

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 379
5468858

BETWEEN

DAVID CORNISH
Applicant

A N D

AMCOR FLEXIBLES (NEW
ZEALAND) LIMITED
Respondent

Member of Authority: Vicki Campbell
Representatives: Tim Allan for the Applicant
Richard Harrison for the Respondent
Investigation Meeting: 23 June 2015
Submissions Received: 23 June 2015 from the Applicant
23 June 2015 from the Respondent
Date of Determination: 3 December 2015

DETERMINATION OF THE AUTHORITY

- A. Mr Cornish was not unjustifiably dismissed.**
- B. Amcor Flexibles (New Zealand) Limited did not breach the employment agreement between it and Mr Cornish.**
- C. The claim for the payment of a bonus of \$15,000 is declined.**
- D. Amcor Flexibles (New Zealand) Limited did not breach its statutory obligations of good faith.**
- E. The non-solicitation provisions set out at clause 17 of the employment agreement were enforceable against Mr Cornish and the term of six months was reasonable.**

F. Costs are reserved.

Employment relationship problem

[1] Mr Cornish claims he was unjustifiably dismissed on 6 June 2014 from his employment as the National Key Accounts Manager for Amcor Flexibles (New Zealand) Limited (Amcor) and that Amcor has:

- a) Breached the terms of his employment agreement;
- b) Failed to pay him a bonus; and
- c) Breached its statutory obligations of good faith.

[2] Mr Cornish also seeks a declaration that the non-solicitation clause in the employment agreement is unenforceable against Mr Cornish or in the alternative he seeks a modification to the clause to reduce the term from six months to three months.

[3] Amcor denies all claims.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Mr Cornish and Amcor but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Background

[5] Mr Cornish was employed as an Account Manager Airport Oaks by Amcor in February 2013 on a fixed term employment agreement which was stated to expire on 4 February 2014. The purpose of the fixed term agreement was to allow Amcor the opportunity to conduct a review of its salesforce structure. The continuation of the role was dependent on the outcome of the review.

[6] On 28 June 2013, Mr Cornish was offered and accepted a variation to his employment agreement. He was appointed to the role of National Key Accounts Manager, Airport Oaks with effect from 1 July 2013. The fixed term agreement was extended to 1 July 2014 but all other terms including the stated purpose for the fixed term agreement, continued to apply.

[7] In the letter setting out the agreed variation, Mr Glen Turnbull, Sales Manager, advised Mr Cornish that he would be invited to join a discretionary bonus system based on performance criteria to be discussed and finalised with his line manager, the Sales Manager, Airport Oaks.

[8] On 3 March 2014, Mr Turnbull sent an email to the sales staff including Mr Cornish setting out his concerns about the failure to meet sales targets. On 21 March 2014 Mr Cornish emailed Mr Turnbull raising concerns that no KPIs had yet been agreed to allow him to achieve a bonus payment. Mr Cornish proposed that he be given additional time off on pay instead of setting KPIs that he may not have time to achieve.

[9] Throughout 2013 and 2014 Mr Cornish made requests that his workload be reduced and accounts moved to other Account Managers. On 12 May 2014, Mr Cornish wrote again to Mr Turnbull requesting the transfer of eight of his accounts and a change of the customer service person working with him on his accounts. In response Mr Turnbull advised Mr Cornish that there were only one and a half months to the end of the fiscal year and assignments would be rebalanced prior to July.

[10] On 19 May 2014 Mr Cornish applied for and was granted special paid leave for the period 9 June to 20 June 2014 and then 30 June to 14 July 2014. On the Notification of Leave forms completed by Mr Cornish he stated that the reason for the leave was in lieu of the payment of a bonus. This was in accordance with the proposal made by Mr Cornish in his email of 21 March 2014 that he be paid special leave rather than take the cash in bonus payments.

[11] In June 2014 Mr Cornish and Mr Turnbull entered into discussions regarding the renewal of Mr Cornish's employment agreement. The fact of these discussions is recorded in an email Mr Turnbull sent to Mr Cornish on 6 June 2014. In that email Mr Turnbull advised Mr Cornish that his fixed term contract would not be renewed and gave him two weeks' notice that his employment would end. Mr Turnbull advised that the reason the employment was not being renewed was because of the cost of the remuneration package paid to Mr Cornish. This was not the stated purpose for the fixed term agreement which was that the agreement was to allow time for a review of the sales force structure.

