

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 32/08
5082351

BETWEEN RUSSELL PATTERSON
 Applicant

AND GOH BANNER CONCEPTS
 DEVELOPMENT LIMITED
 Respondent

Member of Authority: R A Monaghan

Representatives: R Towner, counsel for Applicant
 J Banner, advocate for Respondent

Investigation Meeting: 10 July 2007 at Auckland

Additional material
received: 21 August and 11 December 2007 from Applicant

Submissions received: 20 December 2007 from Applicant
 30 January 2008 from Respondent

Determination: 7 February 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Russell Patterson says he was unjustifiably and constructively dismissed by his former employer, Goh Banner Concepts Development Limited. I refer to that company variously as “the company” and “Goh Banner”.

[2] There was a denial that Mr Patterson was constructively dismissed, and there seemed to be some confusion on the part of the respondent about another matter to which I turn first.

The roles of Mr Goh, Mr Banner and the respondent

[3] Jim Banner is a minority shareholder in Goh Banner. Stephen Goh is the director and majority shareholder. Both attended the Authority's investigation meeting although Mr Goh played relatively little part in it.

[4] Mr Banner said he had attended to 'help as a witness' - indeed he was the principal witness for the employer - and to protect Mr Goh. His perception of his role made it necessary to clarify whether there was any issue with the identity of the employer, as well as to address the legal effect of Mr Banner's actions in respect of the company and the termination of Mr Patterson's employment.

[5] Mr Banner's evidence was that certain property his wife owned was sold to Mr Goh, with the proceeds of the sale being used to purchase a piece of nearby land. A house apparently considered to be at the high end of the scale of residential construction was to be built on the land, which was also to be subdivided and further developed. Goh Banner was incorporated for the purpose of building the house, and carrying out the further development. The company was registered on 4 August 2006.

[6] Mr Banner has extensive experience in the construction industry, and took on an amorphous and unpaid role of overseer/liaison person. He was carrying out that role as construction on what he called his wife's house began. Indeed he said he designed the building's concept. He was the person who recruited and had day to day contact with Mr Patterson, with Mr Goh having almost no direct involvement at all. I accept all of that is so but it is not to any degree an answer to Mr Patterson's claim, and the information must be put in its proper legal context in order to address the claim.

[7] I could not see any ground on which the proposition that Goh Banner was Mr Patterson's employer might be disputed. Nor did I discern in Mr Banner's position any attempt to raise such a dispute. He was focussed instead on his wish to protect Mr Goh and to explain the nature of his own involvement in the project. None of that affects the fact that Goh Banner was the employer party to the employment

relationship and must answer claims arising out of it. Further, Mr Patterson's claim was not directed at Mr Goh in his personal capacity.

[8] Since there was no allegation that Mr Banner was the employer party in his personal capacity either, Mr Banner's evidence seemed to raise a question about whether his actions in respect of Mr Patterson's employment relationship were binding on Goh Banner. Although Mr Banner said he was not paid for his activities in association with the project, in the circumstances all that can be said as a result is that he was not, for example, formally employed by the company as Mr Patterson's manager.

[9] Otherwise, however, Mr Banner had an interest as a shareholder in the company and designer of the project. He maintained a day to day involvement in it. As far as Mr Patterson was concerned, Mr Banner was the face and voice of Goh Banner and Mr Patterson was entitled to view him as the company's representative. In turn, Mr Banner's actions were binding on the company. The alternative is for Mr Banner to assume personal legal liability for the fate of the employment relationship. I did not understand him to be going that far.

The employment relationship and its termination

[10] In May 2006 Mr Patterson's mother approached Mr Banner about whether he could help Mr Patterson, who had been on a sickness benefit for the previous 12 months. According to Mr Banner, Mr Patterson's mother said Mr Patterson had been suffering from depression. Mr Banner had worked with Mr Patterson before, and considered himself a mentor of Mr Patterson's. He wanted to help, and envisaged a role for Mr Patterson in the building of his wife's house and the further development. He invited Mr Patterson to come and see him.

[11] Mr Patterson duly did so later in May, and began working on the project as a foreman/builder in June 2006. His rate of pay was \$36 per hour.

[12] There was a conflict in the evidence concerning whether Mr Banner found out before or after the employment relationship began that Mr Patterson suffered from

sleep apnoea as well as from depression. Mr Banner's wish in May 2006 to help Mr Patterson means I doubt that anything turns on a resolution of that conflict. Moreover, it was common ground that the relationship went well at first.

