

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 517
5437517

BETWEEN	ROBERT DUNCAN KENT Applicant
A N D	BARKERS PARK LIMITED First Respondent
AND	P & K NZ LIMITED Second Respondent
AND	SUNG HO PARK Third Respondent

Member of Authority: Rachel Larmer

Representatives: Applicant in person
Brian Foote, Counsel for the Respondents

Investigation Meeting: 21, 22 and 24 October 2014 at Rotorua

Submissions Received: 4 November 2014 from Applicant
10 November 2014 from First and Second Respondents
11 November 2014 from Applicant

Date of Determination: 16 December 2014

DETERMINATION OF THE AUTHORITY

- A. Barkers Park Limited (Barkers Park) unjustifiably dismissed Mr Kent.**
- B. Mr Kent's employment ended on 11 October 2013.**
- C. Barkers Park is ordered to pay Mr Kent:**
- (a) Three months lost remuneration (to be calculated by the parties);**
 - (b) \$10,000 distress compensation;**

- (c) **Interest on his lost remuneration.**
- D. Barkers Park breached s.4(1A) of the Employment Relations Act 2000 (the Act). No penalty is imposed for this breach.**
- E. Mr Kent's unjustified disadvantage grievances do not succeed.**
- F. Barkers Park Limited breached clause 8.1(1) of Mr Kent's employment agreement which required it to "*act in a fair and reasonable manner, and in good faith, in all dealings*" with him.**
- G. Mr Park breached s.134(2) of the Act by inciting, instigating, aiding or abetting Barkers Park's breaches of Mr Kent's employment agreement.**
- H. Mr Kent's claim for penalties against Mr Park is declined.**
- I. The Authority does not have jurisdiction to investigate Mr Kent's claim for payment for work he claims he did on 14 and 15 October because the parties were not at that date still in an employment relationship.**
- J. Barkers Park is ordered to pay Mr Kent \$71.56 to reimburse his filing fee.**

Employment relationship problem

[1] Mr Kent was employed by Barkers Park as Chief Executive Officer from 01 September 2011 until October 2013 under the terms of a written employment agreement.

[2] Whilst Mr Kent was CEO Barkers Park operated a business consisting of a dog grooming salon, dog daycare and retail supermarket for dogs on land at 171 Fairy Springs Road Rotorua (Fairy Springs), a 14 hectare rural property situated on the outskirts of Rotorua.

[3] Fairy Springs (at the material time) was owned by P & K Limited. In addition to the Barkers Park premises, Fairy Springs also had a large commercial building (the Caterpillar building) which was previously occupied by the Caterpillar Experience Museum on it plus other various outbuildings.

[4] Mr Stanley Park and Barkers Park are the only two respondents involved in Mr Kent's substantive claims. Mr Park is the sole director and shareholder of Barkers Park. He is also a director and one of seven shareholders of P & K NZ Limited. Mr Park is Korean and English is his second language.

[5] Mr Kent claims he was not just responsible for Barkers Park but he had full responsibility for all activities conducted at Fairy Springs (including the development of all buildings such as the Caterpillar building). Mr Kent claims that part of his employment duties involved the project management of the development of the Caterpillar building project. Mr Park and Barkers Park dispute that.

[6] Mr Kent initially claimed that he was also employed by P & K NZ Limited (the second respondent) however the Authority has determined that Mr Kent was employed solely by Barkers Park. Mr Kent's claims against the second respondent P & K NZ Limited were dismissed for want of jurisdiction.¹

[7] Mr Kent was basically left to run Barkers Park on a day to day basis. When decisions needed to be made about the business these were made by Mr Park, his sister Jacqui Park and his business advisor Mr Ian Park. All references in this determination to "Mr Park" refer to the third respondent Mr Sung Ho (Stanley) Park.

[8] Mr Park says he was putting around \$15,000 per month into Barkers Park to keep it afloat. On 11 July 2013 Mr Park advised Mr Kent via email that he (Mr Park) had decided to stop funding Barkers Park so he would be closing the business "*within an agreed timeframe*".

[9] Mr Park, Ms Park, Mr Ian Park, and Mr Kent met on 13 July to discuss the closure of Barkers Park. Mr Kent wanted to persuade the Parks to keep Barkers Park operating so he prepared a document entitled "*Summary of Recent Performance versus Last Year*" which he presented to the Parks on 13 July.

[10] In this report Mr Kent identified that the main short term issue was that Barkers Park, given its size and without further development, did not sustain the salaries of a full time grounds and maintenance person and Mr Kent's CEO salary. In his report Mr Kent noted:

¹ [2014] NZERA Auckland 343.

If there is to be no development of the Caterpillar building (which as I have been waiting three months for a meeting to discuss that it is not necessary for you to fund), and there is to be no further expansion of the Barkers Park operation, then you will not need me, at least not in a full time capacity.

I have therefore already commenced to train Vicki² to take over the administration side of wages, in addition to her running the retail operation. With the assistance of myself, or an accountant, on a part time basis (say a day or two per week), Barkers Park can continue to operate successfully, and rapidly move into profitability as business picks up in the spring, as it did last year.

[11] Mr Kent also referred to his plans to run for Mayor and Councillor in the upcoming Rotorua local body elections to be held on 12 October. He says he did that to mitigate the risk that he would be without any income if Barkers Park closed. Mr Kent advised the Parks in his 13 July report that being Mayor would be a full time role with the Councillor role being part time. He went on to say:

The outcome of the elections on 12 October will determine my further availability to either continue to work for Barkers Park and yourselves in a part time supervisory role, or if elected Mayor whether I will need to withdraw completely. Obviously if I win neither seat I will be looking for other employment to supplement my income!