[12] Mr Cornish raised a personal grievance on 10 June 2014. The grievance was in respect of a claim that Mr Cornish had been constructively dismissed in April 2014. In the letter raising the personal grievance, Mr Cornish raised concerns about the lack of payment of the bonus and challenged the legality of the fixed term nature of the employment relationship.

[13] Mr Cornish then proceeded on his previously approved special leave. On his return, Mr Cornish discovered that Mr Turnbull had arranged for all emails addressed to him, from the date of his departure on special leave, had been diverted to Mr Turnbull. Mr Turnbull says (and I accept) this was because emails had to be addressed while Mr Cornish was on leave.

[14] On 20 June 2014, Amcor responded and accepted that Mr Cornish's role was permanent but advised Mr Cornish that a review of the arrangement between Amcor and Mr Cornish and the need for the continuing role of the National Key Account Manager position would be undertaken.

[15] Mr Cornish was also advised of a proposal to disestablish the National Key Account Manager's role and that Mr Turnbull and others within the team would deal with the national accounts for which Mr Cornish had been responsible.

[16] Amcor advised Mr Cornish that from a commercial perspective there was no requirement or justification for the position and so Amcor was considering disestablishing it. A meeting was arranged to discuss:

- (a) The proposal to disestablish the role and any alternative proposals which Mr Cornish may have or may wish to explore;
- (b) Whether Mr Cornish was interested in an Account Manager position which had been advertised; and
- (c) Alternative positions that Mr Cornish may wish to propose and/or any support Mr Cornish required during the restructuring process including outplacement assistance.

[17] Mr Cornish and Amcor met between 20 and 27 June 2014 to discuss the proposal to disestablish the National Key Account Manager role. Following those

meetings Mr Cornish was advised on 27 June 2014 that his role had been disestablished and his employment would terminate on 21 July 2014.

[18] Mr Cornish was paid his final pay on 27 June 2014 which included the second period of pre-approved leave to 14 July 2014 and two weeks' notice taking him to 21 July 2014.

Issues

[19] The issues for the Authority to determine are:

- (a) When was Mr Cornish dismissed?
- (b) Does the Authority have jurisdiction to investigate the claims of unjustified dismissal?
- (c) Was the dismissal unjustified and if so what, if any, remedies should be awarded?
- (d) Did Amcor breach the employment agreement and if so what, if any, penalties should be awarded?
- (e) Is Mr Cornish entitled to the payment of a bonus?
- (f) Has Amcor breached its statutory obligations of good faith and if so what, if any, penalties should be awarded?
- (g) Is clause 17 of the employment agreement enforceable against Mr Cornish? If so, should the period of the non-solicitation clause be modified by the Authority?

The dismissal

When was Mr Cornish dismissed

[20] Mr Cornish says he was dismissed on 6 June 2014 when he was given two weeks' notice of the termination of his employment as the result of the fixed term agreement coming to its conclusion.

[21] Amcor says that the notice was retracted on 24 June 2014, when it acknowledged that the fixed term agreement was in fact a permanent ongoing employment agreement and identified that the National Key Accounts Manager position was to be reviewed.

[22] The Act at section 66 deals with fixed term employment agreements. Section 66(6)(b) states that if the employer does not comply with section 66(4) of the Act the employer may not rely on any term agreed under a fixed term agreement as having been effective to end the employee's term of employment, if the former employee elects to treat that term as ineffective. Section 66(4) requires an employment agreement to specify in writing the way in which the employment will end and the reasons for the ending of the employment in that way.

[23] When Mr Cornish wrote to Amcor on 10 June 2014, the effect of Mr Cornish's letter was that he was electing to treat the fixed term as ineffective.

[24] I find that the intention of both parties in relation to ending the employment relationship at the expiry of the fixed term employment agreement on 1 July 2014 was not carried through by their actions. This is evidenced by the fact that in May 2014 Mr Cornish and Amcor agreed that in lieu of negotiating and agreeing on KPIs so that Mr Cornish could achieve a bonus which he has valued at \$15,000, an agreement was reached that Mr Cornish could take special paid leave of 20 days in two periods, the second period taking him beyond the expiry date of the fixed term agreement.

