

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 183
5308996

BETWEEN KENNETH JAMES RICHARDS
 Applicant

A N D MAINLINE MUSIC LIMITED
 T/A MUSIC PLANET, NELSON
 Respondent

Member of Authority: M B Loftus

Representatives: John Levenbach, Counsel for Applicant
 Peter Elder, Advocate for Respondent

Investigation meeting: 23 May 2011 at Nelson

Submissions Received At the investigation meeting

Date of Determination: 29 August 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Kenneth Richards, claims he was unjustifiably dismissed, albeit constructively, from his employ with the respondent, Mainline Music Limited t/a Music Planet, Nelson. Mr Richards also claims Music Planet failed to comply with section 65 of the Employment Relations Act 2000 (the Act). He seeks a penalty.

[2] Mainline Music denies it dismissed Mr Richards, either expressly or constructively. It also denies the alleged breach of s.65 warrants a penalty.

Background

[3] For some years Mr Richards managed and owned a business, Good Vibrations Limited, which sold music equipment from premises in Bridge Street, Nelson. Trading conditions were difficult and Mr Richards considered closure.

[4] In August 2009 Mr Richards approached a friend, Mr Roger Smith, who owed and operated a similar business, Mainline Music Limited. Mr Richards asked if Mr Smith would be interested in taking over his business but Mr Smith was not in a position to consider the proposal at the time. The two discussed the issue again in November 2009. Mr Smith expressed an interest as he was then seeking premises in Nelson, though with a preference for a different site.

[5] Good Vibrations closed in December. Mr Smith considered Mr Richards a friend and felt some sympathy for his situation and offered Mr Richards a position in the business he was about to establish in Nelson. Music Planet Nelson would initially operate from the premises previously occupied by Mr Richards and opened in January 2010. Mr Richards was employed as a shop assistant answering to the store manager, Mr Darren McKean.

[6] As already said, Mr Richards claims he was constructively dismissed. He says the dismissal was occasioned by the actions of Mr McKean, who is claimed to have embarked upon a course of action designed to obtain his (Richards') resignation. Those efforts culminated in the events of 24 to 26 April 2010 which, according to Mr Richards and given preceding events, provided the impetus for his decision to resign.

[7] With respect to preceding events Mr Richards refers to three specific dates. He says that on 27 January 2010 Mr McKean called him into the back office and raised a list of concerns he had about Mr Richards' performance. Mr Richards states he was advised by Mr McKean that he was a *plodder* who Mr McKean did not want in the shop. He says the two discussed product belonging to Good Vibrations and which was stored on the premises pending attempts to sell it through Trade Me. Mr Richards also complains he was not advised he was going to get a verbal warning and criticises the process as inappropriate for the issuing of said warning.

[8] Mainline Music's position is there had been an agreement small amounts of Good Vibrations' residual stock could remain for a while but Mr Richards would attempt to remove it with alacrity. Mr McKean states he was simply following up on how the removal was progressing. He accepts he made the *plodder* comment but denies saying he did not want Mr Richards or issuing a warning and there is no evidence, other than Mr Richards' claim, of one having been given.

[9] Mainline Music was also finding trading difficult and had, at this time, embarked upon a review of its business. A restructure was pending.

[10] Mr Richards says that on 19 February 2010 he and another employee, Mr Sahn Bishop, were called to the back of the shop by Mr McKean. He says Mr McKean *gave both of us a very pointed lecture about how temporary our jobs were, and that we were unlikely to remain employed after our three month trial periods expired.*

[11] Mr Richards also says there was increasing tension and frustration on Mr McKean's part when Good Vibrations' residual business was addressed during the work day. He claims that led to incidents by which Mr McKean tried to procure his resignation by embarrassing him. As an example he refers to another event which occurred on 19 February 2010. Some stock previously ordered by Good Vibrations arrived and Mr McKean arranged for it to be returned to the supplier. Mr Richards complains he was not consulted about this and, as a result, suffered embarrassment.

[12] Mr Richards states that on 19 March 2010 Mr McKean called him and Mr Bishop to the front counter to *spell out* the sales targets they would have to achieve. Mr Richards claims when he questioned Mr McKean about the targets Mr McKean became aggressive, alleged they were not a team, and advised they needed to make their own sales and meet their own targets. Mr Richards claims Mr McKean closed by advising that when he was dealing with a customer both he (Richards) and Mr Bishop were to *stay out of his way and not to say or do anything until he closed the sale.*

[13] Mr Richards complains Mr McKean then made it difficult for him to meet his sales target by approaching patrons as they entered the premises and before he (Richards) could do so. Whilst not expressed this way Mr McKean's retort is he (Richards) was too lazy. Whilst cruel, this sits with evidence given by Mr Bishop.

