

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2013] NZERA Christchurch 154  
5390875

BETWEEN SHANE KENNINGTON  
Applicant  
A N D CANTERBURY SAILPLANES  
LIMITED  
Respondent

Member of Authority: David Appleton  
Representatives: Murray Withers, Counsel for Applicant  
Peter Zwart, Advocate for Respondent  
Investigation meeting: 26 July 2013 at Christchurch  
Submissions Received: 26 July 2013  
Date of Determination: 5 August 2013

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**DETERMINATION OF THE AUTHORITY**

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- A. The applicant was not unjustifiably dismissed and his personal grievance is declined.**
- B. Costs are reserved.**

**Employment relationship problem**

[1] Mr Kennington claims that he was unjustifiably dismissed as the managing director of the respondent company on 29 May 2012. The respondent admits dismissing Mr Kennington but denies that the dismissal was unjustified.

**Brief account of events leading to the dismissal**

[2] Mr Kennington ran the business of the respondent, which made and sold model aircraft, as its manager and, Mr Kennington claims, its managing director. The company's shareholding is shown on the Companies Office Register to be owned in

five allocations in the following proportions: 34% by Mr Kennington, 34% by his wife Kirstie Kennington (Mrs Kennington), and 32% by Mr Andrew McGowan, Mrs Kennington's father,. The evidence of the parties is that 98% of the shareholding was actually held by the family trust, but that the Companies Office Register does not allow shareholdings to be registered as held by trusts.

[3] The Companies Office Register also shows that the company has three directors, Mr Kennington, Mrs Kennington (both with effect from 30 July 2008) and Mr McGowan (with effect from 30 July 1992). The respondent corporate entity has had various names over the years and has been used by Mr McGowan to run different businesses during that time.

[4] In 2011, the marriage between Mr and Mrs Kennington encountered difficulties and they separated. Although the Authority did not hear detailed evidence on the matrimonial aspects of the dispute between Mr and Mrs Kennington, it is clear that there have been acrimonious disagreements between them with respect to access to children and family property issues.

[5] It is Mr Kennington's position that Mr McGowan took his daughter's side in these disputes and "*launched a significant attack*" on him.

[6] Mr Kennington's dismissal arose out of his refusal to attend meetings of the other directors (Mrs Kennington and Mr McGowan) and to provide financial information to Mr McGowan (who is a qualified management accountant). Mr McGowan stated that this information was necessary to enable him to prepare annual tax accounts which needed to be filed by 7 July 2012. It is Mr Kennington's evidence that he wished to buy the company from the other shareholders and that he had provided information to enable a valuation of the company for that purpose but that he refused to provide trading information to Mr McGowan because he did not trust him.

[7] Upon questioning by the Authority, it emerged that the reason that Mr Kennington did not wish to provide information for the filing of tax accounts was because he was nervous that Mr McGowan would fraudulently or otherwise dishonestly misrepresent Mr Kennington's income from the company which would then have an impact on his receipt of benefits from WINZ.

[8] Mr Kennington also refused to attend Board meetings. His evidence was that his reason for this refusal was what he

*... had no desire to be involved with them [Mrs Kennington and Mr McGowan] at any level as I was still distraught about the marital situation and how I was being treated, feeling unable to deal with the aggressive two against one approach. What's the point anyway, because they would simply out vote me anyway.*

[9] Copies of correspondence were put before the Authority which, in summary, set out the attempts by Mrs Kennington and Mr McGowan to get Mr Kennington to attend directors' meetings and provide financial information. The company did not have its own constitution and so was governed by the Companies Act 1993. As I understand it, Mr Kennington has argued that proper notice was not given of the directors' meetings, although this does not appear to be correct.

[10] Key events between mid-April 2012 and 29 May 2012, when Mr Kennington was dismissed, are as follows.