[12] Mr Kent says this indication was given on the basis that the Caterpillar building was not going to be developed and Barkers Park was not going to be expanded. Mr Kent sent out four options for the Parks to consider. Mr Kent recommended the Parks select the option which involved Barkers Park being run by Ms Vicki McLean after the outcome of the elections were known.

[13] The Parks considered these options and then emailed Mr Kent on 22 July stating:

“Stanley Park would like to formally confirm that, due to the cessation of Barkers Park operation, all employments at Barkers Park will regretfully not continue any further than 13/10/2013 as discussed.

Due to the losses that have been accumulated, Stanley Park cannot sustain any other option but to have the operation of Barkers Park ceased as soon as the circumstances allow within the three (3) months' timeframe as agreed.

² Vicki McLean is Mr Kent's life partner and was employed by Barkers Park as the Retail Manager & 2IC

Therefore, it would be much appreciated if you could follow up on the details around the discussion we had regarding the options to sell the Barkers Park operation or the whole property.

Please also forward, as soon as possible, the steps involved in the process of closing the operation of Barkers Park including the communication with staff regarding the termination and the notices to the suppliers and service providers. [...]

[14] On 18 June Mr Kent emailed Ian Park and Stanley Park and, among other things, asked what was happening with the Caterpillar building. Ian Park responded that “*any further plan on the Caterpillar building is currently on hold due to the shortage (sic) in fund*”.

[15] Mr Kent took that to mean that the further development of the Caterpillar building project was on indefinite hold until funds became available which he then inferred meant his project management role in that capacity was in doubt. Mr Stanley Park disputes that Mr Kent had a project management role in respect to the Caterpillar building.

[16] On 18 August in his monthly CEO report Mr Kent stated:

Should any hint of closure become public knowledge prior to the announcement of the Local Authority election results on 12th October, my chances of becoming elected Mayor, or to council will be totally destroyed. Even any announcement of closure following the election will seriously impact on my credibility & ability to turn this council and Rotorua around.

[17] With the CEO monthly report on 18 August Mr Kent also presented a staff buy-out offer from himself, Ms McLean and Ms Nicky Hammond (who at that time was the Dog Grooming Salon Manager) to purchase the Barkers Park business. This was rejected by Mr Ian Park on 20 August and Mr Kent was instructed to expedite the closure of the company by 19 September.

[18] That advice resulted in Mr Kent travelling to Auckland on 22 August to meet with Mr Park and Mr Ian Park to discuss the future of the business. At this meeting Mr Kent offered a third option to save Barkers Park where he offered to withdraw from employment but continue to provide his assistance to Ms McLean and Ms Hammond in the capacity as a director of the company for an annual fee, on the condition that Ms McLean and Ms Hammond were given a significant shareholding in

Barkers Park which he said would ensure their ongoing cooperation and support with Barkers Park's continued operation.

[19] The instruction to make staff redundant was verbally rescinded at a meeting that Mr Kent had in Auckland with Mr Park and Ian Park on 22 August. During this meeting Mr Kent told the Parks that if he (Mr Kent) was no longer on the payroll the funds required to support Barkers Park operating over the next 12 months would probably only require on average a couple of thousand dollars a month to be contributed by Mr Park.

[20] On 06 September Mr Kent was advised by email that Barkers Park would be kept open until the election results were known so as not to impact negatively on his election campaign.³ Mr Ian Park also indicated that they were considering keeping the business in operation with an incentive scheme to staff if such an arrangement could produce profit after Mr Kent's departure. Mr Ian Park noted that the details for consideration were yet to be finalised and that Mr Kent would be advised of that. Nothing was said about Mr Kent's employment.

[21] Mr Kent took Mr Ian Park's email of 06 September to mean that the third option which involved Mr Kent withdrawing from the business but providing support as a director of the company for an annual fee was being considered. Mr Kent says he also interpreted Mr Ian Park's email to mean that previous indications that Barkers Park was to close and staff were to be made redundant had been rescinded. Mr Kent says that based on that assumption he did not start a restructuring process or closing down process so did not issue any notices of redundancy to staff.

[22] During the week of 12 September Mr Stanley Park introduced Mr Kent to a consultant named Mr Wilfred Chan, who was going to advise Mr Park on which of the two buildings on the property was suited for an Asian restaurant. Mr Kent provided Mr Chan with a concept and working drawings he had prepared around developing the Caterpillar building.

[23] Mr Kent says Mr Chan agreed that the Caterpillar building was a better option for the restaurant than the Barkers Park building. Mr Kent took that to mean that the

³ Mr Kent had advised the Parks that his election campaign would be fundamentally undermined if Barkers Park closed.

Caterpillar building project would possibly be going ahead in which case he believed there would a strong chance that his employment would be continuing.

[24] On 20 September Mr Park introduced Mr Tim Kim to Mr Kent saying that Mr Kim was the project manager for the restaurant project which was going to be undertaken in the Caterpillar building. Mr Kent said he thought that was odd as he saw himself as the project manager, but he assumed that Mr Kim must have knowledge and expertise in the restaurant trade, so he did not raise an issue about this at the time. He later found out that Mr Kim did not have any restaurant or project management experience.

[25] On 01 October, while Mr Kent was in Auckland on business, he received a phone call from Ms McLean who said that the maintenance man claimed to have spoken to Mr Kim who had allegedly told him that Mr Kent had resigned and that Mr Kim was taking over the role of running the company.

