

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 206
5385160

BETWEEN

DAVID ADAM
Applicant

A N D

CALDWELL & LEVESQUE
ELECTRICAL LIMITED
Respondent

Member of Authority: K J Anderson

Representatives: David Adam, In person
Barry Levesque, Advocate for Respondent

Investigation Meeting: 6 March 2013 at Auckland

Date of Determination: 22 May 2013

DETERMINATION OF THE AUTHORITY

Introduction

[1] The applicant, Mr David Adam, brings three claims to the Authority for determination. Firstly, Mr Adam claims that he was unjustifiably dismissed on 18 May 2012 when his position was made redundant. Secondly, Mr Adam claims that there was a breach of an oral contract, in that he left other employment to take up a position with Caldwell and Levesque Electrical Limited (CLE), on the understanding that he was going to a position with good prospects for the future. Finally, Mr Adam claims that he forced to take unpaid leave while the company was concurrently hiring new staff.

[2] Conversely, CLE denies the claim of unjustifiable dismissal and says that the termination of Mr Adam's employment was a genuine redundancy due to the economic circumstances facing the company at the time. The other two claims advanced by Mr Adam are also rebutted.

Background

[3] Mr Adam is an electrician. He commenced his employment with CLE on 7 April 2011. The background to Mr Adam being employed by CLE is relevant to his claim of breach of contract.

[4] The evidence of Mr Adam is that sometime in March 2011, he had just returned from overseas and was searching for employment and had forwarded applications for various positions. On 30 March 2011, Mr Adam had an interview with Mr James Mulvany, the Manager of the Interiors Division of CLE. There was a discussion about the pay rate being offered: \$24 per hour. Mr Adam indicated that he had been paid more in the past. It is the common evidence of Mr Adam and Mr Mulvany that it was agreed that because Mr Adam was an unregistered electrician, he would be paid \$24 per hour, but upon obtaining registration, he would be paid \$25 per hour. It is also commonly accepted that Mr Adam asked about long term opportunities within the company and Mr Mulvany informed that in the past the company had considered existing employees when suitable opportunities arose.

[5] The meeting between Mr Adam and Mr Mulvany on 30 March 2011 concluded on the understanding that Mr Mulvany would be contacting the referees that Mr Adam had provided and he would contact him again after that had occurred. But it seems that the reference checking took somewhat longer than had been anticipated because one of Mr Adam's referees was not immediately available. In the meantime, Mr Adam was interviewed by another employer with the outcome being that he accepted employment with that business, on a pay rate of \$25 per hour. Remarkably, Mr Adam only worked at this job (the first employer) for one week and then he accepted employment with CLE.

The claim of breach of an oral contract

[6] The Authority understands that Mr Adam is alleging that he left the first employer to take the position with CLE because he was led to believe by Mr Mulvany that there would be good future prospects with that company. While perhaps that may have been the perception of Mr Adam, I conclude that there was no foundation for it as the evidence establishes, to my satisfaction, that Mr Mulvany never gave any express or implied undertaking that Mr Adam would have any advantageous future career prospects with the company. Quite simply, all that Mr Mulvany did was

indicate that in the past, CLE had given employees of the company opportunities, if they arose. I find that the argument advanced by Mr Adam that he was given an assurance about future prospects with CLE and that the company subsequently breached an oral undertaking given to him, is just not sustainable.

Economic issues for CLE

[7] On 7 September 2011, a memorandum was distributed to all CLE staff. Mr Barry Levesque, a director of the company, informed employees of a reduction in work available to the company, due to the environment created by the Rugby World Cup. This was because other businesses had put work “on hold” with no new projects or small jobs starting until late in October or early November 2011.

[8] Relevant to a claim from Mr Adam, Mr Levesque informed employees that:

Now is the time to take some time off to limit the prospect of enforcing holidays to be taken or indeed redundancies. We ask that everyone should review their personal position and if you are in a position to take leave or holidays or leave without pay this will be the time to take it.

[9] The evidence of Mr Levesque is that in early September 2011, a small group of employees put in leave applications but this was not enough to relieve a surplus staffing problem; vis-à-vis the amount of work available. Therefore in mid September 2011, meetings were held with some employees to advise them that they would be required to take leave. Mr Levesque attests that selecting the employees that were required to take leave was based on the work that was available and the skills required to complete this work. As Mr Adam had only been employed by CLE for five months, he did not have much accrued leave and hence he was placed in a position where he was required to also take leave without pay. Mr Adam asserts that he was “forced” to take unpaid leave, yet CLE were concurrently hiring other staff for the same positions. The outcome for Mr Adam was that he was required to take eight days of annual leave and 11.5 days of unpaid leave.

[10] Mr Adam says that he was forced to take this leave and never agreed to it. But there is no evidence that he objected to taking the leave at the time and it appears that had he not done so, the likely outcome for him may have been the redundancy of his position; as indeed occurred for another five employees across the operations of the company.

