

CITATION: *Alan Buckingham v Traditional Credit Union* [2004] NTMC 090

PARTIES: ALAN BUCKINGHAM

v

TRADITIONAL CREDIT UNION

TITLE OF COURT: Local Court

JURISDICTION: Local Court

FILE NO(s): 20309517

DELIVERED ON: 15 December 2004

DELIVERED AT: Darwin

HEARING DATE(s): 15, 16 April 2004; 19, 20 July 2004

JUDGMENT OF: Jenny Blokland SM

CATCHWORDS:

CONTRACT – FORMATION – EMPLOYMENT CONTRACT – OFFER AND
ACCEPTANCE – INTENT TO BE BOUND -

REPRESENTATION:

Counsel:

Plaintiff: Mr Alderman

Defendant: Mr Young

Solicitors:

Plaintiff: De Silva Hebron

Defendant: Paul Maher

Judgment category classification: B

Judgment ID number: [2004] NTMC 090

Number of paragraphs: 67

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20309517

BETWEEN:

ALAN BUCKINGHAM
Plaintiff

AND:

TRADITIONAL CREDIT UNION
Defendant

REASONS FOR DECISION

(Delivered 15 December 2004)

Ms BLOKLAND SM:

Introduction

1. The plaintiff Mr Alan Buckingham brings this action alleging a breach of a contract of employment and consequential damages against the defendant employer, Traditional Credit Union (also at times referred to as TCU). Although the facts will be detailed further in this decision, by way of introduction the essence of the plaintiff's case is that as a result of applying for the position of General Manager of Traditional Credit Union, a contract of employment was concluded between the plaintiff and defendant, partly in writing, partly oral and partly implied. It is alleged the remuneration offered and accepted was \$84,500 per annum excluding superannuation and leave loading. It is further alleged the plaintiff gave notice to his employer (Jabiru Town Council), such notice initially was given orally and later in writing. It is alleged that after the resignation, the defendant, through its agent purported to rescind the contract. As a result it is alleged the defendant has suffered loss and claims damages. For its part the defendant

admits that an offer of employment was made, however the offer was withdrawn prior to acceptance by the plaintiff. Alternatively, the defendant argues that if there was a concluded contract, any loss flowing from the defendant's breach results from a failure to mitigate on the part of the plaintiff by either resigning from his employment with Jabiru Town Council after the offer of employment was withdrawn or failing to rescind his resignation in circumstances where he would have been permitted to continue or return to his employment with Jabiru Town Council.

Evidence Called on Behalf of the Plaintiff

Alan Buckingham

2. The plaintiff gave evidence that at the time of the hearing he was working as a public servant for the Department of Infrastructure, Planning and Environment. Prior to gaining that employment on 27 October 2003 he worked as the Deputy CEO at the Jabiru and Gumbalanya Community Councils; (he explained he was actually working for Jabiru Town Council but there were arrangements to cover Gumbalanya Council as well). He obtained that employment in January 2001. He said during the course of that employment on occasion he acted as CEO, first in the middle of 2001, and again from December 2001 through to the time of the appointment of the new CEO in March 2002. He then acted again in the position of CEO commencing 3 June 2002 until he left the organisation in April 2003.
3. He told the court he saw the position with Traditional Credit Union advertised in the NT News and made inquiries with TCU's agency, Julia Ross. He obtained a document from the agency entitled "Statement of Responsibilities and Duties" for the position of General Manager with Traditional Credit Union: (Exhibit P1). After submitting his application he attended an interview before a panel; that at the interview there was little mentioned in terms of specific salary but there were indications that it was a cash salary and that there was no vehicle; he said he was led to believe there

may be some urgency to find a replacement and he discussed the need to give four weeks notice that may be negotiated to a shorter period.

4. He said that on 10 March 2003, Ms Denise Loraine, (from the employment agency Julia Ross) contacted him by phone; as a result of that conversation he met a member of the interview panel “Tony”; that Tony indicated he would be offered the position and that there was some urgency in filling the position; that later that day Denise Loraine phoned him, confirmed that his application was successful and offered him the position. A meeting was arranged between Ms Loraine and Mr Buckingham on the same day (10 March 2003). At that meeting the plaintiff told the court that Ms Loraine told him the salary was \$84,500 per annum – cash only; that he told Ms Loraine he had a motor vehicle in his current employment and he wanted to know if it was possible to salary package; that Ms Loraine told him he shouldn’t ask for any more money; that he said he would put it on the basis that any changes would be at his cost and that he was happy with the total package but it was the manner it was to be delivered in; that Ms Loraine said she would look at it and that it would be seen in a positive light; that arrangements were made for him to see “Katherine”, the human resource manager of Traditional Credit Union.
5. Mr Buckingham told the court that on 11 March 2003 Ms Loraine phoned him and said that there had been a slight change of plans; that he was to pick up the contract from Ms Loraine’s office on that day which he did. He also had a telephone conversation with Traditional Credit Union’s human resource manager, Katherine Middleton. He told the court Ms Middleton asked him if he was happy with the contract; he told her he was but he would like the salary delivered in a slightly different way; that Ms Middleton told him she did not have much experience with that and she would need to obtain advice; the two matters he raised with her was to have part of the salary paid as a Living Away from Home Allowance that he said was available under Australian tax law and secondly whether he could salary

sacrifice and obtain a vehicle; that he told her this proposal was “a nice to have, not a must have”; that Ms Middleton said she would look into it.

6. Mr Buckingham said Ms Middleton phoned him later the same day and told him she was getting taxation advice; she also told him there may be a car available. The next day he let Ms Middleton know that he was back in Jabiru; that she phoned him later that day to say she had tax advice that the Living Away from Home Allowance was no problem and that there was a car available, the General Manager’s car, “a green car”; that he understood from this that he would not need to salary sacrifice to obtain the use of the vehicle; that in a conversation on the same day with Ms Middleton she asked if there was anything else in the written contract he was unhappy with and that apart from some minor typos he said ‘No I’m happy with the contract’ and she said ‘Okay, is there anything else that we need to – to deal with’ and that he said ‘No’ He said he offered two start dates, one was 31 March 2003 and the second was 7 April 2003. He said Ms Middleton told him she would arrange a director to phone him to confirm the dates.
7. The plaintiff made reference to the then Chair of the Jabiru Town Council, David Norton. On the Wednesday 12 March 2003 when they drove from Darwin back to Jabiru together Mr Buckingham said “it was at that stage that I resigned to him in the car”; he said that he told Mr Norton that he had another opportunity and that he “wished to resign” and that Mr Norton replied “I don’t really blame you considering the way you have been treated”. Mr Buckingham told the court Mr Norton was the person he needed to report to; he said this conversation occurred during the trip about 8-8:30am; he also said Mr Norton was concerned about replacing him; Mr Buckingham told the court that he did not want to leave the Jabiru Town Council “in the lurch”. It was after this conversation that Mr Buckingham says he spoke to Ms Middleton in relation to start dates.

8. Mr Buckingham told the court it was the next day, the Thursday (13 March 2003) that a representative from Julia Ross phoned him and told him “they’re withdrawing the offer”; that Mr Buckingham said “they can’t do that. It’s a done deal” and she said “well they are”. Mr Buckingham said he was shocked; he asked for reasons and wasn’t given any. Mr Buckingham said he spoke to one of the other Jabiru Town Councillors, Mike McHugh on the 12th or 13th March with respect to his resignation; that he went to see Mr McHugh and told him “I’m resigning, I’ve got another position” and that Mr McHugh responded “congratulations” and shook his hand.

9. Tendered through the plaintiff is the copy of the contract (not signed) he was supplied with: (Exhibit P2). Paragraph 5 under “Remuneration” provides in part:

“The Employee’s remuneration shall be comprised of an annual salary package of Eighty Four Thousand and Five Hundred Dollars (\$84,500) per annum inclusive of base salary and all allowances and benefits (but excluding superannuation contributions by the Credit Union and leave loading)”.

