

AEC27/98
A27/97

IN THE EMPLOYMENT COURT
AUCKLAND REGISTRY

IN THE MATTER

of a claim for breach of
contract

BETWEEN

Dennis William McAulay

Plaintiff

AND

Sonoco New Zealand
Limited

Defendant

Court: Travis J

Hearing: Auckland
9-11 February 1998

Appearances: Mr A M Lubbe and Mr S Horne, Counsel for Plaintiff
Mr R M Harrison, Counsel for Defendant

Judgment: 9 April 1998

JUDGMENT OF TRAVIS J

The plaintiff has claimed damages for the breach of an employment contract entered into in July 1994 which appointed him the general manager of the defendant's protective packaging division. The plaintiff alleged that his employment was terminated in breach of this contract which, it was common ground, was evidenced by a letter dated 21 July 1994 which both parties signed. The following are my factual findings.

The plaintiff had become involved in the packaging industry in 1986 and, in particular, the production of protective moulded fibre packaging made from waste paper and other wood products for consumers such as the New Zealand Kiwifruit Marketing Board (NZKMB) and the New Zealand Apple and Pear Board (NZAPB). The plaintiff worked initially for Printpac UEB in Auckland and in 1987 moved to the

position of marketing manager for Fibre Products Limited, a division of Elder Resources. When Fibre Products Limited was taken over by Carter Holt Harvey (CHH) in 1990 the plaintiff ceased to be employed by CHH.

After leaving CHH the plaintiff, backed by investors, set up his own company, Chequer Moulded Pulp Limited, to produce moulded pulp packaging. He claimed his company obtained approximately a 50 percent share of the moulded fibre packaging market, with CHH holding the other 50 percent. In 1993 the investors in Chequer Moulded Pulp Limited decided to wind up the company and the plaintiff was involved in the liquidation process which including selling the machines to a packaging company in the United States. He was still convinced that there was room in the New Zealand market for a significant producer of moulded fibre packaging to compete with CHH.

Because he was reluctant to commit his own capital to a new venture he approached a United States company, Sonoco Products Co Incorporated for backing to establish a New Zealand operation. He had discussions with Mr Brown, Sonoco's chairman, and he was offered employment as the general manager of a new protective packaging division to be created in New Zealand by the defendant, a subsidiary of Sonoco Products Co. The plaintiff began his employment with the defendant on 1 July 1994. During the discussions Mr Brown told the plaintiff that he wanted a 3 year minimum term as this was an appropriate period to establish the division's business, to assess its viability and to allow them to assess each other and to decide whether they wished to retain the relationship. The plaintiff's understanding was that if they were both happy his employment would continue on beyond the 3 year minimum period. The terms and conditions of the arrangement are recorded in the letter of 21 July from Mr Brown, the relevant portions of which read as follows:

This letter will confirm the arrangements relating to your recent appointment within our company.

It is confirmed you were appointed the General Manager for Sonoco New Zealand – Protective Packaging Division, as from July 1, 1994, and this appointment is binding on the company, and by you, for a minimum period of three years from that date.

...

As from July 1, 1994 your salary will be \$80,000 (NZ) per annum, paid on a monthly basis at about mid month timing. ...

The full cost of contributions to enable you to participate in the company Superannuation Fund will be paid by the company from the date of your appointment to this position. ...

An allowance of \$1,500 per annum will be paid to cover the cost of Clubs and/or non claimable expenses which you may incur in the out of office hours demands of your position.

A fully maintained company car will be made available for your use, with replacement being generally on a four year change over period, but in any case to be subject to our normal capital expenditure policy and procedures for approval.

The costs of your home telephone will be paid by the company, subject to you meeting the cost of any personal long distance or international calls on that account.

Costs of medical insurance for you and your immediate family will be borne by the company.

An incentive payment will be available for your reward in achieving the actual profit on sales, as determined by the approved budget level of profits on sales, for the operations from the East Tamaki facilities. Any outside impact of exchange gains or losses, and non budgeted income or expense items, will be disregarded in determining final incentive allocation.

In recognition of the manner in which you have liaised with Sonoco during our period of appraisal and subsequent investment in the Protective Packaging Division, you may be able to earn an incentive for 1994, 1995, and 1996 trading results. This will be based on an incentive bonus of \$20,000 (NZ) for each of these years, if the profits on sales as approved in our budget process are achieved. These targets are as already projected in your discussions with our accounting staff, and will be based on our external Auditor's agreement of performance by the Division. In the event of additional non budgeted investments in capacity being made, it may be necessary to revise the targets for profits on sales now currently adopted for the project, and the agreed investment base.

In the event of non achievement of the 1994 target, and due to the limited period of the year for the project to be operative, we are prepared to combine the incentives for 1994 and 1995, and to measure eligibility for this incentive over the two financial periods. This combination of periods will not apply to a combination of 1996 operations, in the event that profits on sales fall below the budget of the combined results of 1994 and 1995. This incentive plan presents you with the opportunity to earn over three years an additional total payment of \$60,000 (NZ) over and above your salary package outlined earlier in this letter.

...

Incentive payments will be paid within the three month period following a year end closure of accounts of Sonoco New Zealand. From 1998 onwards an amended incentive plan will be used to enable you to earn payments over your normal annual salary arrangement.

It will be a base requirement for any such incentive payments, for the Protective Packaging Division profits on sales to have been attained as per the approved budget when measured in local currency, and if this level of earnings is achieved, then an allocation of 10% of your base salary will be made. If during a twelve months period ending December, the PIR of the East Tamaki location has been maintained at a zero reading, then a further 5% of salary will be allocated. It is a condition that this latter allocation will only be made if the first increment is achieved. Should the zero PIR not be achieved, the incentive based on profits on sales may still be earned as outlined above. The incentive plan is operative for the year ending December 1998, and subject to review will continue in subsequent years.

The total remuneration conditions of your position will normally be reviewed at April 1 of each year, and adjustments may be made to the package, or may be

confirmed as a continuance of those established over the previous year. We wish you every success in the discharge of this senior executive role for Sonoco New Zealand.

It is further agreed that as a condition of your appointment that certain legal costs incurred in our establishment of this project will be paid by the company, and in addition, the surplus car from our purchase of assets, may be sold to you at a transfer cost of \$10,000 (NZ).

The defendant expended considerable funds in setting up the division but there were initial problems with the machinery which prevented the defendant being able to produce the product it had contracted to supply. By the latter half of 1995 most of the initial production problems had been solved. Based on the financial information sent by the plaintiff to Mr Thornely, Sonoco's general manager of Australasia who had the overall responsibility for Australia and New Zealand, Mr Thornely increased the plaintiff's salary to \$89,100 per annum and approved the payment of a bonus. Mr Thornely understood that the plaintiff *"had exceeded the last half of the 1995 budget"*. The total bonus payment for 1995 was \$21,000 and Mr Thornely advised the plaintiff that the bonus scheme would continue for 1996. Mr Thornely's memorandum setting out these matters also thanked the plaintiff for his continuing contribution in 1995 in assisting the division to meet its goals and objectives. Mr Thornely gave evidence that the bonus was only paid because the defendant was misled by the plaintiff as to the success of the division's operations.

The plaintiff gave evidence that one year after starting his employment the NZAPB helped to fund its own plant known as Hawke Packaging and that no one in the industry had anticipated the effect this would have, which was to drastically lower the pricing of packaging in the industry in the 1995/1996 years. Contrary to this the defendant led evidence that Hawke Packaging's entry into the market place was anticipated by the defendant at the time it set up the division and yet it had received assurances from the plaintiff that this would not make an appreciable difference to its projected profits.

