

Attention is drawn to the order prohibiting publication of certain information in this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 225/10
5296031

BETWEEN RICHARD HALL
 Applicant

A N D MY PAGES LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Graeme Downing, Counsel for Applicant
 Maree Kirk, Counsel for Respondent

Investigation Meeting: 15 September 2010 at Nelson

Date of Determination: 6 December 2010

DETERMINATION OF THE AUTHORITY

Prohibition on publication

[1] At the commencement of the investigation meeting, I heard a submission from counsel for the respondent (My Pages) seeking to prohibit publication of the brief of evidence of the applicant (Mr Hall). In essence, My Pages contended that Mr Hall's brief of evidence contained material about sensitive commercial matters which, if published, could damage the proprietary interests of My Pages in the marketplace. While wishing the material to remain in the brief of evidence to enable it to be considered by the Authority as part of Mr Hall's claim for personal grievance, counsel for Mr Hall was prepared to acquiesce to the suppression order being made.

[2] Pursuant to Schedule 2, clause 10(1) and (2) of the Employment Relations Act 2000, I now make an order that the brief of evidence of the applicant, Mr Richard Hall, shall not be published.

Employment relationship problem

[3] Mr Hall claims that he was unjustifiably dismissed from his employment by My Pages or in the alternative that he was constructively dismissed by My Pages. My Pages resists Mr Hall's application, contending that he resigned or abandoned his employment and was not dismissed and a counter claim is advanced based on Mr Hall's failure to give proper notice.

[4] An individual employment agreement was signed between My Pages and Mr Hall on 15 December 2009 employing Mr Hall as general manager of My Pages. Mr Hall's first day of work was 4 January 2010.

[5] At the time of Mr Hall's recruitment and engagement by My Pages, he had another business interest. The essence of the employment relationship problem between these two parties is how long Mr Hall was given to resolve his relationship with that outside business interest and devote his efforts entirely to My Pages.

[6] Mr Hall's maintained in his evidence that there was no compulsion on him to remove himself entirely from his outside business interest before he commenced duties with My Pages, whereas My Pages says that its expectation was that Mr Hall would devote his full attention to its business from the point at which he commenced his duties.

[7] On 15 January 2010, My Pages discussed matters with Mr Hall and in particular My Pages' contention that Mr Hall was spending an inordinate amount of time working on his own business when he should have been working for My Pages and that he was doing this in its paid time and from its premises.

[8] My Pages says it asked Mr Hall to decide whether he was going to commit to My Pages or whether he wished to persevere with his own business affairs.

[9] On Saturday, 16 January 2010, the day after the meeting between the parties, Mr Hall attended at the workplace and found that his desk had been moved out into the reception area. The following day, Mr Hall sent the directors an email in which, among other things, he indicated that *I feel it would be extremely difficult to continue in the role of general manager and to function appropriately at this time.*

[10] My Pages responded that same day, indicating that its wish was that Mr Hall chose whether he wanted to remain in My Pages' employment and commit to it on a full time basis or pursue his own business interest. My Pages' email made clear that the company view was that Mr Hall could not do both. However, My Pages' email continued with the observation *I am assuming you are choosing to resign? ... We would like you to advise us, without ambiguity, what your decision is please.*

[11] Mr Hall took no further steps save to say that he would be in touch once he had sought professional advice. He did not return to work and he did not return My Pages' property. On 18 January 2010, My Pages sought the return of its property. Mr Hall took it from the 18 January 2010 email that he had been dismissed from his employment.

[12] When the employer, My Pages, filed its statement in reply, that statement in reply included a counterclaim amounting to three months' salary which, pursuant to the individual employment agreement signed between the parties, was to be forfeited in the event that one month's notice of termination was not given.

Issues

[13] The Authority will need to consider the following questions:

- (a) What happened when Mr Hall was hired;
- (b) What happened at the 15 January 2010 meeting; and
- (c) What happened after that?

What happened when Mr Hall was hired?

