

The Investigation

[3] Mr Clark's statement of problem was filed on 9 July 2009. He sought lost wages from 29 December 2008 until the matter was heard by the Authority, at the rate of \$50,000 p.a. (base salary) less casual earnings, \$17,500 compensation for hurt and humiliation and costs.

[4] In its statement in reply filed on 4 August the Company said Mr Clark's position was disestablished for genuine business reasons following consultation with the applicant and he was not disadvantaged.

[5] The problem was not resolved by mediation.

[6] In a telephone conference on 4 September the parties agreed to a one-day investigation in Palmerston North on Tuesday 8 December 2009, to provide the Authority with an agreed bundle of documents, and to time lines for providing witness statements.

[7] By the time of the investigation the Company had failed to provide its witness statements, had not replied to requests from Mr Drummond for information relevant to this problem and had not cooperated in the production – as agreed – of a bundle of documents.

[8] The Company was not represented at the investigation on 8 December: no explanation was offered to the Authority for this failure. Ms Callum did speak to an Authority support officer on 7 December who reported her as saying that she thought that liquidation of the Company would happen tomorrow (8 December), that the investigation was a waste of time and money and she had other commitments at the bar. Ms Callum was strongly advised to attend the investigation.

[9] Mr Drummond reported that he had had a communication from the Company's accountant stating that the liquidator had advised Ms Callum not to attend the Authority's investigation: by the time of the investigation (and preparation of this determination) no such communication had been received by the Authority. Mr

Drummond understood the Company to be still trading and that it was for sale, however no evidence was produced to support that claim.

[10] Having regard to all of these circumstances, and in particular Ms Callum's earlier agreement to the investigation date as well as the lack of communication from the Company's representatives as to the reasons for its non-appearance, and because the Company was as recently as the day before registered with the Companies Office, I elected to proceed with the investigation: Clause 12 of Schedule 2 of the Employment Relations Act 2000 applied.

[11] The Company's unexplained non-attendance raises a serious question as to whether it has acted in good faith or not.

Background

[12] Mr Clark's was previously employed in a managerial capacity with the Ministry of Social Development; he had been employed for approximately 10-years. At the time he ceased employment with the Ministry to take up employment with the respondent he was receiving a package of \$65,000 p.a.

[13] Mr Clark was also employed by a security firm as a part-time door person at the respondent's hotel ("the Grand").

[14] While engaged as a door person he was approached by the respondent's director and owner, Ms Michelle Callum and offered a managerial position. Following a meeting in October 2008 Mr Clark agreed to the position of general manager, the Grand, with a salary package of \$50,000 p.a. plus bonuses. He resigned his other two employment positions and commenced his new job on or around 16 November 2008.

[15] By way of a text message and advice from another staff member, Mr Clark was advised of a staff meeting scheduled for Monday 8 December. Mr Clark was unable to attend the meeting.

[16] On 9 December Mr Clark was handed a memorandum that, amongst other things, provided a summary by the Company's accountant of the industry and the respondent's business, together with a signal of staff redundancies.

[17] Mr Clark received a letter dated 10 December inviting him to a meeting on 12 December to discuss his potential redundancy. At the 12 December meeting Mr Clark advised of where potential savings could be made. The meeting adjourned until 15 December.

[18] On 15 December it was announced Mr Clark's position was to be disestablished effective 29 December, i.e. the applicant's employment with the respondent was terminated from that date.

Findings

[19] As is clear from the above, the Company has not disputed Mr Clark's claims other than by way of its statement in reply.

[20] Nothing emerged from my investigation to challenge Mr Clark's key claims. They are:

- He had previously declined Ms Callum's overtures to work for her (the Company);
- However, as he was interested in advancing his career in the hospitality industry, and as he was assured the Company was operating successfully (as demonstrated by Ms Callum's expressed wish to step back from the day to day running of the bar and have Mr Clark replace her), he agreed to the respondent's offer.
- He received no inkling the Company was experiencing trading problems;
- Ms Callum was aware Mr Clark would be giving up secure employment with MSD;

- Ms Callum assured Mr Clark he could afford to forego leave of absence with MSD whereby he would have been guaranteed re-employment;
- Similarly, Ms Callum assured Mr Clark he could forego a 10 days annual leave bonus after 10 years service with MSD that he would shortly be eligible for, because of the bonus he could anticipate in his new employment with the Company;
- As set out above in pars 13-16 inclusive above, Mr Clark was then subjected to procedurally and substantively unjustified restructuring process culminating in his dismissal as redundant.
- Mr Clark believes he is the only person to have been made redundant.

