

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 29
File Numbers: 5293102 &
5305159

BETWEEN Phillip Grey
Applicant/Respondent

AND Levin Meats Limited
Respondent/Applicant

Member of Authority: Denis Asher

Representatives: Andrew Bell for Mr Grey
Phillip Drummond for the Company

Investigation Meeting Palmerston North, 20 & 21 July & 27 October 2010

Submissions Received 20 January 2011

Determination: 25 February 2011

DETERMINATION OF THE AUTHORITY

The Problem

[1] Was Mr Grey unjustifiably dismissed by the Company? Is he owed arrears of benefits, including redundancy compensation, and salary?

[2] Or, did Mr Grey resign his employment as the Company alleges? And did he cause the Company loss such that it should be compensated for by him, including for monies allegedly improperly drawn from the Company's account by Mr Grey?

[3] Each party seeks costs.

The Investigation

[4] The parties agreed to an investigation of the employment relationship problem for 20 & 21 July 2010. Issues emerged beforehand in respect of the provision of documentary evidence that required amending previously agreed time lines for the provision of witness statements. As a result the parties did not comply with their undertaking to provide the Authority with an agreed, complete, bundle of documents and the investigation was extended as a result of documents being produced up to and including the final day.

[5] Attempts by the parties during the investigation to settle matters on their own terms were unsuccessful and the investigation resumed and concluded on 27 October.

[6] Despite agreement on timetabling closing submissions, delay occurred also in respect of their filing. Unfortunately, a bereavement in my family compounded the delays in the release of this determination.

Background

[7] Mr Grey commenced his employment with the Company in January 2005 as its assistant general manager, before being appointed as its general manager in May of the same year.

[8] Until the sale of its plant on or about 6 November 2008 the Company carried on business as a meat processor.

[9] An individual employment agreement was entered into by Mr Grey and the Company dated 31 July 2007 (doc 19 in Mr Grey's second statement dated 19 July 2010).

[10] During Mr Grey's tenure as general manager the business experienced various problems including a significant quantity of stock going missing at a storage company

[11] The parties agree that, following the sale of the business and on the Company's behalf, Mr Grey would attend to a number of outstanding matters.

[12] What is not agreed but is hotly disputed by the parties are the circumstances under which Mr Grey's employment came to an end. Around July 2009 Mr Grey met with one of the Company's shareholders and board members, Mr Ivan Grieve. The parties dispute the outcome of the meeting: Mr Ivan Grieve says Mr Grey resigned his employment, which he accepted on behalf of the Company. Mr Ivan Grieve says no mention was made of making Mr Grey redundant and him being paid compensation. He says instead that Mr Grey was to be paid a retainer "*of \$1,000.00 per week until we tidied up all the outstanding problems*" (par 17 of Mr Grieve's statement).

[13] Mr Grey denies these claims. He says the Company repudiated his employment agreement on or about October 2009 by failing to pay him his salary. Mr Grey also says that, having been effectively made redundant, he is owed redundancy compensation as per the provisions of his employment agreement.

[14] He also claims unpaid wages for September to November 2009 and holiday pay.

[15] Mr Grey also originally claimed a penalty for breach of good faith and that it be awarded to him but, following the Authority's investigation, abandoned that claim. Mr Grey also effectively 'folded-in' a separate allegation of unjustified disadvantage to his allegation of unjustified dismissal.

Counter-Claims

[16] As set out in its amended statement of problem filed on 5 July 2010, the Company makes the following counter-claims. It says that:

- Without permission, Mr Grey arranged for his Board approved lease car to be provided to another employee and entered into a new lease for a more expensive motor vehicle resulting, ultimately, in a \$12,000 loss to the Company on that vehicle's return;

- Mr Grey retained Company property at the conclusion of their employment relationship, namely a computer and phone;
- Following the sale of the business, Mr Grey continued to receive his full normal pay for a period despite, by his own admission, only working 20% of his time for the Company. The relevant (unquantified) sum is sought;
- In employing a plant manager, Mr Grey negligently inserted a provision into the relevant employee agreement whereby redundancy compensation equivalent to 6-months salary was payable: the Company seeks to recover that amount;
- Without authority, Mr Grey arranged payments to himself on 14 August, 13 September and 25 September 2009 of, respectively, \$10,811.20, \$8,140 and \$5,000;
- On 3 June and 12 September 2008, without authority, Mr Grey directed the pay clerk to pay him 5 days and, subsequently, 6 days annual leave totalling \$4,091.35 and \$3,257.86 without any entitlement;
- On 3 June 2008, without authority, Mr Grey arranged to pay himself 12 days sick leave amounting to \$9,819.25; and
- During the investigation and in its closing submission, the Company alleged Mr Grey had authorised improper expense compensation payments to himself.

