

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 114
5331046

BETWEEN	BLAIR BARROW Applicant
A N D	SANDBLASTING SPECIALISTS OTAGO LIMITED Respondent

Member of Authority: James Crichton

Representatives: Applicant in person
Cliff Saunders, for Respondent

Investigation Meeting 21 July 2011 at Dunedin

Date of Determination: 29 July 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Barrow) was employed as the manager of the respondent (SSOL). He claims to have been unjustifiably dismissed by SSOL when the latter sent him an email dated 21 December 2010. Mr Barrow claims compensation for the alleged unjustified dismissal.

[2] SSOL resists Mr Barrow's claim, acknowledging that he was demoted from his position as manager of the company, but pointing out that Mr Barrow himself had told it that he could no longer work with the paint fumes that were part and parcel of the employer's business. Further, SSOL points out that in the balance of the email in question, Mr Barrow was offered alternative employment which he failed to take up.

[3] It is appropriate to sketch the sequence of events leading up to the termination of the employment. I am satisfied there is nothing relevant to the termination of the relationship prior to the end of November 2010. Mr Barrow, at the investigation

meeting, sought to interest me in the proposition that the employment relationship had begun to deteriorate when he was given a written warning by SSOL but that was fully nine months before the employment relationship came to an end and there was no evidence to suggest that Mr Barrow had taken any steps after the written warning to address matters of concern with the employer.

[4] Mr Barrow had an unexplained absence from the workplace on 19 November 2010. He texted to indicate he was running late but never actually appeared. On 25 November 2010, Mr Barrow neither contacted the employer nor attended the workplace. On 26 November 2010, Mr Barrow texted Barbara Woodhouse, a secretary working at an associated company of SSOL where Mr Saunders, the managing director of SSOL was himself based. That text to Ms Woodhouse referred to Mr Barrow having a medical certificate for isocyanide poisoning as a consequence of the absorption of paint fumes. Mr Barrow said that he was having more tests and that if the tests were positive he would not be able to be around paint fumes any more and would keep the employer posted. On the following day, Mr Barrow made the first of a number of promises to come in to see Mr Saunders, to “*sort things out*”. He made a further such statement in another text on 29 November 2010 and again the following day as well. Also on 30 November 2010 was Mr Barrow’s first promise to return the work vehicle which he still had in his possession despite having been absent from the workplace continuously for five days at that stage.

[5] On 1 December 2010, Mr Barrow faxed his ACC claim form to the employer and there was a brief face-to-face meeting between Mr Barrow and Mr Saunders on that day with Mr Saunders making it clear to Mr Barrow that, given his health status, Mr Barrow was not to attend at the premises of SSOL “*for his own health and safety*”.

[6] On 2 December 2010, there was a further text from Mr Barrow to Ms Woodhouse in which, amongst other things, Mr Barrow again indicated that “*I’m at a point that I can’t be around that paint any more*”. Again, Mr Barrow undertook to call to see Mr Saunders soon. Mr Barrow indicated he wanted to raise with Mr Saunders a claim that the latter had made disparaging remarks to customers about Mr Barrow’s drinking habits.

[7] On 7 December 2010, Mr Barrow again promised to “*drop that truck off today*” and then went on to say:

Unless I involve OSH and Labour Department which I don't really want to do if Cliff [Mr Saunders] comes up with a redundancy I will walk away, I will talk to him about that.

[8] On 8 December 2010, Mr Saunders made two attempts to contact Mr Barrow emphasising in the messages that he left that Mr Barrow needed to come in to see him so that matters could be resolved. Also on that date, Ms Woodhouse texted Mr Barrow about the return of the work truck which Mr Barrow had still not returned.

[9] On 9 December 2010, Mr Barrow again texted Ms Woodhouse and indicated:

I have been advised not to deal with him [Mr Saunders] and go through you, ACC will be quicker if I go through Labour Department and OSH, at the end of the day I cannot be exposed to those fumes any longer so need to move on. My proposal is four weeks redundancy less the \$900 I owe you plus my holiday pay and I will resign my position at Sandblasting Specialists without involving anyone else and not push ACC and find a new job ...

