

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 101
3019772

BETWEEN

MORRIS BRADLEY
Applicant

A N D

BRENDAN WILSON,
MARGARET BOND, DENIS
GAPPER, HINEMOA CONNER,
ADRIAN WILSON AND
TRACEY TAMOU as trustees of
the NGATI APA KI TE RA TO
TRUST
Respondent

Member of Authority: Peter van Keulen

Representatives: Andrew Shaw and Sarah Stewart, Counsel for Applicant
Alan Knowsley, Counsel for Respondent

Investigation Meeting: 22 and 23 March 2018 at Blenheim and 26 March 2018
at Nelson

Submissions Received: 26 March 2018 and 9 April 2018 for Applicant
26 March 2018 and 18 April 2018 for Respondent

Date of Determination: 19 July 2018

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Morris Bradley was the CEO for the Ngati Apa ki te Ra to Trust. Mr Bradley commenced work with the Trust in October 2014 and resigned in July 2017.

[2] Mr Bradley resigned because he felt the Board of Trustees of the Trust had undermined his position and destroyed any trust and confidence he had in them. He says he had no choice but to resign.

[3] The events that give rise to this employment relationship problem began on 4 April 2016 when Mr Bradley suffered a heart attack. As a result, Mr Bradley was off work for some time, only resuming full time work on 29 June 2016.

[4] In April 2017 after the end of the financial year 2016/2017, the Chair of the Board noticed that there appeared to be some overpayments made to a contractor to the Trust. The Board investigated this through an independent audit and a report was produced which indicated that some overpayments had been made. Because of this finding, the Board commenced a disciplinary process with Mr Bradley.

[5] At the heart of this employment relationship problem is this disciplinary process invoked by the Board; the Board alleging that Mr Bradley failed to make sure there were adequate processes in place to ensure that the Trust only made legitimate payments. And that Mr Bradley did not discharge his obligation as CEO to have financial oversight of the Trust's accounts and as a result, he failed to identify that the Trust was making overpayments.

[6] Mr Bradley denied any responsibility for the overpayments claiming that the Board was responsible for financial oversight, as one of the trustees had been approving payments. Mr Bradley claimed this was in line with the payment approval process he had put in place and in line with what the Board had been doing during his absence. In essence, his position was that he did not resume responsibility for the financial oversight of the Trust when he recommenced full time employment and the Board continued to undertake this.

[7] During the process, Mr Bradley became concerned about the motives of the Board in commencing and running the process. He queried whether the Board should have commenced the process at all, as he believed it indicated the Board was no longer prepared to work with him and he should consider his future position. People connected to the Trust told him things that led him to believe the Board had already decided to dismiss him and was undermining his position, he found his interactions with Trust staff to be strained and he felt the Board was not listening and responding to what he was telling it in the process.

[8] These things informed Mr Bradley's conclusion that he had lost trust and confidence in the Board and that the Board had undermined his position, which in turn led to his conclusion that he had no choice but to resign.

[9] Arising out of the disciplinary process and his resignation, Mr Bradley brings claims against the Trust for unjustified dismissal, a breach of the duty of good faith and a breach of his employment agreement.

Non-publication order

[10] The contractor who allegedly received the overpayments was not involved in my investigation meeting and did not have an opportunity to address the underlying allegations made by the Board that the Trust overpaid him/her for the contracting work undertaken. Further, it is not necessary for me to make any findings on the substance of these underlying allegations when resolving this employment relationship problem.

[11] With those underlying allegations not addressed there lies potential for there to be prejudicial or adverse inferences drawn about the contractor, which based on my investigation alone, would be unfair. For this reason, pursuant to clause 10 of Schedule 2 of the Employment Relations Act 2000 (the Act), I prohibit from publication any details that may lead to the contractor's identification, save as otherwise set out in this determination.

Constructive Dismissal

[12] The first issue for any personal grievance for unjustified dismissal is, is there a dismissal. As Mr Bradley resigned, he is claiming that I should treat the resignation as a dismissal because of the actions of the Board i.e. he claims the Board constructively dismissed him.

