

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 312/07
5092287**

BETWEEN F FABBIAN LIGHTING (NZ) LIMITED
Applicant

AND STEFANO LA CAVA
First Respondent

MELITO INVESTMENTS LIMITED
Second Respondent

Member of Authority: Leon Robinson

Representatives: Michael O'Brien for Applicant
Simon Mitchell & Carolyn Boell for Respondents

Investigation Meeting: 4 September 2007

Further information: 19 September 2007
24 September 2007

Determination: 5 October 2007

DETERMINATION OF THE AUTHORITY ON PRELIMINARY MATTER

The Problem

[1] There is disagreement about when the first respondent's Mr Stefano La Cava's ("Mr La Cava") employment with the applicant F Fabbian Lighting (NZ) Limited ("Fabbian") ended. This determination disposes of that question only and is not a final disposition of the substantive employment relationship problem between the parties. The issue is deserving of determination for it informs the temporal limits of the contentious restrictive covenants. I answer it as a preliminary matter at Mr La Cava's request.

The Facts

[2] Mr Le Cava was first engaged by Fabbian in October 2004, as a lighting consultant. It is apparent from submissions that it is contended, at least on Mr La Cava's part, that he was engaged as an independent contractor prior to an employment relationship. This is contentious because Fabbian produces evidence of annual leave

entitlements arising out of continuous service prior to January 2006. I do not resolve the matter here.

[3] It is clear however, that on 23 December 2005, the parties entered into an employment relationship as evidenced by written individual employment agreement the terms and conditions of which were effective from 1 January 2006 ("the Agreement"). Mr Le Cava was employed as a Commercial Lighting Consultant under the Agreement.

[4] The Agreement included these terms:-

10.2 Closedowns

In the event that Fabbian determines there is to be a closedown period, you may, at the discretion of Fabbian, be required to take annual holiday entitlements when closedown is in force.

In the event that Fabbian decides there is to be a closedown then Fabbian will give you at least 14 days notice to you that you may be required to take annual leave.

Fabbian may, in accordance with the Act require you to take annual holidays in advance.

Where you have less than one years employment with Fabbian and are affected by a closedown period, you will receive your holiday pay accrued to date at the beginning of the closedown, and you will, in accordance with the Act be deemed to have commenced the beginning of your next employment year for holiday accrual purposes. The purpose being that such employees will attract their full leave entitlement in the event of a closedown at a similar time the following year.

14 Termination of Employment

14.1 General Termination

Fabbian may terminate this agreement for cause, by providing four weeks notice in writing to you. Likewise you are required to give four weeks notice of resignation. Fabbian may, at its discretion, pay remuneration in lieu of some or all of this notice period.

...

Keys, uniforms, phones, company cars and other equipment supplied to you by the company must be returned before you leave. If these are not returned or not returned in reasonable condition, given fair wear and tear, a charge for reasonable cost of replacement may be deducted from your final pay. General Termination procedure is attached to this agreement as part of Employee Handbook.

[5] In its statement of problem dated 2 July 2007, Fabbian alleged that Mr La Cava's employment had ended on 22 December 2006. That allegation was supported evidentially by Fabbian's General Manager Mr Dean John Griffin ("Mr Griffen") in his affidavit of 2 July 2007 at paragraph 5 where he deposes:-

5. On 8 December 2006, Mr La Cava resigned giving four week's notice of termination. I discussed with him finishing early and it was agreed that he would finish up prior to the Christmas break on 22 December 2006 ("the termination date").

[6] Mr Griffen now recants that evidence and in his affidavit sworn on 10 August 2007 he deposes:-

10. In my initial affidavit sworn on 2 July 2007 I said at paragraph 5 that Mr La Cava had finished his employment with Fabbian on 22 December 2006. I have since checked Fabbian's records and that date of 22 December 2006 is not correct. The 22 December 2006 date is the date of our annual shutdown. Mr La Cava remained employed by Fabbian until 5 January 2007, and he took the period between 22 December 2006 and 5 January 2007 as holiday leave (except for the statutory holidays). This meant that Mr La Cava's restraint period (clause 12.7) ran until 30 March 2007.

[7] Mr La Cava gives evidence on oath to the Authority that on Friday 1 December 2006 he informed Mr Griffen he was resigning. Although he is unsure whether he did so in his own handwriting, he says he handed a letter of resignation to Mr Griffen on Monday 4 December 2006. At a subsequent meeting to discuss handover issues and the date of which is not specified, Mr La Cava says he and Mr Griffen discussed when Mr La Cava would finish. Mr La Cava says it was agreed between them that Mr La Cava's last day of work would be Friday 22 December 2006. He says he offered to return after 22 December 2006 but Mr Griffen declined his offer. I understand Mr La Cava to maintain that Friday 22 December 2006 was his last day at work and significantly for present purposes contemporaneously his last day of employment.

