IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 505
5337005

	BETWEEN	GARY CORNISH Applicant
	AND	EVERLAST CONSTRUCTION LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Michael McFadden for the Applicant Susan Wicks and Jeff Wicks for the Respondent
Investigation Meeting:	26 August 2011
Determination:	30 November 2011

DETERMINATION OF THE AUTHORITY

A. The dismissal for redundancy of Gary Cornish by Everlast Construction Limited (ECL) was not carried out in a fair manner.

B. ECL must pay Mr Cornish $2000 as compensation under s123(1)(c)(i) of the Employment Relations Act 2000.

C. Costs are reserved.

Employment relationship problem

[1] Gary Cornish worked for Everlast Construction Limited (ECL) as a general foreman. On 30 September 2010 ECL director Jeff Wicks told Mr Cornish the company could no longer afford his wages and terminated his employment. Mr Cornish left the job that day but was paid notice to the end of the following week.

[2] Mr Cornish had worked for ECL since 2006. Initially this was under labour-only contracts but in February 2009 he was declared bankrupt and asked ECL to change the relationship to one of direct employment. Mr Wicks agreed and Mr Cornish was employed thereafter under a series of fixed term employment agreements linked to the particular project on which he was working.

[3] At the time of his dismissal for redundancy he was employed under an agreement the parties signed on 1 April 2010. It included the following terms:

> *This agreement will commence on 1st April 2011, and will end when the project at 81 Boundary Road, Papakura has been completed. The Employer has genuine reasons based on reasonable grounds for specifying that the employment agreement is to end at this time, namely that there is no more work available after this. The parties also confirm that the Employee has been advised by the Employer when discussing this agreement, the reasons for the employment ending in this way.*
> …
> *In the event the Employee's employment is terminated on the basis of redundancy, the Employee shall be entitled to notice of termination of employment as specified in the termination clause, but shall not be entitled to any additional payment, whether by way of redundancy compensation or otherwise.*
> …
> *The Employer may terminate this agreement for any cause, by providing 3 days notice to the Employee. Likewise the Employee is required to give 3 days notice of resignation.*

[4] Mr Cornish claimed his terms of employment were breached by the decision to dismiss him and how it was carried out. He said the dismissal was unjustified because it occurred "out of the blue" after Mr Wicks had told him that they had not been getting on well and there was no more work for him. He said the dismissal was not for a genuine commercial purpose but, rather, was for an ulterior motive and was not made or carried out fairly.

[5] ECL replied that Mr Cornish was genuinely redundant as the Boundary Road project had ended with no further work lined up. It said Mr Cornish knew of this in advance and was given the notice required by his employment agreement. At the time Mr Wicks believed he may not have been able to continue working due to ill health and the real possibility he would need to undergo a major operation.

The investigation

[6] For the purposes of the Authority's investigation Mr Cornish, Mr Wicks and his wife and fellow ECL director Susan Wicks lodged written witness statements and a number of relevant background documents. Each witness attended the investigation meeting and, under affirmation, confirmed their own statements and answered questions from the Authority member and additional questions from the parties. Each party provided closing submissions.

[7] As permitted under s174 of the Employment Relations Act 2000 (the Act) this determination does not record all the evidence and submissions received. Rather it sets out findings of fact and law, expresses conclusions on the matters for determination, and specifies orders made.

A genuine redundancy

[8] Mr Cornish and Mr Wicks agreed on one important point in their evidence – that at the time Mr Cornish's employment was ended, the Boundary Road project required around six weeks full-time work to achieve practical completion. For that reason the employment cannot be said to have expired on the basis contemplated in the agreement – that the project was complete.

[9] Instead ECL says the foreman's role carried out by Mr Cornish had become redundant because Mr Wicks could do the work needed and the business could not afford to keep paying Mr Cornish's wages.

[10] Mr Wicks had been seeking further projects for his business to carry out. If he had continued to seek them and was successful in securing contracts, Mr Cornish could have been offered another fixed term agreement to work on such a project. However Mr Wicks plans changed dramatically in August 2010 when his mother tested positive for a gene mutation associated with a predisposition to a particular form of stomach cancer. Other men in Mr Wicks' wider family had died of stomach cancer in their forties. A cousin had recently been diagnosed with the mutation and survived only due to a total gastrectomy. Mr Wicks had suffered chronic gastritis,

which can be a symptom of this form of cancer. At the time of making the decision about Mr Cornish's employment – as part of other decisions about the future of the business – Mr Wicks believed he was most likely to have the cancer and was awaiting the result of genetic screening. He anticipated a positive result would require a gastrectomy in February 2011, with an expected two-year recovery period. On 11 November he received test results that, unexpectedly, indicated he did not have the mutation. He was the first member of his extended family to test negative.

[11] Meanwhile Mr Wicks had already taken steps to wind back his business and business costs – including laying off Mr Cornish and doing the work needed to complete the project himself. At the time Mr Wicks expected the business to be 'on hold' for the foreseeable future. Although Mr Wicks had been exploring other work possibilities, there were no further projects for which ECL had contracts – or any real prospect of contracts – and on which Mr Cornish might have been redeployed or engaged for a further term.

