

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 45/08
5101621

BETWEEN PAUL O'BRIEN
 Applicant

AND XTEND-LIFE NATURAL
 PRODUCTS
 (INTERNATIONAL) LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Phil Butler, Advocate for Applicant
 Neil McPhail, Advocate for Respondent

Investigation Meeting: 29 January 2008 at Christchurch

Determination: 30 April 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr O'Brien) alleges that he was unjustifiably dismissed by his employer, the respondent Xtend-Life Natural Products (International) Limited (Xtend-Life).

[2] Xtend-Life says that Mr O'Brien's employment came to an end either by way of a mutually agreed resignation or, in the alternative, by way of a justified dismissal.

[3] Mr O'Brien was employed by Xtend-Life as a website/systems administrator and continued in that role, covered by an employment agreement and job description, until 31 July 2007 at which point the employment relationship came to an end.

[4] It does not appear to the Authority that the employment relationship was a particularly happy one. Mr O'Brien says that he had to bring in computer equipment of his own in order to fulfil Xtend-Life's requirements; Xtend-Life says that no such additional computer equipment was necessary and that Mr O'Brien was using his own equipment not for Xtend-Life's purposes but for his own purposes.

[5] Mr O'Brien was required to do sales reporting and to provide information for the directors on sales which was credible and intelligible; Xtend-Life says that no such information was provided notwithstanding that this was a fundamental part of the role. Mr O'Brien says that he was unable to produce the information Xtend-Life sought because he lacked the necessary training to do it and no training was provided. Xtend-Life says that Mr O'Brien never sought training and, had he sought it, it would have been provided.

[6] Mr O'Brien says that he needed to download programmes that were required to perform his duties; Xtend-Life says that there was no such requirement and that on the termination of the employment relationship, Xtend-Life discovered significant pirated software which Mr O'Brien had downloaded which Xtend-Life says exposed it to legal liability.

[7] Mr O'Brien felt that his authority was *being undermined* through *having to keep the directors informed* about his activities; Xtend-Life says simply that it is entitled to know what its employee is doing for the money it paid him.

[8] Mr O'Brien complains that he was told a month before the termination of his employment that the chairman of the Board of Xtend-Life had no confidence in him and while Xtend-Life acknowledges that was indeed the position, said that the reason for that lack of confidence was Mr O'Brien's poor performance and poor communication skills.

[9] Matters came to a head on 31 July 2007 when Mr O'Brien sent an email to Xtend-Life wherein he referred to his position becoming *untenable for numerous reasons*.

[10] At a meeting which followed the receipt of this email, there was a disputed exchange between the parties but it is accepted that there was a discussion about whether Mr O'Brien was happy in his work with Mr O'Brien indicating that it was not enjoyable currently but also that it was *not a terrible workplace*.

[11] Although there is dispute about the actual words and the order of them, it is common ground that Mr O'Brien expressed a lack of confidence in the management of Xtend-Life (specifically Kane and Warren Matthews) apparently because Mr O'Brien had, a month earlier, been told that Mr Warren Matthews (the chairman of the Board) had no confidence in him.

[12] There was then a discussion between the parties about what was to happen next and again there is dispute as to the order in which events unfolded. Mr O'Brien says that Xtend-Life offered him a severance package and then after the meeting followed that up with a draft letter which it sought to have him sign.

[13] Xtend-Life says that the decision to terminate the employment was made by Mr O'Brien in response to a question from Mr Kane Matthews in which the latter sought an indication from Mr O'Brien as to *where do we go next*.

[14] Subsequent to the termination of the employment, Mr O'Brien took legal advice and raised a personal grievance.

[15] Subsequent to the employment, Xtend-Life discovered that Mr O'Brien had brought into the workplace pirated material in significant quantities and that there appeared to be a significant utilisation of sites such as *TradeMe* as well.

[16] Mr O'Brien accepted in questioning from me that he spent maybe an hour to two hours a day during work time looking at *TradeMe* and other similar sites, but he maintained that he was working at the same time. He said that he would have other machines running doing work things while he was reviewing *TradeMe* on yet another machine.

[17] Mr O'Brien also accepted in questioning from me that he had in fact brought in a significant amount of pirated material but he claimed that that was either for his own use or for the use of other employees, including senior employees, such as Lance Matthews. He did not consider this reflected badly on the company and said that it was *very normal* for someone doing that sort of work to arrange things in that way.

[18] Mr O'Brien seemed unmoved by my suggestion that the amount of pirated material coming into the workplace was huge (apparently something like 300 gigabytes) and Mr O'Brien said that he did not believe that this arrangement *breached the company's rules*. He said that he brought in the hardware primarily for other members of the staff but the software was brought in for the business.