A price war developed in the market place, which the plaintiff claimed was initiated by CHH. Mr Thornely's evidence was that later enquiries revealed that the price war was actually initiated by the plaintiff although this was contrary to Mr Thornely's evidence that Hawke Packaging was the first to cut its prices and the division dropped its prices in response. In any event by May 1996 there was what was described as a state of extreme competition in the market. The plaintiff expressed himself confident that the defendant would successfully come through the

price war, although it would create short term difficulties. He had discussions with Mr Thornely who said that Sonoco would back the plaintiff during the price war. The plaintiff claims that as a result of these discussions he was reassured and was confident that the defendant would be able to meet the marketing challenges.

The plaintiff had a brief meeting with Mr Thornely and Mr Rhodes, to whom Mr Thornely reported, in the first part of 1996. At that meeting the plaintiff expressed confidence in the future and raised the issues of opportunities for new products and expansion into the Australian market which would provide growth for the division. Mr Thornely at this stage was becoming increasingly concerned about the volume of production and the lack of sales. I find that he had expressed those concerns to the plaintiff but at that stage they had not reached such a point that Mr Thornely was giving serious consideration as to the viability of the future of the division. By July 1996 Mr Thornely was increasingly concerned that the division was not meeting its budget, that expenditure was exceeding the estimates, that sales were low and that manufacturing costs and new building costs were higher than budgeted. Losses were mounting and the volume of sales were not being achieved. Mr Thornely said that the plaintiff should have been aware of the lack of sales and of the problems with the profitability of the division as he was the general manager responsible and ultimately accountable for its performance. At no stage did Mr Thornely approach the plaintiff and advise him that his position was under threat. In July 1996 Mr Thornely travelled to the United States and during discussions at the head office proposed that the division be taken directly under his control which would require him to travel regularly to New Zealand in order to try to turn the situation around. This proposal made the general manager's position redundant and created a flat management structure, with the department managers reporting directly to Mr Thornely. On receipt of head office approval Mr Thornely contacted the plaintiff and told him to put things on hold, particularly the commissioning of a new machine, until Mr Thornely was able to return and meet with the plaintiff. He did not discuss with the plaintiff the proposal regarding the removal of the general manager's position. He arranged for Ms Hickey, the defendant's human resources manager based in Melbourne, to travel with him to New Zealand to meet with the plaintiff.

On 1 August 1996 the plaintiff received a handwritten fax from Mr Thornely asking him to attend a meeting at 8am on 8 August and to organise a full staff meeting for 8.30am. The note did not state the purpose of the meetings. The plaintiff spoke to Mr Thornely on 7 August advising that the sales manager would not

be present at the meeting because she was involved in negotiations in the South Island which could see the defendant win the entire apple contract for the South Island. Mr Thornely's response was that did not matter and that he was prepared to take the risk and that he required the sales manager's presence.

At 8am on 8 August the plaintiff met with Mr Thornely and Ms Hickey. There is a conflict of evidence as to precisely what took place in that meeting. Mr Thornely and Ms Hickey claimed that at the beginning of the meeting the plaintiff said that he had bad news and that the division was being run out of New Zealand by CHH and their only hope was to relocate in Australia. Mr Thornely outlined the financial difficulties faced by the defendant and said that it would be necessary for the direct control of the company to be taken over by him as the managing director in Australia and that this meant that the general manager's position in New Zealand had become redundant. The plaintiff was given a letter dated 5 August which Ms Hickey had prepared in advance on advice from consultants in New Zealand, and which Mr Thornely had signed. The letter of 5 August stated:

As a consequence of the restructuring of our company in New Zealand, it is with regret that I must inform you that your position as General Manager — Protective Packaging Division, is to be disestablished with effect from 8th August, 1996.

Accordingly, you should take this letter as formal notice that your current position has become redundant.

Please note that you will not be required to attend work as of end of work 8th August, 1996.

Please return all keys to the Protective Packaging site, security cards, documents, other records, software, computers and all other company property by the 8th August, 1996.

All knowledge that you have of the company's operation in New Zealand is intellectual property which is owned by the company and therefor privileged information. You are not permitted to use this information in any way to the disadvantage of Sonoco's New Zealand operation, or Sonoco's Australian operation. This includes information on costings, strategic plans, budgeting and all information with regards to our Protective Packaging business in the Australasian Region.

Even though you will not be required to attend work as of the 8th August, 1996, your period of notice extends to the 21st July, 1997, as per your appointment letter. This is reflected in your entitlements described over. You are not permitted to solicit or attempt to solicit any business of the type effected by Sonoco from any person or company who is a customer or client of the employer or to establish any operations in New Zealand in which you would directly compete with Sonoco during the period of your notice.

Attached for your reference is a schedule detailing your entitlements. In brief, you will be paid on a monthly basis till the completion of notice. As per your letter of appointment dated 21st July, 1994, these monthly payments will cover the period from the present date through to the time of the expiry of your

contract with us, which is the 21st of July, 1997. In addition you will receive a severance payment based on standard practice in New Zealand. Your own superannuation contributions will be reimbursed plus a proportion of the company's contributions based on the rate at which the plan vests over the three year term of your contract. You will receive interest calculated on your contributions over three years plus the proportion of the company's contributions as referred to above.

I would like to convey our appreciation for your contributions to Sonoco New Zealand — Protective Packaging Division during your employment with us. Please be assured that this situation does not reflect your ability or performance with the company.

If there are any matters in this letter or other wise that need clarification, please contact Mr David Thornely, Managing Director, Sonoco Australia and New Zealand.

It is common ground that the defendant mistakenly set 21 July 1997 as the final date, whereas in terms of the appointment letter this should have been 1 July 1997. The severance entitlements included the continued payment of base salary at \$7,425 gross per month, the use of the company car, a 1994 Audi 80, medical insurance valued at \$240.41 per month, telephone valued at \$76.66 per month, annual leave entitlements, superannuation and severance pay of \$17,134.60.

The plaintiff claimed that he was in a state of considerable shock as a result of the abrupt nature of the announcement but that he recalled saying to Mr Thornely and Ms Hickey that he did not believe the defendant could do this to him, that it was highly illegal and that a restraint of trade had never been agreed to. Ms Hickey also advised the plaintiff that she had looked at opportunities for alternative employment for him throughout the company prior to the meeting and that she asked the plaintiff whether there was any opportunity or any positions or options of which he might be aware that he would wish them to explore. Mr Thornely and Ms Hickey gave evidence that the plaintiff's reaction was quite aggressive and that he accused them of just following procedures and said that he knew his rights and he had been with his solicitor all week and knew what they could and could not do. It was common ground that the meeting became quite tense and concluded shortly after. For reasons which I shall give shortly I prefer Mr Thornely and Ms Hickey's evidence as to what took place at the meeting.

At his request the plaintiff was allowed to meet the managers who reported to him. One of those managers, Mr Mansfield, gave evidence that the plaintiff opened the meeting to the effect that he had just been fired because they thought they could run the business better from Melbourne, that they wanted to pay him to stay home

and do nothing and that he could not understand why they would not let him run the place. The plaintiff ceased work that day. The defendant also paid for the plaintiff and the staff to dine out that night and Mr Mansfield said the plaintiff seemed quite normal and not distressed, unhappy or upset and that everyone enjoyed themselves.

In the plaintiff's view it was clear to everyone both in the division and in the industry that he had been summarily dismissed for some other reason than being made redundant. He gave evidence that *"Again, I can only contrast that with my experience at CHH (Printpac), where I was given the opportunity for a dignified withdrawal, rather than being pushed out in such an abrupt manner"*. However there was no evidence that the defendant's management ever suggested to the staff or to customers of the defendant that the plaintiff's employment was terminated for any reason other than a restructuring of the division which required a *"flat management team"*.

