IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2015] NZERA Christchurch 129
5525476

	BETWEEN	HAMISH METHVEN Applicant
	AND	BIKES INTERNATIONAL LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Peter van Keulen, Counsel for the Applicant Rita Nabney, Counsel for the Respondent
Investigation Meeting:	29 June 2015 at Christchurch
Determination:	8 September 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Methven) alleges that he has suffered a personal grievance by way of unjustified action causing disadvantage, by way of an unjustifiable dismissal and has also suffered a breach of the duty of good faith. Mr Methven's former employer, the respondent (BI) resists all those allegations and pleads that Mr Methven resigned his role by his second email dated 24 September 2014 and that that resignation was accepted by BI the following day.

[2] Mr Methven commenced employment with BI on 10 September 2012. His role was described as South Island Area Manager and there is an individual employment agreement executed between the parties and dated 4 September 2012 which set out the basis of the employment.

[3] I note for the sake of completeness that there was initially some dispute about the terms of Mr Methven's employment. The employment agreement contains a

schedule which sets out the package. Mr Methven's evidence is that in addition to the matters specified in that schedule, he also had private use of the company car and personal use of a bike from the BI stock. Those two additions are denied by BI.

[4] Mr Methven's evidence is that both of those matters were dealt with informally when he was engaged by BI and that those concessions were made by Glen Gordon who was then a senior manager in BI and who was responsible for recruiting Mr Methven. I heard no evidence from Mr Gordon and the only evidence the company put up was from his successor in the management team, Mr Rob Paul who knew nothing of those arrangements but readily conceded in his evidence that he was not involved with the company at the time. For the avoidance of doubt, although nothing turns on the issue, I prefer Mr Methven's evidence on this point.

[5] The employment seems to have been uneventful until July 2014 when it is common cause that the parties began discussion about an alteration to Mr Methven's role. Mr Methven says this was a trial while BI maintain that there was a formal variation of the original employment agreement to include this new work which had Mr Methven also working in three Bike Barn Stores in the South Island. While these three Bike Barn Stores were separately managed it was proposed that Mr Methven use his skills to lift sales in both discrete areas of the wider business.

[6] The question whether this new role was indeed a trial or was in reality a formal concluded variation of Mr Methven's employment agreement originally fell for determination by the Authority.

[7] However, by way of concessions made by Mr Paul during the investigation meeting, I am satisfied that it is accepted now by BI that the new arrangement for Mr Methven was always to be a trial. While those concessions made by Mr Paul during the investigation meeting were properly made, I do not rely exclusively on his oral evidence.

[8] Mr Paul accepted in evidence that an observation made by counsel for Mr Methven in open correspondence dated 13 October 2014 to the effect that Mr Methven *could end the trial period* was never challenged but more important than that is the fact that the variation of Mr Methven's employment agreement, dated 1 July 2014, was never signed and the original employment agreement is quite clear that variations must be in writing and signed by both parties. The relevant provision

in the operative individual employment is absolutely explicit and is in the following terms:

> *The parties may vary this agreement, provided that no variation shall be effective or binding on either party unless it is in writing and signed by both parties.*

[9] The role then with Bike Barns is indeed a trial role. It is apparent that Mr Methven undertook this trial role in good faith but his relationship with the General Manager of Bike Barns was at best uncertain and there was a disagreement between the two men on 24 September 2014. Mr Methven then proceeded to have two conversations with senior management, first with the Managing Director of BI and then with his direct manager, Mr Paul who gave evidence at my investigation meeting.

[10] It seems common ground that Mr Paul told Mr Methven that he should put the concerns that he had expressed over the telephone, into writing via email and as a consequence of that advice, Mr Methven wrote an email dated that day (24 September 2014) and this email was sent to senior managers at BI at 12.59pm on that day. For convenience, I will refer to this email as *the first email.*

[11] The first email commences with this sentence: *I would like to resign the role of brg South Island from my position.* brg is code for the Bike Barn part of the business.

[12] Mr Methven then goes on to add five paragraphs, four of which expand on what he hopes to achieve by freeing up time that he would otherwise be spending on the Bike Barn business and makes a number of suggestions about how he could improve business for the wider group as a consequence. The final paragraph simply thanks senior managers for their *understanding.*

[13] As a consequence of the investigation meeting and Mr Paul's acceptance in evidence that this email is not a resignation from BI's service, I do not propose to dwell on it. It is enough for me to say that it seems to me the meaning is as plain as can be that Mr Methven considered he had a trial role working into Bike Barns, but that trial was not working from his perspective and was causing him frustration and was not achieving any desirable outcomes for the business. He accordingly wished to

sever that part of his role and return to the position exclusively as his employment agreement provided, that is the position that he had been appointed to.