[26] Mr Kent said he told Ms McLean that Mr Kim was project managing the Caterpillar building project and had nothing to do with Barkers Park. Mr Kent says that when he returned to his office he saw he had received two emails from Mr Ian Park on 01 October.

[27] The first email referred to Mr Kent's "*scheduled departure from Barkers Park on 13 October as previously discussed*" and to the fact that Mr Kim would be taking up an administration role at Barkers Park to support staff. The second email asked Mr Kent to coordinate with Mr Kim for communications to staff that the company would be exploring a profit share amongst staff within the coming months.

[28] Mr Kent saw this email as evidence that Mr Kim had been bought on board to take over Mr Kent's role, that it was "*a duplicitous pre plan set up aimed at engineering my departure from the company*". Relations between the parties deteriorated from that point onwards.

[29] On 07 October Mr Kent informed the Parks (who at that time were all in Korea) of an employment relationship problem and requested a meeting. Mr Kent referred to the fact that he considered the Parks actions a "*blatant attempt at constructive dismissal*." Mr Kent's email stated that he could not just be given three months' notice and be replaced by someone else doing the same role on a lesser salary (which is what Mr Kent believed had occurred with Mr Kim).

[30] Mr Kent's email referred to his full time employment terminating at 5pm that Friday and stated that he expected to continue on a part time administrative basis the following week until a formal meeting with the Parks had been held to discuss and resolve any issues that had arisen. Mr Ian Park acknowledged receipt of Mr Kent's email and asked him to attend work on 14 October to process the wages. However no substantive response was given to the concerns Mr Kent had raised.

[31] Mr Kent invoiced Barkers Park \$1,500 for work he claims he did on 14 and 15 October. This involved processing the payroll on 14 October and attending a meeting with Mr Park on 15 October to discuss the employment relationship issues that had arisen. Mr Kent also claims that he was in Auckland on Barkers Park business on 18 October. Barkers Park says Mr Kent's employment ended on 11 October 2013.

[32] Mr Park and Mr Kent met on 15 October to discuss Mr Kent's concerns. During this meeting Mr Kent recommended Mr Park provide a staff incentive option which involved Ms McLean and Ms Hammond being given a significant shareholding for managing the company between them, with Mr Kent's part time support. Mr Kent indicated that he was available to do a day or two each week for which he expected to be paid one-fifth of his previous full time salary.

[33] This was not acceptable to Mr Park. Mr Kent's offer to work part time because he (Mr Park) believed Mr Kim was capable of doing whatever was required so there was no need to also engage Mr Kent. Mr Kent then indicated he would be pursuing his personal grievance.

[34] The employment issues were not resolved at that meeting. Mr Kent did not hear anything else until he received a letter from Mr Park's solicitor (Mr Foote) giving notice of termination.

[35] Mr Kent says that while in Auckland on 18 October he received a distressed phone call from Ms McLean who told him that Mr Park had announced at a staff meeting that day that Mr Kent had resigned. Ms McLean also said that she subsequently found a letter (unenclosed) from Barkers Park's solicitor (Mr Foote) and a trespass notice addressed to Mr Kent that had been left in full view on his desk after Mr Park had left the premises.

[36] The 18 October letter was signed by Mr Foote and had also been emailed to Mr Kent's home address. Mr Foote's letter denied Mr Kent's allegation of a personal

grievance, referred to his previous acknowledgement that the business could not afford to keep him on and stated that:

The notice provided to you in July that your services would no longer be required from 13 October [...] your responsibilities have been (or soon will be) subsumed by other employees or contracted out to our client's associated business. Your position is, in fact, no longer in existence. [...] Our client feels that your correspondence has become somewhat threatening and no longer wish to have anything to do with you. In particular, you are now welcome at the premises. To that end, we enclose a trespass notice advising you to stay off the premises for a period of two years from date of service. Please hand your keys to Vicki to return to the office on Monday.

For the avoidance of any doubt, your recent offer to continue to work for one day per week is not accepted. Your relationship with the company is over.

[37] Mr Kent responded by letter to Mr Foote on 23 October taking issue with a number of facts Mr Foote had referred to in his letter. Mr Kent also recorded his view that he had not been given formal notice of termination or of redundancy prior to Mr Foote's letter and that he did not resign, contrary to Mr Park's advice to other staff.

[38] Mr Kent stated that he believed that any notice that may have been issued in July had been subsequently rescinded by the fact that Barkers Park had not ceased operation, and no staff members have been made redundant. No response was received to Mr Kent's letter.

[39] On 26 October Mr Kent issued a request under s.120 of the Act for written reasons for dismissal. Mr Foote responded on 31 October asking for a copy of Mr Kent's employment agreement "*so I can properly advise my client*". No further response was received. Mr Foote says matters were superseded by Mr Kent filing a Statement of Problem with the Authority.

[40] Clause 16.1 of Mr Kent's employment agreement provides either party may give three months' notice of termination. Mr Kent says that he first received notice of termination of his employment on Friday 18 October 2013 while he was in Auckland. Mr Kent claims he was attending to Barkers Park business in Auckland because he was meeting with the company's computer technical advisers. Mr Park says he was not aware that Mr Kent was in Auckland on company business and he believes Mr Kent's employment had ended on 13 October.

[41] Mr Kent claims he was unjustifiably dismissed. Barkers Park has given contradictory information about why Mr Kent's employment ended.