10. Mr Buckingham told the court he rang Ms Loraine on the 18 March 2003 and asked what had happened and that she replied “You tell me. I’m as surprised as you are”; that she told him the feedback was that he’d been rude and aggressive to Katherine of Traditional Credit Union; that he told her that was completely wrong but that Katherine was nervous when he dealt with her; that he was told that there may have been some sort of misunderstanding and that it would be best for a Director of Traditional Credit Union to speak to him; the plaintiff said he was hopeful that something would be worked out; that the withdrawal of the offer may have been overstated to him; that over the next few days and weeks he spoke to Denise Loraine to try and get an update and also tried to contact Traditional Credit Union; that during this period he believed the position was still available for him to take up. He said he met with Denise Loraine in Darwin on 21 March; that Ms Loraine told him the Traditional Credit Union wanted

to continue advertising to look for other suitable applicants but were still prepared to consider him; he told Ms Loraine he had legal advice that he had a contract and that he wanted Traditional Credit Union to honour their obligations; that Ms Loraine again said she would get a Director to contact him; that Ms Loraine asked him for some written references as only oral ones had been supplied; that he supplied these about a week later; that he sent a copy of a letter by email to Ms Loraine (Exhibit P3) that he wrote on legal advice explaining that there may have been some “misunderstandings”. Part of the email states:

“From this point forward, I believed that I had, and still believe that I have, an employment contract with TCU”.

There are also explanations and qualifications concerning the discussion on salary packaging and the email also states:

“I tendered my resignation for my current position because of our agreement. I can confirm that I will be in a position to start with TCU on 7 April 2003”.

Associated with that document is Exhibit P4, the accompanying email to P3; the plaintiff said he had the impression that Ms Loraine passed the letter on but she had told him she hadn't; the plaintiff observed that P4 tended to indicate she may have passed it on to Traditional Credit Union. The plaintiff said he also dropped off a copy of the letter to Traditional Credit Union dated 22 April 2003: (Exhibit P5). The plaintiff told the court of other attempts he made to contact Denise Loraine and office holders of Traditional Credit Union; he said that a few days after the letter of 22 April 2003 Denise Loraine advised him that another candidate had been selected.

11. Mr Buckingham said that after his resignation the next meeting of the Jabiru Town Council was 18 March 2003; that one item on the agenda was for a replacement CEO; that he assumed that given he had spoken to Mr Norton, Mr Norton had told others in the Council. The Minutes of that meeting of the Jabiru Town Council (Exhibit P6) are before the court; Mr Buckingham

said he thought the resolution carried 218/10 referred to his resignation.

That resolution reads:

“Moved Cr Williams that with the assistance of LGANT and the approval of JTDA, employ a temporary CEO for a six month period and that an audit be conducted and provided at the June 2003 meeting”.

Mr Buckingham said he only attended one further meeting of the Jabiru Town Council on 1 April 2003 when the Council dealt with his temporary replacement. Before the court also is the Jabiru Town Council Special Meeting Minutes of 1 April 2003 that notes:

“The Acting CEO has tendered his resignation. He is obliged under his contract to give four weeks notice which he has done. Please see attached letter”.

Before the court also is a written resignation addressed from the plaintiff to Mr Norton, the Chairman of Jabiru Town Council dated 21 March 2003 (Exhibit P8). That letter reads:

David, As previously discussed I am writing to tender my resignation as required under my contract. I wish to advise that my final day of work will be 22 April, 2003. Alan Buckingham.

The plaintiff told the court he wrote that letter because he had actually resigned in the car on 12 March 2003; that David Norton told him he should resign in writing; that the plaintiff told him there was no requirement to resign in writing as his contract said he just has to give four weeks notice; he said this was tied up with needing to start urgently with Traditional Credit Union so he wrote the resignation on 21 March referring to his oral resignation of 12 March. He said he made his final day 22 April 2003 because he could have taken leave for the last couple of weeks so he could have commenced with TCU on 31 March which would have been preferable to starting on 7 April; that by 21 March (the date of his written resignation) his contract was starting to look “shaky” with Traditional Credit Union and so he could extend the time he could stay with the Council and do a hand

over with the new CEO. The plaintiff's last day with Jabiru Town Council was close of business on 22 April 2003. The plaintiff said he also wrote a letter to Councillors on 21 March 2003 that complains of the way the Jabiru Town Council meeting of 18 March 2003 was conducted (Exhibit P9). That letter describes Council as making the plaintiff's position as CEO as "untenable". The plaintiff also stated that he was considering rescinding his resignation on 18 March 2003 but decided not to because of his conversation with Denise Loraine that made him think it was just a misunderstanding "that we could iron out"; he also said that if he withdrew his resignation he would have to "re-resign" which would have put the commencement date out "which I then worried that that might preclude me from the job". He told the court he was unaware there was a problem until 18 March. He acknowledged the date that he was told of the offer being withdrawn was 13 March 2003.

12. In cross examination Mr Buckingham agreed he had a Bachelors Degree in Economics; that he is a certified practising accountant and that he's had extensive experience working in government, private enterprise and not-for-profit organisations; he agreed he was the financial manager for The Basketball Association of South Australia; he agreed this sometimes meant he was responsible for player's salary negotiations. He agreed the players had written contracts; he said he did not have a written contract when he worked there but he thinks he did have a written contract when he worked for Mobil Oil and knew he had one when he worked at Jabiru Town Council. The plaintiff said he did not remember the words "written contract" being discussed at the interview for the position at Traditional Credit Union; he did not recall whether panel members had told him that a written contract would be prepared; in answer to the question "Would you have expected a written contract to govern the terms of your employment for that job?" he said "Not necessarily but most likely, yes"; he conceded he thought a

written contract would be something he was in favour of; he agreed being given a written contract for signing was “not a surprise”.

13. Mr Buckingham agreed in cross examination that at the Julia Ross office he was told the salary was \$84,500; that he said words to the effect of “I need to think about that. I have a house and a car with the present job and I want to discuss that with my wife”; that Denise Loraine told him she thought he would have had that discussion; he disagreed that he had stated that his salary was lower than his (then) current salary; that he asked her if TCU would consider salary packaging and it was Ms Loraine who put him onto TCU; he disagreed that Ms Loraine told him that if he went back to TCU they were likely to say “thanks but no thanks”; he agreed however that she had said he should not go back for more money; he disagreed Ms Loraine had told him to think over his expectations.
14. Mr Buckingham agreed the written contract he was given was important and it would govern the terms of employment; he disagreed it became final when he signed it, he said he understood that once he agreed to it, it was final; he disagreed, from his experience that a written contract is difficult to negotiate; he said he regards people’s word as higher than a written contract; he said if you start “diving for written contacts, you’re in trouble”.
15. Clause 17 of the contract (Exhibit P2) reads: “This Agreement constitutes the entire agreement between the Credit Union and the Employee in relation to the Employee’s employment between the Credit Union and any representations made or agreements arrived at in relation to the performance by the other party of its respective rights and obligations under the Agreement shall, except to the extent they appear in this Agreement, be deemed for all purposes not to have been made or arrived at”. Mr Buckingham agreed that this term meant that once the document was signed there would be no other terms but he qualified that saying “unless they’re added to the contract”. He said he understood that with salary packaging a

person would be allowed to convert the salary into other benefits; he agreed the salary was a cash salary of \$84,500; he agreed clause 5 of the contract provided for a salary of \$84,500; he disagreed with an interpretation put to him that this clause excluded a car to be provided or a Living Away from Home Allowance; he said as it turned out a car was available on top of the contract; he disagreed the contract meant that he was not entitled to those things; he reiterated that he understood that if the salary could be packaged at no extra cost to TCU that would be acceptable; he said although the contract did not provide him with a car, he understood he would be provided with one; he said in relation to a car, it was just a query; it was put to him that that was why he didn't sign the contract and he said "no".

