

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2018] NZERA Wellington 79
5638767

BETWEEN RICHARD SHIRTCLIFFE
 Applicant

AND TUATARA BREWING
 COMPANY LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Jol Bates, Counsel for Applicant
 Samantha Turner and Shivana Pemberton, Counsel for
 Respondent

Investigation Meeting: 10, 11, 12, 13, 14, 17, 18 and 19 July 2017 at Wellington

Submissions Received: 28 July, 29 August and 6 September 2017 from
 Applicant
 28 July, 31 August, 1 September and 6 September 2017
 from Respondent
 Further exchanges up to and including 4 December 2017

Determination: 6 September 2018

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Richard Shirtcliffe, has four claims. There are two applications for damages arising from alleged breaches of Mr Shirtcliffe's individual employment agreement (IEA) and two personal grievance claims.

[2] The damages claims both relate to contractual provisions concerning employee incentive schemes – one long term (LTI) and one short (STI).

[3] The personal grievances claim Mr Shirtcliffe was unjustifiably dismissed, albeit constructively, and that he was unjustifiably disadvantaged as a result of the respondent, Tuatara Brewing Company Limited (Tuatara), placing him on garden leave prior to cessation.

[4] Tuatara denies the claims in their entirety. With respect to the constructive dismissal claim it says Mr Shirtcliffe willingly resigned to take up a new role he had either actively sought or been headhunted for. It denies he was unjustifiably disadvantaged or that it acted in breach of the IEA in relation to either incentive scheme.

[5] Tuatara also raised a significant counter-claim saying Mr Shirtcliffe breached both express and implied terms of his Individual Employment Agreement (IEA) as well as his obligations of good faith.

[6] In particular it is claimed Mr Shirtcliffe breached various obligations by failing to:

- a. act in good faith under sections 4(1)(a) and 4(1A)(b) of the Employment Relations Act 2000;
- b. act in accordance with his duties of fidelity, good faith and honesty;
- c. act in the respondent's best interests;
- d. act in a way so as not to undermine the respondent's trust and confidence in him; and
- e. disclose relevant information to the respondent about the respondent's business.

[7] Damages and penalties are sought.

Background

[8] The following is a very brief summary of a considerably more detailed timeline – indeed there were thousands of pages of evidence and accompanying documents.

[9] Mr Shirtcliffe was employed by Tuatara as its Chief Executive Officer and while his terms of employment were concluded earlier he commenced in January 2014. His terms of employment were contained in an IEA which, pertinent to his breach claims, included a schedule containing the remuneration provisions. There were two sub clauses which read:

2. **Performance Bonus**

Following the end of each financial year you will be assessed for entitlement to a Performance Bonus relating to your performance during the completed year. Assessment of your entitlement under the Performance Bonus scheme will take account of agreed performance criteria, and the final assessment of any amount payable shall be at the sole discretion of the Board.

The amount of the Performance Bonus paid will be up to 15% of your Base Salary for the applicable financial year. At the beginning of each financial year, following the annual business planning process, the Board will agree with you the performance criteria for the forthcoming year. The criteria will reflect the Company's strategic objectives for the year and the individual objective for you as Chief Executive.

Where your employment commences part way through a financial year, the Performance Bonus will be pro-rated for that year. Where employment is terminated part way through a financial year, the Performance Bonus may be pro-rated for that year at the sole discretion of the Board.

3. **Long Term Incentive Scheme**

Following your commencement as Chief Executive, the Company will discuss with you and implement a Long Term Incentive Scheme for you based on the value added for the shareholders during your period as Chief Executive. This Scheme is expected to be an equity participation scheme or similar and will be based upon market guidelines for the role. For clarity, this Long Term Incentive Scheme will be additional to the Performance Bonus provision described in item 2 above.

[10] While the agreement said the parties would *discuss... and implement* an LTI scheme it failed to specify either a timeframe within which this would be done or outline some form of framework which could be followed or applied. It left that open for discussion.

[11] The evidence shows the parties discussed the schemes but were unable to agree their form and the way in which outcomes would be measured.