[11] A directors' meeting was called on 13 April 2012 at which the appointment of an accountant and auditor, managerial responsibilities and the future of the company were to be discussed. Through his representative, Mr Kennington sought on 12 April 2012 to have that meeting deferred "*until issues relating to relationship property are resolved*". Mr McGowan responded the same day saying that he saw no reason to defer the Board meeting as it was highly appropriate at that time. In his letter, Mr McGowan pointed out that the directors were responsible for the affairs of the company, that at that point he and Mrs Kennington, as directors, had not been informed as to the state of the company and that failure to provide requested information to the directors would invoke a legal response and also "*could become an employment issue*".

[12] Mr McGowan wrote again to Mr Kennington's representative on 13 April 2012 inviting him to advise Mr Kennington "*more appropriately*" with respect to not attending the Board meeting given that "*decisions could be made on issues pertinent to Shane's future income and employment possibilities*".

[13] The meeting of the Board went ahead in Mr Kennington's absence on 13 April 2012. The Minutes of the Meeting of the Board of Directors indicate that it was agreed that the annual accounts would be completed by Mr McGowan, that no auditor

would be appointed, that the directors expressed concern at the lack of information regarding the performance of the company, that they required the manager to regularly report on sales, the cash position and future projections and that a budget needed to be prepared by the manager. It also recorded that there was a need to confirm that the manager was complying with current taxation and GST requirements. With respect to the future of the company, the minutes record that the company's future needed to be defined and that financial records were needed as soon as possible. The minutes go on to state:

*Sensible & logical options include total sale to single existing shareholder, third party sale, or closure and/or liquidation.*

[14] On 20 April 2012, Mr Kennington's representative stated that Mr Kennington would prefer the appointment of an alternate accountant. This request was repeated on 10 May 2012, in an email which provided as follows:

*Andrew, Shane wishes to employ an independent Accountant as he no longer has faith that you will act fairly towards him. Do you and Kirstie agree?*

*As previously advised to you I have advise [sic] Shane not to attend meetings etc until matters relating to relationship property have been further advanced.*

[15] Mr McGowan responded the following day as follows:

*Murray, thank you for your response.*

*This response is considered a continuation of the refusal by Shane to supply financial information. We fail to see how accounts can be completed "unfairly towards Shane" when it is simply an exercise in mathematics?*

*The Directors have made a legitimate decision regarding the accountant issue which stands. As previously stated, the Board categorically refuses to endorse Shane appointing his own Accountant. Shane's ongoing refusal raises the suspicion that he has already engaged someone/entity to complete the accounts. We challenge you to refute this allegation?*

*The comments that Shane does not think we will treat him fairly indicates a breakdown of the employment relationship, and combined with the aforementioned refusal to communicate and supply information indicates to the Board that this employment relationship has reached a parlous state.*

*We agree that business is not now "as usual". The current ability of the Directors to govern the company that they are*

*legally required to do is completely negated by their employee/manager refusing to supply core information. The Directors cannot represent the interests of the shareholders when they are oblivious to the state of the company. The Directors will not tolerate any further obstructions.*

*Shane cannot run a company alone where other Directors take legal responsibility for his decisions.*

*If Shane wishes to “be his own boss” then he must purchase the shares that he does not own at a price that is “FAIR AND REASONABLE” to ALL shareholders.*

*It is the current view of the Board that this would be the sensible resolution and thus allow all parties to get on with their respective lives.*

*Otherwise he must follow the instructions of the Board.*

*We repeat that your advice to Shane not to attend board meetings is considered to be highly inappropriate as it removes Shane’s ability to input on Board decisions. The decision not to attend then becomes his decision. Shane is reminded of a Board Meeting this evening.*

[16] On 16 May 2012, an email was sent in the form of a letter to Mr Kennington from Mr McGowan and Mrs Kennington in the following terms:

*Shane,*

*Despite repeated requests you have failed to provide the Directors with the financial information to complete the annual accounts and subsequently make decisions on the future of the Company. You have been made aware that the accounts must be with IRD by June 7<sup>th</sup> [sic].*

