

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 173
5360375

BETWEEN KATHY GUDOPP
Applicant

AND DHALL & NASH FINE
WINES LIMITED
Respondent

Member of Authority: G J Wood

Representatives: Russell Wilson, for the Applicant
Puneet Dhall, for the Respondent

Investigation Meeting: By way of Teleconference on 1 November 2011

Submissions Received: 1 November 2011

Determination: 10 November 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Kathy Guddop, claims that the respondent, Dhall & Nash, has not complied with the record of settlement reached between the parties. By contrast, Dhall & Nash claims that it has complied with all the terms of settlement.

Factual discussion

[2] This matter relates to compliance of a mediated settlement. By the time the investigation meeting concluded, the only issue between the parties related to a *product list* issue. In particular, Mr Dhall undertook to provide Ms Gudopp with a reference that was signed with an original rather than an electronic signature, by 8 November 2011.

[3] All other outstanding matters had been resolved. Thus only one term of settlement is relevant. It states:

In addition as part of the settlement the employer will provide a product list to the employee within 7 days of date hereof. Thereafter the employer will supply within 7 days of order by the employee \$500 of its fine wine product in each of the months of September/October/November/December 2011. For the avoidance of doubt the \$500 monthly order is at wholesale/trade rates. (See attached)

[4] The attached handwritten document states:

*\$2,000 of D&N product over four months starting Sept.
\$500 per month
i.e: Framingham SB \$10.90 exc per bottle
i.e. Santa Ana Reserve Malbec \$10.95 exc per bottle
i.e. delivered to my address free of charge.
These are trade/wholesale prices
D&N would sell them to joe public for more than that. Equally they
would buy them in for less than that.*

[5] Ms Gudopp construed this agreement as requiring Dhall & Nash to utilise its trade catalogue, 2nd edition 2011, as the agreed *product list*.

[6] By contrast, Dhall & Nash considers that a list of product on hand, which is non-consignment and immediately available, meets the terms of the agreement. This list, produced by Mr Dhall, contains more than 50 types of wine, much of which is very much "*fine wine*", with a value of many tens of thousands of dollars.

[7] Mr Wilson, on behalf of Ms Gudopp, noted that this list did not allow Ms Gudopp to determine whether or not the prices quoted were trade prices. Mr Wilson also submitted that a product list was not equivalent to stock on hand, particularly given the words "*fine wine product*", which meant that it was any product available to customers generally. However, in fact the product on the trade catalogue list appears to be available only to trade customers. Mr Dhall noted that Dhall & Nash had a memorandum of understanding with suppliers on its trade catalogue that it would only sell to trade customers of which Ms Gudopp was not one.

[8] I accept that the bulk of wine sold by Dhall & Nash is on consignment and not from existing stock. I also accept, on the balance of probabilities, that it has an agreement with its suppliers to only sell, under its trade catalogue, wines to trade customers, which Ms Gudopp was not. However Mr Wilson noted that, under the

agreement, Ms Gudopp was not being sold product, it was just provided to her under the terms of agreement.

Determination

[9] I determine that the product list supplied by Dhall & Nash, of stock on hand, does not meet the terms of the parties' agreement. I do so for the following reasons.

[10] First, the attachment provides that certain bottles of wine will be made available under the agreement, not may be, as the term i.e. is used, rather than e.g. Those wines mentioned were a Framingham Sauvignon Blanc and a Santa Ana Reserve Malbec. Both of these wines are available under the trade catalogue, but neither is available under the stock list drawn up by Mr Dhall. As a result, it can not have been contemplated by the parties, in agreeing that such bottles were part of the product list to be supplied, that the product list would be a list of stock on hand, as provided by Mr Dhall.

[11] Second, the words "*fine wine product*" imply more than just stock on hand. While some legitimate confusion may have arisen because of the word *a*, in *a product list*, which implies there may be more than one list contemplated, and thus it may not be the trade catalogue list, equally if the parties had agreed on a list of stock on hand they could have written up the agreement in those terms.

[12] Third, the attachment provides for trade/wholesale prices, which the trade catalogue sets out clearly, but this is not clear from the stock on hand list provided by Mr Dhall. Furthermore, the agreement contemplates some benefit to Ms Gudopp, in that the cost is to be less than that charged to "*Joe Public*", which the stock on hand list does not necessarily guarantee.

[13] It therefore follows that Dhall & Nash is in breach of the record of settlement by failing to provide Ms Gudopp with a copy of its trade catalogue. However, Ms Gudopp has managed to source one from elsewhere, so therefore there is no need to order compliance with that part of the terms of settlement, except if the trade catalogue were to change, in which case Dhall & Nash would be required to supply Ms Gudopp with a new copy as soon as it comes into effect.

[14] It is also clear that Dhall & Nash should be required to comply with the orders made by Ms Gudopp of its fine wine product in September 2011. By way of

compliance order therefore, I order that the respondent, Dhall & Nash Fine Wines Limited, is to deliver, free of charge, by 25 November 2011, to Ms Kathy Gudopp's address, the orders she made by email on Wednesday, 14 September 2011.

[15] If Dhall & Nash had complied with the agreement then the orders for October and November may well have been completed, or at least underway. However it certainly could not do so yet for December. Because the ordering process for these months has not taken place yet, I can not make any compliance orders in respect of those months. I do, however, remind Dhall & Nash of its obligations to meet the terms of the settlement, and indicate that should any further applications for compliance be required, then there may be implications for it over any unnecessary costs from such an application or applications.

[16] I also refer Dhall & Nash to the provisions of ss.138(6) and 140(6) of the Act, whereby failure to comply with this compliance order may expose it to fines and orders for its property to be sequestered.

Costs

[17] Costs are reserved.

G J Wood
Member of the Employment Relations Authority