

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 106
5150309

BETWEEN CONAL ROYCE WATTAM
 Applicant

A N D VINE-TECH CONTRACTING
 LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Mary Flannery, Counsel for Applicant
 Don Rhodes, Advocate for Respondent

Investigation Meeting: 10 May 2011 at Cromwell

Submissions Received: At the investigation

Date of Determination: 21 July 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Conal Wattam, claims that he was unjustifiably dismissed by the respondent, Vine-Tech Contracting Limited (Vine-Tech), on 5 February 2009.

[2] Vine-Tech accepts that it dismissed Mr Wattam but contends that his position was surplus to its requirements and that the dismissal was a justifiable redundancy.

Background

[3] Vine-Tech is a vineyard contracting business jointly owned by Ms Alison Patrick and Mr Geoffrey Moore. Ms Patrick and Mr Moore commenced business in September 2006 and Mr Wattam was engaged soon thereafter (December 2006).

[4] Mr Wattam was initially employed as a machinery operator but was promoted to the position of Viticulture Manager in June 2008. It was a move he welcomed and

which, he says, led to more work with staff and less machinery operating. There was also a significant degree of client liaison, though Mr Wattam did continue to operate machinery from time to time as required. Mr Wattam was paid a salary of \$46,000 per annum, provided with a company vehicle, and claims that he also had the use of a computer and telephone.

[5] Mr Wattam goes on to say:

5. *I worked long hours in an effort to assist the company build the business and used my own equipment including tractor and post driver to complete work for my employers.*

6. *During my employment I was never advised of any concerns about any aspect relating to my employment.*

7. *In November 2008 a new employee, Andrea Stevens was employed by the company who appeared to take over many of my duties. The company vehicle provided to me and my contract was taken from my use in November 2008 and passed over to the new employee Andrea.*

8. *Also the laptop computer and cell phone that had been supplied to me during my employment was taken from my use and also passed over to Andrea.*

[6] In claiming that Ms Stevens took over a large portion of his functions, Mr Wattam emphasises the management of other staff which, he says, passed to Ms Stevens. From this point, he effectively returned to the position of machinery operator. He claims that it was obvious his role had changed and, as a result, he asked that Ms Patrick provide a new contract on an unspecified day in December. A revised contract was never provided.

[7] Mr Wattam goes on to say:

On January 31st 2009 I was called to the office by Geoff Moore a company director. I was told that I was required to take the annual leave immediately. I was reluctant to take this leave on such short notice I did not get 14 days notice as set out in my employment contract under clause 4.2. However in an effort to assist the employers I agreed to take leave and this was taken from Monday 2 February until Friday 6th of February.

[8] Mr Wattam states that while on leave he received a phone call from Mr Moore. He was asked to attend a meeting on Thursday, 5 February. He was told to bring a support person but given no intimation as to what would be discussed.

[9] Mr Wattam's then partner, Ms Inger Culling, had received a similar summons and, as a result, they both sought the services of a solicitor, Mr Tim Cadogan. There is some debate as to whether Ms Culling was present when Mr Wattam met with the

company – both he and she think no; the company thinks yes but neither could be absolutely definitive. I shall not pursue the issue of who is correct as it is unnecessary for the purpose of determining the matter before me. Mr Wattam goes on to say:

11. *The meeting began with Don Rhodes, being employers advocate, advising that the meeting was called to discuss my current position as the position as described in my employment agreement no longer existed as the company had employed a qualified viticulturist who fulfilled the role. Alison Patrick stated that the only other job available was the vineyard supervisor position which would be on an as and when required basis...*

12. *Alison described that the job had changed and that in addition there had been clients had not been happy with my work and that they felt that they needed to find somebody else to fulfil my job otherwise they would lose clients. They said they then went out and found Andrea who was the new person employed referred to earlier.*

...