[12] Another crucial issue during Mr Shirtcliffe's tenure was the possibility Tuatara would be sold. It is fair to say the owners sought from the CEO outcomes which would enhance Tuatara's value to prospective buyers and with that the price which might be attained.

[13] In preparing the company for this possibility there was a growth strategy but while revenue grew, costs climbed at an even greater rate during Mr Shirtcliffe's tenure. This affected overall profit and, from the shareholders point of view, the value of their investment which they consider impaired during Mr Shirtcliffe's tenure. This could, of course, reflect itself in the price achieved in any subsequent sale.

[14] From Mr Shirtcliffe's perspective a number of problems resulted from issues such as under capitalisation and inadequate maintenance both prior to his arrival and during his tenure. Mr Shirtcliffe attributes this to the Boards unwillingness to approve necessary expenditure which, while it might improve the balance sheet and the price obtainable on sale, impeded achievement of the strategic goals he understood he had been set.

[15] These issues essentially resulted in a form of standoff and saw the Board, or at least some influential members thereof, developing a negative view of Mr Shirtcliffe and his achievements. As a result Tuatara's directors decided to seek an independent strategic review of the company so they could, in their words, make informed decisions on options to optimize shareholder value.

[16] In late July 2016, and while this process was playing out, Mr Shirtcliffe tendered his resignation having obtained alternate employment with another Wellington company.

[17] Finally it should be noted Tuatara was sold to DB Breweries some seven months after Mr Shirtcliffe left.

Discussion

[18] This determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances existed to allow a written determination of findings at a later date.

[19] As already said there are a multiplicity of claims. Mr Shirtcliffe claims he was unjustifiably dismissed, unjustifiably disadvantaged (unjust suspension) and owed significant sums as a result of Tuatara's failure to ensure the parties comply with contractual requirements they conclude an agreement in respect to various incentive schemes. Tuatara claims Mr Shirtcliffe failed to act in good faith and breached various obligations inherent in his employment agreement.

Constructive dismissal

[20] Mr Shirtcliffe claims he was constructively dismissed.

[21] In *Wellington etc Clerical Workers etc IUOW v Greenwich*¹ 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.

[22] While a simplistic summary of more complex law, the underlying assumption is actions or words of the employer amounted to a breach which induced a subsequently proffered resignation. It is for the applicant to convince me that is the case. There must also be a causal link between the employer's conduct and the tendering of the resignation² and the possibility of resignation should be foreseeable.³

[23] Notwithstanding considerable evidence which went well beyond the following reasons for dismissing the claim I am convinced by both the evidence and the respondent's submission that Mr Shirtcliffe has failed to comply with some of the requirements for establishing a claim of constructive dismissal.

[24] Mr Shirtcliffe gave verbal advice of his resignation on 28 July 2016. Two days later he followed that with written confirmation to Board chair, Phil Veal. In the letter he makes no mention of dissatisfaction instead thanking ... *the Board for the opportunity to lead such a wonderful company and team*. The letter goes on to say Mr Shirtcliffe felt extremely proud that while there *we* overcome a number of challenges to turn Tuatara into ... *NZ's number 1 independent brewery by value*. He advises he would follow Tuatara's progress with pride and delight before going on to remind Mr Veal of the unresolved question of incentive payments. Mr Shirtcliffe closes by wishing Mr Veal, the shareholders and wider Tuatara team ... *the very best for a profitable and successful future*.

[25] The letters content is not indicative of a person forced from their employment by a repudiatory breach that leaves no choice and I have to note such an omission was deemed pertinent by the Court of Appeal in *Business Distributors v Patel*.⁴

¹ (1983) ERNZ Sel Cas 95; [1983] ACJ 965

² *Z v A* [1993] 2 ERNZ 469

³ *Weston v Advkit Para Legal Services Ltd* [2010] NZEmpC 140

⁴ [2001] ERNZ 124 at [22]

[26] The evidence is Mr Shirtcliffe's resignation was preceded by his acceptance of an offer from his new employer. It also shows he had been aware of, and attempting to gain, the position for at least eleven weeks.