16. Mr Buckingham said he thought it was normal business practice for all parties to sign and witness the contract together which is why he did not sign it; he agreed there was nothing preventing him signing it in front of his wife; when it was put to him that the reason he didn't sign the contract on Tuesday night was that he wanted to negotiate an alteration – he said "I don't believe so"; he said he discussed the possibility of a novated lease with Ms Middleton on the Tuesday. It was suggested to Mr Buckingham that under such an agreement that salary packaged a car there would be a fringe benefits tax payable by the employer; he said it depended on how it was done but that TCU would need to get expert advice on it as Katherine Middleton from TCU had indicated. He disagreed with a suggestion that Katherine Middleton said she would have to get advice from the TCU Board – but rather from an accountant; he agreed she had said she was not familiar with it.
17. Mr Buckingham was also asked about the Living Away from Home Allowance; he explained that if an employee is recruited from a different domicile and has to move, it is allowable for up to two years to be paid a Living Away from Home Allowance. He agreed he owned a house in Darwin but he said that because he was being recruited in Jabiru he was able

to claim such an allowance; he understood such an arrangement gave him a taxation advantage; he agreed this was an appropriate subject for TCU to be able to seek expert advice about; he disagreed with a proposition that Katherine Middleton from TCU had said she couldn't agree to this benefit although he agreed to this she said words to the effect that she didn't understand it and would need to get expert advice; he disagreed Ms Middleton said she would need to obtain Board approval; he said he made it clear that this was a request and if it was too difficult he would "drop the issue". Mr Buckingham rejected suggestion he had invented the phrase "nice to have, not a must have".

18. In cross examination Mr Buckingham reiterated that he accepted the job offer on Tuesday 11 March and that he reiterated his acceptance on Wednesday 12 March; he said his understanding was that the parties were bound at that stage by offer and acceptance; he was questioned about his legal education and advised that he had studied contract law and income tax at Adelaide University in the late seventies and early eighties as part of the commerce faculty; he believed it was part of a commercial law subject; he explained that his understanding was that there was no need to have a written contract; Mr Buckingham rejected the notion that he had simply not signed the contract so that it would give him room for manoeuvring in negotiations.
19. Mr Buckingham confirmed that he drove back to Jabiru on the Wednesday 12 March with David Norton and that it was Mr Buckingham's view that at that time he had concluded a contract with TCU. He agreed that issues such as the salary package issue were not resolved and neither was the issue about whether he would get health insurance taken out of his pay and other issues; he told Mr Young who was cross-examining "I think you're making too much of this salary thing, this, packaging". He agreed that he had made up his mind to resign from Jabiru Town Council and he would be moving to Darwin to commence the job. He agreed that three things were clear to him,

firstly that he had a concluded contract with TCU; secondly he would be resigning from Jabiru Town Council and thirdly he would be moving to Darwin.

20. Mr Buckingham explained that the Living Away from Home Allowance was unresolved until the Wednesday afternoon when he said it was agreed by Katherine Middleton; he told the court she came back and said she had advice and there was no problem with the Living Away from Home Allowance, Mr Young put to Mr Buckingham that that did not in fact take place and Mr Buckingham said that it had. Mr Buckingham also reiterated that in relation to the vehicle although there was some confusion, he was told that the General Manager's vehicle was available; he said he was told that the vehicle was used by other people during the day and he said that this was a similar arrangement that he had at the time with Jabiru Town Council; he rejected a suggestion that what he wanted was a car of his own; Mr Buckingham rejected a suggestion that he said he still wanted a "personal use car"; he said he had never used those words; he thought that the FBT would not be an issue in the same way it would have been in his original proposal; he said that he finished that conversation with Ms Middleton at about 2.30 to 3.00 pm on the Wednesday afternoon (12 March); he also agreed that after resigning from Jabiru Town Council he would be moving to Darwin at the earliest opportunity.
21. He agreed that on the evening of Wednesday the 12th March there was a meeting of the Kakadu Visitor Organisation held in Jabiru; he explained to the court that the Kakadu Visitor Organisation was a regional tourism body; he said it involved tour operators, accommodation providers and other people in the tourism industry and its focus was on the Kakadu area; he said they met once a month; Mr Buckingham agreed that he was on the Kakadu Visitor Organisation by virtue of his position at the Jabiru Town Council as the Jabiru Town Council had traditionally been a member of the Kakadu Visitor Organisation and it was part of his job; he said he enjoyed being the

chair of that organisation; he said he was chairman at the time of that meeting and that he had been in that role for about 12 months; he agreed that the meeting of the Kakadu Organisation on the 12th March was the annual general meeting that included the election of office bearers; he agrees he was elected chairman on that evening; he told the court he was nominated again as chairman and this was a surprise as he hadn't expected to be nominated; he said he thought that it was probably because he was willing to do the job; in answer to the question "you were interested in doing it again or you were the bunny or whatever, but you agreed to do it for another year" he answered "it was a strange situation. Bearing – bearing in mind I'd resigned that morning". Mr Buckingham explained to the court that although he had resigned that morning his decision had not been made public and he found himself at the meeting and he was asked to stand again. He said he expressed the wish not to stand again to the meeting and that he invited other nominations; he said no other nominations were forthcoming and that one of the people told the meeting he'd done such a great job that no one would stand against him; he said he felt he was in a bind because it would have been wrong of him to make an announcement that he was unable to stand because of leaving Jabiru as that was not yet public; he said if he made that announcement it would have put David Norton in a very embarrassing position; he said David Norton would need to find a replacement before an announcement could be made; Mr Buckingham said that in small communities rumours get around and if someone is going to stand down and leave it is necessary to have a solution ready to put up in front of the public; Mr Buckingham said he thought the best way to handle it was not to go around telling everyone that he was leaving before Mr Norton had an opportunity to make a formal announcement. It was suggested to him that Wendy McHugh nominated him and he told the court he could not remember. The minutes of the Kakadu Visitor Organisation dated 12th March 2003 were put before Mr Buckingham (Exhibit D1). After looking at the minutes he accepted that Wendy McHugh had nominated him; he agreed

the minutes reflect that he accepted the nomination and was elected unopposed; he says he was in a dilemma because he had worked for the organisation for 12 months and he didn't want to leave it in shambles. He told the court he was determined to accept the nomination, look around immediately and get someone to replace him so there could be a smooth transition; he said he did not want rumours to start which influenced his decision not to tell the meeting of his plans; he agreed that Mr Mike McHugh is the husband of Wendy McHugh; Mr Buckingham said he told Mr McHugh about his resignation on the Wednesday afternoon; he said that he thought it was appropriate to tell Mr McHugh but not Wendy McHugh who had nominated him; Mr Buckingham accepted that Ms McHugh, at the time of nominating him for the position thought that he would be there for the next 12 months; he disagreed that all the other persons present were under a misapprehension of his intentions as he said that he did ask other people to stand; as nobody did stand he said he thought he would "go with it" and solve the problem between meetings; he said he could not really reject the nomination as there were no other nominations.

22. Mr Buckingham rejected the suggestion that he accepted the nomination at the Kakadu Visitor Organisation because he hadn't made up his mind about whether he was going to take the Traditional Credit Union position. When he rejected this suggestion he said he had already resigned to David Norton that morning. He agreed that on a couple of occasions David Norton asked him for his resignation in writing and that Mr Buckingham had told Mr Norton that his contract just says he has to resign (not in writing); on being asked why he was reluctant to put his resignation in writing he said he considered it unnecessary and that it was Mr Norton's suggestion that it had to be in writing and that he subsequently did put the resignation in writing on the 21 March, some nine or ten days after he says he gave Mr Norton notice of his resignation. Mr Buckingham says he did not resign in writing until nine days later because he regarded it as unnecessary, he was making

arrangements to change jobs and it wasn't a high priority; he rejected suggestions that he did not reduce it to writing so he would have an option of not resigning.

