

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 237/10
5297251**

BETWEEN PETRUS ANDRIES DREYER
 Applicant

AND AUCKLAND CITY COUNCIL
 Respondent

Member of Authority: Leon Robinson

Representatives: Eska Hartdegen, Counsel for Applicant
 David Hood, Counsel for Respondent

Investigation Meeting: 13 April 2010

Submissions Received: 20 April 2010
 23 April 2010

Determination: 21 May 2010

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Mr Petrus Dreyer (“Mr Dreyer”) claims his dismissal for redundancy is unjustifiable. He claims reimbursement, compensation, redundancy compensation and penalties. The respondent Auckland City Council (“the Council”) denies the claim. The parties were unable to resolve the differences between them by mediation.

The facts

[2] Mr Dreyer was employed by the Council as an estimator in the city parks division. He commenced that employment in November 2008. The terms of the employment were recorded in a written individual employment agreement (“the IEA”). He reported to group manager Mr Johan Swanepoel (“Mr Swanepoel”).

[3] Mr Swanepoel became concerned that there were insufficient large tender work to sustain Mr Dreyer’s continued employment and in August 2009 he began formulating a proposal to disestablish the estimator position.

[4] On 19 November 2009 Mr Swanepoel met with Mr Dreyer and provided him with a letter of the same date about the proposed disestablishment of Mr Dreyer's position. The letter incorrectly referred to previous discussions with Mr Dreyer. It set out the main reasons for the proposal and invited Mr Dreyer's feedback by 4 December 2009. It advised a decision would be made on 11 December 2009.

[5] On 3 December 2009 Mr Dreyer made application for other positions with the Council.

[6] On 4 December 2009 Mr Dreyer asked that the time for his feedback be extended by two or more weeks. Mr Swanepoel agreed and invited the feedback by 18 December 2009.

[7] On 18 December 2009 Mr Dreyer and his lawyer met with Mr Swanepoel. Mr Dreyer provided a letter setting out his feedback in relation to the proposal and also put forward a proposal of how his redundancy could proceed. He desired compensation, garden leave, notice and a waiver of the Council's policy of a one year stand-down period from re-employment. Mr Swanepoel said he would take advice from the Council's human resources department.

[8] Having heard Mr Dreyer's feedback Mr Swanepoel decided to proceed to disestablish Mr Dreyer's employment.

[9] On or about 21 December 2009 Mr Swanepoel told Mr Dreyer he agreed to the period of garden leave Mr Dreyer had requested.

[10] Mr Swanepoel wrote to Mr Dreyer by letter dated 24 December 2009. He confirmed the decision to disestablish Mr Dreyer's employment effective 26 February 2010. The letter confirmed that if Mr Dreyer accepted an alternative position with the Council the redundancy notice would be withdrawn but may instead receive partial compensation if the new role was lesser paid.

[11] On 13 January 2010 Mr Dreyer was offered a new role as CCC building assessor in Auckland City Environments. He accepted that one year fixed-term employment on 21 January 2010. The employment was fixed-term until 29 October 2010.

[12] On 28 January 2010 Mr Arun Kumar human resources advisor (“Mr Kumar”) emailed Mr Dreyer advising two options. Firstly, that if he accepted redundancy compensation he would not be eligible for re-employment for one year and the relevant general manager could approve extensions to that policy. Secondly, he could take partial compensation and an alternative position.

[13] By email 29 January 2010 Mr Dreyer wrote to Mr Kumar accepting the second option, i.e. the alternative fixed-term role and partial compensation.

[14] Mr Swanepoel wrote to Mr Dreyer by letter dated 29 January 2010. The letter stated:-

Having accepted the position of Assessor in the Auckland City Environments (ACE) group, please find below details of a one off lump sum payment to compensate your placement at a remuneration rate lower than that you currently receive, but still having employment at the Council.

The merits

[15] It is for the Council to justify its decision to terminate Mr Dreyer’s role. The test of justification is set out at section 103A of the Employment Relations Act 2000. The Council says the dismissal for redundancy meets the test of justification.

[16] Mr Dreyer acknowledged that there was a lack of tender work in his feedback to the proposal. I find the decision made to disestablish Mr Dreyer’s position was commercially genuine. I find it was not motivated by other reasons because I am not persuaded by Mr Dreyer’s evidence of comments by others to either marginalise him at work or that he be “retrenched”.

[17] I also accept that the proposal was explained to Mr Dreyer on 19 December 2009. Mr Dreyer was invited to comment and give feedback on the proposal. His request for further time was granted. Mr Dreyer in fact did give his feedback and I note he did not challenge the rationale underlying the proposal. Mr Dreyer attended a meeting with his representative to discuss the proposal. I accept that Mr Swanepoel did in fact consider Mr Dreyer’s feedback before he made a final decision. The Council agreed to a period of garden leave as Mr Dreyer had requested.

[18] I accept that Mr Dreyer had been applying for other positions within the Council and this was known. I also accept Mr Swanepoel’s evidence that he made enquiries

of the Council Career Centre in relation to Mr Dreyer. In that context, I find the Council did explore redeployment options for Mr Dreyer in addition to what was already known about Mr Dreyer's own efforts.

[19] Clause 11.5 of the IEA obliged the Council to pay Mr Dreyer redundancy compensation where his employment was terminated during the term of the IEA. When Mr Dreyer accepted the position of assessor, his employment with the Council continued and was not brought to an end. Mr Dreyer was advised of his options. On the basis of the IEA, the Council was not obliged to pay compensation to Mr Dreyer. Even though Mr Dreyer accepted a fixed-term employment which he knew would end on 29 October 2010, he must be taken to have known that his employment with Council was not terminated and there was to be no entitlement to redundancy compensation. This situation was expressly drawn to his attention in writing. Mr Dreyer was aware that he would not be paid compensation in the event he accepted other employment within the Council, whether it was indefinite or not.

The determination

[20] I find that at the time the decision was taken and in all the circumstances the Auckland City Council's decision to terminate Mr Dreyer's employment for redundancy and how it acted were what a fair and reasonable employer would have done. I find that Mr Dreyer does not have a personal grievance. There is no case for compensation or penalties and there will be no formal orders.

The costs

[21] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Hood is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Ms Hartdegen is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination.

Leon Robinson
Member of Employment Relations Authority