[13] However Mr Banner became increasingly concerned about the extent of Mr Patterson's absences from work. According to a record of absences which a staff member prepared, Mr Patterson was absent for: four full days in July; one day in September; one day in October; 16 and 28 November; 11 and 12 December; 18 January 2007; and 4 days in early February 2007. In addition half days were worked as follows: one in July; two in August; two in September; and two in October. Only two hours were worked on 27 November. However Mr Banner said, too, that he was aware Mr Patterson was ill and 'protected' him.

[14] Most of that time off was acknowledged, except that Mr Patterson disputed two of the half days off and pointed out that a third absence had been counted twice. On Mr Patterson's account during the 6.5 month period of his employment he had 15 full days off, of which 13 were sick days. Four of those 13 days were related to his sleep apnoea. He had a further 4 part days off, of which 2 were sick days and both were related to his sleep apnoea.

[15] Mr Patterson's evidence was that, on 12 February 2007, Mr Banner approached him with a proposal that his hourly rate of pay be reduced to \$30 and that he work for three days a week. Mr Banner also made various derogatory comments about Mr Patterson's ability to do the job. There was little material dispute about that evidence, except that Mr Banner denied telling Mr Patterson that if he did not accept the offer he would 'have to go'. The next day Mr Patterson advised Mr Banner he did not accept the proposal.

[16] On 14 February Mr Banner told Mr Patterson he would still be paid \$36 per hour, but would work as a carpenter. Mr Banner would work him hard. A written employment agreement dated 19 February 2007, but never given to Mr Patterson, recorded that Mr Patterson was employed as a carpenter at a rate of \$36.00 per hour.

[17] On 15 February Mr Banner again offered \$30 per hour. Messrs Patterson and Banner also had a dispute about Mr Banner's instructions in respect of some scaffolding on the site.

[18] On 19 February Mr Patterson told Mr Banner he was not happy with the offer, and wanted to negotiate further. Mr Banner became angry and abusive. According to Mr Patterson he made comments about Mr Patterson and his family, and said: "I will terminate you as soon as I can. We are not friends any more. You'll stay on working at the moment until this is sorted out and it won't be pleasant."

[19] Mr Banner denied making statements of that kind, but their tone is consistent with the demeanour and tone he exhibited at the investigation meeting. Further, it was clear that he felt extremely let down by Mr Patterson (and Mr Patterson's son in respect of another matter) and was very angry about their conduct. He was angry, too, because he felt he had been set up. Finally, it was clear that he had not been prepared to 'protect' Mr Patterson from the effect of his absences any longer. For those reasons I accept Mr Patterson's account.

[20] Because of Mr Banner's behaviour, on 20 February Mr Patterson sought legal advice. On or about the same day he telephoned Mr Banner to advise that he would not be returning to work, and left a message to that effect when he was unable to make direct contact. His message amounted to an oral termination of employment which he then acted upon. While a formal written letter of resignation would have been desirable, the failure to forward one does not mean there was no resignation.

Whether there was a dismissal

[21] The effect of my findings of fact is that Mr Banner attempted to bully Mr Patterson into accepting a reduced rate of pay, a reduced role, or both. The attempt included threats about Mr Patterson's continued employment, and the quality of the working life Mr Patterson would have if he stayed. Mr Patterson decided he could not continue his employment under those circumstances.

[22] The law is that a constructive dismissal may occur in the following circumstances:

- (a) an employer gives an employee a choice between resigning or being dismissed;
- (b) an employer follows a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; or
- (c) a breach of duty by the employer causes the employee to resign.¹

[23] Mr Towner submitted that (b) and (c) above apply here. Mr Banner's conduct towards Mr Patterson in early February was such that (b) is certainly arguable, but I find that (c) is made out on the facts.

[24] In that respect I have taken into account the following comment of the Arbitration Court's (as it then was):

"It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the border line which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify termination of the employment relationship."²

[25] Mr Banner's conduct was dismissive and repudiatory, and I conclude that Mr Patterson was constructively dismissed. I accept there was a high level of absence from a critical position over a short period, and that was likely to cause a problem in the construction project. However Mr Banner did not handle the problem appropriately. He was not entitled to attempt to browbeat Mr Patterson regarding his terms and conditions of employment in the way he did, and the dismissal was not justified.

¹ **Auckland etc Shop Employees IUOW v Woolworths NZ Limited** [1985] 2 NZLR 372; [1985] ACJ 963; (1985) ERNZ Sel Cas 136.

² **Wellington, etc, Clerical etc IUOW v Greenwich** [1983] ACJ 965, 975; (1983) ERNZ Sel Cas 95, 104.

Remedies

[26] Mr Patterson is entitled to the reimbursement of remuneration lost as a result of his personal grievance, but the Authority must also consider the extent to which Mr Patterson's actions contributed to the situation which gave rise to the personal grievance. It must also take into account Mr Patterson's attempts to mitigate his losses.

