

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 192
5444116

BETWEEN

BAY INTERNATIONAL
LIMITED
Applicant

A N D

PETER HUTSON and ANYA
HUTSON
Respondents

Member of Authority: T G Tetitaha

Representatives: S Langton/R M Tomkinson, Counsel for Applicant
D Alderslade/V Hodgson, Counsel for Respondents

Date of Investigation Meeting: 8 May 2014 at Auckland

Submissions received 2 and 8 May 2014 from Applicant
2 and 8 May 2014 from Respondents

Date of Determination 16 May 2014

DETERMINATION OF THE AUTHORITY

- A. The respondent's employment is of indefinite duration.**
- B. The parties continue to be bound by the terms and conditions the respondent's employment agreements dated 3 November 2009.**
- C. The directors appointed to the applicant Board by Abano Healthcare Group Limited or its subsidiaries may exercise on behalf of the applicant and its Board rights to terminate the respondents' employment under clauses 17.2 to 17.3 of the employment agreements dated 3 November 2009.**
- D. The costs are reserved. If a party seeks costs, they shall have 7 days from the date of this determination to file submissions. The other party shall**

have 7 days thereafter to file any reply. The decision shall be made on the papers.

Employment relationship problem

[1] The parties entered into fixed term employment agreements which were due to expire on 2 November 2012. The respondents continued working after the expiry date until alleged conflicts of interest arose from a takeover bid by the respondents and others. Two directors upon the applicant Board began disciplinary proceedings. The respondents dispute their right to do so, given the expiry of the fixed term.

Unavailability of witness

[2] Prior to hearing the Authority was informed Anya Hutson was unable to attend due to illness. Her future availability for examination was not known at the time. The parties agreed at the conclusion of the evidence she was not required for examination. This was because her evidence largely repeated and relied upon Peter Hutson's testimony. Mr Hutson was available for cross-examination.

[3] Accordingly her evidence may be produced by way of sworn affidavit subject to the Authority's ability to draw inferences as it sees fit, and to attribute appropriate weight to the evidence.

Issues

[4] The sole issue for determination is whether clauses 17.2 and 17.3 of the respondents' fixed term employment agreements continue to apply past the expiry date.

Facts leading to dispute

[5] In 2005 Abano Healthcare Group Limited (Abano) acquired a 70% shareholding in Bay Audiology Limited. At the time 30% of Bay Audiology Limited was owned by the respondents.

[6] In 2007 Bay Audio Pty Limited (Bay Australia) was incorporated to operate an audiology business in Australia. 85% was owned by Bay Audiology Limited and 15% by Peter Hutson.

[7] In 2008 Bay International Limited (BIL) was incorporated to takeover Bay Audiology's shareholding in Bay Australia. Bay Audiology owned 85% and Peter Hutson owned 15% of BIL, along with a number of other minor shareholders.

[8] In 2008 Richard George Keys and Alan Clarke were appointed by Abano as its directors on the BIL's board (Group A Directors). The respondents were also appointed as directors by the remaining shareholders (Group B Directors).

[9] In late 2009 the parties sold Bay Audiology Limited. Their businesses were structured so Abano and the respondents owned a 50/50 joint venture in BIL. The restructuring required a new shareholders deed and employment agreements for the respondents to be executed.

[10] Between 10 and 21 August 2009 the respondents' employment agreements were negotiated. These were executed on 3 November 2009 together with a shareholders deed relating to BIL.

[11] On 2 November 2012 the respondents' fixed term agreements were due to expire. Neither party turned their mind to the expiry date. The respondents continued working. The applicant took no steps about the expiry of the agreements.

[12] In July 2013 the respondents, together with Archer Capital and James Reid, made a bid to takeover BIL.

[13] On 19 September 2013 Alan Clarke, BIL Board Chairman, notified the respondents about certain conflicts of interest arising from the takeover bid. There was a suggestion to protocols be put in place to manage the conflicts. This was rejected by the respondents.