[14] Mr Richards then commented on the events of 24 to 26 April 2010. He says that on the morning of Saturday 24 April business was quiet. He says he was watching two young customers near the *music section* and did so as that part of the shop was particularly difficult to supervise and there was a high risk of theft. He says Mr McKean asked if he would help Mr Bishop rearrange a display cabinet. He did not move immediately and a short while later Mr McKean returned appearing a little agitated. Mr Richards claims Mr McKean said *forget about that. Just do whatever you*

want. *I am not your parents and if you don't to work and just muck around. That is your decision.*

[15] Mr Richards claims he tried to explain he was there for security reasons but Mr McKean responded by bursting out in a loud voice *you are a f...ing joke. You haven't done an f... ing scrap of work all f... ing week.*

[16] Mr Richards says he was embarrassed and hurt by that and concluded it was better he left the store and let Mr McKean cool down. He did so and telephoned Mr Smith to describe what had happened. Mr Smith then advised him to take the rest of the day off.

[17] Mr Smith accepts the call was made. He says Mr Richards advised him that Mr McKean had sworn to which he (Smith) responded with an apology and an acknowledgment he did not condone such conduct. Mr Smith made a comment along the lines of I'm the only one who can hire and fire and your job is not under threat. Mr Richards agrees and states he considered Mr Smith saw him as a part of the businesses future though these comments may have been more a reflection of the immanent restructuring than the days event.

[18] On Monday 26 April Mr Richards sent Mr McKean a text message, copied to Mr Smith stating he intended taking two weeks unpaid leave to help get back to normal health and would then consider his options.

[19] Mr Richards states Mr McKean responded by asking that Mr Richards return his keys for that period. Mr Richards did but claims this led to a further embarrassing incident. The Nelson Jazz Club had kept a set of clubroom keys at the shop when Good Vibrations operated the business. Mr McKean had decided to cease allowing the shop to be a collection point for the keys and advised the president accordingly. Mr Richards complains that caused significant embarrassment when the president phoned to ask why the arrangement had ceased. He had not been consulted or advised and was therefore unable to give an answer.

[20] As events transpired that was the last interaction between the Mr Richards and Mr McKean. Mr Richards never returned.

[21] At 2pm on 26 April Mr Richards sent an email to Mr Chris Rush, the retail group manager. It states:

I have chosen to take a couple of weeks unpaid sick leave while I recuperate a bit more. Going back to work early was a bad thing, but I needed the income. But I don't need it bad enough to put up with episodes like Saturday.

My legal advisers has told me to remain out of the store while he reviews my situation and decides if action if warranted and what form this may take.

I will keep you informed of progress.

[22] Mr Rush responded the following morning. He says:

Sorry to hear that you're not feeling so good. Nobody had advised me on this one. I hope you had a good rest.

Regarding your reference the episode on Saturday, please let me know what this is about.

[23] Mr Richards did not respond until 3 May. The response, headed, *without prejudice*, expresses the view Mr McKean had made it clear both verbally, and by his actions, he did not want Mr Richards in the store. Mr Richards goes on to advise he had sought legal advice and his representative was currently preparing a complaint. The memo ends:

In summary, there is no job for me in the Nelson store, the managers has seen to that ...

[24] In the interim, and on the instruction of Mr Smith, Mr Rush had commenced an investigation into the events of 24 April. Mr Richards chose not to respond to queries from Mr Rush and the investigation was superseded by this claim and not completed. Similarly Mr Richards chose not to reply to a 6 May request from Mr Rush he return, forwarding it to his solicitor instead.

Determination

[25] Mr Richards claims he was dismissed, albeit constructively. Mr Richards is therefore required to establish the fact of dismissal before Mainline Music can be asked to justify it.

[26] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd* (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA) the Court of Appeal held that constructive dismissal includes, but is not limited to, cases where:

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

[27] In this instance Mr Richards claims the employer, or more correctly Mr McKean, followed a course of conduct with the deliberate and dominant purpose of procuring a resignation with the events of 24 to 26 April 2010 being the culmination of a series of issues. In support of his contention he cites four such issues – the three above and a complaint Mr McKean was monitoring his Trade Me activity.

[28] In *Wellington etc Clerical Workers etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95; [1983] ACJ 965 the Court stated that for a dismissal to be constructive:

It is not enough that the employer's conduct is inconsiderate and causes some unhappiness to the employee. It must be dismissive or repudiatory conduct.

[29] Three of the events relied upon by Mr Richards as illustrating repudiatory intent were witnessed by a third party, Mr Bishop. He summarises the situation by saying I always noticed that there was some tension between Darren and Ken. To me, Ken wanted to continue working in the same manner as he had previously worked, while Darren wanted to make some changes, to ensure that we were operating effectively. Darren was trying to change the store and give it a new image. Ken just did not seem to 'get' this or understand what Darren was trying to achieve.