[27] As the respondent said in submission

The applicant resigned from his employment the same day as he accepted employment with Coffee Supreme, advising "I *accepted the role at Supreme, and then resigned from Tuatara on July 28*". This demonstrates the resignation was not caused by a breach of duty by the respondent and that it was caused by the applicant's acceptance of alternative employment.

[28] Other contemporaneous documents support a conclusion the above submission is correct. One example is an unauthorised press release Mr Shirtcliffe issued and in which he described his change of employment as bittersweet.⁵ Another is an e-mail he sent to Mr Veal on 3 August. It states Mr Shirtcliffe wishes to remove any misinterpretation about motives and clarify issues before going on to say, amidst other things:

Simply: I've been poached away; I've resigned; and before I finish up I want to ensure that loose contractual ends (LTI and STI) are finally resolved (after 3 years of waiting and deliberately avoiding legal challenge to resolve them so as to try to keep working relationships intact the

The fact that this has coincided with a sale process (about which I knew nothing until I had crystallised my deal with my new employer) is incredibly unfortunate but one shouldn't muddy the other.

[29] I conclude that last document goes a considerable way to undermining Mr Shirtcliffe's attempt to now attribute his departure to the respondent's alleged breaches and particularly the failure to conclude an agreement in respect to the incentive bonuses. The evidence is he was more than willing to bid his time, and while he did raise the issue of the incentives on various occasions his own evidence is the failure to reach a conclusion was never identified as potentially destructive of the employment relationship prior to his having obtained an alternate. As he wrote himself – *Simply, I've been poached away*.

[30] In other words the casual link has not been established. The evidence supports Tuatara's submission *The intervening and dominant cause [of the resignation] was an offer of alternate employment*.⁶ Indeed the event Mr Shirtcliffe now portrays as the final straw,

⁵ Stuff article attributed to Collette Devlin dated 10 August 2016

⁶ Respondent's closing submission at [9.28]

namely the strategic review, was not completed nor seen by Mr Shirtcliffe until after he had been first interviewed by the new employer.

[31] Similarly the evidence leads to a conclusion Tuatara has no inkling Mr Shirtcliffe was about to depart. Again I note that while he attributes the final decision to resign to the strategic report his contemporaneous responses record a view he considered six of the seven conclusions sensible and in accordance with comments he had expressed to the reviewer.⁷

[32] The seventh conclusion, and the one with which Mr Shirtcliffe expressed disagreement, suggested he had, to date, failed to deliver a comprehensive strategic plan and budget for the upcoming year. In his response Mr Shirtcliffe challenges the accuracy of the above conclusion and observes *The Board can have every confidence in my ability to play that lead role in support of a sale process*. That statement could be even be construed as indicating Mr Shirtcliffe intended remaining into the foreseeable future which again creates doubt about the foreseeability of his resignation.

[33] Having considered the evidence I conclude Mr Shirtcliffe has failed to discharge the duty he carries of establishing a prima facie argument he has been constructively dismissed and which Tuatara need defend. The claim is dismissed.

Disadvantage

[34] Mr Shirtcliffe claims he was unjustifiably disadvantaged by virtue of Tuatara's decision to suspend him in the period immediately prior to his cessation.

[35] The background pertinent to this claim is as follows.

[36] On 28 July 2016 Mr Shirtcliffe advised his resignation adding that while happy to take the Board's direction on handling the announcement Mr Veal should be aware a colleague already knew.

[37] Mr Shirtcliffe says it was then Mr Veal revealed the Board had decided to pursue the sale of Tuatara and an investment adviser had been contracted to take the business through the process and was coming in the following day. Mr Veal says this advice was given three days earlier and there is e-mail correspondence to support that.

⁷ Mr Shirtcliffe's written 'Response to Strategic Review'

[38] The letter confirming the resignation followed on 30 July and contained a reminder the question of incentive schemes remained unresolved.

[39] On 3 August Mr Shirtcliffe emailed Mr Veal encouraging a swift announcement to staff on the grounds his new employer had already made his appointment known to its staff.

[40] On 8 August 2016 Mr Veal met with Mr Shirtcliffe at Tuatara prior to announcing the impending sale process to staff. Mr Shirtcliffe took it as an opportunity to raise his desire they complete the LTI prior to his departure and suggested mediation. It was at this time Mr Veal is said to have advised the author of the strategic report, Rob Wiles, would be appointed interim GM and he would be arriving very soon.