[14] Then at 3.29pm that same day (24 September 2014) the Managing Director sent a responding email to Mr Methven which included as a final sentence the following:

> *I assume this also means you have resigned from your role at BI?*

[15] Of course, this sentence confirms my conclusion, if that should be required, that Mr Methven's first email was neither a resignation nor indeed seen as a resignation from his substantive role by BI.

[16] Mr Methven responded to that email with a further email of his, timed at 4.12pm on 24 September 2014 and I refer to this email as *the second email* for clarity's sake. It is this email which BI say constitutes Mr Methven's resignation from his substantive role. The key sentence in the email reads as follows:

> *I still feel I add value to BI and by me not managing the brg role would still be an asset down here in the south, so with regret I will tender my resignation if you need the person down here to fill both roles.*

[17] At 5pm that same day, Mr Paul telephoned Mr Methven to tell him that his resignation had been accepted. Mr Methven's evidence is that he immediately tried to explain to Mr Paul that he had not resigned and his intention was simply to sever the Barn Bike trial from his ongoing work commitments.

[18] Then half an hour later, Mr Methven telephoned the Managing Director again clarified that he had not intended to resign his substantive role and if that was what BI thought then he formally withdrew the putative resignation. Mr Methven said that the Managing Director (who gave no evidence to the Authority) expressed the view that something could be worked out.

[19] The following day, 25 September 2014, Mr Paul for BI telephoned and then emailed Mr Methven to confirm BI's position that he had resigned his position and that there would be a meeting shortly to discuss the situation.

[20] In the succeeding days there were various exchanges between the principal protagonists and in particular, on 29 September 2014, Mr Paul indicated to Mr Methven that he was seeking Human Resources advice and latterly that he was trying to send Mr Methven an email or text message. When Mr Methven received nothing and subsequently rang Mr Paul and got no answer Mr Methven then proceeded to telephone the Managing Director who was on holiday in Australia but despite being on leave the Managing Director indicated that Mr Methven's history with the company was such as to allow him to be *reinstated.*

[21] On 30 September 2014, Mr Paul, according to Mr Methven, rang and abused Mr Methven for bothering the Managing Director while the latter was on annual leave. Mr Paul denied the allegation of speaking disrespectfully to Mr Methven.

[22] Later that day, Mr Paul telephoned Mr Methven and indicated that BI did not wish to lose his services and that he (Mr Paul) had a plan to get Mr Methven back to work.

[23] Also on 30 September 2014, during a conversation about other matters, Mr Paul told Mr Methven that his resignation still stood but that at the upcoming meeting, the matter could be discussed and an *alternative option* may be found. Mr Methven then emailed Mr Paul again to reiterate that he did not intend to resign.

[24] On 7 October 2014, Mr Methven instructed counsel and the following day, 8 October 2014, there was a meeting between Mr Paul and Mr Methven with Mr Methven's wife (Emma Godfrey) present. Mr Paul's evidence is that he intended to present a plan the effect of which was that Mr Methven would return to his duties, but that this proposal became *somewhat redundant, as the lawyers were involved.* This was a reference to Mr Methven having engaged counsel on 7 October 2014. As a consequence of that engagement, a letter was sent from Mr Methven's lawyers to BI and Mr Paul received a copy of that apparently on the morning of the meeting with Mr Methven.

[25] There was some desultory discussion about the prospect of a managed exit but without resolution and the employment subsequently came to an end, ostensibly on the basis that BI had accepted Mr Methven's resignation.

Issues

[26] It will be necessary for the Authority to address the following issues:

(a) Did Mr Methven resign his position?

(b) If he did resign what did he resign from?

(c) Was the offer to resign conditional?

(d) Was the offer capable of acceptance?

What did Mr Methven do?

[27] I am satisfied on the evidence I heard that Mr Methven did not resign his position. First of all, I observe it is common cause that the first email from Mr Methven to BI management does not constitute a resignation. BI maintain that the second email message from Mr Methven to its senior managers does constitute a resignation capable of acceptance. I do not agree.

[28] It seems to me as plain as can be that the second email sent by Mr Methven is making a conditional offer to resign from his substantive role if ***BI needed one person to fill both his substantive role and the Bike Barn role.***

[29] Quite clearly, a proper constitution of the language that Mr Methven used leads to the inevitable conclusion that this is not an unequivocal termination of the employment relationship but an offer to resign if certain circumstances were met. And there is no evidence before the Authority to suggest that that circumstance (BI needing to have one person doing both roles) was ever in play or if it was there is certainly no evidence to that effect.

