

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 59
5423415

BETWEEN ARDEN ERIC FATU
Applicant

A N D VISION INTERIORS
LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Robert Warburton, Advocate for Applicant
Angela Hansen, Counsel for Respondent

Investigation Meeting: 16 December 2013 at Auckland

Date of Determination: 18 February 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Fatu) alleges that he was unjustifiably dismissed from his employment. That claim is resisted by the respondent employer (Vision) on the basis that Mr Fatu was dismissed for redundancy.

[2] There are underlying claims concerning allegations of unpaid holiday pay, statutory holiday pay and sick pay.

[3] It is common ground that Mr Fatu worked for Vision on two separate occasions. The first of those engagements appears to have commenced on 4 May 2009 and that first engagement concluded on 27 August 2011. There is dispute between the parties as to whether the first employment ended with a resignation or redundancy but nothing turns on that and the argument there is not part of the present

proceeding. Mr Fatu's evidence is that he was made redundant but that he was not unhappy about being made redundant.

[4] What is still in issue from the first period of employment is the allegation that Mr Fatu is still owed pay from the earlier engagement.

[5] The second discrete engagement commenced in August 2012 and as with the former engagement, there was no written employment agreement.

[6] There is some suggestion in the evidence for Vision that Mr Fatu was engaged for a particular project but Mr Fatu disputes that and it is apparent that that claim by Vision is not supported by the evidence nor even persevered with by it.

[7] In May 2013, Vision's dominant client (the Chow brothers) entered into dispute with Vision and both refused to pay outstanding invoices and refused to persevere with the existing contractual arrangement.

[8] The effect of this sudden change in Vision's circumstances was that it was left effectively without any ongoing work and owed \$300,000 for work already performed and invoiced.

[9] Vision says that Mr Fatu, who at the relevant time was the only employee, was kept fully informed of the vicissitudes of the business. The evidence from Mr Andrew Moore for Vision was that one of the directors, Mr Fernley, had regular meetings with Mr Fatu about progress with the business. It is contended for Vision that those meetings provided Mr Fatu with regular updates on the likely future direction of the business; Mr Fatu denies that any of the information imparted to him by Mr Fernley at these meetings amounted in any way to consultation about redundancy in an employment law context.

[10] It is common ground that on 14 May 2013, Mr Fatu was summoned to a meeting with Mr Moore (the other director of Vision) and told that the contract with the Chow brothers had come to a halt because of a dispute about the next stage in the project and that as a consequence, Vision literally had no work to do for the immediate future. Moreover, given that it was owed \$300,000 by the Chow brothers, Vision had no ability to fund continuing employment for anyone.

[11] That being the position, Mr Fatu's employment was terminated with immediate effect. Evidence for Vision was that in the quarter immediately following Mr Fatu's termination, Vision effectively ceased trading, making no payments to its directors, earning no income, and paying no tax.

[12] Subsequent to the dismissal, there was dispute between the parties about wages due and owing. Mr Fatu consulted a Labour Inspector (John Robinson) and as a consequence a payment totalling \$5,860.92 was made to Mr Fatu. Notwithstanding the involvement of the Labour Inspector and the resolution of the claim so far as the inspectorate was concerned, Mr Fatu maintains that the amount does not sufficiently recompense him for the hours that he worked.

[13] In particular, Mr Fatu claims that the actual timesheets which he completed and provided to Vision do not conform with the accounting information that he has subsequently been provided with. In particular, Mr Fatu alleges that on days that he plainly was working (including days on which there is a dispute about why he was working but it is common ground he was working), the accounting record shows no payment having been made yet Mr Fatu's evidence is that he completed a timesheet for the days in question showing that he was working.

Issues

[14] The two matters that the Authority will need to investigate and determine are:

- (a) Whether Mr Fatu was unjustifiably dismissed; and
- (b) If there are any moneys owed to Mr Fatu as a consequence of his employment.

Was Mr Fatu unjustifiably dismissed?

[15] The evidence is clear that Mr Fatu was dismissed for redundancy. That is the clear testimony of Mr Moore, who gave evidence for Vision, and while Mr Fatu himself maintained there was some suggestion that he was only employed on a fixed term engagement, his description in evidence of the nature of the dismissal itself clearly contemplates a redundancy situation. For the avoidance of doubt, the Authority rejects absolutely any suggestion of a fixed term engagement. The evidence to support that contention is slight, there is no documentary evidence by way

of a written term in an employment agreement to support it and the weight of the evidence is firmly on the footing that Mr Fatu was dismissed for redundancy.

