

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Richard Simms (Applicant)
AND Santos Mount Eden Limited (Respondent)
REPRESENTATIVES Grant Pratt for the applicant
Paul Tremewan for the respondent
MEMBER OF AUTHORITY James Wilson
INVESTIGATION MEETING 24 July 2003
DATE OF DETERMINATION 2 December 2003

DETERMINATION OF THE AUTHORITY

The employment relationship problem

1. On 5 December 2002 the applicant, Mr Richard Simms, lodged a statement of problem with the Authority. In that statement Mr Simms said that he had been unjustifiably dismissed (due to constructive dismissal) by the respondent, Santos Mount Eden Ltd (Santos). Mr Simms requested that the Authority award him reimbursement of lost wages and future lost earnings, compensation for humiliation etc and costs. Mr Simms also requested that the Authority impose a penalty on Santos for breaches of section 64 of the Employment Relations Act 2000 (the Act).
2. Santos, in their statement in reply, said that Mr Simms had resigned from his position and had not been constructively dismissed. Santos also said that, although Mr Simms did not have a written employment agreement (as required by section 64 of the Act), Mr Simms was not disadvantaged by not having a written agreement and that it would not be equitable for penalties to be awarded.

The investigation process

3. After unsuccessfully attempting mediation the parties agreed to attend an Authority investigation meeting on 24 July 2003. Shortly before this meeting Mr Pratt, on behalf of Mr Simms, indicated that he wished to introduce as evidence recordings of telephone conversations and meetings between Mr Simms and the Managing Director of Santos, Mr Alex Escalante. These recordings had been made without Mr Escalante's knowledge. The meeting on 24 July 2003 was adjourned to allow the parties to make submissions regarding the admissibility or otherwise of these recordings. At that time it was also agreed that the investigation meeting was to be rescheduled for 4 November 2003.

4. On 21 August 2003 I issued a preliminary determination permitting Mr Simms to submit into evidence the recordings of conversations held with Mr Escalante (Determination AA 254/03).

5. On 9 September 2003 the Authority issued a formal notice of an investigation meeting to take place on 4 November 2003. A copy of this notice was sent to both to Mr Tremewan and to the registered office of Santos Mount Eden Limited. During a telephone conference on the same day (9 September 2003) Mr Tremewan advised the Authority that Mr Escalante was in Italy, the assets of Santos Mount Eden Ltd had been sold and although the company was still registered it had no assets and had ceased to trade. Mr Tremewan also advised that he had no further instructions from Mr Escalante/Santos but that Mr Escalante was aware of the investigation date in November and had indicated that he would return for that meeting.

6. Mr Tremewan advised Mr Pratt, in a letter dated 28 October 2003 and copied to the Authority that:

...we have been advised that Santos Mount Eden Ltd has no assets and is no longer trading. It is about to be struck off the Companies Register.

We write to advise that we have no instructions to appear before the Employment Relations Authority on 4 November should Mr Simms elect to proceed with his client's claim against the company.

7. At Mr Pratt's request the investigation meeting went ahead as scheduled on 4 November 2003. Neither Mr Escalante nor any other representative of Santos was present. At that meeting Mr Pratt advised that the Companies Office had advised him that while notice had been given (by the Registrar) that Santos was to be struck off the Companies Register this had not occurred at that time. (I note that as that 1 December 2003 Santos Mount Eden Ltd still appears as a currently listed company on the Companies Register.)

8. The second schedule to the Employment Relations Act 2000 provides at clause 12:

Power to proceed if any party fails to attend

If, without a good cause shown, any party to a matter before the Authority fails to attend or be represented, the Authority may act as fully in the matter before it as if that party had duly attended or been represented.

Santos failed to attend the investigation meeting or arrange to be represented. They have not attempted to show good cause why they did not appear. I understand that Mr Escalante was in New Zealand on the day of the investigation meeting but chose not to attend. In the absence of an appearance by Santos I have no option but to determine this matter based on the evidence I have received. This evidence includes:

- An unsworn statement provided by Mr Escalante prior to the originally scheduled investigation meeting in July.
- The written and verbal evidence of Mr Simms as provided under oath at the investigation meeting on 4 November 2003.
- The tape recordings and transcripts of the various meetings held between Mr Simms and Mr Escalante.

Legal considerations: constructive dismissal

9. In his submissions Mr Pratt, on behalf of Mr Simms, relies on the judgement of the Court of Appeal in *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers' IUOW* [1994] 1 ERNZ 168. The Court said:

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach. As to the duties of an employer, there are a number potentially relevant in this field. How some should be defined precisely is a matter no doubt still open to debate: see the discussion in the Auckland Shop Employees case. But in our view it can now safely be said in New Zealand law that one relevant implied term is that stated in the judgement of the Employment Appeal Tribunal, delivered by Browne-Wilkinson J, in Woods v. W M Car Services (Peterborough) Ltd quoted in the Auckland Shop Employees case. As the Judge put it:

“In our view it is clearly established that there is implied in a contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: Courtaulds Northern Textiles Ltd v. Andrew [1970] IRLR 84. To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract; the tribunal’s function is to look at the employers conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it; see British Aircraft Corporation Ltd v. Austen [1978] IRLR 322 and Post Office v. Roberts [1980] IRLR 347. The conduct of the parties has to be looked at as a whole and its cumulative impact assessed: Post Office v. Roberts.

10. In the *Auckland Power Board* case the Judge (Cooke J) went on to further quote the Court of Appeal’s earlier decision in *Auckland etc Shop Employees etc IUOW v. Woolworth’s NZ Ltd* [ERNZ] sel cas page 136 (CA150/84). Of particular relevance to the current case, in the *Shop Employees* case the Court of Appeal (also via Cooke J) said:

The circumstances are so infinitely various that there can be, and is, no rule of law saying what circumstances justify and what do not. It is a question of fact for the tribunal of fact – in this case the Industrial Tribunal. Once they come to their decision, the appeal tribunal should not interfere with it. Thus when the manager told a man: “you can’t do the bloody job anyway”, that would ordinarily not be sufficient to justify the man in leaving at once. It would be on a par with the trenchant criticism which goes on every day. But if the manager used those words dishonestly and maliciously – with no belief in their truth – in order to get rid of him, then it might be sufficient: because it would evince an intention no longer to be bound by the contract.

Discussion

11. I do not have sworn evidence from Mr Escalante, nor have I had the opportunity to question him. However, I do have recordings of conversations between Mr Escalante and Mr Simms. I accept that these recordings do not include all of the conversations between these two men. They do however include the specific words which Mr Simms says gave him no option but to resign. For two reasons these recordings are influential in my final determination of this matter. Firstly, Mr Simms was insistent that I admit the recordings as evidence. He argues that the words and intonation used by Mr Escalante in these conversations convinced him that he had no option but to resign. Secondly, Mr Escalante was not aware that these recordings were being made. It appears reasonable to accept what Mr Escalante said during the recorded conversations as reflecting his intentions and not as some premeditated attempt to establish evidence in case of some future legal action.

12. The first of the taped conversations between Mr Simms and Mr Escalante took place in mid June 2002, shortly after Mr Simms had commenced accident compensation leave after he had burnt his hand at work. At the beginning of this conversation Mr Simms (RS) said

(Note: I have edited the following extracts to remove irrelevant words and phrases):

(RS) I'm just wondering if, after I spoke to you yesterday, I spoke to ACC, if you still want me to hand in my resignation ...

Mr Escalante (AE) responded:

(AE) Well it probably would be better for you that ... you're having all these problems,...all the time...you had left before with a personal problem.

And later in the conversation:

(AE) I haven't got the right to fire you or anything...

It won't be as good as before ... before these things that happened...maybe you should...would like to think seriously ... things are going to be a little bit difficult after you come back...

In response to the statement from Mr Simms that Mr Escalante had had no problems with his work previously Mr Escalante said:

(AE) Well I did, yes, and I told you so many times about it, and you recognise that and, that you were doing things wrong...

And later:

(AE) I'm not going to fire you. You are allowed basically by law to come back to work ... but it's going to be difficult under the circumstances, because of what's been happening...in the past.

...and the many things that had not been sort of happening with regarding of your job ... description of what I wanted of you, and that is what I may say that we may have ... difficulties...and to avoid ... that you want to have a fresh start somewhere else but, as I see it, you still have a job here of course under the law...

At the completion of this conversation Mr Escalante said:

I want the best for you and the best for my restaurant, so...well maybe think about what you want to do. Under the law, you still have a job here after you've finished with the ACC

13. Mr Simms' ACC leave lasted much longer than he expected. The next substantial conversation was a face-to-face meeting between Mr Simms and Mr Escalante on or about 30 July 2002. Once again Mr Escalante did not know that this conversation was being recorded. Mr Escalante asked Mr Simms if he wanted to come back to work and said:

(AE) would have to take you back but I would not be very happy with you coming back to work. It is going to be a very tense relationship. It's not going to be a very good atmosphere with your employer. Because of the history of...what happened before the accident...

If you're ... a man of honour you should just find another job somewhere else...

Later in the conversation Mr Escalante told Mr Simms that the restaurant was for sale and suggested that Mr Simms should take the opportunity to find a new position immediately rather than returning to Santos. Mr Escalante then said:

(AE) You knew all along my feelings about the situation. I am just expecting you to be an honest person. That is all I am expecting from you... I try to help you...and I give you a good job but I have quite a few problems with you.

And:

(AE) I'm going to be very strict. And I am going to apply the law. I'm not going to do any thing outside the law; just going to be very strict.....

If I apply the rule of the law in the kitchen; the way you as the head chef should work, and the times, and making sure that everything runs properly ...that there is no room for you to sort of not do things like in the past and that has been happening, so it is going to create problems...that is going to be difficult for you...You know if I'm strict with you I do not think you can, you're going to be able to deal with that problem. ... not going to do anything outside the law. ... that's my attitude,... for the business to work I need to be very...strict. ...I don't want to be difficult. I'm just going to be a boss, an employer....because I've been too friendly before with you and with the staff in general...

I'm not saying you have to leave. I am just saying I am going to be very strict with you when you come back ... I am going to apply the law...

14. This conversation continued in the same vein with both parties disputing several aspects of Mr Simms' performance prior to his accident. The conversation ended with the following exchange:

(AE) Oh Richard, you want to come back to work? Come back to work. I cannot fire you, okay? I have no reason at the moment –

(RS) What are all these things that you keep telling me I had done wrong?

(AE) *I have no reason at the moment because of the situation I am – I cannot afford to do anything that is not within the law, ... I have to accept you at work. That is what you will do, okay? Come back to work on Thursday ... okay?*

(RS) *Okay. Right, see you Thursday.*

The following day (Wednesday) Mr Simms resigned and did not return to work.

15. The question I must determine is whether Mr Escalante's *conduct as a whole* had *such an effect that (Mr Simms) could not be expected to put up with it.* (Auckland EPB, supra). I have listened carefully several times to the tapes supplied by Mr Simms. Based on these taped conversations between Mr Simms and Mr Escalante I am not persuaded that Mr Simms had no option but to resign. I do not believe that Mr Escalante was being *dishonest or malicious* (Shop Employee's, supra) when he told Mr Simms that he could return to work. Certainly he conveyed to Mr Simms that he would be insisting on a dramatically improved performance. Mr Simms says that this was merely an excuse to get rid of him and that there had been no performance issues prior to his accident. In this regard I am inclined to believe Mr Escalante rather than Mr Simms. Mr Escalante did not know his conversation was being recorded. In many ways his words in these conversations are ill chosen but they did not strike me as being premeditated or contrived.

16. During these recorded conversations Mr Escalante clearly expressed his preference that Mr Simms resign. However he is equally clear that Mr Simms was able to return to work - on the understanding that Mr Escalante would be expecting an improvement in performance and would be closely monitoring that performance. This, to use the Judge's words in the *Shop Employees* case is *on a par with the trenchant criticism which goes on every day.* It may be that in carrying out this close supervision of Mr Simms, Mr Escalante may, at some future date, *have conducted himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust* (Auckland EPB, supra). At the time Mr Simms resigned Mr Escalante had not done so. Mr Simms could have, and should have, returned to work and awaited developments. Instead he chose to resign.

Determination

17. I have found that Mr Simms resigned when he could have returned to work. He was not constructively dismissed and does not have a personal grievance against his former employer, Santos Mount Eden Ltd.

Application for imposition of penalties

18. Santos has accepted that Mr Simms' did not have a written employment agreement. In this respect Santos has breached both section 64 and section 65 of the Employment Relations Act. While it does not excuse the clear breaches of the Act, Mr Simms did receive all of his financial entitlements and I accept Santos' contention that he was not disadvantaged by the lack of a written agreement. Given Santos' current financial position (i.e. it has no assets and is no longer trading) it would appear futile to impose any penalty for the breaches. Under the circumstances I find that Santos did breach sections 64 and 65 of the Act but I decline, in this instance, to impose any penalty.

Costs

19. Costs are reserved to allow the parties time to attempt to settle this matter between them. If they are unable to do so Santos may file and serve a submission in respect to costs within 21 days of the date of this determination. Mr Simms will then have 14 days in which to file and serve a response. The parties should note, when discussing the question of costs, that Santos' failure to attend the Authority's investigation meeting will inevitably influence the level of costs awarded.

James Wilson
Member of Employment Relations Authority