[25] I find that the nature of the employment relationship as at 20 June 2014 was, by agreement, indeterminate in nature and was not subject to a fixed term. Through its actions Amcor retracted the notice given to Mr Cornish on 6 June 2014 and the 20 June 2014 letter is an acknowledgment that the employment relationship was ongoing. Mr Cornish did not dispute this as being the correct situation at that time.

[26] Also in its 20 June 2014 letter, Amcor notified Mr Cornish that it was to undertake a restructuring proposal, the proposal being that the role of National Key Accounts Manager be disestablished on the grounds that it was superfluous to the requirements of Amcor.

[27] The evidence of both parties was that Mr Cornish did not engage in the process conducted by Amcor in relation to the potential disestablishment of his position.

[28] On 27 June 2014, Mr Cornish was advised that following the meeting on 25 June 2014 and correspondence between the parties, Amcor had proceeded to make a decision on the information it had available to it, to disestablish the National Key Account Manager role and to create a new role of Account Manager.

[29] Mr Cornish was offered the opportunity to take up the Account Manager role, albeit at a lower salary, and was asked to advise as a matter of urgency whether he wished to do that. Mr Cornish was given the opportunity to ask for any additional information about the Account Manager role in order to make a decision and was advised that it would be made available to him.

[30] Amcor advised Mr Cornish that as he was about to take his second period of paid leave and if he was not going to take up the offer of the new role then he was to make arrangements for the return of Amcor property prior to his departure on leave.

[31] Mr Cornish returned his keys and Amcor's property to Amcor on that same day, 27 June 2014. This was a clear message to Amcor that Mr Cornish did not intend to take up the proffered role of Account Manager.

[32] In further communications from Amcor to Mr Cornish on 3 July 2014, Amcor set out its understanding of the position and events to date which included that there had been no disagreement from Mr Cornish regarding the proposal to disestablish his position and no alternatives had been put forward to either the proposal to disestablish his role or in respect of other positions that may be available as an alternative to redundancy. Amcor set out its understanding that Mr Cornish was not interested in the Account Manager position that had been offered to him as an alternative to redundancy and that Mr Cornish was on leave until 14 July 2014 and had no intention of returning to work following his leave.

[33] Mr Cornish was advised that if any of the points set out in Amcor's letter were incorrect, and given that he remained an employee of Amcor through the leave period, Amcor remained open to engaging in further constructive discussions on any of the issues and was open to finding a resolution if that was possible.

[34] With the exception that Mr Cornish disagreed with a statement by Amcor that it had made clear his employment was continuing after Mr Cornish raised his personal grievance on 10 June 2014 Mr Cornish raised no issues with respect to any of the other matters set out by Amcor in its 3 July 2014 letter.

[35] Mr Cornish's employment ended with effect from 21 July 2014.

[36] I find Mr Cornish was dismissed by reason of redundancy and his employment ended on 21 July 2014.

90 Day period

[37] Amcor submits the Authority has no jurisdiction to investigate a termination of employment by reason of redundancy because Mr Cornish has not raised a personal grievance in respect of that termination of his employment.

[38] Mr Cornish relies on the 10 June 2014 letter in which he says he raised his personal grievance. A review of that letter indicates that the grievance Mr Cornish was raising was in fact a grievance for unjustified constructive dismissal for events that had occurred in April 2014. That personal grievance for constructive dismissal has not been argued and there was no resignation from Mr Cornish for the events that occurred in April 2014. Therefore, there is no evidence to found a personal grievance for constructive dismissal. In any event, Mr Cornish's employment continued until 21 July 2014.

[39] Mr Cornish lodged his statement of problem in the Authority on 8 July 2014. In this statement of problem Mr Cornish raises issues with respect to the process of consultation over the redundancy and refers to the process as being a "sham". In the statement of problem Mr Cornish seeks remedies for the failures of Amcor during the redundancy process.

