

Attention is drawn to paragraph 25 prohibiting publication of certain information contained in this determination.

Determination Number: CA 18/06
File Number: CEA 283/04

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Benson Haywood (Applicant)
AND Blackwell Motors Limited (Respondent)
REPRESENTATIVES F J Wall, Advocate for Applicant
Dean Kilpatrick, Advocate for Respondent
MEMBER OF AUTHORITY Helen Doyle
INVESTIGATION MEETING 18 November 2005
DATE OF DETERMINATION 8 February 2006

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] The applicant, Benson Haywood, commenced his employment with the respondent on 11 March 1991 as a car salesman. He was initially employed on commission and then on retainer and commission.

[2] The respondent, Blackwell Motors Limited (“Blackwell Motors”) is involved in the business of selling vehicles in Christchurch.

[3] The general manager of Blackwell Motors, Stephen Grenfell, thought highly of Mr Haywood and they had a good working relationship.

[4] In 1995 Mr Haywood was appointed to the position of used car sales manager and supervised two salespeople in that role. Mr Haywood’s employment relationship problem is concerned with the disestablishment of his management position on 1 April 2004, after which date he worked as a used car salesperson until he gave two weeks notice of his intention to resign from his employment on 23 June 2004. He was paid out for his notice period and his last day at work was Friday 26 June 2004.

[5] Mr Haywood seeks redundancy compensation, compensation for hurt and humiliation, reimbursement of relocation expenses to Nelson, a penalty if there was any breach and costs.

[6] Blackwell Motors says its decision to restructure was justified, that Mr Haywood chose redeployment so he was not made redundant and that he was not unjustifiably disadvantaged in his employment.

The management structure at Blackwell Motors

[7] At the material time in 2004 the management structure, as it related to the used car department, was as follows. Mr Grenfell oversaw the entire Blackwell Motors operation including the used car department. The sales director, Andrew Brown, had several positions reporting to him including Mr Haywood's and he made any major decisions required. Mr Haywood was responsible for the day to day operation of the department. Paul Dowell was responsible for vehicle wholesaling, a position in which he priced trade in vehicles and bought and sold used cars on the market sometimes buying and selling from yard to yard directly. Mr Dowell was employed in that role since 18 August 2003.

Meetings on 4 and 11 March 2004

[8] On Thursday 4 March 2004 Mr Grenfell asked Mr Haywood to meet with him. Mr Grenfell advised Mr Haywood of an intention to change the structure of the used car department and disestablish his position of used car sales manager. A discussion took place about who would perform the various duties of the used car sales manager role given the change in structure. It was proposed that Mr Brown would take over most of the core sales aspects of the role, a clerk, Marlene Wetherall, would look after the stock/inventory and Mr Dowell would do the buying/wholesaling aspects of the role.

[9] Mr Haywood and Mr Grenfell recognised that there was not a lot left from the reallocation of Mr Haywood's duties for him to do and there was a discussion about where Mr Haywood could fit in at Blackwell Motors. Two possible options were put to Mr Haywood for positions available at Blackwell Motors. They were working in new car sales or Holden special vehicle sales in a newly created position. It was probably at that meeting that Mr Haywood put forward another option that he remain in the used car department as a salesperson. Mr Grenfell told Mr Haywood to think matters over during the weekend and they would talk again.

[10] Mr Grenfell telephoned Mr Haywood on Wednesday 10 March 2004 to see how he was progressing with the consideration of the matters discussed the previous week. A further meeting took place on Thursday 11 March 2004.

[11] Mr Haywood questioned at that meeting the feasibility of Mr Brown managing components of the used car sales manager position and his own position as sales director. Mr Haywood also raised the issue that recent staff appointments had increased the cost of wages.

[12] Mr Haywood and Mr Grenfell then turned to discuss the options for Mr Haywood at Blackwell Motors. There was a discussion about redundancy. A figure of about \$22,000.00, which equated with the notice period in the event of redundancy from a standard Blackwell Motors individual employment agreement, was put to Mr Haywood. I have considered whether Mr Haywood was a party to the agreement at paragraphs 20-22 of this determination. Mr Haywood felt that he could earn as much as that in three months so redundancy was not an option for him.

[13] Mr Haywood did not want to work in the new car department as he felt it was already *heavily manned*. He did not want to accept a position in Holden special vehicle sales. Mr Haywood proposed that he go back to the used car department as a salesperson. The proposal was accepted by Mr Grenfell.