[12] Although a case concerning a damages claim for breach of contract by wrongful dismissal rather than a statutory personal grievance application, the Employment Court in *Williams v Attorney-General* summarised principles which apply to the present matter:[1]

> *The law about termination of employment for redundancy is by now quite clear. In cases of indeterminate employment contracts which are silent on the subject of termination for redundancy, an employer is entitled to terminate the contract by the notice provided in it or, failing any such provision, by reasonable notice. What period of notice is reasonable is a question of fact to be determined according to the circumstances at the time the notice is given, not the circumstances when the contract was formed. If the contract is not silent on the subject of redundancy but makes express provision for it — including provision for notice, compensation, prior consultation, and other matters — those obligations must be met and if they are not can be enforced. By redundancy in this context is meant, of course, genuine redundancy or, as it was put in* Wellington Clerical IUOW v Greenwich *ERNZ Sel Cas 95, the disappearance of the job as a result of economic conditions — not as a result of the employer wishing to replace the particular employee with someone else.*
>
> *A fixed-term contract is, however, quite different. It cannot be brought to an end by the employer by notice at will. Unless it provides otherwise, it can only come to an end upon the expiry of its*

[1] [1999] 2 ERNZ 457, 469-470 (EC).

> *term. An employer terminating a contract early will remain liable for the remuneration for which it provides until the date of expiry. However, the contract may contain provision for early termination in particular events or on particular grounds. These cannot include termination at will for no reason at all because such a provision would be repugnant to the nature of the contract as a fixed-term contract. The fixed term is not only a maximum term but it should also be seen as a minimum term for most purposes. Generally speaking, such contracts — if their term is lengthy — will provide for the employee to be able to obtain release on giving some agreed period of notice. This recognises that employees, as human beings, cannot be kept in employment against their will. To do so would risk the reproach that the contract contains elements of servility and, as such, is illegal.*
>
> *It is also competent for a fixed-term contract to provide that the employment will come to an end either automatically or upon the employer desiring that it should do so upon the happening of specified events. Supervening bankruptcy or inability on medical grounds to continue in employment are two examples that feature in this contract.* …
>
> *I come now to the less obvious case of the position becoming surplus to the employer's requirements. It seems not unreasonable to suggest that parties — notably, employers — have a choice between stipulating on the one hand for contracts of indefinite duration with provision for termination by notice which can be given in the event of redundancy, and on the other hand for fixed-term contracts which should then be expected to run their term in accordance with the contract. However, it was not suggested at the hearing that it is not open to parties to enter into a hybrid contract which is for a term of fixed duration but which can terminate or be terminated before the expiry of its term upon the happening of events defined in the contract. One of these may be redundancy, as defined in the contract.*

[13] The agreement between Mr Cornish and ECL expressly contemplated the prospect of redundancy and excluded any entitlement to compensation in those circumstances. In that respect it was, I find, a "hybrid contract" of the nature contemplated by the Court in *Williams*. So Mr Cornish's employment could end by reason of redundancy before the end of the project and the expiry of the fixed term. However to do so lawfully, the redundancy decision must have been made for genuine reasons, fairly done and carried out in compliance with any other applicable provisions of the employment agreement, including notice.

[14] There was some evidence and dispute over the extent to which the project was running behind time and whether Mr Cornish had finished working on previous projects once around 75 per cent of scheduled tasks were completed. Because of the

conclusions I have reached about what was permitted under the terms of the employment agreement I have not had to consider that evidence or resolve points of dispute between the witnesses over it.

[15] I find, on the evidence of Mr Wicks about his health and the circumstances at the time, that the decision to terminate the employment of Mr Cornish for redundancy was made for genuine commercial reasons.

[16] The circumstances and the employment agreement in the present matter differed from those in *Shortland v Alexander Construction Limited,* on a point that is relevant to the present matter.[2]

[17] In *Shortland* the Court found reference to the "end of the [specific] project" was not sufficient to meet the requirements of s66 of the Act because on its own such a statement did not provide reasonable grounds for having a fixed term agreement. For the grounds to be reasonable required another element, "namely that the company had no other work in prospect, to be included" in the wording of the agreement.[3] And in that respect the agreement between Mr Cornish and ECL was sufficient because it expressly refers not just to the end of the Boundary Road project but also to there being no more work available after that point.

[18] While that lack of future work was the case at the beginning of the agreement, it was also, on Mr Wicks' evidence, the circumstance at the time of the decision. He had pursued several prospective projects but not secured any future work. Even if it were the case that Mr Cornish might have had some legitimate expectation of continued work – either by redeployment or being offered employment on a new project – ECL had no other work as a foreman to offer him at the time.

