

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Andries Hendrik Jooste (Applicant)

AND Denis John Fetherston (First Respondent)
AND Anna Maria Bernadina Fetherston (Second Respondent)
AND Risk Management Holdings Limited (Third Respondent)
AND BBBHL Ltd (Fourth Respondent)
AND Automated Maintenance Holdings Limited (Fifth Respondent)

REPRESENTATIVES Mr Jooste in person
Denis Fetherston in person and for the second, third and fifth respondents

MEMBER OF AUTHORITY Y S Oldfield

INVESTIGATION MEETING 21 July 2005

SUBMISSIONS 22 July 2005

DATE OF DETERMINATION 14 October 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In a determination dated 4 March 2005 I determined that Mr Jooste was employed by one or more of the respondents and that the Employment Relations Authority had jurisdiction to determine his employment relationship problem (an alleged unjustified dismissal and claim for unpaid salary.) That determination sets out the background facts in this matter and should be read together with this.¹ The parties then undertook mediation but were not able to resolve the outstanding issues between them. It now remains for me to determine the following issues:

- i. Whether he is owed arrears of wages;
- ii. Whether he was unjustifiably dismissed, as alleged, on 5 May 2004;
- iii. If so, what remedies he is entitled to in relation to his personal grievance;
- iv. Which of the respondents employed him and bears liability for payment of remedies.

[2] In his statement of problem Mr Jooste also asked the Authority to order that he be reimbursed monies he paid in consideration of the transfer to him of shares in the fifth respondent, Automated Maintenance Holdings Limited. (The transfer never took place.) For this to be within my jurisdiction any agreement for transfer of shares must have been incorporated into the employment agreement. I therefore consider this issue under the topic of 'arrears' below.

¹ Determination AA 81/05 4 March 2005

- [3] In addition I note that the fourth respondent (BBBHL Ltd, formerly Hasieman Holdings Ltd) was struck off the Companies Register in March 2005 and so ceases to be party to these proceedings.
- [4] Finally I record that Mr Jooste sought to draw my attention to other litigation in which Mr Fetherston has been involved. I did not consider any of this relevant to the employment relationship problem and have declined to have regard to it.

Arrears of Wages

- [5] As my first determination records², Mr Jooste was employed on a salary of \$15,000.00 per month. He was also entitled to a car allowance of \$1,000.00 per month. As neither party was able to provide me with a written agreement or similar formal documentation setting out Mr Jooste's terms and conditions I had relied on other evidence in coming to my conclusions about those terms.
- [6] At the meeting of 8 April 2005 Mr Fetherston provided me for the first time with what he says was a letter of appointment that he wrote to Mr Jooste on 10 September 2002. It states that Mr Jooste is to join Hasieman Holdings Ltd as Managing Director on a salary of \$15,000.00 plus the operating expenses of a vehicle, cell phone and car park, and also provides that he will purchase a 5% shareholding in the company at a discount of \$100,000.00.
- [7] Mr Jooste said he did not recall ever seeing this letter and doubted its authenticity. I was concerned that it was not presented when I first requested to see all records pertaining to the terms of the agreement between the parties. However, the letter is essentially consistent with the rest of the evidence about the terms and conditions. Nothing turns on its authenticity except the question of Mr Fetherston's credibility and as I have recorded in my earlier determination I have already found Mr Fetherston was not a credible witness.³
- [8] As we have seen, Mr Jooste received \$98,000.00 during his employment and now seeks the balance of \$202,000.00 payable inclusive of allowances. **He is entitled to arrears of wages in that amount.**
- [9] I turn now to the question of whether the agreement for sale and purchase of shares formed part of the employment agreement. It must be noted first that there were two successive agreements. The original agreement was for the purchase of shares in Hasieman Holdings Ltd (as it then was) which at the time of Mr Jooste's employment held the rights to the main asset of Mr Fetherston's group of companies (intellectual property in the form of exclusive New Zealand rights to certain software used for risk management.) After these rights were transferred into the ownership of the fourth respondent, Automated Maintenance Holdings Limited Mr Jooste put it to Mr Fetherston that shares in Hasieman Holdings Ltd had become worthless. He requested a new agreement entitling him to purchase shares in Automated Maintenance Holdings Limited and Mr Fetherston agreed. A fresh agreement was duly entered into on 26 May 2003.
- [10] Mr Jooste says the original share purchase agreement and its successor are incorporated into the employment agreement because:

² Determination 81/05 4 March 2005, paragraph [6]

³ Determination 81/05 4 March 2005 page 1.

- i. It is recorded in the letter of 12 September 2002, indicating that it forms part of the terms and conditions of employment. (He says that whenever it was written this letter demonstrates what was in Mr Fetherston's mind);
- ii. Mr Fetherston discounted the purchase price of the 5% parcel of shares from \$200,000.00 to half this figure because Mr Jooste was coming to work in the business. The agreement for sale and purchase itself records: "*First 5% for \$100,000.00 in cash and the balance made up of time, commitment and sales and contacts brought to company.*"
- iii. Correspondence to Mr Jooste's mortgagee confirming his remuneration package⁴ included a reference to the share purchase entitlement.

[11] All these assertions are supported by the evidence. In addition, Mr Jooste's employment was conditional on his willingness to invest in the company.⁵ I am satisfied that the option to purchase shares at a discounted rate was a benefit of employment and that Mr Jooste's employment agreement obliged him to take up that option and invest in the company as agreed. It follows that the share purchase agreement forms part of the terms and conditions of employment.

