

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 539
5404680

BETWEEN PHILIP BEVAN
Applicant

AND GREENWAVE ENERGY
SAVING SOLUTIONS
LIMITED
Respondent

Member of Authority: G J Wood

Representatives: P Bevan on his own behalf
M Armstrong for the Respondent

Investigation Meeting: 15 October 2013 at Auckland

Determination: 25 November 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Philip Bevan (known as Steve), claims that his redundancy by the respondent (Greenwave) was unjustified, as it was not a genuine redundancy situation because his work as Business Development Manager was still required in the company, and his redundancy was implemented without consultation. He also claims that he was significantly underpaid bonus commission payments and that, contrary to his wishes he was never enrolled in KiwiSaver. Claims for penalties were withdrawn.

[2] Greenwave (which is run by Father and Son Paul and Murray Armstrong) denies Mr Bevan's claims, apart from the lack of consultation, and has counter-claimed over an agreed overpayment in Mr Bevan's wages.

Factual discussion

[3] I have founded my determination on issues of fact on the basis of reference to documents prepared at or near to the relevant time and by assessing what is inherently more probable than not, rather than through the credibility of evidence from the witnesses, because the key witnesses (Mr Bevan and Messrs Armstrong) had fundamental differences over a number of issues where all cannot have been correct. There was no obvious way of determining, through demeanour or such like, whose evidence was more likely to be correct, and therefore I have applied the above test.

[4] Greenwave provides energy saving solutions to companies, focused principally on their lighting requirements. The company is owned by Mr Paul Armstrong and his son, Murray Armstrong. Mr Paul Armstrong also runs a company, Counties Electrical Limited, which provided installation services to Greenwave on a contractual basis.

[5] Greenwave relies on sales to survive and in August 2011 it employed Mr Bevan to run its sales operation as Business Development Manager. Although a standard form employment agreement came from Counties Electrical, the written agreement was an effective individual employment agreement. It provided for variation by agreement in writing, and recorded that an individual record of confirmation confirmed the full terms of employment between the parties. That record provided for a salary of \$80,000 per year for Mr Bevan, together with *bonuses: 5% on the first payment of a signed project less GST*. Both parties signed this agreement and it has never been varied in writing. There was therefore an incentive for Mr Bevan to arrange deals with clients so as to give as much money as possible under the first payment, rather than any subsequent payments. This had the added bonus of assisting Greenwave get as much money as possible *up front*. This arrangement therefore had a clear business logic.

[6] Details of a previous employee's bonus arrangements (over the same issue) do not assist Mr Bevan, as the problems between that employee and Greenwave could just as easily have meant that Greenwave set out in the agreement to ensure that Mr Bevan was never entitled to 5% on all sales, as not.

[7] As a result of the lack of written evidence to the contrary and the business rationale for the agreement, I reject Mr Bevan's claim that he was entitled to a bonus

of 5% on all sales. He was instead entitled to 5% on the first payment made, less GST.

[8] Mr Bevan claims that he is entitled to be recompensed for not being enrolled in KiwiSaver. While the Authority has no jurisdiction over the KiwiSaver Act 2006, it does have jurisdiction to determine whether there has been a benefit lost by Mr Bevan as a result of a failure by Greenwave to adhere to the terms of the parties' employment agreement - those terms extending in all cases to more than the terms of the written employment agreement. Under the KiwiSaver Act Greenwave should have enrolled Mr Bevan in KiwiSaver as a new employee, and then it would have been for Mr Bevan to resign from KiwiSaver had he so wished. While in this case the one email about how Mr Bevan's pay was made up did not mention KiwiSaver, I accept Mr Bevan's evidence that he only found out later that he had not been enrolled in KiwiSaver. This is because of the total lack of any payslips for Mr Bevan, the irregularity of KiwiSaver schemes reports to clients (particularly in light of Mr Bevan's relatively short period of employment) and the fact that Mr Bevan had enrolled in KiwiSaver in previous jobs. The employer subsidy to which Mr Bevan was entitled constituted 2% of his gross salary (\$80,000 per year over 57 weeks), namely \$1,753.84.