*In addition to this total lack of communication, you have expressed a lack of trust in the Directors.*

*Both these issues strike to the heart of the employment relationship, which we now believe has reached an irretrievable point of irreconcilable differences.*

*If you do not provide the requested financial information within 48 hours, and subsequently communicate and comply with the fair and legitimate instructions of the Directors, we see no alternative but to terminate your employment with the Company.*

[17] Mr Kennington’s representative responded to this letter by repeating that Mr Kennington would supply the information to an independent accountant and would do so once the company agreed on an alternative appointment. He also stated that Mr McGowan should resign as the company accountant because “Shane has

*clearly lost confidence in your ability to act impartially in terms of account preparation”.*

[18] Mr McGowan responded to this by stating that Mr Kennington was welcome to engage an independent accountant to audit the accounts after he had completed them. However, that engagement would be at Mr Kennington’s personal expense as the company would not pay for the audit.

[19] By way of an email the following day, Mr McGowan stated that a pragmatic solution would be for Mr Kennington to get the accounts that he prepared audited by an accountant of his (Mr Kennington’s) choosing which would allow confirmation for Mr Kennington that the accounts were *“fair and correct”*. The auditing would have to be at Mr Kennington’s personal cost. This offer was rejected by Mr Kennington’s representative as too expensive saying that it would be best to get someone independent to prepare the accounts and for Mr McGowan to then check their work. Mr McGowan responded that the only way an independent accountant would be appointed would be if it were at Mr Kennington’s personal expense as the directors had already previously decided to do the accounts internally at less cost. This response was effectively rejected by Mr Kennington’s representative who stated that Mr Kennington would not attend a directors’ Board meeting.

[20] The Authority saw minutes of a directors’ meeting on 18 May 2012 at which Mrs Kennington and Mr McGowan were present but Mr Kennington was not. The minutes record that Mr Kennington *had failed to provide financial data as repeatedly requested*. There was a discussion about future options and actions and it was agreed that there needed to be a further meeting to require Mr Kennington to give an explanation.

[21] On 21 May 2012, Mr McGowan wrote to Mr Kennington stating that a Board meeting had been called for Friday, 25 May 2012 to discuss his continued refusal to comply with Board directives, notably the provision of financial information. Mr McGowan stated that Mr Kennington was urged to attend and provide an explanation for his actions and that no explanation or an inadequate explanation could put his employment in jeopardy. He was also advised that he had the right to be represented at the meeting.

[22] On 28 May 2012, Mr McGowan wrote to Mr Kennington in the following terms:

*Shane,*

*As you have been advised, the Board of Directors of CSP ltd met on Friday night to discuss your refusal, as Manager, to provide, to the Board, required information relating to the 2011-2012 financial year.*

*In the absence of an explanation and on the basis of your continued refusal the Board, by simple majority, has determined to provide you with one last opportunity to provide this information. If you do not provide the information required by noon 29 May, you [sic] employment will be terminated forthwith.*

[23] Mr Kennington's representative responded to this letter by saying that Mr Kennington, in his capacity as managing director, had made available to an independent accountant the books of account and that the accounts would be completed within the next 14 days following which a copy would be forwarded to Mr McGowan for review. This letter also stated that Mr Kennington had not attended meetings of Canterbury Sailplanes as it was inappropriate for him to attend such meetings "*bearing in mind the property relationship situation*".

[24] On 29 May 2012, Mr McGowan and Mrs Kennington wrote to Mr Kennington stating that, further to their letter of 28 May, as he did not provide the information by noon on 29 May, his employment was terminated forthwith.

## **Issues**

[25] Based upon the submissions of counsel for Mr Kennington, the following issues need to be considered:

- (a) Did Mr McGowan and Mrs Kennington have the legal capacity to effect the termination of Mr Kennington's employment?
- (b) If they did have such capacity, was the dismissal substantially justified?
- (c) If Mr McGowan and Mrs Kennington had the capacity to dismiss, was the dismissal procedurally justified?