Discussion and Findings

Dismissal or Resignation?

[17] As is made clear above, the Company claims Mr Grey effectively resigned his employment during a meeting with two of its shareholders and board members around July 2009. Mr Grey disputes that claim. There is no minute of the meeting nor is there any subsequent correspondence between the parties recording or reflecting the same. A credibility finding is therefore required, in respect of the claims by, in

particular, Mr Ivan Grieve, the Board Member who gave evidence at the Authority's investigation, on the one hand, and Mr Grey on the other.

[18] I find in favour of Mr Grey's position for the following reasons: the evidence discloses no coherent or plausible grounds why Mr Grey would forego the generous redundancy provisions set out in his employment agreement. Clause 12.4 of that document (attachment to statement of problem) provides redundancy compensation totalling six months gross salary. What this means in Mr Grey's case is \$106,375. That is a significant sum and it is therefore reasonable to expect an agreement to forego compensation at this level would be set out in writing or be clearly identifiable from relevant events: neither exists.

[19] As his job was coming to an end because of the sale of the plant he managed, Mr Grey's claim he expected to be given notice and compensation consistent with the provisions of his employment agreement is inherently credible; indeed, his email to Mr David Grieve of 1 December 2008 is evidence he communicated this view to the Company (doc 24 to Mr Grey's second statement).

[20] My finding is supported by the fact that no steps were taken by the Company to implement the retainer it says was agreed at the time Mr Grey resigned his employment. As fresh terms of employment were not implemented, the original terms clearly continued in their place.

[21] Furthermore, Mr Grey had no new employment to go to. It was therefore unlikely he would give notice of his resignation and, at the same time, agree to give up a contractual entitlement to redundancy compensation at the generous level provided in his employment agreement, while continuing for some months, as the parties agree, to 'tidy up' outstanding business.

[22] I accept Mr Bell's argument at par 28 of his submissions dated 30 November 2010, that, "*The Company's account of events is ...contrary to common sense*".

[23] The Company's own evidence makes clear it accepted that the sale of the plant would, sooner or later, result in Mr Grey's redundancy. At pars 11.3, 11.5 & 11.6 of

his witness statement, Mr David Grieve, one of the Company directors, states respectively:

Levin Meats Ltd was always committed to meeting any contractual obligations it had with Phil Grey however the sale (of the processing plant) did not result in Phil Grey's position becoming redundant. Levin Meats Ltd had \$12 million worth of meat to be sold and debts to be collected as well as accounts to be finalised

...

*There was no question of Phil Grey being made redundant **at the time of sale because there were (a) whole raft of matters that needed to be attended to which he indicated that he put his 100% effort in assisting as long as he was needed.***

*Following Phil Grey's email (of 1 December 2008 - doc 24) I telephoned him and he **agreed to stay on (as) long as he was needed.***

(emphasis added)

[24] I note here Mr Grey's clear and early offer to the Company by email dated 1 December 2008 that it consider "*making my position as CEO/GM completed this Friday as well, paying accordingly to the contract, and then putting myself on a weekly contract that is equal to the new job description ...*" (doc 24, above): that offer was never uplifted, acknowledged or responded to in writing by the Company.

[25] In the absence of clear notice of resignation and agreement as to fresh terms of employment, I am obliged to accept Mr Grey's version of events that he did not resign, but was effectively made redundant and is therefore entitled to redundancy compensation as provided for in his employment agreement at clause 12.4.

[26] It also follows that, subject to supporting evidence, he is able to seek compensation for humiliation and hurt arising out of what was clearly a unilateral and therefore unjustified dismissal, lacking as it did any procedural fairness.

[27] Further support for the conclusion set out above is, I find, located in the closing submissions from Mr David Grieve, received on 23 December 2010. It is unnecessary for me to set out all of that submission because the following can be clearly summarised:

- a. The directors agreed that, following the sale of the plant, Mr Grey's role "*was nearly completed*" (pg 2) but "*we wished to defer the redundancy payment until all the stock was sold, final accounts prepared and all outstanding creditors paid*" (above);
- b. However, the Board's expectations that those finalisation tasks would be completed promptly was not met; and
- c. Problems then arose from the Board's perspective in contacting Mr Grey, and also in respect of the installation of a machine it says was ordered by Mr Grey without its approval. A demand for payment totalling \$191,000 has been received by the Company in respect of the machine. That issue remains outstanding and the Company is apparently taking separate legal action against Mr Grey in respect of the demand and his, it says, unauthorised actions.

