

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 129
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BETWEEN PAUL COFFEY
 Applicant

AND IMS SECURITY LIMITED
 Respondent

Member of Authority: GJ Wood

Representatives: P Coffey on his own behalf
 G Dewar for Respondent

Investigation Meeting: 5,6 and 7 August 2014 at Wellington

Submissions Received: 7 August 2014

Determination: 17 December 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Paul Coffey, has had a long history in the security business, principally the installing and monitoring of alarm systems for private and commercial premises. He has owned and operated a number of successful companies. Despite this, at least one of his last operating companies was having problems with creditors, particularly the Inland Revenue Department.

[2] In July 2011 two of his main companies sold business assets to a company later named IMS Security Limited (IMS), the respondent, which was to be owned and operated by a former employee of his, Ms Liza Anderson, and her husband Mr Paul Hodson. Mr Coffey now claims that he is a significant owner of IMS by way of

secret trust. It is outside the scope of the Authority's investigation to determine that issue and it is not discussed further accordingly.

[3] Further complicating matters is that Mr Coffey and Ms Anderson had previously been in a personal relationship for many years and remained good friends until the end of Mr Coffey's association with IMS in 2012. Mr Coffey did not enjoy such good relations with Mr Hodson from soon after he became associated with IMS as a principal.

[4] Mr Coffey worked with IMS between July 2011 and 15 January 2012, during which time he was paid a fairly regular salary. Mr Coffey claims that he was employed on the same terms of employment that he did as an employee (as well as being a shareholder and director) of the predecessor companies, while IMS claims that he was simply there to provide vendor assistance.

[5] From 15 January 2012 Mr Coffey was no longer paid by IMS. IMS claims that this was the result of an agreement and that Mr Coffey's employment was terminated accordingly at that time, whereas Mr Coffey claims that he agreed to a deferral of his salary until IMS became cash flow positive.

[6] Whatever the relationship between the parties, there was a major dispute on 18 June 2012 between Mr Coffey and Ms Anderson over access to a vehicle (later including Mr Hodson), which led to the involvement of the Police. The next day there was an issue regarding Mr Coffey's accessing of files at the offices of IMS. In essence Mr Coffey claims that as a totality of the events on 18 and 19 June, which led to his being trespassed off IMS premises on 20 June, he was unjustifiably dismissed.

[7] As a result Mr Coffey makes a claim for unjustified dismissal and a number of linked unjustifiable actions. He also seeks the return of personal property that he had left at IMS and was never returned to him. In addition to lost remuneration, compensation for humiliation and costs he also seeks reimbursement for certain expenses he claims he undertook on behalf of IMS. All penalty claims are out of time, as is accepted.

[8] IMS subsequently counterclaimed against Mr Coffey for the repayment of loans to him, proceeds from the sale of two cars, improper crediting or offsetting of client accounts, together with misappropriation of IMS's customers and breach of confidentiality after he left IMS.

Factual discussion

[9] It is with regret that I note from the outset that I have been unable to rely on much if any of the evidence of the three key protagonists in this matter, Messrs Coffey and Hodson and Ms Anderson. Over points too numerous to mention their evidence was internally inconsistent, inconsistent with independent witnesses, inconsistent with documentary material and inconsistent with business common sense. I will not discuss these points further as the three people concerned are well aware of where their evidence was lacking.

[10] Given that the evidence of these key protagonists was so fundamental to the issues arising out of their relationship, I have simply had to rely on independent witnesses (such as were truly independent and where relevant), documentation created at the time and business common sense to determine the intricacies of these complex inter-personal relationships, which dominated the relevant employment relationship problems.