[9] Unfortunately, Greenwave was not a successful business financially. Over the course of several years the Messrs Armstrong had put in hundreds of thousands of dollars of their own money in order to keep the business afloat. Over the last two months of Mr Bevan's employment no sales had been made, despite a previous appointment of a clerical person to assist with sales. That person was made redundant in September 2012 after nine months employment. There had also been some discussions involving Mr Bevan, where the difficult trading situation facing Greenwave was discussed.

[10] It may thus have been foreseeable to Mr Bevan that he would be at risk of redundancy, but he had no forewarning when he actually was made redundant, and his view that the company needed sales to survive and he was the chief sales person and therefore immune from redundancy, was (until then at least) a reasonable one. However, the Armstrongs as owners of Greenwave, decided that the business could not afford to keep Mr Bevan, and that they would take over responsibility for sales.

Accordingly, when the Armstrongs met with Mr Bevan on 12 October, they knew that he had no forewarning that he was to be made redundant.

[11] Mr Bevan was presented with a letter which stated (verbatim):

As you are aware we have had no sales now for over 2 months. As discussed back in February this year our monthly budget was set at \$100k. Unfortunately to date we have only managed to average just over \$49k per month, well short of budget and has left the Company in a bad financial position in regards to cash flow.

Unfortunately due to this economic reason regrettably your position has become redundant.

As we are a small company with a staff of only three, redeployment is not practicable. We would have been open to redeployment if it had been a possibility.

3rd February this year, we agreed verbally that if you could not make monthly budgets after six months, you would leave and we shook hands on this matter.

As per our obligations under the employment Act 2000, we are happy to provide reasonable counselling and/or career advice should you feel you require it.

As per your contract dated 2nd August 2011 there is no requirement for any redundancy payment. As you are paid weekly then we will be providing you with the equivalent of one week's wages as notice of the redundancy and of course all holiday pay owed to you.

Today will be the final day that we require you to attend work and wish you the best with finding new employment.

To resolve this matter amicably, I have put together a fair financial package.

[12] The package referred to in the letter constituted a full and final settlement offer that involved lesser commissions than Mr Bevan believed was owing, and was thus not accepted. Indeed Mr Bevan was quite angry at the way he had been treated. In addition, he was required to leave and hand over his keys to his company car and his computer. Mr Bevan was told that the parties would meet again on Monday to discuss the offer.

[13] Mr Bevan responded at the next meeting stating that he did not agree to the package, but suggested mediation. This was not agreed to by Greenwave, despite the provision in the employment agreement providing for mediation if problems were not resolved face to face. At that point Mr Bevan was required to return his company

telephone and to leave the premises, which Greenwave itself vacated, given that its lease was a short term one only. He was paid his outstanding annual leave, but not any commissions owing.

[14] Mr Bevan left threatening legal action, which he subsequently initiated by filing with the Authority. The parties attended mediation and despite significant efforts during the course of the investigation they remained unable to resolve matters themselves.

Determination

[15] At the end of Mr Bevan's employment he was entitled to 14 days annual leave, which he was paid. Greenwave claim that Mr Bevan was only entitled to \$9,752.90 in commission payments and (as was agreed) he had been paid \$2,197.60, leaving a balance owing of \$7,555.30. Despite this Greenwave has failed to pay him any of this amount.

[16] However, Mr Bevan also provided documentary evidence that he had been heavily involved in a number of other sales. One of those clients related solely to the claim for the full 5% rather than the first payment, and therefore is not relevant. The other two clients (whose names are not specified for commercial sensitivity reasons) made purchases involving Mr Bevan, on which he should have been paid commission totalling \$2,799.50 (\$1,948.50 plus \$851.00). Thus I conclude that Mr Bevan, when leaving Greenwave, should have been paid \$10,354.80 gross in bonuses.

