

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Gregory Leigh Hunt (Applicant)

AND Powercall Technologies Limited (First Respondent)
AND Brocker Technology Group (NZ) Limited (Second Respondent)
AND Brocker Technology Group Limited (Third Respondent)

REPRESENTATIVES Graeme Gowland, Counsel for Applicant
Chris Patterson, Counsel for Respondents

MEMBER OF AUTHORITY Y S Oldfield

INVESTIGATION MEETING 23 August 2001
24 August 2001

WITNESS INTERVIEW 21 September

FINAL SUBMISSIONS 3 September, 19 October,

DATE OF DETERMINATION 24 December 2001

DETERMINATION OF THE AUTHORITY

The Employment Problem

Mr Hunt lodged his employment problem with the Authority in late May of this year. He believes he was employed by the first respondent pursuant to a contract that was executed on 10 May 1997 for a fixed term of five years. Alternatively he says that if he was employed by the second respondent it was pursuant to the same contract, and further says that the third respondent indemnifies the first and second respondents in respect of any obligations either has under that contract.

The first respondent says that it is not liable under that employment contract. It says that Mr Hunt was re-deployed or transferred to the second respondent pursuant to the contract's termination clause. It says further that if the transfer or redeployment was in breach of the termination clause, which is denied, then any cause of action that the Applicant may have against the first respondent occurred prior to 2 October 2000.

All respondents say, in any event, that the contract was not a genuine fixed term contract and its expiry term is unenforceable by any of the parties.

Mr Hunt was dismissed from a position of sales and marketing manager in February 2001. The justification advanced for the termination of his employment was redundancy, but Mr Hunt says

that the redundancy was not genuine and was procedurally flawed. He also says that at the time of the dismissal his contract had over a year to run.

The second respondent (which says it was the employer at that point) says that this dismissal was substantively justified and conducted in a procedurally fair manner. The respondents all say that they do not owe any arrears to Mr Hunt and that the second respondent's obligations to him were met by the payment of one month's salary in lieu of notice.

Finally Mr Hunt alleges that despite attending a mediation conference, the respondent did not enter into mediation in good faith. In relation to this claim, the respondents say that they were fully prepared to participate in mediation and considered every matter and proposal raised by the applicant, and that the conference was terminated by the mediator.

Mr Hunt seeks the following remedies:

- A determination that the contract executed on 10 May 1997 was the applicable employment contract, and a consequent award to him of \$75,000.00 arrears being the balance due under the terms of that contract.
- Holiday pay due and payable in respect of the balance of wages owing from 23 February 2001.
- Interest on those monies.
- Compensation of \$25,000.00 for humiliation, loss of dignity, and injury to his feelings.
- \$2,500 "exemplary costs" in respect of the respondent's conduct at the mediation hearing.
- Penalty for breach
- Costs of and incidental to the investigation.

Background to the problem

In early 1997 the applicant, Mr Hunt, was one of four directors and shareholders in an information technology development business consisting of two companies, Powercall Limited and Powercall Services Ltd. The major asset of the business was its intellectual property in the form of computer based telephony technology but it lacked the capital it needed to develop and market the concept.

In order to address this problem, the directors entered into negotiations with what is now known as Brocker Technology Group (NZ) Limited but was then Brocker Investments (NZ) Limited (and which I shall call *Brocker NZ*) a wholly owned subsidiary of what is now Brocker Technology Group Limited but was then Brocker Investments Limited, a Canadian parent company (which I shall call *Brocker Canada*.) The principal negotiator for the company was Mike Ridgeway, who has now left the Brocker group and who did not give evidence during the investigation. Mr Ridgeway was a director of all three companies and CEO of both Brocker Canada and Brocker NZ. (The main witness for the respondents was Mr Richard Justice, the current CEO. He took up this position a relatively short time before Mr Hunt's employment was terminated, and had little involvement in the negotiations in 1997.)

The result of the discussions was that a new company, Powercall Technologies Ltd (which I shall call *PTL*) itself wholly owned by Brocker NZ, was set up for the sole purpose of purchasing Powercall Ltd. A sale and purchase agreement to this effect was entered into on April 1 1997. The vendor parties to the agreement were expressed to be:

- Powercall Limited
- The Shareholders of Powercall Limited
- The Directors of Powercall Limited

The purchaser parties were:

- Brocker Investments (NZ) Limited (Brocker NZ) and;
- Brocker Investments Limited (Brocker Canada.)

