

LOW PRIORITY

*NR*

IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY

C.P. NO. 2150/87

BETWEEN      A.P. HOLMAN

Plaintiff

A N D      NEW ZEALAND KIWI FRUIT  
LICENSING AUTHORITY

Defendant

Hearing:      June 20, 1988

Counsel:      Mr. Casey for Plaintiff  
                    Mr. Clark for Defendant

Judgment:      *6 July 1988*

---

JUDGMENT OF MASTER ANNE GAMBRILL

---

This is an application by Mr. Holman to recover from the Defendant by Summary Judgment the sum of \$47,650. Mr. Holman's employment by the Authority was terminated in accordance with Clause 10 of his employment contract dated 4th March 1982. Mr. Holman claimed the additional sum under Clause 12 of the said contract which reads:

"Redundancy Retrenchment: In the event of your services no longer being required because of redundancy retrenchment or re-organisation, you will be entitled to a lump sum payment of one month's gross salary for every complete year of service with a minimum payment of 6 months gross salary".

There is no dispute between the parties as to the sum claimed. The only dispute is as to the entitlement

thereof.

The Plaintiff says the application is suitable for Summary Judgment and refers me to the decision of Thorp, J. in Towers v. R. & W. Hellaby Limited, C.P. No. 185/86, 13th May 1986. I believe if there was no conflict as to the facts it is a proper case where I could find, pursuant to Summary Judgment, an obligation for the Authority to make a payment to Mr. Holman. The Plaintiff says that his employment was terminated, i.e. he was dismissed. His dismissal, he says, resulted from a re-organisation, if not of the whole of the Defendant's Executive structure, then sufficient to result in the Plaintiff's own status and responsibility being affected to the point where his refusal to accept those changes resulted in his dismissal. He says therefore that the right to compensation arose under Clause 12 of his employment contract.

The Defendant says that as shown in the affidavits sworn by Dr. Brash and Mr. Caughey, a number of factual disputes are highlighted many of which are fundamental and go to the heart of Mr. Holman's claim and to the Authority's defence and therefore it would be inappropriate to find that there was an obligation for the Defendant to make a payment pursuant to Clause 12 of Mr. Holman's said contract of employment.

Mr. Holman had a long history of employment by the Authority. He commenced employment as Secretary to the Authority in 1979. Following the appointment of Dr. Brash as the Chief Executive of the Authority, the Authority designated Mr. Holman's position as Director of Services Secretary (4/3/82). Mr. Holman had previously described himself as Chief Executive and Secretary but no longer retained that title. During the period Dr. Brash was the Chief Executive Mr. Holman produced an office memorandum in which it was stated:

"In the absence of the Managing Director, the Director of Services shall stand in place of the Managing Director in respect of the latter's powers.....".

Mr. Holman says this was approved by the Board on 23rd September 1985. Subsequently Dr. Brash left the Authority and in September 1986 the present Chief Executive, Mr. G.S.M. Caughey, was appointed. In July 1986, prior to Mr. Caughey taking up his position as Chief Executive, Mr. Holman recommended to the Board that he be given the title Deputy Managing Director but the Board refused its consent and that at the time Mr. Holman tendered his resignation but, at the request of the Authority, he withdrew the same shortly thereafter.

The major nub of the dispute appears to arise in that

4.

Mr. Holman considered he was second in charge whereas Mr. Caughey deposes that when he was appointed Chief Executive Officer and in his discussions with the Chairman, it was never indicated to him that Mr. Holman was to be second in charge nor did the Board ever direct Mr. Holman was Deputy Managing Director. He says Mr. Holman may have acted on his behalf in relation to specific tasks but Mr. Caughey has never regarded Mr. Holman as an Acting Chief Executive Officer. Mr. Holman says Mr. Caughey's understanding cannot negate his position approved by the Board (para. 4.1, memo 5/9/85).

