

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 64
5272262

BETWEEN DUNCAN CARTER
 Applicant

A N D VANDA WHOLESAL
 BLIND CO LIMITED
 Respondent

Member of Authority: Dzintra King

Representatives: Blair Edwards, Counsel for Applicant
 Timothy Wallace, Advocate for Respondent

Investigation Meeting: On the papers

Date of Determination: 18 February 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Duncan Carter, the applicant, says that he was unjustifiably dismissed by the respondent, Vanda Wholesale Blind Co Limited. The respondent says that the dismissal was justified.

[2] Mr Carter was employed as General Manager of Vanda Wholesale Blind Co Limited and was made redundant on 9 February 2009. He believes that the reason given to him for the redundancy was disingenuous and that the implementation of the redundancy lacked a fair procedure.

[3] Mr Carter said that in the second quarter of 2008, he and Mr Timothy Wallace decided they would set up a blind manufacturing company, Vanda Wholesale Blind Co Limited, to service the wholesale market. As part of the agreed set up he was to be employed as General Manager for a salary package of \$65,000 gross per annum plus company vehicle and telephone expenses. He was employed from 1 June 2008,

being the sole employee of the company at that stage. His initial duties were the design and set up of the business infrastructure, ranging from making the newly used factory premises habitable, seeking office furniture and equipment, designing and coordinating the manufacture of marketing material and writing marketing material for circulation by Vanda Holdings Limited. Once set up, he was to oversee the day-to-day running of the business.

[4] After a fairly slow start Mr Carter said they started to see a reasonable volume of sales through in October and hired another employee, sales building to a peak in November/December, prior to the Christmas close down. A large commercial job originally scheduled for December was moved to January due to delays and so the other employee and Mr Carter took a shorter than usual Christmas/New Year break in order to fulfil that order during January.

[5] On Friday 30 January, he had a visit from Mr David Wallace who had rung him earlier in the week to say that he wanted to come and discuss some shareholder matters. Mr David Wallace was a shareholder of the company and a director of Vanda Holdings Limited. Mr David Wallace told Mr Carter that sales were slow and there was not much in the bank account and that all the shareholders, with the exception of Mr Carter's wife who had not yet been officially notified, had decided that it was not working and that they should pay their creditors for the January accounts and wind things up forthwith. As a result, Mr Carter was to be made redundant effective immediately. Mr Carter said they should allow it to run into the second quarter of the year to give the market time to gear up for 2009 but that was rejected. He then said if the business was to be wound up, his last pay day should be the day after his return from holiday, Monday 9 February, as he would need to take a day to reclaim all his tools and equipment and relocate those to his workshop premises. He was told the business was being wound up so his position was not required any more.

[6] Mr Carter believed that his employer took knowledge from him as the business was showing signs of success for the future and wanted to end his employment so the business overheads could be cut by not having to pay his salary. His termination would remove the only non-family member who had any say in the running of the business.

[7] On 9 February Mr Tim Wallace wrote a letter stating:

This letter confirms that Duncan Benjamin Jeremy Venton Carter has worked for Vanda Wholesale Blind Co Limited since it started operating on 1st June 2008.

The shareholders have agreed that the company be wound up therefore his position as general manager is no longer required. Should you require further information please feel free to contact me on 09 580 1350.

[8] On 31 March 2009 a solicitor acting for the company wrote to Inland Revenue stating that the company had ceased trading and wished to be removed from the company register. He enclosed a copy of the GST return, the PAYE return and a resolution of the shareholders to cease trading. The GST and PAYE were cancelled and the bank account was to be closed.

[9] Mr Wallace said that the company had no alternative but to take the action that it did. It had been in a precarious financial position for several months prior to February 2009 and was rapidly becoming more insolvent as time wore on, surviving only thanks to temporary funds borrowed from both Vanda Holdings Limited and Davani Design Limited to pay wages and other incidentals. Mr Wallace said Mr Carter was told of the company's financial situation on many occasions as its financial position steadily worsened but appeared unwilling to take any responsibility. The only substantial job that the company had been successful in securing since its inception was ready for delivery in late January 2009 for payment in late February, which did happen, however there were no follow up orders in hand at that time so the immediate outlook was bleak.

[10] Assessing the situation on 30 January 2009, it appeared there would be sufficient profit available from the large job just invoiced to pay all trade creditors' accounts and to pay IRD for PAYE and GST but nothing would be left to pay wages, rent, vehicle lease, interest or loan repayments. The only responsible thing to do was to cease trading and take advice on the proper procedure for winding-up the company and ensure that no further debts were incurred, albeit that did not release the company from the obligation of rental payments on the leased factory unit or the monthly finance charges on the leased Toyota van.

[11] Mr Wallace said it could not have come as any surprise to Mr Carter to have been told of that decision on 30 January as he was well aware of the company's

position. However, he seemed to accept this in his usual nonchalant way and said he was off on a week's holiday and was using the company van for that purpose. On his return from holiday, Mr Carter and Mr Tim Wallace jointly undertook a detailed stock take. David and Annette Wallace gifted the company sufficient funds to cover Mr Carter's holiday pay and redundancy pay so as not to jeopardise the company's ability to meet creditor accounts and IRD settlements. The company ceased trading on 9 February 2009. Proceedings were then instigated by the company's lawyer to wind the company up. At the date of this determination the company is still listed on the Companies Office register.

[12] On 15 April 2009 IRD wrote to the company regarding the notification of cancellation of GST registration stating that that had been cancelled with effect from the taxable period ending 31 March 2009.

Was the dismissal justified?

[13] It is clear that the manner in which the dismissal was carried out renders it unjustified. It is not sufficient to say that Mr Carter would have known of the financial situation. He was unable to participate in the decision as to whether or not the company was going to be wound up and his employment was to cease.

[14] I am satisfied that his position was disestablished and that the redundancy was substantively justified.

[15] Mr Carter is therefore able to claim compensation pursuant to s.123 (1) (c) (i) for humiliation and distress. He is not, however, able to make a claim for lost wages.

[16] I set the amount of compensation at \$3,000.

Costs

[17] If the parties are unable to resolve the issue of costs, the applicant should file a memorandum within 28 days of the date of this determination. The respondent is then to file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King
Member of the Employment Relations Authority