23. It was suggested to Mr Buckingham that he still had ambitions at Jabiru Town Council in terms of possibly being able to secure the CEO job; Mr Buckingham said he knew that he couldn't do that; he said he had no prospect of doing that because he had not had three years experience in local government; even though he had been acting in the position he said there was no prospect until January 2004 of him becoming CEO; he said he couldn't have acted in the position until January 2004 because he had been acting in the position for about one year; he agreed that when he applied for the CEO position at Jabiru Town Council he was thwarted by the Jabiru Town Development Association who vetoed his nomination that was made by a panel including Mr Norton and Mr McHugh. Mr Buckingham did not agree that he didn't tell Ms Middleton that he had given notice at Jabiru Town Council, he says she knew because he had given her his starting dates; he said he couldn't recall whether he had told Alana Chand that he resigned because he was so stunned.
24. The minutes of the Jabiru Town Council meeting were put before Mr Buckingham (Exhibit P6) and his attention was drawn to a resolution on page six "moved Cr Williams that with the assistance of LGANT and the approval of JTDA, employ a temporary CEO for a six month period and that a audit be conducted and provided at the June 2003 meeting". He was asked whether that was a response to his resignation and Mr Buckingham said he assumes so as he had resigned a week before. Mr Buckingham agreed that his resignation had not been formally announced by the 18 March; he said there was no discussion at the meeting, that it was a very unusual meeting and people came in, put motions and debate was gagged. Mr Buckingham agreed that the only people aware of his resignation were Mr Norton and Mr McHugh; he agreed that the filling of the CEO position had been a long

running issue at Council; Mr Buckingham was referred to the minutes of the 18 February 2003 (Exhibit D2); he agreed that the position of CEO was discussed at that meeting in February; it was suggested to him that the minutes concerning the 18 March CEO position was simply a continuation of an unresolved issue from the 18 February; Mr Buckingham said “no” there were actually two motions on the 18 March, he said the first motion referred to the permanent replacement of the CEO and that that one had been ongoing and the second motion that he had been asked about he had assumed that it was due to his resignation. Mr Young put to Mr Buckingham that the resolution 218 was Mr Buckingham’s “death knell” as it meant a decision had been made to demote him from Acting CEO back to the Deputy CEO position. To that proportion Mr Buckingham said he had already resigned so it couldn’t have been a death knell. He said they wanted him to stay around until they got a replacement. Mr Young suggested Mr Buckingham was misleading over suggesting a particular motion related to him as Mr Buckingham had suggested it was evidence of his resignation. Mr Buckingham said he was asked by his solicitors if he could supply documents that supported his resignation. He said when he went through the minutes that was what he found. Mr Buckingham agreed he did not give the minutes of the 18 February meeting to his solicitor which put the next meeting in context. Mr Young put a letter written on Mr Buckingham’s behalf by his solicitor to him dated 16 February 2004 that stated “we say that the resolutions are relevant as it confirms the Jabiru Town Council was in the process of looking for a new CEO. The reason it was necessary to look for a new CEO was that the plaintiff had already resigned”. It was suggested in cross examination to Mr Buckingham that the statement “the reason it was necessary to look for a new CEO was because the plaintiff had already resigned” was false. Mr Buckingham said that he had been asked to get documents that were relevant, he found the minutes and he assumed that the first reference to the CEO position in the minutes was an ongoing issue but the second reference was that it was a relevant reference to the issue of

his resignation. Mr Buckingham said he didn't recall what he had actually said to his solicitor. He said he thought that resolution 218 should be some evidence of what had been requested. He said that the minutes reflected his assumption that it was to do with his resignation. Mr Buckingham said that he clarified this with his solicitor after the letter was sent to the effect that it was an assumption but he denied that when he was first asked about it he had not told her it was an assumption because he wanted to create the impression, a false impression that the deliberations of the Council on the 18 March were the result of his resignation.

25. Mr Buckingham was questioned on why his letter of resignation dated the 21 March spoke of his position becoming "untenable". It was put to him that this could not possibly be related to him resigning on the 12 March as he had alleged because if he had already resigned, there was nothing on the 18 March meeting that could have made his position "untenable". Mr Buckingham explained to the court that he was angry about how a group of Councillors had behaved and given he was going to leave the Council soon he thought he could speak his mind rather than be diplomatic. He said that the letter he had written concerning these matters had nothing to do with his resignation. Mr Buckingham agreed with counsel that he did not give his letter of resignation to his solicitor. He said he didn't give it to her because he did not think it was relevant as he considered that he had already resigned to David Norton in the car. He said he did not turn his mind to the existence of the lengthy document that he wrote on the 21 March when he was asked to produce relevant documents. He agreed that his letter of resignation does not refer to the oral resignation of the 12 of March. He pointed out that the resignation says "as previously discussed".
26. Mr Buckingham agreed he was required to give four weeks notice from the Jabiru Town Council; it was pointed out to him in cross examination that his last day being the 22 April was one month from the letter of resignation of 21 March 2004; he told the court he had made himself available to assist in

the replacement of the person filling his position. He told the court that up until 18 March 2004 he was thinking about revoking his resignation; he didn't go to see Mr Norton as it was a serious situation and he wanted to get legal advice; he said that Ms Denise Loraine had indicated there may have been a misunderstanding.

27. In re-examination Mr Buckingham reiterated that paragraph five of the contract with TCU anticipates salary packaging and he thought implies allowances. He explained that Exhibit P9 (letter dated 21 March 2003) was written after his resignation – he says he had resigned in the previous week; he was concerned about the ongoing business of the Council; that he wanted open and accountable government; that there should have been business papers before each meeting and discussion on those papers. He told the court that he accepted that any additional costs that flowed from his salary package proposals would be his. He also told the court that he considered withdrawing his resignation of 12 March 2003 but events had taken their course and he had started making arrangements such as moving out of houses.

David Norton

28. Mr David Norton gave evidence in the plaintiff's case. Mr Norton had been associated with the Jabiru Town Council for 12 years. He said that Mr Buckingham told him in the car on 12 March 2003 that "he was going to resign". Mr Norton said that Mr Buckingham said he is resigning, to which Mr Norton said "I would like it in writing" and Mr Buckingham had said "I don't have to". Mr Norton said he thought he would get something in writing and that he stalled telling the other Council members – he said he was trying to delay it as he didn't want Mr Buckingham to go. He said he was delighted that Mr Buckingham would make himself available to the new CEO. In cross examination he said the deliberations of the Council on 18 March 2003 were not a response to Mr Buckingham's resignation as he said

the councillors would not have known about it; Mr Norton also said he would have accepted the withdrawal of the resignation prior to the 21 March 2003.

Michael McHugh

29. Mr Michael McHugh also told the court that Mr Buckingham told him he had resigned on the way back from Darwin.

Evidence Called on Behalf of the Defendant

Robert Povey

30. Mr Robert Povey gave evidence that he was present at the Kakadu Visitors Organisation A.G.M. when office bearers were elected. He said Mr Buckingham gave a speech and said he would be happy to accept the nomination; he said he did not think the position was pressed on him; he did not know Mr Buckingham had resigned at the time of the Jabiru Town Council meeting of 18 March 2003. He thinks he may have been told of it the next day or the day after that.

Denise Loraine

31. Ms Denise Loraine of Julia Ross Human Directions gave evidence that she had been invited by TCU to recruit a CEO. After the interview process (she was not present at the interviews), she telephoned Mr Buckingham, asked him to come to her office and said she had “good news”. She told him TCU were offering \$84,500; she said Mr Buckingham had said he would have to think about it as it was less money and he had a house and car in his current employment. Ms Loraine said she told him to be careful about the issues Mr Buckingham wanted to raise as the TCU had limited funds. She agreed he picked up the written contract. In relation to the requests for salary packaging she said she would usually do the negotiating and she contacted Ms Katherine Middleton of TCU who had told her that she (Ms Middleton)

could not make that decision. She said she told Mr Buckingham to contact Ms Middleton direct. She said she did not recall how many times she spoke to Mr Buckingham after that. She says she knows she discussed the car issue with him and was aware that had been resolved; she said Mr Buckingham had also raised the issue of the Living Away from Home Allowance and she had told him to speak to the Traditional Credit Union; she told the court she was in Sydney on 13 March 2003; that she received a call from the Traditional Credit Union saying that the offer had been withdrawn; that she advised TCU to contact Mr Buckingham immediately.

32. Ms Loraine was referred to an email of Monday, 10 March 2003 5.18 pm: (part of Exhibit D6). In that email she wrote to Katherine Middleton of the Traditional Credit union as follows:

“Hi Katherine,

Alan is available to see you at 12.45 Tuesday to discuss the finer details. He did ask that as long as it didn't cost the TCU anymore would there be any objection to it being packaged differently. I told him he would need to talk to you. Give me a ring if this is not a convenient time to see him and I will see what I can arrange. Thanks for the cyclone tips. Regards Denise”

Of this email Ms Loraine said that she wasn't aware that Mr Buckingham was interested specifically in a car but she had already got him more money than was on the table as it was “83 to start with and we'd already gone up to 84,500 and I'm trying to close a deal”. She said she didn't know at that stage specifically what Mr Buckingham was going to ask for. She said that when he collected the draft contract on the Tuesday she didn't have any conversation with him. She said he called back later and mentioned some typos; he did not mention anything else. She said that on the Wednesday she had to go to Sydney in the afternoon so she wanted to let both he and Katherine Middleton know that she wouldn't be around for the next week; she said that she and Mr Buckingham had a conversation about the vehicle but she couldn't recall if that was on the Tuesday or Wednesday; she said

the conversation was something about him telling her he already had a car; Ms Loraine said she spoke to Katherine Middleton who had told her there was a car he could use and she was advised that they could do that for him but she couldn't remember whether it was the Tuesday or the Wednesday.

33. She said she recalled discussion of the Living Away from Home Allowance that was also raised on the Tuesday or the Wednesday between herself and Mr Buckingham; she reiterated that she told him that he had to speak to the Traditional Credit Union; Ms Loraine gave evidence that she'd been contacted by Traditional Credit Union and the offer had been withdrawn because they could meet Mr Buckingham's requirements; she said that she advised Alannah Chand to contact Mr Buckingham immediately; she said that her next dealings were on the next Monday morning because when she came back into her office Mr Buckingham rang her and asked what was going on and Ms Loraine told the court she said "I warned you I told you this would happen". Ms Loraine said she wasn't sure whether this was Monday 17th or Tuesday 18th but it was one of those two days; she said that she told him "I told you this would happen, I told you they had limited funds and that if you pushed too hard and were too aggressive about things that you were wanting, that they would just withdraw and they had"; Ms Loraine said that Mr Buckingham wasn't happy but that he'd said something like "I'll just take the position"; she understood that he meant he would take the position without any of the things he had been negotiating and that she (Ms Loraine) said it was too late; she said her understanding was the position had been withdrawn and she said she told Mr Buckingham she would speak to the Traditional Credit Union to see if she could find out any more information; she said there were many more conversations after that but nothing that changed the substance of what was in the conversations she'd relayed to the court.
34. In cross-examination Mr Alderman asked Ms Loraine in relation to the email of Monday 10 March 2003 5.18 pm (Exhibit D5) whether Ms Loraine had

told Katherine Middleton that Mr Buckingham made an inquiry and that as long as it didn't cost TCU anymore would there be any objection to it being packaged differently – Ms Loraine agreed with that proposition; she reiterated that they had already given him more money so he didn't mention the other things to her until the day after; Ms Loraine agreed she was relying off of memory and that she had no notes; she reiterated that she tried to find out why the offer was being withdrawn and she was told TCU couldn't meet his salary requirements; she was asked whether Ms Middleton had told her they found Mr Buckingham to be aggressive – Ms Loraine said she did not say that but she said Mr Buckingham was like that with her when he was asking when to start; she says she thinks she told Mr Buckingham that he'd been aggressive; she qualified this by saying she would be more likely to say “over assertive” in relation to a candidate; she said Ms Middleton didn't know anything about Mr Buckingham's job with the Jabiru Town Council; Ms Middleton didn't tell Ms Loraine that Mr Buckingham had resigned and she and Ms Loraine had not heard about that at all. Ms Loraine agreed she tried to get a Director of Traditional Credit Union to speak to Mr Buckingham and she said this was so that Mr Buckingham could have some “closure”; she said after the 18 March she did not try to help him get the job; she said she tried to get everyone together to talk; she said she recalled sending a letter about it to Traditional Credit Union about a month later.

35. In relation to when Mr Buckingham first came to see her Ms Loraine was asked whether Mr Buckingham said he was happy with the contract; Ms Loraine disagreed with this; she said he wanted to take it away and go through it thoroughly; she said he didn't come back and say he was happy, that he just mentioned the spelling errors; she said at that point he was still negotiating a salary; she said that he wanted several changes made including salary sacrificing, Living Away from Home Allowance and he wanted something to do with a vehicle. Ms Loraine was shown Exhibit P3, a letter Mr Buckingham had written to the Chair of Traditional Credit Union

regarding the offer pursuant to the contract, his belief that he had an employment contract, his advice that he had been reasonable, that he is still keen to carry out the position and that he had resigned his current employment on the 7 April 2003. Ms Loraine agreed that she had forwarded this letter onto Traditional Credit Union. Ms Loraine was adamant that Mr Buckingham had not told her that he had resigned and he had no need to tell her. A letter to Ms Middleton at the Traditional Credit Union from Ms Loraine (Exhibit P13) that reads as follows was put to her:

“Dear Katherine I would appreciate you escalating this to the senior management team and would ask for an immediate response. Can you please provide me with a full explanation as to the Traditional Credit Union’s reasons for withdrawing the offer of employment to Alan Buckingham as General Manager. I understand that Alan queried the possibility of salary packaging the total remuneration that the TCU offered, and that he was informed that this was not a benefit that could be offered. He then confirmed that he was happy to accept the position as originally offered with a total remuneration of \$84,500 plus super pa. I’ll look forward to receiving your response so that I can inform the candidate as to the reasons for withdrawal of the offer of employment”.

It was suggested to Ms Loraine that she was attempting to help Mr Buckingham obtain the position. She said she was looking for closure for him; that she was trying to work on his behalf to reach some sort of closure so that “we could all move on”.

36. Exhibit P14, the response from Traditional Credit Union was put to Ms Loraine. That letter indicates that there was an “informal” offer put to Mr Buckingham and that he was provided with a “draft contract” for perusal and that there was no authority to make a formal offer. He says the interview with Mr Buckingham was followed by negotiations but they did not conclude any formal offer. The letter indicates that further information had come to light as a result of reference checks, however Ms Loraine is asked to advise Mr Buckingham that his current application can be assessed against other applicants not interviewed at the time of his interview.

37. In relation to the written contract Ms Loraine agreed that the contract does not say that it is a “draft”; she said Mr Buckingham wasn’t happy with the offer so he was going to go through the contract and see if there was anything else he wasn’t happy with; she said he was going to look through the contract before he made up his mind; Ms Loraine said it indicated to her that it was a draft contract because there was nothing in it that indicated a commencement or end date; she said that as a recruitment professional that would indicate a draft contract; she said her understanding was that it was solely for him reading through it and making negotiations; she said that if he had come back and said “yes I’m happy with that” then that would have been fine; she said if once he’d gone through it and agreed salary, dates and everything else then the contract would have been put together on that basis and signed off by both parties; Ms Loraine said to the court that she remembered telling Mr Buckingham that Katherine would have to go to the Board of the Traditional Credit Union to refer the negotiations; Ms Loraine said that Ms Middleton told her that she would have to go to the Board and that she had also told Mr Buckingham; she said she knew that there was a car but it was never part of the original package; she said that she did not mention that Mr Buckingham was only asking about these matters, she said they were “musts”, she said they were his requirements; Ms Loraine said that with reference to the email (Exhibit D5) when she has said to Katherine Middleton that Mr Buckingham is “asking whether his salary could be packaged differently at no cost to him” she said she understood that as being before he accepts any position.
38. She agreed that David Glover, the chairman of Traditional Credit Union had said no new offer would be made to Mr Buckingham but the Traditional Credit Union would consider him along with any new candidates; she disagreed that her report indicated that she met with Mr Glover before the 15 March. Ms Loraine said that she did recall asking Mr Buckingham for further references and those references were checked. In answer to the

suggestion that Mr Buckingham had never said that the salary was lower than Jabiru Town Council, Ms Loraine said he did say that; in answer to the suggestion that she did not say to him she thought he would have already spoken to his wife about it, she rejected that suggestion; to the suggestion that she did not say to him not to go back to TCU and ask for a salary package Ms Loraine said that she advised him on what he should and shouldn't be trying to demand to change, TCU had limited funds and they'd been quite clear on that and she had conveyed that to every applicant. She agreed that in the original phone call she congratulated Mr Buckingham and said he was the "preferred candidate"; she agreed she had said words to the effect of "when can you start"; she agreed that if Mr Buckingham had said that's terrific I can start on 7 April that she would have taken that as an indication that he was happy to take the job and happy to proceed and that would have been the conclusion of the contract. In re-examination Ms Loraine said that Mr Buckingham did not confirm he was happy to accept the position as originally offered with a total remuneration of \$84,500 plus super until after the offer was withdrawn.

