

NOTE: An order for the payment of a penalty appears at p 4 of this determination

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Allister Butcher (Applicant)  
**AND** Sheldon and Partners Limited (Respondent)  
**REPRESENTATIVES** G Norton, Counsel for Applicant  
B R Stafford-Bush, Advocate for Respondent  
**MEMBER OF AUTHORITY** R A Monaghan  
**INVESTIGATION MEETING** 15 August 2005  
**DATE OF DETERMINATION** 5 September 2005

**DETERMINATION OF THE AUTHORITY**

**Employment relationship problem**

[1] Allister Butcher says he was unjustifiably dismissed by his former employer, Sheldon and Partners Limited (“Sheldon”).

[2] He also says Sheldon breached its good faith obligations in the way it dealt with him. A further claim for unpaid holiday pay was met in full after mediation, but no interest was paid and interest is now sought. Finally, a penalty was sought for the failure to provide Mr Butcher with a written employment agreement.

**The personal grievance**

[3] Mr Butcher is an immigrant from South Africa, where he worked as a property valuer. During 2004, while still in South Africa, he began searching on the internet for positions in other countries. Sheldon had a property valuer’s position available from June 2004, details of which it posted on the internet. Mr Butcher saw the item and made initial contact with Sheldon by email message dated 4 May 2004. He expressed interest in moving with his family to New Zealand, and described his background as follows:

“I am currently employed as a valuer for a private group of valuers, and have been since July 2003. I have been involved in the property market for nearly 11 years, starting as a trainee valuer for a government department. I then spent 4 years as a valuer for South Africa’s biggest banking group, ... The next 18 months I spent as an estate agent leading up to the position I am in now.”

[4] Shortly afterwards Mr Butcher provided a written CV listing his previous positions, and noting his formal qualifications as having passed ‘1 creditation of Property Valuation’. Although not known to Sheldon at the time, that course was part of a National Diploma in Real Estate. It was one of 12 credits required for the diploma.

[5] Unfortunately much of this problem has arisen because Sheldon made assumptions about the nature and quality of Mr Butcher's experience and qualifications on the basis of practice in New Zealand. In fact, most of Mr Butcher's work as a valuer had been on residential properties for mortgage purposes. He said that in South Africa mortgage companies looked at value for their risk, so that a valuation would provide a dollar figure for a property but not a lot more. It was not until mid-2003 that he began working in a position requiring the more in-depth valuation reports that I understand would approximate the requirements at Sheldon.

[6] For its part Sheldon employs as valuers graduates with relevant university degrees. After some training the valuers move onto a consultancy arrangement, contracting their services as valuers. By then most have obtained registration as a valuer under the Valuers Act 1948. Overall, holding a recognised qualification, as well as having three years' experience as a valuer, qualifies a person to become registered as a valuer with the New Zealand Institute of Valuers. A registered valuer must supervise and counter-sign the work of an unregistered valuer.

[7] Although Mr Butcher did not have a degree or other recognised qualification, Brian Stafford-Bush, a director at Sheldon and the person with whom Mr Butcher had been corresponding, believed Mr Butcher's 11 years' experience was significant. As far as Mr Butcher's formal qualifications were concerned, Mr Stafford-Bush indicated to Mr Butcher in an email message of 1 July 2004 that Mr Butcher may be required to complete from between a few to the full number of papers in a degree course before he could obtain registration as a valuer and work without supervision.

[8] The offer of work was confirmed in a letter dated 5 July 2005. At the time the offer was intended to be for a contract for services, indicating that Sheldon assumed Mr Butcher would not need the kind of training it gave its employed graduate valuers. An attached 'Contract for Valuation Work' appeared to reflect that intention and both parties signed it in July 2004.

[9] Armed with the offer, in or about July 2004 Mr Butcher applied to the New Zealand Immigration Service ("NZIS") for a work visa. Mr Stafford-Bush provided to the NZIS a letter dated 1 September 2004, in support of the application.

