

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 128/09  
File Number: 5154568

BETWEEN                      Wayne Cottle  
   Applicant

AND                              Maintenance Manawatu Limited  
   Respondent

Member of Authority:        Denis Asher

Representatives:            Jenny Murphy for Mr Cottle  
   Astley Paddison for the Company

Investigation Meeting        Palmerston North, 1 September 2009

Submissions Received        On the day of the investigation

Determination:                7 September 2009

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**DETERMINATION OF THE AUTHORITY**

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**The Problem**

[1]     Mr Cottle says his termination because of redundancy was both procedurally and substantively unjustified. He seeks unpaid wages plus interest, unspecified compensation for breach of contract and hurt, costs and any other awards the Authority deems appropriate (statement of problem received 23 July 2009).

[2]     The Company denies the allegations (statement in reply received on 13 May).

- [3] This problem was not resolved at mediation.
- [4] In a telephone conference on 29 May the parties agreed, amongst other things, to an investigation in Palmerston North on 1 September 2009.
- [5] During that conference Ms Murphy confirmed her client was seeking a total of \$10,000 compensation for hurt and costs of \$2,500.
- [6] During the investigation on 1 September the parties agreed in respect of Mr Cottle's unpaid wages claim that, if it had not already done so, the Company would pay the applicant for 18, 19, 20 February 2009, and – subject to any sick leave entitlement – also 24 & 25 February 2009 plus holiday pay on those days where owing. Mr Cottle agreed to forego his claim for payment for 23 February. I reserve the opportunity to the parties to return this matter to the Authority if they are unable to agree on the amounts owed.

## **Background**

- [7] Mr Cottle was employed by the Company on 15 February 2008 as a full-time builder.
- [8] The Company trades under the Fix-It franchise.
- [9] Mr Cottle attended a meeting on 8 February 2009 with the Company's director and sole shareholder, Mr Astley Paddison and the general manager of the Fix-it franchise. Mr Paddison advised the applicant and other employees that because work was slow hours of work were being reduced to 4 days per week.
- [10] On Monday 16 February Mr Paddison handed Mr Cottle a letter advising he was restructuring the business: the applicant was asked to attend a meeting the following afternoon. Mr Cottle says he did not take the letter very seriously as "*we'd only just started to work a four day week*" (penultimate par, first page of his witness statement).
- [11] On Tuesday 17 February Mr Cottle says he was advised by Mr Paddison he was redundant: Mr Paddison denies that allegation and says he advised a decision would be made following that meeting.

- [12] The following day, and as the applicant admits, after drinking heavily the night before, he says he left a message on the Company's voicemail saying he was sick and would not be reporting for work that day.
- [13] At around 3.00 p.m. that day Mr Paddison arrived at the applicant's home and gave him one week's notice of redundancy. Mr Cottle admits to advising Mr Paddison at that time that he had another job to go even though that was not correct.
- [14] Mr Cottle says he understands it was agreed he would spend part of his week's notice cleaning out his Company van, picking up some tools from the workshop and dropping the vehicle off.
- [15] Mr Cottle admits he did not drop off the stock in his vehicle until Monday 23 February. On the same day the applicant was offered fresh employment starting Thursday 26 February.
- [16] Mr Paddison arrived at Mr Cottle's home on the evening of the same day, 23 February: he gave the applicant a letter disputing his claim for sick leave for the preceding Wednesday and Thursday, required him to resubmit his time sheet, said the van had not been returned to its original condition and stock was missing. Mr Cottle said he felt shocked and threatened by his employer's stance and the implication Court action would follow.

### **Applicant's Position Summarised**

- [17] Mr Cottle says he is still upset by the way Mr Paddison treated him: he claims he was threatened with Court action, was not warned he might lose his job and was not informed what the purpose of the Tuesday meeting was about, otherwise he would have obtained representation.
- [18] Mr Cottle says he was unfairly selected for redundancy when it should have been more recently employed workers or another employee who could have retired.
- [19] Since filing his witness statement Mr Cottle has become unemployed.

## The Company's Position Summarised

- [20] The Company and its witnesses say that, because of the abrupt down turn in business, not only was there a reduction to a four-day working week but the possibility of redundancies were mentioned at three staff meetings (including 12 January and 5 February 2009) and by way of two 1 on 1 meetings; Mr Cottle may have been the first to be made redundant but others (three) have also been let go or their status has changed from permanent employee to casual (one). Alternatives to redundancy were explored including measures to increase business activity.
- [21] Mr Paddison met with 6 staff including the applicant on 16 February, when Mr Cottle was given the letter dated 15 February (doc 5 in the applicant's bundle). Mr Paddison met with the applicant the following day, as well as with other affected staff, so as to discuss the circumstances of the business and get any feedback from them: Mr Paddison reported that, while he would consider all of the information overnight, the most likely outcome was redundancies.
- [22] Because of Mr Cottle's ill health from his admitted excessive drinking the night before, Mr Paddison was unable to meet with him as agreed on Wednesday 18 February: he therefore visited the applicant at his home and presented him with a letter giving one week's notice of redundancy (doc 6, above): Mr Paddison said Mr Cottle could work out that notice whereas the applicant advised he had another job.
- [23] Mr Paddison denies ever saying that Mr Cottle had been chosen for redundancy because his wife was employed. Mr Paddison similarly denies threatening the applicant with Court action, accusing him of falsifying his timesheet, or theft of van stock, or stating he had abandoned his employment: the Company did ask for accurate time records and did refer to its verbal agreement with the applicant that he reinstate the van to its original condition.
- [24] Mr Cottle was made redundant for genuine, substantive reasons and a fair process was followed: he chose not to work out his notice period.