[30] At best, Mr Methven's second email could have been accepted if the conditions precedent were met. If for instance BI responded by saying that they required one person to fulfil both roles then that might create a basis on which this conditional offer to take a particular step might have been capable of acceptance.

[31] But that never happened. Mr Paul simply telephoned Mr Methven and told him that his resignation was accepted. There is no evidence before me to suggest that Mr Paul purported to accept that conditional offer to resign on the terms and conditions under which it was made, namely that BI required one person to fulfil both

roles. Mr Paul did no more than purport to accept the resignation simpliciter: *Goodfellow v. Building Connexion Ltd* [2010] NZ EmpC 82 applied.

[32] *Goodfellow* was a case where a conditional offer to resign was accepted by the employer and having had his conditional offer to resign accepted without the conditions precedent being met, Mr Goodfellow regarded himself as having been unjustifiably dismissed.

[33] The Court said that the… *key issue is whether it was properly open to the company to regard Mr Goodfellow's email of 28 May as a resignation which it was entitled to accept.*

[34] The Court then went on to find it was not open to the employer to accept the *resignation* because …*the email was clearly conditional* … and …*the condition …was never met.*. so …*there was nothing for the company to accept.*

[35] His Honour Judge Couch concluded at para. 40 of the judgement that the employer had purported to accept a conditional resignation without the condition being fulfilled and then to accept it on terms not proposed by Mr Goodfellow. The learned Judge concludes that the company's actions *can only be seen as a dismissal. Goodfellow* is directly on point here and I follow it.

[36] I am satisfied then that Mr Methven did not unconditionally resign from his role with BI; all that he did, and this is common ground, was seek to bring to an end the trial arrangement (because that was what it was) wherein he helped in the Bike Barn's environment. So there was no resignation, only a concluding of a trial arrangement based on an earlier agreement which I am satisfied existed that Mr Methven could bring the trial relationship to an end.

[37] In the alternative, if I am mistaken in that analysis, it seems to me clear that Mr Methven's resignation was withdrawn before it could be accepted.

[38] This is because Mr Methven says that in the telephone discussion in which Mr Paul purported to accept Mr Methven's resignation, Mr Methven made it clear that he did not intend to resign and in a subsequent call to the Managing Director he repeated that intelligence. Although Mr Paul does not remember Mr Methven saying this, I prefer Mr Methven's evidence to Mr Paul's. Mr Methven's evidence on the point is

consistent with his other behaviour at the time and I did not hear evidence from the Managing Director.

[39] Accordingly and by way of summary my conclusions are as follows:

(a) Mr Methven did not resign from his substantive position with BI, the only position for which he has a completed employment agreement;

(b) Mr Methven did indicate a wish to bring the trial period relating to the Bike Barn's arrangement to an end; and

(c) Mr Methven did make a conditional offer to resign from the employment but those conditions were never met by BI and therefore that offer was never accepted; and

(d) In the alternative, if Mr Methven's conditional offer could have been accepted, it was withdrawn before acceptance.

What consequences flow?

[40] Having concluded that on the facts, Mr Methven did not resign his employment it follows inexorably that by purporting to accept Mr Methven's putative resignation as if it were a resignation, BI has effectively unjustifiably dismissed Mr Methven: *Goodfellow* and *Boobyer v. Good Health Wanganui Limited* (unreported) WEC 3/94, applied

[41] In *Boobyer*, the Employment Court identified three classes of resignation situations where an employer has misconceived the employee's communication. I agree with counsel for Mr Methven that the present case falls within the third category.

[42] That third category involves situations where the employer seizes on words which were not intended to create a resignation and treats those words as if they have created a resignation. Alternatively, where words relied upon to ground the resignation are expressed in the heat of the moment and it would be obvious to an impartial observer either at the time or subsequently, that the words were uttered without any intention they be relied on. In either circumstance, the law is clear that the employer cannot rely on the words used by the employee.

[43] What I take to be critical from this decision in *Boobyer* and a later decision of the Employment Court in *Taylor v Milburn Lime Limited* [2011] NZEmpC 164 is that **intention** is the important factor. In *Boobyer* the Court said that the important issue was what the employee intended the words relied upon to convey and in *Taylor* the Court said:

> *… where there is doubt, a fair and reasonable employer will ensure that its response (to a supposed resignation) is based on the employee's actual intentions rather than on what might be inferred from equivocal words and conduct.*

[44] Not only am I satisfied that in the present case Mr Methven raised sufficient reasonable doubt about his intentions by the words that he used in the second email, and in particular its conditional tense, I think I am also required to consider the context in which that email was sent.