[41] Mr Wiles duly arrived. He was introduced to staff as the interim GM and to whom all would report. The sale was then announced. Mr Shirtcliffe was upset at the way events unfolded and expressed his dissatisfaction by email to Mr Veal that evening. The main thrust of the e-mail was to criticise the Boards dysfunctional approach, the way the sale had been advised and express a view there had been a reluctance to answer relevant questions.

[42] Further attempts the two communicate failed and culminated in a text from Mr Veal late morning on 10 August advising:

On plane now so can't call back. Further to the emails last night, under clause 11.1(i) and (ii) of your contract we now direct that you do not report to the workplace or contact staff unless asked to. Please keep phone on and work from home assisting Rob and Hugh as required. Talk further soon.

[43] Mr Shirtcliffe acknowledged receipt and advised *My lawyer will be in contact*. He left the workplace approximately 20 minutes later and was almost immediately had his e-mail access blocked.

[44] In addressing this claim it is said on Mr Shirtcliffe's behalf that:

There was no good reason offered as to why the Applicant, who otherwise had a right to work unless his removal was justified or necessary for the protection of the business, had to be stood down⁸.

⁸ Applicant's closing submission at [7.3]

[45] Tuatara position is essentially that it had a contractual right to proceed as it did with clause 11.1 allowing it require Mr Shirtcliffe stay away and cease interacting with staff and business contacts in order to protect the respondent's business during his notice period.

[46] To that is added an argument that at least initially Mr Wiles was not being appointed as CEO but as GM responsible for day to day operational matters which might benefit Tuatara's attainment of various operational goals and thus enhance its value upon sale.

[47] On this I prefer the position proffered by Tuatara. While the evidence supports a conclusion there was a distinct lack of consultation in respect to the decision which would normally render it unjustified the fact is that here the parties had already put their minds to the issue and addressed it when entering into their arrangement. That is not unusual in respect to CEO's and other senior managers. The employment agreement expressly states:

Either you or the Company may give notice of termination of this agreement. ... You acknowledge once notice is given by either party, it may be necessary for the Company to protect its business in any one of the following ways: ... To require you not to work out your notice period in part or in total and for you to take 'garden leave' during this time, which means you will remain employed by the Company during the period of your notice, but will not be required to undertake any or part of your normal duties during this time.

[48] That the parties had turned their minds to the issue and were aware of this provision is confirmed by Mr Shirtcliffe's acknowledgement, when questioned, he expected the suspension. To that I add a conclusion the evidence shows he had, by then, exhibited some behaviours that undoubtedly could, and indeed did, concern Tuatara and which made suspension likely.

[49] Finally I note that even if wrong and the *garden leave* should have been considered unjustified it is unlikely any remedies would have accrued. There was little supporting evidence; indeed it was limited to one sentence in the brief or evidence which says *I was completely humiliated by these actions which were in my view completely unnecessary.*⁹

[50] It is difficult to see how complete humiliation could emanate from a decision that was contractually approved and the occurrence of which the applicant expected. This claim is also dismissed.

⁹ Brief of evidence at [5.16]

Incentive schemes

[51] The employment agreement cites two forms of incentive scheme through which Mr Shirtcliffe might be entitled to enhance his remuneration. They were a performance bonus more commonly referred to during the investigation as the short term incentive (STI) and a long term incentive scheme (LTI). It is the later the parties concentrated on as it had the potential, especially according to Mr Shirtcliffe, to generate a significant sum to which he was entitled but deprived. It is this Mr Shirtcliffe describes as the principle employment relationship problem before the Authority.¹⁰

Long Term Incentive scheme

[52] The submissions in this regard are extensive. Mr Shirtcliffe's amounted to some 80 pages and Tuatara's, while shorter, are also extensive. While the Authority need not record these¹¹ a summation of the party's positions is, I consider, useful.

[53] From a factual perspective it is Mr Shirtcliffe's view he was recruited to grow Tuatara's business and in return receive various benefits including access to ... *a Long Term Incentive scheme, equity participation or similar*.¹² He says the scheme was to be based on the shareholder value added over the whole of his period of employment, whatever that turned out to be, and was to be in accordance with market guidelines for the role.