- [25] Mr Paddison claims the costs of representation and time away from business and believes the Company should be compensated, in particular for stock having been taken and for reinstatement of the van shelving.

### **Discussion and Findings**

- [26] Clauses 11 & 13 of Mr Cottle's individual employment agreement (doc 3, above) effectively provide for one week's notice in the event of redundancy.
- [27] As is made clear in the evidence of other witnesses including those made redundant, and as is also accepted by Mr Cottle, early in 2009 the Company initiated discussion with staff at several meetings about trading difficulties and the possibility of lay offs or redundancies, as well as a reduced working week. For reasons which I set out below (par 29), I prefer Mr Paddison's evidence that he also initiated one-on-one meetings with Mr Cottle about the same concerns, a claim the applicant denies.
- [28] The Company's uncontested evidence is that these communications were initiated because work fell off abruptly between the end of 2008 and the commencement of 2009.
- [29] In reply to my question, Mr Cottle confirmed he understood the Company was looking at redundancies but he, the applicant, *"fobbed it off"* as he expected a *"last on/first off"* policy would be applied by the respondent and *"I didn't think I'd be affected"* and *"I thought my position would be safe"*. Mr Cottle added that he *"could have fallen over backwards"* when he was advised by Mr Paddison the Company was making him redundant. In other words, I find that the issue of his possible redundancy was communicated to Mr Cottle, including in the context of one on one meetings, but he did not pay close attention as he expected to be unaffected.
- [30] I am satisfied from this evidence that the Company properly consulted with Mr Cottle and other staff about the sudden business down turn and its implications for them, that it invited comment and suitable responses (including a shorter working week) but that, for genuine commercial reasons, found it necessary to go further, at short notice, and make staff redundant.

- [31] Why was Mr Cottle selected? Mr Paddison's evidence is that he selected building staff including the applicant on the basis of their work horizons (my term): in other words, objectively measured, those with the least work set down in the immediate future were let go first. The logic of that approach is self evident. Mr Cottle's employment agreement does not include a 'last on/first off' redundancy criteria and there is no evidence of it being Company policy.
- [32] Mr Cottle claims Mr Paddison told him he was being let go of because his wife was in paid employment: Mr Paddison denies that was the basis of his decision but agrees discussion about staff circumstances covered many factors including whether their partners were in paid work.
- [33] It is apparent the selection policy was not made clear to Mr Cottle at the time it was formulated by Mr Paddison and applied to the applicant. There is no evidence of urgency such that the Company was unable to undertake that level of consultation. Rather, any failure can be attributed instead to the small nature of the business and Mr Paddison's lack of appreciation of his good employer obligations in that regard. In fairness to him, it should also be noted that Mr Paddison's efforts to communicate the situation to the workforce and look at all alternatives was extensive, imaginative, genuine and relatively prolonged, and that Mr Cottle was not paying close attention as he believed he would be unaffected.
- [34] Section 103A of the Employment Relations Act 2000 requires the Authority to consider, on an objective basis, whether the decisions made by the employer were what a fair and reasonable employer would have done in all the circumstances at the relevant time.
- [35] In this instance I am satisfied the Company's actions arose out of genuine reasons. But, while forewarning Mr Cottle of the real possibility of redundancy and in implementing the same, the respondent did not put to the applicant its intended selection criteria. It thereby failed to provide Mr Cottle with an opportunity to comment (whereas it was not necessary to obtain his agreement).
- [36] However, consistent with the facts of this termination and relevant case law (see *Coutts Cars Ltd v Baguley* [2001] ERNZ 660; *Simpsons Farms v*

*Aberhart* [2006] 1 ERNZ 825, par 52; etc) and because I am satisfied that it is unlikely consultation on this point would have changed the outcome, I am not persuaded that this failure amounted to an unjustified disadvantage.

[37] I repeat again what is set out above: consistent with the facts of this case, s103A of the Act and relevant case law there are no grounds to fault the respondent's substantive decision to make a number of its workforce redundant, including Mr Cottle, or the way it went about implementing that decision.

[38] I make the observation here that Mr Cottle's evident distress related not to a failure of his employer to consult regarding the criteria resulting in his redundancy but to his selection: the applicant was strongly of the view he was of greater value to the Company and that others should have been let go of first, for reasons such as retirement and lesser skills.

[39] No evidence was provided to substantiate any claims against Mr Cottle regarding alleged missing stock. There was similarly no evidence substantiating the claim he had been threatened in any way by Mr Paddison.

### **Determination**

[40] Mr Cottle's grievance does not succeed.

[41] As requested, costs are reserved. In this instance a portion of Mr Cottle's claim was settled by agreement during the investigation, i.e. his claim for unpaid wages. To that extent the applicant succeeded with his claim. The investigation took half a day. Subject to submission, there appears no reason why costs should not follow the event. As advised during the investigation, costs awards by the Authority for half day investigations typically do not exceed \$1,500.

**Denis Asher**

**Member of the Employment Relations Authority**