

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Michael John Mark (Applicant)
AND Power Farming (Wholesale) Limited (Respondent)
REPRESENTATIVES Graeme Gowland for Applicant
Mark Hammond for Respondent

MEMBER OF AUTHORITY G J Wood

INVESTIGATION 22 February 2005
MEETING
DATE OF 4 April 2005
DETERMINATION

DETERMINATION OF THE AUTHORITY

1. The applicant, Mr Michael Mark, claims that his dismissal by the respondent (Power Farming), ostensibly for redundancy, was unjustified in substance and procedure, and followed misleading and deceptive conduct in employment. Power Farming denies all of Mr Mark's claims.

The Facts

2. Power Farming is a private group of companies whose main line of business is the sale of tractors. However, it also operated, under a trading division known as Agmark, a business known as Sprayrite. Sprayrite wanted to expand further into the water blaster market. Accordingly, the General Manager for Agmark, Mr Dave Donnelly, and its Product Manager for Sprayrite, Mr Greg Small, had a number of dealings with Mr Mark over several months, as Mr Mark had a great deal of experience in the industry. In particular Mr Mark had previously been New Zealand Sales and Marketing Manager for two major players in the industry and ran his own water blasting supply business, Kleantech Limited, out of Waikanae.

3. Mr Mark and Mr Donnelly first met in August 2002 and over the next several months had a number of discussions about how the business interests of the two men could be aligned. In particular, Mr Mark was introduced to key staff in Power Farming's Italian supplier at the end of a trip Mr Mark had already planned to Italy. This allowed him to advise Power Farming on how to better structure its water supply business.
4. While at first discussions between Messrs Donnelly and Mark concentrated on business interests that might be mutually supportive, at some point matters shifted towards the prospect of Power Farming employing Mr Mark directly. Accordingly in March 2003 Power Farming offered Mr Mark direct employment with it. The employment offer was not for a fixed term, but an offer of employment of indefinite duration.
5. Mr Donnelly wanted to make the initiative work as Power Farming's previous efforts at expanding their share of the water blasting market were stymied for different reasons. He made it clear to Mr Mark that this was intended to be long term employment. For this reason Power Farming did not want Mr Mark to be involved in the day to day running of his business Kleantech. Accordingly Mr Mark arranged for a friend of his, Mr Michael Campbell, to take over the Kleantech operations. Power Farming was well aware of this arrangement.
6. The extent to which this job was expected to be of a long term was that a schedule of visits to potential customers and suppliers was envisaged by the parties to last for at least 12 to 24 months.
7. On 21 March 2003 the parties entered into an individual employment agreement. The first clause of the agreement was entitled "Term of Agreement". It stated –

"This Agreement shall come into effect on 1 May 2003 and shall remain in force until renegotiated or terminated pursuant to any provision of this Agreement."
8. The agreement did not provide Mr Mark with any expectation of long term employment in that Clause 29 dealt with redundancy and provided that –

"Redundancy shall be payable at the rate of two week's pay for the first year of service and one week for every year of service thereafter to a maximum of five years (a maximum of seven week's pay)."

9. On 1 May 2003 Mr Mark commenced his employment in accordance with the agreement. Power Farming spent over \$20,000 in equipping Mr Mark with a Ford Transit van in order to do his work.
10. Unfortunately for Mr Mark there were some disturbing under-currents in the company's operations, of which he was not aware. Power Farming's end of financial year was in March and its Chief Executive Officer, Mr John Watkins, and the Managing Director, Mr Geoff Maber, were very concerned about the state of the agricultural industry at that time. On 5 May 2003 they sent a memorandum to all staff, which Mr Mark does not recall receiving. As Mr Mark was travelling around the country starting off his job and showing his replacement at Kleantech, Mr Michael Campbell, around the country as well, I accept that he did not receive this memorandum. I also accept, however, that Mr Mark soon became aware of cost control issues.
11. The memorandum noted that the agricultural market had contracted significantly since October/November and noted further that there was potentially a 33% drop in the market size for tractors. Power Farming noted that it could only respond to such a downturn by conducting a rigorous appraisal of processes, costs and margins to ensure that efficiency levels were maintained (or improved) in all areas of its activity. Staff were then advised of an internal review being undertaken by Mr Watkins and Mr Maber, of which the most likely focus was on expenditure reduction. Mr Mark became aware of this initiative in a general sense only, some days later.
12. The Board of Power Farming had a meeting planned on 12 May 2003. At that meeting Mr Maber presented a report which stated, amongst other things, that –

“If we don't start slashing costs immediately we will be lucky to make \$4 million before tax which in my opinion is totally unacceptable.”

13. Previously it had been hoped that profits would be at least \$8 million. Mr Maber's view, as expressed in the report, was that staff numbers were far too high. In particular Mr Maber stated –

“As at 1 May 2003, we have 100 full time staff. I have presented John with a request to study whether it is possible to run this business 100% effectively with around 55 to 60 staff.”