[19] In relation to the software, Mr O'Brien accepted that the employer was, as a consequence of his actions, using software which he (Mr O'Brien) had obtained illegally by bypassing the licence fee or getting a developer's licence when that was not appropriate.

Issues

[20] There are really only two issues of significance in this matter. The first is whether Mr O'Brien agreed to relinquish his position, having raised significant concerns about his trust and confidence in the employer, or whether in fact it can be said that Mr O'Brien was constructively dismissed.

[21] The second issue for determination is what part, if any, the subsequently discovered improper activities of Mr O'Brien ought to play in the dispute between the parties.

Constructive dismissal or not?

[22] The evidence is unchallenged that Mr O'Brien expressed significant doubts about the continuity of his employment. According to his evidence, he said that his position was *untenable*. During the investigation meeting, he wanted to distance himself from the use of that word in particular claiming, amongst other things, that he did not know what it meant. That seems an extraordinary admission to make many months down the track, particularly when it would have been available to Mr O'Brien to make that claim closer to the point at which he used the word originally. I am not persuaded that Mr O'Brien did not know what he was saying when he used the word *untenable* in relation to his position. I think the evidence and the context suggests that he knew perfectly well what he was saying and knew also what effect the use of words such as that would have on the employer and the stability of his employment relationship with the employer.

[23] I am particularly drawn to that conclusion because the use of the word *untenable* in relation to Mr O'Brien's position is consistent with his remark that the workplace was *not enjoyable at present, but not a terrible place to work*, and more particularly with his avowed statement that he had *lost confidence in Kane and Warren Matthews* (effectively the bulk of the management team of the employer).

[24] Further, in the email in which Mr O'Brien used the word *untenable* in relation to his position with Xtend-Life, he also referred to behaviour of the employer as *a disabler*.

[25] Although I have reached the conclusion that Mr O'Brien knew perfectly well what *untenable* meant, even if that conclusion is wrong, I am satisfied on the balance

of probabilities that Mr O'Brien knew what effect the email just referred to would have, namely that it would destabilise the employment relationship and in particular cause Xtend-Life to doubt that the employment relationship was capable of continuing at least in its present form.

[26] I find that such a conclusion is absolutely consistent with the evidence of Mr O'Brien himself and with the evidence of the Xtend-Life witnesses who had to deal with the consequences of Mr O'Brien's email and the subsequent meeting at which he (Mr O'Brien) developed his theme of being dissatisfied with his employment situation.

[27] Given that all of these impressions were conveyed within a short time of each other (both the email in question and the meeting between the parties which followed it happened on 31 July 2007), it seems inconceivable that the employer representative would have been left in any doubt that Mr O'Brien was seriously questioning the continuing of his employment relationship with Xtend-Life because he had clearly articulated both in writing and in person in a management meeting with the employer that he had effectively lost trust and confidence in the employer.

[28] At this management meeting on 31 July 2007, where Mr O'Brien expressed the views that I have just referred to, there was a point in the meeting at which Xtend-Life says that they formed the view, having heard Mr O'Brien's clear statements, that the employment relationship *could not continue*. Mr O'Brien recalls Mr Kane Matthews referring to the employment being at a *crossroads* and Mr Kane Matthews does not dispute the use of that word.

[29] Then it seems that both parties agree that Mr O'Brien sought, as it were, to pull back from the brink by saying that the difficulties *could be worked through*. Mr Kane Mathews then said something to the effect that there was nothing to work through and there was then discussion, it seems initiated by Mr Kane Matthews, about the sort of severance package which might be available to Mr O'Brien *if he were to leave*.

[30] Xtend-Life's evidence is that Mr Kane Matthews then said something to the effect that *where do we go from here* and Mr O'Brien said *I'll leave then*.

[31] After the meeting terminated, it is common ground that Mr Kane Matthews sought to get Mr O'Brien to sign a letter documenting the basis on which the

employment had come to an end and despite negotiation on the subject, that letter was not ever signed.

[32] Mr O'Brien claims to have sent an email suggesting that a verbal warning be imposed rather than the employment coming to an end but Xtend-Life was very clear that it never received such an email.

[33] Mr O'Brien kept notes of this critical meeting which he dictated to his ex-partner and then initialled two days later. The dictation of the notes took place after the meeting on 31 July 2007.