[10] The following day, SSOL made several unsuccessful attempts to talk to Mr Barrow culminating in a message left for him from Ms Woodhouse in these terms:

Please ring me today, you have not been fired not made redundant, you need to communicate and get this situation sorted.

[11] Mr Barrow responded by text in the following terms:

I cannot work round paint any more and going to be about three months before I can work again.

[12] In her response, also by text, Ms Woodhouse pointed out that as Mr Barrow was the manager of SSOL, and all the proper safety and protective gear was provided by the employer, if Mr Barrow as manager did not wear the equipment, then he also was in breach of his obligations under the Health and Safety in Employment Act. Then, in his response to that text, Mr Barrow said, amongst other things: "... *that's fine I will do what I've got to do. Cheers*" and again on the same day in a subsequent text, Mr Barrow said:

I go through the right channels that probably have the place shut down, no need for you to contact me any more. Thanks for your help.

[13] On 20 December 2010, Ms Woodhouse told Mr Barrow in a text that she had been instructed in no uncertain terms not to deal with Mr Barrow's issues any more. She concluded with this sentence: "*you have to make an appointment to see Cliff yourself*". Then in a subsequent text from Ms Woodhouse to Mr Barrow the same

day, Ms Woodhouse asked Mr Barrow whether he was going to be turning up for work the following day (21 December) because that was what the ACC form stated as his return to work date. The response from Mr Barrow was that he had obtained a fresh medical certificate and that he would be “*off for the next three months*”. In a subsequent email on 21 December 2010, Mr Barrow indicated that he would be back at work on 7 January 2011. Later on 21 December 2010, Mr Saunders himself texted Mr Barrow instructing him to report to 63 Sturdee Street and not to SSOL’s depot. Mr Barrow responded with a text indicating he would be attending at the SSOL yard on 7 January, not at 63 Sturdee Street as Mr Saunders instructed.

[14] That same day, Mr Saunders sent Mr Barrow the email message on which Mr Barrow relies to ground his personal grievance. The text of the message I set out below:

Blair, As you will not communicate with me whatsoever regardless of the countless times I have tried to contact you I am left with no option but to communicate via email.

Due to your recent behaviour I have no option but to demote you from being the manager at Sandblasting Specialists Otago Limited and because of your recent health problems I can not offer you alternative employment there, however if you intend to return to work on 7 January 2011 you will need to come and discuss other employment options I can offer you

[15] On 23 December 2010, there was an extensive number of emails between Ms Woodhouse and Mr Barrow but for our purposes the only ones I desire to refer to are an exchange between Ms Woodhouse and Mr Barrow in which the former seeks to clarify whether Mr Barrow is proposing to attend at the workplace on 7 January 2011 as he had intimated he would do in an earlier text message, or whether his more recent letter dated 22 December 2010 was to be relied upon wherein Mr Barrow said that he would **not** be returning to work on 7 January 2011. That confusion does not seem to have been satisfactorily resolved and later the same day, acting on Mr Barrow’s request, Ms Woodhouse actually made an appointment for Mr Barrow to see Mr Saunders but Mr Barrow cancelled out of that meeting subsequently by saying that he was going to Australia instead.

[16] For the avoidance of doubt, I record that the Authority has been provided with a transcript of all the text messages between the parties over the period in question. I am satisfied that those messages and the record of them are authentic.

Issues

[17] The only issue is whether Mr Barrow is right to regard the email from Mr Saunders dated 21 December 2010 as a dismissal.

Was Mr Barrow dismissed?

[18] I am satisfied on the evidence before the Authority that Mr Barrow was not dismissed by his employer. I have set out in some detail the context in which the employer responded to the various challenges posed by Mr Barrow's behaviour and I am satisfied that in reviewing the context in which SSOL operated, it is impossible to treat the email in question as a dismissal. The message that that email conveys is, I conclude, that partly as a consequence of Mr Barrow's health issues and partly because of his failure for fully a month to sit down with his employer and discuss matters, the position he had previously occupied as manager of SSOL was no longer open to him but that other positions within the group of companies operated by Mr Saunders were.

