

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2024] NZERA 399
3248219

BETWEEN ASSA KOHAVY
 Applicant

AND P & W COATES LIMITED
 (PREVIOUSLY KNOWN AS
 PARAGON MULTIPLEX
 LIMITED)
 Respondent

Member of Authority: Nicola Craig

Representatives: Erin Drew and Kylie Hudson, counsel for the applicant
 William Fussey, counsel for the respondent

Investigation Meeting: 19 March 2024 in Auckland

Submissions and further At the investigation meeting and 3 April 2024 from the
information received: applicant
 At the investigation meeting and 28 March 2024 from the
 respondent

Date of determination: 3 July 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Assa Kohavy was a Territory Manager for Paragon Multiplex Limited (PML or the company) from 2016 to 2023. This involved sales and marketing work, including on behalf of vendors.

[2] Phillip Coates was the founder and managing director of the business from 1985. His wife Wanda Coates worked as PML Sales Administrator / Office Manager / Company Secretary. Together the Coates are the co-directors and shareholders of PML.

[3] In March 2023, the Coates announced to PML staff that the business had been sold to another company. Some staff were offered positions with that company. Some were not. After the sale PML's name was changed to P & W Coates Limited.

[4] Mr Kohavy finished with PML on 31 March 2023, he says having not received an offer from the purchaser and says the company unjustifiably dismissed him. The Coates say they did their best to make arrangements for staff with the purchaser as well as paying out notice.

Authority's investigation

[5] An investigation meeting was held on 19 March 2024. Mr Kohavy, Mr Coates, Ms Coates and a former PML business development manager gave evidence under oath or affirmation and also provided written witness statements.

[6] The Authority requested a document referred to at the meeting. PML was unable to find it but some brief additional submissions were made.

[7] All material provided has been carefully considered. As permitted by s 174E of the Employment Relations Act (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

Issues

[8] The issues for investigation and determination are:

- (i) Was Mr Kohavy unjustifiably dismissed by PML?
- (ii) If so, what remedies, if any, should he receive?

[9] Mr Kohavy had originally also sought to argue that he was disadvantaged by PML's unjustified actions in not complying with contractual obligations about discussions with the purchaser and/or good faith obligations. The day before the investigation meeting the Authority was advised that Mr Kohavy was no longer pursuing that argument.

The Coates' business

[10] PML and its predecessor provided outsourced sales functions to suppliers of goods and services to the supermarket channel. It provided outsourced sales function, brand ownership and distribution for imported products. The Coates are based in Christchurch with PML operating nationwide.

[11] For a number of years PML was in a strong position. More recently Mr Coates could see changes coming in the industry. Then in 2019, over a short period PML lost a significant number of contracts resulting in it losing a substantial amount of income over two years. PML managed to keep all staff working on the same terms.

[12] The Coates began considering changes. Their options, most to least preferred, were the appointment of an operations manager to run the business day to day with the Coates gradually selling out, finding an equity partner, or selling the business outright. After some other efforts they decided the third option was the only viable one.

[13] The Coates had changed their business broker in December 2022. This was not discussed with staff.

[14] Mr Coates was conscious of the need for confidentiality. Earlier one of the possible purchasers or investors had spoken to a principal of PML's, and legal advice needed to be sought. On the day Mr Coates told two principals about the sale, they both walked from PML despite having agreements with it.

Mr Kohavy's prior knowledge

[15] Mr Coates describes talking to staff about getting a possible operations manager change for most of 2022. Although Mr Coates was in Christchurch and Mr Kohavy in Auckland, they attended regular Monday and Friday sales meetings online, with Mr Coates also calling and coming to Auckland fairly regularly. There was discussion about industry changes including digitalisation.

[16] Mr Coates had appointed two people at different times with a view to them moving to that role but neither wanted it. The business development manager told the Authority that as early as 2021 there had been mention of Mr Coates looking to retire. Some of the discussions he acknowledges were quite confidential and I conclude Mr Kohavy may well not have been aware of them.

Sale process

[17] The business was advertised in an unidentified manner on 27 January 2023, with Mr Coates thinking it might take six months to sell. To the Coates' surprise there was serious interest within days. They were out of town on holiday with intermittent internet.

[18] The Coates worked through the process with legal help. The company which ultimately purchased requested a non-disclosure agreement entitled Mutual Confidentiality Agreement (MCA) on 2 February 2023.

[19] The MCA defined confidential information as including "the fact or possibility of the Potential Transaction." It required parties not to "disclose, communicate or distribute to any third party any Confidential Information," expanding to include not disclosing to "any other person."

[20] Mr Coates was concerned that if confidentiality were breached, they could lose valuable clients which might impact on jobs.

[21] Mr Coates had come across T, the owner of the purchasing company, before although probably only met him once. T's company was in a somewhat similar business to PML.

