

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 494
5336920

BETWEEN	PHILIP COLLINGS Applicant
AND	HOWARD TMG LIMITED Respondent

Member of Authority:	R A Monaghan
Representatives:	P Skelton, counsel for applicant J Canterbury, advocate for respondent
Investigation Meeting:	12 September 2011
Additional information provided:	15 September 2011
Determination:	15 November 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Philip Collings says his former employer Howard TMG Limited (HTMG) dismissed him unjustifiably by reason of redundancy. He also seeks payment of a commission owed to him for the last month of his employment.

[2] HTMG says the dismissal was justified on the ground that it occurred in a genuine redundancy situation. It acknowledges that the commission payment is owed.

Background

[3] Mr Collings began his employment with HTMG on 1 July 2010, although he had worked for a company in the Howard group since 2005. Changes to the corporate structure occurred in or about mid-2010 because of issues associated with or

arising out of continuing commercial litigation involving the Howard company and Nissan New Zealand. This led in particular to the incorporation of HTMG and the entry into new employment relationships with staff including Mr Collings.

[4] The predecessor employer had relinquished a Nissan franchise a year earlier. While the company retained a motor vehicle parts and servicing operation, later in 2009 it also began focussing on the sales of scooters and motorcycles. In the interests of the continuation of its business in the longer term, however, it was also seeking another motor vehicle dealership. HTMG continued these activities.

[5] Mr Collings' position in HTMG was that of group after sales manager. He was responsible for parts and servicing. A staff of 11, spread over two Auckland sites, was employed in technical and administrative aspects of parts and servicing.

[6] In mid 2010 HTMG was expecting to obtain Auckland dealerships for Chery and Great Wall motor vehicles. If it was successful there would be a needed flow-on effect of increased work for the parts and servicing department, since the loss of the Nissan dealership was expected to lead to a continuing decline in Nissan-related parts and servicing work.

[7] Also in mid-2010 Mr Philips received an offer of employment at another dealership. He discussed the offer with Jenine Canterbury, HTMG's chief executive officer. Ms Canterbury had high hopes for the future of the Chery and Great Wall dealerships, and in addition she did not want to lose Mr Collings. She indicated as much to Mr Collings. Accordingly Mr Collings decided not to accept the offer. Although the hoped-for outcome was not achieved in that neither the Chery nor the Great Wall dealership has proceeded, I accept that the views Ms Canterbury expressed at the time were genuinely held.

[8] At the same time Tony Howard, to whom I refer as the owner of the Howard group of companies although the shareholder is a trust, was working with the senior managers on ensuring the survival of HTMG. As well as the quest for new dealerships, efforts to address the company's finances included attempts to lease company premises, which were also not successful. Mr Howard said that during 2010 he was providing personal funds to the company as it would have been insolvent

otherwise. Further, although it was not clear when Mr Howard advised staff members that he was providing funds to the company, Mr Collings became aware Mr Howard was doing so.

[9] Otherwise the only financial information available to Mr Collings was in the form of the monthly reports for the service department. Information of this kind was discussed at management meetings which occurred approximately on a monthly basis. Two such meetings occurred on 28 September and 19 October 2010 respectively. From those discussions, and the figures in the monthly reports, Mr Collings believed that budgeted revenues were being met. He was unaware of any wider financial difficulty.

[10] In or about September or October 2010 Mr Howard decided to cease providing personal funds to support HTMG. When Ms Canterbury and Mr Howard discussed the company's financial position in the light of that decision, they sought in particular to reduce expenses. They noted there was 'unsold labour' in parts and servicing (namely that there were more staff members than were required to complete the work available), coupled with a continued decline in customers requiring after sales service. They concluded redundancies would be necessary.

[11] The decision was to cut staff numbers by 5. The service department would comprise 1 service advisor, 2 technicians and a groomer, and would not need a manager. Mr Collings and four others were affected.

[12] On the morning of 11 November 2010 Ms Canterbury sent an electronic notification of a meeting to Mr Collings. The meeting was to be held that afternoon, but there was no indication of its purpose.

[13] Mr Collings reported for the meeting, which was also attended by Ms Canterbury, Mr Howard and an HR consultant. The consultant informed Mr Collings that the business had been struggling and had been losing money. He handed two letters to Mr Collings. The first advised Mr Collings that his employment was to end the following day, 12 November 2010, while the second outlined details of a redundancy package.

[14] The 'package' was that Mr Collings could leave on 12 November but receive four weeks' pay amounting to pay in lieu of notice. An additional payment of 10% of Mr Collings' base salary would be paid as a gesture of good will, a reference would be provided and the consultant would be available to provide assistance.

[15] Accordingly Mr Collings' employment ended on 12 November 2010.

[16] It was drawn to Mr Collings' attention after the termination of his employment that an existing employee had been appointed to his position, adding to his questions about whether his redundancy was genuine. The employee's previous position had been group administration manager, but after the termination of Mr Collings' employment she began using the title customer service manager.

[17] In fact her position was restructured. It remained an administration role, covering certain administration functions Mr Collings had carried out as well as relieving at the service department reception desk. It did not extend to overall management of the service department. When a position disappears as Mr Collings' did it is not unusual for some of the duties to remain, and to be redistributed among existing staff members. That occurred here, but not to the extent that the employee's position was so materially similar to Mr Collings' original position that it could be said she was appointed to Mr Collings' position.

Whether the redundancy was a justified dismissal

[18] In general, a dismissal for redundancy will be justified if it was imposed for genuine reasons, and was implemented in a fair way.