The plaintiff was committed to take a pre-paid holiday and left New Zealand on 9 August. Mr Thornely had authorised the plaintiff's leave application and knew of this impending holiday and thought it was more appropriate to tell the plaintiff of his redundancy before he left. Mr Thornely had gone to some lengths to ensure he met with the plaintiff before the holiday. The plaintiff gave evidence that while he was away overseas he considered his options. He felt he could have rejected any purported restraint of trade and proceeded to set up his own competing business but thought that this was not a viable option for him as the defendant would have cut off the monthly payments. Although he could have challenged this in Court he considered that would have taken too long and that in the meantime he would have been left without immediate income which would have put his family under considerable stress. He also considered that without the balance due to him under the contract and the redundancy compensation he would not have had the means to set up his own company. He considered that the defendant by *"drip feeding me my payment"* and by threatening to cease the payments if he set up in competition had made it impossible for him to establish a competing business.

He also gave evidence that while he was overseas he came across a new system for producing packaging on which it was easier to print and therefore resulted in a more commercially attractive end product. The manufacturing process was about a third of the price of that being currently used by the defendant. He claimed that had he been able to compete in the market he would have bought this machine

and would have been able to have undercut both the defendant and CHH with a cheaper yet superior product. He said that on his return from holiday he took steps to register the patent for the process in both New Zealand and in Australia. He claimed to have had assurances from the NZKMB and from the NZAPB that they would have bought his product in preference to that of the defendant, had he been allowed to set up in business. Although not in his written brief of evidence, he claimed in oral evidence to have lost that business opportunity because the NZKMB decided to move towards plastic packaging. There was no corroborative evidence from the NZKMB or the NZAPB of these claims.

On his return from holiday the plaintiff wrote to the defendant on 10 September 1996 taking issue with the defendant's letter of 8 August. Of particular concern was said to be the requirement not to compete. The plaintiff claimed that this would prevent him from establishing a business or gaining employment in a niche area in which he had built up over the years considerable expertise and work experience and that denying him the opportunity to work in his chosen field would have serious consequences for his profile in the market and the opportunities that would be available to him. He acknowledged that the loss of the position was compensated for by the redundancy compensation offered but that additional consideration should be offered for what was in effect a restraint of trade. He also sought to have the balance of his salary owing until 21 July 1997 paid out in one lump sum. The defendant responded on 18 September stating that it was prepared to continue the plaintiff's employment until 21 July and to pay him throughout that period provided he did not compete in any way, but declined to increase the compensation or to pay the salary in a lump sum. It advised the plaintiff that if he wished to leave prior to the expiry of the notice period to pursue other business interests, then he could do so on 1 month's notice at which point his salary would cease and the redundancy compensation would be paid to him. On 2 October the plaintiff's solicitors wrote to the defendant submitting a grievance and claiming that the plaintiff was entitled to the balance of the agreed term in one lump sum and an acknowledgement that he was free to compete. The defendant through its solicitors rejected this contention. On 28 January 1997 the defendant through its solicitors agreed to accept in full settlement the plaintiff's 2 October offer, but this was no longer acceptable to the plaintiff. He continued to receive his monthly payments until 27 July 1997 when he was paid out the redundancy compensation.

After 8 August 1996 the managers below the plaintiff had their responsibilities increased and Mr Thornely directed the operations of the division from Melbourne. The division did not survive, with production stopping on 15 January 1997. The machinery was sold off and 35 staff were made redundant. Mr Thornely estimated the financial loss to the defendant was in the vicinity of \$15m. He prepared a report on the failure for his superiors in the United States in which he laid the responsibility for the financial collapse of the division on the plaintiff. However in the conduct of its defence the defendant demurred from relying on any claim that there was a lack of performance on the plaintiff's part which would have justified his dismissal at the time he was made redundant.

In November 1996 the plaintiff started a company, Shade World Limited, producing awnings. He drew from his company at the rate of \$3,500 per month and considered it would take him about two years to receive the same level of remuneration to that he had received from the defendant. The plaintiff was still pursuing opportunities for moulded fibre protection packaging. He said he had released test runs of new product on to the market and had been importing product from France and distributing it to packaging houses in New Zealand and Australia for assessment. He claimed however that the manner in which he was dismissed and the 9 months he had been out of the industry had a noticeable affect on his ability to re-establish his credibility. He claimed at the hearing that he was only then beginning to feel that he had regained a degree of trust and acceptance within the industry. The plaintiff remained adamant that there was no need for the defendant to have closed the division, or for him to have been made redundant and claimed that he could have traded the defendant's division out of its difficulties. He took issue with Mr Thornely's report on the division's failure. The plaintiff claimed that he made a substantial contribution to the defendant and his reward was to be summarily dismissed without notice on 8 August 1996 and that his family had been put through a period of considerable uncertainty and distress from which they were only just starting to emerge.

The plaintiff called Mr Yortt, an owner and managing director of a pack house and cool store company who gave evidence of his long association with the plaintiff and who asserted that because the plaintiff was out of the market for some 9 months this did considerable harm to his profile and that the harm was exacerbated because the plaintiff did not resurface within the industry shortly after leaving the defendant. Mr Yortt's evidence also confirmed that representatives of the defendant who visited

him gave no explanation of what had happened to the plaintiff other than reassurances that it would be business as usual. Mr Yortt gave evidence that at the time of the dismissal there was a move in the industry away from moulded fibre packaging towards recyclable plastics and in particular moulded fibre was no longer the preferred packaging for kiwifruit. He considered that despite this there was a future for moulded fibre packaging as it was still used for packing apples in Australia and New Zealand and for avocados. He had sufficient stock on hand to meet his company needs and the following year he used plastic packaging as that was what the NZKMB had stipulated. He expressed the view that it would be disastrous for the plaintiff if he were to suddenly attempt to re-enter the market on a full scale basis and that he was better off taking the steps that he was taking of slowly testing whether his product was viable and conducting trials with interested parties.

I have made a credibility finding preferring the evidence of Mr Thornely and Ms Hickey to that of the plaintiff where there is any conflict between them. This finding is based on my assessment of them while they were giving evidence and also on what I find to be a successful attack on the plaintiff's credibility in respect of his evidence of the circumstances that he left CHH. He had claimed that CHH had reviewed its moulded fibre operation and decided that it no longer required his position and his brief of evidence described the matter thus:

11. *In 1990 Fibre Products' moulded fibre business was taken over by Carter Holt Harvey ("CHH"). Shortly after that CHH reviewed its moulded fibre operation and decided that it no longer required my position, as it had included Printpac's moulded fibre business into an established management hierarchy. Following discussions and consultation with the company, no suitable alternatives were found, and I was eventually dismissed because of redundancy.*
12. *Although the redundancy came as a considerable shock, CHH dealt with the issue in a manner which I considered entirely appropriate. I met with the relevant managers (sic) and we discussed the situation. We talked about whether there were any suitable alternatives, and the outcome of the discussion was that there were not. We then discussed the compensation I would be paid and my employment came to an end. Most importantly for me, CHH acknowledged that there was nothing in my employment contract which prevented me from re-entering the market once my employment had ceased.*
13. *I was therefore able, as soon as I had finished working at CHH, to take steps to re-enter the moulded fibre market, in which I had by then gained considerable experience.*

In the passage I have previously quoted the plaintiff contrasted the way he had been treated by CHH with the way the defendant had acted in depriving him of

the opportunity to compete in his chosen field. In his written brief of evidence he stated:

On the two previous occasions when I had been made redundant (in 1991 when CHH took over Printpac UEB, and in July 1994 when Chequer closed) I had quickly re-established myself successfully in the moulded fibre industry. I therefore had a proven record of successfully re-entering the market which is presumably why Sonoco supported me in the first place. I believed that when Sonoco made me redundant on 8 August 1996 they were concerned that I would re-establish myself in the industry.