Katherine Middleton

39. Ms Katherine Middleton gave evidence in her capacity as the then human resources manager with Traditional Credit Union; she agreed that she was liaising with the recruitment officer Ms Denise Loraine. She said that she was contacted by Robert Chamberlain (who was on the interviewing panel) to say that Mr Buckingham was to be offered the position. She relayed this to Denise Loraine; she said that Ms Loraine said that Alan had indicated he was happy with that and at that stage she suggested she send a draft contract to him to look at; she said Denise Loraine also mentioned Mr Buckingham had requests about salary sacrifice and requested Ms Middleton speak to him which she did on the Monday afternoon.

40. Ms Middleton was referred to the email of 11 March 2003 at 11.56 to Denise Loraine the subject being “contract of employment” reading “Hi Denise, attached is draft contract for Alan to peruse”. She said that on Tuesday 11 March she had a telephone conversation with Mr Buckingham after he picked up the contract and in that conversation she said that she asked Mr Buckingham whether he was happy with the terms and conditions and he said that he was but he would like to discuss salary sacrificing in particular for a motor vehicle to which she said there was already a motor vehicle available on a home garaging basis and that he indicated he would still like to salary sacrifice for his own vehicle. She thinks he talked about a figure of \$10,000 to salary sacrifice for two years.
41. She said he also wanted to salary sacrifice for a Living Away from Home Allowance and she explained that she was not aware that there was such a thing. She said she indicated to him that she didn’t know how it worked and he said he could show how to manage that; she said she didn’t believe TCU’s payroll system would be able to administer it and she was concerned about fringe benefits tax; she said she didn’t have authority in her position to say “yes” or “no” and she said she would have to refer the request to the Board for their approval; she said that at some stage which may or may not have been the same day of that conversation she had asked him *if things could be sorted out* what his anticipated start date was and he gave her two dates. She said 7 April was one date but she wasn’t sure what the other one was; she said he wanted to get it sorted out so he could give notice to his employer and he indicated he’d been on a contract and it had expired but he would still have to give notice so Ms Middleton said she would endeavour to get back to him. She said she believed that conversation was late on the Tuesday afternoon when she was at work and she understood him to be in Jabiru. She corrected that matter and said it must have been on the Wednesday. Ms Middleton said that she believed the living away from home allowance was not resolved and that she was unsure about fringe

benefits with the car issue; she said she thinks she told Mr Buckingham that there was already a car so why was there a need for another one?; she said nothing was really resolved.

42. She agreed she received an email from Barbara Bradshaw indicating that she would need to get accounting advice concerning the FBT issues; she did receive that advice; she agreed that she forwarded the advice when she received it to the Board; she also agreed that she needed to discuss it with other employees such as the accounts manager at Traditional Credit Union; she said the meeting with the accountant never took place although the accountant had met with other staff members; she said she did not at any time have a discussion with the accountant about the FBT matters as there was no need to after the 12 March; she said nothing was resolved and the Board was still making that decision and she said she believed the offer was withdrawn on the Thursday because the Board hadn't come to any agreement; she says she received an email from David Glover on the 13 March inquiring as to the status of negotiations with Mr Buckingham; Ms Middleton told the court it wasn't up to her to make the decisions and her understanding was there would be no valid contract until all the issues were settled as they would have to go into the contract for special conditions. Ms Middleton told the court that she thought that a contract would at least have to be signed by the parties to be agreed; she said in her experience as a human resources manager generally people are not appointed to executive positions on an oral or verbal contract.
43. Ms Middleton was referred to an email being number 14 in Exhibit D6 that represented the advice that she had received concerning the tax implications of the proposed salary packaging; she agreed it was forwarded from Lyastern Business Services on Wednesday 12 March; she said she forwarded that advice to the board members of TCU and that she spoke to Mr Buckingham about the advice; she said she told Mr Buckingham that she had received advice and it needed clarification; she said she had a meeting set up

with Liann from Lyastern Business Services the next day however the meeting did not take place; she said she was seeking and clarification on whether there was going to be any additional costs to the Traditional Credit Union; she agreed she had a meeting set up the next day which would have been Thursday the 13th to clarify these matters; she said she did not in fact proceed with the meeting.

44. Ms Middleton was asked to comment on an email she sent to Mr David Glover, a member of the board on the 13 March 2003 (document 16 of D6); she agreed that the email refers to her advising Mr Buckingham that she's seeking tax advice; she said that nothing further happened and she advised Mr Glover the chairman where she was at with negotiations with Mr Buckingham; she advised Mr Glover that Mr Buckingham had a draft copy of the contract; she said she had no further discussions to Mr Buckingham prior to the offer being withdrawn.

45. In cross examination Ms Middleton agreed she had had several conversations with Mr Buckingham but she couldn't remember the dates or times; she said she remembers the effect of the conversations; Ms Middleton agreed that she had forwarded the duty statement to Ms Denise Loraine and she agreed that there would be three parts to the contract being the duty statement, the contract itself and a schedule relating to any special conditions; she agreed that the contract or draft contract did not include all the terms and conditions of the agreement despite clause 17 of the contract stating "this agreement constitutes the entire agreement between the Credit Union and the employee"; she agreed that was not the case; she agreed that clause five of the contract that provides "the employees remuneration comprised of annual salary packaging of \$84,500 per annum inclusive of the base salary and/or allowances and benefits" meant that there maybe other allowances or benefits; she agreed that a vehicle was now available but she said it had to be available for work purposes during the day for other employees but otherwise he could use it; she agreed that was a benefit for

the former CEO, Barbara Bradshaw; she agreed that the car that Barbara Bradshaw had was described as a “another benefit” that was not necessarily referred to in Ms Bradshaw’s contract; in relation to Mr Buckingham she agreed that a car for home garaging would not be in the contract.

46. Ms Middleton said she recalled a conversation in which Mr Buckingham said he was happy with the conditions of the contract and a conversation where he pointed out some typographical errors; she said that he told her “I’m happy with the conditions of the contract but would it be possible to have the salary delivered in a slightly different way?”; she said he talked about salary sacrifice and asked her whether it would possible to be done including Living Away from Home Allowance for two years and to salary sacrifice a car; she said she did not recall him saying “this is a nice to have, not a must have”.
47. She agrees that Mr Buckingham told her he was returning to Jabiru and he asked her whether the issues had been resolved; she disagreed that she had told him at any stage that she hadn’t received her tax advice but she said she told him that “we’d received some advice from our internal auditor but it needed clarification to ensure there was no additional cost to the Credit Union”. Ms Middleton said that she told Mr Buckingham there was a car available but not that it was the General Manager’s car; she said it’s available to everyone who works at TCU for work purposes but it would be available for home garaging for the General Manager; she agreed with the conversation concerning the fact that the car was green and that he said “green’s good”. She disagreed that Mr Buckingham had said words to the effect that they didn’t need to talk about the car anymore; she said there was still conversation about the possibility of him salary sacrificing for his own motor vehicle; she said she thought it was strange for him to insist on it given there was already a motor vehicle for the organisation. Ms Middleton was adamant that the car issue was not dropped because that was why she was still trying to clarify the tax advice.

