

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 313/09  
5154578

BETWEEN                      BRYAN DAVIES  
   Applicant

AND                              RINKE DESIGN LIMITED  
   Respondent

Member of Authority:      R A Monaghan

Representatives:            B Davies, in person for applicant  
   P Rinke-Mailman, advocate for respondent

Investigation Meeting:     17 July 2009

Additional information      30 and 31 July, 5 August 2009  
received:

Submissions received:     5 August 2009

Determination:              1 September 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     Bryan Davies says his former employer, Rinke Design Limited (“RDL”) dismissed him unjustifiably on the ground of redundancy. He says the redundancy was imposed in an attempt to avoid paying commissions to which he would have been entitled, and as a reaction to concerns he had raised regarding late payments of wages.

[2]     RDL says its financial circumstances meant the future of its business was in jeopardy. The redundancy was genuine and imposed for that reason.

**The background to the redundancy**

[3]     RDL is in business as a furniture retailer. It employed Mr Davies as its Auckland Commercial Sales Manager – Healthcare, commencing in September 2008.

Mr Davies' duties included sales duties in the company's retail outlet in Auckland, as well as raising the company profile and making sales of specialist furniture to the healthcare sector. RDL also employed a part time showroom sales manager and a part time showroom sales consultant, and its directors, Paul and Simone Rinke-Mailman, worked in the business.

[4] The parties had a written employment agreement which included remuneration comprising a base salary and commission, expressed to continue for the balance of 2008 and to be reviewed in January 2009.

[5] In December 2008 there was a further agreement that Mr Davies be paid 4.5% commission on sales of the 'Perfect Chair' and accessories sold from the Auckland showroom, commissions in respect of other sales not directly relevant here, \$200 per 'Perfect Chair' sold through the dealer network, and a one-off payment for achieving a sublease of part of the company's showroom premises.

#### 1. Commissions Mr Davies says he would have received

[6] Mr Davies says the redundancy was imposed in an attempt to avoid any obligation to pay him commission in respect of:

- a. the possible sublease of the showroom premises;
- b. sales of the 'Perfect Chair' through a dealership in Hamilton; and
- c. sales of the 'Perfect Chair' through a dealership in the South Island.

#### (a) The sub-lease

[7] RDL had space available to sublease in its showroom premises. Mr Davies identified a possible subtenant in the form of a home theatre and full home automation company referred to as AV Expressions. He said that in November and December 2008, he 'negotiated with AV Expressions and Paul Rinke-Mailman and managed to broker an acceptable arrangement between both parties.'

[8] It was common ground that Mr Davies, under the authority of Mr Rinke-Mailman, embarked on a series of negotiations during the period and agreement was

reached on some points. However Mr Rinke-Mailman said no acceptable arrangement was finalised. Critical reasons why final agreement could not be reached included: the location and area of the floorspace sought by AV Expressions would have impeded RDL's ability to move its stock in and out of its floor space as well as impeding access to bathroom facilities; and AV Expressions could not provide any business plans, accounts or business structures. This was a concern if it was purporting to enter into a lease for three years with a right of renewal. Finally, Mr Rinke-Mailman sought a payment of rent in advance, which was refused.

[9] Mr Davies was not present when Mr Rinke-Mailman discussed these issues with AV Expressions. However I am satisfied there were discussions and exchanges about them, and they amounted to genuine reasons for not pursuing a sublease with that entity. Mr Rinke-Mailman was not obliged to commit RDL to a possibly risky arrangement that might have benefits in the short term, without giving due consideration to the long term implications for both parties. Mr Davies may disagree with it, but Mr Rinke-Mailman was entitled to make the decision he did.

(b) The 'Perfect Chair' dealership in Hamilton

[10] It was common ground that a company in Hamilton agreed to become the 'Perfect Chair' dealer in Hamilton and the Waikato area.

[11] Mr Davies believes this arrangement would have produced significant sales and said Mr Rinke-Mailman should have given it a 'chance' before imposing the redundancy. In turn he says the decision to make him redundant was an attempt to avoid paying him the resulting commission.