[28] I am satisfied from the above that the Board knew clearly its obligations to Mr Grey, that he was redundant and therefore entitled to redundancy compensation, but elected to offset that obligation in respect of its claims against its former general manager arising out of the dispute about a machine.

Claim for Unpaid Salary

[29] At what date was Mr Grey effectively made redundant? Key events in determining this question include the following: as is made clear above, the processing plant was sold effective November 2008. The parties agreed Mr Grey would be kept on to tidy up outstanding matters (see David Grieve's evidence set out above, and his par 13.1), including significant insurance claims in respect of mishandled export order and missing or stolen stock. A settlement of one of the claims took place on 31 August 2009. Mr Grey's salary was stopped in September. He returned his lease car around the same time, in September or early October. Mr Grey says he "*continued to provide limited services through until December 2009*" (par 47 of his first statement), including assistance with another insurance claim, until, in his own words, "*I had simply had enough of the company's approach and attitude. They were*

refusing to pay me but were ringing me up to 3 times a week seeking services” (par 17 of Mr Grey’s statement).

[30] At that point, in early December (see the Work and Income acknowledgement dated 11 December 2009; doc 1 in Mr Grey’s first statement), Mr Grey approached Work & Income seeking financial assistance, as he was not receiving salary. Mr Grey was continuing to undertake work for the Company, did not wish to resign as it would – he believed – jeopardise his claim for redundancy compensation; he had no fresh employment to go to.

[31] Mr Grey had earlier sought legal assistance; letters were written on his behalf by Mr Bell to the Company’s then legal representatives. A result of that exchange was a fax headed “*without prejudice*” from the Company’s representative, transmitted on 27 November 2009, containing the claim Mr Grey had “*received his final payment from the Company on 19 July 2009 and it was agreed at the time that his appointment was terminated*” (attachment to statement of problem). I note here that the contents of that communication do not appear to warrant any claims as to being without prejudice.

[32] I accept Mr Bell’s submission that an examination of the correspondence supports Mr Grey’s claim he had no knowledge his employer deemed the relationship to have concluded prior to 27 November (par 14, submissions dated 30 November 2010).

[33] By way of relevant background, during July 2009 the plant’s new owner advised it would no longer continue to provide payroll support in respect of Mr Grey and the Company’s other employees still on site. Mr Grey says he therefore arranged for salary payments, including his own, to be effected through the Company’s accountant. He says that, as the Company’s financial position was not particularly good, salaries – including his own – were paid at irregular dates and for irregular amounts, depending on what money was in the Company’s account and what other expenses had to be met.

[34] Mr Grey says that, following a telephone discussion after 25 September 2009 with Mr David Grieve during which the latter advised he was no longer willing to pay Mr Grey a salary but nonetheless still expected services of him, Mr Grey stopped

paying himself as, *“There was no way I was going to risk putting myself in a position where theft could be alleged”* (par 43, second statement dated 19 July 2010).

[35] I am satisfied from the credibility of Mr Grey’s evidence, the email traffic between the parties (see various attachments to Mr Grey’s second statement dated 19 July 2010, including docs 5-15 inclusive) and the admission by Mr David Grieve on behalf of the Company that Mr Grey continued work, albeit on a declining basis, for the Company after the sale of its plant. It is therefore appropriate to award lost wages – as claimed – for one week in September and from 25 September to 27 November 2009 inclusive.

[36] It follows that holiday pay is payable on these unpaid wages.

Penalties

[37] In closing submissions dated 30 November 2010, Mr Andrew Bell, advised, *“With the benefit of discussions with the Authority Member concerning appropriate remedies at the hearing ... (t)he application in respect of penalties is abandoned”* (pars 21 & 2).

Hurt and Humiliation

[38] Mr Grey seeks compensation for stress and humiliation of \$8,000, arising out of his unjustified dismissal. He particularises the detail of that stress and humiliation at pars 48-54 of his first statement dated 27 May 2010. The detail included not being able to meet mortgage payments or other outgoings, borrowing from his family and a temporary separation between the himself and his wife.

[39] There is no basis to dispute Mr Grey’s claims in respect of hurt and humiliation and I am therefore satisfied, having regard to the evidence, that it is appropriate to award him the full amount claimed.