[14] At the time that Mr Hall was engaged by My Pages, the company had three directors. One of those directors, Mr Gene Cooper, was responsible for Mr Hall's recruitment. Mr Hall and Mr Cooper were together when the employment agreement was signed. Mr Hall's evidence is that there was some latitude agreed between the parties to enable him to extract himself from his own business. He says it was envisaged that he might sell the business or engage someone to run it for him.

[15] Mr Cooper's evidence is otherwise. He was absolutely clear that Mr Hall had no such latitude. He told me *we [My Pages] made it clear that the two businesses*

could not coexist. We would not have offered him any employment if he had not been clear that he was to quit his involvement in his own business. He had to get it sorted before he started work for us.

[16] Mr Cooper acknowledges that the issue was discussed by the two men at length, but he is adamant that the arrangement was that while Mr Hall was engaged on 15 December 2009, he was to quit his own business before he commenced employment with My Pages. Mr Cooper notes that there is no email traffic supporting Mr Hall's view of the issue and Mr Cooper gave evidence that he *did everything by email*. As he was the director of the company responsible for the recruitment, his evidence was that if there had been such an arrangement of the sort Mr Hall suggests, it would have been recorded in writing via email.

[17] As if that is not enough, Mr Cooper also points to the clear terms of the employment agreement between the parties. It is common ground that the employment agreement was signed on 15 December 2009. That agreement contains a provision which absolutely precludes *private employment, without the prior written approval of the employer*. Of course, there was no such approval.

[18] I am satisfied on the evidence before the Authority that the arrangement Mr Hall speaks of where he was to have some *latitude* in quitting his other business affairs, is more apparent than real. I preferred Mr Cooper's evidence that there was no such arrangement and that Mr Hall was supposed to quit his private business affairs between the date the employment agreement was signed on 15 December 2009 and the date he commenced his employment on 4 January 2010.

What happened at the 15 January 2010 meeting?

[19] According to My Pages, the 15 January 2010 meeting was called by the directors because they were unhappy about Mr Hall's commitment. Again, the Authority had the benefit of Mr Cooper's evidence. He apparently chaired that meeting and he told me that he indicated to Mr Hall that the directors felt that Mr Hall was not *discharging his duties*. In particular, Mr Cooper says that the meeting was especially focused on the fact that Mr Hall had not shut down his private business or in some other way quit his involvement with it and that, ... *with that in mind what were Mr Hall's plans for resolving the issue of the private business because he could*

not have both. Mr Cooper was clear that the essence of the message to Mr Hall was whether he wanted to be part of My Pages or not and that it had to be *one or the other*.

[20] Both Mr Cooper and Mr Gordon (another director and the continuing director), gave evidence to the Authority that Mr Hall was greatly engaged in his private affairs during the period from his start on 4 January 2010 down to the meeting on 15 January 2010. Both Mr Cooper and Mr Gordon refute absolutely Mr Hall's contention that the time that he took away from My Pages was only *three to four hours* in total. In his evidence, Mr Gordon referred to the fact that Mr Hall appeared to be using two laptops and answering two cellphones (in effect, one each for each business) and although Mr Gordon said he was not taking notes at the time, he thought that a lot of time was involved with Mr Hall's other business. Mr Gordon said that his feeling was that Mr Hall was not *putting his shoulder to the wheel* because he was running two businesses.

[21] Mr Gordon said that the focus of the 15 January meeting was to try to get Mr Hall to decide what he was going to do with his other business. Mr Gordon said that nobody discussed resignation with Mr Hall and My Pages' focus was on getting Mr Hall to commit to its business rather than commit to his own.

[22] Mr Hall complains about the 15 January meeting on the basis that it was held in a public area and there were other employees present. He says the directors complained about his work performance and his failure to resolve his private business. He says that he was told to make a decision over the weekend whether to *stay or go*.

[23] Having already concluded that the better view of the initial recruitment was that the understanding was that Mr Hall would quit his private business before commencing his employment with My Pages, it follows that it is not in the least unreasonable for My Pages to be disgruntled about his continuing to be involved in the affairs of his private business. I have also not been persuaded by Mr Hall's evidence that he spent only a total of three to four hours on the private business; neither Mr Cooper nor Mr Gordon in their evidence before me accepted that view and both thought that the time Mr Hall took was significantly greater. I prefer their view to Mr Hall's.