**Did Mr McGowan and Mrs Kennington have the legal capacity to effect the termination of Mr Kennington's employment?**

[26] Mr Withers submits on behalf of Mr Kennington that the dismissal was *illegal* because the majority of the shareholding in the respondent company (in fact, 98% of them) are held by the Kennington Family Trust and that the trust deed provides that all decisions associated with those actions must be unanimous. Mr Withers submits that the company is therefore not able to pass any form of resolution either by a majority or in any format without the consent and agreement of Mr Kennington as he was one of the trustees of the trust and his agreement to dismiss himself had not been obtained. Mr Withers submits that Mr Kennington's dismissal required an active role of the shareholders of the company and that the two remaining directors acted *ultra vires* and without the support of the shareholders of the company.

[27] With respect to Mr Withers, this argument is misconceived. The Board of directors did not require the unanimous decision of the shareholders in order to make management decisions. The dismissal of its sole employee, Mr Kennington, was within the scope of the directors' authority and powers. Mr Zwart, on behalf of the respondent, directed the Authority to s.128 of the Companies Act 1993 which provides as follows:

*[128] Management of company*

- (1) *The business and affairs of a company must be managed by, or under the direction or supervision of, the board of the company.*
- (2) *The board of a company has all the powers necessary for managing, and for directing and supervising the management of, the business and affairs of the company.*
- (3) *Subsections (1) and (2) are subject to any modifications, exceptions, or limitations contained in this Act or in the company's constitution.*

[28] The evidence before the Authority was that the company did not have its own constitution and therefore, pursuant to s.28 of the Companies Act, the company, the Board, each director and each shareholder of the company have the rights, powers, duties and obligations set out in the Companies Act.

[29] Schedule 3 of the Companies Act deals with the proceedings of the Board of the company and sets out that a quorum for a meeting of the Board is a majority of the

directors. A resolution of the Board is passed if it is agreed to by all directors present without dissent or if a majority of the votes cast on it are in favour of it.

[30] It is my conclusion that, pursuant to s.128 of the Companies Act, and other provisions of the Companies Act relating to the powers and duties of directors, there was nothing illegal or unlawful in respect of the decision of the directors to dismiss Mr Kennington as far as the Companies Act is concerned, as it lay within the lawful exercise of their powers.

[31] I now therefore turn to whether the dismissal was justified or not by virtue of the Employment Relations Act 2000 (the Act).

### **Was the decision to dismiss Mr Kennington substantially justified?**

[32] Section 103A of the Employment Relations Act sets out the statutory test for determining whether a dismissal or other action by an employer is justified or not. The section provides as follows:

*(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*

*(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

*(3) In applying the test in subsection (2), the Authority or the court must consider—*

*(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*

*(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*

*(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*

*(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*

*(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.*

*(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—*

(a) *minor; and*

(b) *did not result in the employee being treated unfairly.*

[33] Reviewing the correspondence sent by Mr McGowan on behalf of himself and Mrs Kennington, it is my view that they had a right to require Mr Kennington, in his role as the sole employee of the company and its day-to-day manager, to provide information to the Board which would enable the Board to determine whether the company was trading solvently and to enable the company's management accountant, Mr McGowan, to prepare end of year accounts for the purpose of filing them with the Inland Revenue Department as required by law.

[34] It is an implied term of all employment contracts that an employee must comply with all lawful and reasonable instructions of the employer made in the context of the employment relationship: *New Zealand Printing and Related Trades IUOW v Clark and Matheson Ltd* [1984] ACJ 283. As long as the order or direction of the employer is not illegal, immoral or dangerous, the employee must obey any proper instruction (upon penalty of instant dismissal) as long as the requirement is within the scope of the contract. Obedience is a fundamental implied term in an employment contract.