The first witness for the defendant was Mr MacDonald who had been employed by CHH for 10 years in their packaging division, the last 5 being as general manager for moulded fibre products. I found Mr MacDonald to be an independent witness who was not shaken in cross-examination and I have no hesitation in accepting his evidence. The plaintiff worked as marketing manager in CHH under Mr MacDonald's authority. In November 1991 it came to MacDonald's attention that the plaintiff had been negotiating with a third party to enter into some arrangement in direct competition with fibre products. He approached the plaintiff with this allegation and the plaintiff admitted that it was true. The plaintiff was suspended. As a result of this incident and the restructuring arrangements that were currently being put into place a severance package was put to the plaintiff and as a term of that he resigned his position as marketing manager effective immediately on 11 November 1991. He received 15 weeks' salary as payment in lieu of notice.

Mr MacDonald gave evidence that when the plaintiff was at Chequer Moulded Fibre Limited that company probably had 20 to 25 percent of the particular market in kiwifruit moulded fibre trays in which it was in competition with CHH. When Mr MacDonald learnt the plaintiff had subsequently left the defendant he understood through his contacts in the industry that this was because of retrenchment on the part of the defendant resulting from limited sales and falling prices. He considered this made perfect sense as the defendant's division had entered as a third player in an already mature and limited market and in these circumstances he did not consider that the plaintiff's departure was suspicious or had in any way damaged his reputation in the industry. He also confirmed that Hawke Packaging was already established in the market when the defendant began trading and that the plant that it had at the time was producing at full capacity. On each of these matters Mr MacDonald's evidence was at variance with that of the plaintiff and seriously undermined the plaintiff's credibility.

I found the plaintiff's assertion that he was quite unaware of the defendant's parlous financial position to be contrary to the information available to him as divisional general manager. An essential part of his duties was his responsibility for sending financial reports to Mr Thornely in Australia. It was these reports that had led to Mr Thornely's concerns and his restructuring proposals. The plaintiff's assertions that he could have traded the division out of its difficulties had he been left in control may have been the plaintiff's belief but his performance in the previous 12 months would not have given cause for such optimism. The defendant's evidence gave a true appreciation of the division's place in the market. Its demise some 6 months later, with losses in the vicinity of \$15m, showed that its closure was inevitable. I find that if the plaintiff had not been redundant as of 8 August 1996 he would have inevitably been made redundant during 1997 when all the other staff were dismissed and the division's machinery was sold off.

Against these factual findings I turn now to consider the plaintiff's claims and the legal submissions. In his amended statement of claim the plaintiff sought to recover as damages the income and benefits from 20 July 1997 that he would otherwise have been entitled to under his employment contract, down to the date of hearing. He also sought damages of a further 2 years' income and benefits from the date of hearing. These sums were never quantified at trial but conservatively would have exceeded \$250,000 excluding the profit incentives. He also sought \$60,000 compensation for hurt feelings, humiliation and distress and the additional sum of \$100,000 as compensation for loss of reputation.

The defendant admitted that the plaintiff's terms of employment included an express term that he would be appointed to the position of general manager of the division for a minimum period of 3 years from the date of the appointment, on the terms set out in the letter of 21 July 1994. The defendant also admitted that it was an implied term of the plaintiff's employment contract that he would be treated fairly and reasonably at all times by the defendant during the course of his employment. The defendant has alleged that in addition it was a further term that the plaintiff would be loyal and faithful to the defendant and would not compete with the defendant's business. That term was clearly implied as it is an integral part of the implied term of mutual trust and confidence which was relied upon by the plaintiff, although not expressly pleaded. The plaintiff also pleaded that he had a legitimate expectation that his employment would continue after the initial 3 years.

The defendant denied the following allegation in paragraph 7 of the amended statement of claim:

It was a further implied term of the plaintiff's employment contract that, in the event the defendant terminated the contract and the plaintiff was not at fault, the defendant would act fairly towards the plaintiff in the manner in which it terminated the contract. In particular it would not attempt to impose terms or act in a manner which impeded the plaintiff's ability to take up new business opportunities or mitigate his loss.

The plaintiff claimed that he was dismissed in breach of an express term of his employment contract that he would be employed for a minimum period of 3 years; that the dismissal was carried out in a manner which breached the implied terms of mutual trust and confidence and fair and reasonable treatment and that the dismissal defeated his legitimate expectation that his employment would continue after the initial term ended on 1 July. The particular breaches are said to be that the plaintiff: was not consulted in relation to the possibility of his position becoming redundant; had received no indication this was a possibility; was not warned prior to the meeting that his employment was to be terminated; was not given the opportunity to have a representative present; was not given an opportunity to work out any notice period, was effectively summarily dismissed and was not afforded the opportunity of leaving his employment with dignity and to look for alternative work from the strength of existing employment. It is claimed that due to the summary nature of the dismissal the plaintiff's reputation and standing in the industry was damaged and, because he was restrained from engaging in competitive business activities, he was unable to further his career, which caused him further damage.

In resolving these issues a central point is whether the defendant was entitled to place the plaintiff on what has been described as "*garden leave*", that is to say preventing him from actually working for the defendant but requiring him not to compete until the minimum term of 3 years had expired. There is also an issue as to whether the acceptance by the plaintiff of the salary and income for the balance of the minimum term amounted to an acceptance of any repudiatory conduct on the defendant's part. I have had the benefit of very thorough and detailed submissions from both counsel on these various issues, and, rather than lengthening this judgment by attempting a summary of all the points made, I have embodied these submissions in the following conclusions.

It was common ground that the employment contract in this case was not a fixed term contract, namely an appointment which started on a stipulated date and ceased on a stipulated date. Rather the contract established an initial 3 year period and clearly contemplated an ongoing relationship both by the use of the word "*minimum*" and by the clauses which established the bonus payment scheme for subsequent years. It was also accepted that the plaintiff was entitled to remuneration for the balance of the term, see *F v Attorney-General* [1994] 2 ERNZ 62 at 73 and it was the defendant's case that by paying the plaintiff the balance of the period it had discharged all its obligations under the contract. This may well have been so if this had been a fixed term contract but, as I have found, it was a minimum term contract and could only be terminated on reasonable notice which could not expire within that minimum term.

I do not accept Mr Lubbe's submission that the notice could not be given until the expiration of the minimum 3 year term. No authority was cited for that proposition. I accept Mr Harrison's submissions that there was nothing in the contractual terms which would have prevented reasonable notice being given while the minimum term still had time to run. What would have been reasonable notice to terminate the contract was in issue between the parties, Mr Lubbe contending that because the plaintiff was recognised by the defendant as a senior executive, reasonable notice would be at least 12 months. Mr Harrison contended that if either party wished to terminate prior to the expiry of the 3 year term, then the appropriate notice period would be the remainder of the term.

The parties did not address the authorities on what would be reasonable notice. They are canvassed in a number of cases including *Ogilvy & Mather (NZ) Ltd v Turner* [1995] 2 ERNZ 398 and most recently in *Hamer v Transport Commercial (Auckland) Ltd* unreported, Colgan J, 26 February 1998, AEC10/98 at p9 following. Because the plaintiff was the general manager responsible for setting up the division a reasonable period of notice could have been as high as 12 months were it not for the context in which the parties had agreed on the minimum 3 year term. On the plaintiff's evidence of his discussions with Mr Brown the intention of that term was to give the defendant a reasonable chance to establish the division, test its viability and also test whether the parties wanted an ongoing contractual relationship after the initial term expired. Such a context may well have arguably reduced the notice period, although no submissions were addressed to this issue.

