

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

**BETWEEN** Owen Ellison (Applicant)  
**AND** Kelston Orchards Limited (Respondent)  
**REPRESENTATIVES** Megan Williams for the Applicant  
Stuart Webster for the Respondent  
**MEMBER OF AUTHORITY** P R Stapp  
**INVESTIGATION MEETING** Napier, 25 October 2006  
**DATE OF DETERMINATION** 6 November 2006

**DETERMINATION OF THE AUTHORITY**

**Employment relationship problem**

[1] The Applicant says that his employer unjustifiably changed his role significantly enough to disadvantage him. He decided to leave his employment and resigned. He is seeking personal grievance remedies to resolve the employment relationship problem. The Respondent has denied the claims, instead saying that there was no employment relationship, and alternatively that Mr Ellison was not disadvantaged and suffered no loss.

**The facts**

[2] Mr Ellison had during the 2002, 2003 and 2004 seasons worked as the harvest manager at orchards owned and operated by Kelston Orchards Limited. The seasonal work occurred during January-February to April-May. His role was to control, manage, direct and hire staff for the harvest. He was paid \$14 per hour and received a \$5,000 bonus in the 2004 season.

[3] Each season the terms and conditions of the employment arrangement were discussed and based on the previous season's arrangements. Mr Ellison was satisfied with the wage and bonus because the arrangement suited his lifestyle and other work commitments and his travel including working in Australia. These discussions usually took place after he had started work.

[4] Mr Ellison made contact with Mr Harrington, a member of the family that owned the business, by telephone before the start of each season to confirm his availability for the next season's work.

[5] At the end of the 2004 season (April-May) Messrs Harrington and Ellison met to discuss the quantum and payment of the bonus and discussed in general terms his role for the next season. This included a discussion that someday the orchard's manager would take over the work Mr Ellison was undertaking but Mr Ellison left with the understanding he could return the next season without any change to his role.

[6] In October 2004 Mr Ellison made his telephone call to Mr Harrington. Mr Ellison says he enquired of Mr Harrington about the job because in previous years there had been changes made to the orchard, including the purchase of new blocks. Mr Ellison says that he understood that his role would be the same as previous years, and following some comment in regard to the orchard manager, who Mr Ellison had to have working relationship with, Mr Harrington said that the orchard manager "*could not handle it (the harvest)*".

[7] Mr Ellison says that the only direction he would receive from the orchard's manager during the seasons he had worked was the time to start picking the crop at its maturity; a date the orchard manager would determine.

[8] He says that Mr Harrington knew that he did not want to work under the orchard manager having regard to his role and work during the previous seasons.

[9] On or about 28 January 2005 Mr Ellison returned to New Zealand and attended at the orchard. The harvest was not ready to start and he went to Wellington and it was agreed he should return in February 2005.

[10] He did not start work until 9 February when he worked 5 hours, and then met with Mr Harrington, because Mr Ellison had heard some gossip from the orchard's "tractor driver" that someone else was to do his job and that he was to be Quality Control for the hail gang. He wanted clarification. I will refer to this as the first meeting.

[11] There was some confusion during the Authority's investigation about the timing of a number of further meetings after this and I have referred to them as follows: Messrs Harrington and Ellison

and the orchard manager (second meeting) and Megan Williams and Messrs Harrington and Ellison (third meeting).

[12] Mr Ellison says that Mr Harrington told him at the first meeting between them on 9 February that the orchard manager was “*wasted in the shed*” and envisaged him having a different role like something to do with marketing. Mr Ellison says that he understood the orchard manager had no knowledge of Mr Harrington’s idea for the role to evolve and for Mr Ellison and the orchard manager to work it out and share the role.

[13] On 10 February Messrs Harrington and Ellison and the orchard manager met (the second meeting). During the meeting Mr Harrington left to deal with a telephone call and Mr Ellison says that the orchard manager told him that he would be doing everything that Mr Ellison had done the previous season and that Mr Ellison’s role would be QC for the hail gang. At this point Mr Ellison decided to leave because he considered his role was different to what he believed he had been employed to do and he had been misled. He did not attempt then to raise the matter with Mr Harrington about what the orchard manager had said. Instead he engaged the services of an advocate, Megan Williams to assist him. She arranged for a meeting with Mr Harrington (the third meeting). The date this meeting took place is unclear. It could have happened on the 11 February. Mr Harrington says he got upset during that meeting and Mr Ellison was uncomfortable at it. There was no resolution of the problem about his role.

[14] Mr Harrington phoned Mr Ellison on the Saturday 12 February and they apparently met at the orchard without any result. At some point Mr Harrington made Mr Ellison an offer to settle. Mr Ellison says the offer was made at the meeting attended by Ms Williams (the third meeting). Mr Harrington says he made the offer to Mr Ellison on 14 February when he says Mr Ellison called at the orchard. Anyway it is agreed an offer was made and was not accepted by Mr Ellison, because he says it was not genuine. He did nothing more, but indicated to Mr Harrington that he was resigning.

[15] Subsequently Mr Ellison decided to lodge a statement of problem in the Authority, to which the Respondent replied, and both parties went off to mediation. The matter remained unresolved and the Authority is now required to determine the facts and resolve it.

## **The issues**

[16] The first issue is to determine whether or not there was an employment relationship upon an offer of employment and the applicant's acceptance of it. The Respondent says there was no employment relationship established because the parties never agreed on the terms of employment.

[17] Secondly, if there was an employment relationship, was there any unjustified action affecting the applicant's employment? The applicant is not alleging that he has a personal grievance by way of a constructive dismissal but the change to his role was unjustified and disadvantaged him in his employment when he was misled to return to New Zealand without knowing that Mr Harrington envisaged structuring his role differently. Mr Harrington says that Mr Ellison would have known of the intention to structure the position differently from their discussion at the end of the 2004 season and the telephone call held in October 2004. .

## **The Authority's Determination**

[18] There was an employment relationship, I hold. My reasons are:

- The October 2004 telephone conversation supports arrangements being confirmed for Mr Ellison to return to New Zealand for work considering the arrangements made in previous seasons.
- Mr Ellison returned to New Zealand from Australia as he had done in 2002, 2003, and 2004.
- On 28 January 2005 Mr Ellison was told and he agreed the season was not ready to commence and to return in February.
- The parties agreed that a loose arrangement existed over the wages and bonus payments but in practice the wages and bonus would be the same as the immediately preceding season and that these would be worked out after Mr Ellison had started.
- Mr Ellison worked on 9 February for 5 hours. This is a decisive factor in Mr Ellison having employment with Kelston Orchards Limited.

[19] On the matter of whether any changes were raised with Mr Ellison on his role I prefer to accept Mr Ellison's evidence because:

- Mr Harrington accepted that he did say during the telephone call in October 2004 that the orchard manager “*could not handle [the harvest]*”, when they discussed the job and the orchard manager. The context of this makes it is probable that Mr Harrington did not clearly disclose his intentions and that he was not specific on the detail of the changed role. Mr Harrington’s evidence was not decisive that Mr Ellison had a clear understanding that the role would be structured differently, I hold. In other words Mr Ellison had a reasonable understanding that the role would be the same.
- There was no written employment agreement, including any job description, which is the responsibility of the employer to provide. If the employer had provided the intended employment agreement and job description as required this problem could have been avoided.
- At the Authority’s investigation meeting Mr Harrington was vague and conceded that he thought Mr Ellison would have known his intention. Mr Harrington did not satisfy me how Mr Ellison would have known, given Mr Harrington’s evidence which was qualified with the words he used that he “*understood*” and “*thought*” what the situation was.