[11] The employment relationship began on 18 July 2011 following the purchase by what is now IMS (owned and operated by Ms Anderson and Mr Hodson) of the business assets of Mr Coffey's companies, which were threatened with IRD action, which apparently continues to this day. The details of the sale and purchase are a matter beyond the scrutiny of the Authority. Suffice to say that IMS purchased the assets without apparently doing due diligence, but that Ms Anderson and Mr Hodson mortgaged their family home in order to buy the assets from companies owned and operated by Mr Coffey. While Ms Anderson had been employed in those businesses in an administrative role for many years, Mr Hodson had little experience with the companies and with the security industry. IMS therefore needed Mr Coffey to help run the business at least in the short term.

[12] I accept Mr Coffey was employed by IMS (as now accepted by it) and that effectively there was a division of labour such that Mr Coffey's responsibility was to obtain business (at which he was particularly skilled), while it was also clear from his previous business dealings that attention to accounts and administration were not his forte. Mr Hodson was to run the monitoring stations, which were later sub-contracted out. Ms Anderson's role was to run the finance and administration arms of the business.

[13] Unfortunately, unlike other employees, no employment agreement was drawn up for Mr Coffey. I do not accept Mr Coffey's claim that he was simply engaged on the same terms and conditions as he had had in the previous companies. I so find because he was not a director anymore, as it was clear that IMS could not afford those levels of payments given the injection of Mr Hodson into the business, the fact that the businesses under Mr Coffey had not recently been successful, and as that was not how he was paid. I therefore determine that his terms and conditions included a gross salary of \$130,000 per annum, as Mr Coffey was generally paid this amount, he did not object to that amount and while he was no longer a director he was paid more in salary than Ms Anderson or Mr Hodson. I also find that it was agreed that Mr Coffey would be paid for the use of a flat in Auckland (given that he worked extensively in Auckland, although his home was in Wellington) and that he would be reimbursed for entertainment and other expenses (including his mobile phone), on the basis that IMS paid for them over the relevant period. I do not accept, however, that IMS was responsible for Mr Coffey's vehicle leases for vehicles in Auckland and Wellington, given that he paid for them out of his own account.

[14] During the course of 2011 the employment relationship did not run smoothly for a number of reasons. First, Mr Coffey began to assert the right to deal with IMS as an owner due to his *secret trust* claim. Second, at least in part due to Mr Coffey's conduct, IMS lost its major client, albeit this was after its business had been put out to tender. Third, Mr Coffey and Mr Hodson did not get on well together, a factor complicated by Mr Coffey's ongoing good relations with Ms Anderson, with whom he had lived for a number of years while Ms Anderson was in Mr Coffey's employ. Fourth, Mr Coffey had a number of personal issues to deal with of a serious nature, together with the ongoing threat, later to come to fruition, of personal prosecution by the Inland Revenue Department.

[15] Mr Coffey claims for unpaid commissions for a job he did for one of IMS's clients. I do not accept that he was entitled to such commissions, given that it was not a matter that he pursued with any vigour while employed by IMS.

[16] IMS also claims that Mr Coffey was responsible for wrongly breaching an offset agreement with the company provided IMS with seats in its corporate box at the Wellington Stadium. The evidence was clear that this offset was agreed to by

Ms Anderson. I also accept that the claim for loss of revenue due to non-payment of another customer was not attributable to Mr Coffey's actions as its employee.

[17] IMS also seeks the repayment of loans allegedly made to Mr Coffey and not repaid. I conclude, however, that the loans were personal loans between the protagonists, and thus not by IMS, Mr Coffey's employer.

[18] Mr Coffey claims reimbursement for the costs of attending a security industry conference in the USA, which he met himself. I do not accept that the trip was in the nature of a holiday or a junket. Mr Coffey arrived in Florida on a Saturday afternoon and left the next Wednesday afternoon, the conference presumably taking place on the Monday and Tuesday.

[19] I accept that Mr Coffey was granted permission by Ms Anderson to attend this conference on the company's behalf, as he had done for his previous companies for many years previously. I also accept that Ms Anderson approved this in the knowledge that Mr Hodson would probably not approve, as she often did things for Mr Coffey without Mr Hodson's knowledge.