[42] In its first Statement in Reply Barkers Park claims Mr Kent was given three months' notice of termination of his employment "*which he accepted and worked towards [...]*". Barkers Park claims that its email of 22 July gave Mr Kent contractual notice of termination because it stated: "*due to cessation of Barkers Park operations, all employments at Barkers Park will regretfully not continue any further than 13 October 2013 as discussed*" (sic).

[43] In Barkers Park's Amended Statement in Reply it states that on 12 July Mr Kent gave three months' notice of resignation in accordance with his employment agreement which was to be effective from 12 October. It also alleges Mr Kent confirmed his intended departure in email correspondence on numerous occasions and had received similar correspondence about his pending departure without objection. Mr Kent denies that.

[44] Barkers Park have also claimed that either Mr Kent resigned and/or made himself redundant after identifying that he was surplus to the requirements of the business. It also says there was a mutual intention that his employment would end in mid-October and that the parties worked towards that.

[45] Mr Kent denies resigning and does not accept there was a genuine redundancy situation. Mr Kent believes that Mr Kim was brought in to do his job. Mr Kent also says that two staff (the maintenance man and Ms Hammond) were given pay rises after he was made redundant which undermines any financial justification for his redundancy.

[46] Mr Kent says his purported 'redundancy' was not genuine and it was not handled properly. Mr Kent says there was no proper consultation and it is only after the respondents' realised the inadequacy of their initial claims that they have now attempted to argue that he resigned.

[47] There also appears to be an issue over when Mr Kent's employment ended. Mr Park appears to believe it ended on 11 October whilst Mr Kent asserts he was in Auckland on company business on 18 October and also worked on 14 and 15 October. Mr Kent claims \$759.23 plus interest for hours he says he worked on 14 & 15 October.

[48] Mr Kent also claims that he has suffered five unjustifiable disadvantage personal grievances, which consisted of:

- (a) The request that he provide copies of information he had about the Caterpillar building project to Mr Kim;
- (b) The employment of Mr Kim by P & K NZ Limited to project manage the Caterpillar building project;
- (c) Announcing to staff that Mr Kim would take over the management and administration of Barkers Park;
- (d) Failing to respond appropriately to the employment relationship problem being raised, instead responding by summary dismissal and issuing of a trespass notice;
- (e) Trespassing him from the workplace so he was unable to collect his personal property and files which resulted in some items being lost or damaged.

[49] Barkers Park denies all of these claims.

[50] Mr Kent further claims that Barkers Park breached its duty of good faith to him by:

- (a) Unjustifiably dismissing him;
- (b) Dealing with him duplicitously;
- (c) Leaving Mr Foote's letter of 18 October and the trespass notice on his desk in full view of staff;
- (d) Using stated lack of profitability and available funds to dismiss Mr Kent then employing Mr Kim in his place and giving other staff pay rises;
- (e) Failing to respond to the employment relationship problem appropriately, instead ending his employment and trespassing him;
- (f) Failing to consult over his dismissal;

- (g) Failing to follow appropriate procedures in respect of the redundancy;
- (h) Appointing Mr Kim to project the Caterpillar building project without first consulting him;
- (i) Denying him access to the workplace.

[51] Mr Kent seeks that penalties be imposed for all of these breaches. He asks that some or all of any penalties imposed be awarded to him personally instead of the Crown. Barkers Park denies all of these claims.

[52] Mr Kent further claims that he has been subjected to the following breaches of his employment agreement:

- (a) Breached clause 8.1(i) by failing to “*act in a fair and reasonable manner, and in good faith, in all dealings with the Employee*”;
- (b) Disadvantaging Mr Kent in breach of clause 8.1(i) of his employment agreement;
- (c) Breaching good faith by breaching clause 8.1(i) of his employment agreement;
- (d) Acting duplicitously in breach of clause 8.1(i) of his employment agreement;
- (e) Dismissing without cause and without notice;
- (f) Failing to respond appropriately to an employment relationship problem;
- (g) Failing to consult regarding a dismissal;
- (h) Failing to follow appropriate procedures regarding the alleged redundancy;
- (i) Appointing Mr Kim without consulting Mr Kent;
- (j) Trespassing Mr Kent from the workplace;
- (k) Not paying Mr Kent for work performed on 14, 15 and 18 October;

- (l) Breaching clauses 6, 8.1(i), 16.1(i), 15.1, 15.2, 17.1 and 17.2 of Mr Kent's employment agreement by summarily dismissing him;
- (m) Claiming Mr Kent had resigned;
- (n) Altering the index to the agreed bundle submitted by Mr Kent;
- (o) Breaching clause 6 by failing to terminate in accordance with the provisions of the employment agreement.

[53] Mr Kent alleges that Mr Stanley Park incited, instigated, aided and/or abetted all of these breaches by Barkers Park of his employment agreement.

[54] Mr Kent seeks penalties be imposed against Barkers Park for its breaches and also that further penalties be imposed against Mr Stanley Park personally for aiding and abetting all of these alleged breaches.

[55] Parkers Park says no breaches occurred and penalties are inappropriate.

[56] Mr Kent also claims that he was not paid for the work that he did on 14 and 15 October and he is seeking recovery of \$759.53 wage arrears. Mr Kent also seeks interest on any amounts awarded to him plus costs (despite not being legally represented).

[57] Barkers Park and Mr Stanley Park deny breaching Mr Kent's employment agreement. Barkers Park denies breaching its good faith obligations and/or Mr Kent's employment agreement. Mr Park denies aiding and abetting any breaches of Mr Kent's employment agreement.