[40] The statement in reply was served on Amcor on 11 July 2014. Mr Cornish was given notice on 27 June 2014 that his employment would be ending. He was then on a period of leave and was not required to work out his notice period. Mr Cornish returned his keys and all property belonging to Amcor on 27 June 2014 following a specific request by Amcor that he do so only if he did not intend accepting the proffered role of Account Manager.

[41] The Act does not prescribe the form in which a grievance must be raised with an employer. Provided the statement makes the employer "*aware*" of the grievance that the employee wants the employer to address, it is sufficient.¹

[42] I find that the serving of Mr Cornish's statement of problem on Amcor satisfied the requirement of section 114(2) of the Act for making the employer aware of the grievance he wanted addressed which was that the redundancy process was a sham. I have taken the word "process" to incorporate all that occurred between 20

¹ See review of case law in *Board of Trustees of Te Kura Kaupapa Motuhake o Tawhiuau v Edmonds* (unreported, EC Auckland, AC 14/08, 16 May 2008, Colgan CJ) at [44]-[50].

and 27 June 2014 including the giving of notice to terminate Mr Cornish's employment. I am satisfied that this was done within the statutory 90 day period.

Was the dismissal justified

[43] The test of justification for dismissal is stated in section 103A of the Act. The test requires the Authority to assess whether Amcor's actions and the way it acted was what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[44] The most recent authority on the application of section 103A in a redundancy setting is *Grace Team Accounting Limited v Brake*². That decision of the Court of Appeal upheld an earlier Employment Court decision where the Court confirmed that employers must show that a decision to make an employee redundant is genuine and based on business requirements. This requires the Authority to scrutinise the reasons relied on by the employer in making its decision to dismiss.

[45] Section 4 of the Act requires parties to an employment relationship to deal with each other in good faith. Parties are to be active and constructive in establishing and maintaining a productive employment relationship in which they are responsive and communicative. The statutory obligations of good faith require employers to provide affected employees with access to information relevant to the continuation of the employee's employment and an opportunity to comment on the information before the decision is made.

[46] Amcor says the termination of Mr Cornish's employment was for a genuine redundancy situation that had arisen.

[47] On 20 June 2014 Amcor advised Mr Cornish that a review would be undertaken of its arrangement with Mr Cornish. Mr Cornish was advised that "*...from a commercial perspective there is no requirement or justification for the position so we are considering disestablishing it.*"

[48] Mr Cornish was invited to attend a meeting to discuss the proposal and was provided with the copy of a position description for a proposed Account Manager position which attracted a salary approximately \$20,000 less than his current salary.

² [2014] NZCA 541.

[49] As already noted earlier in this determination Mr Cornish did not engage in the consultation process which ultimately led to him receiving notice of termination by reason of redundancy.

[50] Mr Cornish says he did not engage in the process because he believed the process to be a sham. He says it was a sham because Amcor had attempted to terminate his employment by relying on the fixed term agreement but when that failed, it immediately embarked on a restructuring process which was contrived to achieve the same outcome which was the termination of his employment.

[51] I am satisfied it is more likely than not, that at least one motive behind the restructuring was to remove Mr Cornish from his employment because Amcor considered his remuneration package to be uneconomical. The focus of the email dated 6 June 2014 when Amcor attempted to terminate Mr Cornish's role was on the cost of Mr Cornish's remuneration package compared to the market benchmark.

[52] There were however, other reasons behind the motivation for the disestablishment of the role. This included issues with respect to sales budgets not being met and that the role was initially only a temporary role to allow a review of the sales force structure.

[53] Mr Turnbull emailed all sales staff including Mr Cornish and made it clear that sales were not tracking in line with budget and the branch had achieved unacceptable results in the area of new business which was not sustainable.

[54] I am satisfied the purpose of the National Key Account Manager role was transitional in nature to allow Amcor to review its sales force and to structure it to meet its needs. When Mr Cornish raised concerns about the proposal to end his employment in reliance on the fixed term agreement Amcor agreed the employment was ongoing, but at the same time was faced with having a position, the purpose for which, had run its course. Further, the costs associated with the National Key Account Manager position were out of kilter with the market in terms of remuneration.

[55] I agree with Mr Cornish that the timing of the restructuring was suspicious. Mr Cornish calls it a “sham”. Where an employee alleges that a process is a sham, they have the burden of proving it is so.³

[56] I find Mr Cornish has not established that the proposal to disestablish the National Key Account Manager position and the offer of the Account Manager position was a sham. Mr Cornish chose not to engage in the process and/or to test the proposals. His response at the first meeting was that Amcor would do what it had to do.

[57] The good faith obligation to be communicative is a mutual obligation. From the evidence I have received I am satisfied Amcor has attempted to engage with Mr Cornish in good faith. The refusal by Mr Cornish to engage cannot now be held against Amcor.

[58] The disestablishment of the National Key Account Manager’s role has been shown by Amcor to be for genuine commercial reasons including that the role was initially a transitional role and the retention of the position could not be justified from a commercial perspective.

[59] I find the process leading to the decision to disestablish the National Key Account Manager position was conducted in good faith by Amcor. Mr Cornish refused to engage in discussions about the proposal and then made the decision not to accept the position of Account Manager. He confirmed the option of termination when he handed in his keys and other property on 27 June 2014.

[60] I find the decision to dismiss Mr Cornish by reason of redundancy was one an employer acting fairly and reasonably in all the circumstances of this case could make. I can be of no further assistance to Mr Cornish in respect of his claim for unjustified dismissal.

³ *na Nagara v McGrath, Chief Executive of the Auckland College of Education* Employment Court, Auckland AEC56/96, 13 September 1996 applying *Trotter v Telecom Corp of New Zealand Ltd* [1993] 2 ERNZ 659.

Breach of the employment agreement

[61] Mr Cornish claims Amcor breached the terms of his employment agreement when it failed to pay him a bonus that had been agreed between himself and Mr Turnbull.

[62] When Mr Cornish entered into the variation to his employment agreement in June 2013, Mr Turnbull confirmed in writing that Mr Cornish's salary would increase to \$105,000 per annum and that he would be invited to join a discretionary bonus system based on performance criteria (KPI's) to be discussed and finalised.

[63] It was common ground that Amcor and Mr Cornish never entered into any agreement around the KPIs and no bonus was paid.

[64] The bonus was at all times discretionary. Notwithstanding that, I find the parties entered into an alternative arrangement which was that in lieu of the payment of a bonus, Mr Cornish would receive two periods of special paid leave in June and July 2014.

[65] In an email dated 21 March 2014, Mr Cornish sets out for Mr Turnbull the arrangement he understood had been entered into in relation to the bonus payment. Mr Cornish advises Mr Turnbull that his first priority was to be paid rather than take leave. However, as a possible solution, Mr Cornish offered to take special leave and set out potential dates for that.

[66] Two Notification of Leave forms were subsequently completed by Mr Cornish seeking paid special leave for the first period of 9 June to 20 June 2014 inclusive and then for a second period of 30 June to 14 July 2014 inclusive. Mr Cornish has noted on both forms that "*bonus not being paid in cash as agreed paid leave in lieu of cash*".

[67] As early as 3 March 2014, Mr Turnbull was raising with all sales staff the fact that sales were not tracking in line with the budget and that the position was not sustainable. Mr Cornish himself was not achieving sales budgets and evidence has been supplied to the Authority which supports that. The sales team at Airport Oaks performed poorly and did not meet their sales targets. For that reason no employees were paid the discretionary bonus.

[68] Mr Cornish has failed to establish a breach of the employment agreement and I can be of no further assistance to him.

Bonus

[69] Mr Cornish claims that when he entered into the employment agreement with Amcor he did so with the understanding that he would accept the salary of \$105,000 and he would be paid a bonus of \$15,000 on the achievement of agreed soft KPI's.

[70] Amcor says the bonus was discretionary and the discretion to pay the bonus lay with Amcor. Further, Mr Cornish did not meet his budget targets and the branch did not meet its targets, therefore no bonus was payable.

[71] As set out above, Mr Cornish entered into an agreement with Amcor that he could take paid special leave in lieu of being paid cash for his bonus. For the first time, at the investigation meeting Mr Cornish told me he believed the agreement for the special paid leave was in part payment of the \$15,000.

[72] I do not accept the explanation that the agreement for paid leave was part payment. Throughout this investigation Mr Cornish has continued to claim an entitlement to the full \$15,000. If the agreement for paid special leave was intended to be only a partial payment then I would have expected the amount claimed by Mr Cornish to have been less than \$15,000.

[73] I find there was no obligation on Amcor to pay a bonus of \$15,000. No KPI's were agreed and budget targets were not met. In any event, Mr Cornish entered into an agreement for paid special leave in lieu of a cash payment of the bonus. I can be of no further assistance to Mr Cornish in respect of his claim for payment of a bonus.

Good faith

[74] Mr Cornish claims Amcor did not meet its statutory obligations of good faith when it attempted to terminate his employment on 6 June 2014 and then when it embarked on a restructuring process.

[75] As set out earlier in this determination I am satisfied Amcor conducted itself in good faith when it attempted to give notice of termination to Mr Cornish in reliance on the fixed term agreement, and then when it entered into a consultation process over the proposal and ultimately the decision to disestablish the National Key Account

Manager's role. I can be of no further assistance to Mr Cornish in respect of his claim for breach of good faith.

Non-solicitation

[76] Mr Cornish has asked the Authority for a declaration that the post-termination non-solicitation terms of the employment agreement are unenforceable against Mr Cornish or alternatively, if enforceable, to reduce the maximum enforceable term to three months.

[77] The employment agreement provides for the protection of Amcor's business in the following terms:

17. Protection of business

You acknowledge that:

- (a) In the course of performing the duties and responsibilities under this agreement you have or will have access to the expertise, trade secrets and other confidential information of the company including the types of information outlined in the above confidentiality provision;*
- (b) Such expertise, confidential information and trade secrets form a valuable part of the company's goodwill and assets which it is entitled to protect;*
- (c) The giving of this restraint was a material factor inducing the company to employ you and to enter into this agreement.*

You will not, whether directly or indirectly and whether alone or jointly with or as agent, principal, partner, shareholder or employee of any other person, firm, or company, engage in any of the following in New Zealand so long as they remain an employee of the company and for a period of six months after you cease to be an employee for whatever reason:

- (a) Solicit or accept in competition with the company the custom of any person, firm or company which is or was a client of the company at any time during the period of 12 months preceding the date of termination of employment;*
or
- (b) Solicit or endeavour to entice away from the company any person who is or was an employee or subcontractor of the company at any time during the period of 12 months preceding the date of termination of employment.*

You acknowledge that:

- (a) Your remuneration and the terms of this agreement provide consideration for the restraint provisions contained in this clause;*
- (b) The above restraints are fair and reasonable in regard to the subject matter and duration;*
- (c) The above restraints are necessary to protect the company's goodwill and its proprietary interests; and*
- (d) The above restraints are given without coercion or pressure.*

If any part of provision of this clause is held to be invalid or unenforceable it will apply with such modification as may be necessary to make them valid and effective, or it will be deemed to be severed to the extent that it is invalid or unenforceable but the remainder of the clause will remain in full force and effect.

[78] Clause 17 prevents Mr Cornish from soliciting clients, customers and employees of Amcor but does not restrain Mr Cornish from entering into employment with competitors or in the flexible packaging industry.

[79] Mr Cornish was a sales representative. The clause in the employment agreement only went so far as to prevent Mr Cornish from soliciting the custom of Amcor's clients in competition to Amcor, and to prevent Mr Cornish from enticing employees to leave their employment with Amcor. Mr Turnbull gave uncontested evidence that a six month non-solicitation clause is an industry standard particularly in the sales industry where individuals develop close relationships with clients and are aware of commercially sensitive arrangements.

[80] I find the non-solicitation provisions set out in the employment agreement were enforceable against Mr Cornish and that the term of six months was reasonable. I can be of no further assistance to Mr Cornish in respect of his claim for a declaration and/or modification regarding clause 17 of the employment agreement.

Costs

[81] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Amcor shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Mr Cornish shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[82] The Authority is likely to adopt its usual notional daily tariff based approach to costs which is currently \$3,500 per day. The parties are invited to identify any factors which they say should result in adjustments being made to the notional daily tariff.

Vicki Campbell
Member of the Employment Relations Authority