[16] That said, Mr Fatu maintains that his dismissal for redundancy was procedurally deficient and that the redundancy was not a genuine one. Dealing with the second issue first, the Authority has little difficulty in concluding that the redundancy was a genuine one.

[17] Despite Mr Fatu's claim that there was continuing work after his employment was terminated, the Authority is satisfied on the evidence it heard that in fact Vision simply did not trade after Mr Fatu's dismissal and that that situation continued for some months. The evidence the Authority heard from Mr Moore was that Mr Fatu was the only employee, that all contractors had been put off, that the directors were not drawing income from the firm, and that with the collapse of the relationship with the Chow brothers, Vision simply ceased trading.

[18] That position is confirmed by the evidence tendered to the Authority by Vision's accountants who confirm that for the five months following Mr Fatu's dismissal, there was "*no trading activity in Vision Interiors Limited*".

[19] On that basis then, it is difficult for the Authority to reach any other conclusion than the conviction that this was a genuine redundancy forced on Vision by what amounted to a *force majeure* collapse of the relationship between Vision and its single client.

[20] It is well established in law that an employer is under no obligation to maintain the employment of an employee where there is no work for that employee. In the present case, the Authority is satisfied that not only was there no work for Mr Fatu but indeed on the evidence the Authority heard, there was no work for anybody at Vision, including the principals. For those reasons then the Authority concludes this was a genuine redundancy.

[21] But Mr Fatu also pleads that he was not provided with adequate consultation about the prospective redundancy situation. There are two aspects of this claim that need to be considered by the Authority.

[22] The first of them is that it is common ground that before the meeting which resulted in Mr Fatu's dismissal, there were two meetings between Mr Fatu and

Mr Fernley. Those two earlier meetings took place on 22 April 2013 and 2 May 2013. Vision's evidence is that Mr Fatu was told on those two earlier occasions that the relationship between Vision and the client was deteriorating and in effect, that if the relationship came to an end then so would Mr Fatu's employment.

[23] However, Mr Fatu denies that that message was ever conveyed to him although he acknowledges that the meetings took place. His evidence is that both of those meetings were operational in nature and there was no intimation that the work was coming to an end, or indeed potentially coming to an end.

[24] Mr Moore, who gave evidence for Vision, agreed with Mr Fatu to the extent that he accepted the meetings were operational in nature but he maintained that on both occasions Mr Fatu had been warned about the difficulties on the horizon.

[25] The Authority has been provided with independent verification about one of those meetings, namely the meeting on 2 May 2013. That meeting took place in a café, as did the earlier meeting. A contractor to Vision overheard the discussion between Mr Fernley and Mr Fatu and filed affidavit evidence confirming that Mr Fernley:

... said to Mr Fatu that work was drying up, that Vision would have no work next year, and that there was no further work available for him. I recall Mr Fernley advising they were looking at closing the company. ...

[26] That affidavit evidence was filed by Kyle David Anderson, a director of a company called Image Interiors Limited (Image). Mr Anderson describes in his affidavit how Vision:

... has been (Image's) primary client. It has been the major supplier of work to our business. ... Image is a creditor of Vision and funds remain owing to us ... we have been unable to recover that debt from Vision as we understand that Vision has not been paid ...

[27] That information about the commercial relationship between Image and Vision is important because, as Mr Anderson himself says later in his affidavit, he naturally took an interest in what Mr Fernley was telling Mr Fatu in the café because of its direct importance for Image's own future business.

[28] Mr Anderson does not enjoy good health and as a consequence, asked to be excused from giving his evidence to the Authority in person. Mr Anderson also was

influenced in making that request by his anxiety in meeting Mr Fatu face-to-face and Vision has suggested that a person close to Mr Fatu sought to intimidate Mr Anderson immediately after his affidavit was filed and served in this matter.

