



From the outset there were major production problems and Mr Cashmore became a full time working director undertaking an operational and management position dealing with resolving manufacturing problems and general operational, financial and process functions. Mr Lewis was responsible for marketing and sales, channel management and customer relationships. Mr Lewis said that in the first few years the emphasis was more on dealing with production problems than on marketing end sales and that there was no strict demarcation between operational and marketing issues, although marketing was his responsibility. Mr Cashmore and Mr Lewis agreed that they worked informally and co-operatively. No employment agreements were ever formulated and there were no job descriptions.

In 2004 the four shareholders agreed that Mr Cashmore would become the General Manager. Mr Lewis said he was the Sales and Marketing Director and that until early 2006 he was working in that role in the New Zealand and international markets. Mr Cashmore said he had to take on more and more of Mr Lewis's responsibilities.

The parties agree that in early 2006 Mr Lewis took on primary responsibility for developing the Australian market. Mr Cashmore referred to there having been three restructurings of which this was the third. Mr Lewis said there had not been a formal arrangement or restructuring as they worked in a collaborative way. He agreed he had asked for assistance but said that was because he had too much work and not enough time to carry out all the tasks.

Undertaking responsibility for Australia involved commuting to and from Australia as Mr Lewis had family in New Zealand and did not wish to move. Mr Cashmore undertook several of the duties and responsibilities that Mr Lewis had had in the New Zealand market and voluntarily took on the UK market.

There was a dispute about whether Mr Lewis's taking up of the duties in Australia was temporary. I am satisfied that it was. An internal memo from Mr Cashmore makes this abundantly clear. Furthermore, had the undertaking of responsibilities for the Australian market been intended to be permanent Mr Lewis would have relocated and have moved his family. Although Mr Lewis and Mr Cashmore did not expressly discuss and agree what Mr Lewis would do upon his return to New Zealand, given that Mr Lewis had not relinquished his existing position that is the position that he would have continued to hold.

Mr Lewis said he spent several months in Australia and was at the same time still ultimately responsible for managing the New Zealand business. However, on his return trips to New Zealand he noticed he was being excluded from meetings, decisions and arrangements that he would previously have been involved in and would have been his responsibility. The evidence indicated that Mr Lewis was being excluded.

Mr Cashmore said that once the new structure (Mr Lewis taking responsibility for Australia) had been agreed there was no sense asking Mr Lewis to get involved with the sales and marketing initiatives in New Zealand or the United Kingdom because they were no longer his responsibility. Mr Lewis, however, did regard them, correctly, as his responsibility and wanted to be kept abreast of what was happening.

Although there was some flexibility in the duties undertaken I am satisfied that Mr Lewis had not agreed to relinquish his marketing role. He indicated both verbally and in writing to Mr Cashmore that he felt he was being taken over and shut out and that he was dissatisfied with this.

Mr Lewis said that the working relationship between him and Mr Cashmore more became increasingly strained. Mr Cashmore agreed there had been an increase in tension and said that had

been primarily as a result of his insistence that once they had agreed a restructure they were to stick to it. He believed that was a totally appropriate response in the circumstances whereas Mr Lewis saw the situation as one where he was being consistently overridden and shut out.

While Mr Lewis was in Australia he asked Mr Cashmore to take on more of his responsibilities. Mr Cashmore said he told him he was not good at detail and did not enjoy management. After a visit to Australia in August 2006 Mr Cashmore decided that there needed to be a serious review of the staffing structure, particularly in the marketing area as the company had not achieved the expected growth in Australia.

### 15 August 2006 Board Meeting

The Board asked for a detailed marketing plan.

After the meeting Mr Cashmore, Mr Lewis and Mr Peter Reiber met to discuss the changes that needed to be made. Mr Cashmore said he indicated that a new staff structure was required and that they should work towards taking a restructuring plan back to the Board. He said Mr Lewis seemed unsure about any proposed changes so Mr Cashmore suggested he write a job brief on the role he felt he should perform.

Mr Lewis did so. This was some time towards the end of August. The job description he furnished was that of a Sales and Marketing Director. Mr Cashmore asked Mr Lewis why he had done that when he had consistently said he wanted to move away from management. Mr Cashmore told Mr Lewis that that the changes that had happened earlier had taken place because the structure had not worked and that he saw no value in returning to that situation. The two were unable to agree and Mr Cashmore told Mr Lewis that he would not support either the continuation of the status quo nor the arrangement proposed by Mr Lewis.

