

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 195/08
5144943

BETWEEN JASON NOTMAN
 Applicant

AND CEA TRADING LIMITED
 Respondent

Member of Authority: Paul Montgomery

Representatives: Phil Butler, Advocate for Applicant
 Vince Mortimer, Advocate for Respondent

Investigation Meeting: On the papers by consent

Determination: 18 December 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Notman had been employed as an Area Manager by the respondent for about two years when he tendered three months notice of his intention to leave his position on 26 November 2008. In that resignation, he confirmed his last day of employment would be 27 February 2009.

[2] The respondent, through Ms Bindon, one of the directors, emailed Mr Notman declining to agree to a three month notice period saying:

... our preference is usually to pay out one week's notice. However, due to your passion for your venues and your staff combined with your desire to ensure that there is a solid hand over to the incoming Area Manager, we are prepared to extend our usual one week to one month. This effectively places your last day of work as 24 December 2008

[3] Having offered Mr Notman one months notice in place of the three months he had tendered, which offer was declined, the respondent confirmed the employment

would end seven days from the date on which the applicant provided his resignation to the respondent.

[4] Mr Notman claims he is entitled to the balance of the notice period and also alleges he has been unjustifiably dismissed.

Analysis and discussion

[5] The application lodged with the Authority sought interim reinstatement in the event that the parties were unable to resolve their differences in mediation, or permanent reinstatement should the Authority be in a position to complete an investigation prior to Christmas 2008.

[6] After a teleconference with the parties' representatives, it was agreed that the Authority would determine the principal issue regarding the notice and, depending on that determination, the parties take steps to resolve the employment relationship problem.

[7] Significantly, there is no written employment agreement governing the relationship between the parties. Nor is there evidence of an agreed required period of notice should either party decide to end the relationship for whatever reason.

[8] The key question put on behalf of the applicant is:

Did the applicant require the agreement of the respondent to the three month period of notice of resignation?

[9] Mr Butler submits that the agreement of the other party is not required unless the period of notice is less than a previously agreed period of notice. As noted above, there was no previously agreed period of notice in this case. Mr Butler cites, among other cases, *Coca Cola Amatil (NZ) Ltd v. Kaczorowski* [1998] 1 ERNZ 264 in support of his submission. In that case, the employee had given three months notice where the employment contract specified one month.

[10] In considering the instant case in the light of *Coca Cola Amatil*, it is important to note there is no evidence of an alleged breach by the respondent which gave rise to Mr Notman tendering his resignation. The key question in that case was whether, in the presence of an agreed one month period of notice, the employee was entitled to provide a period of notice greater than that agreed to in the employment contract. As the then Chief Judge Goddard remarked:

The giving of a long period of notice such as three months generally amounts to an affirmation of the contract and should have been so seen in this case. It is a termination in accordance with the contract, not a cancellation of it because it has been repudiated.

[11] This matter is simply a case of an employee giving three months notice of the relationship coming to an end, an offer to accept a one month notice period by the employer which was declined, at which the employer then imposed was what it says was the company's usual practice of one week. The respondent says that *the company by law needs to accept no more than one week's notice period*. No legal precedent is cited for this assertion.

[12] Having reviewed Mr Mortimer's careful analysis of the cases raised by Mr Butler in the light of the facts of this particular matter, I am unconvinced that his views affect the facts in this case. It is one matter for the employer to prefer a shorter period of notice than that tendered and to suggest that preference to the employee. It is quite another, if that preference is declined, to enforce a week's notice and send the employee packing at the expiration of that week.

[13] The genesis of this problem lies squarely on the respondent's shoulders as it failed to comply with the legal requirement to provide an individual employment agreement setting out the agreed notice provisions.

Determination

[14] In the absence of an agreed period of notice, as is the case in this matter, the applicant was entitled to submit the three months notice period tendered. At that point it was open to the respondent to determine, in consultation with Mr Notman, whether all or part of that three months notice was required to be worked.

Directions

[15] Having resolved the issue which lies at the heart of this matter, the parties are directed to mediation. Alternatively, the opportunity exists for them to resolve the matter between themselves on agreed terms.

Paul Montgomery
Member of the Employment Relations Authority