[54] Mr Shirtcliffe says the opportunity was such he gave up alternative opportunities and then put his heart and soul into Tuatara, its growth and profitability. He says he reasonably expected that as Tuatara's most senior employee he would, in return, be entitled to share in the value added in the same way the shareholders had and an injustice has occurred as a result of his being deprived of that benefit.

[55] While the detail has been expansively explained the legal position underpinning the claim may be quickly summarised. The employment agreement states Tuatara will discuss and implement the LTI. Will is a word of compulsion. It must happen and the clause placed responsibility with the company. Tuatara's failure to comply constitutes a clear breach that has deprived Mr Shirtcliffe of a benefit to which he was unarguably entitled. As Mr

¹⁰ Applicant's closing submission at [1.6]

¹¹ Employment Relations Act 2000, s 174E(b)(ii)

¹² Above n 10 at [1.1]

Shirtcliffe put it, the Authority is simply being asked to uphold the parties bargain¹³ and, through an award of damages, make good the contractual commitment,¹⁴ rather than unjustly enrich the shareholders.¹⁵

[56] In summary, the respondent's case is it did not breach the IEA by failing to conclude an LTI. It says:

- (a) the applicant has attempted to argue a strained interpretation of the LTI clause at issue. However, the terms of the relevant clause are so uncertain as to be unenforceable. To award the damages claimed by the applicant, the Authority would have to fix terms and conditions of employment (which is barred by section 161 (2) of the Employment Relations Act 2000 (Act));
- (b) if the Authority finds that the respondent has breached the applicant's employment agreement and that it has jurisdiction to fix the terms and conditions of an LTI scheme and to assess damages (which is denied):
 - i. the applicant cannot reasonably be deemed to have met any objective criteria, that would have been in line with market guidelines for his role, that would have triggered any entitlement under an LTI scheme had one been implemented;
 - ii. the applicant is not entitled to the damages he seeks;
 - iii. alternatively, the damages sought by the applicant are a stretched interpretation of the clause and there are no market comparisons that could achieve the outcome he seeks...¹⁶

[57] After extensive consideration of the submissions I consider those of Tuatara to be the more persuasive. While it is clear there is a contractual term and it has not been complied with I am persuaded by the underlying argument the Authority is a creature of statute whose powers are both specified and limited by that statute. One of the limitations is a provision stating the Authority does not have jurisdiction to make a determination in respect to anything which relates to the fixing of new terms and conditions.¹⁷

[58] It is clear from the evidence of Ian Frame, Tuatara's then Chair who negotiated the agreement with Mr Shirtcliffe, the intent was to remunerate at a level consistent with fair market standards. It is also clear the wording used was designed to require further substantial consideration with the relevant performance assessed against outcomes contemplated by Mr

¹³ Applicant's closing submission at [1.9]

¹⁴ Above n 13 at [1.10]

¹⁵ Above n 13 at [1.10]

¹⁶ Respondent's closing submission at [1.3]

¹⁷ Employment Relations Act, s 162(2)(b)

Shirtcliffe's position description. In respect to those outcomes the evidence supports the submission that:

the respondent's business at all times of the applicant's employment was focused on achieving the rolling 12 month \$2m EBITDA Earnout target. A key touchstone of value added for the shareholders would have been the achievement of the Earnout;¹⁸

[59] Mr Shirtcliffe's evidence does nothing to undermine these assertions and here it should be noted neither the above earnout, nor anything close, was achieved. There is, therefore, a strong argument that had the parties concluded an arrangement guided by the parameters originally envisaged no payment would have occurred and it is perhaps that realisation which tempered Mr Shirtcliffe's later approach – both his reluctance to agree terms when discussion occurred and his reluctance to push the failure to agree with any enthusiasm.

