

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 460/10
5158040
5310433

BETWEEN LYNETTE MAY PAYNE
 Applicant (5158048)

AND PHILIP PAYNE
 Applicant (5310433)

AND GARTH WILLIAM ELLMERS
 and SANDRA MAXINE
 ELLMERS t/as ELLMERS
 PROPERTIES
 Respondents

Member of Authority: R A Monaghan

Representatives: D Rishworth counsel for applicants
 G Tayler, advocate for respondents

Investigation Meeting: 24 September 2010 at Gisborne

Determination: 27 October 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Lynette and Philip Payne say their former employers, Garth and Sandra Ellmers trading as Ellmers Properties, dismissed them unjustifiably on the ground of their redundancy. They doubt the redundancies were genuine and say further that they were not consulted about them.

[2] Mr and Mrs Ellmers say the dismissals were justified and were imposed as the result of a genuine redundancy situation. They deny any breach of the obligation to consult.

The identity of the employer

[3] According to the written employment agreements, Ellmers Properties Partnership was the employer of Mr and Mrs Payne respectively. According to other documents produced in the course of this investigation, Ellmers Properties Partnership comprised the Sandra Ellmers Family Trust and the Garth Ellmers Family Trust. In other words, the relevant business partnership appeared to involve the two trusts, not the two individuals cited as the partners here.

[4] At the commencement of the investigation meeting I sought clarification from the parties of precisely who was said to comprise the partnership cited as the employer. For the purposes of this employment relationship problem, and with both parties having obtained advice on the point, Garth and Sandra Ellmers agreed to stand in the shoes of the employer party in partnership in their personal capacities and Mr and Mrs Payne have continued to pursue their grievances accordingly.

Background

[5] Mr and Mrs Ellmers employed Mr and Mrs Payne as managers of the Ocean Beach Motor Lodge (the motor lodge). The motor lodge was owned by the Ellmers Properties Partnership.

[6] Written employment agreements for both Mr and Mrs Payne contained the following provision:

18. Employee Protection Provisions

The employee will be notified of the changes within one week following an arrangement or sale being signed by both parties.

The employer will negotiate with the new employer, including whether the affected employees will transfer to the new employer on the same terms and conditions, and will use best endeavours to secure the new employer's agreement to offer employment to the new employee.

Where the employee either chooses not to transfer to the new employer, or is not offered employment by the new employer, the employer will offer the employee absence from work on pay to undertake a job search or attend job interviews for a period of up to 3 days in total.

[7] Mr and Mrs Ellmers had a number of other property interests, which were held in diverse legal entities. At the time of the investigation meeting Mr Ellmers was aged 71 and Mrs Ellmers was aged 63. According to Mrs Ellmers the pair had been working on a restructuring plan to allow them to retire, and to facilitate the movement of their three daughters into the management of the family interests.

[8] To that end most of their properties were sold to the Ellmers Family Trust in December 2008. The motor lodge was not included in these transactions because the Ellmers had been considering either leasing it or converting the complex to unit titles and selling the management rights.

[9] The Ellmers' property interests included development properties as well as investment properties. Changes in the 'associated persons' rules in the Income Tax Act 2007 had significant implications for the tax treatment of these properties on disposal, particularly for those entities and individuals (and their holdings) who would be caught by the wider definition of 'associated persons'. Mrs Ellmers became aware of the changes and their implications by chance in or about mid-March 2009. She also became aware that certain of the changes would affect property purchased from 1 April 2009. That prompted her to act quickly to include the motor lodge in the properties sold to the Ellmers Family Trust so the transaction could be concluded before 1 April.

[10] Accordingly the sale of the motor lodge to the trustee for the Ellmers Family Trust was settled on 31 March 2009. The motor lodge was sold as a going concern, with the purchase price being satisfied by the completion of acknowledgements of debt in favour of the Garth Ellmers and Sandra Ellmers family trusts.

[11] Mrs Ellmers oversaw the day to day running of the motor lodge. By emailed message of 31 March 2009 she advised Mr and Mrs Payne:

The Ocean Beach Motor Lodge is being sold ...

