

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2012] NZERA Auckland 308  
5373452

BETWEEN                      MARK HILLMAN  
Applicant

A N D                              SKL8 LIMITED  
Respondent

Member of Authority:      Rachel Larmer

Representatives:            Patrick McGuire, Counsel for Applicant  
   Maria Dew, Counsel for Respondent

Investigation Meeting:      On the papers

Submissions Received:      13 July 2012 from Applicant  
   27 July 2012 from Respondent  
   2 August 2012 from Applicant

Date of Determination:      06 September 2012

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**DETERMINATION OF THE AUTHORITY**

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**A.      The Authority has jurisdiction to determine:**

- (a)      Mr Hillman's constructive dismissal claim;**
- (b)      Mr Hillman's remedies claim under s.123(1)(c)(ii) of the Employment Relations Act 2000 (the Act) for lost benefit(s);**
- (c)      Mr Hillman's claim for compensation under s.123(1)(c)(ii) of the Act for lost shares provided any such loss arises from a personal grievance;**
- (d)      The basis on which compensation awarded under s.123(1)(c)(ii) of the Act is to be assessed, including the basis on which any shares lost due to a personal grievance are to be valued.**

- B. The Authority does not have jurisdiction to determine:**
- (a) A shareholder dispute between Mr Hillman and Mr Koekemoer;**
  - (b) The rights and interests created under the Shareholders Agreement;**
  - (c) Minority shareholding claims.**
- C The issue of what if any lost benefit(s) Mr Hillman has lost as a result of a personal grievance is not a shareholder dispute or a minority shareholding claim.**

### **Employment relationship problem**

[1] Mr Hillman commenced employment with SKL8 Limited (SKL8) on or around 20 September 2010 as its Projects Manager. He was employed under a written individual employment agreement which SKL8 says was offered and agreed prior to him commencing employment.

[2] Mr Hillman did not sign his employment agreement until 17 May 2011 and he signed SKL8's common terms and conditions on 27 September 2011.

[3] Prior to 28 November 2011 Mr Steven Koekemoer was the sole director and 99% shareholder<sup>1</sup> of SKL8. In or around June 2010 Mr Hillman and Mr Koekemoer commenced discussions about Mr Hillman joining SKL8 as an employee. There were also parallel discussions about Mr Hillman being offered a 20% shareholding in SKL8, subject to:

- a. Mr Koekemoer completing a capital restructuring to permit the issue of new shares and the subsequent transfer of 20% of the total shares from him to Mr Hillman;
- b. Mr Hillman entering into an employment agreement with SKL8;
- c. Mr Koekemoer and Mr Hillman entering into a Shareholders Agreement on terms to be negotiated.

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<sup>1</sup> His wife was a 1% shareholder.

[4] SKL8 says Mr Hillman accepted employment and commenced work prior to there being a concluded agreement between him and Mr Koekemoer as to the terms of the shareholding offered and the Shareholders Agreement.

[5] The Shareholders Agreement was executed by the parties on 28 September 2011 but the parties agreed it would retrospectively become effective from the commencement of Mr Hillman's employment. Mr Hillman was appointed as a shareholder and director of SKL8 as from 28 November 2011.

[6] Clause 8.2(a) of the Shareholders Agreement requires Mr Hillman to transfer his shares to Mr Koekemoer immediately for no consideration if Mr Hillman's employment with SKL8 ended, for any reason, within the first two years. This two year period expires on 20 September 2012.

[7] Mr Hillman resigned with effect from 7 February 2012. Mr Hillman claims his resignation was a constructive dismissal which resulted from Mr Koekemoer allegedly destroying the trust and confidence inherent in their employment relationship.

[8] Mr Hillman transferred his SKL8 shares to Mr Koekemoer for no consideration in accordance with clause 8.2(a) of the Shareholders Agreement after his employment ended.

[9] One of the remedies Mr Hillman seeks is compensation for lost benefits under s.123(1)(c)(ii) of the Employment Relations Act 2000 (the Act). He also seeks compensation for the loss of his SKL8 shares *on a "fair value" basis in accordance with the Shareholders Agreement*.

