

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Jamie Tapp (Applicant)  
**AND** Mighty Mix Dog Food Ltd (Respondent)  
**REPRESENTATIVES** Brent Climo, Advocate for Applicant  
Brian A Fletcher, Counsel for Respondent  
**MEMBER OF AUTHORITY** James Crichton  
**INVESTIGATION MEETING** 18 April 2005  
**DATE OF DETERMINATION** 27 April 2005

DETERMINATION OF THE AUTHORITY

*Employment relationship problem*

[1] The applicant, Jamie Tapp (Mr Tapp), alleges that he was constructively dismissed, suffered an unjustified action to his disadvantage and alleges that there was procedural unfairness in the way his position was made redundant.

[2] The respondent, Mighty Mix Dog Food Limited (Mighty Mix) denies there can be any suggestion of constructive dismissal as Mr Tapp's employment was terminated by reason of redundancy. Mighty Mix denies the disadvantage claim and the claim of procedural unfairness in respect of the redundancy.

[3] The parties attended mediation but were unable to resolve their differences.

[4] Mr Tapp was initially employed by Mighty Mix as a manager of its Blenheim factory. There was some argument about exactly what the content of this managerial position was but it seems clear that Mighty Mix employed a very small staff and there was a modest amount of supervision required together with a certain amount of basic organisation.

[5] Mr Tapp's employment commenced in this role some time around the end of calendar 2002 or the beginning of January 2003. Whatever the content of his job as manager, it was clear that Mr Tapp reported throughout his employment to another individual (Mr Jamie Drummond) who was the son of the directors of Mighty Mix.

[6] There were never performance issues raised with Mr Tapp. In about June of 2003, another employee in the Mighty Mix factory (Mr Jock Rattray) became "co-manager" with Mr Tapp. The unchallenged evidence was that there was no consultation about this change in structure and that Mr Tapp did not raise any concerns about it with his employer. The dominant reason for doing this at the time seems to have been a desire to increase the remuneration of Mr Rattray who was evidently a good worker.

[7] Although no issue was taken about this arrangement at the time, the effect of it seems to have been that of the three workers employed by Mighty Mix in its Blenheim factory, two were designated as co-managers. That the employer should eventually decide to review such an arrangement ought not to come as a great surprise to anyone.

[8] On 30 October 2003, Mr Tapp was asked to attend a meeting at the offices of Mighty Mix' lawyers. He was not given any prior indication of the nature of the meeting and was not told that he could have a support person present.

[9] There were three people present at that meeting, Mr Tapp, Brian Fletcher who acts for Mighty Mix and one of Mighty Mix's directors, Colin Drummond.

[10] Mr Tapp's evidence was that he felt intimidated at this meeting and that he was told that his position as factory manager was being terminated. He referred to "stand-over" tactics being used and he felt that there were things going on behind his back at the factory (a reference to Mr Jock Rattray).

[11] None of that evidence was accepted by Mighty Mix. Mr Colin Drummond's evidence was that the meeting was the first consultation meeting in the restructure proposal that the company had embarked upon, that there were no papers to sign as Mr Tapp had alleged, that the meeting was not confrontational or aggressive and that Mr Tapp's demeanour both during and after the meeting when Mr Drummond ran him back to the factory, was friendly and communicative.

[12] Further, Mr Drummond points to a contemporaneous written record of the meeting which took the form of a letter from Mr Fletcher, Mighty Mix's counsel, to Mr Tapp. The letter was dated the day of the meeting and the evidence was that this letter was delivered to Mr Tapp on that same day.

[13] In answering questions at the investigation meeting, Mr Tapp agreed that the letter was a reasonable reflection of what happened at the meeting but he still wanted to maintain that he felt pressured during the meeting.

[14] The letter of 30 October clearly sets out a request for Mr Tapp to respond to the initial company proposal which was to remove the joint manager designation and have Mr Tapp revert to being an ordinary factory hand leaving Mr Rattray as the manager. There was a commensurate drop in pay, of course.

[15] No proposal appears to have been received by Mighty Mix from Mr Tapp in respect of the proposed restructure save for a letter from Mr Tapp dated 3 November addressed direct to Mr Colin Drummond in which Mr Tapp sets out his puzzlement at the proposal that he accept demotion when he is unaware of any performance deficit.

[16] Clearly Mr Tapp had rather missed the point that the meeting of 30 October was designed to initiate a restructuring process and had nothing whatever to do with his performance.

[17] In the absence of any alternative proposal to that advanced by the employer in terms of the suggested restructure, either from Mr Tapp or from his representative Mr Climo, Mighty Mix confirmed its preliminary view by letter dated 24 November 2003. As part of that proposal (now confirmed) Mr Tapp was offered a job as a factory hand at a lower wage which he declined to accept. Accordingly he accepted the period of notice required and his employment came to an end as a consequence of redundancy on 25 December 2003.

[18] Throughout the period from 30 October down to the end of the employment of Mr Tapp, it seems that the parties were talking past each other. Mr Tapp seems to have failed to grasp the

nature of the proposal being advanced in the 30 October meeting and the opportunity that he had to influence proceedings in his favour.

[19] Instead, Mr Tapp seems to have concentrated his energies on maintaining that the company's decision was unfair because he had not done anything wrong. No one ever suggested that he had done anything wrong, but of course the company was always entitled to look at the structure of its business and make alterations to that structure as economic circumstances dictated. Mr Tapp could have had a part in that process had he chosen to, but he seems not to have understood that that was truly available to him.

***Was Mr Tapp constructively dismissed?***

[20] Mr Climo's argument for constructive dismissal was, to say the least, a novel one. He contended that Mr Tapp was employed pursuant to an individual employment agreement appointing him effectively as the sole factory manager and that when the employer appointed another man as co-manager, that amounted to a unilateral variation constituting a breach of duty culminating in a resignation which Mr Climo says was expressed by Mr Tapp in his letter to Mighty Mix of 3 November 2003.

[21] I do not accept this argument. In the first place, Mr Tap had accepted the co-manager situation and so the variation cannot be said to be unilateral. The original employment agreement between Mr Tapp and Mighty Mix has to be read subject to the later acceptance by Mighty Mix and Mr Tapp of a new ingredient, namely Mr Rattray and his co-managership.

[22] Furthermore, the letter of 3 November is plainly not a letter of resignation but rather a letter expressing dismay about the information contained in the letter from Mr Fletcher dated 30 October and the meeting of that same date, and to indicate what steps Mr Tapp was going to take to quarrel with those actions of the employer. There was no suggestion whatever of resignation.

***Was there an unjustified disadvantage?***

[23] Mr Climo accepted that the only basis for a claim that Mr Tapp had been disadvantaged by an unjustifiable action of the employer revolved around the appointment of Mr Rattray as a co-manager in June 2003.

[24] Mr Climo also accepted that no issue had been raised by Mr Tapp within 90 days of those events and so he chose not to pursue that argument on Mr Tapp's behalf.

***Was the redundancy process fair?***

[25] In my opinion, the redundancy process used by Mighty Mix was fair. Mr Tapp was obviously unused to dealing with matters of this kind and, as I mentioned earlier, he seems to have missed the point of the meeting of 30 October and the subsequent attempts of Mighty Mix through its counsel to obtain some proposal or suggestions from him which might change its view of what an appropriate course of action was.

[26] Undoubtedly, Mighty Mix had a right to restructure its business and it is not for the Authority to put itself in the position of an employer in those circumstances. Mighty Mix sought to enter into a consultative process with Mr Tapp and despite what I consider to be Mighty Mix' best endeavours, Mr Tapp seemed to miss the point and did not at any stage make any viable or concrete proposal (so far as I can tell from the evidence) which would have influenced Mighty Mix to take a different course of action.

[27] In my view, Mighty Mix has done all that it could be expected to do in the circumstances. The only area of residual concern I have is whether, in all the circumstances of the case, Mighty Mix ought to have insisted that Mr Tapp have a representative present with him at the meeting on 30 October. Given Mr Tapp's relative youth (he was at the time these events happened 21 years old), and perhaps his inexperience in dealing with matters of this kind, it may be that Mighty Mix would have been well advised to insist that Mr Tapp attend such a meeting with a representative.

[28] However, in this particular case, it is clear from the facts that Mr Tapp instructed Mr Climo very soon after the meeting on 30 October (in the documents filed with the Authority for instance Mr Fletcher sent a facsimile to Mr Climo on 4 November concerning Mr Tapp). So it is difficult to see that Mr Tapp can have been prejudiced in any way by failing to have a representative present at the meeting of 30 November.

### ***Determination***

[29] Mr Tapp's application to the Authority is dismissed in its entirety.

[30] Costs are reserved but the parties are encouraged to accept the principle that costs should lie where they fall.

James Crichton  
Member of Employment Relations Authority