

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Christopher George Aaltonen (Applicant)

AND Radfords Limited (Respondent)

REPRESENTATIVES G Dewar for Applicant
S Dalzell for Respondent

MEMBER OF AUTHORITY G J Wood

INVESTIGATION 17 and 24 June 2005

MEETING

DATE OF 12 July 2005

DETERMINATION

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

1. Christopher Aaltonen claims that his dismissal by the respondent (Radfords) was unjustified for being in breach of his fixed term employment agreement of three months. Radfords claims that his dismissal was justifiable for redundancy in accordance with the redundancy clause of that same agreement.

The Facts

2. Radfords is a chain of furniture and appliance stores. Its financial position in 2003 and 2004 was negative. It had sustained significant trading losses, which were projected to continue. It accordingly hired Mr Chris Barrett in late 2004 to turn matters around. He did so by commencing a general review of costs. All management, including store managers, were made aware of Radfords' financial position. Mr Barrett was later appointed, at the end of January 2005, as Radfords' chief executive to replace Ms Karen Radford.

3. Mr Philip Galyer was the manager of Radfords' Lower Hutt store. In November 2004, his assistant manager requested a casual or part-time dispatcher for the store, given that it was busy. Mr Galyer determined that his nephew, Mr Aaltonen, be employed (at least at first on a casual basis) for eight hours a day to do that work, as well as such other duties as might be found for him. The assistant manager noted that there was insufficient work for eight hours work but Mr Galyer's response was that something would always be found for Mr Aaltonen to do.
4. Accordingly, Mr Aaltonen started work at the Lower Hutt store on 13 January. It was expected that he would work for the duration of the school holidays at least, as Mr Aaltonen was considering returning to a special school programme that year. From Mr Galyer's perspective, Mr Aaltonen was employed on a trial basis to see how the employment would work out for both parties. Mr Galyer had in fact given notice of his resignation, to take effect on 2 February 2005, by the time Mr Aaltonen started work.
5. While Mr Aaltonen had plenty of work to do while the assistant manager was away, by the time she returned the full impact of significant renovations in the shopping mall tenanted by Radfords had come into effect. These renovations were planned to continue for the rest of the year. They had a significant negative effect on the store's turnover. Thus there was significantly less work for staff at the store, including Mr Aaltonen.
6. As a result of the financial position of Radfords, Mr Barrett had instructed Mr Galyer that he did not have the authority to hire more staff. Despite this, on 31 January, Mr Galyer took the step of offering Mr Aaltonen a three month full-time agreement. When queried by his assistant manager, Mr Galyer told her that he had got authority from head office. While there can be no certainty as to what actually occurred, I do not accept, on the balance of probabilities, that Mr Galyer ever obtained authority to sign his nephew up on a three month agreement. I so determine for the following reasons –
 - Mr Aaltonen's position was not required at that time because of the financial state of Radfords (which Mr Galyer well knew of);

- it is quite possible that Mr Galyer, in his last days of work, placed family matters ahead of company matters;
- Mr Barrett and the assistant manager maintain that Mr Galyer was told that he did not have the authority to hire staff; and
- Ms Radford cannot recall giving the initial authority to hire Mr Aaltonen, as claimed by Mr Galyer, and she was never involved in appointments at that level.

7. As a result of the offer of a three month agreement Mr Aaltonen decided to leave school, instead of returning for a special programme, which was no longer available to him when his employment ended. Mr Aaltonen signed the three month agreement on 1 February.
8. Soon afterwards, concerns were raised over thefts at the Lower Hutt store. Mr Barrett interviewed a number of staff over these matters, including Mr Aaltonen. When he asked the assistant manager who Mr Aaltonen was, he was told that he was a recent hiring and was Mr Galyer's nephew, but that there was no need for his position as he was largely under-employed. Mr Barrett then took Mr Aaltonen aside and told him that he had not been employed on a valid contract, that there was not enough work for him and that he wanted him to talk to his mother, Ms Pauline Galyer, about agreeing to reduce his working hours to four hours a day. Mr Aaltonen's mother was referred to because Mr Barrett knew that Mr Aaltonen relied on his mother a lot for support and advice. Mr Barrett also told Mr Aaltonen that he did not want to end his employment, even though there was no work for him, because then it would look like he was responsible for the thefts and Mr Barrett did not believe that he was responsible.
9. The next day, Ms Galyer telephoned Mr Barrett. The conversation did not go well. In effect, Ms Galyer wanted Mr Aaltonen's employment to carry on unchanged, while Mr Barrett said that the contract was invalid and would be terminated if there was no agreement on lesser hours. Mr Barrett offered four and a half hours work over six months. Ms Galyer wanted the matter referred to mediation, but Mr Barrett considered that the parties should continue negotiating on their own.

