

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

M.241/84

967

BETWEEN WAIMATE WEST COUNTY COUNCIL
 a body corporate under
 and pursuant to the Local
 Government Act 1974

Applicant

AND KENNETH MARK COMBER,
THOMAS GEORGE GODDARD and
HARRY CHARLES NEWLAND being
 the members of an Appeal
 Tribunal appointed to
 determine a dispute between
 the Applicant and the Second
 Respondent

First Respondent

AND JACK HERBERT DENNETT
 formerly County Manager
 of the Applicant Council

Second Respondent

M.238/84

BETWEEN JACK HERBERT DENNETT

Applicant

AND WAIMATE WEST COUNTY COUNCIL

Respondent

Hearing 8 August 1984
 Counsel D B Heatley for Waimate West County Council
 R A McGechan, Q.C. for Comber, Goddard and
 Newland
 S S Williams and B Walworth for J H Dennett
 Judgment 10 August 1984

JUDGMENT OF DAVISON C.J.

These applications arise out of the decision of an Appeal Tribunal acting under the provisions of the Arbitration Act 1908.

The Tribunal heard an appeal by Mr Dennett against his alleged dismissal by the Council from the position of County Manager on 5 August 1982 and in its decision dated

2 May 1983 the majority of the Tribunal found in favour of Mr Dennett and awarded him the sum of \$60,080 by way of compensation and arrears of remuneration.

The Council has moved to set aside the award. Mr Dennett has moved to enforce the award. I propose to deal first with the motion to set aside. During the hearing certain grounds of appeal set out in the motion were abandoned and will not be referred to.

MOTION TO SET ASIDE

- (a) Error of law on the face of the award in wrongly interpreting the words "is determined and brought to an end by the Council" as contained in clause 4.1 of the service agreement.

This was the Council's main ground of application and was based on the argument that in law the words of clause 4.1 require that the employment be determined and brought to an end by the Council whereas it was said the Tribunal found that it was the Chairman and Deputy Chairman who had done so and not the Council.

The facts were these:

Mr Dennett was employed by the Council as its County Manager by agreement in writing dated 26 January 1979. The clauses of that agreement relevant to these proceedings are as follows:

" Determination or renewal of agreement

- 2.1 At any time the parties to the agreement may agree to waive the penalty and compensation clauses and determine the contract.
- 2.2 The Officer may resign from the employ of the Council upon giving the Council three (3) months' notice in writing of his intention so to do.

Dismissal for Cause

- 3.1 If during the said term of this agreement the Officer shall be guilty of serious misconduct or of any wilful breach or continued neglect of the terms of this agreement, or of the duties hereinafter mentioned, or as a result of an Officer

being permanently incapacitated and unable to fulfil his duties the Council may, by resolution stating the reasons for dismissal of the Officer, a copy of which shall be sent or delivered to the Officer forthwith and without any previous notice or payment in lieu of notice, put an end to and determine employment of the Officer.

- 3.2 Provided however the Officer may within one (1) month of receipt of such notice appeal to the Appeal Tribunal as established in Clause 5.1 herein, whose decision shall be final and binding.

Compensation

- 4.1 If during the term of this agreement the employment of the Officer is determined and brought to an end by the Council for reasons other than the misconduct of the Officer or his wilful breach or continued neglect of the terms of this agreement, or of the duties hereafter mentioned, the Council may pay to the Officer as compensation for loss of office, an amount up to five years' salary, but in no case less than two years salary, calculated at the rate of salary payable at the date of determination of this agreement by the Council.

Remuneration

- 9.1 The Council shall pay a salary of \$20276 (twenty thousand two hundred and seventy six dollars) gross per annum as at the 12th June 1978. "

Prior to August 1982 problems had arisen between the Council and the Audit Department over financial matters, and in particular to the remuneration paid to Mr Dennett, with the result that on 4 August 1982 the Chairman and Deputy Chairman of the Council travelled to Wellington to consult the Council's legal advisers and other bodies. They returned to Manaia the following day. In the words of the Tribunal: "They had made up their minds that (Mr Dennett's) services must be dispensed with and that they must be dispensed with instantly."

The subsequent events are best set out in the words of the Tribunal:

" That day, 5 August 1982, they called on the appellant at his office. They brought a locksmith with them, who almost immediately began changing the locks on the door. The Chairman told the appellant he had five minutes in which to resign or he would be dismissed, and 30 minutes in which to get himself and his possessions out of the building. The appellant was told that he would be taken home in his Council car, and then the keys to the car and the car itself would be taken away from him. The Deputy Chairman came in with cardboard cartons and told the appellant to pack his belongings in them, and in the course of the discussions Mr Joyce mentioned that the Audit Office had gone to the Police.