Mr Hunt explained in his evidence that this agreement provided for the four directors to receive small cash payments as consideration for the sale of their intellectual property. This, he said, was:

“linked to an escrow agreement that provided for staged parcels of shares intended to reflect the projected growth in value of the technology. Through our knowledge and experience combined with Brocker’s management and capital resource, we estimated a potential return of \$20 million on revenues could be achieved over the agreed earn out period of five years.

A condition of paragraph 4.2.2 of the sale and purchase agreement was that all four vendors would enter into 5-year fixed term employment contracts that would operate in parallel with the escrow agreement. I signed my fixed term employment contract on 10 May 1997 on the clear expectation and understanding that my job and benefits would be protected for a minimum period of 5 years commencing 1 April 1997 and expiring 31 March 2002.”

The shares in question were to be in Brocker NZ.

The relevant clauses of the agreement for sale and purchase of the business read as follows:

“INTRODUCTION...

D. The Directors will enter into employment contracts with PTL on the terms set out in the contracts annexed to this Agreement.

...

1.3 Joint and Several: Unless otherwise provided, the covenants herein expressed or implied shall bind all persons executing this Agreement and any two or greater number of them jointly and each of them severally.

4.2 By Completion *On or before Completion Powercall and the Shareholders shall:*

...4.2.2 Service Agreement: Procure the execution of employment contracts by each of the Directors for terms of up to five years (in the case of Nick Lyttle as general manager of PTL) in the form annexed as Annexure A.

...

7.4 Directors’ Employment: Powercall, the Directors and the Shareholders each acknowledge that BKINZ, BKI and PTL have entered into this Agreement upon the expectation that each of the Directors will continue to be employed on a full time basis in the Business for the term of the employment contracts referred to in clause 4.2.2. Should any of such contracts be terminated for any reason prior to the end of their 5 year terms other than through the default of PTL or as a consequence of the death or permanent disability of a Director, and as a consequence PTL, BKINZ or BKI suffer any losses or incur any Costs then Powercall, the Directors and the Shareholders shall be jointly and severally liable to reimburse such losses or costs and PTL, BKI and BKINZ shall be entitled to adjust the Consideration according and/or set off any such amount against any payment due to the Shareholders under this Agreement.”

(‘BKINZ’ here is Brocker NZ, ‘BKI’ is Brocker Canada.)

From the vendors’ point of view it was a crucial condition of the sale and purchase agreement that they would be employed in the new company and that Mr Lyttle would be its general manager. Equally important was the fact that the contracts were for a fixed term of five years, especially given that they considered the salaries to be below market levels at that time. They wanted to be in a position to continue to influence the development and marketing of the technology, and to maximise their return, in an environment where the gains might not materialise for several years. Respondent witnesses told me that the purchasers saw a benefit in employing the vendors, but no particular advantage to placing them on fixed term contracts. However, I note that clause 7.4 clearly makes the four vendors liable for any losses arising if they were to leave the company early.

All four vendors started work in April, although Mr Hunt’s employment contract was not signed until 10 May 1997. PTL was expressed to be the employer party; Mr Lyttle had been employed first, and executed the other vendors’ employment contracts on behalf of PTL. Mr Hunt’s employment contract opened with:

“The terms and conditions contained herein supersede and replace any terms and conditions of employment that may have applied prior to the coming into force of this contract.

This contract expires on the 31st March 2002.”

...and also included:

“14 TERMINATION OF EMPLOYMENT

(a) Notification- Employment may be terminated with 1 month’s notice by the employee. If PTL terminates employment for any reason other than serious misconduct or serious breach of contract or employment engagement by another company within the Brocker Group, the salary obligations of BKI shall continue for the full term of the contract.”

...

17 VARIATIONS

Any of the terms and conditions contained in this contract may be varied by mutual agreement.”

Mr Hunt took on the role of Sales and Marketing Manager, reporting to Mr Lyttle. The events of the next three years have little relevance to these proceedings except in so far as sales of the new product did not meet expectations.