[19] Mr Cornish's evidence suggested there was an ulterior motive to Mr Wick's decision to dismiss him on 30 September – that Mr Wicks had become unhappy with the work and attitude of Mr Cornish. On that morning Mr Wicks told Mr Cornish he needed to have a meeting about the job and set a time of 2pm that afternoon. During

[2] [2101] NZ EmpC 41 (EC, Judge Couch).
[3] At paragraph [18].

that day they had two disagreements about work matters – one being whether Mr Cornish would climb up wall nogs rather than using a ladder and another about measurements for a room.

[20] Mr Cornish said Mr Wicks ended the latter discussion by saying they needed to have their meeting. They went to the site office to talk. Mr Cornish said Mr Wicks began the discussion by saying the two of them had not been getting on very well and then said the future prospects did not look good and there was no more work for him.

[21] Even accepting Mr Cornish's account of conversations that day, I do not accept his evidence that some disagreements about how the work was carried out revealed a predominantly ulterior motive for the redundancy decision. I accept and prefer Mr Wicks' evidence that although the project was not complete, ECL no longer needed the position of foreman on the site and there was no further work to which Mr Cornish could be redeployed. In that sense the situation met the common definition of redundancy that the position was surplus to the employer's requirements.

Was it fairly done?

[22] Although decided for genuine reasons, ECL was also required to make its decision fairly, including an opportunity for Mr Cornish to comment on the redundancy proposal and make suggestions on how it should be carried out if a decision was made to proceed with such a proposal. Mr Cornish alleged he was denied those opportunities with a decision announced "out of the blue" on 30 September.

[23] It is, I find, a legitimate complaint. Mr Wicks' evidence established that he had not disclosed his medical issues to Mr Cornish or other employees but he had discussed the prospect of securing future work. Mr Cornish recalls Mr Wicks having talked "about three weeks prior" of some future work as "looking likely". Mr Wicks agreed he had mentioned the potential of further work because Mr Cornish and other employees were "edgy" as the end of the Boundary Road project approached. However Mr Wicks insisted he specifically advised Mr Cornish in a conversation on 17 September that there was "only a couple of weeks left" and Mr Cornish had

responded that he "could see the writing on the wall".

[24] Mr Cornish denied that the 17 September discussion described by Mr Wicks ever took place. However, even if it had occurred as Mr Wicks described, the content and nature of that discussion was not sufficient to meet the minimal requirements of consultation about redundancy. Mr Cornish was given only a vague indication rather than clear information about the specific prospect of his fixed term agreement coming to a premature end, and that was unsure because Mr Wicks had also indicated he was still exploring possibilities for other work.

[25] At the meeting on 30 September Mr Cornish was presented with what for ECL was a stark business reality and for him a *fait accompli*. As Mr Wicks described it, the meeting was to give Mr Cornish his notice and his reference. The reference was typed the night before but Mr and Mrs Wicks had drafted it at least four days earlier.

[26] While Mr Cornish was paid for the remainder of the week and the following week as notice, rather than only the three days to which he was contractually entitled, no real consideration was given to alternatives or how the redundancy decision could best be implemented. The position of the other employee – a labourer – could have been disestablished if Mr Cornish would continue working at a lower pay rate but that prospect was not considered or put to him. ECL could also have considered whether Mr Cornish might do some of the non-building work still required to finish the project, such as painting, a task he had done before.

[27] Instead his work finished abruptly that day in a way, I find, was not what a fair and reasonable employer would have done in all the circumstances at the time.

Remedies

[28] Because of the finding that the redundancy of Mr Cornish's position was for genuine reasons and could, because of the particular wording of the employment agreement, be terminated before the end of the fixed-term, no order for lost wages is required. If that were not the case Mr Cornish, because of the fixed term, would have been entitled to an order for a further six weeks' wages.

[29] He is however entitled to an award of compensation under s123(1)(c)(i) of the Act for the distress caused to him by the abrupt termination and other failures of ECL to implement its redundancy decision in a fair manner. That award is set at the modest level of $2000 as it does not compensate for the loss of the job itself but only for the loss of dignity and injury to Mr Cornish's feelings that arose from how the decision was implemented.

[30] No reduction of the remedy is required under s124 of the Act in this case as the compensation is awarded due only to shortcomings in how ECL implemented its decision to which Mr Cornish did not contribute in any blameworthy manner.

Costs

[31] Costs are reserved. The parties are encouraged to agree any matter of costs between themselves. If they are not able to do so and an Authority determination of costs is sought, Mr Cornish may lodge and serve a memorandum as to costs within 28 days of the date of this determination. ECL would then have 14 days from the date of serve to lodge any reply memorandum. No application for costs will be considered outside this timetable without prior leave.

[32] If the parties cannot resolve costs themselves, the Authority is likely to set costs on its usual tariff basis. For a relatively straightforward investigation meeting of the type which occurred here and lasting two-and-a-half hours, the likely award of costs is $1000. That amount would be subject to the parties' submissions about any factors requiring an upward or downward adjustment of the tariff.[4]

Robin Arthur
Member of the Employment Relations Authority

[4] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808.