I do not have time to discuss this matter with you today as I am in meetings all day but will fill you in on the details as soon as I can, so would like to have a meeting with you and Lyn later this week if you have time. Can you please let me know some times which may be suitable for you.

[12] Mrs Ellmers then instructed Mr Tayler to manage the associated employment matters on her behalf.

[13] Unfortunately Mrs Ellmers' request for a meeting was overtaken by the events that followed almost immediately. The next day Mr and Mrs Payne received a letter from Mr Tayler dated 1 April 2009, advising that Mr Tayler was assisting in employment matters arising from the sale. The letter went on to advise that employment with the partnership would continue in the short term, but that it was envisaged that both management positions would become redundant and be replaced with management contracts on a contracts for services basis.

[14] The letter also advised:

Shortly you will see an advertisement for the commercial management contract in the newspaper, but you need not apply formally as you are invited to register your interest in applying for new positions in which case you will automatically be shortlisted for interview.

However if you decide not to apply then please let us know early so that the appropriate redundancy discussions can proceed. Likewise if you do apply but are unsuccessful the same discussions around redundancy can proceed.

However if we do not hear from you either way by Friday the 3rd April 2009 we will proceed on the basis that you do not wish to apply.

...

Please direct all correspondence regarding the proposed redundancy and related issues to this office from now on.

[15] The reason for the plan to offer the management of the motor lodge on a contract basis was that the Ellmers' daughter Felicity, who was being introduced to the business, had limited business experience. It was hoped that business experience brought to the management of the motor lodge by managers under contract would address the inexperience a way that an employment arrangement could not.

[16] Mr and Mrs Payne were shocked by the contents of the 1 April letter, and consulted their solicitors. By letter dated 3 April their solicitors replied to Mr Tayler, saying that the redundancy was a sham and an attempt to change the nature of the relationship by replacing the employment relationship with one of a contract for services. The letter suggested that the change of ownership and replacement of the

employed positions with contracted positions was a device that would not be condoned by the Authority or the Court. It said Mr and Mrs Payne had no intention of applying for a commercial management contract, as doing so would waive their rights under their employment agreement. It ended by saying a personal grievance was being raised and seeking mediation.

[17] Mr Tayler responded disagreeing with the position being advanced, but advising that mediation would be available in Gisborne in the last week in April.

[18] Unfortunately, mediation did not go ahead until 18 May 2009. Meanwhile arrangements for the change continued.

[19] By letter dated 14 April Mr Tayler advised that the Ellmers Family Trust was the new owner of the motor lodge, and that Felicity Ellmers would represent the trust. In reliance on the statement that Mr and Mrs Payne were not interested in seeking the contract positions he advised that Copperton Limited, a company owned by Duncan Davies, would provide management services on a commercial basis. Mr and Mrs Payne's positions would become redundant on the commencement of the contract with Copperton Limited. Subject to any response they wished to make, notice of termination of their employment was to be given.

[20] The solicitors' response dated 20 April was to repeat the view that there was not a true redundancy situation. It was further alleged that there was a breach of clause 18 of the employment agreements in that the redundancies were being presented as a *fait accompli*, and an attempt was being made to avoid obligations under the clause. Finally, it was alleged that the notice of intention to terminate the employment relationship was not in keeping with the employer's good faith obligations.

[21] By letter dated 22 April Mr Tayler disagreed with the Paynes' position. The work was not being contracted out, rather the new owner of the business had chosen not to employ a manager. The letter pointed out that Mr and Mrs Payne had indicated they were not interested in being engaged under a commercial contract, and said that for her part the new owner's representative, Ms Ellmers, was not interested in working with Mr and Mrs Payne. Accordingly Mr and Mrs Payne were given notice

of the termination of their employment, with the last day of employment to be 21 May 2009.

[22] An unfortunate feature of this problem concerns the Paynes' relationships with Ms Ellmers and with Mr Davies. Mr Davies was already known to Mr and Mrs Payne in that, because Mrs Ellmers was resident in Raglan, she had engaged Mr Davies' company to provide on-site oversight of the motor lodge for a number of years. There had been some tension in that arrangement, as well as more recently in the relationship between Mr Payne and Ms Ellmers. Mrs Ellmers recognised this to the extent that an offer was made to involve Ms Ellmers and Mr Davies in the mediation in an attempt to resolve matters. The offer was rejected.