[14] Mr Grenfell agreed that Mr Haywood would be on the same base rate retainer that he was on in the management position with an increase of an additional 33 cents per hour which equated to Mr Haywood's phone allowance of \$13.19 per week. Mr Haywood tried hard during the discussion to give Mr Grenfell *a twist* on the package discussed. Mr Grenfell was not prepared to pay Mr Haywood a higher retainer as his retainer was already higher than the other salespeople. The commission structure agreed to with respect to units sold was the standard one.

[15] They also reached agreement with respect to a transitional bonus, if ten units were sold per month, of \$1000.00. Mr Haywood said that there was agreement the transitional bonus would continue for three months and Mr Grenfell said that the agreement was to continue for four months. In any event Mr Haywood had resigned before the fourth month. Mr Haywood asked during the meeting if Mr Grenfell could sell him a Holden Cruz for his partner for \$10,000.00. The book value of the vehicle was higher than \$10,000.00 but Mr Grenfell agreed to sell the vehicle at the price offered by Mr Haywood. It was agreed that Mr Haywood would resume the position as salesperson on 1 April 2004. Mr Haywood and Mr Grenfell shook hands.

[16] The main difference in the salesperson package was that Mr Haywood did not receive as salesperson, an over-riding commission of \$80.00 for each vehicle sold in a month that he had received as a manager.

Raising of a personal grievance

[17] On 28 May 2004 Mr Haywood through his advocate Mr Wall raised a personal grievance that he had either been unjustifiably dismissed or unjustifiably disadvantaged in his employment. That was the first Mr Grenfell was aware of the Mr Haywood's dissatisfaction. The matters raised in the grievance letter were that:

- Mr Haywood was employed on less favourable terms and conditions of employment in his new position as used car salesperson.
- That if his former position did become surplus then there was a dismissal and Mr Haywood should have received redundancy compensation for that dismissal.
- That Mr Haywood's position arguably remained.
- That there was insufficient consultation in terms of section 4(c) of the Employment Relations Act 2000.
- That Mr Haywood was disadvantaged in his new position as used car salesperson in terms of his ability to make sales by the taking on of additional car salespeople in the used car department.

[18] On 3 June 2004 Blackwell's responded by letter through their advocate Mr Kilpatrick to Mr Wall. The letter provided:

- In the period 4 March 2004 to 11 March 2004 there were discussions with Mr Haywood about his position and the likelihood of it being disestablished.
- That there were discussions about alternatives to redundancy and that Mr Haywood had accepted a position as a used vehicle salesperson.
- Mr Kilpatrick attached a letter addressed to Mr Haywood dated 18 March 2004 which he said recorded the agreement in writing and the financial arrangements.
- Mr Kilpatrick said that his client did not accept that the appointment of additional sales staff had any relevance to Mr Haywood's claim as it is entitled to employ staff as it sees fit.
- Mr Kilpatrick recorded that his client rejected that Mr Haywood was unjustifiably dismissed or disadvantaged in his employment.

[19] Mr Haywood said in his written evidence about his resignation that:

Never the less my employment with Blackwell Motors with Paul Dowell undertaking my former functions became totally untenable, too many embarrassing reminders on a constant daily basis when dealing with former agents, representatives, staff and customers and having to recant events that transpired to bring about my demise. As previously stated the car sales industry is an open book in Christchurch. To be absolutely honest I was completely “Pissed off” over everything that had taken place and I felt the victim of a big conspiracy.

Was there an applicable employment agreement?

[20] One of the issues that occupied time during the investigation meeting was whether or not the individual employment agreement produced by the respondent was Mr Haywood’s. Mr Haywood could not recall signing such an agreement. The document produced by the respondent only had Mr Haywood’s signature on the first five pages. His signature was not on page seven which page contained clause 10, a provision dealing with restructuring/redundancy. The copy did not have Mr Haywood’s signature executing the document. Mr Wall went somewhat further in his questioning and suggested the possibility of fraudulent behaviour. I am not satisfied that was established. There would be no gain for the respondent in this case by such behaviour.

[21] I intend to deal with the matter in this way. I cannot be satisfied in the circumstances that the agreement I was provided with was one that Mr Haywood entered into with his employer. It did appear to me that Blackwell Motors applied the provisions as set out in the agreement relating to a restructuring and Mr Grenfell in all probability discussed with Mr Haywood an extended notice figure in the event Mr Haywood was to be made redundant of about \$22,000.00. That is in accordance with clause 10.5 of the document I was provided with.