Mr Cashmore considered that the company needed to create a specialist marketing role and to attract a high quality marketer and also to create a direct sales role. Mr Cashmore discussed his view with Mr Alison and My Paykel and they asked him to prepare a paper for the Board.

Around 18 September Mr Cashmore was in the process of producing his proposal for the Board regarding the disestablishment of Mr Lewis' position.

The three then met to discuss the rationale behind the paper and the draft job descriptions. Mr Cashmore said the discussions took place in early November. They agreed that the restructuring had merit and they should start a consultative process with Mr Lewis.

### The Proposal

This reads:

- 1. The lack of effectiveness of the company's sales and marketing performance is a significant barrier to progressing the profitability of the company and meeting the company's objectives.*
- 2. In my view, this is principally a structural problem. It is simply not possible for the company to achieve it's [sic] objectives under the current structure.*
- 3. Therefore a restructuring of the company's sales and marketing is recommended. The purpose of the restructure is to ensure that we have the correct positions and the correct*

*skills in those positions so that we are focused on the key areas that will drive the company forward.*

Mr Cashmore then set out what he regarded as the skills that were required by the company. He posited the setting up of two roles: a distribution and marketing management role and a direct sales role. Of the management role he said:

*The company requires management skills, marketing and partnering with its channel partners. In my view, this should be a role filled by a senior specialised marketer. It will have responsibility for international markets and products in multiple channels. The tasks to be performed by this role ...are:*

- *Support in developing Marketing Strategy*
- *Support in developing Distribution Strategy*
- *Execution thereof*
- *Jointly with GM, building long term relationships with customers*
- *Marketing programs and material:*
  - *Generating awareness Through the chain including the consumer)*
  - *Collateral (consistent, appropriate, up to date, available)*
  - *Web site maintenance*
- *Support of distributors through:*
  - *Correct collateral*
  - *Technical support*
  - *Sales support as required*
- *Administration of distributors*
- *Selling to distributors and key accounts*
- *Selling to other parties in the supply chain as required*

Mr Cashmore also said:

*If we went with this approach, and assuming the Board wished for me to remain in the General Manager's role, then we have a potential redundancy situation with Clive. Obviously that is a very difficult and sensitive issue but if the view is the structure is wrong, then we have to correct it.*

*Clive may feel he can do the Marketing Manager's role, and we certainly need to consider him for this, if he wanted it, but the question must be whether he has the specialist marketing skills we need. It is not an area where he has a proven track record. Obviously we would also need to discuss his interest in the sales role but this may not be something that interests him.*

Apart from the job descriptions attached to the proposal this document was not made available to Mr Lewis until he filed proceedings. He was therefore unable to comment on the adverse remarks in it.

### 18 September

Mr Lewis had a meeting with Mr Cashmore which prompted him to write a letter the next day. He did not accept that it was reasonable for him to be told that his role in the business was simply to provide the ideas and to have no practical input into the business. Mr Lewis wrote:

*The final thing that you pointed out last night was that going forward my role is simply to give you ideas and not to be involved in the implementation of the marketing and creative process.*

*I am finding it progressively harder to understand why the creative and marketing process is continually and constantly undermined.*

...

*I have never in my working career felt that my work and what I have wanted to do is so constantly and continually undermined.*

*You question, you micromanage and want to control almost everything I do. I feel ideas and concepts, even talking out loud about raw thoughts to enable these to be firmed up and worked on is frowned upon.*

...

*I am however very good at what I do when I am allowed to do it. Going forward focusing on sales generating revenue and ensuring marketing holds its rightful position in this company is something I am passionate about and will not give up.*

Mr Lewis said Mr Cashmore told him that he was going to become a sales rep and gave him a commission table relevant to such a role. Mr Cashmore agreed he had done this and said the table would have been relevant had Mr Lewis agreed to take up a sales role. Mr Lewis said he felt very humiliated

Mr Cashmore replied to Mr Lewis's letter by email saying:

*The business has suffered from a lack of quality implementation in this area [marketing] and that is what I want to get out from you. There are many very good ideas that wilt and die on the road to implementation. ...*

*The issue between us is that over the period of the last 5 years I have had to take on an increasing workload and responsibility from you. Apart from the cost to me, I have had no compensation for the fundamental change in responsibility, and likewise, you have retained compensation despite dramatically reduced responsibility. My issue is that this is inequitable, and it would be preferable to sort those out ourselves.*

Mr Harrison contended that this email should have been disclosed to the Board members as should Mr Lewis's letter. Mr Cashmore said he thought he had seen the letter but was not sure when that had been.