[13] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd*¹ the Court of Appeal held that constructive dismissal includes, but is not limited to, resignations where:

- (a) An employer gives an employee a choice between resigning or being dismissed;
- (b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.

¹ [1985] 2 NZLR 372 (CA) at 374-375

(c) A breach of duty by the employer causes an employee to resign.

[14] Whilst Mr Bradley resigned because he no longer had trust and confidence in the Board and because the Board had undermined his position, in his personal grievance claiming constructive dismissal he says the Board repudiated his employment agreement. The two positions are not inconsistent. Mr Bradley's resignation lacks the detail set out in the personal grievance but based on his evidence, the correspondence (including the resignation letter and his personal grievance letter) and the statement of problem, Mr Bradley's position is that the Board's behaviour in the course of investigating the alleged financial irregularities and conducting the disciplinary process was repudiatory. This repudiatory conduct caused him to lose trust and confidence in it and it undermined his position as CEO.

[15] So, Mr Bradley relies on the third limb of the *Woolworths* test for his constructive dismissal claim. The repudiatory conduct that Mr Bradley complains of includes:

- (a) Not investigating the underlying allegations correctly before commencing the disciplinary process;
- (b) Commencing the disciplinary process knowing there was no basis for the underlying allegations;
- (c) Commencing the disciplinary process when an informal discussion between him and the Chair of the Board would have been the appropriate and accepted course of action;
- (d) Not conducting the disciplinary process fairly including not providing the relevant information to him and not investigating what he said in response to the allegations, correctly; and
- (e) Not responding to him appropriately during the disciplinary process to restore the trust and confidence between him and the Board.

[16] In addition to these particular complaints Mr Bradley says the behaviour which informs these complaints together with an alleged statement by one trustee to the effect that he would lose his job shows:

(a) The Board had predetermined the outcome of the disciplinary process;
and

(b) The Board were undermining his position making his continuation in
the role of CEO impossible.

[17] I will consider each of these complaints in turn to assess what occurred and whether, as a result, there has been a repudiatory breach.

Not investigating the underlying allegations correctly before commencing the disciplinary process

[18] I am satisfied that the Board did enough to investigate the alleged overpayments before commencing the disciplinary process. The Chair of the Board had reviewed the Trust's profit and loss data in its accounts database and identified the possible overpayments. He discussed this with Mr Bradley and then with members of the audit and risk committee. As a satisfactory explanation was not received the Board instructed an accounting firm to undertake an independent audit of the payments and produce a report. The Board was initially concerned to determine if there had been any fraudulent activity.

[19] Another trustee then reviewed the report and discussed it with the accountant who had conducted the audit.

[20] From the report, the Board established that the Trust had made overpayments but there had not been any fraudulent activity. As a result, it decided to take action in respect of the Contractor, terminating the engagement. Then the Board decided to commence disciplinary action with Mr Bradley as it had concerns about his failure to control the payments being made; essentially, there had been extra unapproved claims for work done by the contractor that had been paid, which Mr Bradley had not been aware of.

[21] In my view, the Board's investigation was sufficient and the decision to commence the disciplinary process was one that a fair and reasonable employer could have made in the circumstances.

Commencing the disciplinary process knowing there was no basis for the underlying allegations

[22] Mr Bradley says the Board knew he did not return to full time duties in June 2016; he returned to full time hours but his role did not include financial oversight of the Trust as a trustee continued to authorise payments. So, for this reason there was no basis for him to be held responsible for failing to exercise that financial oversight – and the Board knew this.

[23] I do not accept this argument.

[24] I am satisfied that the Board expected Mr Bradley to undertake the full CEO role including all of the responsibilities associated with that role, if he was to return to full time work.

[25] The Board was concerned at the time about Mr Bradley's ability to return to work in that full capacity and asked Mr Bradley to undertake some psychometric testing to establish his mental fitness to return, it already had a medical certificate certifying Mr Bradley's physical fitness to return. That testing did not reveal any concerns regarding Mr Bradley returning to full capacity as CEO and on this basis, the Board was prepared to proceed with his return.