[8] Mr Griffen gives evidence on oath of a different account. He agrees that he and Mr La Cava had a discussion on 1 December 2006 and he recalls he advised Mr La Cava, Fabbian could not meet Mr La Cava's expectations in relation to a commission structure. However, he asserts that precisely one week later, Mr La Cava handed him a signed resignation letter dated 8 December 2006 a copy of which is produced to the Authority. That letter says this:-

Auckland, 08/12/2006

Dean,

As per clause 13 of my employment contract this is my notice of resignation. Four weeks will commence from the above date. Thank you for the opportunity to be part of the Fabbian team. Please advise in relation to all outstanding works and quotes as I will instruct Hayley of all pending situation. Best regards.

[Signature]

Stefano La Cava

[9] Mr La Cava cannot recall this letter. He agrees it is endorsed with his signature but he says it is not his usual full signature. I have sighted the original and I have no

reason to doubt its veracity. It is dated consistent with Mr Griffen's evidence. I find that it was Mr La Cava's formal written notice of resignation in compliance with the Agreement that four weeks notice be given. I further find that this advice gave notice of termination on Friday 5 January 2007.

[10] I prefer Mr Griffen's evidence of the date of resignation as 8 December 2006 and I find accordingly.

[11] Mr La Cava was paid his regular salary payment on 20 December 2006. A further payment of \$3,656.97 which included holiday pay was transferred to his bank account on the evening of Friday 22 December 2006. I shall call this a severance payment. This severance payment included payment for statutory holidays on 25 and 26 December 2006 as well as 1 and 2 January 2007. It also included annual leave payments for three days from 27 to 29 December 2006 and three days from 3 to 5 January 2007.

[12] Mr La Cava also handed back his keys, cellphone, computer password and company car on 22 December 2006. Mr La Cava was presented with a pen as a farewell gift at the end of year function held at Squid Row that same afternoon. Mr La Cava did not perform any other duties after that date.

The Merits

[13] It has been held that the question of when a contract of employment ends is a mixed question of fact and law.

[14] I find that Mr La Cava's written advice of 8 December 2006 fixed his last day of employment as 5 January 2007 as required by the Agreement. This was the initial agreed date of termination. Subsequently, the situation changed. He performed no further duties after Friday 22 December 2006. But was that also the last day of his employment? The critical question for the Authority is to determine whether the initial agreed date of termination was varied. Any variation must be mutually agreed.

[15] Mr Mitchell is understandably quite critical that Mr Griffen recants his earlier evidence. I say understandably because Mr Griffen's initial evidence on the point at issue is in absolute terms. But I am persuaded that there is ambiguity about what

precisely was meant by "*finishing early*" or "*finishing up*". So too I consider is there ambiguity about Mr La Cava's evidence that 22 December 2006 was his "*last day*" of work. The ambiguity is whether Friday 22 December 2006 was the last day of work as well as being the last day of employment.

[16] I have recorded Mr La Cava's oral evidence to the Authority that at the same time he resigned giving four weeks notice, that he and Mr Griffen also agreed he would leave on 22 December 2006 and that he says he is totally sure of this. Mr Griffen's affidavit evidence suggests the same and I understand that what he has deposed is that on 8 December 2006 when Mr La Cava resigned, they contemporaneously had a discussion that Mr La Cava would finish up on 22 December 2006. So I conclude accordingly, that on the same day he gave four weeks notice of resignation, Mr La Cava and Mr Griffen agreed that Mr La Cava would "finish up" on 22 December 2006. Consistent in this regard too, is an application for leave form produced to the Authority because it is dated 8 December 2006.

[17] Fabbian produces the application for leave form, other leave documentation and the severance payment as corroborative of its argument that Mr La Cava remained employed to 5 January 2007. Mr Mitchell is very dismissive of Fabbian's submissions in relation to the significance of the severance payment and its composition. He rejects the submissions arising out of the annual leave payments as a "red herring" and rather more colourfully, a much lighter shade than red.

[18] I accept Mr La Cava's evidence that the annual leave form was presented to him as "standard procedure". I accept too that this form was completed by all Fabbian's employees in respect of the end of year vacation period. I find that Mr La Cava endorsed the form with only his signature, his name and the first and last work dates out of office as 27 December 2006 and 7 December 2006(sic) respectively. He says this form sat on his desk for two or three weeks before he signed it but he cannot remember when precisely he did sign it. I find that subsequently, the last work date was amended by payroll personnel to "5 Jan 07" and it was authorised by management who entered the date of the form as "8 December 2006". That was the same date Mr La Cava gave four weeks notice of resignation. I repeat here I find that on the same date, it was agreed Mr La Cava would finish up on 22 December 2006. The question then arises, as to the significance of the subsequently amended end date of "5 Jan 07".

