

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2012] NZERA Auckland 214  
5340399

BETWEEN	KENNETH RALPH SHOEBRIDGE Applicant
A N D	PARAKAI MOTORDROME 2009 LIMITED Respondent

Member of Authority: K J Anderson

Representatives: E Bluegum and A Jefferies, Counsel for Applicant  
P McBride, Counsel for Respondent

Investigation meeting: 23 February 2012 at Auckland

Date of Determination: 22 June 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant, Mr Kenneth Shoebridge, claims that he was unjustifiably constructively dismissed on or about 6 December 2010. Mr Shoebridge asks that the Authority find that he has a personal grievance and award him various remedies. Conversely, the respondent, Parakai Motordrome 2009 Limited (PML) says that Mr Shoebridge was not constructively dismissed. Rather he resigned during the course of a restructuring process.

[2] PML has a counterclaim against Mr Shoebridge. It is alleged that Mr Shoebridge resigned from his employment and failed to work out the 21 days notice with the result that the business incurred damages. PML also seeks that a penalty for breach of the employment agreement be imposed upon Mr Shoebridge.

## **Background**

[3] PML operates a small mechanical repair shop business. It also operates as an Automobile Association (AA) breakdown contractor. Mr Bernard Flynn, the managing director and principal shareholder of the company, purchased the business in June 2009. Mr Shoebridge commenced employment with PML on 29 June 2009.

[4] The evidence of Mr Shoebridge is that, at the commencement of his employment, he worked as a general mechanic for about a month and then when the changeover of the ownership was complete, he assumed his full duties as supervising mechanic. The common evidence of Mr Shoebridge and Mr Flynn is that the employment relationship was reasonably congenial during the first year.

## **Health issues**

[5] About the end of January 2010, Mr Shoebridge was admitted to hospital with chest pain. He was diagnosed with high blood pressure but no cardiac problems were found. Mr Shoebridge returned to work having only been absent from work for one working day. Mr Shoebridge incurred some similar high blood pressure symptoms in mid-March and again in May 2010. On 21 June 2010, Mr Shoebridge was found to have “dangerously high” blood pressure and was admitted to hospital. He returned to work on 29 June 2010. It appears that Mr Flynn had some concerns about Mr Shoebridge’s health and he recommended that Mr Shoebridge visit his doctor and discuss taking some time off work until his health stabilised. Mr Shoebridge subsequently was told by his doctor that he should not work for three months but he says that he persuaded the doctor that he should only stop work for three weeks as he was feeling “a lot better”. Mr Shoebridge says that he was off work until about the end of July 2010.

[6] Upon his return to work, it appears that Mr Flynn still had some concerns about Mr Shoebridge’s health and Mr Shoebridge carried out what have been termed office duties for two weeks. Mr Shoebridge says that after he returned to work after his ill health, he noticed “a remarked change in attitude” towards him from Mr Flynn. Mr Shoebridge says that he was required to do extra work. In particular, he refers to stock control and procedure write-ups (work policies and procedures). Mr Shoebridge also attests that he previously had the use of a work car but when he returned to work he no longer had access to the car. Mr Shoebridge says that Mr Flynn began to exhibit

“a lot of animosity” towards him. Indeed, Mr Shoebridge portrays a situation where Mr Flynn, allegedly, underwent something akin to a campaign against him following his return to work.

[7] However, on the weight of the evidence, I find that there is no substance to the allegations made by Mr Shoebridge and that his perception of some relatively minor events is largely an exaggeration of the true situation. For example, the matter of the car no longer being available to him was quite simply (and logically) explained by the fact that the vehicle was used for AA breakdown call outs and as Mr Shoebridge was ill, other staff carried out the AA call outs. Mr Flynn says that Mr Shoebridge having the use of the car prior to his illness was really just a “perk” and there was no contractual entitlement to the use of the car. In regard to Mr Shoebridge carrying out alternative work, this was because, during his absence, another mechanic had to be employed and upon the return of Mr Shoebridge this person was still there, hence Mr Shoebridge was utilised to carry out some other duties that were important to the business.

[8] On the whole, while I accept that Mr Shoebridge may have undergone some minor changes in routine upon his return to work after his ill health, I find that there is little tangible evidence available to support his allegations about the general attitude and behaviour of Mr Flynn towards him immediately following that return to work.