[45] Setting aside for a moment my conclusion, already signalled, that this was no more than an offer to resign if certain pre-conditions were met, it is also apparent that immediately after the email was sent there were exchanges between the principal protagonists and between Mr Methven and the Managing Director of BI which I am satisfied any reasonable person would construe as evidence that Mr Methven was not wishing to end the employment.

[46] It is clear on the facts that Mr Paul telephoned Mr Methven within half an hour or so of the receipt of the second email and accepted the resignation. Mr Methven's evidence is that he remonstrated with Mr Paul and made it clear that he was not intending to resign his employment. Mr Paul does not accept that took place, but on this point I certainly prefer Mr Methven's evidence. To prefer Mr Paul's recollection of these events would lead to inconsistency with other aspects of Mr Methven's evidence and I did not conclude that Mr Methven's evidence was unreliable.

[47] Moreover, Mr Methven says that immediately after talking with Mr Paul and having the conversation where he says he remonstrated with Mr Paul for accepting a resignation he had not intended to give, he (Mr Methven) rang the Managing Director and had a similar conversation with the Managing Director saying that he did not intend to resign and that if the Managing Director though he had resigned then he (Mr Methven) was formally withdrawing it. The Authority did not have the benefit of hearing from the Managing Director in evidence at the investigation meeting and so I

am left to rely exclusively on the evidence of Mr Methven. As I have just indicated, I have no reason to think his evidence unreliable.

[48] On that basis then, even if the resignation were a complete resignation capable of acceptance (which I have already found against) I am satisfied as well that the resignation (if made) was formally withdrawn in telephone discussions with both Mr Paul and the Managing Director.

[49] Put shortly, even if there was a resignation (denied) and the employer had erroneously accepted it and there was then discussion with the employee which quite clearly identified the employee's intention not to resign then a good and fair employer would immediately resile from the decision they had previously taken in error. Were that to have happened in the present case, there would be no employment relationship problem.

[50] Because I have concluded that BI's erroneous treatment of its engagement with Mr Methven is tantamount to an unjustified dismissal I do not need to investigate the question whether, in the alternative, Mr Methven has suffered a disadvantage because of a series of unjustified actions of the employer. I agree with counsel for Mr Methven that it is possible to analyse the facts in the present case in either way but it seems to me clear that, as the employment relationship problem identified by Mr Methven is fundamentally about the loss of his employment the analysis that I have undertaken concluding that Mr Methven has suffered an unjustified dismissal is the proper outcome in all the circumstances.

[51] When looking at the question of how to remedy the personal grievance and the associated claim for a breach of good faith which it seems to me is also amply demonstrated by the factual matrix in the present case, I will deal with the matter globally.

Determination

[52] I am satisfied on the evidence I have heard that Mr Methven has suffered a personal grievance because he was unjustifiably dismissed from his employment by BI and as a consequence he is entitled in principle to the consideration of remedies.

[53] Because I have found the personal grievance exists, I am now required to consider whether Mr Methven contributed towards the situation giving rise to the personal grievance and whether that contribution was blameworthy or culpable.

[54] This is not a straightforward question. It is apparent on the evidence that the reason Mr Methven was dismissed was because of his attempts to engage with the employer in respect to the trial position involving Bike Barns. It was the way that he undertook that exercise which led inexorably to his dismissal because BI took Mr Methven's communication as being a resignation and I have found as a fact that it was not.

[55] But if Mr Methven had expressed himself more carefully and in particular avoided the use of the word *resign* or the word *resignation* in his communication, then this whole dispute might have been avoided. Employee's seeking to engage with their employer would do well to avoid the use of any language which suggests to the employer that it is the employee's wish to bring the employment relationship to an end because the risk is that the employer will do precisely what BI did in the present case and purportedly take the employee at his or her word.

[56] I do not accept then the submission of counsel for Mr Methven, that Mr Methven's mode of expressing himself is blameless, but I do not consider the blameworthy nature of it is so grave as to constitute a breach of duty: *Goodfellow* applied.

[57] Mr Methven seeks compensation for non-economic loss under s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act) together with compensation for economic loss under s.123(1)(b) and (c)(ii) of the Act.

[58] Dealing first with compensation for non-economic loss (s.123(1)(c)(i) of the Act) I heard clear evidence of the effect of the dismissal on Mr Methven both in his own evidence and in the evidence from his wife.

