

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Michael Thomas Robb (Applicant)
AND GE Betz Pty Limited (Respondent)
REPRESENTATIVES Michael Thomas Robb, In person
Bernadette Carey, Counsel for Respondent
MEMBER OF AUTHORITY Marija Urlich
INVESTIGATION MEETING 7 July 2005
SUBMISSIONS RECEIVED 8 September 2005
DATE OF DETERMINATION 8 September 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Michael Robb was employed by GE Betz PTY Ltd (“GE”) and its predecessor from 1997 until September 2004. Mr Robb was employed as a technical specialist responsible for customer sales and service of water treatment chemicals and equipment. He worked in assigned territory in Auckland, Waikato and Hawkes Bay. In August 2004 GE raised a performance improvement plan (“PIP”) with Mr Robb. Mr Robb says this action, along with others, breached his employment agreement with GE and the breaches were so serious that he was left with no choice but to resign, which he did so by letter dated 6 September 2004. By way of remedies Mr Robb seeks compensation for hurt and humiliation caused as a consequence of his dismissal. Mr Robb also says the creation of a commercial leader position had the effect of making his position redundant. He seeks compensation in relation to that alleged redundancy.

[2] GE says it has acted fairly and reasonably towards Mr Robb; it says the implementation of the PIP was justified and Mr Robb was not dismissed or forced to resign. It says Mr Robb’s position was not made redundant.

[3] Mr Robb’s statement of problem raised an issue in relation to the payment of superannuation under the GE scheme. I was advised at the investigation meeting that this issue has been resolved between the parties.

[4] To determine Mr Robb’s claim of constructive dismissal the Authority must decide whether GE was entitled to begin the PIP process with Mr Robb and whether that process breached Mr Robb’s employment agreement to such a degree that GE no longer intended to be bound by the employment agreement.

Background

[5] On 11 August 2004 Mr Robb spent a pre-arranged day with his manager Geoff Davies, GE's district manager for New South Wales and New Zealand visiting clients. While Mr Robb was driving Mr Davies to the airport to catch his plane Mr Davies asked Mr Robb to pull over to the side of the road. He told Mr Robb he had concerns about his performance and wished to institute a PIP. A PIP is GE's formal performance review process. Mr Davies told Mr Robb he would ring Meghna Shukla, GE's Sydney based human resource consultant, using the car phone and they would discuss the draft PIP. Mr Davies then telephoned Ms Shukla and presented Mr Robb with the draft PIP, a letter outlining his concerns about his performance and went through these documents with Mr Robb. Mr Davies then asked Mr Robb to take the draft PIP away and come back to him with his comments with a view to agreeing a process to address the identified performance concerns. Mr Davies said the idea for the meeting was to give Mr Robb the documents for him to review.

[6] The covering letter provides:

"Dear Mike

Based on our conversation late last month, effective immediately you are on a Performance Improvement Plan. The goal of this plan is to elevate your performance to a level, which is fully satisfactory. The key measurements of the plan will include:

Completed e-VGPs,

Closed new Sales

VOOC responses

Existing business

GE Values

The duration of the Performance Improvement Plan will be 3 months. We will have bi-weekly, reviews to measure your progress on this plan. At each of these reviews you will be expected to provide a one-page overview of your progress on each element of the plan. The scheduled dates for these reviews will be: 27/08/04, 10/09/04, 24/09/04, 8/10/04, and 22/10/04

The completion date for this plan is 9th November at which time I will assess your progress in meeting the goals in the plan and make a final determination as to what further action, if any, is appropriate. Failure to successfully complete this plan may result in reassignment or discharge.

If you have any questions about this plan, please call/see me or contact Meghna Shukla.

..."

[7] On 20 August Mr Robb emailed Ms Shukla requesting copies of GE's PIP and disciplinary procedures and a copy of his job description. In the email Mr Robb gave reasons for these requests; he needed the PIP procedure to provide a response to the PIP, the PIP contained a written warning and the job description he had differed from the one provided to him by Ms Shukla. Mr Robb recorded in his email that this process was stressful for himself and his family and was having a detrimental impact on his working relationship with GE.