[23] In a written response dated 28 April 2009, Mr and Mrs Payne's solicitors said Mr and Mrs Ellmers were in breach of 's 69, Part 6A' of the Employment Relations Act 2000 as well as clause 18 of the employment agreements. No more specific argument has been raised or pursued in respect of Part 6A of the Act. The letter said further that no effort had been made to negotiate with the new employer as to whether the affected employees would transfer to the new employer on the same terms and conditions, and best endeavours had not been used to secure such transfer.

[24] In repeating again that the redundancy was a sham, the letter denied that Ms Ellmers was the new employer. It said that the real owners remained Garth and Sandra Ellmers, and that effective control of the business remained in their hands.

[25] It was common ground that the Ellmers' intentions regarding the structuring of their business interests and the role of their daughters were discussed at mediation on 18 May. Subsequently, in a letter dated 20 May 2009, Mr Tayler set out the Ellmers' position in some detail, and offered a further month's notice to be taken as garden leave in order to allow Mr and Mrs Payne time to seek alternative employment. That offer was declined, in terms including an allegation that the explanation was a self-serving attempt to rationalise the decision-making process after the event.

[26] Copperton Limited did not take up a full contract to manage the motor lodge. Instead a contract was entered into between the Ellmers Family Trust and Kate and

Hamish Deere, who traded through their company DPK Management Services Limited.

Determination

[27] It was submitted, correctly, that a redundancy is genuine if it was imposed for genuine reasons. A redundancy not imposed for genuine reasons can amount to an unjustified dismissal.

[28] Here I accept that the Ellmers' decision to restructure their holdings was made for the reasons Mrs Ellmers articulated - that is initially as part of a succession-planning programme, and more pressingly in the case of the ownership of the motor lodge because of the implications of the change in the associated persons rules. I also accept Mrs Ellmers' evidence about the intended roles of her daughters, and of Felicity in particular, and that Mrs Ellmers genuinely believed Felicity would be better assisted in the management of the motor lodge if contract managers were engaged rather than embarking on any employment relationship.

[29] Considerations of this kind are just as capable of amounting to genuine reasons for deciding to restructure or reorganise a business - and for raising the prospect of redundancies - as the more commonly relied-on reason that cost savings are sought. Indeed, whether or not a cost saving was achieved here is not relevant. I find on the facts that the reason given to Mr and Mrs Payne was the genuine reason for redundancy at the time the decision was made. There was no sham or device.

[30] It was also submitted that the redundancy was not genuine because the management positions were not surplus - they still existed unchanged.

[31] The submission did not address the phenomenon of the 'technical redundancy', or acknowledge that a technical redundancy can nevertheless be a genuine redundancy.

[32] Indeed the legislature recognised in Part 6A of the Employment Relations Act a need to protect employees when technical redundancies occur but the type of work they perform (or work that is substantially similar) does not disappear. The

protections in Part 6A cover the sale or transfer of a business to another person, and the contracting out of employees' work. One such protection takes the form of the obligation to include an employee protection provision in individual employment agreements.

[33] Clause 18 is such a provision. I now take the opportunity to address the submissions that the clause was breached.

[34] Under the first sentence, the clause is activated by the signing of an agreement to contract out or for the sale and purchase of the business. The sentence requires notification of 'the changes' within one week following the signing. Here, notification of the sale of the motor lodge as well as of the plans for the future of the management position was provided within about a day.

[35] The next sentence sets out the obligation to negotiate with the new employer regarding the transfer of an employee's employment on the same terms and conditions, and to use best endeavours to secure agreement to offer employment to the employee. This does not amount to an obligation to secure the transfer of the employee's employment to the new employer on the same terms and conditions, or the offer of such a transfer. Whether and how the obligation is met must depend on the facts of each case, and in particular what can reasonably be expected in the circumstances.