I also observe that by 1 July 1997 there was no enterprise left for the plaintiff to manage. The parties did not address the issue as to whether or not any reasonable notice period could be abridged by reason of a genuine redundancy. Even if it is to be assumed that 12 months' notice was required as reasonable notice, the notice mistakenly given to 27 July 1997 was only some 12 days short. It is arguable that the plaintiff would have had to have given credit for any earnings during that period, see *Hamer*. From his evidence of the successful operation of his company, the income the plaintiff has received would have well exceeded the 12 days by which the notice was arguably short. I find in all these circumstances that the notice of termination given to 27 July 1997 was adequate and that the defendant did not breach the contract in this respect.

Mr Lubbe submitted that payment for the balance of the minimum term of the plaintiff's contract was not the end of the matter and that the plaintiff was entitled to continue to work in the industry in which he had established his particular reputation and expertise. He contended that the plaintiff should have been entitled to work out the balance of the minimum term because the circumstances of the creation of this employment contract meant that it represented more than simply the receipt of wages. Mr Lubbe cited *Hodgkiss v Palmerston North City Council* unreported, Goddard CJ, 31 July 1996, WEC46/96 where at p10 it was stated:

As a matter of pure contract law, it was perhaps possible to say before Whelan v Waitaki Meats Ltd [1991] 2 NZLR 74 that the payment of the salary down to the end of the term of a contract would discharge all possible obligations under it as it was then considered, pursuant to the judgment of the House of Lords in Addis v Gramophone Co Ltd [1909] AC 488, that a dismissed employee could recover only his or her pecuniary losses and nothing for the manner of the dismissal or the distress that had been sustained. But that case was decided before modern developments in the law of contract adopted a more realistic view of the losses involved in any contract having an element of personal enjoyment or satisfaction in addition to its monetary side. The rule in Addis is no longer a part of the law of contract in New Zealand so that the respondent cannot say that it had discharged all its obligations by paying a sum of money equivalent to the salary for the balance of the term. It still has to answer for preventing the appellant from working at her profession in her contracted employment. The dismissal was therefore wrongful, even if the employment was validly for a fixed term. It was wrongful in part because the employee has a right to work.

Garden leave was also considered by the Court of Appeal in *Ogilvy & Mather (NZ) Ltd v Turner* at 404-405. McKay J, delivering the judgment of the Court, noted the decision of the House of Lords in *Delaney v Staples* [1992] 1 All ER 944 where

Lord Browne-Wilkinson categorised payment in lieu of notice under four headings, the first of which was:

- (1) *An employer gives proper notice of termination to his employee, tells the employee that he need not work until the termination date and gives him the wages attributable to the notice period in a lump sum. In this case (commonly called "garden leave") there is no breach of contract by the employer. The employment continues until the expiry of the notice: the lump sum payment is simply advance payment of wages. (P405.)*

McKay J discussed this first category as follows:

Lord Browne-Wilkinson's first category, which he says is commonly called "garden leave", involves a termination on notice, continuation of remuneration for the period of the notice, and a dispensation by the employer from the obligation to work. If the period of notice is reasonable, there will be no breach of contract. What is less clear is whether the employer can not merely tell the employee that he need not continue to work, but can require him not to work. If the contract does not give the employee a right to work, but merely a right to remuneration, then the employer could without being in breach deny work to the employee: Turner v Sawdon & Co [1901] 2 KB 653 (CA). In many situations, however, employees are interested not only in remuneration, but in the opportunity to use and maintain or enhance their skills. They expect to enjoy the status associated with their employment, and the other amenities incidental to their position. Neither party has contemplated that the employee may be deprived of work so long as the pay is continued, and that the employee will remain bound to the employer. In some cases the employer may undertake a positive obligation to provide work, for example to an actor or actress or to an opera singer, to a person employed on commission or piecework, or to a person engaged to fill a particular senior position: Collier v Sunday Referee Publishing Co [1940] 2 KB 647. In other cases the employer may have the lesser obligation not to completely withhold work which is available, as by requiring a manager to stay away from his office and then having his work done by someone else. Such action will then be a breach on the part of the employer, and may amount to a repudiation of the contract. Each case will depend on the terms of the particular contract, including those terms properly to be implied into it. (PP405-406.)

Mr Harrison contended that there was no positive obligation to provide work for the plaintiff as he was not a person who relied upon public exposure to maintain his marketability and there was nothing in the letter of appointment which prevented garden leave. He contended that the "appointment" was to the general manager position and did not require that the general manager's position must continue for 3 years. I do not accept that submission. The intent of the clause was that the plaintiff would work for the defendant in the role of general manager for the minimum period and the defendant would maintain that position to enable the two parties to evaluate whether they wished to continue the relationship. The appointment of the general manager was said to be "binding on the company" for the 3 year period. I find that

this was a case where the defendant had undertaken a positive obligation to provide work to the plaintiff who was engaged to fill a particular senior position. In this respect the case is on all fours with the views expressed in *Collier* which is cited by the Court of Appeal in the passage set out above. That decision was reached in the context of the traditional master servant relationship where Asquith J could say:

It is true that a contract of employment does not necessarily, or perhaps normally, oblige the master to provide the servant with work. Provided I pay my cook her wages regularly she cannot complain if I choose to take any or all of my meals out. (P650.)

This approach did not represent contemporary views of the employer/employee relationship in England in 1974 for as Lord Denning observed in *Langston v Amalgamated Union of Engineering Workers & Anor* [1974] 1 All ER 980 at 987:

That was said 33 years ago. Things have altered much since then. We have repeatedly said in this court that a man has a right to work, which the courts will protect: ... In these days an employer, when employing a skilled man, is bound to provide him with work. By which I mean that the man should be given the opportunity of doing his work when it is available and he is ready and willing to do it. A skilled man takes a pride in his work. He does not do it merely to earn money. He does it so as to make his contributions to the well-being of all. He does it so as to keep himself busy, and not idle. To use his skill, and to improve it. To have the satisfaction which comes of a task well done. Such as Longfellow attributed to the village blacksmith:

*"Something attempted, something done,
Has earned the night's repose."*

In *Hill v NZ Rail Ltd* [1994] 1 ERNZ 113, after referring to Lord Denning's view, the Chief Judge said:

Sitting here exactly 20 years later I have to say that things have altered much even since Lord Denning wrote his judgment in Langston. It is no longer merely arguable that there is implication in the contract of a right to work. ... in 1994 the right to work, rather than just to be paid, is recognised as a contractual right where there is work to be done. (P120.)

Although the statement in *Collier* about the master servant relationship may not represent modern thinking, it is still notable that Asquith J, after examining what he regarded as exceptional cases where there was an obligation to provide work and other situations where there is an implied stipulation of publicity which makes the provision of work an express or an implied obligation, stated:

I do not hold that in the present case there was in the contract of employment an implied stipulation for publicity and an obligation to provide work for the purpose of providing publicity. But I do hold that the very foundation of the contract was the appointment of the plaintiff, during the contract period, to a specific office. The defendants engaged the plaintiff, not to perform at large the sort of work commonly performed by any chief sub-editor. They engaged him to fill the office of chief sub-editor of a specific Sunday newspaper. By selling that newspaper they destroyed the office to which they had appointed him. That this is a breach of contract, I cannot doubt. (P651.)

In the present case I also hold that the very foundation of the contract was the appointment of the plaintiff during the 3 year period to the specific office of general manager. This was for the purposes expressed by Mr Brown of testing the viability of the operation and the compatibility of the parties. In breach of that clear obligation the defendant removed the plaintiff from his specific office and further sought to prevent him from competing. Further, in terms of Lord Browne-Wilkinson's first category, the defendant did not pay the plaintiff the notice period in a lump sum.