[29] For the avoidance of doubt, the Authority has no reason to doubt the evidence of Mr Anderson; his evidence is filed by affidavit in proper form and while disputed by Mr Fatu, was not subject to any serious challenge. Lest the matter be in any doubt, the Authority is satisfied that Mr Anderson's evidence can be relied upon and is evidence for the view that Mr Fernley did in fact indicate to Mr Fatu on one of the occasions on which it is agreed the parties met, that there was a likelihood of work coming to an end. Mr Anderson's affidavit also strongly supports Vision's position that the redundancy was a genuine one forced upon it by the collapse of its relationship with the Chow brothers.

[30] So it is common ground that there were two meetings, perhaps correctly described as operational meetings, between Mr Fernley and Mr Fatu on 22 April 2013 and 2 May 2013, and that in relation to the second meeting anyway, there is corroboration of Vision's claim that Mr Fernley made clear his warning to Mr Fatu that work might be coming to an end.

[31] Does that then constitute a consultation process? The Authority is not persuaded that it does, but in the particular circumstances of this case, it is difficult to see how there could have been a genuine consultation process in any event. The law requires there to be consultation between employer and affected employee in a restructure so as to give the employee the opportunity of having input into the decision-making process in order to potentially change the employer's provisional view of the matter.

[32] Here, the collapse of Vision's relationship with its only client meant that no amount of consultation was going to resolve matters between the parties so any consultation that was undertaken by Vision, however virtuous the intent, would have been of little force or effect because nothing Mr Fatu could have said to Vision would have changed the fundamental reality that it was without ongoing work and with a huge debt of \$300,000 remaining unpaid.

[33] Accordingly, the Authority concludes that this is not a case where it is reasonable to expect an employer to consult with an employee because on the facts

the Authority heard, such a consultation process would have been a meaningless charade, essentially because nothing Mr Fatu could have said would have addressed the fundamental problem which was the collapse of the relationship between Vision and its client.

[34] Even if the Authority had been persuaded that consultation could genuinely be undertaken in the present factual situation and that that consultation had not been adequately attended to by Vision, the consequences of that finding would not sound in the sorts of remedies that Mr Fatu is claiming. Wages lost as a consequence of the dismissal would only be payable where the dismissal was not found to be genuine. Here, the Authority is absolutely satisfied on the evidence it heard that the redundancy was genuine.

[35] Further, compensation for the alleged wrong done can only be at the very modest level of compensation for the alleged failure to consult and cannot be for the loss of the position because the Authority has been satisfied that the redundancy was a genuine one and therefore that the position was going to disappear in any event.

[36] Accordingly, even if the Authority were to make a finding that consultation ought to have taken place, notwithstanding its conclusion that that would be entirely pyrrhic, only a very modest amount of compensation would have been awarded. In the result, because of the Authority's conclusion that first the redundancy was genuine and secondly that no reasonable employer in the circumstances Vision was in could have been required to consult with an employee, there can be no unjustified dismissal.

Is Mr Fatu owed wages?

[37] The factual position is that Mr Fatu took his claim to the Labour Inspectorate after the dismissal and as a consequence of the engagement between a Labour Inspector and Vision, a payment of \$5,860.92 was made to Mr Fatu by Vision through the Labour Inspectorate, as a consequence.

[38] Mr Fatu's own evidence is that the Labour Inspector told Mr Fatu that if he was dissatisfied with the amount paid by Vision, he should take the matter up with the Authority.

[39] The Authority had hoped to discuss matters with the Labour Inspector and review his working file. However, the Labour Inspector in question is no longer

employed by the Ministry of Business, Innovation and Employment and as a consequence, such a discussion has not proved possible.

[40] On the face of it, it is difficult to see how Mr Fatu can be entitled to payments additional to those already made to him as a consequence of the initiative of the Labour Inspector if the payments in question are part of the minimum code and therefore his entitlement as of right.

[41] The evidence before the Authority is that Vision was asked by the Labour Inspector to provide information about the calculation of Mr Fatu's pay, that it complied with that request appropriately, and as a consequence, Mr Fatu was paid the sum determined as payable by the Labour Inspector.

[42] Mr Fatu claims holiday pay additional to the amount already paid to him, sick pay and statutory holiday pay. Dealing with the additional holiday pay claimed by Mr Fatu first, the Authority is at a loss to understand on the evidence before it why Mr Fatu maintains that he has been underpaid his holiday pay.