[60] Mr Frame was also adamant the benefit deliverable as a result would be similar to that achievable under the STI – namely something in the order of 15% of Mr Shirtcliffe's base salary. It was never designed to produce the type of windfall now sought and which amounts to some three times Mr Shirtcliffe's salary and based upon an assumption the clause could allow an open ended bonus. It is also worth noting that an equity event (ie: the business' sale) was not then in contemplation and there could not therefore have been any intention the scheme would be *essentially self funding through a successful liquidity event* as would be required were I to now accept the claim as couched.

[61] In other words, and Mr Shirtcliffe's evidence does not dispute this, the parties, as part of their discussion and the original setting of terms, left part there-of incomplete. I conclude I am barred from completing the process as to do so would be to specify components of the original bargain. I am precluded by statute from doing so.

[62] Even if that were not the case a significant issue would arise in respect to damages. Normally damages for breach must be measurable and imposed so as to restore the wronged party to the position it would have occupied had the breach not occurred. That would be almost impossible in this situation.

¹⁸ Respondent's closing submission at [3.2(h)]

[63] On one side I have to say the evidence leads me to agree with Tuatara's proposition the remedy Mr Shirtcliffe seeks and which he expresses as a simple mathematical exercise which would see him receive a proportion of the final price obtained upon sale to DB minus an amount to recognise the value when he arrived is tantamount to allowing him to unilaterally *elect to pick minimal, yet highly favourable, isolated elements from the rejected proposal in order to secure an outcome that was never contemplated or intended by the parties.*¹⁹

[64] In this respect there are three further difficulties. First, and while the sale price is known, the opening value would be a source of much conjecture and estimation. Second the sale price, while known, was achieved some time after Mr Shirtcliffe's departure and the effect on it of actions in the intervening period are incalculable. Here I also have to note significant evidence which indicates the price achieved was driven by external environmental factors as opposed to Tuatara's true value as a going enterprise. Third I have to note the while there was some reluctance to specify exactly what the market might have dictated the evidence of the expert witnesses, who were called by both parties, would suggest the parameters in Mr Frame's mind were not unreasonable or inappropriate and, as conceded by one of Mr Shirtcliffe's experts the outcome he seeks would be unusual.

[65] For these reasons the claim fails.

Short Term Incentive Scheme

[66] The executive summary in respect to Mr Shirtcliffe's submission regarding the STI is relatively brief. His position is that:

The Respondent did not comply with its contractual commitment to assess a Performance Bonus on an annual basis either. The relevant clause required the setting of performance objectives on an annual basis, and assessment against them. The Respondent expressly accepts that obligation remains notwithstanding the employment relationship has ended, ... The Applicant is entitled to damages as a consequence of that plain breach as well assessed on an equitable basis, but with the acknowledgement that the short term earnout target was not met (albeit through a technicality) and other mitigating reasons.²⁰

¹⁹ Respondent's closing submission at [2.1(c)]

²⁰ Applicant's closing submission at [1.44]

[67] Tuatara's response is the same as that proffered in respect to the LTI. For the same reasons I accept it. I am barred by s 162 from determining the any resulting quantum.

Counterclaim

[68] As already said Tuatara raised a significant counterclaim. It was staunchly defended.

[69] Again these issues have generated significant submissions – some 170 pages from both parties. This time they will be neither recorded nor even summarised.

[70] While this may now appear dismissive nor do I choose to discuss the underlying facts. This is because after considering the issues at some length I have concluded that to do so would be a fruitless and potentially destructive exercise which is unwarranted. Suffice to say this matter involved a number of successful individuals with considerable reputations. Notwithstanding that it is clear some relationships were strained and the resulting rifts were significantly enhanced by this litigation. In this respect I refer not only to Mr Shirtcliffe's relationship with some members of the Board but also some internal strife within Tuatara's Board reflected in diverse aims and which may have caused Mr Shirtcliffe some grief in that it clearly affected access to funds he considered necessary if he was to develop the business in the way he understood the Board sought.

[71] As already said I consider a detailed public analysis unproductive especially as I have concluded, after considering the submissions, that even if Tuatara was successful in establishing its claims if could not, in a way similar to that in which Mr Shirtcliffe might have found himself, be capable of attaining the remedies sought. In this respect I find Mr Bates' submissions highly persuasive.

[72] The remedies were damages and penalties.

