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Ede v Gun City Limited [2011] NZERA 362; [2011] NZERA Christchurch 78 (2 June 2011)

Last Updated: 22 June 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2011] NZERA Christchurch 78
5312681

BETWEEN BARRY EDE

Applicant

AND GUN CITY LIMITED

Respondent

Member of Authority: Representatives:

Investigation Meeting: Determination:

Philip Cheyne

David Beck, Counsel for Applicant Penny Shaw, Counsel for Respondent

17 May 2011 at Christchurch

2 June 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Barry Ede worked for Gun City Limited in Christchurch in various capacities from about 2006 until his employment was terminated in May 2010. In his statement of problem Mr Ede says that he was *unjustifiably disadvantaged or dismissed in a procedurally and substantively unfair manner due to the manner in which his employer declared his position to be redundant*. There is also a complaint about the lack of consultation *leading up to the disestablishment of [Mr Ede's] position*, in breach of [s.4\(1A\)](#) of the [Employment Relations Act 2000](#).

[2] Near the end of the investigation meeting, while taking the Authority through prepared submissions, counsel for Mr Ede submitted that Mr Ede was actually dismissed because of his inflexibility about working weekends (or for some other undeclared reason) and that the redundancy was no more than a sham. As will be explained there is no merit in that submission.

[3] David Tipple is the company's managing director. The case for Gun City is that Mr Tipple disestablished Mr Ede's position as superfluous to the employer's needs after consultation with him.

[4] There are several factual disputes, most notably about what happened between Mr Ede and Mr Tipple on the one occasion when there was discussion between them about the disestablishment of the position and the termination of the employment. I will set out some background before turning to what happened in that discussion which took place on 13 May 2010.

Mr Ede's position

[5] Mr Ede was first employed as a goods or stores person, then as a salesman and finally as Floor Manager. By the time of the

dismissal Mr Ede was working four days per week for a total of 35-38 hours. He generally did not work Fridays or weekends.

[6] It is common ground that Mr Ede and Mr Tipple had a high regard for one another. In particular Mr Tipple considered that Mr Ede was a very good salesman and his high regard for Mr Ede's abilities and work ethic prompted the decision to offer Mr Ede the role as Floor Manager and encourage him to accept it.

[7] There is a written employment agreement entered into when Mr Ede was employed as a salesman. Both parties accept that it remained applicable subject to orally agreed variations as to pay, hours, position and duties. When Mr Ede took over the role of Floor Manager he was responsible for 4 relatively inexperienced sales staff and two others who worked after school. He also worked as a salesman. Mr Tipple's evidence, which I accept, is that sales targets for Mr Ede were set on the basis that 20 hours of his time were taken up with supervisory duties rather than sales work. Mr Ede's evidence is that he never knew this until the day of his dismissal. There is no reason to doubt that evidence but it does not detract from Mr Tipple's evidence.

[8] Mr Ede's evidence is that his supervisory role took 10% of his time, sales took 30% and keeping the gun racks up to date took the remaining 60%. Mr Tipple accepted this as accurate in respect of the latter part of Mr Ede's time as Floor Manager. I accept Mr Tipple's evidence on this point. It reflects the central point in the company's reasoning for disestablishing the Floor Manager's position that over time as the sales staff became more experienced less supervisory work was required. Keeping the gun racks up to date was a major task although it is not necessary for current purposes to expand on the detail of that the work.

[9] Gun City moved from its old Christchurch premises to a much larger suburban Christchurch showroom in November 2009. Arranging the new showroom became a substantial part of Mr Ede's work.

Developing redundancy situation?

[10] Gun City's trade increases in the lead up to the duck shooting season, traditionally the first Saturday in May. April is Gun City's busiest month and Mr Tipple's evidence, which I accept, is that there was a big push to get the displays all sorted out before then. Trade continues for the first few weeks of May and then tails off. June is usually a quiet trading month.

[11] Following the shift to the new showroom, the two after school workers were supervised and directed by one of the administrative staff rather than Mr Ede. Two sales staff left and were replaced in late February and late March 2010 by experienced sales staff.

[12] Mr Tipple's evidence, which I accept, is that in the month before meeting with Mr Ede he consulted two of his sons who also work for and have a financial interest in the business about whether there continued to be a need for Mr Ede's role in light of the completion in setting up the new showroom, the increasing experience of the sales staff, the forthcoming seasonal downturn in trade and the reduced need to tend to the gun racks. I take it that Mr Tipple's sons concurred with the view that Mr Ede was no longer required. What Mr Tipple did not do is say anything to Mr Ede.

[13] There was a second discussion between Mr Tipple and his sons on 13 May 2010 shortly before Mr Tipple met with Mr Ede. I should also note that Mr Tipple sought and received a copy of the relevant part of Mr Ede's employment agreement.

[14] Mr Tipple told me that none of the discussions with his sons were documented. There is no reason to doubt that evidence or that the discussions mentioned actually occurred.