[43] The documents provided to the Authority include a calculation of the holiday pay due and owing for the two periods of the employment which effectively produces two separate amounts of holiday pay owing. Mr Fatu claims to have received only one of those payments (his evidence is that he received the payment he got by cheque but that only one cheque was paid and not two), and therefore, presumably, the calculations done by the Labour Inspector are misconceived.

[44] But there is no evidence to assist the Authority to conclude that Mr Fatu did not receive both payments. The calculations were prepared by Vision's bookkeeper and then checked by Vision's accountant. It seems inconceivable that if a cheque of several thousand dollars is not presented for whatever reason, that would not have been picked up. So the Authority must conclude that Mr Fatu is mistaken in his claim that he has been underpaid holiday pay.

[45] Underlying Mr Fatu's objection to the calculations done to support the various payments made is his concern that Vision had never provided to him a copy of his timesheets. Vision says that he has never asked for them and whatever the position, the Authority is satisfied that the involvement of the Labour Inspector in the calculation of holiday pay must suffice for the purposes of accuracy. Put another way, if the Labour Inspector was satisfied with the information provided to him by the

employer after he received the request from Mr Fatu, then with his experience in dealing with these matters, the Authority feels satisfied it can rely on the conclusions the Labour Inspector reached.

[46] What is more, those conclusions as to the actual quantum of the holiday pay are supported by the calculations produced by the Inland Revenue Department based on the declaration of Mr Fatu's earnings so the only shortfall appears to be Mr Fatu's contention (entirely without support) that he received only one of two payments of holiday pay during the course of the employment and therefore that the final wash up payment made after the intervention of the Labour Inspector, was wrong in fact.

[47] In addition, Mr Fatu claims sick pay. The difficulty with this claim is that Vision has no record of Mr Fatu being entitled to sick pay because he never applied for or was granted sick leave and there is no evidence before the Authority to counteract Vision's position on the point. What is more, Vision points out that in the second period of the employment, Mr Fatu commenced work in August 2012 and so would not have been eligible for sick leave until February 2013 under the statutory regime, and so the period when sick leave could have been sought could only be between February and May 2013. Vision says no such request was ever made. Nothing in the evidence provided by Mr Fatu assists the Authority in identifying that sick leave was claimed and/or taken.

[48] Finally, Mr Fatu claims statutory holiday pay and points out that it is common ground that he worked over the Christmas/New Year period 2012/2013 because he acknowledges that he did so (and therefore filled in timesheets), and Vision complained about him working during that period because it says it did not require him to work. Either way, Mr Fatu says he was not paid.

[49] Vision's position is that not only did it not ask Mr Fatu to work the public holidays over the Christmas/New Year period 2012/2013 but it in fact made it clear that it did not want him to work those days. Put another way, it was not a situation of not asking Mr Fatu to work; it was a situation where Mr Fatu was affirmatively told not to work. In those circumstances, Vision says it ought not to have to pay.

[50] The Authority agrees. It is difficult to see how an employee can expect payment for work when, on the evidence the Authority heard, Mr Fatu was told not to work the days in question.

[51] On the wider issue of statutory holiday pay more generally, the Authority prefers Vision's evidence that work on statutory holidays was not required of Mr Fatu and as a consequence, there can be no question of his having any entitlement to statutory holiday pay.

Determination

[52] The Authority has not been persuaded that Mr Fatu has sustained any personal grievance.

[53] Moreover, the Authority has not been persuaded that Mr Fatu is owed any moneys from his previous employment with Vision Interiors Limited.

Costs

[54] Costs are reserved, but the parties are encouraged to try to resolve costs between themselves. In the normal course of events, Vision Interiors Limited, having been completely successful in its defence of Mr Fatu's claim, could look to a contribution from Mr Fatu for the cost it incurred in defending that claim.

[55] However, given the likely difference in resources between Mr Fatu and Vision Interiors Limited (even given Vision's recent difficulties), Vision may think it appropriate to let costs lie where they fall.

[56] In any event, if the parties are unable to agree costs on their own terms, Vision may file a submission in the Authority asking for costs to be fixed and Mr Fatu has 14 days from the date of his receipt of those submissions to file his response.

James Crichton
Member of the Employment Relations Authority