[12] Mr Rinke-Mailman was not obliged to continue to incur the cost of employing Mr Davies against the possibility of future sales, if RDL's immediate future was in jeopardy. Had he chosen to do so, not only would the company have been in greater jeopardy, but without the hoped-for cashflow Mr Davies would have been at risk of more late payments or no payments of his wages when they were due. I do not accept that Mr Rinke-Mailman sought to deprive Mr Davies of access to these commissions.

[13] The risk to which the parties might have been exposed had a different decision been made is illustrated in that, in June 2009, the Hamilton company returned the chairs saying they did not suit its demographic. This would suggest that Mr Davies' apparently high hopes of substantial sales, and substantial commission, would not have been realised in respect of the Hamilton company.

(c) The 'Perfect Chair' dealership in the South Island

[14] It was common ground that approaches were made to a company in the South Island, but Mr Rinke-Mailman denied that any dealership agreement was completed. Although there were discussions about the purchase of a container load of 'Perfect Chairs', Mr Rinke-Mailman believed their purpose was more to ascertain a bottom line price from him than to purchase such a large quantity of chairs.

[15] Mr Davies believed that the prospect of such a large purchase was real and genuine. The result is that again he does not accept that RDL was in financial jeopardy and believes its actions were taken in order to avoid paying commission to him.

[16] A number of chairs were sold to the South Island company in the meantime, and Mr Davies received commission in respect of those sales. It would appear, too, that a business relationship continued between RDL and the South Island company, but that is consistent with the fact that RDL continued to trade and was working hard to improve its position. Again, however, hindsight shows that Mr Rinke-Mailman was correct not to rely on the sale of as much as a container load of chairs, because no sale in that volume eventuated.

[17] I do not accept that Mr Rinke-Mailman acted with the intention of avoiding an obligation to pay commission to Mr Davies in respect of this dealership.

2. The financial position of the business

[18] Mr Davies does not agree that RDL's financial position was precarious. He pointed to the above activities and to other commercial leads Mr Rinke-Mailman was following, as well as certain expenses he believed were extravagant. Again,

however, the mere fact that the company was continuing to trade is not in itself evidence of the state of its financial health.

[19] Mr Rinke-Mailman provided a profit and loss statement for RDL for October – December 2008, information about arrangements with suppliers, information about an arrangement with RDL's landlord, and information about discussions with its bank as well as a recent bank statement. I accept that RDL's financial position was precarious when in December 2008 Mr and Mrs Rinke-Mailman turned their minds to the possibility of redundancies. They did so for genuine reasons.

### 3. Late salary payments

[20] There were some four occasions when Mr Davies' salary was paid late. Mr Davies says he was not told why the payments were late, while Mr Rinke-Mailman says that is not the case. There were times when RDL did not have money in its account to make payments to Mr Davies or any of the staff. Mr Rinke-Mailman says the explanation was given at the time, but Mr Davies did not accept it.

[21] Indeed Mr Davies asserted in evidence that the expenditure he observed, and the decision to turn down the 'lucrative' sublease with AV Expressions, led him to believe there were other reasons for the withholding of his wages. I consider it likely that his mind was focussed on what appeared to him on the surface to be a flourishing business and his disagreement with some management decisions, while being closed to the indicators that the financial position may not necessarily be healthy.

### 4. Implementing the redundancy

[22] Mr Rinke-Mailman said although the decision to make staff redundant was made in December 2008, the announcement was delayed until after Christmas.

[23] The staff took a Christmas-New Year break, and were to return later in January or early February. The part time employees were given notice of their redundancies on their return to work.

[24] Mr Davies worked in the first week of January, then had a week's leave. He was to return to work on 19 January 2009, but became ill and did not attend. He sent an emailed message advising of his illness, which was not received.

[25] The message also referred to payment of wages due in respect of the week 5-12 January 2009, expected on 15 January 2009. Mr Davies raised a concern about the failure to make the payment. There had already been exchanges between the parties earlier in January about payments of commission due in January. Unfortunately at or about the same time Mr Rinke-Mailman raised a concern with Mr Davies about his performance and presentation in the showroom, which created further tension. This accumulation of events led Mr Davies to believe his stance on payment was also a reason for the termination of his employment.