[20] Subsequently Mr Coffey has sought reimbursement but it has been denied to him. I conclude that Mr Coffey went to the Florida conference with IMS's blessing, but on the understanding that it would not have to pay for it. The conference benefitted Mr Coffey personally because it kept up his international contacts with suppliers and clients and also kept up his knowledge about the recent trends in the industry. The fact that he did not ever seek repayment of this sum, unlike others, during his employment, and was not part of his original claims, makes it more likely than not that this was the case. I therefore dismiss this claim.

[21] The loss of IMS's major customer, together with difficult trading conditions in 2011 (associated with a recession in New Zealand and the global financial crisis) meant that IMS was not financially successful. It has having difficulty paying its creditors in late 2011.

[22] Accordingly Ms Anderson decided, in her role as financial controller, that as of 15 January 2012 she, Mr Hodson and Mr Coffey would no longer receive salaries from IMS. Mr Coffey received no remuneration from that point on, while Ms Anderson and Mr Hodson subsequently were only paid \$15,000 each in the

subsequent financial year. In any event such sums were more akin to shareholders' drawings than salaries.

[23] IMS claims that Mr Coffey agreed to terminate his employment at that point in mid-January, but I prefer Mr Coffey's evidence that he agreed along with the other senior managers, Ms Anderson and Mr Hodson, to go without remuneration until such time as IMS could afford to pay him, which was expected to be later in the year. This is because Ms Anderson and Mr Hodson's evidence was not consistent on this point, Mr Coffey did not attempt to find alternative employment (yet he had no other source of income) and most importantly the emails produced from IMS's records demonstrate that his association with IMS continued to a significant degree, with him being in almost daily email contact with suppliers and Ms Anderson. In fact Mr Coffey continued in regular contact with customers and continued to be able to commit IMS to expenditure with the knowledge of Mr Hodson and Ms Anderson. He was still part of IMS's email system. Mr Coffey also continued to have access to an IMS fuel card and his telephone payments continued to be met by it. Furthermore, I accept Mr Coffey's evidence that his mobile phone records, held by IMS but never provided to the Authority, would have shown a similar picture. Finally, Mr Coffey's final pay, including holiday pay, was not made up at that time.

[24] However, it was clear that Mr Coffey was becoming disillusioned with the way IMS was operating and the fact that he was not being paid. Most of his company expenses were, however, paid during this period, albeit often late. Mr Coffey did raise the issues that he was expecting to be paid, and in May 2012, as he finally accepted for the first time towards the end of the investigation meeting, he sold two cars that were the property of IMS and kept the proceeds of \$13,313.62 net.

[25] During the course of his employment Mr Coffey claimed that he took no holidays. However the records show that he took at least one day off in April 2012 and that IMS was shut down over Christmas for 8 working days until Monday 16 January. I do not accept that his failure to be working in the Auckland or Wellington office on some days meant he was on holiday on any other days. Mr Coffey was a salesman, regularly working off-site and at odd hours.

[26] In essence, by June 2012 the relationship was headed towards a predictable end. Mr Coffey's motivation was rapidly running out because he was not being paid. Ms Anderson and Mr Hodson were more able to run IMS on their own without the

need for Mr Coffey. Mr Coffey was involved in ongoing arguments with IMS. Even Ms Anderson, his greatest supporter, was involved in daily arguments with him, which shows that things were not going at all well on either side. Despite all these issues IMS never raised any issues in writing with Mr Coffey, which it now recognises that it should have, including over any alleged performance issues.

[27] Furthermore, the parties were in dispute, at the very minimum, over tenancy issues relating to the Auckland apartment and Mr Coffey's claim that he owned the majority of IMS by way of *secret trust*.

[28] Thus it was becoming more and more clear that Mr Hodson and Mr Coffey could not work together and that IMS simply could not afford to operate effectively with three senior managers with such potentially high salary costs and with such complex interpersonal relationships.