[24] The more difficult question is how My Pages framed the challenge to Mr Hall in the 15 January meeting. Did it say, as Mr Gordon said explicitly in his oral

evidence, *we wanted him to make a decision about what he was going to do with his business. Resignation was not an option we put to him?*

[25] In the alternative, was it framed more as a challenge to *stay or go* as Mr Hall himself claims and as the statement in reply inches toward? When Mr Cooper gave his evidence, he said very clearly that he put it to Mr Hall that he had not shut down the private business and My Pages wanted to know what Mr Hall's plans were in that regard, adding *you can't have both. Do you want to be part of My Pages or not? Its got to be one or the other.*

[26] Mr Hall urges on me the proposition that whatever precisely My Pages said, it was sufficient to create in him a genuine and reasonable anxiety that his position was in jeopardy. Against that, I have Mr Gordon's evidence which clearly says that at no stage did My Pages refer to the prospect of Mr Hall resigning and that its whole focus was on getting him to dump the private business so he could concentrate on its business. Certainly, there was nothing in the evidence which would lead me to conclude that My Pages was not anything but committed to retaining Mr Hall's services and that it regarded him as a major find who could make a significant contribution to its business, but only if he focused on it.

[27] I am satisfied on the evidence before the Authority that the meeting on 15 January was a proper exercise of an employer's right to raise performance matters with a senior employee. I am not greatly exercised by the claim by Mr Hall that the meeting was held in inappropriate circumstances; the whole office was open plan and a complaint about the venue and the prospect of the meeting being overheard by others is, I think, unreasonable in the circumstances. The evidence before the Authority is that there were no other staff who overheard the meeting. I also accept My Pages' evidence that the focus of its commentary at the meeting was designed to get Mr Hall to remove the impediment to his devoting all of his professional resources to My Pages' work.

[28] Looked at with a lawyer's eye, the meeting could be seen simply as an example of an employer seeking to remind a senior employee of his obligations in terms of his employment agreement. I am not satisfied that the 15 January meeting could be construed in any sinister way as being an inappropriate exercise of control by the employer and/or as being part of a process of dismissal, actual or constructive. My Pages simply wanted Mr Hall to rid himself of his business entanglements so that

he could focus on its work. Even on Mr Hall's evidence, that is what he promised to do; the only dispute between the parties is how long Mr Hall had to resolve his personal business issues.

What happened after that?

[29] The following day was a Saturday. Mr Hall's evidence is that he called at the office to uplift a piece of personal property. He found that his desk had been moved out into the reception area. In his brief of evidence, he said *I took this to be a very clear indication that the directors had made up their decision that they did not want me to return to My Pages*. However, when I asked him about that observation in the investigation meeting, he readily conceded that the moving of the desk was not in fact *significant* at all. My Pages' evidence on the point was that there had been an agreement the previous week to reorganise the office. The only time that could be done was at a weekend. Mr Hall acknowledged that agreement because he knew of it, but told me that he simply did not expect *the move so quickly*. So I discount the moving of the desk as in any way significant; I also discount My Pages' reliance on Mr Hall having removed a personal item from the office as evidence of his intention. I am satisfied from the evidence before the Authority that Mr Hall called at the office entirely innocently to uplift his laptop and that the removal of the laptop was not in any sense a signal of Mr Hall's intention nor would a fair and reasonable employer have reached that conclusion.

[30] That brings us to the first of a succession of emails which are relevant to the matter in hand. The first of those emails was sent by Mr Hall to the directors of My Pages on Sunday, 17 January 2010. That email is an extremely long one and, as a consequence, arguably, capable of being misinterpreted simply because its various messages are overlaid the one on the other. Mr Hall's evidence is that he had been *left confused, upset and uncertain about [his] future* and that he felt that his *role as general manager had been undermined by the directors*. In those circumstances, he went on:

... I feel it would be extremely difficult to continue in the role of general manager and to function appropriately at this time.

[31] As I noted above, Mr Hall's email is lengthy and it is difficult to distil the essence of his message from such a lengthy communication. However, I am satisfied that it was appropriate for My Pages to take from that email the intelligence that

Mr Hall did not want to continue working in his role at that time until the matters in contention between the parties could be resolved.