In early 2000 as part of a general redevelopment strategy the subsidiary companies of the Brocker group were restructured. The restructuring followed on from a general and concerted effort to de-brand subsidiaries and emphasise the Brocker brand. It was for investors’ benefit as they did not know what the subsidiaries (of which there were a number in NZ besides PTL) were about.

Part of this process was the integration of the sales and marketing of “Bloodhound” (the name given to PTL’s software product) into the sales and marketing function of the whole group. Mr Hunt experienced a number of changes in his employment. He moved to the role of National Sales Manager (responsible for *Bloodhound*) and began reporting to Mr Richard McLean, General Manager Application Development Sales. New business cards were printed for him, and in June

his salary package was increased. In August he was physically relocated to the Brocker head office. In December of that year, his sales team followed him. In mid December Scott Richardson (general manager of another Brocker subsidiary) offered him a new contract. Mr Hunt told me:

“I told Scott that I already had an existing employment contract and saw no good reason to enter into a new one...at no stage did I indicate to Mr Richardson that I would accept any such offer in fact quite the reverse.”

Meanwhile, Mr Justice had never seen the contracts that had been executed for the four vendors. Shortly before Christmas 2000 he had required an audit of all employment contracts but neither the Brocker human resources department nor the PTL payroll officer had uncovered these contracts. Mr Justice first learnt of them in April 2001, after the redundancies had been implemented.

Mr Lyttle told me that during the restructuring Mr McLean had suggested to him that it might be easier to terminate the sale and purchase agreement and move to “normal” employment contracts. Mr Lyttle advised him that he did not think that this would be easy since there were multiple signatories. (Mr Lyttle also told me that some time before the termination of Mr Hunt’s employment, one of the original vendor signatories to the sale and purchase agreement had his employment terminated for serious misconduct. Mr Lyttle negotiated his exit package on behalf of the company and it was expressly part of the deal that the individual concerned waived his rights under the original contract, particularly in relation to the fixed term.)

Then came a change which the respondents now rely on as being of major significance. Mr Hunt told me:

“Later in December, my pay arrangements were transferred from Powercall Technologies to Brocker. I was told by HR that as part of the transfer process, I would need to either have my accrued holiday balance paid out or have it carried over to Brocker. This came as no surprise to me as Powercall and Brocker had been progressively integrating their operations over the previous couple of years, so I was happy to have my pay and holiday pay balance transferred provided no attempt was made to change my employment contract.”

In relation to the holiday pay, Mr Hunt received the following e-mail from Brocker NZ human resource department on 19 December:

“As mentioned previously, you have 2 options regarding the treatment of your Powercall Holiday Pay. Can you please confirm in writing, via return email, showing this history, your preference.

Your Holiday pay, currently a balance of 27.94 days, can either be paid out by Powercall Technologies Ltd as Termination Holiday Pay, or we can transfer the entire balance over to your new role with Brocker Technology Group, and you will therefore continue to accrue days at the current rate of accrual, based on 20 days per annum.”

Mr Hunt replied the following day in these words:

“Please can you transfer the balance of my Holidays, 27.94 days, over to my new role at Brocker.”

Mr Hunt told me that what happened after this was that he used 15 days during the holiday season that followed (having planned this beforehand) and reserved the balance.

Mr Hunt told me that from the outset (April 1997) he had considered himself to be part of the Brocker group. He did not view the changes in 2000 (either in his salary, or to the source of the

direct credit by which it was paid) as in any way significant to his employment status. The latter happened without his knowledge and meant nothing to him, he said. Mr Lyttle told me that it was done because Mr McLean wanted to tidy things up by having all costs of his unit come from the one payroll system. Nor did the nature of Mr Hunt's work change, as he continued to sell the Bloodhound product as before. For him, there was never a definitive moment when he moved from PTL to Brocker NZ.

Mr Justice told me that he considered that Mr Hunt moved from PTL to Brocker NZ in the June of 2000. (I note that this was not the position advanced in submissions by Counsel for the Respondents.) I also asked him who terminated Mr Hunt's employment at PTL (since Mr Lyttle denies that he did) and he told me that it would have been either Mr McLean or the payroll office (by which he was referring to the Brocker NZ payroll office, via the changes to Mr Hunt's automatic salary payment and holiday pay.) With regard to Mr McLean's involvement, he said he was assuming this, since he had no direct knowledge, but senior managers within Brocker NZ were each responsible for a subsidiary, and Mr McLean was responsible for PTL. He would therefore have had the authority to terminate the employment of an employee of a subsidiary. He also said that he was not aware of any specific event that marked the transfer, but saw it as part of the general branding and restructuring exercise.