[22] On 10 February 2023 T's company indicated it would make an offer, which was received and accepted on 14 February. A conditional agreement for sale and purchase was signed. Due diligence proceeded with an unexpected deposit received on 6 March. The Coates were concerned T had not got his head across the business.

[23] The agreement went unconditional on 15 March 2023.

[24] Over the 10 February to 30 March 2023 period Mr Coates describes having many conversations with T where T stated he was seriously understaffed and needed sales staff, including in Auckland. There was discussion that Aucklander Mr Kohavy would be an asset and would get along well with T's key account manager. Ms Coates told the Authority that T was always adamant about wanting PML's sales team, including in conversations she had with him on 20 and 21 March 2023. She did later feel he was unorganised but did not doubt he wanted the staff.

[25] This was reinforced on 30 March 2023 when Mr Coates and T sat down with the CEs of three brandowners who were PML clients. The CEs asked who was going to be

in sales for the new business and T mentioned some names including Mr Kohavy. This was reassuring for Mr Coates.

Pursing staff protection

[26] Earlier in March 2023 Mr Coates spoke to a lawyer about continuity of employment and technical redundancy and described what T had told him. She suggested he get it in writing from T but was cautious about PML having discussion with staff due to confidentiality.

[27] Mr Coates contacted T and had several phone calls, trying to get T to put something in writing. PML did not put up proposed wording as T was not committing. Ultimately the Coates agreed to go with the business broker's suggestion that they not pursue the topic so they did not jeopardise the sale.

[28] Mr Coates emphasises to the Authority that he did not see any reason to doubt T until 3 April 2023.

Announcement to staff

[29] On 17 March 2023 Mr Coates held a catch up meeting with staff throughout the country by Zoom. This included informing people that it was time for the Coates to move on and some explanation about why. It was announced that there was an agreement to sell the business to T as a going concern. Notice of termination was being given with 31 March 2023 as the last day of work for PML and the remainder of the notice period paid out. In the two weeks until then, the transition was to be highly confidential and not to be discussed with anyone outside PML.

[30] Mr Coates indicated to staff he had been assured that the purchaser would be providing them with new employment and T would be in touch directly with staff to discuss it.

[31] Ms Coates recalls saying it was important to them that all the sales team (which included Mr Kohavy) retain their jobs and they had been given a verbal assurance by the new owner that, that would be the case. The business manager's impression was that the Coates expressed high confidence in staff being offered jobs but he did not think there was a guarantee. Mr Kohavy was similarly confident that T would contact him and offer him a role.

[32] Mr Kohavy does not believe staff were given the opportunity to ask questions. Mr Coates felt confident he had gone around the group asking them by name for comment on the Zoom meeting. His wife and the business manager both remember a time to raise concerns or questions.

[33] In any event Mr Kohavy told the Authority he did not have anything to ask as Mr Coates could not give staff any information about their future. He needed to hear from T. Mr Kohavy had met T before when there had been an attempt a few years before to headhunt him. He rejected the offer then and did not see the need to mention it to Mr Coates in March 2023.

[34] Mr Coates recalls phoning Mr Kohavy the night of the 17th just before 5, after the Zoom meeting had finished.

Termination letter

[35] Following the 17 March meeting Mr Kohavy and other staff received a termination letter from PM, dated 16 March 2023. The letter advises of the sale and includes a confidentiality reminder – Mr Kohavy was forbidden to talk to any customer or other party outside PML. As an aside, I note there was a provision in the employment agreement that Mr Kohavy did not have an entitlement to redundancy compensation.

[36] Key dates are set out including, incorrectly, 31 May, rather than 31 March, as the last day of employment. PML informed the Authority that an email had been sent correctly two days afterwards but was unable to locate it given that it has wound down the company's activities since sale. Because of the ambiguity, during the investigation meeting PML offered to pay an additional two weeks' pay but still wanted to defend the grievance claim. Mr Kohavy accepts he understood his finish date to be 31 March. I take this no further.

[37] T had been asked to co-sign the 16 March 2023 letter but refused.

The remainder of March 2023

[38] The Coates did not provide the agreement for sale and purchase of the business to PML staff. The staff were told to wait for contact from T rather than initiate it themselves. T insisted on that, saying he wanted time to tell his staff about the purchase.

Mr Coates saw T as under serious pressure as he had purchased two other businesses at the same time. T said he needed 'space.'

[39] T phoned Mr Kohavy a few days after the 17 March 2023 meeting, to invite him to a coffee shop meeting. Mr Kohavy describes it as a meet and greet opportunity with T and his team. There was no job offer but Mr Kohavy felt everything was going well.