There was some disagreement in matters of detail as to the conversation that took place, but in matters of substance there was none. Mr Joyce showed the appellant two letters that he had, both apparently dated the following day, 6 August. One accepted the appellant's resignation with regret, the other informed him that he had been summarily dismissed for cause under Clause 3.

Mr Joyce told the appellant that if the latter did not resign with immediate effect, he would be handed the letter of dismissal. The appellant wrote out a letter of resignation, in which he gave three months' notice of his intention to resign, but this was unacceptable to the Chairman who rejected it and said that the resignation must be with effect from 4 p.m. that very day. At the time that he said this it was already well into the afternoon. In the end the appellant signed the letter that was produced as Exhibit B1 giving notice of his resignation 'with effect from today's date all in accordance with my contract of employment dated 26 January 1979'. The Chairman thought he detected some technicality in the concluding words and mentioned this to the appellant, but told him that he would accept the resignation in that form.

Under the supervision of the County Chairman and his Deputy, the appellant packed his belongings and was driven home. Since at that time he was handed the letter dated 5 August produced as Exhibit "B2" and referring to the resignation dated 6 August, we should explain that we were told that in fact the letter of acceptance was prepared in advance

of the letter of resignation, and that the appellant inadvertently copied the date of 6 August referred to in the letter of 5 August when writing out his resignation.

By letter dated 12 August the Chairman wrote to the appellant and informed him that at an emergency meeting of the Waimate West County Council held in the Council Chambers at 10 a.m. on Friday, 6th August, the appellant's resignation was accepted and confirmed by the full Council unanimously. Mrs Perrett told us in evidence that she was present at this meeting and that there was no discussion on the subject preceding the passing of that unanimous resolution.

On the same day the appellant wrote to the Chairman to advise him that his resignation was intended by him to be in terms of Clause 2 of the Agreement. He asserted that he had resigned by giving three months' notice, and that his resignation would therefore take effect from 6 November 1982. He went on to say that his understanding from the discussions of 5 August was that he was not required to work out the period of his notice.

Four days later he wrote a further letter addressed to the Chairman and Councillors of the Council, and this referred to outstanding leave which he claimed was due to him.

The next step was a reply dated 31 August from the Chairman to the appellant's letters of 12 and 16 August. He there said that in the Council's unanimous decision at a further meeting held on 24 August, the appellant's resignation had been accepted under Clause 3 of the Contract of Service.

There then followed these paragraphs:

'The reasons for accepting your resignation and not stating the facts was a face saving benefit offered to you for very obvious reasons but for the purpose of Clause 3.1 of the Contract of Service the reasons are serious misconduct and wilful breach and continued neglect of the terms of such agreement.

The other clauses of Clause 3 are correspondingly relevant and Clause 3.2 regarding appeal to the Appeal Tribunal is drawn to your attention.'

The balance of the letter dealt with other matters. "

The Tribunal then asked itself this question:

" Against this factual background the first question we have to decide is whether the appellant resigned, or whether he was dismissed by the Council. If he resigned, then no question of compensation under Clause 4 can arise. "

The Tribunal then considered the law as to constructive dismissal as discussed in Hill v Parsons & Co Ltd [1971] 3 All ER 1345 and Western Excavating Ltd v Sharpe [1978] 1 All ER 713 and then concluded:

" For practical purposes, the appellant had no choice as to what was going to happen. Whatever he did or did not do, he was going to be taken home that afternoon. The County car that had been at his disposal was going to be taken away from him, he was going to be locked out of his office, and he was going to be forbidden to return there, or indeed to any other Council property with the exception of the Council house which he was occupying and which he was to be allowed to occupy for another eight weeks. The only choice that he did have was between leaving it to the Council to pass a formal resolution dismissing him on the one hand, and signing a letter of resignation on the other. The suggestion that was made to him was that a resolution specifying grounds would be embarrassing to him, but that a letter of resignation would enable him to leave with honour and dignity. At the same time reference was made during the conversation by the Chairman to appeal rights under the Agreement. There was no suggestion that these were referred to only in the context of dismissal as opposed to signing a letter of resignation.

The rejection of the appellant's attempt to give three months' notice shows that even this choice was not available to him.