[73] With respect to damages I note two constraints. The first is, as submitted by Mr Bates, the case law upon which Tuatara relies appears to have overtaken. As more recent decisions state there is a now severe question as to whether or not such claims have validity. Here I note the references to *George v Auckland Council*²¹, *Katz v Mana Coach Services Limited*²² and *Everist v McEvedy*²³, and the inherent implication it is:

²¹ [2013] ERNZ 675

²² [2011] NZCA 610, [2011] ERNZ 186

... strongly arguable that in the modern context of employment relationships in New Zealand, and in light of the mutual obligations conferred on the parties under the Act, an employer may not seek to recover damages from an employee arising from acts of negligence committed during the course of their duties. If it were otherwise it would likely have a chilling effect on the way in which employees undertake their duties, could lead to reactive claims or threats of claims against those taking the personal grievances which would undermine the statutory framework for resolving employment relationship issues, and expose employees to significant potential financial liability for a breach even in circumstances that could never justify a dismissal. It also raises policy concerns about the fair allocation of risk and which party is best placed to mitigate potential liability.²⁴

[74] Similarly I note the Court's comments in *Rainbow Falls Organic Farm v Rockwell*²⁵ to which Mr Bates refers and in particular the passage:

*There is some attraction to his argument that if a reasonable bystander had asked the parties at the outset of their employment: "what happens if the employee does not perform his/her duties to a satisfactory standard?" the answer would be "disciplinary action which could result in dismissal", rather than "the employer could undertake disciplinary action which could result in dismissal and also sue the employee for damages for the loss associated with the poor performance."*²⁶

[75] That must be especially so in a situation such as this where the evidence shows Tuatara did little about issues that concerned and of which it was aware while Mr Shirtcliffe remained. It definitely did nothing formal.

[76] Furthermore, and in a way similar to Ms George, the evidence convinces me Mr Shirtcliffe did nothing intended to damage and his endeavours were, prior to physical departure, aimed at advancing Tuatara's interest. This is so irrespective of how they are now viewed or characterised with that characterisation seemingly influenced or enhanced by the development of negative views by some Board members as a result of this litigation.

[77] There is also strong evidence some of the things about which Tuatara now complains cannot be attributed to improper action by Mr Shirtcliffe in the way now alleged. In particular I note the claims regarding staff retention. Some of those to whom these claims apply appeared and their evidence made it very clear they were acting of their own volition and on the basis of their own beliefs as opposed to being influenced or in some way controlled by Mr Shirtcliffe.

²³ [1996] 3 NZLR 348 (HC)

²⁴ *George v Auckland City Council* at [147]

²⁵ [2014] ERNZ 275

²⁶ Above n 25 at [57]

[78] There are then the penalties. Penalties are punitive and apply to wilful wrongdoing. As just said the evidence strongly supports a conclusion Mr Shrtcliffe, while he may have acted in a way with which Tuatara now takes issue, did not, at least prior to his physical departure, act in a way wilfully designed to harm and there is little evidence he did so after departure.

[79] Finally I note the fact that while the claims were brought in Tuatara's name they were pursued by Rangitira Limited which was, prior to the sale to DB, a significant shareholder. That and the fact Rangitira would both fund the litigation and be the potential beneficiary should the counterclaims produce some fruit only came to light after the investigation. It was then the source of significant correspondence.

[80] I have noted paragraphs 2.104 to 2.118 of Mr Shirtcliffe's submission. Suffice to say their content they not only raises but is sufficient to convince me there is a strong argument (albeit only visible after the event) the counterclaims should never have proceeded.

Conclusion and costs

[81] For the above reasons all claims brought to the Authority, be they those of either Mr Shirtcliffe or Tuatara, are dismissed.

[82] Costs are reserved.

[83] Finally it should be noted the agreement for the sale of Tuatara to DB Breweries was before the Authority with its production having been ordered.²⁷ Suffice to say there was some concern about this given the commercially sensitive nature of its content. As a result I undertook to prohibit the publication of its content. That order remains.²⁸

M B Loftus
Member of the Employment Relations Authority

²⁷ Employment Relations Act, s 160(1)(a)

²⁸ Above n 22, Schedule 2 at 10