[22] In the circumstances where Mr Haywood does not accept that the individual employment agreement is his and he has not signed the execution page then I do not place any reliance on the individual employment agreement I was provided with. No other employment agreement or contract was relied on by Mr Haywood.

The Issues

[23] The issues in this matter are as follows:

In terms of the unjustified dismissal

- Was the decision to disestablish Mr Haywood’s position of used car sales manager for genuine commercial reasons - was it genuinely redundant to the needs of Blackwell Motors? This includes consideration as to whether it was:

- Predetermined or a conspiracy?
- An attempt to reduce Mr Haywood’s earnings under the guise of redundancy and redeployment?
- Did the position of used car sales manager cease to exist?

- Was Mr Haywood made redundant?
- Was the process used for the restructuring a fair and reasonable process?

In terms of the disadvantage

- Whether Mr Haywood was disadvantaged by any unjustified actions of Blackwells.

Was the decision to disestablish Mr Haywood's position for genuine commercial reasons?

Financial position of the used car department

[24] During the investigation meeting I asked to be provided with the relevant financial records for the used car department. They were duly made available for consideration at the meeting by the Authority, parties and representatives. I am satisfied that the contents of the financial records accord with Mr Grenfell's evidence. The profit and loss statements reflect that there was a diminishing profit level for the used car department from 2001 and for the year ending December 2002 the department barely broke even. There was a loss recorded for the year ending December 2003 and an increased loss for the year ending December 2004.

[25] Given the sensitivity of the financial records in a competitive market I advised the parties that I would prohibit publication of the records. I order that the financial records of Blackwells be prohibited from publication under clause 10 (1) of schedule 2 of the Employment Relations Act 2000.

[26] I am satisfied that Mr Haywood was aware of the financial situation of the department he managed. Mr Haywood said to me that he was aware that *the profit was slipping back but struggled with the magnitude*. At the end of each month Mr Haywood was provided with an analysis of the used car department's results and there were discussions at management meetings.

Pre-determination or conspiracy

[27] Mr Haywood started to feel particularly aggrieved after he took up the role of used car salesman on 1 April 2004 and reflected on events over the previous few months before his position was disestablished. He went to see Mr Wall and through him made a fairly wide ranging attack on both substance and process in terms of the restructuring.

[28] The concerns in relation to pre-determination or conspiracy went back to about August 2003 when there were several changes which Mr Haywood said were significant.

[29] The first of these changes was the appointment of Mr Brown to sales director from his previous position of financial manager in August 2003. The appointment caused some disquiet as it was an additional tier of management between Mr Grenfell and the new and used car sales managers. Mr Haywood said the staff could not see the necessity for the creation of such a position.

[30] Mr Grenfell gave evidence which, I have no reason not to accept; that the appointment of Mr Brown was to give a fresh focus on sales and allow Mr Grenfell to further the company's growth plans in other areas. Mr Brown's role seemed more strategic and less hands on than Mr Haywood's role. It is not really surprising that there were changes therefore following his appointment with a view to increasing sales of cars and profitability.

[31] In or about mid August 2003 Mr Brown and Mr Grenfell met with Mr Haywood and the new car sales manager Barry Whittle to discuss how sales turnover could be improved in new cars and a return to profitability in used cars. A proposal came from that meeting that Blackwell Motors employ a vehicle wholesaler to work across the new and used departments. Vehicle wholesalers are employed by some of the larger dealerships. Mr Haywood was not opposed at that time to the concept of a vehicle wholesaler although he recognised that it would reduce the wholesaling part of his management role. It was Mr Haywood who put forward the suggestion of Mr Dowell as someone who may be appropriate in that role.

[32] I am satisfied that Mr Haywood questioned Mr Grenfell at the meeting about any impact on his own position in terms of the appointment of a wholesaler. Mr Haywood realised that there would be less work in his role. Mr Grenfell reassured him at that time that it would not affect his position. I am not satisfied at that time there was any intention to disestablish the used car sales manager's role.

[33] Mr Wall submits that in terms of Mr Dowell's appointment and representations to Mr Haywood, Mr Grenfell breached a duty he had not to mislead or deceive Mr Haywood. I do not accept that there was such a breach of duty. Mr Haywood knew about the proposal to appoint such a person in the position of wholesaler. Mr Dowell's role was wider than just the duties undertaken by Mr Haywood. Mr Haywood was supportive of the proposal and knew it would impact on his work but it was anticipated by those present at the meeting at that time that he would be able to do more selling.