We think it would be entirely unrealistic to treat the letter of resignation as anything more than an acceptance of the fact that the employment was at an end. In the words of Lord Denning, the appellant submitted, he did not agree. It certainly seems to us to be inconceivable that for the sake of avoiding the passing of a resolution specifying grounds for dismissal, the

appellant would have agreed to forgo an entitlement to compensation of up to five years' salary, a sum considerably in excess of \$100,000.

But even if we are wrong in this, and the appellant did agree to the termination of the contract, did he do so voluntarily and with knowledge of his rights? We do not think that he did. His will was totally overborne by the rapidity and the violence of the events around him. The appellant called it a forced resignation, which implies it was against his will. He says that he was both astounded and insulted by what he describes as 'this unexpected turn of event'. He said that it was abundantly clear that he was not wanted, and his immediate reaction was to give Mr Joyce his resignation. He added the words 'all in accordance with my contract of employment' to preserve his rights under the contract 'whatever they might have been.' He said he did not have the opportunity of looking at the agreement prior to writing the letter. It seems to us, also, that the Chairman's reference to the fact that the Audit Office had reported the matter to the Police was most unfortunate in the circumstances: Firstly because by that stage the Chairman knew that the Police were not disposed to pursue the complaint, and secondly, because it involved an implied promise that the Council would not support whatever accusation had been made by the Audit Office if the Appellant signed a letter of resignation.

To be convinced that the appellant had voluntarily surrendered his rights to compensation, we would wish to be satisfied that he did so with full knowledge of his rights. It appears from the evidence given before us that he requested, but was denied, an opportunity of reading his contract, and it was quite plain that he was not to be afforded any opportunity of either examining the contract or taking advice on it during the time still remaining to him before he was to be escorted from the Council offices.

In our view, it was not the appellant's intention to surrender his rights, and we cannot accept Mr Young's submission that the three months' notice required by Clause 2.2 of the Agreement was expressly waived by the parties in view of the surrounding circumstances.

Accordingly, we conclude, for the reasons stated, that the Appellant did not resign, but was dismissed. "

Mr Heatley for the Council submitted that the Tribunal made an error of law in deciding that Mr Dennett was dismissed by the Council when in truth it was the Chairman who dismissed him. The whole essence of the Council's case was, he said, that it was not the Chairman who was Mr Dennett's employer but the Council itself and the Council can only act by resolution. The Council did not pass a resolution dismissing him, therefore the Tribunal wrongly interpreted clause 4.1 of the service agreement in equating the Chairman with the Council and made an error of law.

Mr Williams for Mr Dennett, however, made four points in reply:

1. It is not apparent that the Tribunal did make any such error.
2. The Council did pass resolutions confirming or ratifying what the Chairman had done.
3. If the Tribunal made an error it was one of fact as to whether Mr Dennett was dismissed by the Council. It was under no misapprehension that it was the Council as his employer which had to dismiss him.
4. It is unreal to say on the facts that Mr Dennett was not dismissed or his employment determined by the Council.

In considering the opposing contentions of the parties the starting point is the visit of the Chairman and Deputy Chairman to Wellington to consult with the Council's legal advisers and others. The Tribunal found that they went "on the Council's behalf". They decided next day that Mr Dennett's services must be dispensed with instantly and took the actions as narrated earlier in this judgment. The

Tribunal then referred to evidence given by the Chairman that the decision to dismiss Mr Dennett was that of the Chairman and Deputy Chairman arrived at on the morning of 5 August. It could have been in no doubt therefore that the dismissal as it so regarded it would need to have had the authority of the Council or the subsequent confirmation or ratification of the Council because it did not regard Mr Dennett as simply having resigned of his own decision. The Tribunal no doubt bearing in mind the need for such confirmation or ratification recorded: "The Councillors accepted the resignation and they did so unanimously".

A letter dated 12 August 1982 written by the Council to Mr Dennett stated:

" At an Emergency meeting of the Waimate West County Council held in the Council Chambers at 10 a.m. on Friday, 6 August, 1982, your resignation was accepted and confirmed by the full Council unanimously. "

The Tribunal recorded:

" Subsequently in a letter dated 31 August from the Chairman it was stated that in the Council's unanimous decision at a further meeting held on 24 August the appellants' resignation had been accepted under clause 3 of the contract of service."

There then followed these paragraphs:

" The reasons for accepting your resignation and not stating the facts was a face saving benefit offered to you for very obvious reasons but for the purpose of Clause 3.1 of Contract of Service the reasons are serious misconduct and wilful breach and continued neglect of the terms of such agreement.

