in. These are matters that go to the heart of trust and confidence and the findings which Mr Harrison made, and this means that there must be a significant deduction made for contribution and blameworthy conduct in regard to those matters the employer decided that Mr Keogh did not provide an adequate explanation at the time. In addition Mr Keogh decided unreasonably not to make himself available for an interview and meeting when requested to do so by his employer when the Police complaint was an entirely separate matter. That was his risk, I hold. Also, subsequently discovered information must have an impact on the discretionary consideration for remedies in equity and good conscience; for instance Mr Harrison raised that:

- a. Mr Keogh asked another person to delete the Outlook File from the computer. Company information was deleted. Channon incurred the financial cost and time to recover information it was entitled to.
- b. Mr Keogh charged Channon more rent in relation to an apartment compared with the market rent.
- c. Mr Keogh used his work telephone to send an inordinate amount of personal messages unrelated to the business.

[29] Mr Keogh provided his explanations on each of these (his reply statement), but I agree that his evidence was not reliable and unconvincing to adequately explain his actions. This is because:

i. He failed to convince me as to his holidays claim, which was based on the evidence that he took paid time off and was claiming holidays based on keeping his telephone on and

being available during the time that he had off, and where these were unlikely to be successful;

- ii. Mr Harrison had a very good grasp of all the issues, documents and understood the thread and detail of the allegations;
- iii. Mr Keogh had an obligation to be responsible which would have reasonably involved him getting authority on some of the expenditure that could be open to any misinterpretation and ambiguity. He had a greater responsibility as an employee than relying on his family connection to Mr Harrison and the casual arrangements that existed without formal policies because he had a senior role.
- iv. He failed to reasonably address the extra pay and continuation of his salary of \$100,000 when it had been reduced.

[30] I would add that the evidence does not suggest that there was a personal gain made by Mr Keogh except that he did enjoy unapproved benefits in his employment as a sole charge and he left himself exposed in regard to the issues raised by Mr Harrison and Mr Harrison's findings. Furthermore the company's accounting scheme and procedures should have alerted Mr Keogh to be more prudent and cautious.

[31] Mr Keogh's claim for lost wages must involve a deduction because of contribution where he has not adequately explained some expenditure and claims as determined by Mr Harrison, failed to reasonably and properly seek authorisation of some expenditure, agreed he mistakenly paid two salary payments and continued to pay himself \$100,000 for an extra month. Given Mr Keogh's knowledge of those matters any oversight of them is not an adequate explanation, I hold, because he never raised them with Mr Harrison and they only came to light with Mr Harrison's scrutiny. Mr Keogh was not able to prove that he had any agreement with Mr Harrison for approvals and arrangements he believed he had with Mr Harrison. Mr Keogh's claim for one year's salary is a discretionary consideration. I am not satisfied that Mr Keogh sufficiently mitigated his losses for the length of time he has claimed since his dismissal. There was no evidence that he tried to find new employment. He was also inconsistent in his evidence about contracting work. It was not sufficient for him to rely on seeking reinstatement in the early period (withdrawn during the Authority's investigation meeting) and the investigations that he attempted to make regarding the Police involvement in the matter.

[32] I have reduced Mr Keogh's claim for lost wages to three months exercising equity and good conscience and applied 100% for his contribution. His claim for lost wages is dismissed.

[33] Next I turn to the bonus payments and commissions claimed by Mr Keogh. On the bonus I am satisfied that a bonus was only payable once enough apartments were sold to clear Channon's bank debt. I accept that the debt has not been cleared. I find therefore there is no entitlement to a bonus sum that the applicant could have expected to obtain if a personal grievance had not arisen. Secondly, I hold that there was no agreement to pay Mr Keogh a full commission on the sale of any apartment. There was also some doubt that Mr Keogh had completed any sale on an apartment with people he introduced as buyers. Mr Keogh has not established that there was any link between the reduction in his salary and a payment of a commission. The reason for this is the challenging business situation and changes that happened to Mr Keogh's role that were the reasons for the reduction. There were insufficient details provided to base any commission on, I hold. There was nothing in writing and what Mr Harrison thought about paying a bonus was not a commitment and left any payment as a discretionary payment. This claim is also dismissed.

[34] Mr Keogh claims unpaid holiday pay. There were no records kept. Mr Keogh worked autonomously and had the

responsibility to keep records. Channon has made allowance for any liability for holiday pay. This is explained by Channon on the grounds that there were no records kept by Mr Keogh and where it was his responsibility to keep them and caused a potential liability. The lack of any records has made it difficult to calculate any holiday pay. The difficulty has been added to by Mr Keogh's claim, and his evidence, which I agree with the respondent, was unconvincing. This is because Mr Keogh admitted to the Authority he had taken time off, but had claimed holiday pay for that time. I hold that Mr Keogh did take paid time off for school ski trips, an extensive 5 week European holiday (including cruises), Rugby Sevens weekends, Police Credit Union trips, Christmas holidays in Tauranga and days taken up with training for a commercial pilot's licence. I have not accepted that the respondent is liable for days claimed when Mr Keogh says he had to keep his phone on and take calls on days he took leave. He did not support his claim with sufficient detail, dates times etc. Mr Keogh could not account to the Authority what leave was owed and he accepted that he had taken paid time off. The paucity of evidence and unconvincing and vague evidence means I must dismiss the claim.

[35] The last matter claimed is \$30,000 compensation for humiliation loss of dignity and injury to feelings. Any "*deep despair*" that Mr Keogh had in this matter is linked I find to the array of issues the Mr Keogh has contributed to in his employment. Because of the changes and conflicting evidence he has given I agree with the respondent that his evidence has been unconvincing. For these reasons he has not established the claim he has made. Mr Keogh's evidence for his claim has been limited and there was an acceptance by one of Mr Keogh's own witnesses that there may have been other reasons for Mr Keogh being upset. Therefore the claim for \$30,000 compensation was entirely unrealistic, I hold. If anything he would have been entitled to \$5,000 and this has to be reduced by 100% for contribution.

Orders of the Authority

[36] I hold that Mr Keogh has a personal grievance. He contributed significantly to his personal grievance and his remedies have been reduced accordingly.

[37] Mr Keogh's claims for a bonus, commission and holiday pay are dismissed.

[38] Costs are reserved.

P R Stapp

Member of the Employment Relations Authority

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