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**LOW
PRIORITY**

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

C.P. NO. 1611/89

1506

BETWEEN A J FLETCHER
Plaintiff

A N D JOHNSON MATTHEY LIMITED
Defendant

Hearing: 12 and 13 October 1989

Counsel: Mr Murray for the Plaintiff
Mr Wallis for the Defendant

Judgment: 17/10/89

RESERVED JUDGMENT OF MASTER TOWLE

This application for Summary Judgment sought an amount of \$99,456.64 claimed as being due to the Plaintiff upon the termination of his engagement as the Managing Director of the Defendant company. It arises in the following circumstances.

The Plaintiff had been with the company continuously from 1966, first as its Works Manager then subsequently as a Director until his appointment as Managing Director in 1986. The company is a dealer in gold and precious metals and as such the very highest degree of good faith and

honesty was expected by the Defendant of its senior employees at all times. Some time in 1988 as a result of complaints to the Police, charges were brought against the Plaintiff and at least one other employee as a result of which the Plaintiff was officially suspended from all duties by the Defendant on the 5th September 1988 pending the outcome of the Police enquiries. As a result of discussions between the parties during the next two or three days agreement was reached whereby the Plaintiff's employment was brought to an end with effect from the 8th October 1988 with an arrangement that he would leave the company on the 8th September but be paid one month's salary in lieu of notice. In addition the negotiations were on the basis that the Plaintiff was to be paid for accumulated leave and that the Plaintiff was entitled to holiday pay not taken in respect of Christmas 1987 and during 1988 for a period of 56 days for which a total amount was agreed of \$13,138.46. The discussions also covered the entitlement of the Plaintiff to payments from the Defendant's superannuation fund in respect of which the Plaintiff had earned a maximum entitlement of the order of \$110,000 at that time.

The arrangements reached were confirmed in a letter sent to the Plaintiff by the Defendant on the 8th September from which I quote:

" We will make the following arrangements for the payment of outstanding salary, leave pay and superannuation entitlement; -

| | | |
|--------------------------|--------------|---|
| Salary in lieu of notice | \$ 5,083.33 | |
| Leave pay (56 days) | \$ 13,138.46 | |
| Superannuation | \$110,000.00 | " |

At the time that letter was written the Police investigations had not been fully completed but on the 26th October 1988 the Police decided not to continue with the prosecution and no evidence was offered when the case was called against the Plaintiff whereupon the charge was dismissed. In the course of their investigations the Police had visited the Plaintiff's house and uplifted a number of items which the Defendant subsequently identified from photographs as having been the sort originally marketed by the Defendant company. After the prosecution had been dismissed the Defendant sought the advice of its own solicitors who wrote direct to the Plaintiff on the 21st November 1988 concerning his final pay and superannuation. That letter stated that the

Trustees of the Superannuation Fund had had the matter referred to them but that because the company was satisfied that the Plaintiff had tendered his resignation in order to avoid dismissal for breach of his obligations of good faith and fidelity he was entitled to receive back only his actual contributions to the superannuation fund of \$21,491.93 instead of the much larger figure of \$110,000. In addition that letter claimed that there had been a change in the company's calculations for holiday pay and that the Plaintiff was not entitled to the \$13,138.46. Although not expressly stated in the letter it appears that the company's view was that in light of the circumstances under which the Plaintiff's employment had come to an end he was not entitled to any further salary in lieu of notice.

Accordingly payment was made of the \$21,491.93 in respect of superannuation and of a reduced figure of \$7,273.22 for holiday pay as against the \$13,138.46 which had been calculated previously.

I can deal quite shortly with the question of holiday pay which was of course calculated on past

entitlements due to the Plaintiff and not assessed in relation to any further entitlement at the time his employment came to an end. The Defendant has not adduced any evidence to support the basis upon which it relies to justify some lower entitlement than the figure which was clearly negotiated and agreed between the parties on the 7th September and I can find no reasonably arguable defence to payment of the balance of \$5,865.24 for holiday pay.

The remaining two items do however concern the proper entitlement of the Plaintiff upon the termination of his employment.

