

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Michael Diamond (Applicant)
AND Capital Communications Limited (Respondent)
REPRESENTATIVES Gail Irwin for Applicant
Maree Kirk for Respondent
MEMBER OF AUTHORITY G J Wood
INVESTIGATION 25 May 2005
MEETING
DATE OF 30 May 2005
DETERMINATION

DETERMINATION OF THE AUTHORITY

Introduction

1. The applicant, Mr Michael Diamond, claims that his dismissal by the respondent, Capital Communications Limited (“Capital Communications”), was unjustified in two respects. First, he claims that his redundancy was not genuine. Second, he claims that the process adopted by Capital Communications in making him redundant was unfair.

The Facts

2. Capital Communications is a company registered on 5 December 1994 whose sole shareholder and director is Mr Tony Philp-Wright. It operates as a two-way radio communications business from its base in Ngauranga Gorge and currently has four full time staff.
3. Emergency Vehicle Systems Limited (“EVS”) is a company registered on 22 August 2002 whose registered directors are Mr Philp-Wright and his son, who own equal shares in the company. EVS specialises in automotive warning lights, sirens and electrics utilising Federal Signal equipment.

4. Mr Steve Barber was recruited by EVS from England in 2003, because of his expertise with Federal Signal equipment, to act as its Service Manager from February 2004. Dealings with NZ Immigration showed that although some documentation referred to Capital Communications Mr Barber was required to work for EVS. Since February 2005, he has been the Managing Director of EVS with a 10% shareholding, although this is not yet reflected in Companies Office documentation. Since that time also, Capital Communications has contracted out its service department work to EVS. That service work done on contract is only a small part of the business of EVS.
5. Mr Diamond was employed by Capital Communications as its Service Manager on 23 May 2003. That position came available due to an internal promotion. At that time Capital Communications employed nine staff. The Service Department consisted of Mr Diamond and two technicians.
6. Throughout the term of his employment, Mr Diamond was repeatedly told about the need for Capital Communications to increase sales and for the Service Department to pay its own way. He was made aware that this was because of a declining market for Capital Communications' products, which were based on Motorola equipment, as cheaper radios and cellular based technology were reducing Motorola's market share.
7. Mr Diamond was therefore aware throughout his employment of the poor financial position of Capital Communications. No specific mention of the possibility of Mr Diamond's job being made redundant, however, was made until March 2004. By that time it was clear that the Service Department's external revenues had only passed the break even point in one month in the last twelve and that Capital Communications' cash position was not strong. Mr Philp-Wright and his Sales Manager, Mr Christopher Jackson, were aware that many other companies in their place had contracted out their service departments and concentrated on the sales function.
8. Mr Philp-Wright accordingly prepared a memorandum on a proposed company restructure, which looked at blending in the Service Department with that of EVS. It was implicit in this that EVS would take over the work currently done by the Service Department. The proposed restructure noted that a number of changes would need to

be considered, including, most importantly, the impact on staff including redeployment, upskilling and the number of staff required.

9. The specific restructuring proposal was first raised in a regular weekly company meeting held on 25 March 2004. I find that Mr Diamond left this meeting early and therefore the matter was not discussed in his presence. However, I accept the evidence of Mr Philp-Wright that the memo was subsequently made available to all staff, including Mr Diamond. I so find on the basis of Mr Philp-Wright's, Mr Jackson's and Mr Barber's evidence that they had all seen the memo and Mr Philp-Wright's and Mr Jackson's evidence that they had discussed the implications of the memo with Mr Diamond directly, as against his denials.
10. There can be no certainty in matters of credibility such as this. The Authority must simply determine the matter on what is more likely to have happened than not. Given acceptance of the ongoing uncertainties as a result of the poor financial position of the company, the accepted prior discussions about the viability of the Service Department, the consistent evidence of Messrs Philp-Wright, Jackson and Barber, Mr Diamond's current fragile state of health and therefore the greater likelihood of his evidence being mistaken, and the relatively unlikely possibility that Capital Communications' witnesses would perjure themselves and create false documentation to support its case, I find that Mr Diamond is mistaken in his evidence that he did not receive the memorandum and that he was not party to any discussions about his role specifically being made redundant.
11. On 6 April 2004 Mr Philp-Wright and Mr Jackson met with Mr Diamond. Mr Diamond was told that major savings were required by Capital Communications and that jobs would be lost. Mr Diamond's suggestion was to hire another service technician, which was rejected as being contrary to the requirements of Capital Communications to reduce costs.
12. Mr Philp-Wright was conscious of trying to find alternative opportunities for Mr Diamond. Soon after 19 April he therefore suggested that Mr Diamond could lead an initiative to sell a new point-to-point multi-data wireless technology known as Canopy, on behalf of Motorola. Mr Diamond expressed an interest in doing that work,

but never took any initiative in that regard. It is important here to note that Mr Diamond, by his own admission, was dissatisfied with his job at Capital Communications, at least by this point, and had a number of issues about it, which meant that he was looking for other jobs and was in fact later happy to leave.