[34] The impression that one gets from reading those notes is that Mr O'Brien effectively set himself up to fail by making a succession of inflammatory comments to his employer then, realising that he had gone too far, sought to resile from the consequences of those initial observations.

[35] For its part, Xtend-Life's personnel, and in particular Mr Kane Matthews, clearly regarded the observations that Mr O'Brien made about lack of confidence in management as a kind of circuit breaker because he is recorded as saying (and he does not deny in his own evidence) that once Mr O'Brien had made the observations that he had, the suggestion that matters could be *worked through* was implausible because there was *nothing to work through*. Mr Matthews seemed to mean by that that the observations Mr O'Brien made were so significant as to effectively constitute a repudiation of the employment relationship.

[36] That repudiation of the employment relationship was effectively accepted by Mr Kane Matthews on behalf of Xtend-Life and that brought the relationship to an end just as surely as would have been the case had Mr O'Brien been dismissed, constructively or otherwise, or had he resigned his employment in the normal way.

[37] I think the facts in this particular and most unusual case support my conclusion that Mr O'Brien went so far in the remarks that he himself acknowledged he made to encourage the employer that in truth there was no relationship to continue with. Mr O'Brien had so departed from the normal proprieties in expressing the views that he had, that it was available to the employer to accept the repudiation and bring the employment relationship to an end.

[38] It may be that that was not the intention that Mr O'Brien had when he embarked on the course of action which he himself plainly initiated but it is, I fear, the consequence of his actions.

Improper activities

[39] Had I reached any conclusion visiting culpability on Xtend-Life, I would have of necessity had to consider whether post-termination discoveries about improper conduct by Mr O'Brien could impact on issues relating to the dispute between the parties.

[40] The factual position is that, after the termination of the employment, Xtend-Life discovered that Mr O'Brien had been engaged in a significant amount of improper activity which potentially brought risk to the employer, particularly around the use of pirated software, the extensive engagement with the *TradeMe* and other similar sites, and the bringing into the business of extensive hardware applications allegedly for members of Xtend-Life's staff, but also for Mr O'Brien's personal use.

[41] It will be recalled that Mr O'Brien did not deny that any of these events happened; he simply contended that it was *very normal for someone doing this sort of work* to bring in to the business the pirated material and the hardware and in relation to the *TradeMe* site, Mr O'Brien's view was that while he acknowledged viewing the *TradeMe* site for perhaps an hour or two hours a working day, he was doing work for the employer at the same time.

[42] In my opinion, if any of those matters had been the subject of inquiry prior to the termination of the employment relationship, and those explanations were offered by Mr O'Brien to the employer, then Mr O'Brien would have been at significant risk of disciplinary consequences, including the most significant disciplinary consequence.

[43] It seems to me impossible to ignore *deliberate and serious misconduct ... simply because such conduct was not known to the employer at the time it dismissed the particular employee ...: Carlton & United Breweries Ltd v. Bourke* [1994] 2 ERNZ 1.

[44] Were I to have reached a conclusion that Mr O'Brien had been unjustifiably dismissed by reason of a constructive dismissal, I should have found in reliance on *Carlton & United Breweries v. Bourke* that Mr O'Brien was not entitled to remedies.

Determination

[45] I have reached the conclusion that, by his actions in initiating an engagement with the employer about the future of the relationship, first by email on 31 July 2007 and then by an extensive exchange of views at a meeting subsequently that day, that Mr O'Brien, by expressing views which were antithetical to the continuation of the employment relationship, effectively repudiated the bargain, a repudiation which Xtend-Life chose to accept, thus bringing the employment agreement to an end.

[46] I am not persuaded that Xtend-Life has failed in its duty to Mr O'Brien; indeed, the whole initiation of the termination of the employment came from Mr O'Brien and not from Xtend-Life and his observations about the nature of the employment relationship and the adequacy of the employer were so negative as to be repudiatory of the employment agreement continuing.

[47] I accept that Mr O'Brien may not have intended this consequence but it is plain from the evidence I heard that he initiated it and drove it to the conclusion which invited the employer to accept the repudiation of the employment agreement, a repudiation which I hold the employer was entitled to accept.

[48] It follows that I have not found the existence of a personal grievance and so no remedies flow.

[49] For the sake of completeness, I should say that had I reached the conclusion that Mr O'Brien had been constructively dismissed, then I should have applied *Bourke's* case in any consideration of remedies and given the seriousness of the factual findings post-termination, I should have found that no remedies would have been appropriate because Mr O'Brien had contributed 100% to the circumstances leading up to his dismissal.

Costs

[50] Costs are reserved.

James Crichton
Member of the Employment Relations Authority