[40] Mr Kohavy heard nothing from T after the meet and greet session on around 21 March until 29 March 2023. On the 29th T called Mr Kohavy saying he did not have a position in the company for him as a territory manager. No reason was offered. T made mention of a possible future opportunity for Mr Kohavy. There was no job title, salary or territory mentioned.

[41] Mr Coates and Mr Kohavy had three or four discussions on other matters from 17 to 27 March 2023. Mr Coates did not ask Mr Kohavy whether he had been appointed by T. At that stage he felt he had no reason to believe staff would not be offered roles so he did not pursue it with them.

[42] Mr Coates recalls trying to phone Mr Kohavy on 31 March 2023 but the call was not picked up. Mr Kohavy does not recall that although he acknowledges he found the 29 to 31 March period very stressful.

Business transfer

[43] The start time for people with T's business was understood by Mr Coates to be 3 April 2023. PML handed over, providing costs, employment agreements, wages and salary history.

[44] On 3 April 2023 Mr Coates found out Mr Kohavy and two other employees had not been offered work by T. He was really surprised and tried to get the facts. One employee did not want to work for T and vice versa.

[45] Mr Coates phoned Mr Kohavy, likely on 4 April. They were in the middle of a major IT problem so Ms Coates took over the call. She apologised for the job not being lined up. Mr Kohavy told her T had mentioned a possible job but without details. He indicated it might have more travel. She offered for them to be his referee when he was seeking jobs.

[46] Attempts were made to contact T. Mr Coates let rip at T, which resulted in the third employee being employed and T indicating Mr Kohavy would be offered a role.

[47] On 6 April T and Mr Coates travelled by car as part of the business handover. T repeated his reassurance. Mr Coates cannot remember if T mentioned a role title or description for Mr Kohavy at that point.

[48] Sometime in April 2023 T invited Mr Kohavy for another coffee shop meeting, T expressed that he was thinking about potential developments. There was still no offer or contract, no position or title mentioned. T indicated he would contact Mr Kohavy with information.

[49] A similar discussion occurred in May 2023 between T and Mr Kohavy again with no offer, title, or package.

[50] In April Mr Coates says T told him that he had made a verbal offer to Mr Kohavy, specifying the salary, benefits and travel. Later, as there was some difficulty settling final payments, Mr Coates began to wonder about T's veracity.

[51] I accept that Mr Kohavy was never offered an actual position in 2023 by T, either verbally or in writing.

Unjustified dismissal claim

[52] The Coates were entitled to sell their business and retire. Mr Kohavy and the business development manager were pleased for them on a personal level. However, PML also had to meet its obligations as employer. Did it objectively act as fair and reasonable employer could have done in all the circumstances?¹

[53] I accept PML made multiple efforts to ensure that staff were taken on by T. However, ultimately the Coates saw it as not in their best interests to push T further and so left staff with no guarantee of work with T's business.

¹ The Act, s 103A(1) and (2).

Consultation

[54] There are relevant consultation obligations. Under s 4(1A) of the Act, an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of an employee's employment must provide:

- (i) Access to information, relevant to the continuation of the employee's employment, about the decision; and
- (ii) An opportunity to comment on the information to the employer before a decision is made.

[55] As discussed in *Simpson Farms Ltd v Aberhart* consultation is not simply a prior notification or a mere formality.²

[56] The evidence is clear that the Coates as PML had already decided by the time they talked to staff on 17 March 2023 that the business was being sold and the employment agreements terminated. They had already signed an agreement for sale and purchase of the business. As Mr Coates accepts, any window for consultation had closed. The 17 March meeting was the announcement of the outcome.

[57] There is no carve out for situations involving agreements for sale and purchase of businesses. Thus, on the face of it the failure to consult breaches s 4(1A) and gives rise to a grievance.

[58] However, PML emphasises the high level of confidentiality needed and the Coates' concerns about the sale and potentially the business itself falling over if word leaked out. Under s 4(1B)(c) of the Act, an employer is not required to provide access to confidential information:

Where it is necessary, for any other good reason, to maintain confidentiality of the information (for example, to avoid unreasonable prejudice to the employer's commercial position).

[59] In *Birthing Centre Ltd v Matsas & Ors* the Employment Court looked at consultation in a transfer of business situation.³ The Court concluded that a fair and reasonable employer could in the circumstances in that case have considered options for exploring whether it could maintain the integrity of the employer's commercial position

² *Simpson Farms Ltd v Aberhart* [2006] NZEmpC 52 at [62].

³ *Birthing Centre Ltd v Matsas & Ors* [2023] NZEmpC 162.

as well as the other party's commercial position, while informing the employees of the proposal in a confidential manner.⁴

[60] Here the Coates signed a non-disclosure agreement with T, which he sought. This could potentially amount to a "good reason" not to disclose information. But they took on that obligation without consideration of the impact on employees and without attempting to reach some arrangement with T which might have ameliorated the impact.