[11] In regard to the assertion made by Mr Adam that CLE was employing other people at the same time as he was required to take leave, Mr Levesque responds that during September and October 2011, seven people were employed across the company and he gave an explanation about that, conveying that only one of these people was engaged in regard to the Auckland operation. And this was because a registered electrician came back to his position after an extended period of leave overseas and it had been agreed that his position would remain open for him.

[12] I have some empathy for the position Mr Adam found himself in, being newly employed with family commitments, and possibly ruing suddenly leaving the earlier position that he had taken up. Nonetheless, I conclude that probably, Mr Adam was, at the time, faced with a dilemma: that is, either take the mix of leave as occurred or face possible redundancy. Given that there is no evidence that he protested the taking of the leave at the time, it can reasonably be implied that he accepted the situation, albeit, perhaps, reluctantly.

[13] I also note that Mr Adam returned from his period of leave on 23 October 2011 and he did not raise any concerns about taking that leave, until pursuing the current grievance related to the eventual redundancy of his position. In other words, he did not see fit to take issue about the taking of the leave mentioned and he had at least six months prior to the announcement of his redundancy to do so. Indeed, Mr Adam had the option of pursuing a disadvantage personal grievance but he is now well outside the statutory time limit (90 days) to raise the matter now. But in any event, I conclude that it is more probable than not that Mr Adam can be taken to have willingly, or if not willingly, then certainly impliedly, accepted at the time that it was more appropriate for him to take the leave as occurred, rather than be made redundant.

Redundancy

[14] It was commonly accepted that on 8 May 2012 a meeting took place with a number of staff, including Mr Adam. The tenor of that meeting is recorded in a letter to Mr Adam (and several other employees) as follows:

Dear David

With reference to our discussion on Tuesday the 8th of May in respect to the downturn of work within the company and the possible ramifications we wish to advise on the following points.

- a. As discussed there has been a slowing down of work (new projects) for the last few months and the company is

experiencing difficulties in maintaining enough workload for the current staffing level.

- b. The immediate future appears similar to what we have been experiencing in the last few months with all indications that things may get worse.
- c. If there is a continuation of a downturn within our division in the company there is a possibility that your position may be made redundant.

I am constantly reviewing this and suggest we hold another meeting to discuss further developments on Friday the 11th May at 4pm.

Yours faithfully
Caldwell and Levesque Electrical Limited

Barry Levesque, director

[15] A further discussion with a number of employees took place on 11 May 2012. The subject matter is described in a letter of the same date from Mr Levesque to Mr Adam (and other employees):

Dear David

With reference to our discussion today Friday the 11th of May and previously at our first meeting on Tuesday the 8th May in respect to the downturn of work and the possible ramifications, we wish to advise on the following points:

- 1. As discussed there has been a slowing of work (new projects etc) and the company is experiencing difficulty in maintaining enough workload for the current level of staff. The immediate future appears similar to what we have been experiencing in the last few months.
- 2. If there is a continuation in the downturn within the Electrical Division and the Company there is a possibility that your position may be made redundant.
- 3. I am constantly reviewing this and suggest we hold another meeting to discuss further with you any options which you may think would be viable ie redeployment within the company.

I suggest we meet again on Thursday the 17th of May at 4pm. If you have any concerns regarding any issues that we have discussed please do not hesitate to talk directly to myself or Wendy Malloy.

[16] There was a final meeting on 18 May 2012. Unfortunately the outcome for Mr Adam (and others) was that he was advised of the redundancy of his position as recorded in a letter of the same date:

Dear David

With reference to our discussions on the 8th and the 11th of May in respect to the downturn of work within the Interiors Division and the Company, after constant review it is with regret that we are forced to make your position redundant.

As previously discussed there has been a slowing down of work, new projects are out there however due to the current economic environment the margins are so slim and competition is so high to secure the work that taking on these projects for little or no margin is not an option. After constant review the immediate future holds little change.

We unfortunately officially issue notice of redundancy of your position. As stated in your employment agreement “the employer shall not pay redundancy compensation”. Your last day of work will be Friday the 1st of June 2012 when you shall receive all holiday pay and wages due to you. A reference will also be provided upon request.

[17] Mr Adam was advised that over the next few weeks he was welcome to take time off as required to attend interviews, career counselling or for any assistance that he may require.

[18] While the letter informs that Mr Adam’s last day of employment would be 1 June 2012, as I understand it, it was agreed Mr Adam would be paid in lieu of notice and his last day of work for CLE was somewhat before that date.

[19] Mr Adam challenges the genuineness of the redundancy and he also says that process adopted was: “a show put together to serve the appearance of good intention and faith”.

Analysis and conclusions

[20] As with any dismissal, pursuant to s.103A of the Employment Relations Act 2000, the test that the Authority must apply is whether the decision to dismiss Mr Adam on the ground of redundancy was what a fair and reasonable employer could have done in the circumstances.

