

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 292
5462274

BETWEEN GARRICK WALKINSHAW
Applicant

A N D SARGES DELIVERIES
LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Applicant in person
Peter Sarjeant, for the Respondent

Investigation Meeting: 7 July 2014 at Hamilton

Submissions Received: from the Applicant
from the Respondent

Date of Determination: 9 July 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Walkinshaw) alleges that the respondent (Sarjes) has refused to negotiate on employment matters.

[2] Sarjes deny that claim and indicate that they have been willing to negotiate with Mr Walkinshaw, have in fact negotiated with Mr Walkinshaw, but did not reach an agreement with him on the matters that Mr Walkinshaw complains are unresolved.

[3] Sarjes purchased the business for which Mr Walkinshaw works in early 2012. The business is a paper run in various towns and cities from New Plymouth across the King Country to the Waikato. Mr Walkinshaw is employed in Te Awamutu.

[4] When Sarjes purchased the business, they sought to meet with all of the existing staff although the existing staff had their employment relationships concluded by the previous owner of the business.

[5] Mr Walkinshaw was one of the staff from the former employer who continued in the employment after the change of ownership. Mr Sarjeant told me that there were 28 staff employed by the company now.

[6] There is a standard individual employment agreement applying to each of those staff. That individual employment agreement has been developed with the assistance of employment advice.

[7] A copy of that employment agreement was provided by Sarjes to Mr Walkinshaw although because of the ongoing dispute between the parties, it has never been signed.

[8] For the avoidance of doubt, I am satisfied on the evidence I heard that the terms of the individual employment agreement are the terms of the employment relationship between Mr Walkinshaw and Sarjes. I reach this conclusion first because Sarjes were very clear during their negotiation with Mr Walkinshaw that whether he signed the individual employment agreement or not, if he continued to work in the position, he would be regarded as being covered by the terms of the standard individual employment agreement, in exactly the same way as all other staff were covered by its terms.

[9] Moreover, it is apparent that the employment relationship has continued with Mr Walkinshaw provided work strictly in conformity with the terms of the individual employment agreement, and Sarjes providing payments again strictly in conformity with the terms of the individual employment agreement.

[10] On that footing, I am satisfied the operative employment agreement between these parties is the individual employment agreement created by Sarjes and provided to Mr Walkinshaw at the beginning of the employment, notwithstanding the fact that that individual employment agreement remains unsigned.

[11] Mr Walkinshaw was responsible for a paper run delivering the *Herald on Sunday* newspaper within Te Awamutu.

[12] At the point at which the ownership of the business changed to Sarjes, Mr Walkinshaw and other Te Awamutu staff entered into negotiation with Sarjes, with a view to making amendments to the proposed individual employment agreements.

[13] There were a number of written exchanges between the parties, including with the assistance of the UNITE Union, in the weeks immediately after Sarjes took ownership of the business.

[14] As a consequence of those discussions, Sarjes agreed to make some changes to the proposed individual employment agreement and those changes were incorporated in the document which was eventually adopted by Sarjes and promulgated to Mr Walkinshaw.

[15] Notwithstanding those concessions, Mr Walkinshaw has continued to persevere with the various claims which were advanced by him during those negotiations, but which were not agreed to by the employer. That is the focus of this employment relationship problem.

Issues

[16] The only issue in contention here is whether Mr Walkinshaw can legally demand changes to the employment agreement between the parties.

Can Mr Walkinshaw demand concessions from the employer?

[17] At the investigation meeting with these parties, I indicated that there was no basis in law on which Mr Walkinshaw could insist that his employer agreed with his various claims and that if the employer was satisfied that they had made all the concessions they wished to make in respect to the negotiated arrangement between the parties, then that was an end of the matter.

[18] This is a straight forward example of a negotiation which has resulted in a conclusion which one party (Mr Walkinshaw) remains unhappy with. That of course is commonplace in employment negotiations. Just because one party wants further concessions from the other does not entitle those concessions to be made and there is no legal basis on which the Authority can force a party to make concessions to the other.

[19] In the end, if the terms and conditions of the employment that are proffered by the employer are not acceptable to the employee, then the employee's remedy is to resign his employment and seek alternative employment elsewhere.

[20] In the particular circumstances of this case, the nature of the employment is, as I have mentioned, a paper run. Moreover, it is a paper run on one day of the week. I am satisfied on the evidence I heard from Mr Sarjeant that the financial elements of the bargain between the parties proceeds generally on the basis that what is provided to Sarjes by its client APN is passed on to the employees. This is not a business with a huge margin and there is limited ability for Sarjes to negotiate on the financial elements of the employment relationship without eating into the modest profit that is made by Sarjes from their business.

[21] Mr Walkinshaw's statement of problem is effectively a log of claims. He raised eleven matters which he says are unresolved and which he seeks the Authority's assistance to resolve for him.

[22] As I explained to the parties during the investigation meeting and I reiterate now, there is no basis on which the Authority can direct parties to agree with each other in a negotiating environment.

[23] Not only is that the practical reality; it is also the law. By s.161 (2) of the Employment Relations Act 2000 (the Act), the Authority is specifically precluded from making determinations about bargaining, except in a small range of circumstances which this matter does not fall within.

[24] Mr Sarjeant made clear in his evidence that Sarjes had gone as far as they were able to within the parameters of the negotiation they had with Mr Walkinshaw and that there was simply no ability to make any further concessions.

[25] However, as the parties talked in my investigation meeting, it became clear that there might be a basis on which they could craft an understanding of their own. I have encouraged both parties to engage with each other with a view to seeing if there can be a resolution of some of the issues that trouble Mr Walkinshaw but in the context of a give and take that is the essence of a negotiation.

[26] In particular, I note that during the investigation meeting Mr Walkinshaw made a concession in relation to those future discussions which may well assist Sarjes to make concessions as well.

[27] However, both parties understand that the Authority cannot demand agreement by one party with the other and there is no legal basis on which such a situation could be countenanced.

Determination

[28] I am satisfied that the Authority is unable to assist Mr Walkinshaw further. As I indicated to him during the course of the investigation meeting and reiterate now, the Authority cannot force his employer to agree with his various claims it being precluded by force of law from having any such power; the only basis on which the parties can come to terms is by a negotiated settlement reached on a basis which both of them can live with.

Costs

[29] Costs in this matter will have been modest and primarily concerned the travel of both parties to get to the Authority's investigation meeting.

[30] In the normal course of events, the successful party could look to the unsuccessful party for a contribution to their costs. However, I would urge both parties to pick up their own costs and engage with each other in good faith to see if they can now resolve some of the outstanding issues having had the legal position clarified for them by the effect of this determination.

James Crichton
Member of the Employment Relations Authority