Unjustified Dismissal

[21] I am satisfied Mr Clark was unjustifiably dismissed for the following reasons:

[22] No evidence other than the generalised claim set out in the statement in reply has been provided by the Company in support of its decision to dismiss Mr Clark by way of redundancy. No particularised financial evidence has ever been provided in support of its claim the Company was operating unsuccessfully, that the applicant was well aware of that development and that the dis-establishment of Mr Clark's position was a necessary part of the "*rapid action needed to be taken in order to save the business from closure which would have resulted in more job losses*" (par 2, statement in reply). No evidence has been provided of circumstances such that, bearing in mind Mr Clark's recent recruitment and the assurances given him at the time, his termination for redundancy was justified.

[23] In *Air New Zealand Ltd v V* (unreported, Colgan C J, Travis, Shaw and Couch JJ, AC 15/09, 3 June 2009), at para [37] it was made clear that the Authority is required to objectively review all the actions of an employer up to and including the decision to dismiss, against the test of what a fair and reasonable employer would have done in all the circumstances.

[24] Ample case law is clear as to, in a situation such as this, that employees are entitled to fair notice and an opportunity to be heard in respect of meaningful information relating to a proposed restructuring. The absence of procedural and substantive justification is sharpened in this case, extraordinarily so, by the unchallenged evidence as to the assurances given Mr Clark shortly beforehand as to the prospects and security of his employment, the brevity of his employment, the huge loss imposed on him resulting from his dismissal, and that he was the only person to be made redundant.

[25] For the reasons set out above I have no hesitation in determining that Mr Clark was unjustifiably dismissed.

Unjustified Disadvantage

[26] As was conceded by Mr Drummond during the investigation, the claim Mr Clark's employment conditions were altered to his disadvantage by an unjustified action on behalf of the Company was effectively a restatement of his claim of unjustified dismissal. As I have found in favour of his substantive claim I do not intend to take this other matter any further.

Remedies

Lost Wages

[27] On the day of the investigation Mr Clark provided the Authority with extensive documentation of his efforts, unsuccessful to date, to obtain fresh employment.

[28] Bearing in mind the practical difficulties of accounting to a prospective new employer his departure from the MSD and the respondent only a few weeks later, his lack of success to date is not surprising.

[29] Having regard to the circumstances set out above, I am satisfied Mr Clark should be remedied all wages lost to him from 29 December 2008 to the date of this investigation.

[30] I accept the calculation emailed to me later on the day of the investigation, that the respondent be directed to pay the applicant the sum of \$25,033.43 (which reflects some casual earnings received by Mr Clark during this period).

Compensation for Hurt

[31] Mr Clark seeks compensation for hurt and humiliation of \$17,500. His evidence of humiliation (e.g. going back to MSD but this time as a client), of having to borrow from family and friends and his sense of betrayal is robust and convincing, as is Mr Clark's evidence of being publicly abused by Ms Callum after his dismissal. I am satisfied an award of \$12,000 is appropriate in the circumstances.

Contributing Fault

[32] There is no evidence of Mr Clark contributing in any way to the situation that gave rise to his personal grievance.

Determination

[33] The Company unjustifiably dismissed Mr Clark and is to pay to him the following sums:

- Lost wages of \$25,033.43 (twenty five thousand and thirty-three dollars and forty-three cents) gross; and
- Compensation for hurt and humiliation of \$12,000 (twelve thousand dollars).

[34] Costs are reserved. This matter ran to less than half a day. Subject to parties' submissions, I can see no reason not to set costs at \$1,500 for the investigation.

Denis Asher

Member of the Employment Relations Authority