The redundancy

In the first months of 2001 Brocker NZ continued with a review of all its business units. However in February far more serious and urgent matters overtook that. A major fraud was discovered in the Australian operation, with implications for the survival of the whole group. By mid February staff had some awareness of what had happened but for reasons of commercial sensitivity, official statements by the company were minimal.

On Friday, 23 February 2001, at approximately 2.00pm, Brocker's HR manager, Gillian Cooper approached Mr Hunt and advised him that he was required at a staff meeting in an hour's time. The meeting was attended by 60 other Brocker NZ employees. Richard Justice, Brocker's Chief Executive Officer, addressed the meeting and gave a presentation outlining the situation the company was in. Mr Hunt told me that:

"Mr Justice explained that as a result of a major accounting fraud in Brocker's Australian operations, the Group was required to immediately begin restructuring its New Zealand business by significantly reducing staff numbers across all business units. At the conclusion of his address, Mr Justice handed each of the employees present, myself included, a letter confirming our immediate termination of employment."

The termination letter opened:

"It distresses me to have to inform you that due to the urgent need to cut back operations to make economies in the Brocker group your position has become redundant. This letter is notice of your dismissal for that reason.

While your contract provides for one month's notice, notice need not be given if a payment of one month's pay is made in lieu. In your case we are exercising the option to terminate your employment immediately and pay you one month's salary in lieu of notice, however an appropriate handover period will be required to be held with your manager."

He was also required to hand in all company property that afternoon, and advised that he would be paid his final pay and holiday pay on 15 March 2001, with payment being conditional on the return of all the property.

When Mr Hunt returned to his desk, he discovered his network and e-mail access had been discontinued. Nonetheless he managed to phone and postpone future appointments, including one for 9.00am the following Monday with a key reseller of Bloodhound products. After speaking briefly with Mr Lyttle, he agreed to return on the Tuesday morning to complete the hand over of work in progress, as provided for in his letter. Security guards were posted on the exits to search redundant staff as they left the building and when Mr Hunt returned on the Tuesday, he was required to wear a visitor's pass for this meeting. He received his final pay and holiday pay three weeks later.

It is now the intention of Brocker NZ to sell all its application development software, and close down its application development team completely. Although Mr Lyttle continued to be employed at the time of the investigation into Mr Hunt's case, his future too is uncertain. Mr Lyttle told me that at the time of the redundancies, he never thought to tell anyone that Mr Hunt (like himself) was on a fixed term contract.

Mr Hunt, and his wife, Ms Huria, spoke at some length of the devastating effects of the redundancy on them, which were compounded by its suddenness and by the concomitant loss of any opportunity to reap the returns they had expected from the sale of the original business.

Issues

- *The identity of the employer.*
- *Whether the 10 May 1997 employment contract applied at the time of the redundancy.*
- *If it did, whether it was a true fixed term contract.*

The applicant's position is that he was employed by PTL on a fixed term contract and did not, within the terms of that contract or otherwise, consent to the transfer of his employment to another employer. He says that there is no provision within the employment contract to vary his terms and conditions, including the 5 year term, other than with his agreement. Therefore his employment at PTL was never terminated and he was still employed by PTL at the time of his dismissal. He is therefore entitled to the full balance of his fixed term contract according to its terms. It is also submitted for the applicant that clause 14 of the applicant's employment contract in respect to "*engagement by another company within the Brocker group*" is principally to cover any technical redundancy situation. Counsel says it serves only to protect PTL (or Brocker Canada on its behalf) from liability for the balance of the 5-year fixed term contract upon "*engagement by another company within the Brocker group.*"

