

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 97/09
5119507**

BETWEEN DAWIE MALAN
 Applicant

AND ZEALANDIA HORTICULTURE
 LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: David Smyth, Counsel for Applicant
 Graeme Riach, Counsel for Respondent

Investigation Meeting: 16, 17, 18 September 2008
 27 November 2008

Submissions Received: 18 December 2008

Determination: 30 March 2009

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Mr Dawie Malan ("Mr Malan") claims he was unjustifiably dismissed from his former employment with Zealandia Horticulture Limited (formerly Jornas Limited and formerly Mt Wellington Nurseries Limited) ("Zealandia"). Zealandia director Mr Vincent Wylaars ("Mr Wylaars") wrote to Mr Malan by letter dated 12 December 2007 confirming his immediate termination for serious misconduct as follows:-

Following our attempt to have a meeting with Dawie Malan as notified on the 7th, 10th and then further notification on the 12th December, concluding with his non appearance nor returning calls and text, Jornas Ltd gives notice of the termination of the contract with Visionary Management Consultants Limited on the grounds that Dawie Malan has been guilty of serious misconduct including misleading staff as to directors instructions, deliberate refusal to follow instructions in relation to recruitment, misrepresenting himself as being a director of the company and staff management issues - all of which have been fully particularised in previous correspondence. The termination is effective immediately.

[2] The parties were unable to resolve the problem between them by mediation.

The issues

[3] These issues arise for determination:-

- (i) was Mr Malan an employee? and if so
- (ii) was Mr Malan dismissed? and if he was
- (iii) was the dismissal justifiable?

An employee?

[4] Mr Malan accepted employment as General Manager with Zealandia's predecessor Mt Wellington Nurseries Limited in February 2006. Mr Malan reported to Mt Wellington Nurseries Limited director Mr Graham Windross ("Mr Windross"). Mr Malan says he signed an individual employment agreement which was retained by the employer. He produces an unsigned individual employment agreement to the Authority which he says constituted the terms of his employment with Mt Wellington Nurseries Limited.

[5] Mr Malan accepted advice from Mt Wellington Nurseries Limited's accountant that he ought to be remunerated through a limited liability company for tax advantages. The accountant prepared incorporation documents for a limited liability company Visionary Management Consultants Limited ("Visionary Management") with Mr Malan and his wife as shareholders and directors. The accountant advised Mr Malan to submit invoices from Visionary Management to Mt Wellington Nurseries Limited each month in respect of Mr Malan's productive efforts.

[6] I find that Mr Malan was an employee and that he accepted the accountant's suggestion that his remuneration be paid through Visionary Management. This arrangement was purely for taxation purposes. I find that Mr Malan was employed personally by Mt Wellington Nurseries Limited.

[7] Mr Windross was very pleased with Mr Malan's work and told him so on multiple occasions. In August 2006 Mr Windross increased Mr Malan's salary to \$100,000.00 per annum and increased his bonus entitlement from \$20,000.00 to

\$100,000.00. It is disputed however as to whether Mr Windross contemporaneously gifted 50% of the business to Mr Malan.

[8] In September 2006 negotiations commenced in respect of the amalgamation of Mt Wellington Nurseries Limited and Jornas Limited (a south island nursery). The amalgamation was effective as from 1 April 2007 and the new operation was known as Jornas Limited. Mr Malan continued as General Manager of the Mt Wellington nursery and I find that by performance, he became employed by Jornas Limited as *General Manager Jornas North Island*. There was no written individual employment agreement and the arrangement where Mr Malan was paid on invoice by Visionary Management continued. I find that Mr Malan was employed personally by Jornas Limited as its General Manager North Island.

[9] I find that Zealandia did not adopt any contract with Visionary Management.

A dismissal?

[10] By the letter dated 12 December 2007, Mr Wylaars wrote purporting to terminate a contract between Visionary Management and Zealandia on the grounds that Mr Malan had been guilty of serious misconduct.

[11] I have found that Mr Malan was personally employed by Zealandia and the arrangement concerning Visionary Management was no more than a taxation vehicle. Accordingly, I find that Mr Malan was dismissed by Zealandia through Mr Wylaars' letter of 12 December 2007.

A justifiable dismissal?

[12] Mr Malan claims he was unjustifiably dismissed. There is a test of justification prescribed at Section 103A of the *Employment Relations Act 2000* ("the Act"). That section provides:-

103A. Test of justification

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[13] Mr Malan says that Mr Wylaars became hostile towards him as from November 2007.

[14] Mr Wylaars instructed Mr Malan to attend a meeting at Christchurch on 28 November 2007. Mr Malan thought he was attending a regular planning meeting. The meeting was brief and Mr Malan was suspended at the conclusion of it. He was not told that his employment was at risk or that he may be suspended. Mr Wylaars addressed a letter dated 28 November 2007 to Visionary Management. The letter advised that Jornas had suspended the services of Visionary Management and listed four serious issues around the management of Jornas North Island including misrepresentation of directors, issues about staff management at Mount Wellington, issues about recruitment process and issues regarding Visionary Management's practices in the Jornas North Island operations. The letter advised that Mr Malan was to contact management to arrange a suitable meeting to discuss the issues further.

