

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 8/10
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| BETWEEN | NICOLE SCHNEIDER Applicant | FRANCES |
| AND | BBX DISTRIBUTION PTY LIMITED as agent for BBX MANAGEMENT LIMITED (now BARTER MANAGEMENT (NZ) LIMITED) Respondent | |

Member of Authority: Paul Montgomery

Representatives: Tim Twomey, Counsel for Applicant
No appearance for Respondent

Investigation Meeting: 21 December 2009 at Christchurch

Submissions Received: 23 December 2009 from Applicant

Determination: 20 January 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ms Schneider began her employment with the respondent company on 26 January 2009. The role was that of Receptionist/Office Assistant/Trade Coordinator. Her employment was subject to the terms of an individual agreement, one of which terms was a three month probationary period which, if invoked by either party, enabled termination on one day's notice.

[2] The applicant says she was subjected to unjustified action causing disadvantage in her employment and was unjustifiably dismissed by telephone on 20 March 2009 by the respondent's New Zealand Manager Mr Jacques Gray.

[3] The respondent, by its sole director Mr Michael Touma, says the termination was justified because clause 15 of the employment agreement allows the employer to terminate the applicant's employment on one day's notice. The statement in reply says Ms Schneider

Did not perform duties requested of her in accordance with the employment contract. Furthermore, during the conference call for termination, the applicant made it clear to Mr Jacques Gray ... and the other staff present that she was looking for alternative employment.

[4] The parties were scheduled to attend a mediation in early September 2009 but it did not proceed when Mr Touma advised he was not authorised to make any settlement offer and there was little likelihood of payment given the financial position of the company.

Essential facts

[5] Ms Schneider says she was enjoying the job in the first few weeks but then became conscious she was being ignored. When expressing interest in learning more about same tasks she was put down by her seniors in the course of telephone calls with them. The applicant says she felt unsupported –

At that time, Sarah, BBX's administration manager, assured me that she understood that I was under pressure and apologised for not giving me enough training. Sarah gave me further administration duties and as far as I am aware I was carrying out these duties without any problem.

[6] On 18 March 2009 the applicant was given a performance review sheet to complete and to return to Sarah Rendel. She did so at about 2.00pm on Friday 20 March 2009, and Sarah and Summa Fox completed the review and forwarded it to the company's head office in Sydney.

[7] At about 4.55pm the same day the applicant was told Mr Gray was telephoning from Auckland and she was to take the call in the boardroom. Ms Rendel accompanied the applicant as Ms Fox refused to be involved.

[8] Mr Gray told Ms Schneider her employment was being terminated. No reason was given but the applicant was simply told the company *had to let you go*.

[9] Immediately after the phone call Ms Rendel handed the applicant a written dismissal letter personally signed by the company' Managing Director, Michael Touma, who was in Australia at the time.

The test

[10] Section 103A of the Act says the question of whether a dismissal or an action was unjustifiable needs to be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

The investigation meeting

[11] The respondent chose not to be present nor represented at the Authority's investigation meeting. This appears to have rested on Mr Touma's assertion that the respondent was being voluntarily liquidated and saw little point in expending funds in defending the claims.

[12] At the meeting the Authority heard from the applicant and her father, Mr Ian Schneider, in person. It also received a brief of evidence from Ms Summa Fox who was unable to attend the meeting in person.

[13] I have since interviewed Ms Fox and taken her evidence into account in coming to the findings set out below.

[14] The Authority is appreciative of the research by Mr Schneider relating to the swarm of related corporate entities and also for material from the annual general meeting of BBX Holdings Limited held on 20 November 2009. Significantly, the 2009 annual report makes no reference to placing BBX Distribution Pty Limited into voluntary administration nor to the winding-up of BBX Management Limited.

The issues

[15] To resolve this matter the Authority needs to make findings on the following issues:

- Who was the applicant's employer; and

- Was the applicant disadvantaged in her employment by the unjustified action of the employer; and
- Was the applicant unjustifiably dismissed; and
- If so, to what remedies is she entitled; and
- Did the applicant contribute to the circumstances giving rise to the dismissal?

Analysis and discussion

[16] The Employment Relations Amendment Act 2008 (2008 No.106) inserted ss.67A and 67B into the Act. Section 5 of the Amendment makes it clear the above sections apply only to employment agreements entered into after 1 March 2009 when those sections came into force. In this matter the parties entered the employment relationship by agreement on 26 January 2009, and so the two sections do not apply in this case.

[17] The 90 day trial period does not exempt an employer from the duty of providing the opportunity for an employee to be heard when dismissal is contemplated.

[18] This is axiomatic and failure to provide Ms Schneider the opportunity to state her case prior to any decision being made is fatal to the respondent's defence. Its position is worsened by the fact that Mr Touma had already decided the applicant's fate before the dismissal was conveyed to her. The dismissal letter personally signed by Mr Touma was handed to Ms Schneider immediately after the telephone call from Mr Gray. A classic case of *fait accompli*.

[19] It is no defence to rely on the applicant's admitted statement to Mr Gray that she was looking for other employment. It came after the dismissal and was made by a young woman in her first full time job and who was stunned at the dismissal and who had no matters concerning her performance put to her prior to the call from Mr Gray. Further, the respondent sought through Mr Touma to avoid its responsibilities by insisting as early as 2 December 2009 that the employing company was being wound up and the Australian company was about to go into voluntary administration the following day.