Mr Lewis was very unhappy and asked for a meeting with the Board so that he could try and resolve the problems. He organised a presentation for the anticipated meeting. He said he wanted to bring the Board's attention to the problems and frustrations that had developed in the working relationship and to offer a proposal for resolving matters.

#### 7 December 2006 Meeting

The meeting was set for 7 December. Mr Alison said he was unaware that Mr Lewis had requested a meeting. At the meeting, before Mr Lewis had an opportunity to speak or make his presentation,

he was given a letter advising him of the proposed restructuring and his redundancy. Mr Lewis said that once he was given the letter he felt that the opportunity for him to say anything had gone. He said that once he had read the letter he was stunned.

Mr Cashmore could not explain why he had not given Mr Lewis an opportunity to have his say prior to giving him the letter. Nor could he explain why he had not told Mr Lewis that the purpose of the meeting had changed. He just said “we’d reached the point where we needed to put forward a proposal for restructure.” It is not surprising that Mr Lewis expressed disquiet about this when he responded to the letter on 14 December.

The 7 December letter signed by Mr Cashmore as director said:

*The purpose of this letter is to confirm, in writing, how your fellow Directors view the current staffing situation at Stonex:*

- 1. As we’ve discussed many times, the current structure is not working as effectively as we need. We all agree that we’ve got a great product. However, I believe, and so the other Directors, that we don’t yet have the specialist marketing skills in house that we need to achieve our objectives in our target markets.*
- 2. To that end, we believe Stonex may be better served by creating a new role of Distribution and Marketing Manager. In that position, we’d look to employ a high quality, experienced marketing expert who could help create and drive our marketing plans and initiatives.*

I asked Mr Cashmore why Mr Lewis was not offered a position. Mr Cashmore said it had been suggested that he apply. He said “His experience was in the old job. We left it to him to make the application”. Having seen the comments in the proposal these responses are clearly disingenuous. Mr Cashmore did not believe that Mr Lewis could do the job. That this is so is borne out by Mr Cashmore’s comment in his 20 September email referring to a “lack of quality implementation”.

#### 15 December 2006 Meeting

At the meeting Mr Lewis tables a letter which stated saying:

*When I requested a meeting with the Directors I did so in good faith because of my concerns about issues of roles and responsibilities and how decisions were being made that I felt materially affected both my ability to do my job and that impacted negatively on the company. I wished to do this in an open forum.*

*However, in a maneuver [sic] that would have impressed Napoleon, I believe a meeting was called by you, without my involvement and as an outcome of this meeting your letter dated above was presented to me before I was able to discuss with the board of my own concerns and recommendations. It would be a fair assumption, that I was the focus of this meeting and that a one sided view was presented.*

In his letter Mr Lewis went on to say that he believed the redundancy was not genuine, that it was preconceived and that the jobs described were his. He went on to refer to his 19 September letter and gave examples of being sidelined and undermined.

### 19 December 2006 Meeting

At the meeting Mr Lewis was advised that the directors had decided to disestablish his position and would proceed with the creation of two “new” positions. Mr Lewis was told that he could apply for the positions if he wished to do so. A letter confirming this, written by Mr Alison, was given to Mr Lewis. In that letter Mr Alison stated that he did not believe Mr Cashmore’s actions over the past year were relevant and he did not accept that the Marketing Manager’s role was the same job as the one Mr Lewis was currently doing.

As there was no job description (which the employer was legally obliged to provide and did not) and given that Mr Cashmore had not given the description Mr Lewis had provided to the other Board members it is difficult to ascertain how this conclusion could have been reached.

Mr Alison also wrote:

*You now need to decide if you wish to apply for either role, as they will be advertised shortly.*

*Obviously the sale role is a lot less senior, with reduced pay, but you may wish to be considered for it. As for the Marketing Managers [sic] role, while you obviously don’t have a specialist marketing background, it is only fair to give you the opportunity to show why you could fill this role, if you wish.*

It is evident from this and from Mr Cashmore’s comments in his proposal that an application for the Marketing Manager’s role would have been a Sisyphean exercise.

### Validity of Decision to Dismiss

#### *Constitution*

The letter giving notification of termination was signed by Mr Alison as a director. Mr Harrison contended that this was ultra vires as the Constitution required a meeting of directors and notification of the meeting in accordance with clause 32.5 of the Constitution.

I agree that a decision to dismiss is unjustified if the person effecting the dismissal does not have the necessary authority. However, in this instance I do not think it can be said that Mr Alison did not have that authority. Clearly he had been given it by the other two directors, either expressly or impliedly.