48. In relation to the Living Away from Home Allowance Ms Middleton said she told Mr Buckingham that it may be alright and she said she had a conversation with him along the lines of how it might be managed through the payroll system because of the simple payroll system; she agreed Mr Buckingham told her how it could be done; Ms Middleton said she indicated salary sacrificing maybe able to be done; Ms Middleton did not agree she told Mr Buckingham the whole living away from allowance was exempt from FBT; she disagreed that Mr Buckingham said to her “when can I start?”; what she said was that if they could resolve all of this and “work it all out” when would he be likely to be able to commence?; she said he gave her two dates one being the 7 April and she didn’t recall the other date but she thinks it may have been in March; she disagreed that she told Mr Buckingham that she would get a director to ring him and confirm the start date; she said she still did not have authority to approve Mr Buckingham’s request; she was waiting for tax advice and she suggested that he should perhaps be talking directly with the chairman Mr Glover.
49. It was suggested to Ms Middleton that given the previous General Manager had use of the car in that position, there would be no increase in cost to TCU; Ms Middleton answered if that had been the case there wouldn’t be a difference but she said Mr Buckingham was still looking at salary sacrifice for a motor vehicle and Living Away from Home Allowance. Ms Middleton agreed she expected Mr Buckingham to be the next General Manager; she agreed that if he had said he was happy with the terms and conditions and given start dates, she would accept that that was a concluded agreement; she agreed her advice was that Mr Buckingham was asking if his salary could be packaged differently; she agreed she had requested information on whether and how an announcement would be made on Mr Buckingham’s appointment. Ms Middleton accepted that the home garaging would not be part of his package. In answer to whether her email in (Exhibit D6;5) meant that she was expecting Mr Buckingham to start when he provided

commencement dates she agreed but she qualified that answer stating “we were still waiting on tax advice”. She agreed those emails indicated she was seeking advice on how Mr Buckingham’s appointment was to be announced.

50. On Exhibit P2 Ms Middleton said the contract wasn’t complete; it was purely a draft; she agreed she was waiting for Ms Loraine to advise of a start date because she would need to do some planning; she said she wanted the duty statement to be passed on and form part of the contract; she confirmed that on all of Mr Buckingham’s queries she would need to get Board approval; she said it was not entirely correct that she suggested in email D6.8 that she thought Mr Buckingham was to be the next General Manager and that the salary sacrifice would have no bearing on that; she said she conveyed to Mr Buckingham that he was appointed to the position if the salary sacrificing could be resolved; she said her instructions from Mr Chamberlain were to offer Mr Buckingham the position and send the draft contract for perusal; she disagreed Mr Buckingham was already appointed when she was obtaining advice for the board and the tax advice; she disagreed with the proposition that he had accepted the position; she agreed Mr Glover advised her he was going to withdraw the offer because TCU could not come to an agreement on the salary side of things; she reiterated that despite telling Mr Buckingham about the possibility of home garaging the TCU vehicle he still wanted to look at salary sacrificing a car.
51. Ms Middleton agreed that when the position of General Manager was re-advertised, Mr Buckingham was told he could apply and would be reviewed with other applicants; she agreed a Mr Frank Mills was the newly proposed General Manager; his commencement date was 29 or 30 June 2003

Barbara Bradshaw

52. Ms Barbara Bradshaw, the immediate former General Manager of TCU gave evidence. Although no longer employed by the TCU she participated in the interview panel and interviewed Mr Buckingham; she said the contract to be

offered to the successful person would be a written contract given it was a senior position and he would have been told the written contract would contain terms and conditions of his employment; that it would be similar to the written contract she had entered; she said that after an offer was made there were issues of fringe benefits tax and extra benefits not originally contemplated; she said she was concerned because previous policy was not to offer taxable benefits because the nature of the organisation was that if it was offered to one person it would need to be offered to others including staff living in remote communities that would be a potential cost to the TCU.

53. Ms Bradshaw said that generally senior staff at TCU had a contract or original documents including conditions and duty statement; she said it is also considered best practice for financial institutions which are under APRA supervision to have written contracts.
54. In cross examination Ms Bradshaw agreed the contract did potentially contemplate fringe benefits but she said it was not the case. She agreed when she was General Manager she would home garage the TCU vehicle but she said she didn't use it privately as she had her own car; she said she would have to make her own way to work if the car was being used for work purposes; she said there was no letter of appointment when she commenced with TCU, she just signed on a particular date and then started on a particular date; she agreed there was to be a hand-over at some particular time between Mr Buckingham and herself but she said she did not know at that time whether he had been appointed or not. In re-examination she said she wouldn't have thought he would be appointed at that time.

Consideration of the Evidence

55. On the primary issue of whether a contract of employment has been concluded, there are different sources of evidence including the plaintiff and his witnesses, the witnesses for the defendant and documentary evidence.

As can be seen from the summary of the evidence given thus far, there are conflicting views on whether a contract had been concluded prior to the withdrawal of the offer of employment by the Traditional Credit Union. Mr Buckingham characterised his request for salary packaging over the car and living away from home allowance as an inquiry, indeed, in his words, “a nice to have, not a must have”. This inquiry followed what he says was his acceptance of the offer that he was “happy” with the total package. His evidence also is that during these discussions concerning the question of salary packaging he received advice from Ms Middleton that he could have a home garaged car and that the Living Away from Home Allowance was not a problem. He said that on 11 March 2003 he told Ms Middleton he was “happy with the contract” and that there was nothing further to deal with and that he offered two start dates being 31 March and 7 April. At about the same time (the morning of 12 March 2004) and presumably on the strength of these arrangements that he believed he had made, Mr Buckingham told the court he resigned (verbally) to the Chair of the Jabiru Town Council. That same evening he accepted a nomination for a position on the Kakadu Visitor Organization.

56. There are a number of matters that undermine the credibility and reliability of the plaintiff’s stated position that when taken together mean I cannot accept all of his evidence. First, the plaintiff is a reasonably experienced manager himself with significant experience in employment issues. In fact, his knowledge of certain subject matter concerning such things as “novated leases” and the tax implications of living away from home allowances and related matters demonstrate his high level of expertise. On the other hand, when questioned about much more basic practises such as a possible preference as a matter of good commercial practice to have important contracts reduced to writing, he seemed to under state the significance of a written contract, stating he regards people’s “word” as higher than a written contract stating that if you “start diving for written contracts, you’re in

trouble.” He did concede that a written contract would not be a surprise given the level of the position he was applying for. His stated preference for oral agreements is of course consistent with the view he would no doubt like the court to take in this matter, but in his case, it is hard to accept he genuinely holds the view he stated.

57. I would not discount significant amounts of his evidence if that were the only matter concerning his credibility that the court has some difficulty with, however, he also stated he resigned orally on 12 March 2004, there being, according to him, no need for his resignation to be in writing. Of course I accept that as a matter of law an oral resignation may be effective, however, in my view most people, employers and employees would expect a resignation to be in writing; Mr Norton himself wanted the resignation in writing. That is a discussion I will return to but the problem with the plaintiff’s claim of resignation is that on that very evening he stood for a position at the Kakadu Visitor Organisation, a position he can only hold being an employee of Jabiru Town Council, or at least, I presume, living and working in that region. This conduct is deeply inconsistent with his asserted resignation. His explanation that he was pressed to stand again and he didn’t want rumours to flow from not standing for office does not hold up. The evidence of Mr Povey who attended the meeting contradicts the plaintiff and I accept Mr Povey’s evidence as being closer to the true state of affairs of what occurred at that meeting.

57.1 The plaintiff was evasive over whether he knew that the CEO position discussed at the Jabiru Town Council on 18 March 2003 concerned his purported resignation. As is mentioned in the summary of evidence, the letter written on behalf of the plaintiff by his solicitors indicates the minutes of that meeting provide evidence of the plaintiff’s asserted resignation on 12 March 2003. As was revealed in the hearing, the minutes do not provide such evidence, those minutes refer to the continuation of business concerning the CEOs’ position as was raised in Council on 18 February. The plaintiff explained to the court that it

was his assumption that these minutes referred to his resignation, saying he “assumed that was the reason” and “I’ve no reason to know the reason”. Mr Povey said he did not know of the plaintiff’s resignation and he said as far as he was aware, neither did other members of Council. This matter also detracts significantly from the plaintiff’s credit. Further to this, in the circumstances of the plaintiff’s position, the fact that his letter of resignation dated 21 March 2003 does not refer to the asserted verbal resignation in the car to Mr Norton leads me naturally to think this resignation on 21 March 2003 is his actual resignation. In it he gives four weeks notice which he is required to do. Also put to him was a longer letter of the same date setting out his grievances with the Council and amongst other things it speaks of Council making his position “untenable”. He was very concerned in the witness box as to how the letter was obtained and had not provided it during the discovery process. These letters undermine the plaintiff’s case to the effect that he had resigned back on 12 March 2003 in reliance on a legally binding contract with the Traditional Credit Union. Although I accept that when leaving a position employees may use the occasion to express dissatisfaction it is hard to see how the plaintiff’s position was untenable if he had resigned.