10. Radfords' offer was later repeated, but was declined by Ms Galyer on Mr Aaltonen's behalf. There were then a number of other discussions between Mr Barrett and (variously) Mr Galyer, Ms Galyer and Mr Aaltonen, when offers changed on both sides.
11. However, by 22 February the position had been reached whereby Mr Barrett was offering five hours per day over six months and Mr Aaltonen was insisting on six hours for six months or eight hours for three months. Mr Barrett told Ms Galyer that unless the offer of five hours over six months was accepted, Mr Aaltonen's employment would be terminated. I accept that Radfords' reasons for this had been made clear to Mr Aaltonen and /or his family. This was that there was not sufficient work for him to do over eight hours a day. However, I also accept that Mr Barrett was annoyed at Mr Galyer for hiring Mr Aaltonen without authority and believed that the contract was not valid. Radfords' final offer was declined.
12. On 23 February, Mr Barrett decided that he would terminate Mr Aaltonen's employment on three weeks' notice, as the parties had agreed was the correct period of notice. Despite the employment agreement being for a three month fixed term, it also had a clause relating to redundancy, which Mr Barrett relied on. The redundancy clause contained a definition that redundancy may occur when the position becomes surplus to the needs of the employer. In such a case Radfords was required to follow a procedure of consulting with Mr Aaltonen, exploring alternative options and providing no less than the agreed notice period. This (unusual in a fixed term agreement) clause was never considered by Mr Aaltonen or his family during the discussion period.
13. A meeting was held on 25 February to inform Mr Aaltonen and Ms Galyer of Radfords' decision. At that meeting, Mr Barrett explained the purpose of the meeting and read out the letter of termination. The third paragraph of the letter states:

“Our discussion focused on the fact that due to the downturn in business for the store due to massive renovations (which have eight months to go) we do not require you to work 8 hours per day.”

14. The letter then refers to the failings of Mr Galyer in offering the agreement to Mr Aaltonen. It then stated:

“I believe the company has acted in good faith in trying to undo what I believe is a void agreement due to the breaches of company policies outlined above and despite all these issues offered you times that suit the needs of the business and offered to double the duration of your employment agreement from three months to six months to ensure you are not disadvantaged.”

15. The letter then goes on to discuss the negotiations held between the parties and concludes with the following paragraph:

“I have fully considered the circumstances after consultation with you, Pauline and Phil but I cannot economically justify the current hours you are working and it is therefore with regret that I move to terminate your employment with Radfords.”

16. Ms Galyer responded that she did not accept Radfords’ view of matters and suggested urgent mediation. Again, Mr Barrett declined this option, but told Ms Galyer that she should take whatever steps she thought were appropriate. The discussion turned to the period of notice. Mr Aaltonen elected to leave immediately and was paid three weeks’ pay in lieu of notice.
17. Mr Barrett continued working on the issues facing Radfords. As a result, some three weeks later large numbers of staff were made redundant by Radfords, including seven staff out of fourteen in the Lower Hutt store where Mr Aaltonen had worked, which was far more than the average per store, because it was seen as greatly over-staffed.
18. In the meantime, Mr Aaltonen had taken legal advice and a grievance was raised on 11 March. A further letter was sent to Radfords on 16 March as no response had been received. Mr Barrett replied that very day indicating that mediation had been agreed to by him.
19. There was a difficulty, however, about how quickly Radfords was prepared to attend mediation. Therefore on 21 March Mr Aaltonen’s representatives filed for interim reinstatement and unjustified dismissal in the Authority. This facilitated the parties attending mediation rather more quickly than might otherwise have been the case and meant that the claim for interim reinstatement was not pursued.

20. The substantive employment relationship problem, however, remained, despite mediation and an open offer of settlement by Radfords of \$1,000. Despite further attempts by the parties to resolve matters during the course of the investigation meeting, no agreement has been able to be reached and a determination by the Authority is accordingly required.

Determination

21. I must determine on an objective basis whether Radford's actions, and how it acted, was what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.
22. Mr Barrett was the one making the decisions on behalf of Radfords. He was aware that Mr Aaltonen was employed by his uncle without actual authority. While this does not affect the validity of the agreement between Radfords and Mr Aaltonen, it does objectively provide a reason for treating Mr Aaltonen differently in effecting his redundancy than the other seven members of Radfords, who lost their jobs due to redundancy in March.
23. Similarly, the fact that there was demonstrably a lack of work for Mr Aaltonen meant that Radfords was able to consider invoking the redundancy clause in the agreement. When doing so, Radfords was required to follow a fair procedure, consult with Mr Aaltonen and explore alternative options. Mr Aaltonen was consulted with directly, as well as through his mother and uncle, over the course of several weeks. A number of alternatives were considered and it was very unfortunate that the parties could not reach agreement, particularly when the only difference between them ended up being over one hour's work per day.
24. The fact that Mr Barrett was prepared to increase the number of hours offered to Mr Aaltonen from four to five and the period of his employment from three months to six months, shows that Radfords was acting fairly, given that Mr Aaltonen's services were not required for eight hours per day.
25. By the time Mr Barrett came to prepare the letter of termination on 23 February, it was clear that, despite ongoing efforts, agreement could not be reached between the parties.

As Mr Aaltonen's position was surplus to the needs of Radfords, it was therefore entitled to make him redundant in the way that it did.

26. In the course of events, I accept that Mr Barrett became very annoyed with Mr and Ms Galyer at times and that he did believe the whole contract was invalid. However, he did not act on this belief to terminate the agreement, but instead utilised the redundancy clause, and even then only after fully exploring alternative options. As Radfords' chief executive he had to further the best interests of the company consistent with its legal obligations. I therefore accept that, when looking at matters objectively as a whole, Mr Barrett acted as a fair and reasonable employer would have done in these circumstances.
27. While this was a very unfortunate introduction to working life for Mr Aaltonen, and one that was certainly not of his making, the fact remains that given the terms of his employment and the fact that there was insufficient work for him to do, his dismissal was effected fairly. I therefore conclude that Mr Aaltonen's dismissal was justified on the grounds of redundancy.

Costs

28. Costs are reserved.

G J Wood
Member of Employment Relations Authority