[10] Delay in the issue of Mr Butcher's visa meant Sheldon faced a growing risk of losing to other valuers work associated with the vacancy. To address this, Sheldon decided to appoint an existing staff member to the position. Unfortunately it did not warn Mr Butcher of its dilemma, and merely advised him of its decision by email message dated 30 September 2004. Mr Stafford-Bush explained the need to redeploy an existing staff member, and that there had been a slow down in the real estate market with fewer valuation vacancies. He went on to say in the message:

"We no longer have the original position available for you. That is not to say that we don't wish to employ you but we can no longer guarantee you a position. If you still want to come to NZ we will be pleased to talk to you, ..."

[11] Mr Butcher became aware the same day that his visa had been issued. He replied to Mr Stafford-Bush advising of that, and saying:

"We have set our minds on a move to New Zealand .... I am prepared to accept which ever position is available."

[12] On 17 October 2004 Mr Butcher and his family arrived in New Zealand. Mr Butcher contacted another of Sheldon's directors, Gary Brunson, to discuss the possibility of a position at Sheldon. Although by then there was no vacancy, Mr Brunson indicated a new position was being made available to Mr Butcher, in the hope that there would be sufficient work to warrant its retention. Mr Butcher began work on 1 November 2004, under Mr Brunson's supervision.

[13] Mr Stafford-Bush was absent from the office in the early part of November. On or about 22 November, when he returned, he asked Mr Butcher for a copy of his qualification. He said at the investigation meeting he did so only because he was investigating the prospect of Mr Butcher becoming a registered valuer. Mr Butcher explained to Mr Stafford-Bush that the course he had completed was real estate rather than valuation based.

[14] Mr Stafford-Bush was concerned, and spoke to Mr Brunson. During the course of that discussion another concern arose about the relevance of Mr Butcher's experience. According to Mr Stafford-Bush, while Mr Butcher's lack of qualifications was a hurdle, his skill level was also short of the requirements of private practice in New Zealand. There had been no real position for him, and I infer the view was that in the circumstances it would not be practicable to create one.

[15] Later that day Mr Butcher was called into a meeting with Messrs Brunson, Stafford-Bush and a third director. In short, he was told that it would take too long to train him to the necessary standard of work and that Sheldon could not continue to employ him. He was given one month's notice of the termination of his employment.

[16] There has not been any suggestion that Mr Butcher misrepresented his qualifications and experience. As I have indicated, the problem was that he was not questioned about them carefully enough. It may be that the result was Sheldon employed someone who was not capable of working to the expected standard, and would require significant additional training before he was able to do so. That is not Mr Butcher's fault. It is unfair to dismiss him in those circumstances.

[17] Moreover, the dismissal was implemented without following the basic requirements of a fair procedure. At their most fundamental, these include:

- (a) notifying an employee of the specific allegation or concern about that employee, and the likely consequences of the allegation or concern being upheld;
- (b) giving the employee a real opportunity for explanation or discussion; and
- (c) giving unbiased consideration to such explanation.

(ref: **New Zealand (with exceptions) Food Processing, etc, IUOW v Unilever New Zealand Limited** [ERNZ Sel Cas 582]).

[18] In addition, although the evidence about the discussions between Messrs Butcher and Brunson on 1 November was vague to say the least, the requirements of procedural fairness also apply to arrangements in the nature of a trial period. If something like a trial period was intended here, Sheldon was still obliged to warn Mr Butcher if it was forming the view that his employment could not continue beyond the end of the period.

[19] I acknowledge Mr Stafford-Bush's evidence that Sheldon tried to take a counselling role in the 22 November meeting, suggested areas of alternative employment better suited to his skills, and assisted him to make contact with potential employers. I would not wish to discourage an employer from taking that kind of approach as part of a managed termination, but these efforts do not cure the fact that Mr Butcher's dismissal was presented to him as a *fait accompli*.

[20] For these reasons I find the dismissal was unjustified. Mr Butcher has a personal grievance.