14. Mr Watkins provided the Board with a plan to reduce staff by about 20 and Mr Watkins and Mr Maber were given the approval of the Board to undertake a cost reduction programme that would result in approximately that number of redundancies.
15. Mr Donnelly was then approached by Mr Watkins and Mr Maber to see what sort of cut backs could be made within the Agmark division. Mr Donnelly explained that the division could not operate properly if any redundancies were to be implemented, and recommended no redundancies accordingly. Mr Maber and Mr Watkins told Mr Donnelly that while his views on his division might be correct, he had to understand that they were looking at Power Farming in its entirety.
16. On 16 March 2004 Mr Watkins gave a speech to each department of Power Farming. Again Mr Mark was elsewhere in the country and missed out on the presentation. Mr Watkins noted that reductions in expenditure had already occurred. He then stated –

“Regrettably, these initiatives by themselves have not delivered the required levels of cost reduction required to keep Power Farming competitive within the industry.”

17. He asked for volunteers for redundancy by Monday, 19 May 2004. His speech then stated –

“Once this is complete we will then issue letters to those individuals whose functions are being considered for redundancy, inviting them to a formal meeting on Wednesday 21st May 2003. These letters will be issued by Steve Baker on Tuesday 20th May.

Initial Meeting (Wednesday 21st May 2003)

- *Employee is entitled to bring a representative*
- *Explain to the employee that management is considering making their position redundant.*
- *Notice Period of at least one month. More if possible.*
- *Redundancy Entitlement*
- *Employees are entitled to work out their notice period if they wish.*
- *During Notice period normal wages apply.*
- *Arrange second meeting advise that at the next meeting you will discuss any progress made by the company regarding the redundancy and listen to any comments they might have.*
This gives the employee the breathing space to collect their thoughts and provide suggested alternatives.
- *Letters will be issued inviting affected individuals to attend this meeting*

Second Meeting (Thursday 22nd May 2003)

- *Discuss any progress made by the company regarding the redundancy and listen to any comments they might have.*

- *Consideration will be given to points raised by the employee during this meeting.*
- *Any assistance we may be able to provide such as CV preparation, counselling.*

Geoff Maber (Friday 23rd May 2003)

As this is a private company John Watkins will put forward his proposals to Geoff Maber for his consideration and approval. Final decisions will be concluded by 8.00am Monday 26th May 2003.

3rd letter

A letter will issued to all individuals who received the first letter inviting them to the Initial Meeting. This letter will invite them to attend the final Meeting. Steve Baker will hand out these letters on Monday 26th May 2003.

Final Meeting

These meetings will be held on Tuesday 27th May 2003. The individual will be advised of the decision regarding whether or not the company has decided whether their position is to be made redundant.

Asset Personnel

We have engaged the services of Asset Personnel, who will be on site on Wednesday 28th May to perform a skill assessment of the individuals affected with redundancy. They will also construct a professional CV for each of those affected.

Alternative redeployment

We are looking throughout the organisation's retail outlets, independent dealers and our Australian interest for possible employment opportunities for those affected.

Restated we cannot proceed further until we receive the results of the request for voluntary redundancy."

18. While Mr Mark did not attend any of these presentations Mr Donnelly told him that a redundancy process was in place and that all positions, including Mr Donnelly's and Mr Mark's, were potentially at risk. Mr Mark responded that Power Farming would look pretty stupid if it were to make him redundant so soon after hiring him, and Mr Donnelly agreed with him. As we know, Mr Donnelly was supportive of Mr Mark continuing on with his employment, but he had no decision making power.
19. According to Power Farming's timetable, workers at risk of losing their jobs were to have an initial meeting with Power Farming representatives on 21 May, following the issuing of a letter the day before. Unlike the other staff, Mr Marks' meeting was called on only one hour's notice and it was at that time that he was given the letter that other workers had received the day before. His meeting was also held at a later time to others.

20. The letter he was expected to respond to with one hour's notice states the following –

“I refer to my letter dated 5th May and our subsequent discussions of the 16th May regarding the commercial environment this company is currently experiencing and its forecast continuance for the coming 18 months.

After further deliberations, it is appropriate that I now hold a formal meeting regarding the possibility of this company being forced to make your position redundant.

You are entitled to have a representative or support person with you at this meeting, and you are encouraged to do so. This person can be anyone of your choice, a fellow worker, a relative, a union delegate, your lawyer or a friend.

At the meeting I would like to outline the company's position regarding the redundancy and the selection criteria that will be used.

The meeting is also to provide you with the opportunity of putting forward any comments and suggestions you may have regarding the making of your position redundant.

We will also discuss your entitlement regarding redundancy as stated in your Employment Agreement and any assistance that may be offered should it become necessary to make your position redundant.

The meeting will be held at 8.30am Wednesday 21st May in John Watkins office. Please advise Laurana if this is not convenient.”

21. Given the short notice, Mr Mark chose to have Mr Campbell attend with him at the meeting.
22. Mr Watkins gave an introduction based on his speech the previous week. Mr Mark stated that his position was new, that there was a great deal of potential growth in the business and that it would be unfair to terminate his position after such a short period of time. Mr Watkins undertook to get back to Mr Mark as soon as a decision had been reached.
23. According to the process that Power Farming was operating under, a further meeting was to occur to discuss the progress it had made and to consider the points given by workers during the meetings. Mr Mark informed Mr Donnelly that he had a number of appointments that particular day and Mr Donnelly told him that it was not necessary for him to attend. Mr Donnelly considered that Mr Mark had given a good account of himself at the meeting and he believed, although Mr Mark was not told this, that Mr Mark's position was in fact safe.

24. Mr Mark was aware that final decisions would be concluded by 8.00am Monday 26 May and he kept trying to get in contact with Mr Donnelly over the weekend and on the Monday to find out what had happened to his position. Unfortunately for Mr Mark, the decision was made that his position, plus one other in the Agmark group, would be made redundant. Needless to say, Mr Mark was extremely disappointed, frustrated and upset by this decision.
25. He was formally advised of his dismissal in writing in a letter dated 27 May, which he did not receive for approximately a week thereafter. Once again, the letter is factually inaccurate as it stated that two meetings had been held with Mr Mark when this was not in fact the case. The letter set out his entitlements to redundancy and holiday pay and told him that his employment would be terminated on 30 June. He was also told that he was entitled to paid time off for job interviews and that Power Farming was happy to assist with counselling. The letter further noted that Asset Personnel, a recruitment agency, would be able to assist him in obtaining a position. Unfortunately, by the time the letter arrived the date for the use of the recruitment agency on site had already passed.
26. Around that time Mr Mark sent an email to Mr Watkins, copied to Mr Donnelly and Mr Small, complaining about his selection for redundancy. By the use of colourful language, he accused Power Farming management of incompetence and using him as a cheap consultant. Mr Watkins replied by calling Mr Mark, who was in the Agmark van with Mr Campbell. Mr Watkins told Mr Mark that this was simply a business decision, while Mr Mark told him that employers could not treat people that way and that he should have explained the full situation to him before he started.
27. Mr Mark then told Mr Watkins of the difficulties this placed him in with respect of Mr Campbell's employment and that he had been treated unfairly and wanted compensation. He suggested, in part jokingly, that he could take possession of the van, worth around \$23,000. He also suggested that the sum of \$10,000, being the bonus he would have earned in the first six months had he operated successfully, would be an appropriate response.

28. Mr Small later spoke with Mr Mark telling him that he had upset Mr Watkins. Mr Small also told Mr Mark that Mr Donnelly would talk to him about matters at Wellington airport on a stopover.
29. Accordingly, Mr Donnelly met with Mr Mark towards the end of May. During that conversation Mr Donnelly was already aware, through Mr Small, that Mr Mark was considering legal action over his termination. It was clear from the discussion that Mr Mark was still upset about his dismissal. Mr Donnelly's purpose was to try and retain some benefit from Mr Mark's expertise. He therefore put forward a proposal that Power Farming and Kleantech enter into some kind of mutually beneficial arrangement. Mr Mark undertook to consider that, but also told Mr Donnelly that he was still considering his options and that legal action could follow. Mr Donnelly told him that he should do what he had to do.
30. Mr Watkins authorised Mr Donnelly to send Mr Mark a letter on 18 June 2003 offering a business agreement between Kleantech and Power Farming. Mr Mark responded by stating that he would agree to the arrangement between Kleantech and Power Farming, but it would be "*without prejudice to Court actions*". He told Mr Donnelly this orally, as well as writing it on the letter when signing his acceptance of the terms of the letter. Mr Watkins told Mr Donnelly that he had no objection to Mr Mark providing such an amendment to the agreement.
31. Mr Mark also claims that he sent Mr Donnelly a fax on 22 July in which, along with raising his concerns, he stated -
- "I have approached an employment lawyer and intend to seek compensation for the damage I believe Agmark have done to me as well as I believe wrongful dismissal."*
32. Power Farming is unable to find a record of this fax being received and Mr Donnelly can not recall it being received. Therefore I accept that, while it may have been sent, it was not received by Power Farming.

Raising a Grievance within 90 days

33. It is clear on the evidence that Mr Mark raised a personal grievance with Power Farming before the matter was filed with the Authority in October 2004. The law in

Winstone Wallboards Ltd v Samate [1993] 1 ERNZ 503 remains in effect, as noted by the Employment Court in *Ruebe-Donaldson v Sky Network Television Ltd* (unreported, Judge Travis, AC 44/04, 13 August 2004). In *Winstone* it was held that all that was necessary was that the employer be given some positive notice of the bringing of a claim. Here it was clear from discussions between Mr Watkins and Mr Donnelly of Power Farming with Mr Mark that he was dissatisfied with the decision to make him redundant and wanted compensation. The thrust of the Employment Relations Act is on parties trying to promptly resolve employment relationships themselves before judicial intervention. Just because the evidence showed that Mr Mark had not decided to file legal proceedings at the time of these conversations does not mean that he did not raise a grievance. I therefore determine that Mr Mark did raise a grievance with Power Farming within the 90 days required by statute.

Fair Trading Act Claim

34. It was submitted on behalf of Mr Mark that Power Farming was in breach of the Fair Trading Act 1986 by engaging in conduct that was misleading or deceptive. This was on the ground that the “promise” of long term employment constituted a misleading and/or deceptive representation. Mr Donnelly certainly stated that it was his intention that Mr Mark’s employment be long term. The employment offered was an offer of employment of indefinite duration, known more colloquially as a “permanent job”. This intention was also demonstrated by the fact that Mr Mark was told that his full time employment with Power Farming was not consistent with Mr Mark still running Kleantech. However, none of these representations were for employment for a particular period of time. In fact the employment agreement provides for no such period of time and also clearly provides for redundancy. Mr Mark was, of course, paid redundancy compensation owing to him under this agreement. Furthermore, the representations, such as they were, must be assessed at the time they were made. I accept that Power Farming’s top management were concerned about staff members at the time Mr Mark was employed, but what I do not accept is that Mr Mark was employed in the knowledge that staff numbers would have to be reduced significantly soon after his employment. It was only following a rigid Power Farming-wide cost

control process, which was not formally instituted until 12 May, that Mr Mark's position came into question.

35. In point of fact Mr Donnelly did all he could to try and save Mr Mark's job, although I find that the course of events does not reflect well on information flows within Power Farming. I therefore find that this is a case such as *Kluskens v James Hardie Building Services and Technology NZ Ltd* (unreported, Travis J, AEC 36/97, 9 May 1997) where no representations were given that there would be no redundancies in the future, and that matters changed as a result of investigations at the top level of Power Farming into staffing levels overall. This claim is therefore dismissed.

Unjustified Dismissal/Disadvantage

36. I find that Mr Mark's dismissal for redundancy was substantively justified in the sense that this was a company-wide restructuring. There is no evidence other than Mr Mark's assertions that his employment was designed to use him as a cheap consultant. Rather Mr Donnelly's evidence was convincing that Mr Mark was taken on and terminated for redundancy for genuine reasons and that Mr Donnelly tried to assist Mr Mark throughout.
37. This dismissal was procedurally unjustified however, I find. Power Farming developed for itself a fair (even if extremely compressed) process for selection for and giving notice of redundancy. However, it did not apply this process to Mr Mark. Of all the steps that Power Farming undertook to involve its workers in the redundancy process, only one was provided for Mr Mark. Even then the one meeting it held with him took place on only one hour's notice.
38. It is basic to the law of redundancy that an employee is entitled to a fair process and a dignified exit from employment.
39. Specifically here, however, Mr Mark –
- was not given the original memo about cost-cutting;
 - was not asked whether he wished to volunteer for redundancy;

- was not given a second meeting at which discussions could be held about the redundancy decision and alternatives;
- was not given a final meeting at which he was advised about the outcome of the redundancy process; and
- was not given access to the services of Asset Personnel.

All of this was compounded by the fact that Mr Mark was a new employee who could have expected particularly sensitive treatment given that he had only recently joined Power Farming. The Court of Appeal in the leading case of *Aoraki Corporation Ltd v McGavin* [1998] 1 ERNZ 601 held that Aoraki had to accept some responsibility for inducing a false sense of security in Mr McGavin, which would have increased the force of the blow which fell upon him when the announcement was made, but which might have been dissipated to some extent by an earlier and fuller explanation. That was certainly the case here, where Mr Mark was told not to attend what would have been an important final meeting, giving him further false hope that his employment would continue. In the case of Aoraki, \$15,000 compensation was set. The impact on Mr McGavin was even more serious than that on Mr Mark, I determine. However, Mr Mark gave clear evidence, supported by Mr Campbell, of how Power Farming treated him during this redundancy process and how it impacted on him: his anger at the mistreatment is still very apparent almost two years after the events took place. While he cannot be compensated for the loss of his job, he can be compensated for the particularly shabby way he was treated. I therefore order that compensation in the sum of \$9,000 be paid to Mr Michael Mark by Power Farming (Wholesale) Limited.

Costs

40. Costs are reserved.

G J Wood
Member of Employment Relations Authority