Determination Number: AA 455/05
File Number: AEA 675/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Ian Sampson (Applicant)
AND	Bridgestone New Zealand Limited (Respondent)
REPRESENTATIVES	Daniel Erickson, for Applicant Richard Harrison, for Respondent
MEMBER OF AUTHORITY	Janet Scott
INVESTIGATION MEETING	2 November 2005
DATE OF DETERMINATION	30 November 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

The applicant submits he was unjustifiably disadvantaged and constructively dismissed from his employment with the respondent. To remedy his alleged grievance(s) he claims lost remuneration, loss of benefits and compensation.

The respondent submits the applicant retired from his employment with the respondent on 29 April 2005 and the circumstances pertaining to his decision to retire do not give rise to a personal grievance of unjustified disadvantage or unjustified dismissal. The respondent also submits that the claim of unjustified disadvantage was not submitted within the 90 day period required for the submission of a grievance and the respondent does not agree to the grievance being raised out of time.

Background

Mr Sampson was employed by Bridgestone New Zealand Ltd (Bridgestone) for 13 years prior to his retirement on 29 April 2005. He was employed as a sales representative. In 2004 Mr Sampson was approaching an age where he was considering his retirement but he had not yet advised a date.

In April 2004 there was an informal discussion between Mr Sampson and Mr Cunningham the company's Human Resource Manager in relation to Mr Sampson's plans for retirement.

On 2 July Mr Cunningham followed up this discussion with Mr Sampson and he asked Mr Sampson if he had settled on a date for his retirement. The parties have very different recollections as to the discussions pertaining to Mr Sampson's retirement plans but it is not disputed that performance issues were raised and that a performance management proposal comprising sales training and mentoring was discussed.

On 7 Mr Sampson submitted notice of his intention to retire on 11 March 2005. Unfortunately this letter was not acknowledged by the company.

On 30 August Mr Sampson wrote to Mr Cunningham again. In this letter he submitted that he had been coerced into notifying his retirement date. He noted he had not received a reply to his notice of retirement and that he had not received minutes of the meeting of 2 July which he had previously requested. Lastly he advised that his circumstances had changed and he now wished to terminate his employment on Friday 29 April 2005.

Mr Cunningham was concerned to receive this letter containing the allegation that Mr Sampson had been coerced into nominating his retirement date. He immediately sought a meeting with Mr Sampson. That meeting occurred on 31 August 2004. Present at the meeting were Mr Sampson and Mr Cunningham and Mr Johnson (Mr Sampson's immediate manager). It is not disputed that Mr Sampson was offered the opportunity to obtain representation. He declined that offer.

The parties have different perspectives on the nature and tone of this meeting too. However, it is not in dispute that Mr Sampson was given back both letters and advised that the question of whether he retired and the date for it was up to him. It is also not in question that training and mentoring to assist him to improve his sales performance was also discussed at that meeting.

On 1 September Mr Sampson wrote to Mr Cunningham confirming that he would retire on 29 April 2005. His resignation was accepted and acknowledged by the company and Mr Sampson worked out his notice without incident. A few weeks prior to his planned departure date he was asked by Mr Johnson if he would stay on as the company had not found a replacement for him. He declined this offer.

On 8 April 2005, Mr Sampson's counsel wrote to Bridgestone submitting a disadvantage grievance and putting the company on notice that Mr Sampson's departure on 29 April would be treated as a constructive dismissal.

On 22 April counsel for the company replied explaining its position and advising that Mr Sampson could withdraw his notice and that would be accepted by the company. The company also advised that it would implement a performance management plan if Mr Sampson decided to continue his employment with the company.

Mr Sampson did not withdraw his resignation. His retirement on 29 April was marked by a social function paid for by the company. The evidence suggests this was a happy occasion.

Issues to be Decided

The questions to be answered here are:

- Is the claim of unjustified disadvantage out of time?
- If not, has Mr Sampson suffered an unjustified disadvantage in his employment?
- Did the respondent follow a course of conduct the dominant purpose of which was to force Mr Sampson to resign (retire)?
- Was there a serious breach of duty by the respondent that left Mr Sampson with no option but to resign his employment?

- If there was breach did Mr Sampson affirm the contract in knowledge of the breach?

Discussion and Findings

Unjustified Disadvantage

The disadvantage claim was notified to the respondent on 8 April 2005 – nine months after the events that gave rise to this alleged grievance arose.

The applicant submits the employer has impliedly consented to the alleged grievance being raised out of time. The respondent disputes this.

To some extent the debate on this issue is somewhat academic as the events that give rise to the allegations of unjustified disadvantage are also raised as supporting the claim of constructive dismissal. I note too that in responding to the advice that Mr Sampson considered he had a grievances against the company the respondent addressed the matter as a problem between the parties that called for resolution and immediately proposed that Mr Sampson could withdraw his resignation and continue his employment. It also advised of its readiness to attend mediation. This is entirely consistent with the provisions and philosophy of the Act.