However, if the Authority were to find that there was a transfer, then the applicant submits that it could only be by a type of integration as discussed in *New Zealand Seafarers Union Inc v Silver Fern Shipping Ltd (No 2)* [1998] 3 ERNZ 787. In that case it was held that the two companies in question were so closely integrated, including sharing the same directors, it was proper to regard them as being one employer entity under the employment contract. Counsel submits that this case is on point with Mr Hunt's case and that all three respondents were, as far as his employment was concerned, an integration of directors and CEO acting as one legal employing entity. He relies on the following facts to support this proposition:

- At the time of the applicant's employment, Mr Ridgeway was the director of PTL, Brocker NZ and Brocker Canada, as well as the Chief Executive of the latter two companies. Later Mr Justice filled the same positions.
- All three respondents were parties to the sale and purchase agreement

- All three have exercised a degree of control over the applicant and undisputed evidence was given that senior managers of the second respondent had authority to hire and fire staff of subsidiaries.

He submits that in such circumstances, Brocker NZ assumes responsibility for all the terms and conditions of the applicant's employment contract, including the 5 year term. It is also submitted that it is a fundamental principle of any technical redundancy situation (such as this transfer, if it occurred) that there is no reduction in terms and conditions of employment at the point of transfer of employment.

Counsel for the respondent submitted that the applicant by his conduct agreed or by implication consented to his transfer or re-deployment to Brocker NZ on 20 December 2000, and so PTL has no liability to him at all. He bases this on the following:

- When Nick Lyttle negotiated a salary increase with Mr Hunt in 2000 it was as an agent of the second respondent, not the first.
- Brocker NZ did begin paying his salary.
- Mr Hunt held himself out as an employee of the second respondent, taking up his new role and commencing to use new business cards.
- His office was relocated.
- The second respondent accepted that the applicant was its employee.
- Mr Hunt agreed to have his leave transferred to Brocker NZ, as evidenced by the e-mail of 20 December.
- The employment contract entered into with PTL provided that PTL could terminate his employment in the event of employment engagement by another company within the Brocker Group.

The second respondent now agrees that it did not execute a new employment contract with the applicant (notwithstanding the words of the dismissal letter.) However it says that it is reasonable to infer permanent employment, terminable upon notice of one month or payment of one month in lieu of notice as per the employment contracts it had with other staff.

The third respondent's position is that it has never been an employer of the applicant (or indeed of anyone) as it functions principally as an investment company, and it should not be found liable by lifting the corporate veil.

Conclusions

Unlike many of the cases to which I have been referred, this case is not really about going behind the corporate veil. Neither party is trying to sheet home liability to a company standing in the shadows behind the apparent employer. Rather it is a question of an employment relationship changing over time in a somewhat untidy and informal way, so that the identity of the employer is no longer immediately obvious, and must be determined as a first step in the resolution of the employment problem. Did Mr Hunt began as an employee of PTL but subsequently terminate that employment, commencing afresh with Brocker NZ on new (and unwritten) terms of employment? Did he simply remain an employee of PTL, on the same terms of employment as always? Or was it something in between?

There is no evidence to support a suggestion that Mr Hunt resigned his employment at PTL; a step which could have serious implications given the potential for liability under clause 7.4 of the sale and purchase agreement. Mr Patterson says that the e-mail of 20 December constitutes express consent to a transfer of employment, but even if it does not, such consent can be implied. Support

for this proposition is to be found in *Red Eagle Corporation Limited v Michelle Walker* (AEC86A/95.) There the Court found that it could go behind the corporate veil and attach liability to the head of the parent group. Whether such an implication can be drawn depends on the facts of the particular case. In *Pemberton v Was Ltd (Formerly Webling & Stewart Seed Ltd)* it was found that there was no transfer of employment since there was no documentation of a transfer, which was contrary to the usual practice of that company. Mr Patterson relies on the principles of these cases while distinguishing the latter on its facts.