[14] On 7 October 2013 the Group A directors, Alan Clarke and Richard Keys, commenced a disciplinary process and proposed the respondents suspension. On 8 October 2013 the respondents were suspended. The same day, the respondents notified their opposition to suspension. They alleged the fixed term agreements were invalid (having expired) including clauses 17.2 and 17.3 and the Group A directors did not have the right to commence a disciplinary process on behalf of the applicant pursuant to those clauses. The respondents' suspensions were confirmed the following day.

[15] On 10 October 2013 the respondents raised a personal grievance. On 21 October 2013 they sought a reply to their personal grievance and alleged conflicts of interest by the Group A directors.

[16] On 23 October 2013 the Group A directors advised the disciplinary process would be delayed while further investigation was undertaken.

[17] On 4 November 2013 the respondents' solicitors (again) notified the applicant it had no right to suspend, consider terminating or terminating the respondents' employment without the full agreement of the applicant board.

[18] On 18 December 2013 investigation meetings with the respondents were held.

[19] On 20 December 2013 the Group A Directors notified the respondents a disciplinary process would be undertaken. On the same day an application to the Authority was filed for resolution of the dispute over the interpretation, application and operation of the parties employment agreements.

Legal framework

Contractual interpretation

[20] This dispute is about interpretation and application of an employment agreement. The necessary inquiry is what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean. To be properly informed the Authority must be aware of the commercial or other context in which the contract was made and of all the facts and circumstances known to and likely to be operating on the parties' minds. The objective in a contract interpretation dispute is to establish the meaning the parties intended their words to bear.¹

[21] The starting point is the words written in the agreement but the Authority is not limited to giving the words a purely literal meaning. The Authority looks to find the meaning which the agreement would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.²

¹ *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5; [2010] 2 NZLR 444; (2010) 9 NZBLC 102,874 (SCNZ) at [19]

² *Mount Joy Farms Limited v. Kiwi South Island Cooperative Dairies Limited* (Court of Appeal, CA 297/00, 6 December 2001) at para.[38] per Hammond J for the Court

[22] Context is always a necessary ingredient in ascertaining meaning. It is permissible to go outside the written words for the purpose of identifying the context in which the contract was made and its objective purpose. It is fundamental that words can never be construed as having a meaning they cannot reasonably bear. The plainer the words, the more improbable it is that the parties intended them to be understood in any sense other than what they plainly say.³

[23] Previous negotiations of the parties⁴ and their declarations of subjective intent⁵ are not admissible in interpreting the agreement.⁶ Evidence of facts, circumstances and conduct attending the negotiations is admissible, if it is capable of shedding objective light on meaning.⁷

The Employment agreements

[24] The starting point is the employment agreements between the parties. Peter Hutson was appointed Executive Chairman Bay Group/CEO Bay International. His employment agreement included the following terms:

3. ***Term***

3.1 *The Employee's employment in this position is for a fixed term of three years from the commencement date described in Item 4 of Schedule 1 unless:*

(a) *the Employee resigns or retires as a director of the company; or*

(b) *in the reasonable opinion of Abano Health Care Group Limited the Employee no longer takes an active role in the management of the business of the company, other than as a result of ill health or incapacity to which other provisions of this agreement apply (each of 3.1(a) and (b) is a "Specified Event");*

in which case the fixed term will end on the occurrence of any of the Specified Events.

3.2 *The genuine reason for the fixed term is that the Position combines ownership and governance duties with management responsibilities to the Company (the Employee's associated*

³ *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [23]

⁴ *Hansells (New Zealand) Limited v. Ma* (2007) ERNZ 637 at [35]

⁵ *Association of Staff in Tertiary Education Inc. v. Hampton, Chief Executive of the Bay of Plenty Polytechnic* [2002] 1 ERNZ 491 at [20]; *Godfrey Hurst New Zealand Limited v. National Distribution Union Inc.* AC 62/04, 27 October 2004 at [5]

⁶ *Terson Industries Limited v. Loder* (2009) 6 NZELR 345 at [21]

⁷ *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [29]

interests own 50% of the shares in the Company). The Employer has agreed:

- (a) to fund the Position only for a fixed term of three years provided the Employee remains a Director of the Company and takes an active role in the management of the Company; and
- (b) at the end of the three year fixed term, or earlier if any of the Specified Events occurs, a review will need to be undertaken by the Company to determine whether its management will be separated from ownership and governance.