[61] There was an option to have considered an offer to take over the business operation subject to a condition that staff be consulted on a confidential basis.⁵

[62] Mr Coates acknowledged under cross examination that he did not think about the possibility of staff signing non-disclosure agreements to enable discussion or consultation to occur. He admits that he did not necessarily see why staff should take a decision on what he could do.

[63] Mr Coates describes himself as anal about confidentiality and integrity – he did not want to take the risk.

[64] I accept that the Coates were genuinely concerned about the possibility of leaks. They did not consider options other than not telling staff. However, a fair and reasonable employer, with a small group of staff in a family run business, should have considered making an offer to the potential purchaser to consult with staff subject to staff signing a non-disclosure agreement before seeing the information. This would supplement the employees' existing good faith obligations.

[65] Similarly, there were tight timeframes at some points of the process which might have impacted on the ability for proper consultation and feedback. Those timeframes were adopted or accepted by PML.

Failure to follow up with Mr Kohavy

[66] There were signs which potentially could have alerted PML to future danger – no commitment in the sale and purchase agreement to take on staff and refusal to sign the 16 March 2023 letter.

⁴ Above at [95].

⁵ Above, at [98].

[67] Having told staff they were to wait to be contacted by T, PML left that process to run in the days until employment finished. Despite talking to Mr Kohavy on at least a couple of occasions in that late March period, Mr Coates did not ask if Mr Kohavy had been contacted by T and whether he had been made an offer of work.

[68] A fair and reasonable employer would have followed up to check that everything was on track. Mr Kohavy could also have let his employer know.

[69] It is accepted that once the Coates became aware that Mr Kohavy and a few others had not been offered work as expected, they took steps to pursue this with T on a number of occasions. It is to their credit that they took these steps despite the employment relationship having finished.

Conclusion on dismissal

[70] I have considered whether this situation is better described as an unjustified action to Mr Kohavy's disadvantage but in light of the *Birthing Centre* judgment conclude that it can be seen as an unjustified dismissal.

[71] PML failed to attempt to arrange for consultation and to ask Mr Kohavy what was happening in late March 2023.

[72] PML submits that the failure to consult was but a minor defect which did not result in unfairness. I do not accept that. It is possible that the business would have been sold anyway but it is also possible that staff raising concerns about a lack of agreement that they would be offered jobs, may have had an impact.

[73] PML unjustifiably dismissed Mr Kohavy.

Remedies

Lost wages

[74] Mr Kohavy seeks \$16,826.90 gross. He provided comprehensive information about multiple job attempts he had made.

[75] Submissions for PML, drafted before the investigation meeting, refer to Mr Kohavy not mitigating his loss by failing to accept T's job offer. The Coates' concern was based on their understanding from T which they became less confident about at the investigation meeting. I accept Mr Kohavy's evidence that although T mentioned

future prospects to him on more than one occasion, he was never actually offered a job. There was no failure to mitigate his loss.

[76] Mr Kohavy was able to find and start other work within the three month period. Under s 128(2) of the Act, he should be awarded the sum equal to that remuneration. Any sick leave paid in addition to his entitlement during his employment should not be deducted from lost wages. The wages lost were \$11,778.83.

Compensation

[77] Mr Kohavy was left devastated, stressed and very concerned about how he would manage financially when he lost his job. He felt as if he had effectively only been given two days' notice of termination – from the 29th when he was told by T there was no job.

[78] Mr Kohavy shares custody of his primary school aged child. He does not have family in this country to fall back on. He had to use his savings to cover rent and food, at the time when the cost of living was sharply increasing. Mr Kohavy was significantly stressed thinking about the possibility of losing his rental home and not being able to look after his daughter and provide for her. His physical and mental health were impacted and he saw a doctor.

[79] It is likely some of Mr Kohavy's anxiety related to not getting a job offer from T rather than from PML's conduct as such. There is a chance however if PML had acted differently this anxiety could have been avoided either by T offering work or Mr Kohavy having longer time to find other work around the time his PML employment finished.

Outcome

[80] There is no suggestion of Mr Kohavy contributing to his dismissal. PML is thus ordered to pay the following to Mr Kohavy within 28 days of the date of this determination:

- (i) Lost wages of \$11,778.83 gross; and
- (ii) Compensation for humiliation, loss of dignity and injury to feelings of \$12,000.

Costs

[81] Costs are reserved. The parties are invited to resolve the matter.

[82] If they are unable to do so Mr Kohavy shall have 28 days from the date of this determination in which to file and serve a costs memorandum on the matter. PML shall have a further 14 days in which to file and serve a memorandum in reply.

[83] The parties could expect the Authority's assessment to start from the notional daily tariff for a one day investigation meeting which is \$4,500, before considering any upward or downward adjustments.

Nicola Craig

Member of the Employment Relations Authority