I too, intend to address the matter broadly as an employment relationship problem between the parties that now requires determination. The distinction between an alleged unjustifiable disadvantage and constructive dismissal is an artificial one where the claims rely (to a large extent) on the same alleged breaches of duty.

For these reasons I am addressing this matter as a constructive dismissal claim. The applicant is not prejudiced by this approach because the events that found this claim will be dealt with in determining the constructive dismissal allegation.

Constructive dismissal

With respect to the constructive dismissal claim the applicant bears the onus of proving (on the balance of probabilities) that the termination was, as matter of law, a dismissal and not a resignation. *NZ Amalgamated Engineering etc IUOW v Ritchies Transport Holding Limited* [1991] 2 ERNZ 267.

In *Wellington Clerical Workers' Union v Barraud & Abraham Ltd* [1970] 70 BA 347, Horn SM (as he then was) held that:

> *"An apparent resignation can also amount, notwithstanding the words used, to a dismissal. For example, if the employer's actions or words oblige or strongly tend to induce an employee to proffer a resignation, the result can still be a dismissal in reality."*

In *Western Excavating Ltd v Sharp* [1978] 1 All ER 713 at 717 per Lord Denning MR, Lawton and Everleigh LJJ concurring it was held that:

> *"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is*

entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct which he complains of; for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

This principle has been confirmed by the full Court in *Para Franchising v Whyte* [2002] 2 ERNZ 120.

In *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd* [1985] ACJ 963 the Court of Appeal held that constructive dismissal included, but was not limited to, cases where:

(i) An employer gives an employee a choice between resigning or being dismissed;

(ii) An employer has followed a course of conduct with the dominant purpose of coercing an employee to resign;

(iii) A breach of duty by the employer leads an employee to resign.

Relying on the above principles then, for Mr Sampson to establish that his resignation was in fact and law a dismissal, he must show there was a course of conduct which had the dominate purpose of forcing him to resign or breach of duty by the respondent of such magnitude that it entitled him to terminate the contract of employment. He could, if the employer's conduct was sufficiently reprehensible, terminate his employment immediately or on notice but he must have acted in timely manner to avoid affirming the conduct knowing of the breach.

In arriving at findings in this matter I have had regard to the evidence of the parties, submissions and relevant case law.

Credibility

Mr Sampson's evidence focuses on what he sees as oppressive conduct on Mr Cunningham's part during two conversations where he alleges the threat of implementing a training programme followed by dismissal was used as a threat to extract his resignation.

The evidence of Mr Cunningham and Mr Johnson (to the extent he took part in these conversations) suggest a line of general inquiry that developed into a frank discussion which focussed on the genuine interests of both parties and attempts to find a solution to issues and perceived problems that met the interests of both parties.

For a number of reasons I find that the evidence of Mr Cunningham and Mr Johnson more reliable than that of Mr Sampson. For instance, Mr Sampson's claim that he had no idea what Mr Cunningham was talking about when it came to the performance concerns that were raised is just not supported by the facts. In his December 2003 performance review it was noted that while Mr Sampson kept his established clients very happy there was a need for him to develop new business and his computer skills required development. Mr Sampson concurred with this assessment.

I note too that the weight of the evidence supports the company's position that the concerns raised by Mr Sampson – that he had felt coerced into giving a retirement date – were frankly discussed and resolved at the meeting of 31 August.

As a result, I must say that where the evidence of the parties is in dispute on critical matters it is the evidence of the respondent's witnesses that I prefer.

Findings

I find that in April 2004 Mr Cunningham genuinely believed that Mr Sampson had been talking about retirement. He was happy to take on the task of talking to Mr Sampson to clarify his plans because he had a good rapport with him.

Mr Cunningham had also been charged with taking up with Mr Sampson senior manager's concerns relating to aspects of Mr Sampson's performance. These concerns did not emanate from Mr Johnson other than to the extent he had undertaken the latest performance review (December 2003) with Mr Sampson which identified he needed grow his business base and improve his computer skills. Mr Sampson's retirement plans were relevant to the company's proposal to provide him with training and mentoring to lift his skills – that training being costly in itself.

I find that Mr Cunningham had been made aware of these concerns at his December 2003 performance review with which he concurred. There was no breach by the respondent in raising the matter in July 2004 with a view to a formal training programme to address the performance issues identified and neither was there any breach of duty inherent in the delay in raising the matter in a formal way. Nevertheless, Mr Sampson was insulted and upset that these concerns were being raised formally. Neither could he see any point in putting a 66 year through a performance development programme. It is a pity he reacted as he did because the company was entitled to implement training/mentoring programmes with a view to enhancing the skills of its employees. Indeed the company was obliged to do so if the failure to develop new business could have jeopardised Mr Sampson's employment. (*Trotter v Telecom Corporation of New Zealand Ltd* [1993] 2 ERNZ 659.