I cannot see that it needed a formal Board resolution. If that were the case then Mr Lewis would have needed to be notified and would have been able to vote on his own dismissal.

#### *Shareholding Agreement*

The approval of all shareholders is required in the event of “The merger or restructuring of the company”. I accept Mr Mackinnon’s submission that “restructuring” relates to a change in the shareholding. Had I thought otherwise I doubt that the Authority would have jurisdiction to enforce a shareholders’ agreement.

### Rationale for Decision to Restructure

### *Financial Considerations*

The company said it was in a dire financial position and this had prompted the restructuring. The company has run at a loss since its inception and has required considerable injections of finance by the shareholders, principally Messrs Paykel and Alison. It experienced manufacturing and production problems up to 2006 and the last financial year was to focus on sales and marketing.

Mr Harrison submitted that the annual plan and Board minutes show that it was accepted that the company would continue to make a loss until 31 March 2007. I accept Mr Harrison's submission that the evidence does not support the contention that the company is going into a fast decline or that there has been a sudden crisis. It seems more likely than not that the directors/shareholders saw their investment in the company as a long term proposition. The restructuring proposal put forward by the company would in fact have resulted in a significant increase in salary expenditure although the company may well have hoped to recoup this by improved sales.

Financial considerations may well have in part underlain the decision but they are not mentioned expressly until the 19 December letter from Mr Alison.

### *Inequitable Situation*

Mr Harrison argued that the *primum mobile* for the restructuring was Mr Cashmore's desire to address what he perceived to be an inequitable situation between him and Mr Lewis. Flowing from this is the fact that the difficulties between the two were relevant to the matter and should have been disclosed to the directors.

I do not agree with Mr Alison (letter of December) that the issue regarding the interpersonal relationship was irrelevant. Mr Alison said he may have seen Mr Lewis's letter of 19 September but could not recall when that had been. I agree that the correspondence should have been disclosed to the directors. Its absence meant that any consideration Messrs Paykel and Alison gave to the redundancy was lacking in significant information.

Mr Harrison said that the restructuring proposal was designed to remove Mr Lewis and address the inequity issue.

When asked why he had pre-empted anything Mr Lewis might have said at the Board meeting of 7 December Mr Cashmore said he had been organising a meeting time and had completed work around a sound proposal to restructure the business and the two came together. I received no cogent explanation for the failure to tell the Board that Mr Lewis had requested a meeting or to tell Mr Lewis that the purpose of the meeting had changed.

Mr Cashmore's proposed restructuring paper was not disclosed to Mr Lewis. The key tasks that are said to be required to be completed in the proposal are not referred to in the 7 December letter. Mr Lewis could not respond to the suggestion that he did not have the skills or that he was not undertaking the work or that he lacked a "proven track record".

Mr Cashmore's point that he assumes the Board will wish him to remain as General Manager and to devolve his marketing duties to the new position was not put to Mr Lewis. I agree with Mr Harrison that if Mr Cashmore had as many of Mr Lewis' duties as he claimed then his position was also being restructured.

This paper should have been disclosed to Mr Lewis not only because it contained adverse comments but also because it raised the possibility that Mr Cashmore's position was also being restructured yet he was not required to apply for the General Manager's position.

### The "new" jobs

When I asked Mr Cashmore to go through the Marketing and Distribution Manager's job description and the Sales' job description and explain the tasks to me it was quite clear that the three aspects of the Sales job - selling, sales training and technical support –were also elements of the Distribution and Marketing role. Mr Cashmore could not provide a cogent explanation of the differences between those tasks for the two positions, apart from saying they were at different levels.

### Difference between Mr Lewis's position and "new" position/s

In reply to questions from Mr Harrison Mr Cashmore accepted, albeit reluctantly, that Mr Lewis had done what Mr Cashmore termed "aspects" of the job description that Mr Lewis presented to him in August. There is very little difference between that job description and the descriptions formulated by Mr Cashmore as "new" positions.

The company did not draw up employment agreements as it was required to do. A mandatory element of an employment agreement is a job description. The company failed to provide one. A job description would have been very helpful in determining aspects of this case. I accept that many jobs change over a period of time but the tasks must remain within the general ambit of the nature of the position unless there the contract provides otherwise or the incumbent agrees to a major change which should be recorded.

The Annual Plan to 31 March 2007 has a section titled "Stonex proposed Work Top Programmes by Primary target Audience". This document shows Mr Lewis having responsibility for the majority of the programmes.