The plaintiff was denied the status associated with his employment as general manager, a matter which was noted in the trade from the evidence of both Mr MacDonald and Mr Yortt. He was denied the use of his office and the amenities incidental to his position as general manager. The case also has strong analogies to the cases which held there was an implied requirement to allow performance for the purpose of publicity, for the plaintiff needed to be able to maintain his status in the market place in order to maintain his credibility. His work was withheld from him and taken over by Mr Thornely. For the minimum period of 3 years such actions were not in the contemplation of the parties, as Mr Brown's statements to the plaintiff clearly demonstrated.

I accept Mr Lubbe's submission that the defendant was well aware of the plaintiff's profile and reputation within the protective packaging industry and this is why it engaged him to set up the division. It may also be inferred from the defendant's initial refusal to allow the plaintiff to compete, notwithstanding that it had dispensed with the position of general manager, that it was well aware of the impact the plaintiff might have been able to make in the market place. The plaintiff was keen to re-enter the market place in order to use his skill and experience and this was well known to the defendant. The defendant instead deprived the plaintiff of his status as general manager, did not provide him with work and went further in trying to prevent

him from competing. This was in the contractual context of the defendant's obligation to provide the plaintiff with an appointment as general manager for the minimum term.

I also accept Mr Lubbe's submission that the plaintiff's situation differed significantly from the usual garden leave cases as exemplified in *Evening Standard Co Ltd v Henderson* [1987] ICR 588 CA. This was an appeal against a refusal to grant an interim injunction restraining the employee from seeking employment with any competitors where the parties were bound by a written contract which required 1 year's previous notice in writing or payment of salary to terminate. The defendant held the senior position of production manager and was responsible for ensuring the timetable was maintained for the production of the newspaper. He gave the plaintiffs 2 months' notice in order to work for a rival publisher of newspapers, Mr Maxwell. The plaintiffs did not accept the defendant's repudiatory conduct as terminating the contract and offered to continue to pay his salary and other benefits until his notice, if it had been in proper form, had run out. They gave the further undertaking not to seek any damages from him for the period he was not working for them. They were also willing to continue to have him working for them as their production manager. Lawton LJ observed that the injunction must not force the defendant to work for the plaintiffs and it must not reduce him to a condition of starvation or idleness, but as the undertakings given did not have that effect the balance of convenience therefore favoured the grant of an injunction.

A similar situation had arisen in New Zealand in the High Court in *Rank Xerox NZ Ltd v U-Bix Copiers (N.Z.) Ltd & Anor* unreported, Barker J, 20 December 1985, HC Auckland, A.1407/85. That again involved an interim injunction seeking to prevent an employee from working for a competitor where the contract provided for termination on 3 months' notice with a further restraint on competition of 3 months from termination. The employee purported to resign with immediate effect but this was not accepted. The plaintiff did not permit the defendant to carry out his previous functions of sales manager but maintained all the employee's contractual entitlements. Barker J was presented with authorities such as *Collier* and *Langston*, observing that one academic view of the latter case was that it is not authority for the proposition that there is a duty to provide work but for the more limited proposition that the employee must not unreasonably withhold work when there is work available to be done. The Court held that the plaintiff's actions in preventing the employee from going into his office did not justify the employer in seeking to repudiate the

contract, distinguishing *Langston* on the basis that the worker was there keen to work and had not given any intention to leave. The restraint was also held to be enforceable and injunctions were duly granted.

The situation in the present case is distinguishable. The plaintiff wanted to continue working and it was the defendant which disestablished the position of general manager and sought to restrain the plaintiff from competing. Having withdrawn the work from the plaintiff it could not then purport to keep the employment on foot by continuing to make the contractual payments and requiring the plaintiff not to compete.

Although not cited, the question of garden leave was considered in *Ogilvy & Mather (NZ) Ltd v Darroch* [1993] 2 ERNZ 58 at 69 where an injunction was granted to prevent an employee resigning with immediate effect provided the employee was continued to be paid salary and emoluments. The Court held there that the contract remained alive until the employer accepted the repudiation and because it had not done so the employee was still employed and could not work for the competitors. After considering the authorities which had recognised garden leave the Court observed:

Without going into detail, the principles enunciated in these cases can be applied in this country, provided certain things are remembered. The first is that an employee's spare time is his or her own, even when that employee is a senior executive. A contract which purports to say that an employee may not spend his or her own time as he or she pleases, including spending it in gainful employment, must say so in clear terms if it is to be held to mean what it seems to say. The situation is altogether different where that spare time is applied to the interests of a competitor, as it was by the employees in Hivac. The second point is that there must be a real opposition to the employer's interests and not just some fanciful potential conflict. Thirdly, the expressed terms of a contract, if clear, must be given effect no matter how unreasonable unless and until they are set aside or modified following an application duly made under s 57 Employment Contracts Act 1991.

These comments are consistent with a trend that has developed in the United Kingdom in considering garden leave clauses in contracts. Whilst generally enforcing such clauses by way of interim injunction the courts have tended to do so only for the shortest period possible and the following passage from Dillon LJ in *Provident Financial Group Plc & Anor v Hayward* [1989] ICR 160 at 165 is frequently cited with approval, for example in *Credit Suisse Asset Management Ltd v Armstrong* [1996] ICR 882 (CA):

The practice of long periods of "garden leave" is obviously capable of abuse. It is a weapon in the hands of employers to ensure that an ambitious and able executive will not give notice if he is going to be unable to work at all for any one for a long period of notice. Any executive who gives notice and leaves his employment is very likely to take fresh employment with someone in the same line of business not through any desire to act unfairly or to cheat the former employer but to get the best advantage of his own personal expertise. It is well established that the court will not specifically enforce a contract of personal service between an employer and his employee. Therefore, it has been held that the court will not grant an injunction in very wide terms following the wording of a clause in a contract of employment, which would prevent the employee working for anybody else at all, if the effect of granting such an injunction would be to compel him to go back to work for his previous employer. (P892.)

I accept Mr Lubbe's submission that once the defendant had repudiated the plaintiff's contract by withdrawing the position of general manager, it was not open to the defendant to then attempt to hold the plaintiff to the remaining employment terms. I find that the defendant's actions were in breach of the defendant's contractual obligations and amounted to repudiatory conduct. This would have entitled the plaintiff to have accepted the breach and to have cancelled the contract. The plaintiff would then have been free to compete and could have sued for the balance of the contractual term. However the plaintiff did not elect to pursue this course and a question arises now as to whether or not the plaintiff by his conduct acquiesced in the defendant's breach. I observe that the matter of acquiescence was not expressly raised by Mr Harrison and neither party addressed the effect of the Contractual Remedies Act 1979.

Mr Lubbe submitted *"The fact that Mr McAulay continued to receive salary and income for the balance of the minimum term, did not amount to an election on his part that he would not accept the repudiation"*. Mr Lubbe contended that the plaintiff had made it clear from the beginning that he considered that he was entitled to the immediate payment of the balance of the minimum term and the other benefits and that the monthly payments were received on account of those damages. It is claimed that the defendant knew full well that it held the economic upper hand over the plaintiff by *"drip feeding"* the payments in the manner it did. I agree that the plaintiff may have been accepting the monthly payments on account of damages but his actions clearly did not amount to an election to cancel the contract. The plaintiff continued to draw the monthly payments right through until July 1997 and did not compete with the defendant during that time. Having elected not to cancel the

contract the plaintiff's claim is restricted to a claim for damages for breach of contract because he was denied the right to work.