[15] On 29 November 2007 Mr Malan informed Mr Wylaars he was waiting to hear if his representative was available.

[16] On 3 December 2007 Mr Malan's representative advised Mr Wylaars that he was meeting Mr Malan on 5 December 2007. When he did not hear from the representative, Mr Wylaars wrote to the representative on 7 December 2007 seeking a meeting. On 10 December 2007 Mr Wylaars emailed the representative to advise a meeting would proceed on 12 December 2007. The representative emailed Mr Wylaars that he no longer acted for Mr Malan.

[17] At about 9.30am, Mr Smyth transmitted a facsimile letter to Christchurch for Mr Wylaars advising of his instructions to act for Mr Malan. Mr Smyth noted that Mr Malan had been given only two days notice of the meeting and stated:-

Mr Malan does not agree to your unilateral meeting. It will not affect any claims he has, particularly in relation to reinstatement. I invite you to propose dates so that agreement can be reached as to a suitable joint meeting.

[18] Unfortunately Mr Wylaars says he did not receive the facsimile advice.

[19] At 11.30am when Mr Malan had not appeared, Mr Wylaars telephoned Mr Malan's mobile but the call was disconnected. Mr Wylaars then sent a text message to Mr Malan but did not receive a response.

[20] Mr Wylaars and Mr Windross formed the view that Mr Malan's lack of communication was deliberate and they decided to terminate Mr Malan's employment. Mr Wylaars wrote the letter of 12 December 2007 confirming Mr Malan's dismissal.

The determination

[21] Mr Wylaars says that he and Mr Windross gave Mr Malan every chance to respond to allegations which had been clearly brought to his attention. He says that in the absence of co-operation as to a meeting, they considered they had no choice to terminate the contract with Mr Malan.

[22] The only allegations brought to Mr Malan's attention were the matters set out in the suspension letter from Mr Wylaars dated 28 November 2007.

[23] The first allegation was specified as "Misrepresentation of Directors". The alleged misrepresentation was that on 13 November 2007 Mr Malan had told an employee, one Ms Lee, that Mr Wylaars and Mr Windross were "very" unhappy with the hours she was working. Ms Lee became upset and angry with the directors when this advice was reported to her. On 14 November 2007 Ms Lee informed Mr Windross of what Mr Malan had told her. Mr Windross assured Ms Lee there were no issues with her work.

[24] The next allegation was specified as "Issues about staff management at Mount Wellington". It was said that the issue became apparent because a long standing staff member had resigned. It was also said that other staff had said they were looking for new jobs. It was alleged that Mr Malan's communication, treatment and intimidation of staff was a core reason for staff discontentment. There was one example of intimidating behaviour specified and that was towards Ms Lee in respect of Mr Malan's requests of her to sign an employment contract. Other than that, there were no details or specifics provided to Mr Malan.

[25] The third allegation was that Mr Malan had ignored a clear directive from both directors not to recruit a new administration person until a meeting held been held. It was said that Mr Malan ignored this directive and went on to recruit a new person without communication with the directors and failed to supply the recruit with an employment agreement.

[26] The final allegation was specified "Issues regarding Visionary Management's practices in the Jornas North Island operations". This apparently refers to Mr Malan misrepresenting himself as a director. The allegation has no substance. I say no more about it.

[27] Mr Malan did not address the allegations against him. Zealandia unilaterally fixed a meeting time but Mr Malan did not attend. Unfortunately advice from his representative was not received and calls and texts to him were not answered.

[28] I find it more likely than not that Mr Malan did receive calls and texts from Mr Wylaars but consistent with the advice his solicitor had transmitted but not received by Mr Wylaars, he had no intention of participating in a meeting that day.

[29] Zealandia made a decision to proceed to make a decision without hearing from Mr Malan. But if not later that day then the following day, it became aware of Mr Smyth's advice. The proper course would have been to acknowledge the lawyer's advice had not been seen by Mr Wylaars and to retract the decision to dismiss until Mr Malan had been heard. Zealandia did not propose either of these things and its decision to summarily dismiss Mr Malan remained.

[30] I find that while Zealandia had very particular and specific instances of discontent with various aspects of Mr Malan's performance, it did not specifically disclose those particulars formally to Mr Malan at any time before it dismissed him.

[31] I do not consider it was reasonable for Zealandia to unilaterally fix a meeting for 12 December 2007 by notifying the same at 5.20pm on 10 December 2007 having regard to the fact that Zealandia was aware Mr Malan was seeking advice. It was not reasonable to expect that meeting to proceed once Zealandia was informed Mr Bennet no longer acted for Mr Malan. I note that there was no telephone contact between the

parties between Mr Wylaars email of 10 December 2007 and the meeting scheduled for 12 December 2007. It is regrettable that Zealandia did not receive Mr Smyth's facsimile transmission on 12 December 2007.