[10] SKL8 says the Authority does not have jurisdiction to:

- a. Determine Mr Hillman's claim for the alleged loss of SKL8 shares; or
- b. Award the remedy sought by Mr Hillman of compensation for the loss of his shares on a fair value basis.

[11] SKL8 says the above two matters are in reality a *shareholder claim* which it submits is a separate and distinct claim arising solely under the Shareholders Agreement and which has at its heart a claim against Mr Koekemoer as the other party to that Shareholders Agreement.

[12] SKL8 admits the facts which give rise to what it described as the *shareholders claim* are broadly speaking the same as those which give rise to the employment relationship problem. However, it says the Authority is not empowered to resolve disputes between shareholders just because a dispute might factually arise in the same circumstances as an employment relationship.

### **Investigation Meeting**

[13] The parties agreed that the jurisdiction issue should be dealt with as a preliminary matter on the papers. No evidence was filed, so the facts in this determination are taken from the Statement of Problem (SoP) and Statement in Reply (SiR).

### **Issues**

[14] The following issues require determination:

- a. What does the Authority have jurisdiction to determine?
- b. What does the Authority not have jurisdiction to determine?

### **What does the Authority have jurisdiction to determine?**

[15] In the SoP Mr Hillman identifies the following problem for the Authority to resolve: *a personal grievance for constructive dismissal against SKL8 Limited*. There is no dispute the Authority has jurisdiction to determine that claim.

[16] Mr Hillman seeks the remedy of compensation for a lost benefit under s.123(1)(c)(ii) of the Act. If the Authority determines Mr Hillman has a personal grievance then it is clear it has jurisdiction to provide compensation under s.123(1)(c)(i) of the Act for the *loss of any benefit, [...], which the employee might reasonably have been expected to obtain if the personal grievance had not arisen*.

[17] The real dispute between the parties therefore appears to be whether the Authority may compensate Mr Hillman for his alleged loss of shares on a “*fair value*” basis in accordance with the Shareholders Agreement. I consider there are two aspects to this issue which need to be determined, namely:

- a. Can the Authority award compensation for lost shares?
- b. If so, can it award compensation on a “*fair value*” basis?

*Can the Authority award compensation for lost shares?*

[18] The decisions of the Employment Court in *NZ Clerical Workers’ Union Inc v Walker Corporation Limited*<sup>2</sup> and *Smith v Practical Plastics Limited*<sup>3</sup> and of the Court of Appeal in *Walker Corporation Limited v O’Sullivan*<sup>4</sup> all recognise that the loss of shares is a benefit which may be compensated provided the employee might reasonably have been expected to have obtained the benefit of the shares had they not been wrongly or unjustifiably dismissed.

[19] The employee in *Smith* claimed his wrongful dismissal resulted in the loss of his 4000 shares when the employer sold them under a lien in order to reduce the balance of his current account, which it had required him to repay upon dismissal.

[20] The employer in *Smith* unsuccessfully argued the Court did not have jurisdiction to award damages for the loss of shares because the lien was exercised after Mr Smith had been dismissed, so his claim could not have been founded upon the employment contract.<sup>5</sup> The employer contended Mr Smith’s claim was therefore a dispute between shareholders over which the Court had no jurisdiction.

[21] The Employment Court held it could award Mr Smith damages to compensate him for the loss of the value of his shares which it found had arisen from the exercise of the lien, because it held that his shares had been sold as a result of his wrongful dismissal. Mr Smith was entitled to be restored to the position he would have been in had his employment contract not been breached by the wrongful dismissal. The Court held that would have left Mr Smith in possession of his 4000 shares, so he was entitled to the value of them.

[22] The Court of Appeal in *O’Sullivan* acknowledged the Labour Court under s.227(c)(ii) of the Labour Relations Act 1987 (LRA) and the Employment Court under s.40(1)(c)(ii) of the Employment Contracts Act 1991 (ECA), after concluding an employee had a personal grievance, could award compensation for *the loss of any*

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<sup>2</sup> Unreported, Colgan J, 12 March 1996, CEC7/96.

<sup>3</sup> [1998] 1 ERNZ 323.

<sup>4</sup> [1996] 2 ERNZ 513.

<sup>5</sup> This was a case under the Employment Contracts Act 1991.