### **Further events**

[9] On 13 November 2010, there was some discussion between Mr Shoebridge and Mr Flynn relating to some apparently negative feedback that Mr Flynn had received from a customer regarding Mr Shoebridge. It appears the conversation then led to Mr Flynn informing Mr Shoebridge that due to the financial position of the business he would like Mr Shoebridge to consider relinquishing the supervisory role and do more mechanical work, so that the business could charge out more hours relating to that type of work. The evidence of Mr Flynn is that he asked Mr Shoebridge to consider the idea so that they could discuss it further.

[10] Mr Shoebridge has a different view of this discussion. He says that Mr Flynn told him about how the business was in financial difficulty and then informed Mr Shoebridge that he wanted him to resign from his position “*or he would take steps to remove me*”. Mr Shoebridge says that Mr Flynn told him that it would “*look better*

to other staff” if he resigned. Mr Shoebridge attests that Mr Flynn “*made it clear that he was going to remove me if I didn’t [resign]*”. In regard to this latter point, Mr Flynn acknowledges that he did say to Mr Shoebridge that it would look better to the other staff if Mr Shoebridge announced it was his idea to relinquish the supervisory role and carry out the mechanical work as discussed. Mr Flynn denies the allegation that he wanted to remove Mr Shoebridge.

### **Meeting 22 November 2010**

[11] As a result of a request by Mr Shoebridge, a meeting between him and Mr Flynn took place on 22 November 2010. Mr Shoebridge was accompanied by Ms Paula Fitzgerald in a support role: she also took notes which appear to be commonly accepted as being a reasonable reflection of the matters that were discussed. In summary, the notes record that:

- (a) The meeting was arranged at the request of Mr Shoebridge to discuss the current situation in regard to his position as supervising mechanic;
- (b) Mr Flynn advised that the business was under financial pressure, he had completed some forecasting over the previous two weeks and if something was not done soon, the business would “go under” in three or four months. Mr Flynn was looking at options that would improve productivity and efficiency while retaining the core staff structure. The position of supervising mechanic was being looked at but Mr Flynn did not currently have any firm plans about the position and was seeking input from Mr Shoebridge on this;
- (c) Mr Shoebridge felt he was being “pushed out” of his job and gave an example of Mr Flynn having “unloaded” on him in front of other staff;
- (d) Mr Shoebridge advised he was happy to work a four day week and he had spoken to another staff member who was prepared to do the same to help the business;
- (e) Mr Flynn advised that he intended to move two other employees onto one week in five for the AA breakdown shifts;

- (f) Mr Flynn agreed that some of Mr Shoebridge's thoughts on assisting the business were good and he wanted to continue to work with him but was looking at how he, Mr Flynn, could "influence" himself into the supervisor's role. Mr Flynn acknowledged that as he was not a mechanic and he needed some assistance in this area.

[12] The notes record that Ms Fitzgerald made some constructive comments about Mr Shoebridge and Mr Flynn discussing any personal conflict issues. The meeting concluded on the basis that Mr Flynn and Mr Shoebridge would discuss "personal issues and conflicts" before a further meeting on 27 November 2010. It was also agreed that the proposed restructure would be tabled at the forthcoming meeting on that date.

[13] On 23 November 2010 there was some discussion between Mr Flynn and Mr Shoebridge. Mr Flynn prepared some notes pertaining to the discussion which occupied an hour. There was some discussion about Mr Shoebridge's ill health and the possible effect on his confidence and security. Mr Flynn made some positive comments about Mr Shoebridge's role as a supervisor and there was some discussion about how various tasks could be managed. While Mr Shoebridge portrays a somewhat negative perception of Mr Flynn's comments, on the whole, it appears that the discussion between the two men was reasonably constructive.

### **Meeting 27 November 2010**

[14] A further meeting took place on 27 November 2010 with Ms Fitzgerald again present in a support role and taking notes. There was considerable discussion about the operation of the workshop and the respective roles of Mr Flynn and Mr Shoebridge. Mr Shoebridge was given a letter dated 27 November 2010:

#### **Re Proposed Restructuring**

This is a follow up to our meeting on 22/11/2010 attended by you, Paula and myself where I announced that I was considering opportunities to increase productivity and efficiency for the business. As I explained then one of these opportunities would possibly involve a restructuring of the supervising mechanic's role. I have considered further and decided that a restructuring is required to ensure the continued financial survival of the business. This is formal notification that I intend to assume these duties myself and therefore the workshop supervisor role will become redundant. The structure I propose is to have three mechanics and an apprentice in the workshop. I have attached the current job descriptions for the

supervising mechanic and the proposed mechanic's role. I welcome your feedback on this proposal which will be carefully considered. I intend to have finalise [sic] structure by 3rd December.