Contributory Fault

[40] There is no evidence of any actions by Mr Grey contributing to the situation that gave rise to the personal grievance: s. 124 of the Employment Relations Act 2000 applied.

Counter-Claims

[41] The amount sought by the Company by way of reimbursement have not been fully particularised but total over, by one of my estimations, \$93,000 and, by another, nearly \$300,000.

[42] I do not accept the Company's claim that Mr Grey's arrangements in respect of providing another employee with his approved lease vehicle and entering into a new lease for a more expensive motor vehicle resulting, ultimately, in a \$12,000 loss to the Company on that vehicle's return, are recoverable as damages. That is because there is no evidence of Mr Grey acting in breach of express or implied duties to his employer in that regard. A condition of Mr Grey's employment was the provision of a car for work purposes and limited personal use (clause 9.4); through his position, he was in charge of staffing matters. I am satisfied it was within his authority to make these arrangements, consistent as they were with his contractual entitlement and in the absence of Board minutes or delegations to the contrary.

[43] Mr Grey advised during the investigation that, as a result of the Company's counter-claim (it being first notice of its concern), he had returned the Company's computer and phone. I have no evidence of any damages arising out of the delay in the return of this property and decline to make any award in respect of this claim.

[44] Mr Grey does not dispute that, on the sale of the plant, he continued to receive his full normal pay for a period despite reducing work levels. However, I decline the Company's claim for the balance (unquantified) on the ground that, as Mr Bell submits (par 18, submissions dated 30 November 2010), there was a contractual duty on the Company to supply work.

[45] For the same reasons I reject the claim that Mr Grey acted negligently in employing a plant manager by inserting into that person's contract a provision whereby redundancy compensation equivalent to 6-months salary was payable: there is no evidence of Mr Grey exceeding any Board directions and his actions were broadly consistent with his staff managerial responsibilities.

[46] I do not accept that Mr Grey exceeded his authority by arranging what were wage payments to himself on 14 August, 13 September and 25 September 2009, of, respectively, \$10,811.20, \$8,140 and \$5,000: that action was prompted by the Company unilaterally, and in breach of its contractual obligations to him, ceasing salary payments. Those monies were due and owing by way of salary.

[47] I accept Mr Bell's submissions in respect of the 3 June and 12 September 2008 directions by Mr Grey to the pay clerk, to pay him 5 days and, subsequently, 6 days annual leave totalling \$4,091.35 and \$3,257.86: the annual leave was an entitlement. The Company was always liable to pay these monies to Mr Grey, either as annual leave during his employment or by way of a payment on the termination of his employment. There is no evidence of double-dipping, i.e. of Mr Grey taking his leave as well as ordering payment of the same.

[48] Mr Grey conceded, at the first point it was raised, that, on 3 June 2008, he acted without authority in arranging to pay himself 12 days unused sick leave amounting to \$9,819.25: that sum is recoverable from monies I am ordering the Company to pay Mr Grey.

[49] No claim is before the Authority in respect of the machine the Company alleges Mr Grey installed without authority, and therefore no determination is required by me in respect of the matter.

[50] Finally, recovery is sought by the Company of what it says are unidentified (and unauthorised) expenses paid to Mr Grey on 6 September 2007 and 21 April 2008 (page 4 of Mr David Grieve's closing submissions received on 23 December 2010). Again, I accept Mr Bell's submissions in respect of this very late claim: the Company has failed, on a balance of probabilities basis, to prove its allegation that these were unauthorised or otherwise inappropriate payments.

Determination

[51] Because Mr Grey was unjustifiably dismissed, the Company is directed to pay the following monies to Mr Grey:

- a. Per clause 12.4 of Mr Grey's employment agreement, redundancy compensation totalling six months gross salary, i.e. \$106,375 (one hundred and six thousand, and three hundred and seventy five dollars); and
- b. Unpaid wages for one week in September, i.e. \$4,091.35 gross (four thousand and ninety-one dollars and thirty-five cents), and from 25 September to 27 November 2009 inclusive, i.e. \$36,721.23 (thirty-six thousand, seven hundred and twenty-one dollars and twenty-three cents) plus holiday pay on the same, i.e. \$5,735.50 (five thousand, seven hundred and thirty five dollars and fifty cents), less unauthorised sick leave pay of \$9,819.25 (nine thousand, eight hundred and nineteen dollars and twenty-five cents); and
- c. Compensation for humiliation and hurt of \$8,000 (eight thousand dollars).

[52] Costs are reserved.

Denis Asher

Member of the Employment Relations Authority