I find that to the extent that the disciplinary procedure was discussed between the parties it was described as a process that could be implemented only in the situation where all steps to improve Mr Sampson's performance through training, mentoring, encouragement and support had failed to lift his performance. However, Mr Sampson saw the training proposal as the slippery slope to dismissal for poor performance. I find on the evidence before me that nothing said or done by Mr Cunningham was responsible for Mr Sampson coming to this dramatic conclusion.

I find that such was Mr Sampson opposition to undergoing training that he resolved to notify a date for retirement that would maximize the time he stayed in the job (so as not to jeopardise the trip he planned) while at the same time avoiding the proposed training. It was not the company's proposal that Mr Sampson retire or that he retire on a specific date.

The matter was on the face of it settled when Mr Sampson wrote giving his retirement date as 11 March 2005. There was, I find, an implicit understanding the company would not pursue the issue of training.

I find that when Mr Cunningham received Mr Sampson's letter of 30 August alleging he had

been coerced into retiring he was concerned and immediately sought to address the matter with Mr Sampson. I find the meeting of 31 August got off to a rocky start focussing as it did on this allegation of coercion. However, the meeting moved beyond its rocky start to a discussion of the parties' individual and common interests. I find that the outcome of the meeting (in respect of Mr Sampson's notified resignation) was that the two resignation letters would be withdrawn and the question of whether Mr Sampson retired and when would be left entirely to him.

I do find that the performance matters were discussed at this meeting and the proposal for training and mentoring to assist him to develop the skills he needed was also discussed. It was not the case that the proposal for training was used as a threat to extract a retirement date from Mr Sampson. These were separate issues (albeit both parties had interests which necessarily brought the two topics into a one interests based discussion). Such conversations are I find entirely consistent with the purpose of the Act which is to encourage good faith conduct between parties and thereby constructive and productive employment relationships.

I find that the meeting ended on an amicable note. After the meeting Mr Sampson wrote to confirm that he would retire on 29 April 2005 and Mr Sampson's employment continued without event. The company did not pursue its proposals for training.

Shortly before his retirement date Mr Sampson turned down a personal approach from Mr Johnson that he continue his employment because the company had not found a replacement for him.

After the submission of grievance the company again notified Mr Sampson they would accept the withdrawal of his notice. His job was then kept open for him to return until after the mediation held with a view to resolving the problem between the parties.

Mr Sampson took part in a farewell function put on and paid for by the respondent.

Conclusion

The respondent was entitled to implement a training/skills development programme with Mr Sampson. The IEA binding the parties supported the implementation of development initiatives and the disciplinary procedure contained in the company's code conduct explicitly requires that positive action including training, support, encouragement and feedback be taken prior to considering disciplinary action for non performance. Disciplinary action, if necessary, may have emerged months in the future (I would suggest) and only when any training and mentoring programme put in place to support Mr Sampson in the acquisition of the desired skills had been unsuccessful.

It was also open to the employer to have a frank and open discussion with Mr Sampson regarding his retirement plans given the employer had a genuine belief Mr Sampson was considering retirement and given the fact that the planned training proposal was expensive in itself. Mr Sampson was not the only person to whom it occurred that training did not make much sense if it was his genuine intention to retire. On the facts of this case there was no conduct that meets the tests described above that would result in a finding that Mr Sampson was constructively dismissed from his employment.

If I am wrong in my findings in this matter I must also conclude that it is inconsistent with the principle of good faith and the mutual trust and confidence essential to employment

relationships for an employee to store up grievances with a view to smiting the employer with them months after the event. Employers are prohibited from raising matters in a disciplinary setting months after the event(s) that have given rise to concern. *Donaldson and Young v Dickson* [1994] 1 ERNZ. The same principle applies to employees. That is why there are time limits attached to the right to pursue grievances and where constructive dismissal is alleged the findings in *Western Excavating* and *Para Franchising* (cited above) are clear. If there were any breach that I could detect on the facts in this matter then I would have found that Mr Sampson affirmed the contract knowing of the breach. The delay in terminating the relationship in reliance on the breaches of duty by the employer was fatal in itself.

There would have been other problems had Mr Sampson succeeded in his claim. He did not mitigate his loss. He was twice offered the opportunity to continue his employment with Bridgestone and declined that opportunity. He said this was because he had been found to be a poor performer and he was not comfortable with continuing on that basis. For the record I note that Mr Sampson was not "found to be a poor performer". His performance was generally good but could stand some improvement particularly in the important task of securing new business. However, the point that needs making about this explanation for not taking up the offer of ongoing employment is that Mr Sampson was happy to work for seven months with the mindset that he had been found to be a poor performer. It was no impediment to his ongoing employment between September 2004 and April 2005 and it was therefore no impediment to him continuing his employment for any period up to August 2005 when he says he did intend to retire. Mr Sampson did not mitigate his loss. I also note there was no humiliation to be remedied. Mr Sampson left his employment on good terms.

Determination

Mr Sampson was not constructively dismissed and his application is declined. For the sake of certainty, I also find that the facts of this matter would not have given rise to any finding of unjustified disadvantage had that issue been formally addressed.

Costs

Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined

Janet Scott
Member of Employment Relations Authority