[32] The directors responded promptly (and the same day) with a much shorter email suggesting that Mr Hall's email was both *misleading and longwinded*. Then it continues:

We made it clear to you we wanted you to make a decision about which employment you chose and that running both could not be an option. That is not an unreasonable request AND please do not try and construe this into us forcing you to stay or go. They are unrelated. From the above [the above email, namely Mr Hall's email], I am assuming you are choosing to resign? ... We would suggest you arrange a meeting with us in person to resolve where both parties are at.

[33] That email concludes with the suggestion that the directors were happy to meet on a without prejudice basis or to involve a representative and that they were *very relaxed* about discussing Mr Hall's concerns.

[34] Mr Cooper's email on behalf of My Pages suggests that the employer has concluded from Mr Hall's earlier email that he has resigned and it seeks confirmation of that fact. I do not think that Mr Hall's email can properly be construed as an indication of an intention to resign; as I indicated above, I think a proper construction of Mr Hall's admittedly lengthy email (equivalent to some three A4 pages) is that he wished to have some *time out* while the issues in contention were being addressed. The words that he uses do not, in my opinion, import any intention to bring his employment to an end in a definitive sense.

[35] That view of Mr Hall's position is confirmed by his very short response to Mr Cooper's email:

Thank you for your very quick response. As I stated in my email to you, once I have had professional advice I will be in touch.

[36] Clearly then, the employment relationship has not been brought to an end but there is an employment relationship problem on which Mr Hall is seeking advice. It follows that by the end of Sunday night, 17 January 2010, the employment relationship between the parties was still intact.

[37] What happened next is relied upon by Mr Hall as evidence for the conviction that the employer had brought the employment to an end. On Monday morning, Mr Gordon sent an email to Mr Hall in the following terms:

Thanks for the response and we await your contact. In the meantime please can you return any property you have of My Pages today.

Mobile phone office key USB stick with company information on any confidential paperwork business cards.

[38] Mr Hall says that email amounted to a dismissal. I do not agree. First, it is clear that Mr Gordon is acknowledging Mr Hall's response of the previous night (a response to Mr Cooper), and notes that *we* (My Pages) are awaiting *your contact*. Clearly, if Mr Gordon was unhappy with the proposal that Mr Hall would get back to them once he had taken professional advice, he would have said so. He did not. Mr Gordon's email continues with the phrase *in the meantime*, referring to the return of My Pages' property. Again, the employer is seeking a return of its property while it awaits Mr Hall's further contact. That may seem a little odd and, no doubt on reflection, Mr Gordon may have written the email differently, but at the time his evidence was that he was concerned about the company's unique intellectual property which was held by Mr Hall (or at least copies of it were) and he wanted to ensure that that information was in the company's possession unless and until Mr Hall had recommitted to My Pages. After all, it was Mr Hall's decision, conveyed in his first lengthy email, that he did not wish to perform in the role of general manager ... *until these issues have been resolved, which I hope we can do in a timely manner*. That suggests that there will be an interregnum of some sort, during which the issues between the parties can be addressed, but in the meantime Mr Hall was being clear that he was not going to be performing his duties. In those circumstances, a request from the employer that property (particularly confidential material and information) be returned, until employment relationship issues have been resolved, is a not unreasonable request and cannot, in my opinion, be interpreted as evidence that the employer wishes to terminate the employment relationship.

[39] Then, there is a further email from Mr Hall to My Pages asking if he had been dismissed. That email had not been responded to by My Pages when Mr Hall's solicitors' letter raising the personal grievance was received by the employer. However, in responding to that personal grievance letter, Mr Cooper for My Pages makes clear there has been no dismissal and indicates that Mr Hall *remains absent*

from his role without our consent and that that amounted to abandonment of his employment.

What consequences follow?