On the same date as the Defendant company's solicitors had written to the Plaintiff, his own solicitors had written to the Defendant demanding payment in accordance with the letter of the 8th September and threatening that if this was not paid a claim would be issued against the Defendant for damages for wrongful dismissal. The two payments agreed to by the Defendant were made together with certain minor reimbursements of the Plaintiff's out of pocket expenses. No agreement was reached

concerning the claim for the balance of the superannuation or for salary in lieu of notice and proceedings were issued by the Plaintiff on the 26th July 1989 relying upon the terms of the letter of the 8th September 1988.

I am quite clear from the Plaintiff's affidavit filed in support of his application and the Defendant's affidavits in opposition, that the real question to be determined is whether or not the Plaintiff left the Defendant's employment without stain on his character or whether his conduct was such that the Defendant is justified in refusing to pay him his full superannuation benefits or indeed any salary beyond the date he finally left its employment on the 8th September 1988. There are a host of factual areas in dispute concerning matters where the Defendant alleges the Plaintiff was dealing in goods through the company to his own personal advantage and that he has failed to give a satisfactory explanation of his possession of certain of the company's goods. There is also a disputed allegation that he had without authority come into possession of some watch movements. None of these matters can be resolved satisfactorily in

a Summary Judgment context and I am in a position where if I were to find for the Plaintiff for the full amount of his claim it would be tantamount to a finding that his employment had come to an end without any fault on his behalf.

I am quite unable to come to this conclusion on disputed evidence and the Plaintiff therefore cannot satisfy me that he can properly rely upon the wording of the letter of the 8th September as creating an obligation to pay the sums stated. The Defendant has a right to be heard on whether or not the circumstances applying at the time the Plaintiff left its employment were sufficient to justify dismissal. The Trust Deed relating to the superannuation fund has not been placed before me but I understand that the Trustees have discretion to consider a participant's entitlements to be paid not only his own contributions but those of his company and that these may be properly assessed upon the circumstances under which his employment came to an end. In short I believe there is a reasonably arguable defence available to the Defendant for the greater part of the Plaintiff's claim.

With its affidavit in opposition the Defendant filed a lengthy draft statement of defence and counterclaim alleging a number of respects in which it claims the Plaintiff breached his obligations as Managing Director. The Defendant claims that damage resulted from the Plaintiff's breaches of his contract of employment. Apart from the factual difficulties which I have already outlined, it seems to me that this whole matter is one where the rights and obligations of the parties are completely interwoven and where, applying the principles approved by the Court of Appeal in Grant v. New Zealand Motor Corporation Limited C.A.53/88 it would be unjust to allow the substantial part of the Plaintiff's claim to be determined without the cross claim also being heard at the same time.

This consideration does not apply the small sum to which the Plaintiff has satisfied me that the Defendant has no reasonably arguable defence and I do not think it would be appropriate to hold up the entry of judgment in that regard. Accordingly there will be judgment for the Plaintiff in the sum of \$5,865.24 at this stage but I do not propose to make any award of costs until the whole of the

other matters at issue have been determined.

It is apparent from the correspondence that the Plaintiff has never abrogated his right to bring a claim for alleged wrongful dismissal against the Defendant or to sue for damages. Although I have now reached the point where I am satisfied that the application for Summary Judgment in respect of the balance of the claim must be dismissed, the timetable order which I make is on the basis that the Plaintiff will wish to file an amended statement of claim. I have discussed the following timetable with Counsel and I make orders as follows:

1. The Plaintiff must file an amended statement of claim by the 27th October.
2. ±The Defendant should file its statement of defence and counterclaim by the 10th November.
3. The Plaintiff is permitted until the 24th November to file his statement of defence to the counterclaim.
4. Discovery is to be given by verified lists of documents by the 8th December.
5. Leave is reserved to both parties to apply for further directions if need be.

10.

6. All questions of costs are reserved.



MASTER R P TOWLE

Solicitors:

Sturt and Partners, Auckland, for the Plaintiff
Brandon Brookfield, Auckland, for the Defendant