58. Due to the undermining of the plaintiff’s credit, where his evidence conflicts with that of the witnesses for the defendant, I prefer the versions given by the witnesses for the defendant. In doing so I appreciate that witnesses for the defendant have generally not taken notes and have conceded that there are some details of conversations they may not recall and the sequence of some conversations may not be precise. Generally however there are contemporaneous records in the form of emails for each step of significance and I believe they recall the substance of the conversations of significance. Further, in my view they were honest and although giving evidence in the defendant’s case they seemed genuinely impartial. I note Ms Loraine was actively trying to put a contract in place between the plaintiff and defendant

as that was the basis on which she would be paid for her services. I note Ms Middleton is no longer in the employment of the defendant.

59. The plaintiff bears the onus on the balance of probabilities to prove the elements of the existence of the contract. It is clear that an offer was made by the defendant to the plaintiff. I have come to the conclusion however that the plaintiff has not clearly demonstrated his acceptance of the offer. In my view the matter is more fundamental than the question of whether there has been a mere inquiry concerning salary packaging or on the other hand a counter-offer with legal consequences. I must of course ask whether the parties arrived at a consensus capable of forming a binding contract in which the parties intended such consensus to be a binding contract: *Air Great Lakes Pty Ltd v KS Easter (Holdings) Pty Ltd (1985) 2 NSWLR 309*.
60. I accept Ms Loraine's evidence that when Mr Buckingham was told of the offer he said he would have to think about it as it was less money than his current position and he had certain other benefits in his current employment. It is very clear that Ms Loraine told him to be careful as TCU had limited funds. After Mr Buckingham picked up the written contract she told him to contact Ms Middleton about salary packaging. The plaintiff's dealings with Ms Lorraine concerning this occurred over Monday 10 March 2003 and the morning of Tuesday 11 March 2003. At no point was there any clear acceptance of the offer, neither does Mr Buckingham's conduct indicate he relied on any representation by the defendant that caused him to act to his detriment. Ms Loraine denied that Mr Buckingham told her he was happy with the contract and I accept her evidence. I have already mentioned the asserted resignation on 12 March 2003, but I do not accept that evidence from Mr Buckingham. In his own words, it is more an expression of intent that he "wished to resign" – Mr Norton himself obviously wanted something in writing before he would act on it. That written resignation came well after the original offer was withdrawn.

61. Ms Middleton was informed by email by Denise Loraine of Mr Buckingham's salary package request. It is clear Ms Middleton could not negotiate the salary packaging without Board approval and there were cogent reasons given by Ms Middleton and Ms Bradshaw as to why an organisation like TCU could not accede readily to such requests. Ms Middleton was clearly of the view that despite her being able to facilitate a certain resolution concerning home garaging of the office vehicle, that was not what the plaintiff wanted – he was still wanting to salary sacrifice for a vehicle and the sum mentioned was \$10,000. Throughout 11 March 2003 Ms Middleton was in email contact with various board members over the question of salary sacrifice and she sought tax advice about FBT. Ms Middleton agreed that Mr Buckingham told her he was happy with the conditions but he asked whether the salary could be delivered in a different way. Ms Middleton was, however, still attempting to obtain advice on FBT and the living away from home allowance. While these may be matters of routine for some organisations, they clearly were not for the TCU. Mr Buckingham was on notice about that. In my view the parties were still in negotiation when the offer was withdrawn on 13 March 2003. The plaintiff simply did not communicate his clear acceptance of the offer. In the climate where he was aware and in fact warned that TCU would have some difficulty meeting his requests, the statement to the effect that he was “happy” with the terms and conditions but wanted the salary delivered differently does not demonstrate clear acceptance of the offer. It is more probable that Mr Buckingham was holding out to see if a better delivered package was available before he became a party to the contract. In my view the objective circumstances more probably and properly reflect a situation of parties in negotiation. The evidence favouring the case for the plaintiff that there was an acceptance is too flimsy. Given what the court now knows of Mr Buckingham's difficulties with the CEO position at Jabiru Town Council and possibly being placed as Deputy CEO (after what seems to have been a harsh process inflicted on him), the factual scenario is also consistent with

Mr Buckingham wanting to leave Jabiru Town Council in any event, regardless of the position at TCU.

62. I just don't accept on balance, there was ever an expression of acceptance (until after the offer was withdrawn) and hence there was never a meeting of the minds between the parties. I accept the submission that "acceptance" could occur over a period of a few days, but I do not think the conversations over 10 March – 13 March reveal acceptance.
63. While in theory and consistent with one interpretation of the written contract there *could* be acceptance of the offer and the question of salary packaging left open to negotiate further without adverse legal consequences to the offeree, the way the discussions flowed and the insistence exhibited by Mr Buckingham concerning the salary packaging of the car and the living away from home allowance still leads me to conclude that any expression purportedly consistent with acceptance was still subject to him obtaining the salary package he wanted. In other words, these "requests" were more in the nature of "requirements" or, indeed formed a counter-offer. In coming to that conclusion I have considered the submission made by Mr Alderman that the conversations concerning certain conditions (primarily here, "salary packaging") do not need to be considered a counter-offer on the part of the plaintiff: (*Brambles Holdings Ltd v Bathurst City Council [2001] NSWCA 61*). It is also clear to me that these proposed arrangements, be they inquiries or counter offers were never agreed to by the defendant – such is clear from Ms Middleton's evidence and Ms Bradshaw's evidence. I accept that TCU were attempting to negotiate in good faith to try and meet Mr Buckingham's inquiries or requirements but could not and therefore there was no agreement.
64. From the evidence given by witnesses for the defendant it is clear to me that TCU would not be bound unless there were a signed written contract. Both counsel have referred me to *Masters v Cameron (1954) 91 CLR 353*

concerning how the question might arise in different settings: firstly, that the parties may be bound immediately though expressing a desire to formulate a document setting out the clauses later; secondly that they may intend to be bound immediately but the operation of some clause or clauses are delayed; thirdly they intend to postpone the creation of legal obligations until a written contract is executed. Counsel have also referred me to *Baulkham Hills Private Hospital v GR Securities (1986) 40 NSWLR 622* where a further circumstance is contemplated, namely, where the parties intend to be bound immediately by the terms but expect to make a further contract in substitution for the first contract containing additional terms. In my view, given the seniority of the position of General Manager within a financial institution, it is more likely there was no intention to be bound unless and until a written contract could be concluded. The plaintiff himself accepted, albeit in a round-about manner that he would expect a written contract to govern the terms and conditions of his employment. Although I accept there are other ways to indicate being bound to an employment contract, this one was only ever going to be concluded in writing. I do not agree that in this matter the parties were content to be bound immediately by the terms they had agreed whilst expecting to make a further contract with additional terms. There was no indication from the defendant that further benefits could be offered, although clearly representatives of the defendant tried to negotiate those matters. It is useful to look at this problem from the flip-side. Accepting it is rare (for all sorts of sound reasons) for employers to hold an employee to a contract of employment, had TCU wanted to hold Mr Buckingham to the alleged contract, could it be said he was bound at the relevant time? I don't think so. I think it would be said that his requirements were not met.

65. I do not believe it was reasonable for the plaintiff to have resigned when he did. As already indicated, I do not accept there was the verbal resignation on 12 March 2003. On 21 March 2003 the plaintiff resigned in writing from the

Jabiru Town Council. He could not have possibly thought he had a position to go to at the TCU at that time. It is true he was told that his application would be considered again in a further round but there was nothing in the conduct of agents for the defendant that he can rely on to give rise to estoppel. The plaintiff was also in a position to revoke his resignation. Even if I had found a contract existed, the defendant has failed to mitigate by resigning when he did and not revoking the resignation when he could have.

66. For these reasons the plaintiff's case is dismissed and I will hear any matters concerning costs.

Dated this 15th day of December 2004.

JENNY BLOKLAND
STIPENDIARY MAGISTRATE