[17] However, there remains the counterclaim for overpayments. Mr Bevan accepted that his salary should have been \$1,538.46 gross per week, being \$80,000 divided by 52 weeks. However he was in fact paid \$1,667.66, because of a mathematical error by Mr Paul Armstrong when calculating his wages. This meant that he was overpaid by \$6,718.32 a year. This calculates to \$7,307.97 over the 57 weeks of Mr Bevan's employment. The error also meant that his holiday pay was overpaid by \$359.91 gross. I have used gross figures because matters of tax are for the parties and the IRD, not the Authority.

[18] Because this sum will be offset against monies owing by Greenwave to Mr Bevan, he cannot be said to have changed his position in reliance on receiving this additional money, and neither did he so claim.

[19] Mr Bevan, having been paid his holiday pay at the end of his employment, is therefore owed \$2,686.92 gross (being the \$10,345.80 owing in commissions less the \$7,667.88 in overpayments), together with \$1753.84 in unpaid KiwiSaver contributions.

[20] There remains Mr Bevan's claim for a personal grievance. I accept, for the financial reasons given above, that the redundancy was done for genuine financial reasons. I do not accept that it related to the personal issues Mr Bevan was having with an employee of Counties Electrical, whom he claimed he was training up, and later took his job. The fact is that that person never worked for Greenwave as an employee, and has since left Counties Electrical. Furthermore, financial imperatives belie Mr Bevan's claim, and instead I accept the Armstrongs' evidence that this person did not have enough work at Counties Electrical and was therefore helping out at Greenwave during Mr Bevan's employment, and later did some work for Greenwave on the same basis. This did not change the financial position of Greenwave, which has not subsequently improved.

[21] However, as acknowledged by Greenwave, this was an unjustified dismissal/disadvantage, because although I accept that the redundancy was genuine, how Mr Bevan was treated was not how a fair and reasonable employer could have treated him. There was simply no consultation with Mr Bevan, and no forewarning that he was to lose his job for redundancy, let alone effectively that day.

[22] As is clear from s.103A and s.4(1A)(c), employers in situations like those faced by Greenwave are obliged to provide both information, and an opportunity to comment, on any proposal that will or is likely to have an adverse effect on the continuation of employee's employment. I accept that Greenwave should have been aware of its obligations because, at Mr Bevan's suggestion, it had engaged legal counsel when making a previous employee redundant. For whatever reasons it failed to follow the process set out for it in the previous employee's case. If it had done so it was possible that Mr Bevan could have come up with proposals, such as contract work for instance, that might have met the needs of both parties. Thus it is clear that the procedure that Greenwave adopted was not one that a fair and reasonable employer could have done.

[23] Given that the redundancy was a genuine one, Mr Bevan is not entitled to lost remuneration, except for a reasonable period of two weeks during which consultation should have occurred. That constitutes the sum of \$3,076.92 gross.

[24] Mr Bevan is also entitled to be compensated for the impact on him of the way that his dismissal was handled by Greenwave. He gave clear evidence on that impact, particularly his shock at the way that decision was relayed to him out of the blue.

[25] In all the circumstances of this case, including the financial position of Greenwave, I consider that compensation in the sum of \$5,000 is appropriate.

Determination

[26] I therefore order the respondent, Greenwave Energy Saving Solutions Limited, to pay to the applicant, Mr Philip Bevan, the following sums:

- \$1,753.84 net in compensation for unpaid KiwiSaver contributions;
- \$2,686.92 gross in unpaid monies owing at the end of his employment;
- \$3,076.92 gross in lost remuneration; and
- \$5,000 without deduction in compensation under s.123(1)(c)(i).

Costs

[27] Costs are reserved.

G J Wood
Member of the Employment Relations Authority