[29] Matters came to a head over the use of one of the company vehicles. Mr Coffey asserted that he had the right to use it for work and that for the last six weeks he had merely lent it to Ms Anderson. Ms Anderson, later in conjunction with Mr Hodson, made it clear to Mr Coffey that it was IMS's car and that Ms Anderson needed to use it.

[30] The argument over the use of the car extended from IMS's office onto the street, and led to Ms Anderson getting very upset and calling the Police. When Mr Hodson arrived he was upset and wished to defend his wife from what he saw as threatening behaviour by Mr Coffey. I have no doubt that Ms Anderson, Mr Hodson and Mr Coffey were very very upset and that Mr Hodson and Mr Coffey abused each other (including swearing at one another) with, for example, Mr Hodson at one point telling Mr Coffey to *f... off out of my company*.

[31] By this point all parties had lost any sense of self-respect and decorum and the Police had to intervene. Mr Coffey was then cut off from his mobile phone and email access. When he attempted to return the next day to collect some material, which he felt was his property, he was trespassed from entering IMS's premises. Although his employment by IMS was clearly over by this point, again no final pay or holiday payments were made to Mr Coffey.

[32] Mr Coffey had been looking at options for working overseas and after the events of June he did go overseas to help out a new partner, although he was unpaid

for this work. He also took a three month holiday between late December 2012 and late February 2013.

[33] Mr Coffey subsequently started work for a company that is IMS's competitor. He was not subject to any restraint of trade clause with IMS. I am not satisfied that there is any reliable evidence to support IMS's claim that \$50,000 worth of business profits that Mr Coffey has allegedly unlawfully taken from it. Given that he was under no restraint of trade he was entitled to approach customers, particularly given his previous experience as an owner of predecessor businesses to IMS. There is also insufficient evidence of any misleading or deceptive conduct by Mr Coffey in gaining those customers in breach of the duties of confidence that remained beyond his employment with IMS.

[34] After his trespass notice from IMS's Wellington offices Mr Coffey was unable to obtain and IMS did not return to him the following property, which IMS held:

- (a) 47 inch LCD Toshiba TV and remote;
- (b) 4 x pairs of Bose 191 speakers;
- (c) Bose stereo cubes and subs;
- (d) Hand tools including De Watt battery drill and accessories;
- (e) HP colour printer;
- (f) 1 x case of wine (12 bottles).

Determination

[35] These employment relationship problems are part of a complex web of commercial and interpersonal dealings that have gone awry to the extent of simultaneous legal proceedings in a number of jurisdictions. However, what is clear is that Mr Coffey was an employee of IMS from its commencement and that he was paid as an employee until mid-January 2012. At that point Mr Coffey agreed to stay on as an employee of IMS but to forego any remuneration until IMS could afford to pay him, expected to be later in the year. There is no doubt that IMS, a company in its infancy, having lost its major customer, was in a critical financial position at that time. However Mr Coffey agreed to forego remuneration in the interim, not for ever.

[36] The relationship later disintegrated, in part because of IMS's failure to reinstitute payments to him. IMS's claim of estoppel for a contingent condition has not been met. Mr Coffey never stated that he would not ever claim his remuneration, but merely agreed to deferring payment. It was implicit in any such agreement that should Mr Coffey's employment with IMS end, he would be entitled to claim the remuneration he had foregone. His agreement was for a deferral of payment, not that he would never be paid. In other words, it went without saying that if the employment relationship ended Mr Coffey could claim for the periods that he was not paid. Mr Coffey is therefore due payment for the 22 weeks he worked for IMS for which he was not paid. The sum outstanding is \$55,000.00.

[37] When Mr Coffey's employment was terminated he was not paid holiday pay. Given that he was not paid holiday pay he is owed that sum. He should have earned \$120,000 gross in the 48 weeks he was employed, which would give a gross sum of \$9,600 in holiday pay. A deduction must be made for the 9 days annual leave he took, which equates to \$4,500, leaving a balance owing of \$5,100 gross.