[20] In making this finding I have balanced the evidence given by Mr Ellison at the Authority’s investigation meeting that involved him giving additional evidence when he had had an earlier opportunity to change or add to or delete evidence from his prepared statement. He caused some confusion about the times and dates of meetings comparing his oral evidence to his written statements and diary notes produced. However, he was able to respond with credible explanations in reply, which I found more convincing than Mr Harrington’s vagueness.

[21] Therefore Mr Ellison has established he was employed by Kelston Orchards Limited that would have involved him working for the same pay and bonus as the previous season, at least until the matters were further discussed, and not unreasonably he understood that his role would be the same as the previous season.

[22] Mr Harrington wanted to change the role, but left it to be worked out by Mr Ellison and the orchard manager. His decision to structure the position differently was open to him to decide, but the implementation of his decision was unjustified in the circumstances, where Mr Ellison had returned from Australia with the reasonable understanding he would carry out the same role as in the previous season. Mr Ellison had no prior notice, except to find out from “gossip”, and what Mr

Harrington conceded was the “*bullish*” remark, made by the orchard manager, that he was taking over the role and Mr Ellison was to be QC for the hail gang. I am not satisfied that the Messrs Harrington’s and Ellison’s meeting in April-May 2004 and telephone conversation in October 2004 disclosed Mr Harrington wanted to structure the role differently.

[23] In other words Mr Harrington’s action of not being clear about the change he wanted and in letting Mr Ellison find out from “gossip” and a “*bullish*” comment after he had arrived from Australia, and had commenced work on 9 February 2005, was unjustified.

[24] I also hold that Mr Ellison was disadvantaged in his employment, not because of any change to his wages, but he was left with the prospect that his bonus could be affected, when earlier Mr Harrington had commented to him that the orchard manager would not be able to handle the role. In other words it was a reasonable conclusion for Mr Ellison to arrive at, I hold. The payment of the bonus was a significant sum that relied upon a quality harvest that Mr Ellison genuinely believed was at risk. Furthermore such a change in the role put the prospects of Mr Ellison’s employment in jeopardy because he concluded, with good reason, he had been misled. I conclude that Mr Ellison has a personal grievance.

### **The remedies**

[25] Mr Ellison mitigated his loss because he obtained alternative employment quickly after leaving. Indeed he was able to pick up three jobs in quick succession until he returned to Australia as planned. He was not able to satisfy me of the start date of his first job after leaving Kelston orchards although it was within days after the event. He earned equivalent wages and worked equivalent hours in the employment he was able to obtain after leaving Kelston orchards. This is not a matter for an award of lost wages. The payment of 5 hours wages (and holiday pay) that was not paid for the work carried out on 9 February 2005 may be an issue. I will leave this matter for the parties since the sum was not claimed and give leave to return for an order if it is required.

[26] A claim for the payment of the bonus was withdrawn during the Authority’s investigation meeting. The claim for airfares had no contractual foundation. Airfares had not been paid previously in 2002, 2003 or 2004. The claim is dismissed.

[27] I accept that the Respondent’s action has impacted on Mr Ellison in that he says he was *gutted*. The job meant a lot to him because of the relationships he had built up with the orchard’s

family and the work involved. He told me of his sense of loss, including the expected bonus that he probably would have received if he had worked, that involved a “*very good harvest*”, according to Mr Harrington. I award Mr Ellison \$4,000 compensation under s 123 (1) (c) (i) of the Act because his feelings were affected by the Respondent’s actions and he has had a sense of loss in regard to a job he considered was a special arrangement.

### **Costs**

[28] Costs follow the event and I award Mr Ellison the sum of \$2,000 plus the \$70 filing fee to contribute towards his costs.

### **Summary of Orders**

[29] Kelston Orchards Limited is ordered to pay Owen Ellison the sum of \$4,000 compensation under s 123 (1) (c) (i) of the Act for hurt feelings and \$2,000 costs and the \$70 filing fee.

P R Stapp  
Member of the Authority