

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Toni Barrett and Alan Mathews (Applicant)

AND The Matai Club Inc (Respondent)

REPRESENTATIVES Brent Climo, Advocate for Applicant
Peter Goodman, Advocate for Respondent

MEMBER OF AUTHORITY Paul Montgomery

INVESTIGATION MEETING Nelson, 18 July 2006

DATE OF DETERMINATION 8 December 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicants claim they have been unjustifiably dismissed from their employment with the respondent on the ground of redundancy. Both say the redundancies were *shams* and the process followed by the respondent was seriously flawed. Mrs Barrett, the former Bar Manager, seeks lost remuneration, compensation of \$10,000 and costs. Mr Mathews, the former Secretary/Manager, seeks lost remuneration for the balance of the period of his alleged 30 month fixed term agreement, compensation of \$10,000 and costs.

[2] The respondent conceded that having taken advice in good faith, it proceeded to declare the applicants' positions to be surplus to requirements only to discover that the process followed was not lawful in the circumstances. It has apologised to both applicants for this. It strongly contests that the redundancy of each of the applicants was contrived. It says that the straightened financial situation of the Maitai Club necessitated realigning tasks to reduce the overhead costs and to avoid insolvency. The parties attended mediation and were unable to resolve the issue of quantum payable to the applicants.

A brief history

[3] The Maitai Club Incorporated is an umbrella organisation which began as the Maitai Bowling Club and has developed into its present form undertaking responsibility for the administration and management of the building, grounds, liquor licence and sales, contract catering and venue hire on behalf of the affiliate member clubs. These clubs operate and function as independent organisations paying a per capita membership subscription to the Maitai Club. The Maitai Club is controlled by an elected Management Committee representative of the affiliated clubs. All members of that committee are unpaid.

[4] Mrs Barrett was originally employed by the RSA and upon that association coming under the Maitai umbrella, says she was told she could transfer in her role to the Maitai Club on the same terms and conditions. This applicant says she was told *nothing will change apart from*

the change in location. At the time of her position being declared redundant, Mrs Barrett had approximately 15 years' of continuous service.

[5] Mr Mathews accepted the role of Secretary/Manager in April 2003 and began in that position on 12 May 2003. He says that at the second interview he was asked if he would accept the position on the basis of a 30 month term and said he agreed to this because the future was difficult to judge as more clubs were moving into affiliation with Maitai Club, and he believed such an arrangement made good sense.

[6] In a covering letter dated 25 April 2003, after the employment agreement was signed by the applicant, the then Chairman of the Maitai Club said:

It is envisaged that the appointment be for a period of 30 months which could be extended by a further 30 months subject to written agreement between the employer and the employee.

[7] Mr Mathews said he was content with this arrangement.

[8] On Monday, 21 February 2005, Toni Barrett was working in the Club bar in the afternoon when Mr Goodman approached her and said he would like to speak with her in the office. After getting a replacement organised, she went to the office and met Mr Goodman and a Mr Borrás. The applicant said she was handed a typed letter by Mr Goodman who then told her that her position as Bar Manager was no longer required. Mrs Barrett was taken aback and asked whether the decision was personal and who else from the staff was leaving. She received no accurate response except to be told that it was not a personal matter. Mrs Barrett says she left the office, went into Mr Mathews' office and burst into tears.

[9] Having determined from Mr Goodman that she was able to leave immediately without working out her notice and without the loss of four weeks' wages, this applicant handed in her keys and left the premises.

[10] On the same afternoon, Mr Mathews says that Mr Goodman put his head through the applicant's office doorway and asked if he could see Mr Mathews at 3pm. Mr Mathews confirmed that that would be fine. Mr Borrás and Mr Goodman arrived in the office at 3pm. Mr Mathews says that Mr Goodman said that the applicant's position was being made redundant and that Mr Goodman handed him his redundancy letter. Mr Mathews worked out the four weeks' notice period required of him prior to leaving the Club.

[11] There is no dispute between the parties over the events in these meetings.

The issues

[12] Given that the respondent accepts that the procedure it adopted was seriously flawed, in relation to Toni Barrett's claim the Authority needs to decide the following issues:

- Was the redundancy genuine; and
- What, if any, remedies are due to Ms Barrett in all the circumstances?

[13] In relation to Alan Mathews' claims, the Authority needs to decide the following issues:

- Was his employment agreement for a fixed term of 30 months; and
- Was the redundancy genuine; and
- What, if any, remedies are due to him in all the circumstances of the case?

The investigation meeting

[14] At the investigation meeting I was assisted by hearing evidence from both applicants and from Ms Raewyn Smith on behalf of the applicants. On behalf of the respondent, I heard from Peter Goodman and from Colin Buckle, the Club's treasurer.

[15] Given the respondent's concession in respect of its process, the primary focuses of the investigation meeting were the justification of the decision to make the two positions redundant and the effects on the two respective applicants.

[16] The respondent's tabled a considerable array of financial documents to which both Mr Goodman and Mr Buckle spoke. They clearly reflect the parlous state of the Club's financial position at the time the decisions were taken. At the time the Club was faced with insolvency in the year ending 31 March 2006 if urgent action was not taken to increase income or reduce expenditure by more than \$25,000. The Club was also in debt to affiliate clubs due to loans having been made to the respondent in order to avoid insolvency during the previous financial year. Placed in that position, the respondent has attempted to increase its overdraft facilities with its bankers, but with little success.