The other clauses of Clause 3 are correspondingly relevant and Clause 3.2 regarding appeal to the Appeal Tribunal is drawn to your attention. "

The Tribunal was clearly in the passages referred to recording evidence which established to its satisfaction that even though the decision to dismiss the appellant was made by the Chairman and Deputy Chairman on 5 August 1982 it was a

decision which was confirmed unanimously by the Council by resolution. There were in fact two resolutions, namely, those of 6 August 1982 and 24 August 1982. The fact that the resolutions purport to accept the resignation of Mr Dennett did not blind the Tribunal to what it regarded as the true position, namely, that he was constructively dismissed or, as the Tribunal itself expressed it:

" For practical purposes the appellant had no choice as to what was going to happen. ... The only choice that he did have was between leaving it to the Council to pass a formal resolution dismissing him, on the one hand, and signing the letter of resignation on the other. "

The Council itself could have been in no doubt as to the circumstances of Mr Dennett's dismissal and must have known that he did not voluntarily tender his resignation. The letter from the Council of 31 August referred to above makes that plain when it referred to the reasons for accepting the resignation being "face saving" and that the reasons for doing so are "serious misconduct, etc."

The Tribunal would have no doubt thought it inconceivable that the Council did not have a report from the Chairman relating to the circumstances of Mr Dennett signing the letter of resignation.

In my judgment the Tribunal made no error of law in reaching the conclusion that Mr Dennett was dismissed by the Council and did not misdirect itself as to the identity of Mr Dennett's employer and fail to give a proper legal interpretation to the phrase "is determined and brought to an end by the Council".

The Tribunal accepted, as its decision shows, that Mr Dennett was dismissed by the Chairman but went on to deal with the matter in such a way as to leave the reader of the decision in no doubt that it regarded such decision as being authorised by and confirmed or ratified by the Council by resolution duly recorded.

- (b) Error of law in the application of ss 24 and 32 of the Higher Salaries Commission Act 1977.

The Tribunal decided that for the period 1 November 1981 to 8 August 1982 Mr Dennett had been paid a salary determined by the Higher Salaries Commission of \$28,304 per annum instead of the amount agreed to be paid by the Council in terms of the service agreement which at that stage was \$33,213 per annum. For the 40 week period the shortfall was \$3770. The Tribunal awarded Mr Dennett that sum on the basis that the Council was obliged to pay what it had contracted to pay and not the salary as determined by the Higher Salaries Commission.

The issue before the Tribunal was whether the Council was by law required to limit Mr Dennett's remuneration to the amount of the Higher Salaries Commission's determination. The relevant provisions of the Higher Salaries Act 1977 are as follows:

- s 12(3) " Except as provided in this Act, where the salary or allowance payable to any person is fixed under this Act, no amount in excess of the salary or allowance so fixed for the time being shall be paid to any person on account of that salary or allowance.
- s 24 Where any position is subject to the determination of the Commission under section 12(1)(a) of this Act and the salary for that position is determined by the Commission at a rate that is lower than that being lawfully received by the holder of that position, his remuneration shall not be reduced as a result of that determination.
- s 31(1) Every determination of the Commission shall prevail over any contract of service to the extent that there is any conflict between the determination and the contract; and the contract shall thereafter be construed and have effect as if it had been modified, so far as necessary, in order to conform to the determination.
- (2) Nothing in this section shall derogate from section 24 of this Act. "

The important dates which affect the question in issue are these:

- 16.10.78 Determination of Higher Salaries Commission fixing salary applicable to Mr Dennett.
- 26. 1.79 The service agreement between Mr Dennett and the Council was executed providing for a salary of \$20,276 per annum to be adjusted from time to time to comply with cost of living or other statutory wage-fixing orders.
- 1. 2.79 Determination of Higher Salaries Commission replacing the determination of 16 October 1978 with effect from 12 June 1978.

The Tribunal held:

" Because the first determination in respect of the appellant's position as County Manager was after the date of the Agreement, section 24 of the Higher Salaries Commission Act 1977 applies, and there was no obligation on the Council, and indeed no right to reduce his salary. "

The Tribunal's reasoning was:

" The determination of the Higher Salaries Commission relating to his position as County Manager, was issued on 1 February 1979 with effect from 12 June 1978. This determination expressly stated that it replaced the determination of 16 October 1978. The Higher Salaries Commission thus treated that earlier determination as if it had never existed because the determination of 1 February 1979 took effect from 12 June 1978. We should also treat the earlier determination as if it had never existed. "

If that was a correct approach and the determination of 16 October 1978 could be treated as if it never existed, then the determination of 1 February 1979 having been made after the service agreement was executed on 21 January 1979 did not reduce Mr Dennett's remuneration below that provided for in the service agreement because of the provisions of s 24 of the Act as set out above.