Mr Gowland, as we have seen, says that the first respondent is the employer, or in the alternative, submits that I should follow the *NZ Seafarers Union* case (above.) The Court found in that case, not that there had been a transfer of employment, but that there was an integration of two companies so that both shared the responsibilities of the employer. Judge Colgan said at page 807:

“Long established statutory law of incorporation of legal identities separates companies from their shareholders, officers, and others. Incorporation of companies bestows advantages upon businesses in the conduct of their commercial affairs. A contract entered into with an incorporated company is, for most purposes, enforceable only against that company. But those taking the commercial advantages of incorporation should not be allowed by the law to abuse the process by using it to defeat the obligations that it would otherwise have to its employees under a contract of employment. “

Judge Colgan went on to summarise the principles as applied in New Zealand law as follows (p.808):

1. *“It is unnecessary to show that the corporate structure was established for the purpose of the pretence alleged or for the purpose of any pretence arrangement. Rather, the question is whether the use of the corporate structure in place is pretence. An otherwise usual corporate structure may nevertheless be used by the constituents of it to create or perpetrate a pretence: Square 1 Service Group Ltd v Butler [1994] 1 ERNZ 667.*
2. *The Courts take a cautious approach to interfering with the long established law of corporate separateness: NZ Seamans IUOW v Gearbulk Shipping (NZ) Ltd [1990] 1 NZLR 688 following Securitibank Ltd (No 2) Re [1978] 2 NZLR 136 (CA)*
3. *In the specialist employment jurisdiction considerations of equity and good conscience in the determination of cases (s. 104(3) Employment Contracts Act 1991) and of the special relationships of trust, confidence and fair dealing between employers and employees have caused this Court and its predecessor, in a principled way, and rarely, to lift the corporate mask or pierce the corporate veil to ensure that justice is done as between parties in an employment relationship: Gearbulk (above); Square 1 Service Group (above); Red Eagle Corp v Walker, unreported, Colgan J, 11 September 1995, AEC 86A/95.”*

Judge Colgan also noted that although the Labour Court in *Gearbulk* eventually found it unnecessary to lift the corporate mask in determining that case, the Court concluded that, had it been necessary, it would have done so. He also noted that there has been less reluctance to lift the veil where a subsidiary company has acted as agent for its holding company, and that it is a question of fact in each instance whether the subsidiary is carrying on the business of the parent company or its own. Quoting the judgement of Atkinson J in *Smith, Stone and Knight Ltd v Birmingham Corp* [1939] 4 All ER 116, 121 he then reiterated six principles or guidelines, although it was a question of fact and degree in each case.

1. *Were the profits treated as those of the parent company?*
2. *Were the persons conducting the business appointed by the parent company?*
3. *Was the parent company the head and brain of the trading venture?*

4. *Did the parent company govern the venture and decide what should be done and what capital should be embarked on it?*
5. *Were the profits made by its skill and direction?*
6. *Was the parent company in effectual and constant control?*

(Judge Colgan also mentions another criteria of relevance to the present case-whether the subsidiary is obviously under-capitalised for the carrying on of an independent existence.)

Applying these principles to this case, I am satisfied that the same sort of integration can be seen here.

From the time that PTL was incorporated, in May 1997, there was a degree of integration between the operation and control of Brocker NZ and that of PTL. The respective companies shared directors and a CEO and a Brocker manager was responsible for the subsidiary, even to the point of being able to hire and fire staff. As was expected at first, PTL ran at a substantial loss and this loss was financed by Brocker NZ.

From early 2000 onwards, the level of integration increased markedly through a gradual movement by which the work, and later the remuneration, of selling *Bloodhound* was integrated into the operations of the parent company. This integration of operations drove the change in Mr Hunt's place in the organisation of the group. The selling and development of *Bloodhound* moved, and hence, so did he, even though PTL continued to exist and to have ownership of that technology.

Mr Patterson puts the date of the alleged transfer at 20 December 2000, but Mr Justice put it at the previous June. The fact that Counsel for the respondents and their CEO cannot themselves agree on the date of transfer does not help to convince me that a specific event of this nature occurred. There is no evidence that PTL terminated Mr Hunt's employment at any point; the e-mail of 19 December came from Brocker NZ, not PTL. This tends in my view to lend support to the integration theory rather than the transfer theory. If there had been a transfer within the group (as provided for in clause 14 of the contract) then I would have expected the parties to negotiate a new employment contract. This did not happen.

What has been characterised as a specific event was rather an increase in the interrelationship between the operation and management of the two companies. I am satisfied that there was a process of progressive integration over a period of some time, resulting in a situation with some similarities to that found in the *NZ Seafarers Union* case above.

My conclusion is that the applicant's second or alternative argument is correct, and that on the particular facts of this case, the first and second respondents share liability as employers of Mr Hunt.