### **Remedies for personal grievance**

[21] Mr Butcher is entitled to the reimbursement of remuneration lost as a result of his personal grievance. He was paid at a rate of \$4,000 a month at Sheldon. The equivalent weekly amount is

$(\$4,000 \times 12) \div 52 = \$923.08$ . He obtained alternative employment commencing 17 January 2005, at a rate of \$25 per hour for 40 hours per week. The weekly total exceeds the weekly total at Sheldon, so that the relevant calculation of loss concerns the period between the date of termination at Sheldon and commencement in the new position.

[22] That period was 3.5 weeks. However Sheldon was closed for its Christmas shutdown period between 23 December 2004 and 4 January 2005. A skeleton staff worked from 5 – 7 January 2005, but Mr Butcher could not work without supervision so could not have worked on those days. The first person capable of supervising Mr Butcher returned to work on 10 January 2005. Mr Stafford-Bush pointed out that, because of his length of service, Mr Butcher would not have qualified for paid annual leave for the period of the shutdown.

[23] Accordingly Mr Butcher has lost remuneration in respect of the week beginning 10 January 2005. The loss is \$923.08. Since the problem Sheldon encountered was due largely to its failure to properly check Mr Butcher's qualifications and experience I do not believe any inadequacies in Mr Butcher's performance should be invoked to reduce that amount. Accordingly Sheldon is ordered to pay Mr Butcher \$923.08, with appropriate adjustments for tax.

[24] Mr Butcher gave evidence of injury to his feelings, and is entitled to compensation for that injury. I assess the amount at \$4,000 and order accordingly. Although considerably more was sought, I am not satisfied that many of the matters invoked in support are attributable to the personal grievance.

#### **Interest on holiday pay**

[25] Pursuant to Schedule 2, clause 11 of the Employment Relations Act 2000, the Authority has the power to include interest in a sum for which judgment is given. However since the claim for holiday pay was met following mediation, I have not been asked to give judgement in respect of the matter. I therefore decline to make an award of interest on the sums so paid.

#### **Penalty for failure to provide written employment agreement**

[26] Section 64 of the Employment Relations Act was still in force in November 2004. Subsection (2) required, among other things, that new employees be given a written employment agreement addressing specified matters. Section 64(3) made employers who failed to do so subject to a penalty in respect of the failure. Mr Butcher was not given the required written agreement.

[27] No reason was given for the failure, although initial confusion about whether Mr Butcher was to be an employee or a contractor may have played a part. There are, however, wider public policy reasons for requiring employers to provide their employees with written employment agreements. In recognition of that a modest penalty is warranted. Sheldon is ordered to pay in to the Authority the sum of \$250.

[28] I comment further that, if Mr Butcher's ongoing employment was conditional on Sheldon being able to justify maintaining a permanent position for him, the associated arrangement could and should have been included in a written agreement.

#### **Breach of good faith**

[29] I was not addressed on precisely what was relied on in support of the allegation of breach of good faith. I have assumed the allegation is based on the encouragement Mr Butcher says he received, and on the circumstances in which his employment ended.

[30] I do not believe Sheldon acted in bad faith when it encouraged Mr Butcher to come to New Zealand and work for it, although its manner of informing him that the original position had been filled left something to be desired. It also seems to me that by purporting to withdraw its offer Sheldon breached a concluded contract, but that matter has not been an issue in this employment relationship problem and I take it no further. Pursuing the matter would, in any event, first require a finding as to whether the agreement was in reality a contract of or for service.

[31] As for the fate of Mr Butcher's employment, the circumstances are attributable to poor recruitment practice rather than to a breach of good faith.

### **Summary of orders**

[32] Sheldon is to pay Mr Butcher:

- (a) \$923 as reimbursement of remuneration lost as a result of his personal grievance; and
- (b) \$4,000 as compensation for injury to his feelings resulting from his personal grievance.

[33] Sheldon is to pay the Authority a penalty of \$250 for the failure to provide a written employment agreement to Mr Butcher. For its information, the penalty will be forwarded to the Crown Fund.

### **Costs**

[34] Costs are reserved. The parties are invited to reach agreement on the matter. If they seek a determination from the Authority they may file and exchange memoranda setting out their positions.

**R A Monaghan**  
**Member, Employment Relations Authority**