[38] Whatever the background to an employment relationship and whatever its context, the provisions of s.103A of the Act still apply, namely that a dismissal must be justifiable on the basis that IMS's actions and how IMS acted were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[39] It is clear there was a dismissal here as a result of the altercation on 18 June. Mr Coffey was sent away on that date and soon thereafter his email and mobile phone access was cut. When he tried to access the premises of IMS the next day he was subsequently served with a trespass order. This clearly shows that the employment relationship was at an end at the initiative of IMS. IMS did so without any proper investigation as required by s.103A. Mr Hodson and most likely Ms Anderson had simply had enough of Mr Coffey and did not want his continued presence in the business, even although he was not even being paid.

[40] Such a dismissal without any investigation must be unjustified because the failures to apply the conditions in s.103A(3) of an investigation, the raising of concerns with the employee and giving the employee a reasonable opportunity to respond, in conjunction with an genuine consideration of that response. Such matters

are not minor defects in the process, even taking into account the small size of IMS Security, and they clearly did result in Mr Coffey being treated unfairly.

[41] I do not accept that Mr Coffey has fully mitigated his loss. He had a significant holiday, he worked for free for a partner in Dubai and an experienced business professional such as himself could have been expected to obtain work in the security industry much earlier than in fact he did. I therefore consider that there are insufficient grounds to extend lost remuneration beyond three months.

[42] Mr Coffey gave clear evidence on the impact that losing his job had on him. On the other hand there was little or no corroborating evidence provided on his injury to feelings. In these circumstances I consider that an appropriate sum for compensation for his unjustified dismissal and any other grievances (which have not been clearly identified) at \$8,000.

[43] IMS relies on Mr Coffey's conduct between July 2011 and June 2012 as being so egregious as to result in a contribution of 100% towards the situation that gave rise to his personal grievance for unjustified dismissal. There are a number of factors that must be considered here as blameworthy behaviour by Mr Coffey contributing to his dismissal. These are:

- His continued assertions to outsiders that he was an owner of IMS by way of *secret trust*, which could only have destabilised IMS's operations;
- His role in losing a major client;
- His poor relationship with Mr Hodson (perhaps a two way street);
- His unacceptable language in emails directed at Ms Anderson and Mr Hodson;
- His reducing commitment to the business of IMS;
- His significant role in commencing and fully participating in the argument on 19 June.

[44] On the other hand IMS was not paying him and showed no signs of resuming payments. Its managers were clearly partly responsible for the arguments. IMS was

entirely responsible for the failure to investigate the situation that led to Mr Coffey being effectively removed from the company and hence dismissed. These factors were significant.

[45] I must also take into account, in equity and good conscience, Mr Coffey's failure to account to IMS for the proceeds from the sale of the two cars. This was unacceptable behaviour, even in a self-help setting where he had not been paid for several months.

[46] On balance I consider that overall the deductions should be set at 50%. Mr Coffey's entitlements are therefore to lost remuneration of \$16,250.00 and \$4,000 under s.123(c)(i).

Conclusion

[47] IMS failed to pay Mr Coffey wages for five months and then unjustifiably dismissed him following an altercation between him and the owners of IMS. Mr Coffey was however significantly responsible for his own dismissal.

[48] IMS's counterclaims against Mr Coffey were not successful, apart from his failure to account for the proceeds of sale of two company owned cars.

[49] I therefore order the respondent, IMS Security Limited, to pay to the applicant, Mr Paul Coffey, the following sums:

- \$55,000.00 in unpaid wages;
- \$5,100.00 in unpaid holiday pay;
- \$16,250.00 in lost remuneration;
- \$4,000.00 net in compensation under s.123(1)(c)(i);
- I also order IMS Security Limited to return to Mr Coffey the items of personal property set out in paragraph 34 of this determination.

[50] I also order Mr Paul Coffey to pay to IMS Security Limited in respect of the proceeds of sale of two company owned cars the sum of \$13,313.62 net.

Costs

[51] Costs are reserved.

G J Wood
Member of the Employment Relations Authority