[40] I have concluded on the evidence before the Authority that when Mr Hall was hired by My Pages, the understanding that was reached was that Mr Hall would cease engagement with his own business as a matter of urgency and in any event before he commenced his employment with My Pages. To facilitate these arrangements, the parties signed the employment agreement on 15 December 2009 but Mr Hall did not commence duties until 4 January 2010. It was between those two dates that I am satisfied the parties' intention was that Mr Hall was to quit active engagement in his business. How he did that was a matter for him. That conclusion is fostered by the evidence of the director of My Pages, James Gordon, and by the former director, Gene Cooper. Their testimony on the issue is supported by the email traffic and more particularly by the employment agreement signed by the parties which specifically precludes private employment without the express written consent of the employer (which was not sought or obtained). I found Mr Hall's evidence on this aspect of the case inherently implausible, running counter as it does to the employment agreement he himself signed and the very clear and explicit testimony of My Pages' witnesses who seem to me more credible.

[41] Furthermore, I am not satisfied that the 15 January 2010 meeting was an improper exercise of the employer's rights. To the contrary, I think it was fair and reasonable for My Pages to raise with Mr Hall its disappointment that he had failed to honour his obligations by getting rid of his involvement in his own business as I am satisfied he promised he would do. Again, for the avoidance of doubt, I was not persuaded by Mr Hall's evidence that he worked for a total of three to four hours on his own business affairs during the short period of this employment. I prefer the evidence of My Pages' witnesses which suggest that his commitment to his own business took far greater time. One of the reasons I reach this conclusion (apart simply from the plausibility of the evidence as given), was the relative unlikelihood of an employer complaining so soon into an employment relationship about time spent on other affairs if, in truth, only three to four hours was involved. I am satisfied that that meeting concluded on the footing that Mr Hall was to decide what he wanted to do and what he wanted to focus on. I accept from My Pages' evidence that the very

clear message from the then directors of the company was that they wanted Mr Hall to focus on their business.

[42] Then we come to the events at the weekend. I have already made clear that I think it unreasonable both of Mr Hall and My Pages to read into the events of Saturday that which they choose to derive from those events. First, I think Mr Hall is wrong to conclude (as he apparently did at the time) that the fact that his desk was moved over the weekend out into the reception area was evidence that his position was under threat. He quite properly accepted in his oral evidence before me that his view on that matter was mistaken. Similarly, I do not think anything sinister can be read into Mr Hall's collection of his own laptop on the Saturday; it was his property and he was entitled to have it and to have use of it. The fact that he chose to come and collect it on that day might well have had a relationship to the meeting on the Friday when he was told by the company to make his decision about which direction he wanted to take. As I understood the evidence, his private laptop contained information pertinent to his own business and so it was perfectly reasonable and understandable that he would want to have access to it.

[43] Then on the Sunday, of course, there were three emails exchanged between the parties followed by a further email on the Monday from My Pages to Mr Hall. The first of these emails is Mr Hall's lengthy email on Sunday, 17 January 2010 setting out his complaints about the way he was treated and concluding with the message that he could not be expected to continue in the role until matters had been resolved. That was responded to by Mr Cooper, on the same day, asking whether Mr Hall was resigning. As I have already made clear, I am satisfied that Mr Hall's initial lengthy email cannot be seen as a resignation but it is, in a sense, a *withdrawal of labour* in that he is unilaterally demanding time off while the issues in contention are being addressed.

[44] While it is understandable that, in its response, My Pages would seek clarification about whether Mr Hall had in fact resigned, I am satisfied that a fair and reasonable employer would not regard Mr Hall's email of Sunday night as a resignation although it is clear that it firmly flags an employment relationship problem. Mr Cooper's response on behalf of My Pages quite properly suggests discussion, including with a representative, and mentions in particular the possibility of *without prejudice* discussions, all of which is a sensible and measured approach

from the employer. The response from Mr Hall is simply to indicate that he will be in touch again once he has obtained professional advice.

[45] Then, on the Monday morning, Mr Gordon wrote his email seeking a return of the company property. As I have already indicated, I am satisfied that a proper construction of this email, while accepting it is not elegantly written, is not that this was to terminate the employment relationship, but simply that this was the employer seeking to protect itself while there was a protracted absence of its chief executive from the workplace. In particular, I am satisfied that there was no way that Mr Gordon's email can be construed as evidence of a constructive dismissal or an actual dismissal; plainly, if there is any initiative taken by either party to bring the employment relationship to an end, it is the initiative of Mr Hall who, in his long email of 17 January 2010, effectively unilaterally withdraws his services until the matters that are in contention are resolved. Even that email, as I have indicated above, cannot in my view be seen as a resignation or evidence of Mr Hall turning his back definitively and permanently on the employment relationship continuing.