[26] After the reason for Mr Davies' absence on 19 January was clarified later that day, Mr Rinke-Mailman decided to proceed with the implementation of Mr Davies' redundancy and advise him of it as soon as possible. In an emailed message dated on the evening of 19 January he advised Mr Davies of the redundancy, saying the reason was the need to cut costs following the 'terrible downturn in the market'. He advised Mr Davies that he would receive 4 weeks' notice of termination, but was not required to report for work.

[27] Mr Davies said he was crushed and very angry when he received the message. He expressed concern that the matter had not been discussed with him. He said that, had there been a discussion which satisfied him of the company's true financial position, he would have been prepared to go onto a commission-only arrangement in the interests of keeping his job. However that was because among other things he was expecting the South Island dealer to purchase a container-load of chairs, yielding significant commission. As already set out, no such arrangement was entered into.

[28] For his part, Mr Rinke-Mailman did not consider offering a commission-only arrangement because the parties had discussed that method of payment at the commencement of Mr Davies' employment. Mr Davies had indicated commission-only payment was not convenient, and given his reasons. The nature of the reasons, and the state of RDL's finances, was such that Mr Rinke-Mailman did not expect any change in Mr Davies' view.

[29] There followed a rapid deterioration in the parties' relationship, which became very acrimonious. Neither party behaved sensibly, both were angry and both engaged in unnecessary exchanges.

### **Whether the redundancy was a justified dismissal**

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

[31] From the background as I have set it out, I find that Mr Davies' redundancy was imposed for genuine reasons. It was motivated by RDL's financial position, not by the other factors Mr Davies has raised.

[32] Regarding the fairness of the implementation, the redundancy was advised by email and without prior discussion or consultation. The law applicable to those circumstances is set out in the decision of the Employment Court in **Simpsons Farms Limited v Aberhart**<sup>1</sup>. 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.”<sup>2</sup>

[33] Mr Rinke-Mailman did not meet the requirements of s 4(1A).

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<sup>1</sup> [2006] ERNZ 825

<sup>2</sup> P 842

[34] For that reason I found that the dismissal was unjustified.

## **Remedies**

### 1. Remedies under the personal grievance provisions in the Act

[35] Mr Davies seeks the reimbursement of three months' remuneration, compensation for the loss of commission payments in the sum of \$30,000, and compensation for injury to feelings in the sum of \$20,000.

[36] I have accepted that the redundancy was imposed for genuine reasons. Accordingly I consider it likely that the redundancy would have been imposed even if Mr Rinke-Mailman had observed the obligations in s 4(1A) of the Act. I consider it unlikely that Mr Rinke-Mailman would have been able to persuade Mr Davies of the true state of the company, not least because Mr Davies remains unconvinced of the matter.

[37] Mr Davies' grievance as established concerns the failure to provide him with information and an opportunity to comment on it. His loss of remuneration flows from something else, namely a genuine redundancy situation. For that reason there will be no award of lost remuneration.

[38] Secondly, Mr Davies would not have become entitled to the commission payments he claims. There will be no order for the payment of \$30,000 which was sought.

[39] Thirdly, Mr Davies is entitled to compensation for the injury to feelings resulting from his personal grievance. Again, however, the grievance arises out of the failure to provide information and an opportunity to comment. That matter must be the basis for any compensation, rather than any wider injury associated with the loss of his job.

[40] In setting an appropriate amount it is difficult to separate the injury to Mr Davies' feelings about the loss of his job from the injury associated with the way in

which the job was lost. Similarly, some of the injury concerns his anger because of his view that Mr Rinke-Mailman was seeking to avoid paying commissions to him, when Mr Rinke-Mailman was not so motivated.

[41] RDL is therefore ordered to compensate Mr Davies for injury to his feelings in the sum of \$4,000.

## 2. The claim for a penalty under s 135 of the Act

[42] Mr Davies seeks the payment to him of a penalty either in respect of the lack of genuineness of the redundancy, or because of the way in which notice of termination was provided to him.

[43] Both of these grounds are directly concerned with the justification for the termination of his employment and have been addressed in that context. To impose any further penalty would duplicate the remedy already available to him.

[44] Accordingly there will be no order for the payment of a penalty.

### **Costs**

[45] Costs are reserved.

[46] The parties are invited to resolve the matter themselves. If they are unable to do so any party seeking an order for 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 a further 14 days in which to file and serve a response.

R A Monaghan

Member of the Employment Relations Authority