13. Mr Diamond and Mr Philp-Wright discussed the matter further with Mr Diamond on 24 May. By that time Capital Communications' bank balance had become seriously in the red and Mr Philp-Wright had received accounting advice that large savings had to be made very quickly. Mr Philp-Wright again told Mr Diamond that redundancy was in prospect. Mr Diamond responded that he accepted that redundancy of his position was an option. Mr Philp-Wright indicated that Mr Diamond ought to consider getting independent advice over the matter.
14. At the end of that week, Mr Philp-Wright approached Mr Diamond again over what had been happening with Canopy, as he wanted to avoid making Mr Diamond redundant if that was at all possible, but was told again that no progress had been made.
15. Over the weekend, Mr Philp-Wright determined that due to Mr Diamond's apparent ambivalence over the potential of taking on the Canopy job, his lack of work on that initiative and the pressing needs of Motorola, Mr Diamond could no longer be considered for such a position. He also considered that, to meet his accountant's requirements, Mr Diamond's position had to be made redundant in order to make the savings needed.
16. Mr Philp-Wright met with Mr Diamond on 1 June and asked him if redundancy was still a possibility for him. Mr Diamond agreed with that. They then discussed the two options identified in a letter Mr Philip Wright had prepared giving Mr Diamond notice. I accept that this letter was mistakenly dated the next day. The two options were that Mr Diamond, in line with his contract, could be paid in lieu or could work out his notice.
17. Mr Diamond was relieved to be told that he was being made redundant and in fact at that time was happy to go, as he confirmed in evidence. He opted for working out his notice.

18. The letter, which was given to Mr Diamond at the end of that meeting, mistakenly gave him only four weeks' notice instead of one month. Accordingly it was agreed between the parties at the commencement of the investigation meeting that \$351.51 gross was still owing to Mr Diamond and that Capital Communications would pay it to Mr Diamond within the next fortnight.
19. As stated above, Mr Diamond was happy with the redundancy at the time. He was, however, subsequently told by an acquaintance that the procedure adopted by Capital Communications, as explained by Mr Diamond, was in breach of employment law. He therefore brought a personal grievance, claiming an unjustified dismissal based on unfair procedure. He also later challenged the genuineness of the redundancy because he found out that the work of the Service Department was contracted out to EVS. He saw Mr Barber as in effect being hired to replace him, although as I have indicated above, I find on the balance of probabilities that this is not correct.

Genuineness of the redundancy

20. As can be seen from the above, I am satisfied on the balance of probabilities with Capital Communications' evidence that the redundancy was genuine. There was insufficient evidence for me to conclude that EVS was in effect part of Capital Communications. While some of the dealings with Immigration did not appear to show this, other material, including in particular Mr Barber's work permit, did show that he was restricted to working for EVS. Furthermore, I accept that the nature of Mr Barber's employment is not the same as Mr Diamond's previous employment.

Redundancy process

21. The key issue in this context is that a just employer will implement a redundancy in a fair and sensitive way. This may well extend to a requirement for consultation. In this case, Mr Diamond was made aware over a long period of the difficult financial position Capital Communications faced; he was given a written proposal which canvassed the potential for his position to be made redundant and it was discussed directly with him on two occasions at least; and Capital Communications tried to assist him by redeploying him into a job involving work on Canopy but Mr Diamond was

ambivalent about this and therefore it was reasonable for Capital Communications to decide that he was not interested in this job.

22. There were no issues relating to selection criteria, because only Mr Diamond's position was being made redundant. Furthermore, the requirement in the employment agreement for consultation with respect to sustaining hours of work is not relevant as that was not in issue here. Rather the issue was that Mr Diamond's entire position was to be made redundant. The redundancy clause therefore is the one of more relevance, as the reduction of hours was to be a reduction to no hours at all. Sufficient savings would not have been made if Mr Diamond's hours had been reduced to some lesser hours than forty per week.
23. Finally, I am satisfied that Mr Philp-Wright approached the matter in a fair and sensitive manner, apart from paying Mr Diamond insufficient notice, which has been remedied. I therefore dismiss Mr Diamond's claims before the Authority.

Costs

24. Costs are reserved.

G J Wood
Member of Employment Relations Authority