As for the third respondent, the only evidence to establish its liability in these proceedings was the relevant provisions of the agreement for sale and purchase. Although those provisions may impact on the enforcement of this decision, they do not in my opinion create an employment relationship.

I conclude that the third respondent did not employ the applicant.

Returning now to the precise terms of the employment relationship, I conclude that the original contract continued in force despite the changes that took place in 2000. Mr Hunt clearly rejected any offer of a new contract. In the absence of any re-negotiation of the terms and conditions of employment, I am satisfied that the existing terms continued to apply. It is not necessary to consider whether these terms are implied into Mr Hunt's employment contract because I consider

the express terms remained in effect. I consider that the party alleging the change to those terms must be able to point to evidence of the variation. The salary was changed, but I consider it too much of a leap for me to say that this means the entire contract was scrapped as a result. I accept that, along with PTL, Brocker NZ assumes responsibility for all the terms and conditions of the applicant's employment contract, as executed on 10 May 1997.

The final point for determination before turning to the redundancy itself is whether the contract was truly for a fixed term.

Mr Patterson argues that the contract of 10 May 2001 was not for a genuine fixed term because there was no genuine commercial reason that justified the use of a fixed term and the fixed term does not genuinely relate to the operational requirements of the undertaking. I reject this argument. There was clear evidence that the five year term for the employment contract (matched by the term of the escrow agreement) was for a genuine and reasonable commercial objective. It was for the benefit of both parties and was to enable both to maximise the return on the intellectual property concerned. The purchaser/employers needed the vendors' product knowledge and the vendors needed to be able to influence the way in which the product was developed and marketed. This fixed term was the real thing.

Mr Patterson further argues that the inclusion of a termination clause may be definitive in establishing that it is not a fixed term contract. However, Mr Gowland referred me to *Williams v Attorney-General* [1999] 2 ERNZ 457 where in respect of a shorter notice period for the employees, the Chief Judge said:

"In general, fixed term contracts for a long period provide an employee with a means to obtain a release on giving some agreed period of notice. This recognises that employees cannot be kept in employment against their will. To do so would risk the reproach that the contract contains elements of servility and is as such illegal."

I agree, and note also that the sale and purchase agreement provided a remedy to the respondents in the event of the applicant resigning before the fixed term was concluded.

- ***Whether the dismissal for redundancy was substantively and procedurally justified.***

I have concluded that the dismissal was substantively justified.

Mr Justice gave evidence that the fraud uncovered in the Australian operation was of such major proportions that nothing but a speedy and drastic downsizing of the entire group was going to enable it to survive at all. The rapidity and extent of the crisis put Mr Justice and his senior managers in a very stressful and personally difficult situation. The scale of the cuts was massive. Mr Hunt was certainly not part of a small or minority group to go. Mr Justice also stated that business units that were not generating revenue were the first to be cut. Bloodhound, although a good product, required more investment before it would begin to generate significant revenues. The only option, it was felt, was to sell the whole thing off along with other application software. There was therefore no role left for Mr Hunt.

All of this I accept as matters of fact.

Mr Patterson has submitted that Brocker's business requirements were such that it had to make a commercial decision straight away. There was no opportunity to postpone the decision to declare a large number of positions redundant including that of the applicant. Citing *Baguley v Coutts Cars Limited* he notes that consultation is not mandatory in all situations, and says that this is just the sort

of mass redundancy situation where it would not be reasonable to expect it. However, he says, the respondent did endeavour (by means of its presentation to staff on the day of the redundancies) to inform staff as fully as possible of the reasons for the redundancies. Mr Patterson also says that one month's pay in lieu was reasonable.

Mr Gowland on the other hand, says that the dismissal was unnecessarily abrupt and carried out in a demeaning way, especially with regard to the immediate removal of e-mail access and the presence of security guards to search people as they left the building. No proper hand-over was arranged and it was left to Mr Hunt to seek out Mr Lyttle to arrange something about this. The form letter of dismissal was not even accurate in relation to Mr Hunt. There was no offer of counselling or outplacement services. Mr Gowland describes the dismissal as "*brutal and insensitive*"

I agree with some of what Mr Gowland says. I have formed the view that the Directors did have to act fast and did not have time for a full consultation process. At a minimum however, a representative of the company should have met with the applicant individually. Had this been done, his particular history with the Group could have been explored and discussed. Also, I note that the security measures the company put in place were undertaken as a general precaution. However, they were highly offensive to Mr Hunt, and it was not unreasonable for him to find them so.