Issues

[58] The following issues are to be determined:

- (a) Was Mr Kent dismissed?
- (b) What date did Mr Kent's employment end?
- (c) If so, was his dismissal justified?
- (d) If not, what if any remedies should be awarded?

- (e) Should interest be awarded?
- (f) Was Mr Kent unjustifiably disadvantaged in his employment?
- (g) If so, what if any remedies should be awarded?
- (h) Did Barkers Park breach its good faith obligations?
- (i) If so, should penalties be imposed?
- (j) Did Barkers Park breach Mr Kent's employment agreement?
- (k) If so, should penalties be imposed?
- (l) Did Mr Park aid and/or abet any breaches of Mr Kent's employment agreement that may have occurred?
- (m) If so, should a penalty be imposed on Mr Park?
- (n) If penalties are imposed, should some or all of them be paid to Mr Kent instead of the Crown?
- (o) Is Mr Kent entitled to be paid for 14 and 15 October?
- (p) Should interest be imposed on any amounts awarded to Mr Kent?
- (q) What if any costs should be awarded?

Was Mr Kent dismissed?

[59] Barkers Park has given a number of contradicting explanations as to how and why Mr Kent's employment ended. Mr Kent therefore bears the onus of establishing on the balance of probabilities that he was dismissed. A dismissal is a sending away that occurs at the employer's initiative. A voluntary resignation is not a dismissal.

[60] Mr Foote's letter to Mr Kent dated 18 October referred to the "*notice provided to you in July that your services would no longer be required from 13 October.*" This indicates the initiative for the termination of Mr Kent's employment came from Barkers Park giving "*notice*". If Barkers Park believed Mr Kent had resigned I would have expected Mr Foote to have stated that.

[61] During the Authority's investigation meeting Mr Park told the Authority that Mr Ian Park's email to Mr Kent of 11 July 2013 saying that "*the operation of the Barkers Park will need to cease trading within an agreed timeframe*" was notice to Mr Kent of the termination of his employment. This again suggests the initiative for the employment ending came from Barkers Park, not Mr Kent.

[62] Mr Foote in his closing submissions said that this apparent concession was a mistake and that this email was simply notice of the likely future closure of Barkers Park and the need to discuss that with Mr Kent. Mr Foote submits that Mr Kent "*identified he was surplus to the requirements of the business and proposed a solution to the employer*" which involved the termination of his employment. If Mr Foote is submitting that Mr Kent unilaterally made himself redundant then I do not accept that submission.

[63] The respondents claim that the "*Summary of Recent Performance versus Last Year*" report which Mr Kent presented to the Parks on 13 July was a unilateral announcement of his plans to leave. I also do not accept that was the case.

[64] Mr Kent did put a number of options to Barkers Park and the Parks to consider in light of the expressed concerns about the ongoing financial viability of the business. Mr Kent's focus was on identifying different ways to keep the business operating under various different business scenarios and models. Merely identifying these options cannot amount to the giving of contractual notice, as required under Mr Kent's employment agreement.

[65] The situation was that if the respondents had wanted to restructure the business to disestablish Mr Kent's CEO position then he was clearly amenable to that. However, he reasonably expected the respondents to comply with employment law requirements around restructuring and also with the terms of his employment agreement. I find that did not occur.

[66] Mr Foote submits that the respondents took Mr Kent's advice that he would be running in the local body elections as notice of termination and therefore proceeded on the basis that Mr Kent would be departing post-election so they focused on looking at other options for continuing the business without him. That may have been the case, but I find that was not clearly communicated to Mr Kent.

[67] It was unwise and unfair for the Parks to make assumptions about Mr Kent's intentions without first discussing that with him. This omission created a lack of clarity between the parties over whether or not Mr Kent wished to change his employment status (by reducing his hours, ending his employment or changing into an independent contractor) and if so on what basis.

[68] Mr Kent says the Council role only took up a few hours per month so could easily be combined with full time work, which was his preference. The respondents could and should have talked to Mr Kent about his plans and found out what time commitment would be required by him if he was elected in the local body elections. By failing to do so they appear to have proceeded on mistaken assumptions and I find they must bear the consequences of that.

[69] I turn now to address in more detail the respondent's evidence on how and why the employment relationship ended. In his witness statement Mr Park says that he believed Mr Kent had been given three months' notice in July which Mr Kent had accepted. I find as a matter of fact that Mr Kent had not been given contractual notice as required by clause 16.1 of his employment agreement.

[70] Mr Park says that by late August 2013, having given Mr Kent notice the business was to close and knowing that Mr Kent intended to leave after the local elections, they were starting to consider continuing Barkers Park without Mr Kent's involvement on the basis that he had acknowledged that without the cost of his salary the business had a better chance of survival.

[71] Mr Park says that what was clear was that after the elections Mr Kent's employment would be over because the business simply could not afford him. I do not accept that was clear because that was never adequately or appropriately communicated to Mr Kent.

[72] Mr Park says that Mr Kent knew from the announcement in July that he was dropping back to either part time work (if Barkers Park accepted his offer to work on a part time basis) or no work from the date of the elections. I do not accept that because the respondents had not responded to Mr Kent about the various options he had proposed. Mr Kent therefore did not know what their plans were for the business or how those plans would impact on him (if at all).

[73] In the Statement in Reply filed on 19 November 2013 Barkers Park said that in July Mr Kent was given three months' notice of termination of his employment because the company was in serious financial jeopardy. I do not accept that. He was never given contractual notice. Although the Parks indicated an intention to close the business for financial reasons but that did not in fact occur. Barkers Park was still operating at the time of the Authority's investigation.