[26] So, the Board believed Mr Bradley was both physically and mentally capable of returning to the full CEO role and it was prepared to support this.

[27] The Chair of the Board then met with Mr Bradley to discuss his return. The Chair was very clear in his evidence about the Board's expectations of Mr Bradley's return to full time work and he was very clear on what he discussed with Mr Bradley. The Chair's evidence on this point was also consistent with other evidence. This includes Board minutes, other Board members' evidence about what the Board expected from Mr Bradley, the evidence about what employees were told about Mr Bradley's return and the fact that for a short period of time on his return Mr Bradley was tasked with authorising payments.

[28] In contrast, Mr Bradley's evidence on this issue, particularly the meeting with the Chair in which he discussed his return to full time work as CEO was less credible, it lacked support of other evidence and when I consider it in the context of all matters, it seemed less likely to be correct. Mr Bradley's version of what occurred seems less

likely given all of the circumstances and the overall evidence; I do not accept that the Board would have accepted Mr Bradley returning to full time capacity without the obligation to fulfil all of the full time duties of the CEO.

[29] I do however accept that when Mr Bradley returned to full time work, he may have become confused about the Board's expectations over the extent of his duties particularly as those duties related to financial oversight of the trust's accounts and expenditure. This arises primarily because shortly after Mr Bradley recommenced full time work a trustee took over the obligation to authorise payments as trustees had done during Mr Bradley's absence.

[30] The interesting aspect of the authorisation by the trustee was that he did not think he was doing it as part of any financial oversight of expenditure or budgetary approval. The trustee did this simply as a processing function to assist Mr Bradley. The trustee's evidence on this was reasonably clear to me; as a signatory in replace of Mr Bradley, he was processing payments that he believed had already been approved through the normal budgetary and/or management approval process. The trustee was acting as a second signatory to facilitate the payment not to authorise the underlying expenditure. The trustee did not believe he had assumed financial oversight in doing this role. He did not report to the Board that he was doing it, he did not check payment amounts in a manner consistent with approving the expenditure and for some payments he signed off on the payment after it had actually been made.

[31] The confusion with this was that the trustee was adopting an old process of authorisation, a system that the Trust had used prior to Mr Bradley's employment. Mr Bradley had implemented a new system where the signing off for payment included authorisation so that the signatory had to be satisfied that the payment was authorised and would not simply rely on the payment request. As part of this new system, Mr Bradley was normally the second authorisation, fulfilling his financial oversight by satisfying himself that the payment was in line with budgetary approval or normal Trust expenditure i.e. Mr Bradley was approving or authorising the underlying expenditure when he signed off on the payment being made.

[32] I can see why Mr Bradley may have assumed that he did not have financial oversight and this may well have provided an explanation for his failure to be aware of and prevent the overpayments – and this explanation may have been accepted by

the Board had the disciplinary process run its full course. However, this does not mean the Board was aware of this at the time it began the disciplinary process. In fact, the evidence confirms the opposite, the Chair of the Board believed Mr Bradley should have had financial oversight for the Trust in his role. Because of the Board's understanding of the verification process and its understanding of what the trustee may have been doing as a second signatory for payments, I accept there was no basis for the Board to conclude otherwise.

[33] So, I conclude that the Board genuinely believed there was an issue for Mr Bradley to answer in respect of his alleged mismanagement of the financial oversight aspect of his CEO role because it believed he had financial oversight at the time of the overpayments.

Commencing the disciplinary process when an informal discussion between Mr Bradley and the Chair of the Board would have been the appropriate and accepted course of action

[34] Mr Bradley says the Board should not have commenced a disciplinary process with him as it is normal in such circumstances for a Board to speak to a CEO informally to resolve any concerns.

[35] Dr John Peebles, an expert witness, said:

...[I]t is customary that where there are performance issues with a Chief executive, the Chairman of the Board would first resolve those concerns informally and privately. Such informal resolutions could require the Chairman and other Board members to work closely with the Chief executive over a period of time to resolve those matters and such informality provides the Chief executive with assurances that the Board maintains trust and confidence in him/her and that the employment relationship is destined to continue.