[21] And then, as was held by the Employment Court in *Simpsons Farm Limited v. Aberhart*¹:

¹ [2006] ERNZ 825

So long as an employer acts genuinely and not out of ulterior motives, a business decision to make positions or employees redundant is for the employer to make and not for the Authority or the Court, even under s.103A.

[22] The statutory concept of unjustified dismissal is concerned with both the reason for the dismissal and the manner in which it was handled; with the substantive justification and with procedural fairness².

Was the redundancy of Mr Adam's position genuine?

[23] The evidence of Mr Levesque is that CLE did not employ any staff during the months of May, June and July of 2012 and at the time that Mr Adam was made redundant, there was no indication or certainty that there would be any increase in the work available to the company. Mr Levesque acknowledges that by mid-August 2012 the company became aware that there would be an increase in business leading up to Christmas and hence CLE placed advertisements for staff in recognition of the changing circumstances. Nonetheless, Mr Levesque attests that while there was a "slight rush" in projects becoming available prior to Christmas 2012, as of that time, CLE did not feel as though they were "out of the woods" yet and employees were still affected, with some remaining on reduced hours. And there were pay cuts of 5% and 10% across the board for managers and administration staff.

[24] Given the weight of the overall evidence, including the fact that several other employees lost their positions at the same time as Mr Adam, I conclude that the redundancy of his position was genuine. I also find that a valid business decision was made and there is no material evidence of any ulterior motive.

Were there any procedural defects or other factors that made the determination of Mr Adam's employment unfair or unreasonable?

[25] Mr Adam argues that the process adopted by CLE in regard to identifying that redundancy was a possibility, through to confirming the termination of his employment was effectively, a sham and hence CLE had probably pre-determined that he would be made redundant. Mr Adam appears to infer that Mr Levesque had a personal agenda in regard to removing him from his employment. While there were some previous disciplinary issues involving Mr Adam, I find that those matters did not have any influence on the process that was adopted pertaining to the redundancy

² *GN Hale & Son Limited v. Wellington etc. Caretakers etc. IUOW* [1990] 2 NZILR 1079

of Mr Adam's position or the selection criteria. The same process was applied consistently in regard to the other employees that lost their employment with the company at the same time.

[26] Mr Adam also points to the refusal of Mr Daniel du Plessis, the Service Division Manager, to confirm the letter of recommendation that had been provided by him to Mr Adam (23 May 2012). This was relevant to a reference being sought by another prospective employer for Mr Adam. Apparently, when contacted by the prospective employer, Mr du Plessis referred that party to the directors of CLE, explaining that he did not have the capacity to provide a recommendation.

[27] The evidence is that Mr Adam raised a personal grievance with CLE via a letter dated 31 May 2012. This was responded to by Mr Levesque on 1 June 2012. On 26 July 2012, Mr du Plessis received a request from a prospective employer regarding a verbal reference for Mr Adam and he concluded that as he had not received permission from Mr Adam to give a reference to a third party, it was appropriate to forward the request to a company director.

[28] Later on 26 July 2012, Mr du Plessis received an email from Mr Adam. The content of the email mentioned the family of Mr du Plessis and the effect on them of legal action possibly being taken by Mr Adam. Mr du Plessis was informed that if he did not phone the prospective employer within 30 minutes of receiving the email and "repair the damage" he would be responsible for the outcome. The "outcome" being (apparently), legal action by Mr Adam against Mr du Plessis and Mr Adam would be making the clients of Mr du Plessis: "... aware of some very interesting facts".

[29] Mr du Plessis was disturbed by the content of Mr Adam's email and reported it to the Police; he also made Mr Levesque aware of Mr Adam's threats. Subsequently, on 26 July 2012, Mr Levesque informed Mr Adam by email that he was not to contact CLE staff regarding his prior employment with the company and that all correspondence should be directed to Mr Levesque.

[30] The Authority is not required to make a substantive finding on this sorry chapter of events. It is enough to say that given his actions, Mr Adam should hardly be surprised that CLE were reluctant to endorse him as a prospective employee.

Determination

[31] Having closely considered the overall evidence presented to the Authority, I find that the redundancy of Mr Adam's position was a genuine business decision, influenced by the economic circumstances confronting CLE at the time. I also conclude that the process adopted by the company was appropriate for the circumstances that prevailed.

[32] I find that the dismissal of Mr Adam on the ground of redundancy was something that a fair and reasonable employer could do in all the circumstances.

[33] For the reasons set out above, I also find that the claim of breach of an oral contract is not valid. Nor is there any validity to the claim of being forced to take unpaid leave.

[34] In summary, the claims advanced by Mr Adam are unsuccessful and dismissed accordingly.

Costs

[35] As the respondent was represented by Mr Levesque, as a director of the company, a consideration of costs is not required.

K J Anderson
Member of the Employment Relations Authority