*benefit, whether or not of the monetary kind, which any worker might reasonably have been expected to obtain if the personal grievance had not arisen.*

[23] The Court of Appeal held that the loss of benefit provisions in the LRA and ECA did not require *that the particular claim be rooted in the employment contract. Rather, it is the loss of the benefit which the worker, but for the unjustified dismissal, might reasonably have been expected to obtain which determines the scope of the Court's power to grant relief.*

[24] I find the Court of Appeal's ratio also applies to s.123(1)(c)(ii) of the Act which mirrors the loss of benefit provisions in the LRA and ECA. Accordingly, the Authority has jurisdiction to award Mr Hillman compensation under s.123(1)(c)(ii) of the Act for the loss of shares if it determines such loss would not have occurred but for his unjustifiable dismissal.

*Can the Authority award compensation a "fair value" basis?*

[25] The applicant seeks compensation for his loss of shares on a "fair value" basis in accordance with the Shareholders Agreement. The Shareholders Agreement defines "Fair Value" in Appendix 1.

[26] The Court of Appeal in *O'Sullivan*<sup>6</sup> noted that the loss of benefit remedy provisions in the LRA and ECA were not limited to a purely contractual assessment of loss. It held that *what is involved is determining what loss of benefit, which [the employee] might reasonably have been expected to obtain, has occurred because of the unjustified dismissal.* It expressly recognised that an assessment of the loss of benefit was not merely a matter of determining the price of the shares as at the date of termination.

[27] The Employment Court in *Smith*<sup>7</sup> also did not accept that the appropriate assessment of the loss of benefit of the shares involved valuing them as at the date of termination. The Court reserved for further consideration the valuation of the shares in order to determine the amount of the employee's loss. The Court specifically recognised that one of the issues to be determined would involve the date of the valuation.

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<sup>6</sup> Ibid 4.

<sup>7</sup> Ibid 3.

[28] The basis on which the Authority assesses compensation for a loss of benefit arising from an unjustified dismissal is dependent upon its view of the evidence in support of such loss. I therefore find that is a matter which will need to be addressed at the substantive investigation.

[29] Insofar as jurisdiction is concerned, I consider the Authority has a wide discretion to determine how any lost benefits that are to be awarded should be assessed and valued. The Authority is unable to form a view about what method of valuation is appropriate until it has made factual findings about the loss allegedly caused by a personal grievance.

[30] At this stage I merely record that Mr Hillman's claim that his alleged loss of shares should be valued as per the "*fair value*" definition in the Shareholders Agreement does not preclude the Authority's jurisdiction to determine how compensation awarded under s.123(1)(c)(ii) of the Act is to be assessed.

[31] In accordance with the Court of Appeal's decision in *O'Sullivan*<sup>8</sup>, the amount of any compensation that may be awarded will depend on the Authority's assessment of the actual loss (if any) that it finds Mr Hillman suffered should it determine he was unjustifiably dismissed.

**What does the Authority not have jurisdiction to determine?**

[32] The Employment Court in *Smith*<sup>9</sup> held that it was not its role to comment on any allegations of oppression of a minority shareholder or the rights of shareholders under the articles of association of a company.

[33] It follows the Authority does not have jurisdiction to determine:

- a. A shareholder dispute between Mr Hillman and Mr Koekemoer;
- b. Claims regarding any rights and interests created under the Shareholders Agreement;
- c. Minority shareholding claims.

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<sup>8</sup> Ibid 4.

<sup>9</sup> Supra 7.

**Outcome**

[34] The Authority has jurisdiction to award Mr Hillman compensation under s.123(1)(c)(ii) of the Act if it determines he has a personal grievance and that he lost his SKL8 shares as a result of that grievance.

[35] The Authority does not have jurisdiction to investigate or determine alleged breaches of the Shareholders Agreement, a shareholder dispute, or minority shareholding claims.

[36] I find that the issue of what if any benefit(s) (including SKL8 shares) Mr Hillman has lost as a result of a personal grievance is not a shareholder dispute so therefore be determined by the Authority.

[37] This matter will now be timetabled for a substantive investigation.

**Costs**

[38] Costs are reserved to be dealt with at the conclusion of the substantive proceedings.

**Rachel Larmer**  
**Member of the Employment Relations Authority**