[27] Mr Patterson earned \$1,536 per week at Goh Banner. He has not obtained alternative employment and now seeks the reimbursement of lost income calculated as 44 weeks x \$1,536 = \$67,584, less the \$9,781 he has earned from odd jobs carried out since the dismissal. The total loss claimed is \$57,803.

[28] In that Mr Patterson's absences from work caused Mr Banner to attempt to address the matter in the way he did, they contributed to the situation giving rise to the dismissal. However in order to warrant a reduction in remedies, Mr Patterson's actions must be blameworthy.³ Since Mr Patterson could not help the fact that he was ill, and nor was he responsible for the way Mr Banner attempted to address the matter, his actions did not include the necessary element of blameworthiness so that no reduction in remedies on that ground is warranted.

[29] Regarding mitigation of the loss Mr Patterson says that, because of his sleep apnoea, he is unable to take a position that involves driving for any distance and cannot, for example, commute between his home in Kaiarau and South Auckland. Accordingly he says his ability to obtain alternative employment is limited. Accordingly he has not sought alternative employment, rather has sought minor building jobs in a self employed capacity in the area near his home.

[30] Mr Patterson's assertions regarding his ability to secure alternative employment led me to seek further medical information. The delay in obtaining it has led to the delay in the issuing of this determination. In the interests of progressing the matter I have not required the practitioners concerned to appear and give evidence,

³ **Paykel v Ahlfield** [1993] 1 ERNZ 334

although I would normally do so. The material was copied to Mr Banner, who had a right of reply.

[31] The material confirmed Mr Patterson suffers from sleep apnoea. His condition was diagnosed some time before he began his employment with Goh Banner. Letters from a consultant respiratory physician, as well as from Mr Patterson's GP, indicate there is no reason in principle why Mr Patterson's condition should prevent him from driving provided he has received adequate sleep the night before. There is no reason why he should not undertake building work. According to the respiratory physician Mr Patterson's treatment regime should ensure he receives adequate sleep, although it appears Mr Patterson has reported further daytime sleepiness.

[32] The respiratory physician commented that residual daytime sleepiness despite adequate treatment is sometimes because of a co-morbid condition. Nothing in the notes indicates whether the physician was aware of Mr Patterson's history of depression or whether he took it into account when commenting on Mr Patterson's sleepiness. Nor do the notes comment on whether driving from Kaiaua to South Auckland and back (for example) would be considered 'excessive' amounts of driving. Otherwise in general terms Mr Patterson's sleepiness is relevant to whether or how far he should be driving on any particular day.

[33] I have not pursued these outstanding matters because, in any event, I do not consider that the effect of Mr Patterson's alleged inability to mitigate his loss in the above circumstances should be visited entirely on Goh Banner. Further, Mr Patterson indicated in evidence that a move to the South Auckland area, for example, could address the concern about driving but he prefers to remain where he is. More importantly, the concern arises on days when there is residual sleepiness and I am not persuaded that such circumstances are incapable of being addressed with a potential employer. There is no evidence Mr Patterson has attempted even to approach a potential employer, let alone discuss ways in which his condition can be accommodated.

[34] Overall I am not satisfied that Mr Patterson's loss has been caused by his personal grievance to any significant degree. There came a point at which his own

choices, as well as his long-standing medical condition, overcame the effect of his unjustified dismissal. Nor, for associated reasons, am I satisfied he has made adequate efforts to mitigate his loss.

[35] Taking these factors into account, as well as the nature and level of Mr Patterson's skills, I consider it appropriate that Mr Patterson be reimbursed for lost remuneration in the equivalent of four weeks' wages. The amount is $4 \times \$1,536 = \$6,144$. Payment is ordered accordingly.

[36] Mr Patterson is also entitled to compensation for the injury to his feelings caused by his personal grievance. He asserted that his health worsened as a result of the dismissal. There was minimal evidence to support that assertion. While I am prepared to accept there was injury to Mr Patterson's feelings in that he suffered a loss of self esteem, I am not persuaded as to the effect of the dismissal on his health.

[37] Goh Banner is therefore ordered to compensate Mr Patterson for injury to his feelings in the sum of \$3,500.

Summary of orders

[38] Goh Banner is ordered to pay to Mr Patterson:

- (a) \$6,144 (gross) as reimbursement of remuneration lost as a result of his personal grievance; and
- (b) \$3,500 as compensation for injury to his feelings.

Costs

[39] Costs are reserved.

[40] The parties are invited to agree on the matter. If they seek a determination from the Authority Mr Patterson shall have 28 days from the date of this determination in which to file and serve a memorandum setting out his position, and

Mr Banner shall have 7 days from the date of receipt of the memorandum in which to respond.

R A Monaghan

Member of the Employment Relations Authority