[19] From the background as I have set it out, I find Mr Collings' redundancy was imposed for genuine reasons. It was motivated by HTMG's financial position, and for genuine reasons the position no longer exists.

[20] Regarding the fairness of the implementation, the redundancy was advised without prior discussion or consultation.

[21] The law applicable to those circumstances is set out in the decision of the Employment Court in **Simpsons Farms Limited v Aberhart**¹. There the court summarised earlier case law regarding an employer's obligation to consult with an employee who may be affected by a redundancy, as well as discussing the effect on redundancy dismissals of s 103A of the Employment Relations Act 2000. It pointed out, too, that s 4(1A) of the Act – which detailed aspects of the statutory obligation to deal in good faith – included requirements that an employer proposing to implement redundancies provide to the affected employees access to information about the proposal, and an opportunity to comment on it, before the decision is made. The court concluded:

“[65] Following the new s 103A, the Authority or the Court must consider on an objective basis whether the decisions made by the employer, and the employer's manner of making those decisions, were what a fair and reasonable employer would have done in all the circumstances at the relevant time. The statutory obligations of good faith dealing and, in particular, those of s 4(1A)(c) inform the decision under s 103A about how the employer acted. A fair and reasonable employer must, if challenged, be able to establish that he or she has complied with the statutory obligations of good faith dealing in s 4 including as to consultation because a fair and reasonable employer will comply with the law.”²

[22] HTMG did not meet the requirements of s 4(1A). Even if Mr Howard was correct when he said that as a result of general conversation Mr Collings should have a better appreciation of the company's financial position than he indicated, this was not sufficient to meet the obligation to consult. In particular there was no discussion with Mr Collings about the company's financial circumstances as they affected his ongoing employment, he received no opportunity for input into how those circumstances might be addressed, and no warning that the disestablishment of his position was possible.

[23] Mr Collings said the result may have been different if the financial circumstances had been shared with him, and he had an opportunity to discuss options for dealing with the matter. He said he would have been prepared to consider a pay cut, a reduction in his hours of work, or a reduction in his benefits.

¹ [2006] ERNZ 825

² P 842

[24] By the time of the investigation meeting HTMG employed 3 service staff and had 10 staff overall. Its business centred on motor cycles. In short, the outcome it had been resisting appears to be coming to pass. Against the background discussed during the investigation meeting I consider it unlikely that an acceptable arrangement could have been reached in or about November 2010 regarding the conditions of Mr Collings' continued employment, at least for any more than the short term. It is likely that at best the impact and suddenness of the blow could have been mitigated and Mr Collings' move to seek alternative employment eased.

[25] Overall I conclude that the suddenness of the dismissal, the lack of any consultation about the possibility of a restructured position or the circumstances in which any termination of Mr Collings' employment would be effected, and the failure to provide information that would facilitate informed discussions on these matters, mean the dismissal was unjustified.

Remedies

1. Reimbursement of lost remuneration and benefits

[26] Mr Collings found alternative employment in February 2011, but seeks the reimbursement of remuneration lost to that date as a result of his personal grievance. With reference to his base salary of \$66,000 per annum he has quantified the sum as \$13,750 less \$6,600 paid as a goodwill payment, being \$7,150.

[27] Mr Collings has also sought reimbursement in respect of the loss of use of a company vehicle, and payment of the commission he would have earned in December, January and February.

[28] However the basis of my conclusion that Mr Collings has a personal grievance on the ground of unjustified dismissal was the failure to consult. Otherwise there was a genuine redundancy situation and Mr Collings would still have lost his employment, together with the remuneration and benefits which are the subject of this claim. Since I find his loss of earnings flows from a genuine redundancy situation and not from the personal grievance, there will be no order for the reimbursement of lost remuneration or of benefits that would have been obtained but for the unjustified dismissal.

2. Compensation for injury to feelings

[29] Mr Collings seeks compensation in the sum of \$10,000 for the injury to his feelings caused by his personal grievance. He gave evidence on the matter. I accept he has suffered injury as a result of the way in which the termination of his employment was effected.

[30] I do not accept Mr Collings' feeling that Mr Canterbury misled him over his employment at HTMG, when the two discussed the alternative offer of employment he had received, can be compensated for as part of the injury caused by the personal grievance. The grievance concerns the lack of consultation in association with the decision to disestablish Mr Collings' position. Mr Collings' decision not to accept the offer of an alternative position was a separate and earlier event, and I have found that Ms Canterbury acted genuinely in the response she gave at the time.

[31] HTMG is therefore ordered to pay Mr Collings the sum of \$4,000 as compensation for the injury to his feelings.

Commission owed for November 2010

[32] Despite HTMG's acknowledging the commission payment for November 2010 was owed, as at the date of the investigation meeting payment had not been made.

[33] If that remains the case, then HTMG is ordered to pay Mr Collings the sum of \$1,000 as commission for November 2010.

Summary of orders

[34] HTMG is ordered to pay to Mr Collings:

- (a) \$4,000 as compensation for injury to feelings resulting from the personal grievance; and
- (b) \$1,000 as commission for November 2010 (if payment has not yet been made).

[35] If payment has not been made I further order that interest be paid on the amount identified at (b) above. The rate of interest is that prescribed under s 87(3) of the Judicature Act 1908³ calculated as 5% per annum⁴ from the date of termination of employment to the date of payment.

Costs

[36] Costs are reserved.

[37] The parties are invited to reach agreement on the matter. If they are unable to do so a party seeking costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have 14 days from receipt of the memorandum in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority

³ Ref: Employment Relations Act 2000 Schedule 2, clause 11.

⁴ Judicature (Prescribed Rate of Interest) Order 2011