[74] In the Second Amended Statement in Reply the respondents say that Mr Kent gave three months' notice pursuant to his employment agreement of his resignation to be effective from the 12 October 2013 local body elections. I find that Mr Kent set out options for the Parks to consider – he did not give contractual notice of resignation. I also note that at no time did the respondents confirm the purported 'resignation.'

[75] Even if the respondents had been genuinely confused about Mr Kent's intentions Mr Kent made it very clear in his 07 October letter to the Parks that he considered he was being constructively dismissed. Mr Kent strongly expressed his view that Mr Kim had been taken on to do his job and that a personal grievance would be forthcoming. That was the point where the respondents should have (but did not) investigate whether there had been a miscommunication between the parties.

[76] I am satisfied on the balance of probabilities that Mr Kent did not resign. His employment agreement required him to provide three months' written notice of termination. That never occurred. Nowhere does Mr Kent advise any of the Parks that he would be resigning or had resigned.

[77] It is obvious that there has been a breakdown in communication. Some of that may be due to the fact that the Park family are often out of the country and there are also language difficulties which I consider played a factor in the miscommunications.

[78] I find that the respondents did not clearly communicate to Mr Kent that they intended to restructure the business and disestablish his position. Whilst that was one of the options that he had put forward for consideration, it was clear from the ongoing communications between the parties that all options were still under consideration.

[79] The fact that the Park family backtracked from their initial advice to Mr Kent to close the business which was given in July and the various changes that were made to the business show that the situation was an evolving one.

[80] I find on the balance of probabilities that Mr Kent's employment was terminated at the sole initiative of Barkers Park. I do not accept that Mr Kent freely or voluntarily resigned.

What date did Mr Kent's employment end?

[81] I am satisfied on the balance of probabilities that Mr Kent's employment ended on 11 October.

[82] Mr Kent's CEO monthly report acknowledged his departure on 11 October. Mr Kent's letter of 07 October to the Parks also recorded his understanding that his full time employment was ending at 5pm on 11 Oct. Mr Kent also invoiced Barkers Park for work he claims to have done on 14 and 15 October which would not have occurred if his employment had not ended.

Was Mr Kent's dismissal justified?

[83] Justification is to be determined in accordance with the justification test in s.103A of the Act. This requires the Authority to objectively assess whether how Barkers Park acted, and its actions, were what a fair and reasonable employer could have done in all the circumstances at the time that Mr Kent was dismissed.⁴

[84] A fair and reasonable employer is expected to comply with its statutory and contractual obligations. Failure to do so undermines an employer's ability to justify a dismissal or its actions (as the case may be).

[85] I find that Barkers Park is unable to justify its actions and how it acted. It did not comply with its good faith obligations in s.4(1A) of the Act to provide Mr Kent with information relevant to his ongoing employment and an opportunity to comment on that information before he was dismissed.

[86] Barkers Park also failed to comply with any of the four procedural fairness tests in s.103A(3) of the Act. I find that Barkers Park did not adopt a fair or proper process before it dismissed Mr Kent. His dismissal is procedurally unjustified.

[87] I also find that Barkers Park failed to comply with the contractual requirement to give Mr Kent three months' written notice of termination or pay in lieu.

⁴ Section 103A(2) of the Act

[88] I also find that Barkers Park is unable to substantively justify Mr Kent's dismissal. Its failure to follow a fair and proper process and failure to comply with its good faith obligations means Barkers Park was not fully and properly informed about the relevant matters that a fair and reasonable employer would take into account before dismissing Mr Kent.

[89] I am not satisfied that Mr Kent's dismissal was inevitable. Two employees received pay rises (that they had not even requested) as soon as Mr Kent was dismissed which tends to undermine the financial concerns put forward to the Authority.

[90] It is also clear that substantial work was to be done on the Caterpillar building and Mr Kent had previously been involved in that as part of his CEO role. Mr Kim's involvement is also of concern as there appears to be a lack of clarity and potential cross over between his duties and tasks Mr Kent was undertaking as part of his CEO role. These matters needed to be fully and properly explored (which I find did not occur) before Mr Kent's dismissal could be substantively justified by a fair and reasonable employer.

[91] The complete lack of process fundamentally undermines Barkers Park's ability to substantively justify Mr Kent's dismissal. Accordingly I consider his dismissal was procedurally and substantively unjustified.

What if any remedies should be awarded?

[92] Mr Kent seeks lost remuneration of \$106,000.

Mitigation

[93] Mr Kent says that he mitigated his loss by seeking election as a councillor in the Rotorua District Council which involves working three to four half days a month and an evening Council meeting or two, for which he receives an annual stipend of \$39,400.

[94] Mr Kent seeks to recover from Barkers Park the \$13,477.50 he says he expended in personal expenditure on his election campaign.

[95] Mr Kent also told the Authority that he has undertaken training and has gained accreditation as a hearings commissioner under the Resource Management Act 1991

and has been appointed to the Statutory Hearings Committee of the Rotorua District Council for which he receives payment at the prescribed rate of \$80 per hour.

[96] At the time of the Authority's investigation Mr Kent had earned \$800 from that. He had also undertaken some building work in Tauranga but for health reasons could not continue with that.

[97] I find that the evidence of mitigation does not support an award of lost remuneration in excess of three months.

Lost remuneration

[98] I am satisfied that Mr Kent has lost remuneration as a result of his unjustified dismissal. I consider it appropriate for him to be awarded three months' lost remuneration under s.128(2) of the Act.

[99] However, Mr Kent did not provide the Authority with details of what, if any, income he had earned in the three months following his dismissal. That amount is to be deducted from the lost remuneration awarded to him.

[100] I direct the parties to attempt to agree on the amount of lost remuneration Mr Kent is to be paid within 14 days of the date of this determination. If agreement is not reached, then either party may apply to the Authority to fix the amount.

Distress compensation

[101] I am satisfied that Mr Kent has suffered significant distress as a result of his unjustified dismissal. He feels that his reputation has been impinged and that he has been treated very poorly. It is clear that Mr Kent put his heart and soul into the Barkers Park business. His dog is even the company mascot.

[102] I am satisfied on the balance of probabilities that Mr Kent has suffered considerable humiliation, injury to feelings and emotional distress as a result of his unjustified dismissal. I order Barkers Park to pay Mr Kent \$10,000 under s.123(1)(c)(i) of the Act to compensate him for that.

Local body campaign expenditure

[103] I do not accept that Mr Kent is entitled to be compensated for the \$13,477.50 he expended on a personal campaign to be elected a Councillor of the Rotorua District

Council. He committed to this expenditure before he had been given notice of termination and before his employment had ended so it does not properly form part of costs associated with mitigating his unjustified dismissal.

Should interest be awarded on Mr Kent's lost remuneration?

[104] I am satisfied that it is appropriate to award Mr Kent interest at the current rate of 5% under the Judicature Act 1908 from the date of his dismissal until paid in full. Mr Kent has been deprived of the use of that money and Barkers Park have had the benefit of it.

Did Barkers Park breach its good faith obligations?

[105] I find that Barkers Park breached its good faith obligations under s.4(1A) of the Act by failing to provide Mr Kent with information relevant to his ongoing employment and an opportunity to comment on that before he was dismissed.

[106] I consider that the other nine alleged breaches of good faith that Mr Kent has identified all relate to the circumstances of his dismissal and amount to duplications of factors which form part of his unjustified dismissal claim.

[107] Under s.160(3) of the Act the Authority is not bound to treat a matter as the type described by the parties and may concentrate on resolving the employment relationship problem. I consider the core problem in this case is that Mr Kent was dismissed without a fair or proper process and without good reason.

[108] I consider that the underlying problem has been addressed by Mr Kent's success on the unjustified dismissal grievance claim. I therefore consider that many of the other claims he raises are just a duplication of various discrete factors which form part of the unjustified dismissal matrix. I therefore do not consider it appropriate to deal with each duplicate claim separately as I consider the employment relationship problem which gave rise to duplicate claims has been resolved in his favour.

Should penalties be imposed for breaches of good faith?

[109] I have found that Barkers Park breached s.4(1A) of the Act. Mr Kent has sought penalties be imposed for any breaches of good faith.

[110] Penalties are discretionary. Section 4A sets out the prerequisites that must be met before a penalty for breach of good faith may be imposed. I do not accept that the requirements of s.4A have been met so I decline to impose a penalty.

Was Mr Kent unjustifiably disadvantaged in his employment?

[111] Mr Kent claims he suffered five unjustified disadvantages in his employment, namely:

- (a) The request that he provide copies of information he had about the Caterpillar building project to Mr Kim;
- (b) The employment of Mr Kim by P & K NZ Limited to project manage the Caterpillar building project;
- (c) Announcing to staff that Mr Kim would take over the management and administration of Barkers Park;
- (d) Failing to respond appropriately to the employment relationship problem being raised, instead responding by summary dismissal and issuing of a trespass notice;
- (e) Trespassing him from the work so he was unable to collect his personal property which resulted in some items being lost or damaged.

Request that Mr Kent provide copies of information he had about the Caterpillar building project to Mr Kim

[112] I find that this did not disadvantage Mr Kent. The information was Barkers Park's property and it was up to them if they wanted to share it with others. Even if there had been some disadvantage (and I am not satisfied there was) I do not find that any such disadvantage was unjustified. I consider that Barkers Park was justified in providing details about the Caterpillar building to those that it wished to engage in respect of that project.

The employment of Mr Kim by P&K NZ Limited to project manage the Caterpillar building project

[113] I do not accept that Mr Kent has an unjustifiable disadvantage grievance in respect of this claim. I have already found in an earlier determination that Mr Kent was not employed by P&K NZ Limited. That is a separate legal entity to Barkers

Park and it is entitled to employ whomever it wishes. This personal grievance claim does not succeed.

Announcing to staff that Mr Kim would take over the management and administration of Barkers Park

[114] I do not consider that the evidence establishes this claim to the required standard of the balance of probabilities. This relied on hearsay evidence that had been relayed to Mr Kent by his partner, Ms McLean, which had been relayed to her by another employee who in turn had it relayed to her by the maintenance man who in turn had it allegedly relayed to him by Mr Kim, that Mr Kim would be taking over the management and administration of Barkers Park.

[115] The extent of the hearsay nature of this evidence makes it unreliable enough to establish Mr Kent's claim. I also note that upon receipt of this information, Mr Kent announced to staff that what had been communicated via this hearsay to Ms McLean was incorrect. I therefore do not consider Mr Kent was in fact disadvantaged even if what he believed occurred did in fact occur (I am not satisfied to the required standard that it did).

Failing to respond appropriately to the employment relationship problem being raised, instead responding by summary dismissal and the issuing of a trespass notice

[116] I consider that this is at the heart of Mr Kent's unjustified dismissal, so I consider it has already be addressed in connection with the unjustified dismissal grievance so it is not appropriate to treat it as a separate unjustifiable disadvantage. This disadvantage claim therefore does not succeed.

Trespassing Mr Kent from the workplace so he was unable to collect his personal property which resulted in some items being lost or damaged

[117] I find the Authority does not have jurisdiction to consider this disadvantage claim. I find the employment relationship ended on 11 October. Mr Kent was trespassed on 18 October. There was no employment relationship between the parties at the time that trespass notice was issued. The Authority only has jurisdiction over claims that involve parties to an employment relationship.

[118] I consider the issues associated with the trespass order have already been considered (and reflected) in connection the award of distress compensation as it was something that clearly increased Mr Kent's distress over his unjustified dismissal.

What if any remedies should be awarded?

[119] Remedies are not an issue as none of Mr Kent's unjustified disadvantage claims succeed.

Did Barkers Park breach Mr Kent's employment agreement?

[120] Clause 8.1(i) of Mr Kent's employment agreement required Barkers Park to "*act in a fair and reasonable manner, and in good faith, in all dealings with the Employee*".

[121] Mr Kent claims numerous breaches of his employment agreement which I now address in turn:

(a) *Breach of clause 8.1(i) of his employment agreement*

[122] This claim succeeds. Barkers Park did not act in a fair and reasonable manner and in good faith in all dealings with Mr Kent.

(b) *Disadvantaged Mr Kent by breaching clause 8.1(i) of his employment agreement*

[123] None of Mr Kent's disadvantage claims have succeeded so his breach of contract claim which is predicated on disadvantage occurring also does not succeed. Even if he had been disadvantaged I consider that has been addressed already as part of his successful unjustified dismissal claim.

(c) *Breaching good faith by breaching clause 8.1(i) of his employment agreement*

[124] Barkers Park breached its good faith obligations in s.4(1A) of the Act which also amount to a breach of clause 8.1(i) of Mr Kent's employment agreement.

(d) *Acting duplicitously in breach of clause 8.1(i) of his employment agreement*

[125] This claim does not succeed.

(e) *Dismissing without cause and without notice*

[126] This claim forms part of Mr Kent's unjustified dismissal claim and has been dealt with under that heading.

(f) *Failing to respond appropriately to an employment relationship problem*

[127] This claim forms part of Mr Kent's unjustified dismissal claim and has been dealt with under that heading.

(g) *Failing to consult regarding a dismissal*

[128] This claim forms part of Mr Kent's unjustified dismissal claim and has been dealt with under that heading.

(h) *Failing to follow appropriate procedures regarding the alleged redundancy*

[129] This claim forms part of Mr Kent's unjustified dismissal claim and has been dealt with under that heading.

(i) *Appointing Mr Kim without consulting Mr Kent*

[130] I find that there was no legal obligation on the respondents to consult Mr Kent over the engagement of Mr Kim. This claim does not succeed.

(j) *Trespassing Mr Kent from the workplace*

[131] There is no jurisdiction over this claim as the employment relationship had already ended by the time Mr Kent was trespassed from Barkers Park.

(k) *Not paying Mr Kent for work performed on 14, 15 and 18 October*

[132] This breach of contract claim does not succeed because the parties were not in an employment relationship at the time this claim arose, so the Authority does not have jurisdiction to determine it.

(l) *Breaching Mr Kent's employment agreement by summarily dismissing him*

[133] This claim forms part of Mr Kent's unjustified dismissal claim and has already been dealt with under that heading.

(m) *Claiming Mr Kent had resigned*

[134] This claim forms part of Mr Kent's unjustified dismissal claim and has already been addressed under that heading.

(n) *Altering the index to the agreed bundle submitted by Mr Kent*

[135] This claim relates to events that occurred after the employment relationship had ended so the Authority does not have jurisdiction over it.

(o) *Breaching clause 6 of Mr Kent's employment agreement by failing to terminate in accordance with the provisions of that employment agreement*

[136] This forms part of Mr Kent's unjustified dismissal claim and has been dealt with under that heading.

Did Mr Stanley Park incite and/or instigate and/or aid and/or abet any breaches of Mr Kent's employment agreement that may have occurred?

[137] I find that Mr Park as the sole director and shareholder of Barkers Park was responsible for any breaches of Mr Kent's employment agreement. Mr Park was the business owner and decision maker. He was the person giving instructions regarding Mr Kent's employment so I find that Mr Park did aid and/or abet the breaches of Mr Kent's employment agreement that occurred.

Should a penalty be imposed?

[138] I do not consider this is an appropriate case to impose a penalty. Mr Park was an absent owner. English is his second language and he required a translator for the Authority investigation. He also took legal advice and his solicitor prepared the relevant documents and ran the consultation meeting. Mr Park says he followed his lawyer's advice.

[139] I do not consider the prerequisites of s.4A of the Act have been met so I decline to exercise the discretion to impose a penalty on Mr Park.

Is Mr Kent entitled to be paid for 14 and 15 October?

[140] I find that the parties were not in an employment relationship on 14 and 15 October so the Authority does not have jurisdiction over this claim.

What if any costs should be awarded?

[141] Mr Kent was not legally represented so has not incurred legal costs. He is entitled to be reimbursed \$71.56 for his filing fee. Barkers Park is ordered to reimburse Mr Kent \$71.56 to reimburse his filing fee.

Rachel Larmer
Member of the Employment Relations Authority