[34] Mr Haywood views that meeting as *...the foundation and outcome of that meeting was ultimately to set a platform for my own demise*. I have considered the evidence and am not persuaded that the appointments of Mr Brown and Mr Dowell were other than a genuine attempt to deal with profitability concerns at Blackwell Motors.

[35] The other matter that concerned Mr Haywood was the appointment of additional sales staff. There appeared to be two main drivers behind this. The first was a desire to expand from Holden only stock to include other makes of vehicle. I accept that there was discussion around bringing on extra sales staff with experience to deal with that expansion of stock and potential increase in stock at the same meeting in which a proposal was discussed to bring on a wholesaler. The second was I find to promote competition amongst the sale staff with a view to increasing sales.

[36] Around that time Mr Brown reviewed the commission structure of salespersons. Mr Wall refers to this in his submissions at some length. There was no evidence that Mr Haywood was disadvantaged by this review and it is therefore not relevant for the purposes of his claim. I do accept that it was just one of several steps that were taken to try to improve sales at that time and increase profitability.

[37] There was a discussion between Mr Grenfell and Mr Haywood in or about December 2003. They recalled the discussion differently but there was agreement that Mr Grenfell expressed that he was coming under some pressure from the Board of Directors. Mr Haywood said that the pressure was about wage figures and that Mr Grenfell said he would be looking more closely at his *wage packet* to make savings. Mr Grenfell recalled the discussion was about the poor performance of used cars. He said that there was a discussion with Mr Haywood about salaries, commission structures and advertising budgets and that it would probably have to be addressed in the New Year. In any event what is clear is that Mr Haywood knew that there would in all probability be a discussion in the New Year with a view to the need to make savings.

[38] It is not surprising that, following the disestablishment of Mr Haywood's role he reflected on these events. Mr Haywood may well think the decisions made were the wrong decisions but nevertheless Blackwell Motors was entitled to attempt to make its business more profitable including making new appointments.

[39] I do not find that there was predetermination of the decision to disestablish Mr Haywood's position or that the business decisions to make appointments were part of a wider agenda/conspiracy to remove Mr Haywood from his management position. I find rather that there was real concern about the used car department in December 2003. Blackwell Motors final accounts for 2003 were available in February 2004 and these were discussed at a Board meeting. The structure was then considered and reviewed.

Was there an attempt to reduce Mr Haywood's earnings under the guise of redundancy/redeployment?

[40] Mr Wall submits that the restructuring was merely an exercise to restructure Mr Haywood's wages and was a unilateral variation of his terms and conditions.

[41] I do not accept that the evidence supports such a submission. In March 2004 Blackwell Motors made a decision that the position of the used car sales manager was no longer required. At the time of the investigation meeting in November 2005 there was no used car sales manager position in Blackwell Motors structure. Mr Haywood accepted a salesperson role rather than be made redundant and the evidence did not support that he continued after 1 April 2004 to discharge the duties that he had in his management role. Mr Haywood asked after the meeting on 11 March 2004 that he no longer attend management meeting between then and 1 April 2004 when he took up the new role. The difference in the package that Mr Haywood received as salesperson was the overriding commission which was a commission directly related to the management position.

[42] Mr Grenfell gave evidence that things have become *tougher* in the used cars sales department since Mr Haywood resigned and there have been redundancies of salespeople.

[43] Mr Wall submits that Mr Haywood at the meetings in March was *absolutely convinced that there was never even the remote possibility that he faced dismissal.....* I accept that Mr Grenfell would have by his suggestions for redeployment made it clear that he did not want Mr Haywood to leave. That however is an indication of the high regard that Mr Haywood was held in by Blackwell Motors and Mr Grenfell rather than a factor going to the genuineness of the redundancy of the management position. Mr Haywood did tell the staff in his department that he had lost his job after the first meeting on 4 March 2004. He was not dismissed but redeployed to another position.

Did the position of used car sales manager cease to exist?

[44] Mr Haywood described Mr Dowell after the disestablishment of his position as *the unofficial manager*. He said that Mr Dowell was performing some of his previous duties. Mr Grenfell explained that some of the duties performed by Mr Dowell initially were then performed by Ms Wetherall when she got up to speed with the requirements of those duties and her other role. Mr Haywood accepted that Mr Dowell still carried out his existing role and that he was still known as *vehicle wholesaler*. I am not satisfied that Mr Haywood was of the view that there still was a position known as the used car sales manager. I am satisfied that the role of used car sales manager at Blackwells ceased to exist and the duties were absorbed into other roles.