[8] On the same day Ms Shukla responded to Mr Robb raising the following:

- (i) apologising if the PIP process had inadvertently caused stress to Mr Robb or his family;
- (ii) stating the purpose of the PIP was to lift Mr Robb's performance;
- (iii) requesting Mr Robb's comments on the draft PIP;
- (iv) offering support to enable Mr Robb to comment on the PIP;
- (v) setting up a telephone conference the following Monday to clarify Mr Robb's request for the PIP procedure and his view there was a written warning in the draft PIP;
- (vi) requesting a copy of the job description Mr Robb referred to, to compare the differences;
- (vii) confirming a copy of the disciplinary procedures would be forwarded to him; and
- (viii) advising no written warning is contained in the draft PIP.

[9] On 27 August Mr Davies wrote to Mr Robb to set up a meeting for the following week to discuss the PIP process in detail and address any concerns Mr Robb may have. The letter advises Mr Davies will attend the meeting with Trish Meakin, HR leader, New Zealand and invited Mr Robb to bring a support person.

[10] On 31 August Mr Davies, Ms Meakin, Mr Robb and his support person, Angela Clark meet. Ms Meakin summarised the issues from the meeting in an email dated 1 September:

- (i) Mr Davies' concerns about Mr Robb's performance concerns had been discussed with Mr Robb earlier in the year;
- (ii) Mr Robb's comments on the draft PIP were to be provided by 3 September;
- (iii) further discussion was to be scheduled to aim to finalise the PIP by 10 September, that date was then to be the PIP starting date;
- (iv) Ms Meakin had advised the discussion on 11 August constituted a verbal warning and that a written warning may be issued following review six weeks into the PIP;
- (v) a job description was to be provided to Mr Robb by 10 September;
- (vi) information regarding withdrawal of funds from the GE superannuation scheme was to be provided to Mr Robb by 10 September;
- (vii) a personal grievance had been raised on Mr Robb's behalf, which Mr Davies would respond to; and
- (viii) a copy of the PIP policy had been provided to Mr Robb.

[11] On 1 September Mr Robb wrote to Mr Davies setting out his response to the meeting on 31 September which were:

- (i) the implementation of a PIP was flawed in both process and substance;
- (ii) the implementation of the PIP was triggered by the new commercial sales position;
- (iii) the delay in implementing the PIP had caused him undue stress;
- (iv) the meeting of 31 August had been an attempt to intimidate him and his career prospects at GE were non-existent; and
- (v) proposed amendments to the PIP which would make it acceptable to him.

[12] After the meeting on 31 August Mr Robb started looking for another position and attended interviews during that week. He told me he did this because the timing of a possible dismissal under the draft PIP just before Christmas was unacceptable to him, he had sought to have this changed at the meeting on 31 August without success and he could not afford to be without work just prior to Christmas with a family of four to support.

[13] On 6 September Mr Robb tendered his resignation to Mr Davies giving two weeks notice as required under his employment agreement. Mr Robb told me he resigned because he felt confident of securing one of the positions he had interviewed for. Mr Robb's resignation letter includes:

“..."

I feel I have been left with few other options than to actively seek other employment. This is due to the way the company has initiated my PIP and means I feel that I can no longer rely on GE for long-term stable employment. In addition I will not place my families income in a position where Christmas would possibly see me without a job. I have not been reemployed currently and will advise GE should this change.”

[14] On 7 September Mr Davies acknowledged receipt of Mr Robb's resignation in writing including:

“..."

I am disappointed that you feel this is your only option. As we explained at last weeks' meeting, the purpose of

the PIP is to help you focus on areas needing improvement in order to bring you back on target.

I am more than willing to discuss this in more detail Mike if you feel this would help.
..."