For these reasons I find that there were procedural defects in the handling of what was otherwise a substantively justified redundancy. This renders the dismissal procedurally unjustified. The appropriate remedy will be discussed below.

- ***Whether the respondents are in any way liable in respect of their conduct at mediation.***

The applicant claims that the respondent did not act in good faith at the mediation held in Auckland on Friday 18 May 2001. The statement of problem contained very little detail as to the basis of this complaint. This left me somewhat unclear as to what I should be investigating. At the meeting I put this to Mr Gowland and suggested that he needed to provide me with something more to go on before I could progress this aspect of the claim one way or the other. I also indicated that I was uncertain as to whether I had jurisdiction to examine the conduct of mediation undertaken by consent (which this was) rather than as the subject of a direction from the Authority.

He stressed to me that he did not wish me to inquire into the substance of what was discussed at mediation, but only into the process. He also requested that I interview the mediator concerned, in order to ascertain his view of what had taken place and whether there had been a breach of good faith. Subsequent to the meeting I did so and provided both counsel with a transcript of the interview. I will also record that Mr Gowland made it clear in submissions that Mr Hunt has no complaint with regards to the behaviour or conduct of the two employees of the respondent attending the mediation, Mr Justice and Ms Cooper, but:

"counsel for the respondent was considered to be unreasonably aggressive, obstructive and misleading in his approach to the applicant and his representatives."

I can record here that the mediator advised me of nothing that would in my view amount to a breach of good faith.

That is essentially the end of this matter. If the Authority receives further problems in which the conduct of the parties at mediation is raised as an issue, no doubt the legal and policy issues surrounding it will be given a more thorough airing. Meanwhile it may assist the parties for me to make a few general comments about the sort of questions that might need to be considered:

- Whether the Authority has jurisdiction to investigate a complaint of this sort.
- Whether it is appropriate for the Authority to take upon itself the role of supervision of the mediation service, or whether that is best left to the Employment Relations Service.
- The importance of allowing the process of mediation to be free, frank and even robust.

Remedies

1. I have concluded that the contract executed on 10 May 1997 was the applicable employment contract. I accept Mr Gowland's submission that there is no duty to mitigate where the parties have provided in the employment contract for a specific outcome in the event of a termination of employment sooner than the 5 year term. There is in clause 14 a clear indication that the applicant would in such circumstances be paid out for the balance of the 5 year term. I therefore proceed to make a consequent award of the balance due under the terms of that contract.

The first and second respondents are ordered to pay to the applicant the sum of \$75,000.00 pursuant to s.123(b) of the Employment Relations Act.

Holiday Pay at 6% is also to be paid on this sum.

However, having made this award pursuant to s.123 (b) I decline to award interest on this sum.

2. I have also concluded that the dismissal for redundancy was rendered procedurally unfair by means of the unsatisfactory way in which it was handled. The award of the balance of payment for the fixed term disposes of any need to make an award for loss of earnings arising out of the dismissal. This leaves the issue of compensation for the distress caused to the applicant. From what Mr Hunt and his wife told me, much of that distress was financial in nature. While not wishing to minimise the importance of this in any way, I consider that to have been dealt with by the award I have already made. I consider a further modest award is sufficient to address the hurt and humiliation arising out of the way in which the dismissal was handled.

The first and second respondents are ordered to pay to the applicant the sum of \$5,000.00 pursuant to s.123 of the Employment Relations Act.

3. I make no award for penalty. Although I have found that the contract was breached, I am not satisfied, in all the circumstances, that an award of a punitive nature is appropriate.

Costs

As is the usual practice in the Authority, I require the parties to attempt to resolve the matter of costs between themselves. Because this determination will reach the parties just before the holiday period I allow until 31 January 2002 for them to discuss the issue. On or before that date they must advise the Authority of what progress has been made on the issue, and whether they wish the Authority to determine it.

Y S Oldfield
Member of Employment Relations Authority