[36] This expert evidence may be correct. However, on its own it does not prove a repudiatory breach by the Board. I need to consider, in light of this expert evidence, if the Board had an obligation to commence some informal process rather than a disciplinary process.

[37] The expert evidence alone does not mean the Board had an obligation to discuss matters with Mr Bradley informally rather than commencing a disciplinary process.

[38] I have already determined that the Board had a basis to commence a disciplinary process with Mr Bradley. It is clear that under the Act the Board has statutory obligations to comply with to ensure any disciplinary process is justified and the duty of good faith imposes further obligations on it. If the Board meets these obligations then it can, largely, commence, carry out and complete its process without criticism. I do not see how an industry norm or a generally accepted understanding of how disciplinary or capability matters are handled, can change this. To allow this would mean any employers and employees in a particular industry or sector of employees (such as in this case CEO's) could change the statutory obligations imposed on, not just themselves, but others in similar situations. This cannot be right.

[39] So, in this case there was no obligation on the Board to conduct some informal process of discussion with Mr Bradley rather than the formal disciplinary process. And, its decision to commence the disciplinary process cannot be a repudiatory breach.

Not conducting the disciplinary process fairly including not providing the relevant information to Mr Bradley and not investigating what he said in response to the allegations, correctly

[40] I am not satisfied that the Chair of the Board failed to disclose relevant material or information to Mr Bradley in the course of the disciplinary process. Further, I can understand why Mr Bradley may have been concerned about the extent to which the Chair was investigating and considering the explanations he provided but this was not a proven breach at the time Mr Bradley resigned.

Not responding to Mr Bradley appropriately during the disciplinary process to restore the trust and confidence between Mr Bradley and the Board

[41] This is not a valid criticism of the Chair of the Board and there is no breach of any obligation in this regard.

Predetermining the outcome of the disciplinary process

[42] When I stand back from the individual complaints outlined above, which Mr Bradley believed were valid concerns both during the process and when he resigned, I can see why cumulatively Mr Bradley believed the Board had predetermined that he would be dismissed and was pushing through a process to make this happen.

[43] Added to this are two further major contributing factors for Mr Bradley.

[44] The first contributing factor is recorded by Mr Bradley in his evidence:

... I received a telephone call from [the contractor]. [The contractor] told me that [he/she] had heard that I was going to no longer be working for the Trust and there had been a discussion at a function at the Parliament Buildings in Wellington where a Trustee had spoken openly of this. [The contractor] told me that the trustee had said that I would be gone in two weeks or words to that effect.

[45] There are several parts to this evidence as it pertains to the claim of constructive dismissal:

- (a) Mr Bradley did not hear the alleged statement by the trustee directly nor in fact did the contractor. Mr Bradley became aware of the alleged statement through the contractor who in turn had heard it from a third party who claimed to be a party to the conversation. In essence, the statement Mr Bradley relies on is second hand hearsay.
- (b) The Chair, who was conducting the disciplinary process and had a mandate from the Board to decide the outcome of that process, did not make the alleged statement.
- (c) Mr Bradley believed the alleged statement to be true but could not immediately verify if it had been made and, if it had been made, if it reflected the views of the Chair. That is he may have believed it showed the Board had already decided he would be dismissed but he could not be sure of this based on the nature of the evidence.
- (d) If the statement had been made and it actually reflected the views of the chair and the Board i.e. there was predetermination, then this would be a repudiatory breach.
- (e) If the statement had been made but it only reflected the views of the trustee then that is not proof that the Chair or the Trust had predetermined the outcome of the disciplinary process but it would, in my view, be a breach of the duty of good faith given Mr Bradley's role and the circumstances at the time.

[46] I can deal with the predetermination aspect of this allegation in relatively short terms. The evidence about the alleged statement by the trustee did not persuade me that the Chair of the Board had predetermined the outcome of the disciplinary meeting. In contrast the Chair's own evidence on his views of the process and predetermination were credible. I find that the Chair did not predetermine the outcome of the disciplinary process.

[47] The remaining question is, did the trustee make the statement thereby undermining Mr Bradley's position as CEO? This issue is to be answered in the next section but I will address it here as it logically fits with this aspect of the predetermination issue, as it concerns the same evidence.