[15] On the same day Mr Robb received a job offer which he accepted. As this new job was with a competitor Mr Robb immediately advised Mr Davies who wrote to him on 7 September setting out the handover process through his notice period. This letter also advises Mr Davies is working on a response to Mr Robb's letter of 3 September raising a personal grievance which was duly provided to Mr Robb in a letter dated 10 September.

Did GE breach duties owed to Mr Robb?

[16] GE was entitled and indeed required to identify and manage poor performance in a fair and reasonable manner¹. GE says the PIP process was designed to do just that; it was a performance management tool tailored to specific, identified performance issues.

[17] Mr Davies said he had noticed Mr Robb's performance had dropped in early 2004 and had raised these issues informally with him in May and June 2004. He attended a management review meeting in July 2004 at which staff performance was reviewed against targets set for the first two quarters of the year. Issues about Mr Robb's performance were identified at this meeting; Mr Robb was not meeting his sales targets, he had fallen behind in customer reporting, he had made little progress with his KPIs and there was a perception he had not adopted the GE values. Following the meeting Mr Davies meet again with Mr Robb in July to informally discuss these concerns and the PIP process was started with Mr Robb in August.

[18] Mr Robb said he did not recall any informal discussion about performance failings in May and June 2004 but did recall a discussion about issues and barriers to meeting his performance goals in July 2004. Mr Robb and Mr Davies agreed that during the July discussion Mr Robb was also advised about the creation of a new position to be labelled commercial leader. Mr Robb expressed interest in the position and there is no dispute Mr Davies' told Mr Robb that he did not think Mr Robb had the necessary skills for the new position but that he should speak to the manager to whom the position would report. Mr Robb did this and he told me he considered this discussion to be an interview for the position, for which he was unsuccessful.

[19] The July discussion regarding performance issues and Mr Robb's suitability for the new role resulted in a perception by Mr Robb that the two were interlinked. This perception was reinforced by the internal advertisement of the commercial leader role after Mr Robb raised this with Ms Shukla and the 11 August PIP discussion. I am satisfied on the evidence received that this amounts to an unfortunate convergence of events rather than a concerted effort on GE's part to force Mr Robb to resign from his position.

[20] Mr Robb's response to the specific performance concerns raised in the 11 August draft PIP are set out in his letter of 1 September. The letter goes on to set out conditions upon which Mr Robb would commit to the PIP process. Personal grievances on the following grounds were also raised:

- (i) lack of progress in implementing the PIP;
- (ii) the superannuation issue, now resolved; and
- (iii) constructive dismissal.

¹ *Trotter v Telecom Corp. of New Zealand Limited* [1993] 2 ERNZ 659

[21] Prior to any response being received to his 1 September letter Mr Robb tendered his resignation on 6 September.

[22] To establish a personal grievance for unjustified constructive dismissal Mr Robb must show either he was given a choice to resign or be dismissed, or GE engaged in a process with the dominant purpose of coercing him to resign or there was a breach of duty which justified Mr Robb treating the employment agreement as at an end.

[23] There is no evidence Mr Robb was given a choice to resign or be dismissed. That ground of constructive dismissal cannot stand.

[24] Is there evidence to establish GE engaged in a process designed to coerce Mr Robb to resign? Concerns about Mr Robb's performance had been raised with him informally and were formally raised on 11 August 2004 with the presentation of the PIP. It was entirely appropriate that such concerns should be formally raised with Mr Robb to give him an opportunity to respond prior to any implementation of the PIP. This would be a fair process. However, Mr Robb was advised in the letter of 11 August that the PIP was to be implemented "effective immediately". I am satisfied that prior to this no performance concerns had been raised with him with any degree of specificity to allow him the opportunity to give a response.

[25] It is a fundamental of a fair process that an employee is given an opportunity to comment on an allegation before any disciplinary steps are taken. The PIP is a disciplinary process which had the potential for very serious disciplinary outcomes for Mr Robb up to and including dismissal. Mr Robb understood this clearly and took reasonable steps to get information about the PIP. The provision of that information took some time. This delay precluded Mr Robb providing a response to the PIP. Mr Davies then took steps to progress matters, calling the meeting on 31 August. By this time it was evident to GE that the PIP could not be implemented on 11 August. The start date was deferred and a timetable for a new start date put in place which accommodated Mr Robb's response and discussion around his issues.

[26] The 11 August letter says dismissal could be an outcome of the PIP process. Does this in itself amount to a breach of duty serious enough to indicate GE did not intend to be bound by the employment agreement? As I have said above the PIP process was a disciplinary process. Fair notice of the possible outcome of a disciplinary process is an established element of procedural fairness. I have found the implementation of the PIP on 11 August was flawed because Mr Robb had not been given a fair opportunity to respond to the performance concerns; Mr Davies could not make a robust decision to implement the PIP because he had not had the benefit of Mr Robb's views that the performance concerns were fair. By 31 August GE no longer sought to implement the PIP from 11 August, effectively remedying that breach.

[27] Was Ms Meakin's advice in the meeting of 31 August that a verbal warning had been issued on 11 August a breach of duty so serious as to constitute a repudiation of the employment agreement? Mr Robb felt Ms Meakin's advice that he had a verbal warning put his employment at jeopardy but it was not advice that he would be dismissed or of the inevitability of dismissal. The issuing of a warning to Mr Robb on 11 August was not fair and reasonable; the disciplinary meeting was not fairly constituted and Mr Robb was not given an opportunity to respond to any specific performance concerns before the disciplinary sanction was implemented. I accept Mr Davies turned his mind to finding a suitable location in which to hold the meeting on 11 August. However, I also accept Mr Robb was alarmed to be told to pull his car to the side of the road and that a meeting to present the draft PIP would be held then and there. Given the potentially unusual circumstances of the meeting it would have been desirable to give Mr Robb fair notice of the meeting so that consultation as to the location could occur and he could have a representative present if he wished.

Determination

[28] I am not persuaded on the evidence received that GE's actions towards Mr Robb breached the duties it owed him to such a serious degree as to justify Mr Robb forming the view GE no longer intended to be bound by the employment agreement. Mr Robb set out his concerns about the proposed PIP and the verbal warning in his letter of 1 September. He resigned before he received a response and worked out his notice period. Such circumstances do not amount to grounds for an unjustified constructive dismissal.

[29] I am satisfied the verbal warning was retrospectively issued to Mr Robb on 31 August to take effect from 11 August, was unjustified and detrimental to his employment and that the constitution of the 11 August meeting fell below the accepted standards of fair treatment. Mr Robb has made out a personal grievance for unjustified action causing disadvantage in relation to these aspects of his claim. In reaching this decision I have had the benefit of the parties' submissions on reframing Mr Robb's personal grievance as an unjustified action causing disadvantage.

Redundancy

[30] Mr Robb says the commercial leadership position had the effect of making his position redundant. When Mr Robb resigned from his job with GE the commercial leadership role had not been filled and his role had not been made redundant. Given this set of circumstances I understand Mr Robb's claim to be that his position would be made redundant once the commercial leadership role was implemented. This view was based on Mr Robb's understanding of how his role and the commercial leadership position would overlap.

[31] In his letter of 1 September 2004 Mr Robb set out this concern. He received an unequivocal response from Mr Davies that his role would not be made redundant.

[32] There is no evidence Mr Robb's role as technical specialist was redundant at the date of his resignation. There will be no consideration of the claim for redundancy compensation because there is no evidence Mr Robb's position was redundant.

Remedies

[33] Mr Robb has established a personal grievance for unjustified action causing disadvantage in relation to the retrospective issuing of a verbal warning on 31 August and the constitution of the 11 August meeting. He has said he was very distressed by these events and felt his employment was in jeopardy.

[34] GE is ordered to pay Mr Robb \$3000 pursuant to section 123(c)(i) of the Act.

Costs

[35] Costs are reserved. I invite the parties to try to resolve the issue of costs between them. If they are unable to do so they should apply to the Authority to determine costs.