IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2014] NZERA Wellington 128
5441917

	BETWEEN	ROBERT LAWRENCE EASTHOPE Applicant
	AND	A & D DECORATORS LIMITED Respondent

Member of Authority:	G J Wood
Representatives:	P May for the Applicant G Ogilvie for the Respondent
Investigation Meeting:	13 August 2014 at Wellington
Submissions Received:	By 14 October 2012
Determination:	17 December 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Robert Easthope, claims that he was unjustifiably dismissed from his position with the respondent A&D Decorators Limited (A&D) for redundancy. He claims compensation for loss of income, distress and legal costs.

[2] This claim is denied by A&D, who consider that Mr Easthope, who is a major shareholder in A&D, agreed to leave the business and be paid three months' salary as per a shareholders' deed, together with holiday pay and a six figure sum in consideration for his shares, in a meeting with Mr Andrew Reisch, the majority shareholder and sole director of A&D.

Factual discussion

[3] The applicant, Mr Easthope, is an experienced painting contractor who ran his own company between 2000 and 2007. In 2007 it was agreed by Mr Easthope and Mr Reisch that their companies would merge as A&D, albeit that it seems that Mr Easthope brought less capital to the merged company than Mr Reisch.

[4] The two principals worked together well for 18 months, at which time a shareholders' deed was drawn up, together with a long term agreement for sale and purchase of shares in A&D. In essence Mr Reisch would own 51% of the shares and Mr Easthope 49%, but that Mr Easthope's shares would be only part paid, with the balance being paid over time through company profits. Both Mr Easthope and Mr Reisch were to be employed by A&D on terms agreed by A&D such shareholders. Despite the requirements of the deed no separate employment agreement was drawn up at any point for Mr Easthope.

[5] Another clause in the deed dealt with cessation of employment. It states:

> *The parties and the company agree that in the event that the majority of the directors vote to either terminate the employment of, or make redundant any one of the shareholders from time to time (the departing shareholder) then the departing shareholder shall be entitled to:*
>
> *(a) Three (3) months' notice or payment in lieu of such notice;*
>
> *(b) To be paid all holiday pay owing at the expiration of the three months' notice period ("the termination date") as referred to in the preceding paragraph); …*

[6] I also note, however, that pursuant to the shareholders deed Mr Easthope's employment, because he was a shareholder, could never be terminated (by redundancy or otherwise) without him being given three months' notice or payment in lieu. In effect the clause appears to provide for a set process for compensation for shareholding employees whatever their conduct may have been, especially given that no exception is made for misconduct. Thus it appears to be a commercial shareholder protection provision which serves to give Mr Easthope special rights and benefits as an employee. That appears to be the flip side of the commercial arrangements that Mr Reisch has relied on in defending Mr Easthope's personal grievance claim.

[7] Schedule 1 provides a share valuation formula. I note that as a result of Mr Easthope leaving the employment of A&D, the parties have been in dispute over the terms of this schedule.

[8] The company operated quite well until mid-2013. Then, as a result of the failure of the Mainzeal group of companies, and other adverse trading conditions, A&D suffered some serious financial losses. Because he was a shareholder and manager (but not a director) of A&D, I conclude that Mr Easthope was well aware of the financial issues facing A&D and prefer the evidence of Mr Reisch and his office manager over Mr Easthope on this point accordingly.

[9] Indeed Mr Easthope accepted that there had been discussions of reducing the number of staff members and using more sub-contractors, as one option.

[10] Mr Reisch foresaw the possibility of A&D going under should overheads not be significantly cut. An issue Mr Reisch pursued with A&D's accountants was that Mr Easthope put money into the company by way of paying for the balance outstanding on his shares. However Mr Easthope indicated that he did not have the six figure sum that was said to be necessary to meet this obligation. I note that there was no obligation on him to do so, however, as he was not in breach any of the written conditions relating to his ongoing payments for shares. This discussion again shows that Mr Easthope was, or should have been, aware of the difficult circumstances A&D was facing.

[11] On 30 August 2013 Mr Reisch formally put forward the option that he would buy Mr Easthope out of the company, as a precursor to other types of downsizing. Mr Easthope indicated that under this arrangement Mr Easthope's employment would end on three months' notice and that he would be paid a six figure sum in consideration of the shares he had already paid for.

[12] Mr Easthope was told that this could take effect from Friday 6 September ie a week later. Both parties agreed that they would consider the matter over the weekend.

[13] On Monday 2 September, I conclude that Mr Easthope agreed to Mr Reisch's proposal. I do not accept Mr Easthope's evidence that it was a *fait accompli* because Mr Easthope had rights as an employee and as a shareholder, which he could have exercised to approach a proposal. In addition, he had had the weekend to think the matter over.

[14] Similarly, Mr Easthope agreed in evidence that he had agreed to Mr Reisch's proposal, albeit reluctantly. This was strengthened by the approach that they agreed to take with the staff. Mr Easthope told the staff that it was in the interests of A&D that he left, that he would be doing so that Friday and that the company was to undergo significant downsizing.

[15] Subsequently Mr Reisch and Mr Easthope came to be in dispute over the valuation of Mr Easthope's shares. That is a matter that will be determined in another forum, and is not relevant to this matter, agreement already having been reached on what would happen about Mr Easthope's employment and his shares, even if inconsistent with the terms of the deed and the shareholding agreement.

[16] Subsequently Mr Easthope's employment did not end on the Friday, but was terminated later. No claim has been made in the Authority about those events and they are not discussed further accordingly, except to note that as a result of the cessation of employment clause in the deed Mr Easthope could expect three months' notice or pay in lieu.

Determination

[17] Employment agreements and shareholder agreements are quite separate in law. However when determining employment relationship problems, the whole of an employer and employee's circumstances must be taken into account. Here I note that Mr Easthope was, as a minority shareholder, always subject to commercial decisions being made by Mr Reisch that he would not concur with, but would be unable to resist.

[18] The result of Mr Easthope's agreement (as a minority shareholder) to the proposal of Mr Reisch (as a majority shareholder) was that he would lose his employment by way of redundancy as provided for under the shareholders' deed. In these circumstances I conclude that the agreement was a mutual agreement to the termination of Mr Easthope's employment and thus was not a dismissal. In these circumstances Mr Easthope has no personal grievance as claimed because he was not dismissed.

[19] I would, however, note in any event that there were grounds for a genuine redundancy and Mr Easthope was consulted in a way that was open to A&D as a fair

and reasonable employer, given Mr Easthope's knowledge of the workings of A&D and its finances.

[20] I therefore dismiss Mr Easthope's application.

Costs

[21] Costs are reserved.

G J Wood
Member of the Employment Relations Authority