[15] Mr Flynn explained that he required feedback from Mr Shoebridge by 6 December 2010 at the very latest as his current financial status was that his credit cards were "maxed out" and his home was mortgaged "to the hilt" and he had to do something to save the business. When Mr Flynn informed that he enjoyed working with Mr Shoebridge and was not trying to "push him out", the latter responded that he believed that Mr Flynn had made the decision to restructure eight months ago. The meeting appears to have concluded on that note with Mr Shoebridge being asked to go home and think about things and respond as suggested.

### **The resignation**

[16] The evidence of Mr Shoebridge is that he had an appointment with his doctor on Monday, 29 November 2010 and was then put off work for a week due to stress. Mr Shoebridge returned to work on 6 December 2010 and gave Mr Flynn a brief resignation note:

Bernie, I Ken Shoebridge as on the 6/12/10 are [sic] giving you 21 days notice of me finishing.

[17] Under cross-examination, Mr Shoebridge acknowledged that he had sought legal advice before resigning. Following some discussion about whether Mr Shoebridge would work out the 21 days' notice, it appears to have been agreed that he would not. Mr Shoebridge returned the next day to pick up his tools.

### **Analysis and conclusions**

[18] Mr Shoebridge says that his resignation was in fact a constructive dismissal in that his employer followed a course of conduct with the deliberate and dominant purpose of coercing him to resign.<sup>1</sup> In support of this proposition, it is submitted for Mr Shoebridge that there are three distinct facets that, when combined, culminated in Mr Shoebridge's resignation:

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<sup>1</sup> *Auckland etc Shop Employees etc IUOW v. Woolworths (NZ) Ltd* [1983] ACJ 963 (CA).

(a) *A unilateral variation*

[19] It is alleged that there was a unilateral variation to Mr Shoebridge's role as supervising mechanic. I conclude that this argument is not sustainable. This is because a fair and reasonable process was adopted whereby Mr Shoebridge was consulted in regard to the financial difficulties that the business was experiencing. Mr Flynn had certainly proposed that the position of supervising mechanic could no longer be retained and that he envisaged that Mr Shoebridge could continue to be employed as a mechanic; with the result that his working hours could be charged out: while Mr Flynn, as the owner of the business, adopted the supervisory role. Mr Shoebridge was asked to give some feedback on the proposal and did so to some extent. But when asked for further feedback, by no later than 6 December 2010, he instead chose to resign. While it is understandable that Mr Shoebridge may not have found what was being proposed to be acceptable to him, I am satisfied that, given the financial position of, what is in reality, a very small scale business; the proposal put forward by Mr Flynn was ultimately reasonable if the business was going to have a better chance of surviving.

(b) *Workplace bullying and undermining:*

[20] It is submitted that Mr Flynn was "rude and abusive" and subjected Mr Shoebridge to different treatment than other staff. Reference is made to what appears to have been a light-hearted comment in October 2010, relating to Mr Shoebridge needing to complete his unpacking, having relocated to take up the job at PML. It is argued that this remark was an inference that Mr Shoebridge might be shifting again due to some perceived uncertainty about the security of his job. But I find that far too much has been construed from what I accept was just a workplace joke or some banter. Perhaps Mr Shoebridge may have perceived it as otherwise, but if so, I conclude that his perception was misplaced.

[21] It is also argued that Mr Shoebridge was "undermined" in the presence of his subordinates when mention was made of him being "grumpy." And a certain amount has been made of Mr Flynn speaking to Mr Shoebridge in a terse manner on several occasions; in particular, following an incident where Mr Shoebridge backed a car out of the workshop into another car parked outside. While it can be accepted that in regard to the latter incident, Mr Flynn was angry and made this obvious, this incident has to be seen as a spontaneous reaction on the part of Mr Flynn and indeed not

particularly unexpected, given the circumstances in that a customer's car was involved. The behaviour of Mr Flynn in regard to this incident has been compared with his reaction to a situation whereby it is alleged that another mechanic "destroyed" a car engine two days earlier whereby the estimated repair cost was between \$2,000 and \$3,000. Mr Flynn denies that he treated Mr Shoebridge any differently from other employees and he referred to other incidents involving Mr Shoebridge where he simply discussed these with him and in one situation there was a change of working practice in the workshop. While there may have been some tension in the relationship between Mr Flynn and Mr Shoebridge, I do not accept that there is any tangible evidence that supports the proposition that Mr Flynn deliberately or consciously set out to undermine Mr Shoebridge. And I do not accept that he was bullied by Mr Flynn.

(c) *Coercion to resign*

[22] It is submitted for Mr Shoebridge that Mr Flynn, by "his actions and without reasonable and proper cause", conducted himself in a calculated manner designed to force the resignation of Mr Shoebridge. In support of this proposition, Mr Shoebridge refers to Mr Flynn telling him on several occasions that: "*you don't want to be working here do you?*" It is also alleged that Mr Flynn told Mr Shoebridge that if he did not resign he would take steps to remove him. But I conclude that it is improbable that the latter comment was made. Rather, Mr Flynn had conveyed to Mr Shoebridge that the business was in financial difficulty and Mr Shoebridge was asked to consider a restructuring proposal. Mr Shoebridge has attempted to give the impression that Mr Flynn suddenly transformed from being a caring and reasonable employer<sup>2</sup> into a quite different person, as a result of Mr Shoebridge's absences due to ill health.

[23] I do not accept this to be so. I conclude that it is more probable that a variety of circumstances led to the operation of the business having to undergo a serious review if it was to survive and it was simply a matter of economic necessity that the role of Mr Shoebridge came under scrutiny. While there were some apparent tensions between Mr Flynn and Mr Shoebridge (for various reasons) I do not accept that Mr Flynn embarked on a deliberate course of action to force Mr Shoebridge to resign. Rather I conclude that it is more probable that due to his ongoing health issues,

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<sup>2</sup> Mr Shoebridge acknowledged that Mr Flynn was a good and caring employer during the first months of the employment relationship.

Mr Shoebridge was finding it difficult to cope with the changing environment and had contemplated his future with the business some time before deciding to resign.

[24] Having weighed all of the evidence, I conclude that the resignation of Mr Shoebridge, while unfortunate and most probably unexpected by Mr Flynn, given the discussions that had taken place, was not a constructive dismissal and Mr Shoebridge does not have a personal grievance. Given this finding, it follows that the various claims of Mr Shoebridge, relating to a breach of good faith and a breach of the implied terms of the employment agreement, are also unsuccessful.

### **The counterclaim**

[25] The respondent says that Mr Shoebridge breached his employment agreement in that he failed to work out the 21 days' notice as required by clause 13.2 of the employment agreement. The respondent claims damages of the sum of \$112.50 (plus interest) being the additional wages cost incurred as a result of Mr Shoebridge's sudden resignation. A penalty is also sought pursuant to s.136(2) of the Employment Relations Act 2000. Apart from the fact that I suspect that the counterclaim is advanced somewhat "tongue in cheek", it is not valid.

[26] As evidenced by his brief resignation note, Mr Shoebridge gave 21 days' notice of the termination of his employment. It was subsequently agreed that he would not be required to work out the notice, as evidenced by the email dated 6 December 2010, sent by Mr Flynn to Mr Shoebridge. It includes the following:

I propose that we agree on a termination date of 6 December and I pay you this amount [set out earlier in the email] plus one week's wages as full and final settlement.

[27] It is clear to me that there was a common agreement between Mr Flynn and Mr Shoebridge that he would not be required to work out the 21 days' notice period; hence the counterclaim cannot succeed.

### **Determination**

[28] For the reasons set out above, I find that Mr Shoebridge was not constructively dismissed. He does not have a personal grievance.

[29] I also find that the counterclaim advanced by the respondent must fail.

[30] For reasons of completeness, I record that Mr Shoebridge had presented a claim for payment of outstanding wages relating to him being available on call during the period 24 December 2009 to 11 January 2010, but this claim was withdrawn at the investigation meeting.

### **Costs**

[31] It is the understanding of the Authority that Mr Shoebridge is in receipt of legal aid and hence the usual principles relevant to such circumstances most probably apply. However, the respondent has requested that costs be reserved, presumably in order to ascertain its position given the outcome of this matter. In the event that the respondent wishes to present costs submissions, it has 21 days from the date of this determination to do so. The applicant has a further 14 days to respond.

**K J Anderson**  
**Member of the Employment Relations Authority**