[35] I pause here to examine briefly Mr Kennington's reason for refusing to provide the information. He said that he did not trust Mr McGowan. However, upon questioning Mr Kennington, he was unable to give any cogent evidence to support his assertion that Mr McGowan had failed to act in good faith towards him in his role as a director of the respondent company.

[36] Mr Kennington made some vague and unspecified allegations in relation to Mr McGowan's conduct in respect of another family business. It is my belief having heard the evidence that the reason that Mr Kennington refused to supply the information was because he was in a bitter matrimonial dispute with Mrs Kennington and Mr McGowan was taking Mrs Kennington's side in that dispute. Whilst, emotionally, Mr Kennington may well have felt outnumbered by Mrs Kennington and Mr McGowan, objectively speaking, in Mr McGowan's role as a director of the company and the company's accountant, there appears to be no objective reason for Mr Kennington to have mistrusted Mr McGowan's motives.

[37] Incidentally, Mr Kennington stated in his evidence that he did not see how Mr McGowan could be a director of the respondent company. However, it is clear from the face of the company's records that he had been a director since 1992 of the entity that became known as Canterbury Sailplanes Limited and it would appear to be bordering on the fanciful to suggest that Mr McGowan had somehow inveigled himself into the position as a director of the company solely in order to bolster Mrs Kennington's position to the detriment of Mr Kennington.

[38] It is my view that Mr McGowan and Mrs Kennington gave a lawful and reasonable instruction to Mr Kennington to provide the financial information requested of him. Mr McGowan and Mrs Kennington had genuine reasons and a legal need to obtain the information; the information was within the knowledge of Mr Kennington, it was relatively easy for Mr Kennington to supply the information and he was obliged, as the manager of the company, to provide the information upon request.

[39] I am therefore satisfied that Mr Kennington failed to obey a lawful and reasonable instruction to provide the information.

[40] Mr McGowan gave evidence that, despite not having the information provided by Mr Kennington, he was still able to file the accounts within the IRD's deadline. He explained, however, that he had to do this by adopting a forensic accounting approach by essentially replicating the information from GST returns, PAYE records and bank statements. He said that this was a very time consuming exercise and that it was not a very accurate approach but that the IRD was helpful and accepted the production of the tax accounts using this forensic approach.

[41] Therefore, I do not accept the submission of Mr Withers on behalf of Mr Kennington that the dismissal of Mr Kennington was unnecessary given that Mr McGowan was able to submit the accounts to the IRD in any event. Mr McGowan was forced to adopt the approach he did solely because he was unable to obtain information which Mr Kennington had but unreasonably refused to give.

[42] Furthermore, it was clear from the correspondence from Mr Kennington's representative that Mr Kennington had no intention of co-operating with his fellow directors and the Board, his *de facto* employer, and that he fundamentally mistrusted these people. Whilst Mr Kennington felt strongly that he had genuine reasons for this

mistrust, it meant that the company and its sole employee had reached an *impasse*, with no obvious way forward.

[43] During cross examination, Mr Withers, on behalf of Mr Kennington, asked Mr McGowan why he had not resigned as the accountant and director. Mr McGowan said he saw no reason why he should have resigned. Mr Kennington's evidence was that he was the only one who ran the company and he should have been allowed to have done so alone, without interference from Mr McGowan and Mrs Kennington. However, this approach ignores the fact that Mr McGowan and Mrs Kennington were legitimate directors of the company and that they had a legal duty to ensure that the company was being managed properly. They also had a legal duty to protect the assets held by the company, especially in light of the matrimonial dispute. In light of this, and the *impasse* reached due to Mr Kennington's refusal to co-operate, I believe that dismissal was an action that fell within the range of responses open to the employer.