[48] The evidence on whether the statement was made by the trustee came from three witnesses – two trustees, who were at parliament and allegedly involved in the statement, including the trustee who allegedly made the statement and a third party who heard the conversation, although this was not the person who reported the conversation to the contractor.

[49] Each of the three witnesses was credible, the two trustees denying that the statement was made and the third party claiming he heard the trustee say that Mr Bradley would be gone in three weeks.

[50] I have had real difficulty in deciding whose evidence I preferred. I have relied on the guidance provided by Judge Harding in the District Court in *R v Biddle*² that was cited with approval on appeal to the High Court³. This includes considering the following:

- (a) What each witness said – reviewing how each witness expressed his/her evidence both orally and in writing, considering what was said and how the witness said it.
- (b) Consistency – looking at whether the witness's evidence was consistent throughout; and whether the witness's evidence was consistent with other evidence such as contemporaneous documents or agreed or known facts.

² [2015] NZDC 8992

³ *Biddle v R* [2015] NZHC 2673 at [21]

- (c) Reliability – considering whether the witness appears reliable and was accurate in his/her perceptions and recall of events.
- (d) Concessions – looking at whether the witness made appropriate concessions.
- (e) How plausible – asking, overall, how reasonable, plausible or probable the witness’s evidence was; and whether the witness’s evidence hangs together and has a degree of truth or is persuasive.
- (f) Demeanour – considering the witness’s bearing, appearance and attitude but noting that this is limited as genuine witnesses may be mistaken in their memory and those who do not tell the truth can still be convincing, i.e. looks can be deceiving.

[51] The key factor for me when I assessed these things was the trustee’s denial of making the alleged statement included a credible explanation for why she would not have discussed Mr Bradley’s possible dismissal or departure from the Trust at the function she was attending. And, on balance that was persuasive. It made her evidence (or her story) plausible so that it hung together.

[52] When I add to this assessment the requirement that an applicant has the burden of proving the repudiatory breach I find that Mr Bradley has not met the required standard.

[53] Turning to the second contributing factor to the assertion that the Board had predetermined the outcome of the disciplinary process, the evidence provided by Mr Bradley is that the commencement of a disciplinary process with a CEO is a clear signal that a board has lost trust and confidence in the CEO and the board sees the relationship coming to an end.

[54] On this issue, Dr John Peebles said:

The institution of a formal investigation is widely considered to be a loud warning bell that the Board is no longer prepared to work with the Chief Executive and is almost always an indication that the Chief Executive should consider his future position.

[55] The simple point Mr Bradley wants me to accept is this expert evidence shows that the Board's actions in commencing a disciplinary process were an indication of pre-determination of dismissal.

[56] I do not accept this. Commencing the disciplinary process does not mean that the Board had actually decided that it would terminate Mr Bradley's employment and it chose to commence the disciplinary process to convey this message to him. Just because that might be the case for some Boards and CEOs that does not mean it is true for this Board and Mr Bradley.

[57] I reiterate the point I made at the outset of this section, I can see that if Mr Bradley believed the concerns he had during the process and when he resigned were valid, I can see why Mr Bradley believed the Board had predetermined that he would be dismissed and was pushing through a process to make this happen. In this regard, I have some empathy with the position he found himself in but his belief does not make predetermination a fact and Mr Bradley has not persuaded me on balance that this was the case.

Undermining Mr Bradley's position

[58] For the same reasons set out above, I find that the Board was not undermining Mr Bradley's position and this is not a basis for his constructive dismissal claim.

Breach of duty of good faith and breach of employment agreement

[59] Based on my findings on the constructive dismissal claim it follows that there is no breach of the duty of good faith and no breach of Mr Bradley's employment agreement.

Determination

[60] Mr Bradley's claims for unjustified dismissal, breach of duty of good faith and breach of his employment agreement are dismissed.

Costs

[61] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[62] If they are not able to do so and a determination on costs is needed, any party seeking costs may lodge and serve a memorandum on costs within 28 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority