

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 86/08
5088939

BETWEEN JAMES WRIGHT
 Applicant

AND HEVILA PAK LIMITED
 Respondent

Member of Authority: R A Monaghan

Representatives: A Jackson, Counsel for Applicant
 A Holgate, Counsel for Respondent

Investigation Meeting: 21 January 2008 at Whangarei

Submissions received: 5 and 20 February 2008 from Applicant
 14 February 2008 from Respondent

Determination: 11 March 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Hevila Pak Limited (“Hevila Pak”) employed James Wright as the operations manager in its avocado pack house. Mr Wright says he was unjustifiably dismissed by reason of redundancy. He says the redundancy was engineered to get rid of him because of the conflict between himself and Chris Frost, the chairman of the board of directors.

[2] Hevila Pak says that, while it had embarked on a restructuring process, it did not dismiss Mr Wright. Rather, he walked off the job.

[3] Hevila Pak has also counterclaimed. It says Mr Wright breached the parties’ employment agreement by failing to give reasonable notice of the termination of his employment, and failing to be present at work to carry out his duties for as long as the

employment agreement remained in force. It seeks penalties in respect of these breaches.

The employment relationship

[4] In September 2006 Hevila Pak purchased the avocado pack house and business which employed Mr Wright. The operation packs and markets avocados for orchards including those owned by the shareholders. Mr Wright was registered as a director and shareholder when the company was incorporated in August 2006.

[5] The operation was running at a loss when Hevila Pak purchased it. The shareholders planned ways of returning it to profitability. One significant loss-making activity, the picking gang, was discontinued in March 2007. On costings provided to the board, some 25% of management and 15% of administration time had been allocated to the picking gang.

[6] The company's financial statement for the year ended 31 March 2007 recorded overall only a modest nett surplus. Although that document was not formally tabled until the beginning of May 2007, concerns about the operation had already surfaced. For example minutes of a directors' meeting of 4 April 2007 note a concern that the figures available to date were behind budget. They indicated there would be 'no payout to shareholders'. A shareholders' meeting was to be called so that shareholders could be informed of the situation. A preferred date was 7 May 2007.

[7] After the 4 April meeting Mr Frost telephoned four of the other six directors to discuss what should be done. As a result of the discussion, Mr Frost initiated a review process which would include examining whether any jobs should be made redundant.

[8] In individual letters dated 1 May 2007 Mr Frost advised the staff, including Mr Wright, of the directors' concern that the packhouse was not performing within budget. The letter identified the primary concern as being that overheads (outgoings) exceeded income. Mr Frost said he was 'conducting a review of all facets of our operations' and on the conclusion of the review he would 'be making some

recommendations to the shareholders regarding the future operation of the pack house'. There was no express reference to the possibility of job losses. The letter ended with advice that Mr Frost would contact the recipient to arrange a meeting.

[9] Mr Wright received his copy of the letter on 2 May. His response to Mr Frost was that he did not wish to attend a meeting and he did not have any suggestions to offer. However Mr Frost did meet with the remaining staff members. Various suggestions were discussed, most of which concerned improvements to administrative procedures.

[10] On 7 May Mr Frost sought a meeting with Mr Wright to 'discuss the outcome of the review'. The meeting went ahead on 8 May. Mr Frost advised that he would be recommending Mr Wright's position be made redundant. This would be discussed at the shareholders' meeting in May.

[11] Mr Wright said in evidence that all he said about the recommendation was 'good luck'. He said he did not think his position would be made redundant, because he knew he was putting in a high number of hours and believed he was saving the company money. In his view the saving came from the fact that he was maintaining company equipment himself, rather than paying others to do so.

[12] The annual general meeting of shareholders went ahead on 9 May 2007. Mr Wright was present. The year end financial statements were tabled, and Mr Frost also tabled a chairman's report. The report commented with concern on the picking gang and the inadequate documentation of its activities, as well as on the cost of a full time manager's salary. It also expressed strong concern about the suitability of having an employee, Mr Wright, as a director. Finally, it expressed the view that the company would shortly be in overdraft. Accordingly it recommended that the packhouse manager's position be discontinued as soon as possible, the packhouse be put on the market to allow shareholders wishing to do so to withdraw funds, and the shares of shareholders wishing to sell be purchased and trading continue.

[13] After discussion the meeting resolved to recommend to the board that the full time position of operations manager be discontinued. As for the restructuring or sale of the business, the shareholders asked the board to put a recommendation to them.

[14] Mr Wright asked the meeting if the recommendation meant he no longer had a job. Mr Frost said 'probably', but it was common ground that another shareholder explained there had been a recommendation but no final decision. Mr Wright was told the recommendation would be put to the directors, and if they accepted it then Mr Wright would be out of a job.

[15] The above is not the account Mr Wright gave in the written statement of evidence he provided to the Authority. He asserted that the recommendation was to terminate his position immediately. That was not the recommendation. Mr Wright's statement set out the construction he put on the recommendation, rather than the actual recommendation or the explanation he was given regarding its implications.

[16] Despite the above, Mr Wright took the outcome as a dismissal. On 10 May he attended the packhouse premises and began preparing for an immediate departure. Mr Frost was also on the premises.

[17] Mr Wright said in evidence that he went up to Mr Frost and said 'I might as well pack up and leave', to which Mr Frost said 'yes'. There followed a discussion about whether any of the shareholders would purchase Mr Wright's shareholding. Mr Frost's evidence was that he asked Mr Wright why he was packing his personal belongings, and the response was that Mr Wright felt unfairly treated so was leaving for that reason. Mr Wright told Mr Frost he expected redundancy compensation and that Hevila Pak would purchase his shares. Mr Frost said he explained to Mr Wright that the company still considered him an employee, and required him to carry out the work he normally did until the directors made their decision. Mr Wright denied this.

[18] I resolve that conflict by referring to Mr Wright's repeated stance that the discussion in the meeting of 9 May was a dismissal, in the face of both parties' evidence that the actual outcome was only that a recommendation would be put to the

board. I consider Mr Frost's account to be more consistent with this background, so I accept it.

[19] Mr Frost's further evidence, which I also accept, was that Mr Wright completed packing his things despite Mr Frost's explanation, and left.

[20] There was a directors' meeting on 15 May. Mr Wright did not attend. One of the agenda items was the shareholders' recommendation to discontinue the operations manager's position. Although by then the issue was moot, the motion to discontinue the position was carried.

[21] At the same meeting, the directors agreed to contract Mr Frost's management services. Mr Frost abstained from voting on the matter, but inevitably Mr Wright says his redundancy was a sham created so that Mr Frost could secure the work. There was no evidence to suggest Mr Frost was so motivated.

[22] Since then Mr Frost has provided management services on essentially a part time basis, and other staff members have also carried out some of Mr Wright's duties.

Was there a dismissal

[23] Counsel for Hevila Pak relied on decisions of the Employment Court¹ and Court of Appeal² in a personal grievance Mrs Edna Wood raised in respect of the termination of her employment at the Christchurch Golf Club. In association with a restructuring, Mrs Wood was given three months' notice that her position as part time secretarial assistant would be made redundant. She resigned before the end of the notice period and before any new arrangements regarding secretarial duties had been concluded. Counsel cited the following from the decision of the Employment Court:

“... A prerequisite for redundancy is that there should be a termination of the worker's employment by an employer. In Mrs Wood's case there was no such termination. Her decision to resign ... before the notice of redundancy had run its full course meant that she

¹ **Christchurch Golf Club Inc v Wood** (unreported, Judge Shaw, 22 September 1999, CC 28/99)

² **Wood v Christchurch Golf Club Inc** [2000] 1 ERNZ 756

pre-empted any termination which might have arisen as a result of her position becoming superfluous.

...

It is not disputed that there was a position which remained until the new year of the sort that Mrs Wood had filled prior to her resignation. However her resignation thwarted any possibility of determining whether she would have been able to continue in that position because she gave the club no opportunity to consider her for it.”³

[24] Although I have reservations about the approach Mr Frost was taking here, on the face of the matter there were valid reasons for looking at cost cutting measures, as well as the future of the operations manager’s position. Moreover Mr Wright’s response to Mr Frost’s attempted review was unwise and far from being in his own best interests.

[25] Further, I do not accept that the outcome of the 9 May meeting was Mr Wright’s immediate dismissal. His position remained at least until the directors had resolved to discontinue it, with the eventual fate of his employment (or any amended terms and conditions) to be resolved then or at some future time.

[26] It is not possible to say what the final outcome would have been. I say that in part because Mr Frost said he had in mind the obligation to consult with Mr Wright about the possibility of redeployment or part time work, and I am not in a position to reject his evidence that those matters were still to be discussed. Mr Wright’s action pre-empted any action Mr Frost (or anyone else) might have made to embark on that kind of consultation process.

[27] In addition, and despite my reservations, Mr Wright was too unresponsive and his departure too premature to allow any finding that his treatment was such that he was entitled to reach the conclusion that he had been dismissed.

[28] In short, as in **Wood**, I find there was no termination of the employment by the employer. Mr Wright’s departure pre-empted any termination that might have been

³ At p 6.

imposed after a director's meeting and after any subsequent consultation with Mr Wright.

[29] The question of justification does not, therefore, arise and no remedy is available to Mr Wright.

[30] There is one matter I address despite the above finding. It was submitted that Mr Wright's 'position' continued because 'the work' was carried out mainly by others. This was not a redundancy. However that submission mixes the notion of a position and the duties associated with it in a way that is not consistent with redundancy law. A position may disappear - and may be declared redundant - without any requirement that the duties comprising it disappear too. Some duties may indeed disappear in the course of a restructuring, but duties can also be retained and redistributed among other existing or new positions without calling into question the existence of a genuine redundancy. If any redistribution was cosmetic or minor there may be a finding of no redundancy, but such a finding would be based on the original position remaining essentially unchanged.

The claim for penalties

[31] On the facts as I have found them, Mr Wright left his employment prematurely, and not as the result of a dismissal. In doing so he failed to give the notice of termination of employment he was obliged to give, and failed to be present to carry out his duties for as long as the employment agreement remained in force. These are breaches of the employment agreement.

[32] However the Authority has a discretion as to orders for penalties. I consider Mr Wright has effectively been penalised already in that his actions caused him to lose his employment, as well as any opportunity to negotiate an alternative arrangement with Hevila Pak. There will be no further penalty.

Costs

[33] Costs are reserved.

[34] The parties are invited to agree on the matter. If they seek a determination from the Authority they shall have 28 days from the date of this determination in which to file and serve memoranda, with a further 7 days from the date of receipt of the relevant memorandum in which to file and serve any reply.

R A Monaghan

Member of the Employment Relations Authority