The Employee has agreed to be appointed to the Position for these reasons and on the terms of this agreement.

- 3.3 The Employee confirms that unless otherwise expressly agreed in writing by the Employee and the Company there is no expectation that the Employee's employment by the Company will continue beyond the end of the fixed term.

17. Termination

17.1 The Employees employment will automatically terminate at the expiry of the fixed term, without further notice or notification to the Employee. Termination at the end of the fixed term will not be unjustified and will not be deemed to be redundancy.

17.2 Nothing in this agreement prevents the termination of the Employee's employment prior to expiry of the fixed term by written notice with immediate effect and without payment in lieu of notice if the Employee:

- (a) is guilty of any material breach of any terms of this agreement; or
- (b) is guilty of serious misconduct, examples of which are:
 - engaging in sexual or racial harassment;
 - stealing cash or property from the Company ...
 - refusing to obey any reasonable instruction or direction given or reasonable policy issues by the Board;
 - deliberately misstating financial results;
 - divulging confidential information;
 - using confidential information for personal gain;
 - engaging in insider trading;
 - being involved in a serious conflict of interest;
 - acting in a manner calculated to damage the interests or reputation of the Company;
- (c) is in breach of the warranties contained in Clause 20 of this agreement;

- (d) *is convicted of a criminal offence the nature of which is in the reasonable opinion of the Company would materially affect the ability of the Employee to carry out his duties or is of a nature which seriously places doubt in the trust and responsibility vested in the Employee by the Company;*
- (e) *Resigns or retires from his Directorship of the Company or, if in the reasonable opinion of Abano Healthcare Group Limited, he no longer takes an active role in the management of the business of the Company, other than as a result of ill health or incapacity to which other provisions of the Agreement apply, and this Agreement does not otherwise expire.*

17.3 The rights of the Company to terminate the Employee's employment under clause 17.2 may be exercised on behalf of the Company and the Board by those directors appointed to the Board by Abano Health Care Group Limited or any its subsidiaries.

25. Entire Agreement

25.1 This agreement constitutes the entire agreement between the Company and the Employee and supersedes all previous representations, negotiations, commitments and communications either written or oral between the Company and the Employee.

[25] Anya Hutson was appointed Human Resources Director – Bay Group. Her employment agreement contained the same clauses 17.2 and 17.3 as Peter Hutson's agreement except for the omission of clause 17.2(e). Clause 3 was also worded differently as follows:

3. Term

- 3.1 *The Employee's employment in this Position is for a fixed term of three years from the commencement date, as described in Item 4 of Schedule 1 or unless terminated earlier by either party under the provisions of this agreement.*
- 3.2 *The genuine reason for the fixed term is that the Employee's associated interests own 50% of the shares in the Company and that at the end of three years a review will be undertake to determine whether management will separate from ownership and governance. The Employee's Position has been created by this Fixed Term Agreement for the three year term of this agreement and the Employee has agreed to be employed for that duration.*
- 3.3 *The Employee confirms that unless otherwise expressly agreed in writing by the Employee and the Company, there is*

no expectation that the Employee's employment by the Company will continue beyond the end of the fixed term.

[26] Schedule 1 set out the position description, reporting, commencement date, hours of work pay and leave entitlements. Clause 11 also set out the written notice required for termination under clause 17:

11 Period of written notice required to terminate in accordance with clause 17, before the expiry of the fixed term: 4 weeks

Shareholders Deed

[27] At the same time the employment agreements were signed, a shareholders deed relating to Bay International Limited dated 3 November 2009 was executed. It gives relevant commercial context to this dispute.