Counsels' submissions then dealt with the implied terms. Mr Harrison accepted that there is a duty of fairness and reasonableness implied into employment contracts which places an onus on the employer to act in a fair manner with regard to termination: *Marlborough Harbour Board v Goulden* (1985) ERNZ Sel Cas 159. Mr Harrison correctly submitted that the decisions which have considered this duty in New Zealand have been largely concerned with dismissals for cause and the need for fair treatment during the dismissal process in the context of personal grievance claims pursuant to the Employment Contracts Act 1991. The issue for the parties however was whether the obligations that have developed in the personal grievance cases arising out of redundancy situations can be imported into common law actions as part of the implied term of trust, confidence and fair dealing. I should observe first that the extent of the obligations to act fairly in redundancy situations in personal grievance cases is still a matter of some controversy: compare the majority and minority judgments in *Brighouse Ltd v Bilderbeck* [1994] 2 ERNZ 243. There is an issue as to the extent of the requirements of procedural fairness and whether they impose a duty to consult, as held in cases such as *Phipps v NZ Fishing Industry Board* [1996] 1 ERNZ 195.

Mr Harrison cited from a passage from the judgment of Cooke P, as he then was, in *Brighouse* as to the distinction between the common law and the statutory remedies of personal grievances at p253:

Beyond question the personal grievance jurisdiction was intended to give employees remedies not available to them at common law. I have previously expressed the opinion that in this field common law and statute law are coming closer together. That does not alter the fact that the very raison d'être of the statutory jurisdiction was the perceived inadequacy in many cases of common law contractual rights and remedies. The philosophy reflected in this part of the Act is that the common law may well be inadequate to achieve justice between employer and employee. That is its whole point. It is elementary that a dismissal may be unjustifiable within the meaning of the statute although an exercise of the employer's common law rights. A dismissal on contractual notice or with payment in lieu of contractual notice may be unobjectionable at common law, but that is certainly not determinative of the generality of unjustifiable dismissal cases under the statute.

Mr Lubbe cited *Raddock v Air NZ Ltd* [1997] ERNZ 399 which fully discussed the development of the implied obligation of trust and fair dealing in the context of a

breach of contract claim and held that an employee was entitled to damages that arose from losses suffered as a result of the breach of implied terms and conditions of the employment contract. Mr Lubbe also cited *Malik v Bank of Credit and Commerce International SA (In Liquidation)* [1997] 3 All ER 1 where the House of Lords discussed the implied duty of trust and confidence at p16:

The evolution of the implied term of trust and confidence is a fact. It has not yet been indorsed by your Lordships' House. It has proved a workable principle in practice. It has not been the subject of adverse criticism in any decided cases and it has been welcomed in academic writings. I regard the emergence of the implied obligation of mutual trust and confidence as a sound development.

The House of Lords held that ex employees of a bank which had collapsed as a result of corruption and dishonest dealings had an arguable claim that their employer's conduct had damaged their personal reputations and created difficulty for them in obtaining employment in the banking field. This was described as "*stigma compensation*" and a claim could be based on an implied obligation that the employer would not without reasonable and proper cause conduct its business in a manner likely to destroy or seriously damage the relationship of confidence and trust and would be liable if the breach caused continuing financial loss of a nature that was reasonably foreseeable.

In *Hamer*, which was too recent to be cited by the parties, the Court held that a failure to advise a service manager of an impending redundancy, or to consult with him in any way, was a breach of an admitted implied term of the contract that the employer would not conduct itself in a manner calculated or likely to cause the plaintiff undue mental distress, anxiety, humiliation, loss of dignity or injury to feelings. This was held to be a breach notwithstanding the evidence that there was no alternative position for the plaintiff and that the situation was unlikely to have been altered by advice to or consultation with him. The elimination of the position was a cost saving exercise which the Court held should have been implemented upon reasonable notice. The Court took into account the payment of redundancy compensation at the time to temper what would otherwise have been a higher award of general damages. The Court had regard not only to the particular consequences of the breach upon the plaintiff but also to the level of damages in like cases in the common law jurisdiction and to awards of compensation cases decided under s40 of the Employment Contracts Act applying "*the principle that the Courts are to exercise firm restraint and a sense of proportion when considering an award of general*

damages": *Carter Holt Harvey Ltd v Pirie* [1997] ERNZ 648, 652 per Thomas J. After analysing the recent authorities and taking into account the plaintiff's evidence of distress and humiliation, the Court ordered \$15,000 by way of general damages. Colgan J was also careful to distinguish between the consequences of the unlawful action on the defendant's part which included distress, anxiety, humiliation and loss of dignity and injury to feelings for which damages were awarded and the distressing consequences of dismissal *per se* for which no damages were awarded. The latter situation as Colgan J observed is dealt with in the statutory remedies but not in the common law context.

In the present case the failure to warn the plaintiff of the impending redundancy or to consult with him on possible alternatives before the final decision was made, the failure to warn him of the purpose of the 8 August meeting and to give him the opportunity to seek advice and have a representative present and not to allow him to leave his position and look for alternative work from the strength of existing employment, all constituted breaches of the implied term of trust, confidence and fair dealing. Although he received assurances of support during the price war, the effect of those assurances had been spent at the time of the dismissal, as the plaintiff's opening remarks to the 8 August meeting demonstrated.

I accept Mr Harrison's submission that the second implied term pleaded in paragraph 7 of the statement of claim does not satisfy the test for implying a term, see *Attorney-General v NZ Post Primary Teachers Assn* [1992] 1 ERNZ 1163 (CA) and this allegation was not actively pursued by Mr Lubbe in his final submissions.

Another matter pleaded but only briefly dealt with in the plaintiff's submissions was that the plaintiff had a legitimate expectation that he would be entitled to actually work for the full minimum term. That obligation was derived from both the wording of the letter and from Mr Brown's statements. However I prefer Mr Harrison's submissions that there was no legitimate expectation that the term would necessarily be continued. That again came from Mr Brown's statements to the effect that if the enterprise was not viable or if the parties found they were incompatible the term might not be extended.

Mr Lubbe finally submitted that the defendant's actions had damaged the plaintiff's reputation in the manner described in *Malik* as follows:

Employers may be under no common law obligation, through the medium of an implied contractual term of general application, to take steps to improve their employees' future job prospects. But failure to improve is one thing, positively to damage is another ... Employers must take care not to damage their employees' future employment prospects, by harsh and oppressive behaviour or by any other form of conduct which is unacceptable today as falling below the standards set by the implied trust and confidence term. (P8 per Lord Nicholls.)

Mr Lubbe submitted that the defendant's actions in restraining the plaintiff's ability to work in the only area in which he had indepth specialist knowledge and experience amounted to a breach of this implied term not to damage the plaintiff's future employment prospects. I find accordingly. It was submitted this breach resulted in loss of income and also damage to the plaintiff's reputation, matters to which I now turn.

Mr Lubbe introduced his submissions on damages by referring to *Murgatroyd v Henry Berry Ltd & Anor* unreported, 12 August 1992, CA191/90 at p5 as follows:

The general principles governing the award of damages at common law for wrongful dismissal are well settled. The claim is for breach of contract and the measure of damages the amount required to place the employee in the same position as he would have been in had the contract been performed. It does not follow that a contract terminable on notice is assumed to continue indefinitely. The normal measure of damages for wrongful dismissal is the amount the employee would have earned under the contract for the period between his or her dismissal and the date as at which the employer could lawfully have terminated the contract, less the amount the employee could reasonably have expected to earn in other employment during that period.

Mr Harrison responded with *Hadley v Baxendale* [1854] 9 Ex Ch 341 at 354 to the effect that damages must not be too remote and must be such as could be fairly and reasonably be considered as arising either naturally, that is according to the usual course of things, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach.

I do not accept Mr Lubbe's submission that *Telecom South Ltd v Post Office Union* [1992] 1 ERNZ 711 CA which indicated that awards can be made for both remuneration actually lost to the date of hearing and for future losses is relevant as that was a case of a personal grievance and turned on the interpretation of ss40 and 41 of the Act.