[12] Mr Jooste paid \$96,000.00 of the \$100,000.00 share purchase price. He told me that he did not pay the balance because of the on-going failure to pay his salary in full and on time. **He is therefore entitled to reimbursement of the \$96,000.00 paid.**

Alleged dismissal

[13] Both parties agree that the relationship between them ended in a meeting on 5 May 2004. Mr Fetherston told me that Mr Jooste 'failed to perform' and resigned. He denies dismissing Mr Jooste and told me that if he had fired Mr Jooste he would have removed him as director (Mr Jooste was director of the fifth respondent.) However he agreed that the relationship between them had reached the point where either a resignation or a dismissal was inevitable.

[14] Mr Jooste told me that the relationship was unequivocally ended by Mr Fetherston at that meeting. He said Mr Fetherston demanded the return of all company records and property in his possession, told him that he was fired from his role as director, and threatened to call in the police. After the meeting however Mr Jooste realised that he still on the Company Register as Director of Automated Maintenance Holdings Limited. He was concerned about his legal position now that he had lost the ability to influence the company and requested Mr Fetherston to remove him from the Register. His request was ignored and on 10 June, on legal advice, he resigned his directorship.

[15] The meeting of 5 May was taped and I was supplied with a transcript which is agreed (although the tape ran out a few minutes before the meeting ended.) The transcript confirms that Mr Fetherston requested the return of company property, purported to dismiss Mr Jooste as director, and threatened to bring in the police. It also records that Mr Fetherston and Mr Jooste argued about whether Mr Jooste was an employee or a contractor with Mr Fetherston vigorously denying this.

[16] I am satisfied that this amounts to a "sending away" by Mr Fetherston notwithstanding that he did not expressly say he was dismissing Mr Jooste from his employment. Unsurprisingly (given that he continues to assert that Mr Jooste was not an employee) he did not embark on any attempt to justify the dismissal, procedurally or substantively.

⁴ Determination 81/05 4 March 2005, paragraph [23]

⁵ Determination 81/05 4 March 2005, p2, paragraphs [2]-[6]

[17] I conclude therefore that Mr Jooste was dismissed and that this dismissal was unjustified.

Remedies

[18] From May until August 2004 Mr Jooste looked for work. He was not successful. He told me that prospective employers turned him down either because of his lack of New Zealand experience or because he was over-qualified. He then gave up the search for a job and bought a share in a business.

[19] I am satisfied that Mr Jooste did his best to mitigate his losses and is entitled to pay in lieu of notice (which he puts at one month) and of lost earnings for the three months during which he was looking for work. **This amounts to the sum of \$60,000.00 plus expenses of \$4,000.00.**

[20] Mr Jooste has also claimed compensation for hurt and humiliation of \$15,000.00 however I did not hear much evidence relating to this. **On that basis I set the level of award conservatively at \$5,000.00.**

Liability

[21] The Respondents deny that there was any employment relationship between any of them and Mr Jooste. Mr Fetherston said that neither he, nor his wife nor their family trust was personally involved in any working relationship with Mr Jooste at all.

[22] However Mr Fetherston conceded that Mr Jooste was “involved with” both Hasieman Holdings Ltd (as it then was) and with Automated Maintenance Holdings Limited. Thus if there was an employment relationship he said it would have been with BBBHL Ltd and possibly with Automated Maintenance Holdings Limited.

[23] As for the other respondents Mr Fetherston is emphatic that there was no relationship of any sort with any of them. His explanation was as follows. Risk Management Holdings Limited was a software development company which provided development, supply and support services to Automated Maintenance Holdings Limited. Automated Maintenance Holdings Limited in turn existed only as a vehicle to hold the rights to the risk management software. BBBHL was a wholly owned subsidiary of Automated Maintenance Holdings Limited and was the trading arm of the group (and so the company for which Mr Jooste actually performed work.)

[24] Mr Jooste told me that he believed that Mr Fetherston (who controlled the bank accounts of all the respondent companies) was in fact his employer and/or he was employed by the group of companies. He said Mr Fetherston operated the group as one enterprise and deployed Mr Jooste to work for any or all of them interchangeably. He said that business plans contained intermingled references to all the respondent companies, all of which were at some point described as holding an interest in the crucial intellectual property. Mr Jooste noted that in such documentation he was held out to potential investors as working for all three respondent companies, including the third respondent. In addition correspondence to his mortgagee described him as working for Risk Management Holdings Limited.⁶

⁶ Determination 81/05 4 March 2005, paragraph [23]

[25] Regarding the claim that the Fetherston Family Trust are liable for remedies Mr Jooste told me that some of the share purchase monies he paid went into Trust bank accounts and he received payments from that source also.

[26] The documentary record supports Mr Jooste's assertion that he was employed by all the companies named as respondents in this matter. I am satisfied that in practice the third fourth and fifth respondents did not operate independently or serve the distinct purposes Mr Fetherston described to me. They did business as a group and Mr Jooste was indeed held out as working for all three, even though he was originally employed by Hasieman Holdings Ltd.

[27] I have not however been convinced that Mr Fetherston personally employed Mr Jooste. Although the evidence shows that he was the active personality behind the group he never made any undertakings to Mr Jooste on his own behalf. Nor am I persuaded that either the Fetherston Family Trust or Anna Fetherston was ever in any kind of employment relationship with Mr Jooste.

Summary

[28] The third and fifth respondents are jointly and severally liable as Mr Jooste's employers and are ordered to pay to him the following remedies:

- i. \$202,000.00 arrears of wages;**
- ii. Reimbursement of the \$96,000.00 part payment of the share purchase price;**
- iii. Lost earnings of \$60,000.00 plus expenses of \$4,000.00;**
- iv. \$5,000.00 compensation pursuant to s.123 of the Employment Relations Act.**

Costs

[29] This issue is reserved. Any submission on costs must be made to the Authority within 28 days of the date of this determination.

Y S Oldfield
Member of Employment Relations Authority