[28] The deed specifically referred to the employment arrangements for Peter Hutson only. Decisions on key matters requiring approval in writing of all directors included “*any amendment to the terms and conditions of [Peter] Hutson's employment*” (clause 4.16(i)).

[29] The deed also set out the structure for decision making by the BIL Board. The quorum for a Board meeting is two directors, including at least one Group A Director and one Group B Director (clause 4.8). Group A directors appointed by Abano were Alan Clarke and Richard Keys. Group B directors were the respondents. Every director has one vote. A resolution of the Board passed if it is agreed by a majority of the Directors including at least one Group A Director and one Group B Director (clause 4.9).

The parties' positions

[30] The applicant submits upon expiry of the fixed term agreement, the respondents' employment continued on a permanent basis on the same terms and conditions. Alternatively, the parties continued their employment relationship on a permanent basis under an implied contract upon the same terms.⁸ Neither party turned their minds to the expiry of the fixed term agreement or whether any variation was required. The respondents' employment simply continued as before on a

⁸ *SJD Group Limited v KJM (Scotland) Limited* [2010] CSOH 13

permanent basis. Therefore clauses 17.2 and 17.3 form part of the respondents' terms and conditions of employment, but in the context of the employment now being permanent.

[31] The applicant further submits if clause 17.2 was intended to codify summary termination rights which would "fall away" following expiry of the fixed term, the clauses would have been worded very differently. There is no evidence of mutual intention to the extent proposed by the respondents. The meaning advocated flouts business common sense and would produce a commercially absurd outcome. The respondents would in effect upon becoming permanent employees also become masters in the employment relationship.

[32] The respondents submit the reason for the fixed term nature of the employment had been satisfied and whilst the employment of the respondents continued, it did so on some (but not all) terms which had applied during the fixed term contract. The reason for the fixed term and clauses 17.2 and 17.3 was to assess the respondents' commitment to BIL followed by permanent employment upon different terms thereafter. Clause 17.3 of the agreements was not intended to apply past the termination of the fixed term agreements. To determine otherwise would be to completely ignore the words "*prior to expiry of the fixed term*" contained in clause 17.2.

[33] The respondents further submit that the parties have chosen to structure their relationship in such a way that the respondents' managing their own employment was not an unusual occurrence. If deadlock decision making occurred arising from their employment, either could seek relief under the Companies Act (ss.240 and 241) should the deadlock persist. This situation is implied by both the fixed term agreement and the shareholders deed. There was no further discussion between the parties regarding the terms of any ongoing employment following termination of the fixed term. The Courts have found that terms such as restraints of trade in a fixed term agreement did not continue beyond the expiry of the fixed term.⁹ A similar outcome should occur here regarding clauses 17.

⁹ *Auto-Movements (NZ) Ltd v. Eveleigh* (unreported, WRC8/07, 18 May 2007, Shaw J)

Determination

[34] The basis of employment after the expiry of a fixed term is generally employment on the same terms but indeterminate in duration.¹⁰ Mutuality of intention is the essence of contract and employment agreement. In the absence of either party giving any thought to the terms of an agreement which overruns its expiry date, the parties must be assumed to continue to be bound by the existing terms of the agreement.¹¹

[35] It is common ground the respondents continued working after the fixed term. This changed their status from fixed term employees to permanent employment.

[36] The evidence supports the inference continued employment was not contemplated by the parties at the time the employment agreements were entered into. This evidence included:

- The specific references to termination after the three year fixed term within the agreements (clauses 3 and 17)
- Mr Hutson's evidence of his ill health, unsuccessful attempts to find someone to replace him in management, seeking a work/life balance and his wish not to travel through Australia and Asia for BIL.
- The shareholders deed specifically provided for the immediate transfer of Mr Hutson's Group B shares in the event he ceased to be a director and was unable to take an active role in management within the first four years.¹²

[37] The respondents' evidence about assurances from Alan Clark of ongoing employment was vague and did not detail what was said, by whom, where and when. Mr Clarke's evidence was no such discussion occurred, other than generic references without any commitment. Even if assurances were given, clause 25.1 specifically excludes any pre-contract discussions or negotiations. As stated therein, the written agreement constitutes the entire agreement between the parties.