15. *Alison said that my position with the viticultural aspects removed now amounted to a tractor and truck driver and this was what was no longer on offer. She said I could take the position of vineyard supervisor as there was no other position available for me with a company. There was still two other staff employed to drive tractors at this time, who were both more recently employed than myself.*

16. *It was made clear to me that if I did not accept this new position of vineyard supervisor which involved lesser duties that I've been carrying out and a reduction in pay and did not have set hours there was no other work available.*

17. *My employment was terminated by the employer as I was unwilling to accept the new position as it was very different and remuneration, roles and responsibilities from my previous role*

[10] Mr Wattam also complains that at the conclusion of the meeting he found his belongings had already been placed outside the office for him to remove. That said, and whilst answering questions from Mr Rhodes, he changed this allegation to one of having seen his property outside the office when he and his solicitor arrived for the meeting and suggested that this was indicative of a predetermined outcome.

[11] On behalf of Vine-Tech, Mr Moore commented that there had been a number of concerns about Mr Wattam's performance and, in particular, his handling of machinery and the number of accidents he had. He states that while he questioned Mr Wattam about various incidents he never took any formal action before going on to say:

8. *The first real disappointment with Conal came in March 2007, when due to Conal calling what was then one of our largest clients "only a [expletive] potato farmer" we got no more work from them. At the time their work had the potential to be worth*

approximately \$20,000 annually to us and therefore was very significant.

9. *When I spoke to him about this incident he accepted what he had said and done was wrong, and we had no repeat of similar behaviour until into 2008.*

[12] Mr Moore says that in June 2008 Vine-Tech was approached by a significant client and asked to undertake a labour contract for two of that client's vineyards with the possibility a third would be added later. Mr Moore goes on to say that he and Ms Patrick considered this a big opportunity and, after discussing it with Mr Wattam whose input they valued because of his experience in the industry, they decided to pursue the opportunity with Mr Wattam managing the work.

[13] That decision that led to Vine-Tech discovering, shortly thereafter, that Mr Wattam was not a qualified viticulturist as they had originally thought. That said, it must be noted that Vine-Tech accepts that while it thought he was qualified, the question had never been asked. The newfound knowledge did, however, become a source of aggravation as Vine-Tech now tried to get Mr Wattam to obtain formal qualifications. He resisted those efforts, trying instead to rely upon recognition for prior learning which would allow him to obtain the qualification without further study. As events transpired this was never resolved, instead festering as a point of dissatisfaction between the parties.

[14] The other consequence of this knowledge was that Vine-Tech felt compelled to engage the services of an independent viticulturist in order to get the contract. Although unable to meet all of the client's requirements, Mr Wattam remained the vineyard manager.

[15] Mr Moore goes on to say:

19. *Then in October 2008, Conal began arriving at work late, and as well we received complaints from clients that he was becoming 'pushy' and had an overbearing attitude towards them. ...*

20. *When I questioned him about this in the beginning, Conal said the Estate Manager had a problem working with males, and it had nothing to do with his, Conal's, attitude. ...*

21. *The complaint ... in October, was for us unacceptable, and given Conal's response I decided he obviously could not continue as Vineyard Manager with [that client], so I took over the role. This meant however my workload was too much and it was at this stage we hired a qualified and experienced viticulturist. ...*

22. *As a result of Conal no longer being the Vineyard Manager, he returned to mainly doing tractor and driving duties, but was also able to become much more involved in another aspect of our operation, that of compost production. This suited him much better*

as his relationship with clients was considerably reduced and he continued in that job until he was made redundant. As he no longer required a laptop computer for this work, it was given to our new viticulturist. He states in his evidence we also took his cellphone, but that is not correct. We supplied the viticulturist with her own cellphone and Conal kept his.

[16] The compost operation referred to above was another irritant, with Mr Wattam being of the view that he and the company were going to establish it as a separate joint venture business. He considers that Vine-Tech resiled from earlier undertakings regarding the composting business and, having entered into an arrangement with the owner of the land from which it operated, reducing his involvement to that of employee and not part owner. Vine-Tech disputes any suggestion it considered operating the composting business as a joint venture with Mr Wattam.

[17] There was a further joint venture involving the management of a vineyard contemplated by Vine-Tech, Mr Wattam and Ms Culling which never came to fruition. Mr Wattam again expressed dissatisfaction with the situation while Vine-Tech, having accepted it entered into an agreement about this joint venture, says it subsequently concluded that Mr Wattam and Ms Culling were incapable of performing their agreed obligations. Vine-Tech therefore pursued the venture on its own account.