[46] Then, Mr Hall sends a further email seeking to know whether he has been dismissed by Mr Gordon's Monday morning email, but before My Pages can respond to that request, it receives an email from Mr Hall's solicitors raising a personal grievance and apparently relying on Mr Gordon's email as the point of dismissal. In response to that missive, My Pages responds to Mr Hall's solicitors by indicating that Mr Hall has not been dismissed but he is absent from the workplace without authorisation and that it wants him back.

[47] It seems to me on the evidence before the Authority that the only reasonable conclusion that one can draw is that My Pages did not dismiss Mr Hall, either constructively or actually, and that the employment relationship came to an end by abandonment, Mr Hall having unilaterally refused to continue serving and despite the parties' efforts to resolve matters following that, including through counsel, the employment relationship was never restarted after that email exchange. For reasons which I have made clear already, I am satisfied that Mr Gordon's Monday morning email seeking the employer's property back cannot reasonably be construed as a dismissal; it is simply a response to Mr Hall's own behaviour in refusing to continue performing services while ongoing employment relationship problems were being addressed. It is hardly unique for employment relationship problems to occur in

ongoing employment relationship context, and the reality in this case is that it was Mr Hall's precipitate decision to withdraw his services rather than any decision or communication of the employer which brought the relationship eventually to an end.

[48] It follows from that analysis that Mr Hall simply left the workplace, gave no notice and just terminated the engagement by the passage of time. While I accept that this is a case that could conceivably be analysed as a purported resignation, I do not think the facts support that that was Mr Hall's intention. I think he genuinely wanted to resolve matters but was hurt by his perception (erroneously in my view) that he had been unreasonably treated by My Pages. I think this is a case where, correctly analysed, Mr Hall simply abandoned his role having made a unilateral announcement that he was not intending to continue until matters had been dealt with, and that even at the point at which Mr Hall's solicitor became involved and the prospect of those issues actually being able to be addressed, there was still no indication from Mr Hall, either of his own motion or through counsel, that he would return to duty.

Determination

[49] Mr Hall has not satisfied me that he has been either unjustifiably dismissed from his employment or constructively dismissed from that employment; I am satisfied that the correct analysis of the factual matrix discloses that Mr Hall abandoned his employment.

[50] My Pages, via counterclaim, allege it is due three months' salary in lieu of notice. This claim is in reliance on clause 7(a) of the employment agreement. In essence, one month's notice of resignation is required or three months' salary is payable in lieu of that notice. Clearly, in the present case, there was no notice.

[51] I decline to grant the counterclaim. I am satisfied on general principles that a three month penalty is out of all proportion to the alleged loss when only a month's notice is required. Furthermore, it would not be appropriate for My Pages to be seen to have profited in circumstances where its own treatment of Mr Hall after the employment had come to an end, was lacking in good faith. It was some months after the employment came to an end that Mr Hall's basic salary for the two week period he was employed, was paid. That is unacceptable and a clear breach of good faith.

[52] In the circumstances, I am not prepared to countenance the counterclaim but nor am I prepared to levy a penalty against My Pages for its breach of good faith,

although its performance in respect of Mr Hall's remuneration after the employment came to an end was less than would be expected of a good and fair employer.

[53] One final matter requires comment. The employment agreement between the parties provided that Mr Hall was to be remunerated by salary and by a sales commission which was expressed to be rated at 3% ... *of all sales of all subsidiaries achieved whilst in employment.*

[54] If Mr Hall has not been paid commission for the period of the employment, I direct that Mr Hall is to be paid by My Pages a sales commission at 3% of all sales of all subsidiaries achieved whilst in employment. Leave is reserved for counsel to revert to the Authority if required.

Costs

[55] Costs are reserved.

James Crichton
Member of the Employment Relations Authority