[38] Clause 3.2 set out the genuine reason for the fixed term was the respondent's combined ownership, governance and management. At hearing Peter Hutson

¹⁰ *Varney v Tasman Regional Sports Trust*, EMPC Christchurch CC15/04, 23 July 2004 at 41.

¹¹ *Electrotech Controls Ltd v Rarere* [2007] ERNZ 586 (EMPC) at [26] – [27]

¹² Bundle of Documents (BOD) p49 Schedule 2, clause 3 shareholders deed

confirmed the intention was to separate these roles by finding another separate manager. The evidence did not support the fixed term being used to assess their commitment to BIL. Prior to employment, the respondents' had committed significant personal resources to BIL. They were well qualified and experienced business people. They would have been highly motivated given their personal investment and qualifications to ensure BIL's success.

[39] The phrase in clause 17.2 "*prior to expiry of the fixed term*" needs to be viewed in its entirety and relevant context. The phrase in its entirety "*prior to expiry of the fixed term by written notice*" refers to the four week written notice required to terminate under clause 17.¹³ It does not necessarily impose any time limitation upon the operation of clause 17. It is a reasonable interpretation that this phrase was only intended to define the period of notice of termination.

[40] Having regard to clause 3.2 and its acknowledgement of the respondents' ownership, governance and management as the basis for the fixed term, the purpose of clause 17 must logically be to enable the Group A Directors to exercise control over the respondents employment. The respondents were owners, Group B Directors and managers. It makes business common sense to ensure some control over the respondents' employment in these circumstances.

[41] I do not accept the respondents' submission clause 4.16(i) of the shareholders deed indicated all employment decisions about the respondents should be referred to the BIL Board. This clause requires all directors' agreement to amendments to the terms and conditions of Peter Hutson's employment only. I accept the applicant's submission these amendments would require the agreement of both parties in any event and this clause does not add anything to the interpretation of clause 17.

[42] I accept Mr Clarke's evidence clause 17 was intended to prevent a "deadlock" of decisions about the respondents' employment at the Board level. I accept the applicants' submission the Companies Act would not necessarily assist in the resolution of employment disputes. That legislation was never intended to be used in that way.

[43] Without clause 17, the BIL Board could be unable to terminate the respondents' employment at all, especially in the current situation where they are

¹³ BOD pp 129 and 144 Schedule 1, Clause 11 of the employment agreement

permanent employees. There is no evidence of any mutual intention clause 17 “fell away” after three years, allowing the respondents’ to self-manage their employment. Given the parties are highly skilled, knowledgeable business persons with access to legal advice, it is presumed they would have explicitly provided for this within the employment agreement if it had been within their reasonable contemplation at the time.

[44] The case law cited by the respondents as a basis for excluding clause 17 can be distinguished. In that case the restraint of trade was excluded because before the expiry date the employee was asked to stay on in a different role.¹⁴ That is not the case here.

[45] In the circumstances, the Authority determines:

- (a) The respondent’s employment is of indefinite duration.
- (b) The parties continue to be bound by the terms and conditions the respondent’s employment agreements dated 3 November 2009.
- (c) The directors appointed to the applicant Board by Abano Healthcare Group Limited or its subsidiaries may exercise on behalf of the applicant and its Board rights to terminate the respondents’ employment under clauses 17.2 to 17.3 of the employment agreements dated 3 November 2009.
- (d) The costs are reserved. If a party seeks costs, they shall have 7 days from the date of this determination to file submissions. The other party shall have 7 days thereafter to file any reply. The decision shall be made on the papers

Tania Tetitaha
Member of the Employment Relations Authority

¹⁴ *Electrotech Controls Ltd v Rarere* [2007] ERNZ 586 (EmpC) [2007] ERNZ 586, 592 at [31] Judge Shaw distinguishes *Auto-Movements (NZ) Ltd v Eveleigh* [2007] ERNZ 370.