Mr Lubbe correctly submitted that while the plaintiff had an obligation to mitigate his loss, the actions of the defendant in preventing the plaintiff from utilising his experience and skills in the market place may have prevented the plaintiff from being able to mitigate his loss entirely. However I did not understand from Mr Harrison's submissions that the defendant was asserting that there was a failure to mitigate on the plaintiff's behalf.

The plaintiff first sought special damages arising out of the breach of his contract. Mr Lubbe submitted that the measure of damages for wrongful dismissal was the amount the plaintiff should have received had the contract been properly performed. By referring to "*wrongful dismissal*" I have taken Mr Lubbe to be referring to the allegation that insufficient notice of termination was given. I have already found against that contention and for the reasons given, conclude there are no damages recoverable under this head. This disposes of the plaintiff's claim for the equivalent of his lost income to the date of hearing and 2 years' future salary which, although not quantified, would have totalled in excess of \$250,000.

Turning now to the claim for general damages, I accept Mr Lubbe's submission that by virtue of the defendant's breaches of the plaintiff's contract the plaintiff is entitled to general damages for proven humiliation, distress and injury to feelings. The amount claimed by the plaintiff under this head was \$60,000, for what Mr Lubbe described as a knowing breach of the plaintiff's employment contract carried out in a callous manner. If granted this would be the highest award that has been given in New Zealand for such damages.

Mr Lubbe relied on *Whelan v Waitaki Meats Ltd* [1991] 2 NZLR 74 where an award of \$50,000 was made to a plaintiff who was close to retirement age and had given many long years of service. In *Andrews v Parceline Express Ltd* [1994] 2 ERNZ 385 which contains the note of restraint on the quantum of awards in this area, damages for the mental consequences of the breach were awarded in the sum of \$10,000.

In *Hamer* the Court set out at length the evidence of the plaintiff's wife of the effects of the dismissal on the plaintiff who had not shown any emotional reaction to the employer's representatives at the time he was dismissed for redundancy. The Court found that despite the intensity of the negative consequences of the breaches upon the plaintiff, the consequences had limited effect by reason of him obtaining

alternative employment some months later. The Court, in assessing the level of general damages, had regard to an extensive number of recent cases in the Employment Court, the High Court and Court of Appeal, concluding that awards in the higher ranges have involved extended consequences as a result of the breaches. The Court awarded \$15,000 for general damages.

The plaintiff's claims for distress and humiliation in the present case, unlike *Hamer*, were not corroborated by evidence from close family or friends as might have been expected in a claim of this magnitude. Further, the claims were not borne out by contemporary accounts of the plaintiff's reactions and demeanour the night of the farewell dinner, nor by his subsequent correspondence. I accept the plaintiff's evidence that the enjoyment of his overseas holiday may have been lessened by his dismissal and that he would have suffered some embarrassment in dealing with his staff. I do not accept that the dismissal came as a complete surprise as the plaintiff described, preferring as I do the account of Mr Thornely and Ms Hickey as to the plaintiff's opening statement at the 8 August meeting. However I find that there was an element of shock to the plaintiff in that he was the first to be made redundant. I accept Mr Harrison's submissions that the plaintiff, who described himself as an entrepreneur, knew that he was taking risks and that the viability of the division had not yet been tested. With the assent of the defendant, the plaintiff set up a successful company, assisted to a significant degree by the defendant's provision of the motor vehicle. Although the plaintiff had previously left the employ of CHH in difficult circumstances he was still able to successfully re-enter the market. Taking into account all these submissions I consider that an award of general damages for distress, humiliation and injury to feelings of \$5,000 is appropriate.

Turning to the claim for \$100,000 damages for loss of reputation, Mr Lubbe relied on *Malik* and also on *Richards v Elastomer Products Ltd* [1993] 2 ERNZ 215 at 237. In *Richards* an implied term of fair and reasonable treatment was held to have been breached and an award of \$11,000 general damages was made. The Court there held that the plaintiff had suffered a considerable and avoidable level of distress, anxiety and humiliation through the manner of his dismissal. The plaintiff had been a plant engineer for more than 9 years and as a result of a poor financial position was called to a meeting, dismissed for redundancy and required to leave the plant that day.

Mr Lubbe also relied on *Feast Group Ltd v NZ Railways Corporation* [1993] 2 ERNZ 537 where the High Court awarded \$128,698 for the balance of the term of the contract, \$100,000 for the loss of opportunity to earn incentive bonuses and \$50,000 for general damages for loss and injury to the business goodwill of the plaintiffs (the plaintiff was employed through a management company he owned). The contract there was terminated in a way which was harmful to the plaintiffs and involved discussion in the public domain and in Parliament. There had been serious allegations involving implications of fraudulent or unlawful conduct of a high profile executive.

While accepting that it is difficult to assess the level of an award under this head for damage to reputation Mr Lubbe submitted that the Court had an indication of the loss suffered by the plaintiff by his inability to take up the business opportunity that was available to him immediately after the dismissal which he had estimated to have cost him approximately \$165,000 and that this should be taken into account as part of the Court's equity and good conscience jurisdiction in reliance upon *GWD Russells (Gore) Ltd v Muir* [1993] 2 ERNZ 332. In response to questions from the Court Mr Lubbe accepted however that the Court was not exercising an equity and good conscience jurisdiction when being asked to make an order that the High Court could make in relation to damages, see s104(3) of the Act.


It is curious that this claim for lost opportunity damages was not made under a separate head rather than under the claim for general damages based on alleged loss of reputation. The plaintiff did not give precise evidence in support of this claim for loss but it appeared that he was claiming he had been denied a window of opportunity for the introduction of his new packaging material in the period between the flooding of the market with cheap fibre moulded packaging by all three suppliers and the changeover to disposable plastic by the producer boards. If the plaintiff had been as assured of his market as he claimed it is most likely he would have accepted the offer made to him in January 1997 of the balance of the term and the redundancy compensation so that he could then have competed. That he did not do so and has still yet to build up a substantial packaging business all suggest the evidence of loss of business opportunity was speculative and overly optimistic. If the plaintiff's evidence of a loss in the vicinity of \$165,000 was credible that estimate would have been backed by financial statements and corroborative evidence from the potential customers. I am not satisfied that a separate award would have been justified under

this head or that this alleged loss can be taken into account to inflate the general damages award for loss of reputation, as contended by Mr Lubbe.

Although Mr Lubbe had relied upon Mr Yortt's evidence to show the damage to the plaintiff's reputation, Mr Harrison observed that Mr Yortt agreed that he and others in the industry would consider any business proposals the plaintiff might bring to them. This suggested that the plaintiff was not in fact damaged in his reputation. The evidence of Mr MacDonald also suggested a lack of damage. Mr Harrison relied on the evidence that the plaintiff was assisted by the monies he received from the defendant and the free use of the Audi motor car to establish a successful business and has been re-establishing himself in the packaging industry. Mr Harrison contrasted this with the manner of the plaintiff's departure from CHH which he submitted would have been more damaging to his reputation and yet it did not prevent the plaintiff from re-establishing himself.

I accept Mr Harrison's submissions. Although the defendant denied the plaintiff the right to work in competition, and this kept him from the market place for some 12 months, this was during a period when the industry was in turmoil as a result of the price war. The plaintiff conceded the risks of entering the market at that stage and very wisely was not prepared to risk his own capital. No financial losses as a result were proven. Further, I find there was no damage to the plaintiff's reputation as a result of the defendant's breaches. I therefore make no award under this head.

At the request of the parties costs are reserved and if they cannot be agreed may be addressed in an exchange of memoranda, the first to be filed no later than 2 months from the date of this decision.

A handwritten signature in black ink, appearing to be 'B. J. T.', is written on the page.