

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 221/10
5288448**

BETWEEN DAVID CHURCH
 Applicant

AND JAMES HARDIE NZ LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: Applicant In Person
 Marie Wisker, Counsel for Respondent

Investigation Meeting: 18 February 2010

Further Information: 24 February 2010

Submissions Received: 26 February 2010
 2 March 2010

Determination: 10 May 2010

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Mr David Church (“Mr Church”) claims his dismissal for redundancy is unjustifiable. He claims reinstatement, reimbursement and compensation. The respondent James Hardie (NZ) Ltd (“James Hardie”) denies the claim. The parties were unable to resolve the differences between them by mediation.

The facts

[2] Mr Church was employed by James Hardie as Environment Health & Safety Manager. He commenced that employment on 16 October 2008. The terms of the employment were recorded in a letter signed by Mr Church on 14 September 2008.

[3] By letter dated 8 May 2009 James Hardie confirmed to Mr Church that his employment was terminated for redundancy.

[4] Mr Church saw an advertisement on 14 October 2009 which he says advertised the role he was made redundant from. He obtained a position description in relation to the advertised position. He concluded that his dismissal had been unjustifiable. He raised a personal grievance on 9 November 2009.

The merits

[5] It is for James Hardie to justify its decision to terminate Mr Church's role. The test of justification is set out at section 103A of the Employment Relations Act 2000. James Hardie says the dismissal for redundancy meets the test of justification.

[6] James Hardie advised Mr Church by its letter of 8 May 2009 that the decision to terminate his position came "as a result of a necessary re-structuring of the business to reduce the operations structure to be in line with market volumes". Mr Church himself says that the "requirements of the role never disappeared, or discontinued: they were just reallocated". But he says his role was advertised subsequently and so he raised a personal grievance on 9 November 2009. He says that "there is no legitimate reason for his employment having been unjustly terminated. The company made no attempt to contact [him] when they were re-advertising the role. He believes [it] would have done so if it was in fact a genuine redundancy".

[7] He also says that a subordinate employee was refusing to cooperate and her actions constituted serious misconduct. He says that during the last two weeks of his employment he was under duress from two directions, firstly the subordinate employee refusing to cooperate and secondly, his position was under threat.

[8] As a result of the economic downturn and declining sales, James Hardie looked to reduce its costs. By early 2009 managers were asked to review operations with a view to reducing costs. Consultation with staff occurred in April 2009 and with union employees in May 2009. Altogether 20 positions were made redundant 10 of which were voluntary. James Hardie has reduced its staff by about 50 as a result of that process. Mr Church's position was one of them.

[9] There were three main components to Mr Church's role – Environmental, Occupational Health & Safety strategy and Health & Safety.

[10] Mr Church met with James Hardie General Manager Mr Rob Kidd (“Mr Kidd”) and Human Resource manager Ms Jo Oakes (“Ms Oakes”) on 22 April 2009. Mr Church was informed of the basis for the proposed restructure and invited to offer feedback on the redistribution of his role. James Hardie was interested to know whether the functions of Mr Church’s role could be absorbed by other positions. At the meeting Mr Church agreed to list the functions of his role and the time allocation of each to enable Mr Kidd to decide whether those functions could be reallocated.

[11] As well as the information provided by Mr Church, Mr Kidd took into account the existing people in the business and their skills, experience and capacity to absorb additional functions. He also considered the training and expectations of department managers to provide required health and safety focus, the support within structures of both the New Zealand and Asia Pacific region for a divided role, and the roles of other staff.

[12] As a result of that exercise, Mr Kidd resolved that there was the capability to redistribute the functions of Mr Church’s role and a standalone Environmental Health and Safety Manager position was redundant. This decision was conveyed to Mr Church in the letter of 8 May 2009. James Hardie implemented a redistribution of the functions formerly performed by Mr Church following his termination.

[13] I am satisfied that the decision to redistribute the functions performed by Mr Church amongst existing roles was a legitimate decision and did in fact occur. This meant that Mr Church’s role was redundant. I therefore find the decision taken to disestablish Mr Church’s role was a genuine commercial decision. This Authority does not stand in the shoes or second guess an employer’s commercial decision.

[14] I am further satisfied that James Hardie conducted a full and fair consultation process with not only Mr Church but its entire workforce. There was consultation with all staff and the union. I find that Mr Church was consulted about the proposed restructure of his position and he did in fact participate in that process and offer feedback about the proposal.

[15] I accept that at the time the decision was taken and in all the circumstances at the time, James Hardie’s decision to terminate Mr Church’s employment for redundancy and how it acted were what a fair and reasonable employer would have

done. The decision to terminate the employment meets the test of justification at section 103A of the Act.

[16] Having examined the evidence, I am satisfied that the advertised Health and Safety advisor role was not the role formerly performed by Mr Church. The advertised Health and Safety advisor role is not a management role as Mr Church's role was and nor did it have an environmental component.

[17] I do not accept there is any issue around the subordinate employee that has any relevance to the decision taken by James Hardie that Mr Church's employment was redundant.

The determination

[18] I find that at the time the decision was taken and in all the circumstances James Hardie's decision to terminate Mr Church's employment for redundancy and how it acted were what a fair and reasonable employer would have done. I find that Mr Church does not have a personal grievance. There will be no formal orders.

The costs

[19] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Ms Wisker is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Church is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination.

Leon Robinson
Member of Employment Relations Authority