[36] The circumstances here concerned the transfer of the employing business from one legal entity to another, where the entities concerned were controlled by the same people – Mr and Mrs Ellmers. I consider that the practical reality was that the obligation to negotiate meant there was an obligation to give reasonable consideration to the transfer of Mr and Mrs Payne's employment to the new entity on the same terms and conditions. In that respect a relevant consideration was the fact that the entities were being restructured for the purposes of the next generation of the Ellmers family, as well as the need to supplement the commercial experience of that generation. Since the decision was not arbitrary, and was reached following genuine and reasonable considerations, it was not in breach of the clause.

[37] The second sentence also obliges the employer to use its 'best endeavours' to secure the new employer's agreement to offer employment. Again, the meaning and extent of the 'best endeavours' required of the employer will depend on the facts of each case. I do not consider it appropriate to apply the phrase here so that it obliges the employer to act in a manner that defeats the purpose of an objective it was entitled to have, namely to supplement Ms Ellmers' skills and responsibilities with those of contracted managers. I find further that the attempt to involve Ms Ellmers in the resolution of the problem, in the form of the suggestion that she participate in the mediation, was indicative of good faith on the employer's part.

[38] No issue was taken with the third sentence. Accordingly I observe that employment was not offered by the new employer, and an offer of a paid absence from work was made.

[39] I conclude that nothing arising out of the application of clause 18 supports a conclusion that the Ellmers breached their obligations in a manner rendering their redundancies unjustified.

[40] Turning to the parties' mutual obligations to deal with each other in good faith, and more particularly to the consultation process, a failure to consult can amount to a failure to act in good faith and in turn lead to an unjustified dismissal.

[41] Regarding the decision to sell the motor lodge the Ellmers were entitled to restructure their assets, and the imminence of the tax changes which prompted the quick sale meant it was impracticable to embark on consultation about the implications of the sale prior to its occurring. I do not accept there was a breach of good faith in any failure to consult prior to the sale.

[42] There was also no consultation on whether the management positions should continue as employed positions or contracted positions. Although the 1 April letter said it was 'envisaged' that both positions would be replaced with management contracts, the advertising and subsequent arrangements also notified in the letter did not indicate any real possibility that the management positions would remain employed positions. At the same time, in the light of the reason given for the change

to contracted positions by one party and the resistance in principle by the other, consultation was unlikely to achieve anything.

[43] It is understandable that the suddenness of the 1 April letter caused distress to Mr and Mrs Payne. It is also unfortunate that the meeting which Mrs Ellmers had intended to have did not go ahead – it seems because of a misunderstanding. Mrs Ellmers had expected an approach from the Paynes regarding their willingness to meet, which she did not receive. Mr and Mrs Payne did not make an approach because they believed the entire matter was now in Mr Tayler's hands as far as Mrs Ellmers' role was concerned.

[44] It is, again, unfortunate that the distress the Paynes experienced was accompanied by their continued accusations that the redundancy situation was a sham and a device, extending to the rejection of the attempts to explain the arrangements and the later accusation that the explanations were self-serving and made after the event.

[45] Although the legal documents in respect of the sale and purchase of the motor lodge were not produced until the investigation meeting, amounting arguably to a flaw in the consultation process, the Paynes were proceeding in any event on the view that the Ellmers were not entitled to seek to replace the employed positions with contract positions at all. Their position on that point was entrenched. This was so much so that when – in the light of the information discussed during the investigation meeting – they were asked whether they would have been prepared in principle to consider entering into a contractual arrangement, Mr Payne continued to rely on the view that the employer was not entitled to take such a path.

[46] This attitude made the employer's attempts to discuss the matter difficult. Such attempts were made, and were genuine, to the extent that when the possibility of interpersonal difficulties arose an attempt was made to address them through the mediation process. I conclude that any flaws in the consultation process were outweighed by the extent of the attempt to resolve matters through the mediation process. I do not consider the flaws sufficient to render the redundancies unjustified on the ground of any breach of good faith or failure to consult.

[47] For these reasons I find the dismissals on the ground of redundancy were justified.

Costs

[48] Costs are reserved.

[49] The parties are invited to resolve the matter. If they are unable to do so any party seeking an order for costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days in which to file and serve a memorandum in reply.

R A Monaghan

Member of the Employment Relations Authority