[59] That evidence was of physiological symptoms, mental health issues, and fundamental attitudinal changes to work and life generally. The evidence is clear and graphic. To remedy those non-economic losses I direct that BI is to pay to Mr Methven the sum of $10,000.

[60] In respect to economic loss (s.123(1)(b) and (c) of the Act) the claim is essentially for the benefits that Mr Methven has lost as a consequence of losing his role with BI, benefits which are and were additional to the salary. He obtained a new role almost immediately after the dismissal and that new role was at the same salary but it did not have the bonus structure that applied in the role with BI and in addition, he did not enjoy the benefits of having private use of a motor car or the use of a bicycle from the BI stock.

[61] Put shortly, the claim for bonus lost amounts to $33,177.96 and the claim in respect to the loss of the company vehicle is put at $5,000 per annum and the bike at $4,000 per annum.

[62] Counsel for BI rely on *Rack v. Cartage Limited* EmpC Auckland AC7/02, 20 February 2002 in which judgment the Court defines the expression *ordinary time remuneration* which appears in s.128(2) of the Act as excluding payments such as bonus payments.

[63] But that submission does not deal with the totality of the matter because as counsel for Mr Methven correctly identifies s.128(3) of the Act gives a discretion to order a further payment for remuneration lost as does s.123(1)(b) and (c)(ii) of the Act.

[64] I am satisfied that my obligation is to place Mr Methven back into the same position that he would have been in if the legal wrong he suffered had not happened: *Telecom New Zealand Limited v. Nutter* [2004] 1 ERNZ 31. If this counterfactual analysis is undertaken, it is difficult to see how I can avoid taking into account the bonus and the other parts of the package (the bike and car) which Mr Methven has lost. There may be appropriate arguments about quantum but as a matter of principle I think those matters must be included in the calculation.

[65] I deal first with the car and the bike. I have already made the point earlier in this determination that I am satisfied on the evidence I heard that there was an arrangement between Mr Methven and Mr Paul's predecessor at BI to the effect that he had private use of the vehicle and the use of a bicycle from the BI stock.

[66] The sum of those two claims, annualised, is $9,000.

[67] While I have a discretion to award a greater payment than for a three month period, I am drawn to the statement in *Nutter* that *... the longer the period in respect of which compensation is sought, the more uncertain and speculative the assumption underlying the eventual award becomes.*

[68] I conclude that a payment of $4,500 as a contribution to the losses Mr Methven sustained in respect to the loss of the use of a motor car and the loss of a bike, is reasonable in all the circumstances.

[69] I turn now to the question of bonus. Again I am drawn to the conclusion that, notwithstanding the efforts of counsel for Mr Methven to interest me in a larger figure, the reality is that it is almost impossible to predict with accuracy an entitlement to an ongoing benefit of an employment agreement which has so many variables not the least of which is the effect of the marketplace. This is particularly so given the submissions for counsel for BI which helpfully sets out the much reduced bonus entitlement for the new incumbent in Mr Methven's former role.

[70] That said, one would have to assume there was a difference between the performance that Mr Methven could deliver, by reason of his qualifications and experience in the role, and the performance of the new incumbent.

[71] So the Authority must balance the evidence suggesting the market may have slowed somewhat with the possibility that some of that slowdown is occasioned not by the market itself but by the incumbent in the role and his or her skills compared to those of Mr Methven.

[72] In the end, all that I can do is identify a period over which I think it reasonable for Mr Methven to be remunerated for a bonus entitlement and then identify what figure a reasonable, impartial by-stander could award for each of those months having considered the relative abilities of Mr Methven and his successor, the effects of the market, and the evidence of what Mr Methven was able to earn from bonus payments in the period prior to his unjustified dismissal.

[73] Having taken all of those issues into account, I have not been persuaded that it is fair or just to impose on BI a longer period than three months for payment of bonus and reviewing the factors I mentioned in the preceding paragraph I conclude that the gross figure payable to Mr Methven per month for each of three months ought to be $3,000, so a total of $9,000 for the quarter, but deducted from that must be the

bonuses that he has already earned which I calculate from the information available to be around $1,500 per month.

[74] On this basis then, Mr Methven is due a contribution to the bonuses that he would otherwise have earned from BI in the sum of $4,500.

[75] There is no entitlement to wages lost as a consequence of the unjustified dismissal because as I have already noted, Mr Methven's new role pays exactly the same rate as the old role.

[76] BI is also to pay to Mr Methven the sum of $71.56 being the Authority's filing fee.

Costs

[77] Costs are reserved.

James Crichton
Member of the Employment Relations Authority