[18] Mr Moore goes on to say:

23. Near the end of December 2008 Conal mentioned to me that he would have to take a week off in January to look after his children. He said he could not give me an exact date but would get back to me later. He never did.

24. Then on Friday January 7th a client, ..., contacted me to say Conal had told him he would not be at work the next week. This call did not make me happy at all, and I tried to ring Conal that night but he did not answer his cell phone.

[19] The following day, Mr Moore and Mr Wattam discussed the matter. Ms Patrick was also present. Vine-Tech was concerned about what it considered a large leave balance and Mr Wattam's failure to confirm an actual date upon which he intended commencing leave, while Mr Wattam felt he was being pressured to take leave immediately and objected to that on the grounds that a period of notice was required before leave could be forced. The parties ultimately agreed that Mr Wattam would take a week's leave then and a further week at the beginning of February.

[20] January also saw a dispute over Mr Wattam's working hours. Vine-Tech claims that he advised that he would only work between the hours of 8am and 5pm. Mr Moore says:

We were a bit stunned by this, and told him that did not fit with our business, which required people to be flexible in their work hours, especially during the harvest and cultivating seasons. He insisted however, so we then told him he would have to come off salary and go on to an hourly rate and fill in timesheets, because if he only worked those hours we could not afford to keep him on a salary.

[21] Again, Mr Wattam's view differs. He accepts he made the comment but contends that it related to one job only and was the result of the vineyard owner requiring him to work the same hours as the vineyard's staff did whilst he was there. He adds that notwithstanding the comment, a simple review of his timesheets in his last week or two confirm that he continued to work his 'normal' hours. Regardless of what hours Mr Wattam actually worked, it is Mr Moore's evidence that this latest irritant was the catalyst for what he described as a review of the companies operation.

[22] That review led to the meeting of 5 February with Mr Wattam. Mr Moore says he told Mr Wattam that:

... if he wanted the hours he said, then the only work for him was as a driver on an hourly rate, and perhaps taking over our compost operation, but that there was no way we could give him a guarantee of hours: or alternatively he could take the Supervisors job we had offered Inger but which she stated she could not take up because of the requirement to work flexible hours. We told him to consider our proposal, and come back to us with his representative so he could discuss this with us.

[23] Mr Moore says that right from the outset Mr Wattam, and his lawyer Mr Cadogan, accused the company of having decided already what it was going to do and suggesting it was a waste of time to put up any alternatives before adding:

We said that was not the case, and when Conal's lawyer asked us was Conal redundant our advocate Don Rhodes told him that if they had no alternative to put, or nothing further to add, then he would be redundant.

[24] Mr Wattam's confirmation that he was unwilling to consider the alternate positions suggested by Vine-Tech led to a declaration that he was redundant.

Determination

[25] The respondent, Vine-Tech, accepts that it dismissed Mr Wattam but contends that the dismissal was justified by reason of redundancy.

[26] It is well established that:

When reviewing an employer's decision to make employees redundant, the Authority or Court will generally look at two initial factors: the genuineness of the redundancy; and whether the dismissal was carried out in a procedurally fair manner.

Kevin Leary (ed) *Employment Law* (looseleaf ed, Brookers) at ER103.17

[27] Mr Wattam's employment agreement provides that:

... 'redundancy' means a situation where the employee's employment is liable to be terminated, wholly or mainly, owing to the fact that the Employee's position is, or will become, superfluous to the needs of the employer.

[28] This is a fairly standard definition and means that the redundancy, or at least the substantive justification therefore, *is determined in relation to the position not the incumbent* [see *NZ Fasteners Stainless Ltd v Thwaites* [2000] 1 ERNZ 739 at para 22].

[29] I conclude that Vine-Tech has failed to substantively justify the redundancy. I reach this conclusion as a result of the forthright answers Mr Moore gave when questioned about his decision making processes. He accepted that:

- i. He promoted Mr Wattam to the position of Viticulture Manager;
- ii. Notwithstanding various concerns about Mr Wattam's performance he did nothing substantive to address them and, definitely, nothing formal;
- iii. After the complaint concerning Mr Wattam's interaction with a client in October 2008 he concluded that Mr Wattam was no longer a suitable Viticulture Manager and that he would take over the role [see paragraph 21 of Mr Moore's brief recited in 15 above];
- iv. Mr Wattam was never formally advised of the change in iii above and it was simply actioned via an alteration to the tasks he (Wattam) was given;

- v. That he then concluded that Vine-Tech could no longer justify a Manager's salary being paid to someone performing the tasks of a machinery operator;
- vi. The changes proposed on 5 February were a reaction to this and a means by which he could be assigned a more appropriate pay rate; and
- vii. His thinking was influenced by a general dissatisfaction with Mr Wattam which was fuelled by the other aggravations referred to above.