13 May 2010

[15] There is usually a staff meeting after the shop closes on a Thursday. Shortly before then, Mr Tipple saw Mr Ede coming up the stairs and asked him to meet with him before the staff meeting. There were only the two men in the office. The evidence of them both is that neither of them took any notes during the discussion or soon afterwards. In addition, Mr Tipple's evidence is that he did not prepare anything in writing beforehand to guide the discussion but relied on his experience in dealing with such situations. Both men agree that the exchange took about 15 minutes.

[16] The company statement in reply, prepared by Mr Tipple, reads *I began the meeting by telling Barry that his position was redundant and asked if he was willing for me to explain it fully and offer some alternatives right there and then. Barry asked to continue with the meeting immediately.* Mr Tipple's evidence is that he began by telling Mr Ede *that we considered that his position was redundant.* In response to questions Mr Tipple said that his carefully chosen opening words were *I believe we're going to make your position redundant.* Nothing turns on that minor difference. Mr Ede's evidence is that Mr Tipple started with *There is no easy way of saying this Barry but I cannot justify paying a floor manager 20 hours per week when there isn't anyone to supervise so we are making the job redundant.*

[17] It is difficult to determine which of the two versions better reflects the exact words used. Both men impressed as reliable witnesses. Neither departed from their prepared statements in any material way when questioned. There is no contemporaneous material to assist and no-one else witnessed the conversation. Neither version is inherently more likely. However, I am inclined to think that Mr Ede might have conflated some subsequent statements with the opening words.

[18] There is next a dispute about what followed the opening words. Mr Tipple's evidence is that he asked Mr Ede if he wanted to discuss it immediately or did he want to get some advice and meet later; to which Mr Ede responded that he wanted to continue. That matches the allegation in the statement in reply. Mr Tipple says that he knew the required process so he did give Mr Ede the chance to seek advice. Mr Ede denies that there was any such exchange. He also says that he would not have turned down the opportunity to seek advice if it had been offered. I am left with a similar difficulty in assessing this evidence although I am inclined to think that someone in Mr Ede's position might accept an opportunity to get some advice. That is especially so for someone who *would have had no inkling of any of this* as was Mr Tipple's evidence.

[19] Mr Tipple's evidence is that he explained that there was no longer a need for the supervisory role for young workers because they had chosen to employ experienced sales staff. Mr Ede says there was no mention of this. However, I do note Mr Ede's evidence about what was said at the beginning of the meeting. It refers to there being no-one left to supervise. Given that, I accept that something of that sort was said by Mr Tipple and it is more likely that it was said after the opening exchange rather than as part of it.

[20] Mr Tipple's evidence is that he then offered Mr Ede a part time sales role that would include weekend work. Later, when questioned, his evidence was that he said *There will be weekend work, casual*. That reflects more closely Mr Ede's evidence that he was offered only weekend work. It is common ground that Mr Ede declined that offer but it is not necessary to resolve the difference over whether or not (or what) reasons were given by him. Mr Tipple then told Mr Ede that there was a sales position going at a competitor's shop and offered him an introduction to the owner. Mr Tipple's evidence is that he knew but not from the competitor about the prospects of a vacancy. It is also common ground that Mr Tipple expressed the view that Mr Ede's skills as a salesman would be welcomed by the competitor. The final point of agreement is that Mr Ede told Mr Tipple he would think about it. Some days later Mr Ede declined the offer of an introduction.

[21] Finally there was an exchange about when Mr Ede would finish up. It is not necessary to unpick exactly what was said except to say that Mr Ede finished work that same day and was paid in lieu of notice. Mr Tipple also offered to provide a reference.

[22] Mr Ede left the office. When he was seen by other staff they asked what was wrong. He told them that he had just been made redundant. None of them had been aware of any redundancy situation. Mr Ede remained at work for the staff meeting. Nothing was said about the redundancy during that meeting.

[23] Later, after requesting it, Mr Ede received a reference from Mr Tipple. It is a positive reference that includes the statement *His position here became redundant and we were sad to let him go*. Mr Ede also received 4 weeks pay in lieu of notice.

Justification

[24] Neither party suggested that the statutory amendment to [s.103A](#) that came into force on 1 April 2011 is relevant and I agree that justification must be assessed in accordance with the pre 1 April 2011 law.

[25] Whether the decision to dismiss Mr Ede was justifiable must be determined on an objective basis by considering whether the employer's actions and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time.

[26] The statutory duty of good faith applies when an employer is making employees redundant: see [s.4\(4\)\(e\)](#). [S.4\(1A\)\(b\)](#) provides that the duty of good faith requires parties to an employment relationship to be active and constructive in establishing and maintaining an employment relationship in which the parties are, amongst other things, responsive and communicative. [S.4\(1A\)\(c\)](#) of the [Employment Relations Act 2000](#) provides that an employer who is proposing to make a decision that is likely to have an adverse effect on the continuation of an employee's employment must give that employee access to relevant information and an opportunity to comment before the decision is made. To summarise, good faith includes the mandatory requirement to consult with the potentially affected employee before the decision is made.