[30] With respect to the events of 19 February Mr Bishop states:

Darren made it clear to both of us that we needed to reach certain sales targets. He also made it clear that we were on three month trial. I did not take from the statements that Darren was making any threat at all in this regard. He merely wanted us to know that we had to meet certain goals.

[31] I conclude an employer is entitled to set standards, especially when it is facing trying conditions and I accept Mr Bishop's evidence there was nothing untoward in the way it was done.

[32] In the same way Mr Bishop is of the view the discussion in March was simply a reiteration of targets and was not surprising given the situation Mainline Music then faced.

[33] When it was put to Mr Richards that Mr Bishop was essentially saying the March event was innocuous he replied *yes, basically* but says Mr McKean gave details about pay rates and the sales required to cover them. Mr Richards considers that inappropriate. Inconsiderate and a cause of some unhappiness for Mr Richards it may be but it is not repudiatory.

[34] With respect to the events of 24 April Mr Bishop says he is not surprised things came to a head. He claims Mr Richards was constantly going out the back of the store or leaving to conduct his own business. Mr Bishop expresses the view Mr Richards seemed to want to evade work as much as possible. He says that on the morning of 24 April Mr Richards had gone out of the store, got a paper and sat down to read it. He says just before the altercation Mr Richards was near the music section but looking through books for sale and:

The situation seemed to wind Darren up a bit. Darren said to Ken, "Can you do some work".

Ken said, "I have been doing security on the other side of the store."

I had not actually seen anyone on the side of the store that Ken was claiming he had been doing security in.

Darren then said, "No you f...ing well have not."

At that point Darren then walked outside. As I recall, Darren went to his car for at least five minutes or so.

[35] Mr Bishop says Mr Richards then passed a derogatory comment about Mr McKean before also leaving the store. Mr Bishop concludes by stating *at no time did I ever see Darren McKean act inappropriate towards any employee or bully any employee. This includes both Ken and myself.*

[36] There is then 26 April. Mr Richards says he was embarrassed as he was not consulted about Mr McKean's decision which cancelled a practice Mr Richards had established when running Good Vibrations. I fail to understand his complaint. Good Vibrations was another business. As manager of Mainline Music Mr McKean is entitled to make decisions about how the business operates provided they are not

unlawful, unsafe or unreasonable. I see nothing unlawful, unsafe or unreasonable about this decision and conclude it is yet another example of an event which may have annoyed Mr Richards but can not be considered repudiatory.

[37] Unwitnessed was the event of 27 January. Mr McKean acknowledges making an inappropriate comment but his explanation in respect to the rest of the claims are quite plausible and acceptable. I accept his position given his evidence must be considered preferable where events were witnessed. Once again it is matter of annoying behaviour as opposed to repudiatory especially as the one annoying event is a brief comment immersed within a discussion an employer was entitled to pursue.

[38] Finally there is the issue of monitoring Mr Richards Trade-Me activity. Mr McKean accepts he looked at 4 or 5 of the items but denies concerted monitoring. He says he was interested in the prices and the degree to which Mr Richards was undercutting Music Planet. That is an understandable commercial interest. He was also a potential buyer and did purchase two of the items. Again perfectly understandable and I accept his response.

[39] Can the events be considered repudiatory when considered as a whole – ie: a series. Again I consider the answer no as the evidence would suggest at least three of the events (set standards and cease to hold the Jazz Club keys) involved actions Mr McKean was perfectly entitled to take.

[40] All that is left is 24 April - a single event. Unless a one-off occurrence is totally destructive of the relationship it can not constitute the foundation of a constructive claim. This does not come close, especially given Mr Bishop's evidence and the suggestion Mr Richards conduct contributed to some extent.

[41] There is also Mr Richards circumstances at the time. He was recovery from a major medical event and by his own admission returned to work before he should have. The evidence suggests he was brittle and could well have overreacted.

[42] Finally there is the issue of monitoring Mr Richards Trade-Me activity. Mr McKean accepts he looked at 4 or 5 of the items but denies concerted monitoring. He says she was interested in the prices and might even have considered a purchase or two. I accept that.

Section 65 and the penalty claim

[43] Section 65 of the Act requires an individual employment agreement be in writing. The parties agree that was not done in respect to Mr Richards. That does not, however, mean Mainline Music should automatically incur a penalty.

[44] Penalties are imposed where behaviour is wilful. Here the original oversight is, in my view, understandable given the situation and Mr Smith's desire to help a friend. Nor is there any evidence Mainline Music then ignored repeated efforts to rectify the situation. Indeed, Mr Richards evidence is he only mentioned it once and did not pursue the issue. These are not the circumstances in which a penalty is appropriate.

Conclusion

[45] For the reasons given above, I conclude Mr Richards has failed to discharge the onus he carries of convincing me he was dismissed. The actions he relies on to evidence his claim are not repudiatory as is required. His claim therefore fails.

[46] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority