New Zealand Employment Relations Authority Decisions

Spitzbart v Solarix Networks Limited (Auckland) [2016] NZERA 681; [2016] NZERA Auckland 9 (8 January 2016)

Last Updated: 19 September 2021

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND		
		[2016] NZERA Auckland 9 5541332
	BETWEEN	RICK SPITZBART Applicant
	A N D	SOLARIX NETWORKS LIMITED Respondent
Member of Authority:	T G Tetitaha	
Representatives:	G Bennett, Advocate for the Applicant	
R Harrison, Counsel for the Respondent		
Investigation Meeting:	4-5 November 2015 at Auckland	
Submissions Received:	6 and 10 November 2015 from the Applicant	
13 November 2015 from the Respondent		
Date of Determination:	8 January 2016	
DETERMINATION OF THE AUTHORITY		

A. The application for rehearing is dismissed.

B. **The personal grievance application is dismissed.**

C. **The application for penalty is dismissed.**

D. **Costs are reserved. Parties are directed to file their costs submissions within 14 days of the date of this determination.**

Employment relationship problem

[1] In February 2015 Rick Spitzbart resigned from his employment with Solarix Networks Limited (Solarix). He alleges he was constructively and unjustifiably dismissed. He also alleges that Solarix breached its duty of good faith by being misleading and deceptive by refusing to provide relevant information about his proposed redundancy.

Facts leading to dispute

[2] Solarix is a telecommunications provisioning business. In July 2013, it acquired a provisioning business known as Telco-in-a-Box. This was rebranded as KiwiTel.

[3] On 9 August 2013, Mr Spitzbart commenced employment as a customer support engineer later promoted to customer support manager. His job involved provisioning supplies, organising customer set up and billing for KiwiTel. At the time he commenced employment he was part of a provisioning team of three. By December 2014 he was the only dedicated KiwiTel employee at Solarix.

[4] In January 2015, Solarix undertook its annual review of business workflow. His manager, Theresa Morgan, met with him on 20 January 2015 to discuss his individual workload. She emailed Mr Spitzbart noting his feedback and requesting a further meeting.

[5] Mr Spitzbart met with Ms Morgan again on 23 January. Ms Morgan emailed him the same day confirming their discussions that the business was considering provisioning structural changes that may affect his job which meant his *"job may be at risk"*. She also noted the company had not made any decisions, sought feedback and advised it would be considered at the Wednesday management meeting.

[6] Mr Spitzbart was concerned and went to see a Solarix director and shareholder, Flemming Rasmussen that same day. He asked Mr Rasmussen if he was being made redundant and was told no decision had been made.

[7] On 28 January, Ms Morgan emailed Mr Spitzbart again. She now advised Solarix was considering disestablishing his role. She sought another meeting to discuss this telling him his *"job is at risk"*. He was advised he could bring a support person. Ms Morgan noted again *"no final decision has been made yet"*.

[8] On the same day at 3.50pm, Mr Spitzbart sought out Stuart Impey, Senior Manager, Engineering Division. Mr Spitzbart covertly recorded their conversation. During this period he spoke to another staff member and manager about his possible redundancy. He then instructed a legal representative.

[9] That evening Mr Spitzbart's legal representative contacted Ms Morgan. He orally raised a personal grievance. Ms Morgan ended the telephone conversation shortly thereafter.

[10] His legal representative wrote to Mr Rasmussen on 29 January 2015. The letter raised a personal grievance of unjustified disadvantage, unjustified constructive dismissal (pending) and unjustified dismissal (pending) and alleged a breach of good faith by misleading and deceptive behaviour. His client was distressed and under the care of a doctor with concerns about his wellbeing and safety. To 'quickly' remedy these grievances and breach he sought $25,000, three months' lost wages and costs. There was also a request for various written documents about the restructuring. Mr Spitzbart subsequently took sick leave for a period of 6 days.

[11] Mr Rasmussen replied on 3 February. He denied the existence of diagrams or notes reflecting the organisation changes under consideration, as Mr Spitzbart's position was junior/intermediate and consultation was still under way. Consultation had been reinitiated today and he referred to Ms Morgan's letter seeking a meeting. He refused to attend mediation believing it premature as no final decision had been made.

[12] The parties met again on 5 February. Mr Rasmussen, Ms Morgan, Mr Spitzbart, his legal representative Mr Bennett and Stan McGuigan, a former Solarix KiwiTel employee attended.

[13] Following that meeting his representative sent a letter on Saturday 7 February 2015 raising concerns about the refusal of his requests for documentation and Mr Rasmussen and Ms Morgan's replies the documentation did not exist. The letter alleged a decision about restructuring had been made before any opportunity to comment upon it. It also stated his client would endeavour to provide a response by 12 or 13 February 2015.

[14] Instead of providing feedback, on 13 February Mr Spitzbart resigned raising a personal grievance of constructive dismissal. He set out concerns about the process leading to his resignation including his understanding he had been targeted for restructure and staff comments about his role 'being gone'. He also attached a medical certificate dated 11 February 2015 noting his doctor's advice that he resign.

[15] Mr Rasmussen sought advice before accepting Mr Spitzbart's resignation. He left that day.

[16] The parties have an ongoing dispute regarding the housing of a server owned by Mr Spitzbart that continued after his employment ended.

Issues

[17] The issues for hearing were agreed at a teleconference on 12 May 2015 as follows:

(a) Was the applicant unjustifiably and constructively dismissed or, in the alternative, unjustifiably dismissed;
(b) Did the respondent breach its duty of good faith by being misleading and deceptive in not providing documents regarding the proposed restructure?

Rehearing

[18] Following the conclusion of the investigation meeting, Mr Spitzbart filed a Memorandum dated 6 November 2015 seeking a rehearing of Ms Morgan's evidence. The stated grounds were the interests of natural justice. It was alleged during Ms Morgan's testimony she had been passed notes by respondent Counsel and/or Mr Rasmussen. Mr Spitzbart alleged I should direct a new hearing *"as Ms Morgan's evidence cannot be said to be entirely given of her free will but has been influenced by Mr Rasmussen and/or Counsel."* It was not expressly stated what power I have to direct a rehearing especially following the closure of the parties cases.

[19] In carrying out my role I must comply with the principles of natural justice.1 Alleged influence upon a witness is not a breach of natural justice. It is a matter affecting the credibility of evidence. I did not witness the alleged behaviour. However I took steps to advise both parties about the damage to a witnesses credibility by such behaviour. No further action was required. Subsequent to this event, Mr Spitzbart had the opportunity to cross-examine Ms Morgan and to later file written submissions. There is no suggestion I am incapable of impartially weighing

1 Section 157(2)(a) Employment Relations Act 2000.

Ms Morgan's evidence in these circumstances. Mr Spitzbart also has the right to challenge my decision by way of de novo appeal.

[20] In the circumstances the application for rehearing is dismissed.

Was Mr Spitzbart unjustifiably and constructively dismissed or, in the alternative, unjustifiably dismissed?

[21] Mr Spitzbart submits the respondent breached its duty of good faith by not providing documents relevant to the proposed restructure. In particular Ms Morgan and Mr Rasmussen were both misleading and deceptive about comments made by other employees that they said they had but never produced. This caused Mr Spitzbart to resign.

[22] Constructive dismissal occurs where an employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign or there is a breach of duty by an employer causing an employee to resign2. The essential questions in constructive dismissal cases are3:

(a) What were the terms of the contract;
(b) Was there a breach of those terms by the employer that were serious enough to warrant the employee leaving?

[23] If there was a breach, the next question is *"whether a substantial risk of resignation is reasonably foreseeable, having regard to the seriousness of the breach"*4.
[24] The onus is upon the employee to prove the conduct of the employer towards him or her was of such a repudiatory nature that he was entitled to elect to cancel the employment agreement and did so.5
[25] Ms Morgan and Mr Rasmussen's evidence was that they provided all documents or information relevant to this proposed decision. The proposed decision was disestablishment of his position not termination of his employment.

2. *Auckland Shop Employees Union v. Woolworth (NZ) Ltd* [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA)
3. *Wellington Etc Clerical Etc IUOW v. Greenwich (t/a Greenwich & Associates Employment Agency and Complete Fitness Centre)* (1983) ERNZ Sel Cas 95 (AC) at 112-113
4. *Auckland Electrical Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] NZCA 250;

[1994] 1 ERNZ 168 (CA)

5 See above n 2.

[26] The evidence shows up to 23 January 2015 the respondent had been consulting staff about workflow. Ms Morgan did not take any notes from these staff meetings. She produced an example of the types of emails she sent and received from other employees.6 It discussed individual workloads and did not seek commentary about proposed restructuring or redundancy.

[27] There was evidence Solarix was looking at re-organising the KiwiTel provisioning business to improve 'workflow'. It is common ground Solarix was concerned about the profitability and viability of the KiwiTel due to the downturn in the telecommunications market. It had previously re-organised the KiwiTel business to the point Mr Spitzbart was the only dedicated employee left of a team of three and some duties such as faults were shifted to a customer call centre. One team member, Stan McGuigan, had his employment terminated under a 90 day clause in his contract. Another employee was redeployed elsewhere within Solarix.

[28] There were confusing emails sent by Ms Morgan on 23 and 28 January 2015 which did not assist matters referring to his job being at risk. However Mr Spitzbart was told he was not being made redundant. His own evidence was that he asked Mr Rasmussen on 23 January if he *"was to be made redundant as early as next week"* Mr Rasmussen denied this, stating *"nothing's been confirmed yet."*

[29] Mr Spitzbart did not believe what he had been told. This was because he alleged he had received 'confirmation' of his probable redundancy from three other staff on or about 28 January 2015. He produced a transcript of a covertly recorded conversation with a senior manager, Stuart Impey. I have considered the transcript. This is not clear evidence Mr Impey confirmed redundancy. It is Mr Spitzbart whom suggests he has been made redundant. Mr Impey expresses surprise and concern about the decision and the process. He even offers assistance.