Was it then a correct approach to treat the determination of 16 October 1978 as if it never existed? It can not be disputed that as at 26 January 1979 (when the service agreement was executed) the Higher Salaries Commission determination of 16 October 1978 was in force. It continued in force until 1 February 1979 - five days after the service agreement was signed.

As at 26 January 1979 the remuneration fixed by the service agreement for Mr Dennett, being in excess of that provided for in the 16 October 1978 determination of the Higher Salaries Commission, was rendered unlawful by s 12(3) of the Higher Salaries Commission Act. The replacement of that determination five days later on 1 February 1979 by another determination expressed to be effective from 12 June 1978 did not make lawful that which had been unlawful on 26 January 1979. The Tribunal in my judgment was wrong in treating the determination of 16 October as though it had never existed. It was effective until it was replaced.

The salary fixed by the service agreement of 26 January 1979 was therefore unlawful as being in excess of the 16 October 1978 determination: it remained unlawful up until the date of the next determination of 1 February 1979. That determination was, of course, subsequent to the date of the service agreement and fixed a rate lower than that provided for in the service agreement. But s 24 of the Act, does not save the service agreement remuneration because the service agreement remuneration was not being lawfully received. It was unlawful for the reasons I have already given.

Section 24 saves existing remuneration in excess of a subsequent Higher Salaries Commission determination only when at the time of such determination it was being lawfully received. Such was not the case here. Reference was made by Mr Heatley to s 32 of the Higher Salaries Commission Act but, in my view, it has no application to the present case.

The Tribunal did make an error of law in the respect I have referred to and should have applied to its

calculations the remuneration as fixed by the Higher Salaries Commission.

- (c) The Tribunal made an error of law in failing to consider that clause 9.1 of the service contract was void as being in contravention of s 30 of the Higher Salaries Commission Act.

In view of my decision on ground (b) (ante) it becomes unnecessary to deal with this ground. In passing, however, I would mention that it appears to me that s 30 has no application to the circumstances of the present case. Section 30 prevents any other person or body fixing remuneration which it is within the jurisdiction of the Higher Salaries Commission to fix. Section 30, however, has no application to any remuneration fixed by agreement between two parties. Such a situation is covered by s 12(3) and by s 31 of the Act.

- (d) The Tribunal made an error of law in failing to apply the mitigation rule to compensation awarded under clause 4.1 of the service contract.

There is no substance in this argument. Clause 4.1 provided for "compensation for loss of office, an amount up to five years' salary, but in no case less than two years salary".

The Tribunal awarded Mr Dennett two years' salary. The mitigation rule has no application to this case.

In the result, the Council succeeds only on that part of the case concerning the award of \$3,770 for arrears of remuneration. I would have preferred to deal with this issue and determine what if any is the correct sum to be awarded under this head so as to save the parties the time and expense of a further hearing. However, there does not appear to be sufficient information before me to enable this to be done. I think the proper course to follow is to set

aside that part of the decision awarding Mr Dennett the sum of \$3770 for arrears of remuneration and to remit it to the Tribunal for further consideration in the light of my direction as to the law. There will be an order accordingly.

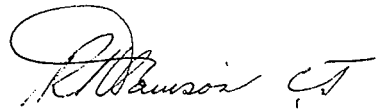
MOTION TO ENFORCE AWARD

As there remains one matter to be reconsidered by the Tribunal, the motion to remit the award must be adjourned until that matter has been determined. However, in view of Mr Heatley's intimation at the hearing that any sum payable by the Council to Mr Dennett would be paid as soon as the amount is finally determined, there should be no need for any further hearing on the motion.

COSTS

In order that the parties can conclude this matter once the remaining issue has been decided by the Tribunal, I should fix the costs of these proceedings. As the Council has succeeded on only one item of the Tribunal decision, and Mr Dennett has succeeded on the major issues, he is entitled to costs, but I make a reduction in those costs to take into account the issue on which the Council succeeded.

I allow Mr Dennett the sum of \$900 and disbursements as fixed by the Registrar.



Solicitors for Waimate West
County Council

Solicitors for J H Dennett

Gillespie, Young & Co
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