Was Mr Haywood made redundant?

[45] Mr Haywood was advised his position was to be disestablished. He was given the choice of taking an alternative position within Blackwell Motors or being paid out an extended period of notice for redundancy. He decided to take an alternative position which had the same base rate but a less favourable commission package. Blackwell Motors were not obliged to make up the difference. Mr Haywood chose to continue to be employed by Blackwell Motors in a different capacity and he was not dismissed for reason of redundancy.

Conclusion as to the disestablishment of the position of used car sales manager

[46] There was consideration given by Blackwell Motors to the efficiency of the management structure in the used car department against the background of a drop in profit and then sustained losses. The company concluded that it would reorganise the department and disestablish the position of used car sales manager. Meetings were then held with Mr Haywood. I am satisfied that the position of used car sales manager was disestablished for genuine commercial reasons and the position was genuinely redundant.

Was the process used for the restructuring a fair and reasonable process?

[47] Blackwell Motors was required to treat Mr Haywood throughout the restructuring process in a manner that was both fair and reasonable.

[48] Mr Haywood said that he had no warning of the disestablishment but I find that he knew there was an issue with the profitability of the department and there had been an attempt from at least August 2003 to turn things around. There had also been a warning in December 2003 about the need for a discussion in the New Year.

[49] Mr Haywood was not advised to take a representative with him to either meeting with Mr Grenfell. I am satisfied that Mr Haywood who is an intelligent man was not materially disadvantaged by the lack of representation at the meetings. I have reached that view based on the fact that Mr Haywood came up with yet a further option for redeployment, was able to persuade Mr Grenfell at the second meeting to sell him a car at less than book value and he attempted to persuade Mr Grenfell to increase his retainer.

[50] Importantly too Mr Haywood did not take any issue with the fairness of the meetings or the process for at least two months after that time.

[51] Mr Grenfell presented Mr Haywood with a fairly firm proposal about disestablishing the position of used car sales manager. I do find however that there was room for some discussion exactly how that would be done and the implications as supported by Mr Grenfell's rough notes taken at that meeting.

[52] Mr Haywood continued at the second meeting to question the feasibility of the disestablishment although there was no agreement reached about that. Consultation however is not about reaching agreement.

[53] There was discussion about the options for Mr Haywood including payment for an extended notice period in the event he wished to be made redundant. There was discussion and agreement about when the changes would take place and when the position would be disestablished on 1 April 2004.

[54] I am satisfied when viewed overall that the process used for the restructuring was a fair and reasonable process.

Was Mr Haywood disadvantaged by any unjustified actions of Blackwell Motors?

[55] I have found that Blackwell Motors was not obliged to redeploy Mr Haywood to a position on no less favourable terms and conditions. That cannot form the basis of a disadvantage claim.

[56] The second matter that Mr Wall relies on is a letter Mr Haywood says he never received dated 18 March 2004 from Mr Grenfell. The letter sets out the package for the new role as used vehicle salesperson. I accept that Mr Haywood never received the letter although that would appear to have been accidental rather than intentional. Mr Haywood accepted that the letter appeared to contain the package details he recalled discussed at the 11 March meeting for the new role. The letter has a review provision in it relating to the commission rates. The provision provides that following consultation the employer reserves the right to change the commission rates from time to time in accordance with the needs of the business.

[57] Mr Wall views that clause negatively but it cannot be held to have disadvantaged Mr Haywood because he had no knowledge of it. There is no evidence that the commission rate was ever reviewed during the period that Mr Haywood was a used vehicle salesperson.

[58] I do not find that Mr Haywood was disadvantaged by any unjustified actions of Blackwell Motors.

Determination

[59] Mr Haywood's position as used car sales manager was genuinely redundant to the requirements of Blackwell Motors. The position of used car sales manager was disestablished following a fair and reasonable process in which Mr Haywood chose, not to be made redundant and receive a payment for an extended notice period, but, to accept a position as a used vehicle salesperson. Mr Haywood resigned from that position but not in circumstances that I find give rise to a personal grievance.

[60] I do not find that Mr Haywood was disadvantaged by any unjustified actions of Blackwell Motors.

[61] Mr Haywood does not have a personal grievance and there is nothing further I can do to assist him.

Costs

[62] I reserve the issue of costs.