Mr. Holman describes the circumstances which led to his dismissal and says Mr. Caughey was intending to undertake a substantial re-organisation of the management of the Authority and that included significant changes to his position and level of responsibility. Mr. Caughey says with the expansion of the Authority it was inevitable there would be re-alignment of the responsibilities of the staff but at no time did he consider Mr. Holman's position was threatened as he saw him as a key executive. Furthermore, he says Mr. Holman's position was never discussed by the Board. On 10th February 1987 Mr. Caughey sent Mr. Holman a memorandum and he replied to the same. He, Mr. Holman, says the discussions concerning his position made it plain his position was to be significantly altered and that the level

5.

and extent of activities which he had undertaken previously while Dr. Brash was the Managing Director, were considerably reduced. He says that he no longer fulfilled the role of Deputy and his position was reduced to a position far below that which he enjoyed previously and his services were down-graded. Mr. Caughey disputes that and he says as a result of Mr. Holman's expressed concern over his memorandum, no action was taken or Board approval sought with regard to the proposals he had made for staffing changes. Mr. Caughey gives as the reason for Mr. Holman's termination of employment was his own intransigence and says that the Authority is disappointed he is no longer working for them and that it wished to continue to utilize his services. The Defendant therefore says that Mr. Holman's services were still required, Mr. Holman was not made redundant, there was no retrenchment and there was no re-organisation and he is therefore not entitled to the sums claimed.

Counsel cited to me the leading authority of Pemberton v. Chappell [1987] 1 N.Z.L.R., 1, standards of proof required, the procedure to be used and Doyle's Trading Co. Limited v. Westend Services Limited (unreported) C.A. 94/86, 12/12/86, highlighting the statement that bearing in mind that the overall onus is on the Plaintiff, it will be enough if what the Defendant puts forward leaves the Court in a state of uncertainty or doubt. Considering

6.

that statement, Counsel also cited to me the recent decision of the Court of Appeal in Bilbie Dymock Corporation Ltd. v. Patel & Baja, C.A. 200/87, 16/12/87, pages 3 and 4.

Having carefully read the affidavits and the various memoranda before me, I am satisfied that there are questions of fact which will constitute the evidence as to whether Clause 12 should apply.

It is clear the Authority terminated Mr. Holman's appointment. It is definitely not clear to me if Mr. Holman can establish whether his services were no longer required because of redundancy, re-organisation or retrenchment. There is affidavit evidence from the Defendant that his services were required. The Plaintiff says that his dismissal was the result of Mr. Caughey's re-organisation of executive responsibility. Although this is the Plaintiff's assessment of the situation and he says Mr. Caughey's terminology does not hide the substance of what occurred, I have affidavit evidence to the contrary and I cannot be satisfied that this may not be correct. The Plaintiff says that Mr. Caughey did not know or was unconcerned about the Plaintiff's role which he had previously established as stand-in for the Managing Director and his status or ranking in seniority. Mr. Caughey's failure to recognise these matters reinforces the Plaintiff's claim, i.e.

7.

his role was altered by Mr. Caughey's administration and he can justify compensation arising through a re-organisation. He says further, there is no dispute as to his 'higher' status in the Brash era.

I accept the affidavit evidence that the Authority wished to retain Mr. Holman's services and I believe the offers of certain gratuities indicate their willingness so to do. However, the matter of subsequent offers should not concern me.

I believe that if Mr. Holman no longer carried out as extensive duties as he did previously, the explanation may lie in the Defendant's affidavits which show both the increase in production of kiwifruit and the increase in staff numbers employed by the Authority and the work they carried out. It is arguable whether a realignment in responsibility is as the Plaintiff says, a down-grading in his services and whether this would constitute compliance with Clause 12.

It is obvious there have been difficulties and some disagreement between the relevant parties over the years over the Plaintiff's status and I believe in this context, the only way for this claim to be dealt with equitably and fairly is for both parties to have the opportunity to examine and cross-examine their major witnesses. Regrettably it is not an

8.

interpretation of the wording of Clause 12 I am called upon to make. It is an interpretation of the facts which may or may not have constituted the situation where Mr. Holman was in a position where his services were not required because of redundancy, retrenchment or re-organisation. I cannot feel confident that I can make such a finding. I cannot read from the evidence before me sufficient evidence of compliance with Clause 12 and I therefore have a reservation as to the Plaintiff's entitlement. I would therefore dismiss the application for Summary Judgment. I would assess costs of \$1200 for the Defendant plus disbursements as fixed by the Registrar. A Statement of Defence is to be filed within 30 days hereof.

*Anne Gambrell*

MASTER ANNE GAMBRILL

Solicitors:

Kensington Swan, Auckland, for Plaintiff  
Russell McVeagh McKenzie Bartleet & Co., Auckland,  
for Defendant