[20] As a statutory requirement Mr Touma needed to sign a declaration in support of the applicant for voluntary liquidation. In that declaration dated 25 November 2009, Mr Touma asserted *the company is not a party to any legal proceedings*. That was untrue and Mr Touma, who had attended the aborted mediation and also represented the respondent in the case management conference with the Authority, knew the declaration was incorrect as the matter was set down for the Authority's investigation on 21 December 2009.

[21] Further, it is clear Mr Touma failed to disclose an outstanding contingent liability in regard to Ms Schneider's claims.

[22] It is also clear Mr Touma's representation that BBX Management Limited was being wound up was deliberately intended to mislead. Counsel for the applicant had notified the respondent of the personal grievance claims on 7 April 2009. The matter was lodged with the Authority on 16 June 2009.

[23] On 11 December 2009 at 16:36:12 hours, a Reg Maraj of Murray Sharma and Associates Limited, PO Box 15544, New Lynn, Auckland, filed an on-line application and had the name of BBX Management Limited changed to Barter Management (NZ) Limited.

[24] BBX Management Limited was not wound up, its name was simply changed with the 100 shares still held by BBX Holdings Limited and Mr Touna remaining as its sole director.

[25] On the same day another company in the BBX group by the name of ABCD Pty Management Limited, changed its name to BBX Management Pty Limited of which Mr Touma is the sole director and the sole shareholder is BBX International Hong Kong which, according to the annual report, is 100% owned and controlled by BBX Holdings Limited. It is BBX Holdings Limited which is the parent company for the companies mentioned in this determination as well as a considerable number of others.

[26] The 2009 annual report for BBX Holdings Limited sets out the following information on Mr Touma:

Qualifications - *Certified Trade Broker*

Experience - *Appointed Director in 1999*

Founder and Managing Director of BBX Group of Companies since 1993

Special responsibilities – Managing Director

Interest in shares - 19,808,000 ordinary shares
 - 56,000 ordinary shares held jointly with other parties
 - 635,720 ordinary shares held by other entities in which Mr Touma had an interest

Other directorships - Director, DBX Property Investment Fund Limited

[27] The report does not include Mr Touma's sole directorship of BBX Management Limited, now renamed Barter Management (NZ) Limited nor of ABCD Management Pty Limited (now renamed BBX Management Pty Limited). It does not include his sole directorship of BBX Distribution Pty Limited either.

Submissions for applicant

[28] Mr Twomey submits this is a case where, in the interests of justice, lifting or looking behind the corporate veil is appropriate. Counsel refers to *Red Eagle Corporation Ltd v. Walker*, unreported, AEC 86A/95, and to *NZ Seamens' Union v. Gear Bulk Shipping (NZ) Ltd* [1990] 1 NZILR 688.

[29] In the latter, the now Chief Judge set out six tests which need to apply before deciding to lift the corporate veil. Further, in *Service 1 Group Ltd v. Butler* [1994] 1 ERNZ 667, the Court stated that this procedure could be employed in equity and good conscience *where there are sufficient elements of artificiality or a sham is apparent*. Mr Twomey refers the Authority to s.160(2) which permits it to take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.

[30] While I accept on the balance of probabilities Mr Touma is the heart and mind of the parent company and that of the respondent, and clearly had a major role in the dismissal of Ms Schneider from her position with BBX Management Limited, I am unable to answer with sufficient certainty each of the six questions set out in *Gear Bulk Shipping* (supra).

[31] Lifting the corporate veil is generally the domain of the Court where the evidence is argued thoroughly before it. In the present case the respondent has failed to appear or to be represented and thus the Authority was unable to probe the elements on which a decision to lift the corporate veil might have been based.

[32] However, the facts of the case are abundantly clear. The applicant was dismissed in the course of a performance review without any warning her position was at risk. The instruction from Mrs Touma to Ms Rendel that she provide a more negative assessment of Ms Schneider's performance; the use of the New Zealand Manager Mr Gray to implement the dismissal and his failure to give a reason for it; the handing of the pre-prepared letter from Mr Touma to the applicant by Ms Rendel; all indicate pre-determination and a total lack of good faith or fair process.

[33] The company which employed Ms Schneider is still on foot, although under another name. It can still be held accountable for its shameful treatment of the applicant. The evidence before the Authority in respect of the impact on Ms Schneider was compelling.

[34] Further, the list of BBX companies set out in the Australian Securities and Investment Commission search indicates that of some 60 established, 29 had either been removed, de-registered or struck off. This suggests the possibility that at least some of these entities may have been collapsed to avoid liabilities. Ms Fox's evidence confirms this.

[35] I am satisfied that the individual employment agreement signed between the parties clearly establishes those parties were the applicant and BBX Management Limited.

Determination

[36] Returning to the issues set out above, I find the employer of Ms Schneider was BBX Management Limited, now re-titled Barter Management (NZ) Limited.

- The applicant was unjustifiably dismissed.
- The applicant was unjustifiably disadvantaged in her employment by the failure of the respondent to provide adequate training in her role.

[37] Ms Schneider has a personal grievance and is entitled to remedies. For the purposes of compensation, I will deal with the two grievances together.

[38] Ms Schneider did not contribute to the circumstances giving rise to the personal grievances.

Remedies

[39] The respondent is ordered to pay the applicant:

- the sum of \$7,200 net of PAYE, being 13 weeks remuneration based on her salary of \$29,000 per annum, under s.123(1)(b) of the Act; and
- the compensatory sum of \$9,000 without deduction under s.123(1)(c)(i) of the Act.

Costs

[40] Costs are reserved.

Paul Montgomery
Member of the Employment Relations Authority