

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 471
5409860

BETWEEN JOHN ROBERT JONES
Applicant

AND TEXTILE BONDING
LIMITED
Respondent

Member of Authority: R A Monaghan

Representatives: R Pool, counsel for applicant
P Tremewan, advocate for respondent

Investigation Meeting: 16 July 2013

Date 15 October 2013

DETERMINATION OF THE AUTHORITY

A. Clause 18.2 of the parties' employment agreement entitled John Jones to a payment of nine months' salary on the termination of his employment.

B. Payment is ordered accordingly

Employment relationship problem

[1] This is a dispute between John Jones and his former employer, Textile Bonding Limited (TBL) about a payment Mr Jones says is owed to him under the parties' employment agreement. The dispute is about the meaning of the agreement.

[2] The relevant clause reads:

18 Redundancy

18.1 If your employment is terminated because of redundancy the employer will provide three months' salary or payment of three months' salary in lieu of notice.

.....

18.2 Should more than 50% of the shares in the company change hands and this move leads directly to the retirement or dismissal of the employee then he shall be paid nine months' salary in addition to the three months mentioned above.

[3] In November 2012 100% of the shares in the company changed hands. During the preceding due diligence process Mr Jones had become very unhappy, so when the sale of the shares was confirmed he decided to retire. He gave notice of that decision, and says cl 18.2 applies so that he is owed a further nine months' salary. TBL wished to retain his services, says there was no redundancy, and denies any obligation to pay.

[4] The issues are:

- (i) does cl 18.2 apply only in the case of redundancy;
- (ii) does cl 18.2 apply only to employer-initiated terminations of employment;
- (iii) was Mr Jones' retirement characterised more correctly as a resignation, so outside the scope of cl 18.2; and
- (iv) if the termination of Mr Jones' employment was characterised correctly as a retirement, did the change in ownership of the shares lead directly to the retirement.

Does cl 18.2 apply only in the case of redundancy

Background to the agreement

[5] The meaning of the words used is not clear, so I turn first to the context in which the employment agreement was made.¹

[6] Mr Jones was residing outside New Zealand when the former directors of TBL recruited him to the position of general manager in New Zealand. Existing business connections meant Mr Jones was already known to them. Mr Jones began his employment in December 2001, and the written employment agreement was signed in 2002.

[7] The agreement was based on a template provided by a consulting firm, but the template did not contain cl 18.2. The template was given to Mr Jones for his comment, and he raised a concern about the restraint of trade provision it contained.

¹Ref: *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5; [2010] NZLR 444, especially [19]

He discussed with one of the former directors the length of the period of restraint, particularly in the light of the possibility of a sale of the company, and the effect of this on his future in New Zealand.

[8] There was nothing to suggest Mr Jones sought the inclusion of cl 18.2. Instead the former directors were mindful that they would seek to sell the company, and that Mr Jones had moved his family to New Zealand to take up their offer of employment. They did not wish to leave Mr Jones ‘high and dry’ if, having taken up the offer, he was then faced with the possible loss of employment as a result of a sale. Accordingly they reduced the period of restraint and envisaged a provision that would ‘give comfort’ to Mr Jones about his circumstances should the company be sold. Clause 18.2 was that provision, and it is likely one of the directors drafted it.

[9] None of the parties was able to provide any further detail of their discussions, and in particular on the scope of the ‘comfort’ to be given to Mr Jones.

Do the words used mean the clause applies only in the case of redundancy

[10] Returning to the words used, I note first that the heading ‘redundancy’ does not mean necessarily that cl 18 applies only to redundancy situations. Its principal role is that of a heading, although it may be indicative of the scope of a provision if the scope is not readily ascertainable otherwise.

[11] Clause 18.1 applies to any termination of employment on the ground of redundancy, and applies whether or not, for example, the redundancy occurs because of the sale or transfer of the employer’s shares or business.

[12] Clause 18.2 introduces specific provision for what happens if more than 50% of the shares in the employer company change hands, and employment terminates.

[13] The words of the subclause say on their face that if there is a termination on the ground of retirement or dismissal, the employee must be paid nine months’ salary *‘in addition to the three months mentioned above.’* If the requisite change in shareholding has occurred, and employment is terminated by dismissal on the ground of redundancy, the italicised words can readily be understood as a reference to the giving of notice or the payment of three months’ salary in lieu of notice under cl 18.1.

[14] The meaning is less clear if the requisite change in shareholding has occurred but employment terminates by '*retirement or dismissal*' when there is no redundancy. One approach is to say, as Mr Jones does, that the notice provisions in cl 18.1 must also apply to terminations of this kind. An alternative is to say, as TBL does, that the notice provisions in cl 18.1 apply but this means the overall context in which they appear must also apply. That context is the existence of a redundancy situation. The termination of employment to which cl 18.2 applies must be read down accordingly.

[15] Further to which of these approaches is correct, the words '*retirement or dismissal*' have a meaning extending beyond redundancy. This is well enough understood as a matter of general usage. If the parties had wished to limit the circumstances in which cl 18.2 could apply they could have referred expressly to the termination of employment because of redundancy. If the scope of the words '*retirement or dismissal*' is to be limited to redundancy situations as TBL's interpretation suggests, clearer language would be required.