[27] The employment agreement deals with redundancy at clause 36. There is a standard definition which includes the sort of circumstances described above, an exclusion for technical redundancies (not presently relevant) and a requirement to give or pay two weeks notice. In addition the clause says:

In the unlikely event of an Employee's position becoming redundant efforts will first be made to offer the Employee another suitable position with the Employer.

[28] Consultation is a well understood concept in the present context. For example

in *Cammish v Parliamentary Service* [\[1996\] 1 ERNZ 404](#) the Employment Court said:

Consultation is to be a reality, not a charade. The party to be consulted must be told what is proposed and must be given sufficiently precise information to allow a reasonable opportunity to respond. A reasonable time in which to do so must be permitted. The person doing the consulting must keep an open mind and listen to suggestions, consider them properly, and then

(and only then) decide what is to be done. However, consultation is less than negotiation and the assent of the persons consulted is not necessary to the action taken following proper consultation.

[29] Regardless of the dispute about the actual words used at the outset of his meeting with Mr Ede, Mr Tipple delivered the decision that Mr Ede's employment as Floor Manager was at an end. As it was put in the statement in reply, *We were very sad to reach the inevitable conclusion that ...his position had become redundant* and *We felt that the least stressful way of conveying this to Barry was to tell him in his first meeting that his position had become redundant*. I have already referred to other parts of the statement in reply which convey the same sense that Mr Tipple did not have an open mind. What Mr Tipple was doing was more directed to the obligation in the employment agreement concerning the offer of another position. That was a second obligation that only arose *In the unlikely event* of redundancy, not a substitute for the [s.4\(1A\)](#) obligations.

[30] If there had been consultation with Mr Ede, it probably should have commenced soon after Mr Tipple's first discussions with his sons. There should have been some mention of the seasonal trading pattern and the completion of the set up work associated with the new showroom, but there was not. There should have been some discussion about Mr Tipple's plans for covering the rack work should a proposed redundancy proceed, but there was not. There should have been some discussion about Mr Tipple's perception that Mr Ede filled up his time looking after the racks and vacuuming, but there was not. There should have been open consideration about whether Mr Ede's role could be modified so as to avoid redundancy, but there was not. In short, Gun City Limited breached its obligations under [s.4\(1A\)](#) of the [Employment Relations Act 2000](#).

[31] A fair and reasonable employer would not have breached its statutory obligations. It follows that Mr Ede was unjustifiably dismissed and he has a personal grievance against his former employer.

Remedies

[32] For Gun City, counsel argued that Mr Ede contributed in a blameworthy way to the circumstances giving rise to his grievance because he failed to engage with Mr Tipple about redeployment options. I do not accept that submission. There was nothing blameworthy about Mr Ede's lack of interest in casual or part-time weekend sales work. Nor was there anything blameworthy about his lack of interest in working for the competitor. I accept that the genesis of this grievance was Mr Tipple's perception of a redundancy situation. It is hard to see how Mr Ede could have contributed in a blameworthy manner to that. I find that there was no blameworthy contribution by Mr Ede to the circumstances giving rise to his grievance.

[33] There is a claim for compensation of \$10,000.00 for humiliation, injured feelings and loss of dignity. Mr Ede's evidence is that the dismissal came out of the blue and he was left speechless for quite some time during the meeting. He says he was completely devastated by what happened because he thought he had been doing a good job, had never been warned and was a long serving member of staff. He was left in a state of disbelief about Mr Tipple's failure to handle the matter properly. Mr Ede's evidence is that he prided himself on his work and gave loyal service so he could not work out why he had lost his job. He was in a daze for some days and affected by mood swings and sleeplessness. He had to sell of a much loved possession to get some money. Mrs Ede's evidence is that *Barry was shell shocked to put it mildly*. There is no reason to doubt any of this evidence. I also note that Mr Tipple described Mr Ede as being *absolutely gutted* and he must have appeared that way to other staff who asked him what was wrong. I assess \$10,000.00 as an appropriate award to compensate Mr Ede for these proven effects.

[34] There is a claim for lost remuneration. I am not convinced there should be an award to cover this loss for two reasons. First, as indicated, this was in essence a genuine redundancy situation. I cannot be certain but the evidence indicates that a redundancy probably would have followed even if Mr Tipple had properly consulted with Mr Ede. What could have been avoided is Mr Ede's sense of grievance as just described. The second reason is that Mr Ede probably would not have suffered any loss of income if he had pursued the option of work with the competitor. Instead, Mr Ede looked for other work but encountered great difficulty in finding a replacement position. Because I cannot to the standard of probability say that the loss of income was caused by the established grievance there cannot be any award to cover the loss of income.

Summary

[35] Mr Ede was unjustifiably dismissed.

[36] Gun City Limited is to pay Mr Ede the sum of \$10,000.00 compensation pursuant to [s.123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act 2000](#).

[37] Costs are reserved. Any claim for costs should be made by lodging and serving a memorandum within 28 days and the other party may have a further 14 days to lodge and serve any reply.

Philip Cheyne
Member of the Employment Relations Authority