[44] In summary, it is my view that the dismissal was an action which a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

#### **Was Mr Kennington's dismissal procedurally justified?**

[45] There was no meeting with Mr Kennington prior to dismissal in the way that one would normally expect. However, it is absolutely clear from the face of the correspondence shown to the Authority that Mr McGowan and Mrs Kennington attempted on several occasions to get Mr Kennington to attend board meetings. On each occasion, through his representative, Mr Kennington refused to attend. It is also clear that Mr Kennington was given numerous opportunities to provide the financial information and was also warned on at least two occasions in unequivocal terms that his employment was in jeopardy if he failed to provide the information.

[46] I am also mindful of the fact that throughout the material period Mr Kennington was represented by counsel, and so had professional advice available to him.

[47] It is also worth noting, when considering the procedural obligations set out in s.103A of the Act, and in particular the obligation for the employer to genuinely consider the employee's explanation in relation to the allegations against the

employee before dismissal, that at no time did Mr Kennington explain that he was refusing to provide the information required by Mr McGowan because Mr Kennington feared that Mr McGowan would misrepresent his income in the accounts so as to endanger his WINZ benefits. Whilst it is true that Mr Kennington stated that he did not trust Mr McGowan to prepare the accounts fairly, he did not appear to go any further than making this generalised statement. This appears to be a breach of Mr Kennington's duty under s. 4(1A)(b) of the Act to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, amongst other things, responsive and communicative.

[48] In any event, stepping back and looking at the overall situation, it would appear that Mr Kennington was not ever going to be persuaded to provide the information to the company. It is my view that it was reasonable for the company to refuse to accept Mr Kennington's alternative suggestion that an accountant be engaged to prepare the accounts given the cost of engaging an independent accountant and the fact that the company was not trading at any profitable level.

[49] It is also relevant to take into account the fact that Mr McGowan offered Mr Kennington the opportunity to have the accounts audited by an independent accountant. When I asked Mr Kennington why he had not accepted this offer, Mr Kennington said that he did not even remember the offer. However, that offer was made in writing at least twice by Mr McGowan to Mr Kennington's representative.

[50] In light of the fact that Mr Kennington steadfastly refused to attend any meetings and also, it appears, refused to communicate directly with Mr McGowan and Mrs Kennington, his fellow directors, I do not see how the company could have acted any differently than the way it did leading to its decision to dismiss Mr Kennington. I therefore believe that the dismissal was not procedurally flawed, so as to render it unjustified.

## **Conclusion**

[51] I am mindful of the fact that Mr Kennington found himself in a very difficult position following the break up of his marriage, both financially and emotionally. It was clear that he retains an enormous amount of hurt and anger even now. There is no doubt in my mind that Mr Kennington's refusal to provide the information required

of him by the Board of directors stemmed from his sense of hurt arising out of the breakdown of his relationship with his wife and subsequent events following from it.

[52] However, Mr Kennington was employed by the respondent company and drew a weekly wage from it and was the only person within the company with any detailed knowledge of its day-to-day trading. He was not, however, the sole shareholder of that company nor the sole director. No matter how hurt he felt with respect to his fellow shareholders and directors, he still had legal obligations with respect to the company and his role as an employee in it. His failure to comply with reasonable instructions from the Board to provide financial information necessary for Mrs Kennington and Mr McGowan as directors of the company to enable Mr McGowan to prepare the annual accounts cannot be excused by those feelings of hurt. The dismissal by the company of Mr Kennington appears to have come at the end of a long period during which the company tried on several occasions without success to obtain provision of the financial information.

[53] Therefore, in accordance with the terms of the Act, I find that Mr Kennington's dismissal by the company was justified. I therefore dismiss Mr Kennington's personal grievance for unjustified dismissal.

### **Costs**

[54] The parties are to seek to agree how costs are to be disposed of between them. However, if they are unable to agree within 28 days of the date of this determination, the respondent is to apply for a contribution to its costs by way of a memorandum from Mr Zwart and Mr Kennington will have a further 14 days within which to provide a memorandum in reply by way of his counsel, Mr Withers.

**David Appleton**  
**Member of the Employment Relations Authority**