The role identified by Mr Lewis as being his and the "new" position are fundamentally the same.

Mr Cashmore did take on some marketing tasks but fundamentally Mr Lewis remained the Marketing Manager. He did not agree to Mr Cashmore assuming all the tasks that he did. Mr Lewis's job is the position description that he drew up in August.

It cannot be said that Mr Lewis' position had disappeared. At most, it might be that an additional position – the Sales position – had been created as that did not have the strategic elements of the manager's position but given the great degree of similarity between the tasks set out in the two "new" positions I am doubtful even about that.

### Competence and Skills

The company's case was that restructuring was necessary because certain skills were lacking. The Shorter OED defines a skill as "Practical knowledge in combination with ability; cleverness, expertise". A skilled person is one who is "possessed of skill or knowledge, properly trained or experienced". "To perform" is "to carry out an action, execute (a command, promise, undertaking etc); to carry out, achieve".

Roget's Thesaurus defines "skill" as "ability" and gives "competence", "facility", "expertise" and "proficiency" as synonyms.

When asked why he did not think Mr Lewis was up to the job Mr Cashmore said “We work in a very complex environment. There’s a requirement to address all the stages”. Mr Harrison asked whether the standard to which Mr Lewis worked was acceptable. Mr Cashmore said “There was the opportunity to do better”. He also said he thought Mr Lewis was doing the best he could and that he did not believe Mr Lewis had the skill set to run marketing in the company’s business. He reiterated that Mr Lewis did not have the skills.

Mr Cashmore’s problem with Mr Lewis was that he believed Mr Lewis did not have the skill or ability to carry out the work he was tasked with competently. It is not that Mr Lewis did not have marketing knowledge, ability and expertise. It is that from Mr Cashmore’s perspective Mr Lewis did not have those skills or abilities to the requisite level. This is a performance issue. It is not an issue that should be dealt with by restructuring.

No coherent explanation was given as to why the decision was made to advertise the two jobs externally and why they were not offered to Mr Lewis. The only inference that can be drawn is that it had been determined that he was not suitable because he was not competent: it was a performance issue disguised as a redundancy.

The “restructuring” was designed to replace a person who was perceived to be performing inadequately with a person who would perform more competently. The term “restructuring” in those circumstances is a misnomer.

The evidence is that Mr Cashmore became frustrated because he felt he was having to assume an increasing number of Mr Lewis’s duties because he thought Mr Lewis could not carry them out properly. The relationship between the two men was relevant to the restructuring proposal and should have been revealed to the other directors who should have addressed the issues raised by Mr Lewis.

This was not a genuine redundancy and it was not carried out in a fair manner. The lack of genuineness arises from the fact that the position did not disappear and that a performance issue was treated as a redundancy. Comments Mr Cashmore made to Mr Lewis at a meeting on 7 March 2007 are further evidence. These were:

*Even if you win, we will still restructure the company, but will go about it another way.  
It’ll just take us more time and cost us more money.*

*Not to put it too bluntly, you’re fucked one way or the other.*

The dismissal was unjustified.

### Reinstatement

Mr Lewis said the most important thing was the success of the business and he would be happy to go back to work. He would continue to be involved as a director and shareholder and has a stake in ensuring that the company is successful.

Mr Cashmore opposed this because in his view Mr Lewis did not have the skills necessary for the job and his reinstatement would place the company in a perilous position. Because the company treated the matter as a redundancy I am in no position to make a judgement about Mr Lewis’s skill level and neither was the company. Mr Cashmore is sincere in his view but I can make no judgement about its accuracy.

Mr Cashmore and Mr Alison said they could work professionally with Mr Lewis.

Mr Lewis is to be reinstated to the position of Sales and Marketing Director. The duties are those set out in the job description he produced in October.

Mr Lewis has indicated that he is open to reviewing his role. Given his undoubted sincerity and his wish to ensure that the business functions in the best possible manner, availing themselves of the services of a mediator may assist the parties in ensuring a smooth return to employment.

#### Lost Remuneration

Any loss sustained should be reimbursed. If there is any difficulty with this leave is reserved for the parties to return to the Authority.

#### Compensation

Mr Lewis has sought compensation for hurt and humiliation. While he is clearly entitled to this it may be preferable for the parties to discuss this and try to agree on quantum. If agreement cannot be reached leave is reserved to return to the Authority for a determination.

#### Costs

The parties should also attempt the issue of costs. If this is unsuccessful the applicant should file a memorandum within 28 days of the date of this determination. The respondent should then file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King

Member of the Employment Relations Authority