[16] I conclude the application of cl 18.2 is not limited to situations of redundancy.

Does cl 18.2 apply only to employer-initiated terminations of employment

[17] TBL says the word 'retirement' in '*the retirement or dismissal*' must refer to a retirement imposed by the employer, rather than to a voluntary retirement by the employee. Because the word 'the' is used only once, the meaning of the word 'retirement' must be similar or related to the word 'dismissal'. In contrast if 'the' was used twice - as in 'the retirement or the dismissal' - the words 'retirement' and 'dismissal' could be read separately and the meaning of one would not necessarily be affected by the meaning of the other.

[18] Secondly, TBL says that cl 18 overall is concerned with terminations of employment at the initiative of the employer. The clause does not make any reference to a termination of employment at the initiative of the employee. In particular it does not use anywhere the word most commonly used to refer to a termination of employment at the initiative of the employee, that is 'resignation'. The word 'retirement' must therefore be read as a reference to a retirement imposed by the employer.

[19] Thirdly, TBL says that, as a matter of ordinary usage the word ‘resignation’ rather than the word ‘retirement’ would have been used if the benefit of cl 18.2 were to extend to termination of employment at the initiative of the employee.

[20] Mr Jones says in its ordinary and natural meaning the word ‘retirement’ includes a termination of employment at the initiative of the employee. The word would be unnecessary if the scope of cl 18.2 was limited to the termination of employment at the initiative of the employer. It must have been included for a reason, and must be given meaning.

[21] In general I find Mr Jones’ interpretation accords more with ordinary and natural usage. Although not determinative I draw some support from the fact that, when the agreement was entered into, Mr Jones was aged in his early 50s. I consider it likely that, in the circumstances, the directors at least contemplated the possibility of Mr Jones’ retirement in association with a change in shareholding.

[22] For these reasons I conclude cl 18.2 is not limited to employer-initiated terminations of employment, and extends to the voluntary retirement by the employee.

Was the retirement more correctly characterised as a resignation

[23] TBL says that Mr Jones terminated his employment because of his view of the new shareholders, and since then has continued to participate in the workforce on his own account. It says his employment terminated by his resignation, not by his retirement.

[24] Mr Jones says ‘retirement’ and ‘resignation’ are synonymous, and both refer to a voluntary withdrawal from the employment agreement.² A person can ‘retire’ not only at the end of his or her working life, but from the employ of a particular employer.³

[25] The cases cited in support concerned claims for payments and other benefits under contractual terms linked expressly to retirement. The applicants argued that they met the criteria in the relevant provisions, particularly those referring to a qualifying length of service. The courts found that, if the applicants met the criteria,

² *Auckland Local Authorities Officers IUOW v Takapuna City Council* [1978] ACJ 153; *South Canterbury District Health Board v Milner* Christchurch Employment Court, 12 April 2002, CC 9/02.

³ *Scurr v Director General of Social Welfare* [1999] BCL 227.

they were entitled to the benefits. In that context, on the termination of their employment at their initiative, the words 'resignation' and 'retirement' could be used interchangeably. I accept it is possible for the words to be used interchangeably in appropriate circumstances, but do not accept that as a matter of ordinary usage they can always be used interchangeably.

[26] I find on the facts that, while Mr Jones has continued with some income-producing activity, he has done so to only a limited degree. He has not, for example, entered into any new employment relationship, rather he has conducted some business as a consultant and on a project basis.

[27] Mr Jones has withdrawn sufficiently from the workforce to justify a finding that he has retired from it.

Did the change in ownership of the shares lead directly to Mr Jones' retirement

[28] This is not a case where the decision to retire was unrelated to the change in shareholding. The question is whether the decision was prompted by a factor which intervened between the fact of the change in shareholding, and the decision.

[29] TBL would identify that factor as Mr Jones' own unwillingness to work with the new shareholders.

[30] Mr Jones says, in effect, that his willingness to work with the new shareholders cannot be separated from the fact of the change or in any event it is not necessary to separate these matters. Interactions during the preceding due diligence process led him to conclude he could not work with the people who became the new shareholders. As soon as their acquisition of a shareholding of more than 50% was confirmed by the completion of the share transfer, Mr Jones advised of his retirement. The action was immediate, and in response to the change.

[31] I conclude this is sufficient for a finding that the change in shareholding led directly to Mr Jones' decision to retire.

Order of the Authority

[32] The above conclusions mean the termination of Mr Jones' employment fell within cl 18.2. TBL is therefore ordered to pay 9 months' salary to Mr Jones.

[33] Leave is reserved to seek further orders regarding quantification if the need arises.

Costs

[34] Costs are reserved.

[35] The parties are invited to resolve the matter. If they are unable to do so any party seeking an order for costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have 14 days from the date of receipt of the memorandum in which to file and serve a memorandum in reply.

R A Monaghan

Member of the Employment Relations Authority