[30] These responses evidence a focus on Mr Wattam and his performance as opposed to an inquiry as to whether or not his position and its attendant tasks were still required.

[31] Mr Moore's evidence confirms that due to performance reasons which were never formally addressed (and definitely not in accordance with the prescriptive requirements of Mr Wattam's employment agreement), Mr Wattam found himself performing a reduced range of duties that did not, in Vine-Tech's view, justify retention of his manager's salary.

[32] In such circumstances I conclude that this is not a genuine redundancy, but an indirect and inappropriate attempt to address a performance issue.

[33] The fact that I have concluded Vine-Tech have failed to substantively justify the redundancy means that the procedural issues need not be examined. That said, Vine-Tech would have failed in this respect as well if, for no other reason, a key requirement of procedural fairness is adequate consultation.

[34] To have been adequately consulted, Mr Wattam would have had to have been fully apprised of the issues Vine-Tech was considering. This did not occur, with the company emphasising Mr Wattam's alleged availability while never openly discussing what it now confirms as the real issues – namely dissatisfaction with his performance and a view he was overpaid vis-à-vis the tasks he was, by January, being asked to perform.

[35] I therefore conclude that Mr Wattam has a personal grievance in that he was unjustifiably dismissed. By way of remedies he seeks:

- (i) Lost wages for a period of three months;
- (ii) Compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act in an unspecified amount; and
- (iii) Costs.

[36] Mr Wattam is entitled to wages lost as result of his unjustified dismissal. Notwithstanding his claim for three months pay, it is accepted that he was paid two weeks in lieu of notice and that he commenced with a new employer on 27 April 2009. The intervening unpaid period is nine weeks. For Mr Wattam nine weeks pay is \$7,961.54.

[37] Mr Wattam's compensation claim centres on the fact that both he and his then de-facto partner, Ms Culling, lost their jobs with Vine-Tech the same day and that the resulting financial stress took a toll on their relationship.

[38] I do not accept this argument. Both obtained replacement employment in relatively quick time and it is clear from the evidence that the relationship was under stress in any event. Their personal problems can not be visited upon Vine-Tech.

[39] That said, I can have no doubt that the way in which Mr Wattam was treated by Vine-Tech, and that their indirect approach to the problems that existed in the employment relationship deprived him of possibly addressing the respondents concerns. That can only have had a damaging effect worthy of redress. Having considered the evidence I conclude an award of \$2,000.00 to be appropriate.

[40] The conclusion that remedies accrue means that the issue of contribution must be discussed. The dismissal was for redundancy. Redundancy is, by definition, a no fault situation to which the applicant could not have contributed. There is, in my view, no possibility that Vine-Tech can argue that Mr Wattam contributed to his situation by virtue of his questionable performance. Such an argument would have to be supported with evidence emanating from an appropriate performance investigation. No such investigation occurred and Vine-Tech can not, therefore, now rely on evidence that may have been elicited from such an enquiry.

Orders

[41] For the reasons given, the following orders are made:

- (i) The respondent, Vine-Tech Contracting Limited, is to pay to the applicant, Mr Conal Wattam, the sum of \$7,961.54 (seven thousand, nine hundred and sixty one two dollars and fifty four cents) as reimbursement of wages lost as a result of Mr Wattam's unjustified dismissal; and
- (ii) The respondent is to pay to the applicant a further \$2,000.00 (two thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

Costs

[42] I reserve the issue of costs. I ask that the parties try to resolve the issue but failing that, and in the event Mr Wattam wishes to seek costs, he is required to lodge, and serve upon the respondent, an application within 28 days of this determination. The respondent is to file any response within 14 days of the application.

M B Loftus
Member of the Employment Relations Authority