[32] In the circumstances I find it was wrong of Zealandia to proceed to make a decision to dismiss without hearing from Mr Malan.

[33] I consider that Zealandia was entitled to find that Mr Malan had told Ms Lee that Mr Wylaars and Mr Windross were unhappy with the hours she was working. I find that Zealandia was then entitled to conclude they had made no such statement to Mr Malan and that consequently Mr Malan had misrepresented the situation to Ms Lee. In the event that Mr Malan had been formally heard by Zealandia to answer the allegation, I have no doubt that Mr Malan would have sought to put in context his discussion with Ms Lee and to persuade it that his intentions were not objectionable being an attempt to elicit more work hours from Ms Lee. That being his motivation, Mr Malan would no doubt argue his actions were entirely consistent with his faithful service to his employer, and not inconsistent with it.

[34] As for the allegation specified as "Issues about staff management at Mount Wellington" it is not established that there was communication, treatment or intimidation of staff by Mr Malan. Critically, there were no particulars of such allegations put to Mr Malan. While Zealandia led much evidence of misconduct by Mr Malan against others at the Authority's investigation, it had not raised such matters with Mr Malan previously for him to answer. Zealandia is not entitled to make findings against Mr Malan in respect of these allegations without having first identified and particularised the detail of them.

[35] The final allegation was that Mr Malan had ignored a clear directive from both directors not to recruit a new administration person until a meeting held been held. I find that this allegation is not established. I am unable to find any such "clear directive".

[36] I now stand back and assess both the way in which Zealandia acted and the decisions it made.

[37] I note that Mr Malan was rewarded with a significant salary increase and increased bonus entitlement. I contrast that fact with what Zealandia now says to the Authority, that Mr Malan's performance was seriously defective requiring his instant dismissal.

[38] I find that while Zealandia was entitled to conclude that Mr Malan had conveyed inaccurate information to Ms Lee, the situation was not irretrievable and in context, Mr Malan's actions were not repudiatory of his contract of service with Zealandia. That being the only allegation of substance against Mr Malan I also have regard to the unfortunate absence of Mr Malan's input before the decision to dismiss was taken. This is not a case of misconduct. It is about performance management. Zealandia failed to appreciate this. Weighing all the particular circumstances and the ultimate decision which resulted, I conclude that the decision to summarily dismiss Mr Malan was not the actions or decision of a fair and reasonable employer. Zealandia was not entitled to find serious misconduct. **I therefore find that Mr Malan was unjustifiably dismissed. Mr Malan has a personal grievance and he is entitled to remedies in settlement of the personal grievance.**

The resolution

[39] Having made those findings and in considering both the nature and the extent of the remedies to be provided, I am bound by section 124 of the Act to consider the extent to which Mr Malan's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[40] I have found that Zealandia was entitled to find that Mr Malan conveyed inaccurate information to Ms Lee. I find that action contributed to the situation that led to the personal grievance. Accordingly, I reduce the compensation to be awarded to Mr Malan.

Reinstatement

[41] Zealandia has always been on notice that Mr Malan seeks reinstatement. That desire was repeated in Mr Smyth's advice of 12 December 2007. Reinstatement is the primary remedy and Mr Malan having succeeded in his claim is entitled to that remedy. I am not persuaded that reinstatement is impracticable.

[42] I consider then that it is appropriate to direct the parties to mediation in relation to the issue of reinstatement and I direct that such mediation shall take place within 28 days of the date of this Determination. **Zealandia Horticulture Limited is ordered to reinstate Dawie Malan to his former position as general manager or in a position no less advantageous to Dawie Malan as shall be negotiated by the parties following mediation assistance to be undertaken within 28 days of this Determination.**

Reimbursement

[43] Following his dismissal Mr Malan did not obtain alternative employment. Instead he undertook voluntary work with his church. I find that Mr Malan did not mitigate his losses by taking steps to obtain alternative work. **I therefore decline to award reimbursement.**

Compensation

[44] Mr Malan described being hurt disappointed and devastated by his dismissal. He says he felt very humiliated and hurt because he had considered Zealandia's directors his friends. He says the dismissal permeated every aspect of his life including his family and his involvement with his church. He says the dismissal directly impacted his whole family. He says he has struggled with motivation and cannot bring himself to tell his extended family of his dismissal.

[45] I accept Mr Malan has suffered hurt and humiliation, loss of dignity and injury to his feelings. Having regard to his evidence, his length of service and the nature of his personal grievance, I award him \$15,000.00 compensation but reduced for his contribution to the sum of \$10,000.00. **I order Zealandia Horticulture Limited to pay to Dawie Malan the sum of \$10,000.00 as compensation.**

Costs

[46] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Smyth is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Riach is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe without leave.

Leon Robinson
Member of Employment Relations Authority