[19] Fabbian contends that the initial agreed date of termination of 5 January 2007 always remained but that it simply did not require Mr La Cava to continue to perform his duties after 22 December 2006. In that regard it cites the severance payments and leave documentation in corroboration. I infer that it argues that Mr La Cava worked out the first two weeks of his notice, but was not required to work the final two weeks. But more than that, it required Mr La Cava to take those final two weeks as annual leave. It says it requires this of all its employees pursuant to the closedown provisions of its employment agreements with employees.

[20] Fabbian maintains it required Mr La Cava take the final two weeks as leave in accordance with the closedown provision at clause 10.2 of the Agreement. I do not agree that the closedown provisions have been correctly applied. Fabbian gives evidence of its closedown running to 8 January 2007. The provision deems the anniversary of service for leave purposes as coincidental with the closedown. But Mr La Cava's anniversary of service for annual leave purposes is shown on Fabbian's own payroll records as 1 February each year. That date bears no relation to the contended closedown. And nor does the closedown coincide with the expressed commencement of service date in the Agreement of 1 January either. Notwithstanding this view, I accept that Fabbian required Mr La Cava to take the final two weeks of his notice period as annual leave. I find that Mr La Cava did not object.

[21] Further complicating matters is that Mr La Cava was apparently not entitled to any leave because he had anticipated leave previously and he was not entitled to further annual leave until 1 February 2007. I find that Fabbian required Mr La Cava to take anticipated leave in respect of his final two weeks.

[22] Ordinarily I would not think it proper that an employer unilaterally require an employee to take part or all of their notice period as annual leave. In this case however, I am inclined to accept the parties acted genuinely in accordance with the closedown provision, albeit not entirely correctly. The effect of requiring an employee to take part of the notice period as annual leave is to reduce the severance payment at termination. I am persuaded this employer was not motivated by that situation but rather the closedown provision.

[23] I am not persuaded that Mr Griffen and Mr La Cava expressly agreed that Mr La Cava's employment would terminate on 22 December 2006. I am not persuaded that both their evidence is sufficiently explicit to establish that situation conclusively. I regard it more likely than not, that Mr Griffen and Mr La Cava solely for convenience agreed that Mr La Cava would work to 22 December 2006. But the discussion between them stopped there. I am not persuaded that the evidence establishes a variation to the termination date itself and I find there was **no** agreement to vary the initial termination date of 5 January 2007. Rather, I find there was an agreement reached that Mr La Cava was not required to work after 22 December 2006.

[24] I am persuaded that Fabbian continued to conduct itself consistent with the initial notified termination date of 5 January 2006. Its leave record nominates 5 January 2007 as the termination date. The severance payment paid on 22 December 2006 is calculated on service to 5 January 2007.

[25] Mr La Cava maintains his employment terminated on 22 December 2006 and says that the severance payment to him on 22 December 2006 does not extend his employment to 5 January 2007. It is submitted the law encourages a clean break by payment at termination. The principle is right. The problem here however, is that the severance payment is calculated to the termination date of 5 January 2007 and not the termination date Mr La Cava maintains of 22 December 2006.

[26] It is undoubted that Mr La Cava was paid until 5 January 2007. He did not concern himself with how the severance payment was composed. Mr La Cava was paid to 5 January 2007 and he has retained that payment at risk that it be regarded as acceptance by him of the terms on which Fabbian now maintains it paid it to him.

[27] I refer also to Mr La Cava's completion (at least partial) of the application for leave form itself. If he knew and honestly believed his employment had been agreed to terminate on 22 December 2006, he should not have completed the form, irrespective of whether it was standard procedure to do so previously. On this occasion, the standard procedure was entirely inappropriate because I infer he knew, that he would not be taking any leave after his employment terminated on 22 December 2006. The completion by him of this form is inconsistent with his position.

[28] In addition to my finding that there was no agreement varying the initially notified termination date, there is also the payment of statutory holidays to Mr La Cava. The severance payment included four statutory holidays falling after 22 December 2006. If there was an agreement by both parties to withdraw the notice expiring on 5 January 2007 and substituting 22 December 2006 in its stead, Fabbian would not have paid statutory holidays to Mr La Cava after 22 December 2006 as though the employment had continued beyond that date.

[29] I also note that these payments were made during the final stages of Mr La Cava's employment and with no hint of these present proceedings being in issue. This persuades of Fabbian's *bone fides* in what it argues now.

The Determination

[30] **For all the above reasons, I determine that Mr La Cava's employment with Fabbian terminated on 5 January 2007.**

Costs

[31] If costs are sought they are reserved.

Other directions

[32] I direct the parties to attend a conference with me within seven days of this Determination to schedule further steps in this investigation.

Leon Robinson
Member of Employment Relations Authority