[17] The applicants both challenged the position descriptions issued by the respondent deposing that they were substantially the same as those they had had when employed in their respective roles. Having reviewed these, there are similarities. However, in the case of the Executive Manager's role (which replaced the Secretary/Manager's role held by Mr Mathews), it is predominantly the role previously named Office Administrator, with a number of the duties previously within the disestablished Secretary/Manager portfolio added and several added from the previous description of the Bar Manager.

[18] The respondent's evidence was that, during an absence of Mr Mathews due to a back injury, the Club came to the view that it could operate *reasonably well* without the Secretary/Manager, but could not operate at all without the Office Administrator. That, said the respondent, was the basis for designing the duties for the newly created Executive Manager. That, it appears to me, is an option open to the respondent in the circumstances it faced at the time.

[19] Toni Barrett's evidence was that she would have accepted any position with the respondent if she had been asked. Employed as the Bar Manager prior to the reorganisation, Ms Barrett, although invited to apply for the new position of Senior Bar Steward, did not do so although two other bar stewards did apply.

[20] Both applicants contended they were seriously embarrassed when friends spoke to them about seeing *their jobs* advertised in the newspaper. The respondent's evidence was that the advertisements were for the new positions, and that the Executive Manager job was advertised only after two appointees were unable to remain in the role due to personal or family situations which developed subsequent to their appointments.

[21] Mr Mathews contended that his appointment as Secretary/Manager was on the basis of a fixed term appointment. He rested this view on a sentence in his letter of appointment dated 25 April 2003. That sentence read: *It is envisaged that the appointment be for a period of 30 months which could be extended by a further 30 months subject to written agreement between the employer and employee.*

[22] In the individual employment agreement signed by Mr Mathews on 12 May 2003, para.6.11 reads:

Redundancy. *In the unfortunate event of an employee who is party to this agreement becoming redundant, the parties agree that no redundancy compensation shall be paid. A minimum of four weeks' notice shall be given.*

The legal principles

[23] The requirement to consult employees likely to be affected by decisions to reorganise a business is clearly set out, in the context of the Employment Relations Act 2000, in the Employment Court's judgment *Baguley v. Coutts Cars Ltd* [2002] 2 ERNZ 409.

[24] In *Waitakere CC v. Ioane* [2004] 2 ERNZ 194 (CA), Justice Young suggested that causation needs to be taken into account where a dismissal is unjustifiable only on the ground of procedure. Noting the decision of the Employment Court, where Ioane had been awarded \$67,500, the learned Judge had this to say:

[23] It is likely, to say the least, that a fair process would have resulted in Mr Ioane's justifiable dismissal. The approach adopted by the Chief Judge made no allowance for this possibility and this seems to me to be contrary to the principles which underlie the fixing of compensation.

[24] If a fair process would unquestionably have resulted in Mr Ioane's justifiable dismissal, the Council's 'unfair' process was not causative of any significant loss of remuneration.

[25] A little later on in the same judgment, Justice Young says:

Where a dismissal is regarded as unjustifiable on purely procedural grounds, allowance must be made for the likelihood that had a proper procedure been followed, the employee would have been dismissed.

The determination

[26] Returning to the issues set out earlier in this determination, in relation to Toni Barrett's claim, I find that the redundancy was genuine. However, I find that her dismissal was unjustifiable on the ground of a thoroughly deficient procedure. As a result of this finding, Ms Barrett is entitled to remedies which I shall address below.

[27] Turning to Mr Mathews' claims, the Authority also finds that his dismissal was unjustifiable on the ground of a deficient process on the part of the respondent. I find that his claim that his employment agreement was a fixed term arrangement is not made out. The written agreement refers to a starting date and at no stage does it state that the agreement is for a fixed term. In considering the letter of appointment, I find the reference to *30 months* is insufficient to override the document signed by both the parties.

[28] Having found that Mr Mathews has been unjustifiably dismissed, I need to consider the remedies appropriate to his situation.

Remedies

[29] I have found that both applicants were unjustifiably dismissed and have noted that both were given the appropriate notice which was either worked out or paid in lieu.

[30] I have also found that the position of each applicant would most likely have been declared surplus even in the event that a correct or proper procedure had been followed by the respondent. In these circumstances, I decline to make an award for lost remuneration to either applicant.

[31] However, both Mrs Barrett and Mr Mathews have suffered embarrassment and humiliation as a result of their dismissals. In this regard, I would observe that it is most unfortunate and hurtful when members of the public draw incorrect inferences from newspaper

advertisements for vacancies. It is difficult to see how this could be avoided. However, any inferences drawn or hurt to the applicants as a result cannot be fairly laid at the door of the employer. Nonetheless, I think it appropriate that each of the applicants is awarded compensation for the hurt and humiliation that they have suffered excluding public perceptions.

Toni Barrett

[32] Pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000, I order the respondent to pay Mrs Barrett the sum of \$8,000. In assessing quantum, I have been mindful of her previous employment with the RSA and the undertaking given to her that on transfer to the respondent her terms and conditions would remain the same.

Allan Mathews

[33] Pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000, I order the respondent to pay Mr Mathews the sum of \$6,000.

Costs

[34] Costs are reserved. The parties are encouraged to attempt to resolve this issue between themselves. If that cannot be achieved, Mr Climo is to lodge and serve his memorandum on or before 19 January 2007. Mr Goodman is to lodge and serve his memorandum in response no later than Friday, 2 February 2007.

Paul Montgomery
Member of Employment Relations Authority