[30] Mr Spitzbart did not provide evidence in his brief about whom and what the other two staff had told him. I allowed oral evidence to be given about this point. He named a senior manager, Richard Kelly, as confirming his redundancy. However his own evidence showed it was Mr Spitzbart again who suggests he has been made redundant and Mr Kelly gives a neutral reply *"it is what it is".* The final employee is a low level administration staff member who confirms she heard rumours his job is

6 Respondent's Bundle of Documents pp 3-4.

being transferred to Christchurch. Mr Spitzbart chose to believe this rumour despite his knowledge she was part of clique of women known as the 'gossip Queens'.

[31] I accept Ms Morgan's explanation that her emails were inaccurate and were meant to only refer to his role being disestablished and not to possible termination of his employment. This is because it is logical and consistent with other evidence.

[32] There was evidence Mr Spitzbart was critical to the continued successful operation of KiwiTel. Solarix would need to consult a client and retrain its existing staff to take on KiwiTel if it made him redundant. Logically this respondent had no reasonable business motivation to make Mr Spitzbart redundant.

[33] No other motivation was shown to terminate his employment. I refused to allow Mr Spitzbart to give oral evidence at hearing of 'slights' and alleged bad behavior by Mr Rasmussen during his employment which he described as *"not serious enough to do anything about."* The late production of this evidence was unfair. He never raised a personal grievance about this behavior. He did not seek to engage the dispute resolution process set out in his employment contract7 about this behavior. There was also evidence contradicting any bad motive by Mr Rasmussen. Mr Spitzbart admitted Mr Rasmussen allowed him to retain his employment despite serious misconduct8 resulting in a criminal conviction for possession of cannabis for supply (which he did not advise Solarix about at the start of his employment) and imposition of a sentence of home detention which he had to partially serve at Solarix's offices.

[34] There was evidence Solarix continued to confirm to Mr Spitzbart no decision about redundancy had been made or appeared to even be contemplated. An email from Mr Rasmussen on 3 February 2015 confirmed no written information existed about organisational change because it was premature, consultation is still under way and "*no final decision(s) have been made."*9

[35] It was accepted by Mr Spitzbart under cross-examination Mr Rasmussen had never expressly told him there had been a decision to disestablish his role. Stan

7. Clause 40 Individual Employment Agreement between Solarix Networks Limited and R Spitzbart dated 8 August 2013.
8. Clause 36.6 Individual Employment Agreement between Solarix Networks Limited and R Spitzbart dated 8 August 2013 defines serious misconduct as including possession and/or use of non-prescribed drugs and stimulants.

9 Applicant's Bundle of Documents tab 3; Respondent's Bundle of Documents at p5.

McGuigan confirmed Mr Rasmussen told them at the 5 February meeting that *"no decision had been made in relation to redundancy."*

[36] Even if a decision to restructure or disestablish his role had been made, it did not mean Mr Spitzbart's employment would have terminated. There was evidence of a new merged role being available to him for redeployment. He accepted Mr Rasmussen had raised the possibility of merging his role with another.10 There were earlier emails where Mr Spitzbart suggested a new merged role by him taking on Solarix provisioning tasks involving the single tail and billing system alongside his KiwiTel provisioning role.11 Although he refused to accept this under cross- examination, the next logical step following disestablishment of his position would have been to offer him the new merged role. Mr Spitzbart pre-empted this possibility by resigning.

[37] From the evidence it appeared Solarix had provided Mr Spitzbart with all written information it possessed about the proposed decision to disestablish his position. The fact he believed he had been made redundant and therefore more documentation should be available makes little difference. There is no duty to provide or produce information about redundancy where this has not been contemplated by the employer. Any obligation upon Solarix to produce information had been met. No serious breach of duty has occurred such that this employer would have foreseen resignation.

[38] There is insufficient evidence on the balance of probabilities to prove Mr Spitzbart was constructively dismissed by Solarix. He cannot have been unjustifiably dismissed because he resigned. The personal grievance application is dismissed.

Did the respondent breach its duty of good faith by being misleading and deceptive in not providing documents regarding the proposed restructure?

[39] As noted above, Solarix provided copies of all documentation it had in its possession relating to the proposed decision to disestablish his position. Accordingly no breach of any duty of good faith to provide documentation can have occurred.

10 Letter dated 7 February 2015 at para. 6 Applicants Bundle of Documents Tab 2.

11. Email T Morgan to R Spitzbart dated 20 January 2015 Applicants Bundle of Documents Tab 2; Respondents Bundle of Documents pp 3-4.

[40] Even if there was a proven breach of the duty of good faith, the evidence does not meet the tests for the award of any penalty. The application for penalty is dismissed.

Costs

[41] The respondent was successful. Costs follow the event. The parties had confirmed at hearing if successful an award of costs at the Authority's notional daily tariff was appropriate. The applicant now seeks to make submissions about costs. Parties are directed to file their costs submissions within 14 days of the date of this determination.

T G Tetitaha

Member of the Employment Relations Authority