[19] I have considered whether a proper analysis of the factual matrix would entitle me to conclude that although this email could not be a dismissal, if only because other work was offered, it might perhaps be an unjustified action by the employer causing Mr Barrow disadvantage. But again, it is difficult to see how that view could be sustained either. First, Mr Barrow has not suffered any disadvantage. Throughout the text exchange that I have referred to, Mr Barrow, on a number of occasions, makes the point that he can no longer work with paint. That of itself meant that his role at SSOL had to terminate. Indeed, arguably, to require Mr Barrow to continue working in that environment would of itself be a disadvantage so a good and fair employer would do precisely what SSOL did, namely say that in the interests of Mr Barrow's own health, he could no longer work in that environment.

[20] Furthermore, to hold that SSOL had committed an unjustified action by refusing to allow an employee to continue to damage his health seems illogical as does the associated contention that it is not available to an employer to respond to constant avoidance behaviour by an employee with a disciplinary consequence. If a managerial role (which Mr Barrow held) is a position of special trust, which it must be, then it seems available to a good and fair employer to contemplate demoting an employee in such a role when they fail to live up to the expectations of them and

when, in particular, they fail absolutely to engage with the employer in legitimate discussion about their future employment direction.

[21] What SSOL was offering Mr Barrow was an opportunity to continue in the employment but not continue to be exposed to paint fumes and yet, despite extensive efforts by the employer over fully a calendar month, Mr Barrow not only refused to engage with the employer in any meaningful way, and particularly in a face-to-face discussion, but also deprived the employer of any work over that period and for a good chunk of it also deprived the employer of the work vehicle that Mr Barrow had been provided with.

[22] Furthermore, the only information that SSOL had at its disposal about what was going on was one doctor's certificate and one ACC form together with the information Mr Barrow himself provided via text message to Ms Woodhouse. As I have already noted, the information Mr Barrow provided was at best confusing. At various times throughout the text exchange over that month, he indicated that he could not work at all for three months, that he could not work at all amongst paint fumes, but on other occasions he indicated that he was about to return to work and was intending to return to work in his previous capacity as manager of SSOL. This was so notwithstanding his earlier vociferous intimations that he could not work with paint fumes.

[23] The only supporting documentation provided to the employer by Mr Barrow was an ACC injury claim form dated 1 December 2010 which passed him unfit for work for 11 days from 25 November 2010, meaning that he would return to work on 13 December 2010 and that injury claim form was rather overtaken by a further medical certificate provided by the same general practitioner which stated that Mr Barrow could return to normal work with effect from 21 December 2010. The difficulty with this information, as Mr Saunders for the employer pointed out, was that it seemed to run contrary to the various claims made by Mr Barrow himself in the numerous text messages. He claimed at various times to be receiving various tests in relation to his alleged poisoning and he specifically stated to the employer on more than one occasion in the text exchange that he would not be able to work at all for three months, or that he would not be able to work with paint fumes. How was the employer to square those claims with the scant medical information and the subsequent advice that the ACC had turned down Mr Barrow's claim for a workplace

injury? The only proper thing the employer could do in that situation was to seek to discuss matters with its employee and it tried very hard to do that.

[24] Mr Barrow made numerous promises that he was going to come in and speak to Mr Saunders but he never did and towards the end of the text exchange he indicated that he had been advised (but not by whom) that he ought not to speak to Mr Saunders at all. If that advice was given, it is bizarre advice. Employment relationships are bilateral relationships requiring good faith behaviour on both sides. Open, frank communication is the essence of a good faith relationship. The employer in this case is entitled to expect that Mr Barrow would engage with the managing director face-to-face in a frank and open way, ironically in precisely the way that Mr Barrow engaged with Mr Saunders during the investigation meeting. If Mr Barrow had been prepared to sit down with Mr Saunders during December 2010 and resolve the issues between them, the present proceeding would have been completely unnecessary.

Determination

[25] For reasons that I have enunciated above, Mr Barrow's claim is unsuccessful.

Costs

[26] Costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority