**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI**
**TE WHANGANUI-Ā-TARA ROHE**

[2020] NZERA 437
3116592

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| | BETWEEN | WINDSOR GROUP ENGINEERING LIMITED |
| | AND | KEITH ALLEN ROBERTSON<br>Respondent |
| Member of Authority: | Michael Loftus | |
| Representatives: | Beverley Edwards, counsel for the Applicant<br>Rebecca Rendle and Meghan Bolwell, counsel for the Respondent | |
| Investigation Meeting: | 11 September 2020 at Wellington | |
| Submissions Received: | At the investigation meeting | |
| Date of Determination: | 22 October 2020 | |

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Windsor Group Engineering Limited (Windsor) claims Keith Robertson has breached various restrictive covenants in his employment agreement. Relief was initially sought on an interim injunctive basis. Mr Robertson denies the alleged breaches.

[2] During a telephone conference convened to schedule an investigation of the application as initially lodged, it was agreed the answer to one single question would likely determine the substantive outcome. That question is upon which day did Mr Robertson's employment end? The parties therefore agreed that question should be the subject of a preliminary investigation and it is that this determination considers.

**Background**

[3] Mr Robertson was employed by Windsor for some 28 years. He was, by the beginning of 2020, a senior manager and member of the executive team. His terms and conditions of employment were contained in various documents prime amidst which, at least as far as this determination is concerned, was a variation agreed in 2015. Contained therein are the restrictive covenants it is claimed Mr Robertson has breached and which remain enforceable for six months following termination of employment.

[4] Also contained in that agreement is a redundancy provision. Part thereof reads:

> If your position is surplus to Windsor's requirements, you shall be given two months' written notice of termination of employment on the grounds of redundancy or payment in lieu of such notice. In addition you shall be entitled to redundancy compensation of four month's total remuneration.

[5] On 30 January 2020 Windsor's Chief Executive, Mark Holm, asked Mr Robertson to meet with him on the morning of 3 February. The meeting went ahead at 10:00am.

[6] Mr Robertson says the meeting commenced with Mr Holm referring to a strategy meeting that had occurred some three months prior and to which, much to his chagrin, Mr Robertson had not been invited. He goes on to say:

> I was advised by Mr Holm that Windsor had determined at the strategy meeting that there was going to be a shift in direction and that the business that I was in (the timber sector and drying) would at best stay the same size but would most likely shrink going forward. As a result, I was told by Mr Holm that my services were no longer required by Windsor.

[7] Mr Robertson says he was then presented with two options for his exit. He could be retrenched and an appropriate process would be commenced or in order *to respect my long service to Windsor, I would be allowed to 'retire' from my role and leave on a 'no fault basis'*. Here it should be noted an employment agreement the parties agreed in 2014 contains a provision entitled *No Fault Termination* which envisages departure at Windsor's behest but contingent on the payment of some eight month's salary (two months notice or payment in lieu *plus a gross payment equal to six months total remuneration*).[1]

[8] The same agreement also has a redundancy provision which provides for a similar level of compensation. The 2015 variation reduces the redundancy package to two months notice or

[1] Clause 11 of the 2014 agreement.

payment in lieu plus redundancy compensation of four months total remuneration but leaves the no fault termination provision unaltered.

[9] Mr Robertson says that after further discussion and somewhat reluctantly he decided he would opt for the no fault option which he characterised as the *retirement* option. In using that terminology he says he was talking retirement from Windsor and not the workforce. He says he did so because he considered that would be more beneficial for his future prospects.

[10] Mr Robertson says Mr Holm advised the termination would come into effect straight away but asked if he would be willing to accept the final payment over a period of six months rather than as a lump sum payment. He says *Mr Holm told me that this would help Windsor with the cash constraints that it was currently facing*. Mr Robertson says he assumed that meant he would eventually receive payment from Windsor but would be expected to walk out.

[11] Mr Robertson says he agreed.

[12] Discussion then turned to other benefits that Mr Robertson received and further agreements ensued. These related to medical and life insurance policies, telephones and a laptop.

[13] Mr Holm agrees the two met on 3 February to discuss the fact the business needed a change in direction which necessitated some form of agreement with Mr Robertson regarding his role going forward. Mr Holm agreed Mr Robertson's description of the conversation was accurate and portrayed the choice as being between a painful discussion (though words such as redundancy were never used) or invocation of the no fault clause.

[14] About the outcome Mr Holm says:

> The result of the discussion was that the respondent and I agreed on a no fault gentleman's agreement and on the respondent's request that he would effectively cease walking for Windsor Engineering Group Limited on terms that included extended notice payments and benefits in which he would be regarded as an employee with the final day of employment being 20 August 2020.

[15] The following day, 4 February 2020, Mr Robertson again attended at Windsor's premises and there was further discussion about Mr Robertson's departure. Mr Roberston also handed Mr Holm a written resignation which simply reads *This letter confirms my resignation on terms as discussed and agreed effective February 4th 2020*.

[16] The following day, 5 February 2020, Mr Robertson received an email from Mr Holm. Attached was a copy of the resignation and a letter. Here it should be noted there are two versions of the letter but after some discussion the parties agreed it was most likely one was a draft and the operative one was that dated 4 February 2020. Following a preamble it contains what Mr Robertson says is a proper reflection of the terms he and Mr Holm had earlier agreed. In that regard it reads:

> 1. A termination payment as set out in your contract. That is 2 months' notice, plus four months additional pay at full rate, being a total of 6 months. To assist the company with current cash constraints we have agreed that this will be paid out on a monthly basis over 6 months.
> 2. We will however pay out as a lump sum on departure, your total accrued leave entitlements up to 4th February 2020 plus the additional leave that would have been accrued in the upcoming 6 months.
> 3. The company intends to continue with the payment of Medical and Life insurances until their next anniversary. We are seeking advice from both providers as to their policy and procedures in this instance.
> 4. During the period of 6 months, you may retain the company laptop and phone, for business purposes. At the completion of 6 months we will gift you the hardware, however you will need to arrange an account and new number with a provider, in your own name.
> 5. During the 6 months period, you will be covered by the terms of your contract, with respect to protecting the companies IP, and good name.

[17] As events transpired, and whilst a couple of monthly payments were made, Mr Robertson subsequently asked that he receive the balance in full. Windsor agreed and this occurred in March.

[18] Also provided by Mr Holm was a written reference. It opens by advising "*I confirm Keith Robertson was employed by Windsor Engineering from August 1992 through to February 2020*".

[19] As events further transpired, Windsor became aware in August that Mr Robertson had obtained employment with a significant competitor. It was that knowledge which saw the commencement of these proceedings.

[20] Also of note might be the possible discrepancy about what might have been payable on termination given an apparent contradiction between what was payable under the no fault termination clause which the parties both suggest was the provision invoked (8 months compensation) and the amended redundancy provision of six months which was the amount

paid. That said I take the issue no further given the parties agree the document dated 4 February reflects their agreement and that provides for six months pay – another variation perhaps.

**Discussion**

[21] As already said, this determination addresses the question of when Mr Robertson's employment ended: 4 February 2020 as he contends or early August 2020 as Windsor contends. Essentially the answer to that question will determine whether or not the restraint covenants had already ceased to apply when the alleged breaches occurred in August or whether its effect is ongoing until February 2021 as Windsor says.

[22] I have to conclude the documentary evidence strongly supports a conclusion the employment ended, as claimed by Mr Robertson, on 4 February 2020.

[23] First there is the resignation letter. It contains a clear statement the resignation, read termination, was effective 4 February 2020. The statement is unambiguous – termination is effective 4 February and it must be noted the parties agree this document was actually drafted by Windsor.

[24] That this was the intended cessation date is, in my view, confirmed by the wording used in the document which both parties agree is an accurate reflection of the arrangement they made with a number of its provisions also indicating the employment ended on 4 February. These include:

(a) The preamble which opens with advice the letter contains terms *agreed for a timely exit* which, as was submitted on Mr Robertson's behalf, is inconsistent with what Windsor now contends which is a departure 6 months hence. It is, however, consistent with Mr Holm's evidence the parties agreed the break should be quick and Mr Robertson leave immediately.

(b) The agreement states there will be a termination payment. That implies termination has occurred and the payment includes *four months additional pay.* There is no mention of this being pay in lieu of an extended notice period nor is there mention of garden leave or something similar.

(c) The agreement then provides for an immediate payment of holiday pay owing with this to occur on departure. Again use of the word departure indicates the employment has come to an end.

(d) The agreement also provides for a further holiday payment covering leave that *would* have accrued over the following six months. The word *would* indicates the entitlement is in lieu of something that had not actually been earnt which again suggests termination has already occurred. Had the employment continued the leave would have accrued in the normal way and this need not have been mentioned or conversely it would have been a payment of leave in advance.

(e) The rationale behind continuing monthly payments was that it would assist Windsor given current cash constraints. That rationale implies that but for the constraints payment would have been made via a lump sum which further implies termination at that point. Indeed I agree with the submission that had the employment continued this provision would not even have been necessary as Mr Robertson would simply have remained employed, though not necessarily required to work, and payment would have continued in accordance with his employment agreement.

(f) There is then the fact Mr Robertson retained his phone and laptop for business purposes but I read little into this as his uncontested evidence is this meant little more than directing contacts who still approached him to a more appropriate contact who remained at Windsor.

(g) Finally I note the letter of 4 February states Mr Robertson would be covered by the terms of his contract with respect to protecting the companies IP during the 6 months period. There is only one six months period referred to in the agreement and that is the one which ran from February to August 2020.

[25] The third relevant document is the reference, again written by Windsor, which states Mr Robertson was employed through to February 2020. It does not suggest the employment continued as is now being claimed.

[26] As already said, I conclude the documentary evidence confirms the employment ended on 4 February and this I consider determinative for two reasons. First Mr Holm stated in oral evidence that there was no discussion about the termination date being anything other than what was recorded in writing agreement.

[27] Second the three key documents, the resignation letter, the letter of 4 February and the reference, were all written by Windsor. Both the resignation and the reference state, in unambiguous terms, that the employment ended in February and this suggests any ambiguity in the 4 February letter has to be interpreted consistently with those documents but, in any event, the contra proferentum rule means any ambiguity has to be interpreted in Mr Robertson's favour.

**Conclusion**

[28] For the above reasons I conclude Mr Robertson's employment came to an end on 4 February 2020. While that strongly suggests he did not therefore breach the restraint covenants I must leave it to Windsor to decide whether or not it wishes to pursue its original claim further.

[29] Costs are reserved.

**Michael Loftus**
**Member of the Employment Relations Authority**