

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 84/10

File Number: 5285378

BETWEEN James Gallagher  
Applicant

AND Southern Plumbing & Gasfitting  
Limited  
Respondent

Member of Authority: Denis Asher

Representatives: Mr Gallagher represented himself with assistance from  
Paul Hooper  
Doug Brennan for the Company

Investigation Meeting Wellington, 30 March 2010

Submissions Received On the day of the investigation; additional evidence 1  
April 2010

Determination: 4 May 2010

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**DETERMINATION OF THE AUTHORITY**

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**The Problem**

[1] Did the respondent (the Company) have a genuine reason for making Mr Gallagher's position redundant, and did it act properly and in good faith during the redundancy process?

## **The Investigation**

[2] During a telephone conference call on 16 December 2009 the parties agreed to undertake mediation and, in the event settlement was not achieved, an investigation on 30 March 2010. A timetable was agreed for filing witness statements. Mediation on 29 January did not resolve the problem. Following the conclusion of the investigation the respondent undertook to, and did, supply further evidence.

## **Background**

[3] At the time of the termination of his employment arising out of the redundancy of his position Mr Gallagher had been an employed as a plumber by the respondent for 7 years.

[4] Attached to Mr Gallagher's statement of problem are minutes of team meetings held on 28 July and 4 August 2009. They were authored by Mr Brennan, who is one of the Company's directors and a co-owner, following meetings with staff which included the applicant; he says there were other meetings with similar content.

[5] The minute of 28 July says, "*the current work flow coming into the business has dropped noticeably from a month ago. We need a deliberate action to upsell and cross sell or bluntly find work. Those who develop or produce beyond their cost will not be considered for layoffs if we get to that point. I have done as much as I can. The rest is up to you*".

[6] The minute of 4 August says, amongst other things, "*Must upsell and cross sell to get work its getting really light now otherwise we will be back at the workshop with nothing to do. ... Its your livelihood we are talking about*".

[7] By letter dated 10 August Mr Brennan advised the applicant that, amongst other things, the Company was to undergo a restructuring in the near future; he was calling a meeting of the "*four possible affected individuals who could see their employment terminated ... due to the economic downturn ... on 18 August ... Your meeting time is 10 am. You are entitled to bring a support person to the meeting ... (and if) you wish to give us any feed back around this issue you can give it to me at the start of the meeting*" (attachment to

statement of problem). During the Authority's investigation, Mr Gallagher said the advice, "*arrived out of the blue*".

[8] Mr Gallagher replied by letter dated 14 August: he sought clarification of various matters. There was no written reply by the Company.

[9] Mr Brennan met with Mr Gallagher on 18 August. The former provided the applicant with a letter or memo of the same date (attachment to statement of problem). It says, amongst other things:

*Southern Plumbing is not immune to the economic downturn and is going to have to lay off some staff. This document is to undertake consultation and invite you to give feed back during this interview. The firm has not decided who or how many will be laid off at this point.*

*Selection Criteria*

*Redundancies will be issued on the basis of a person's skill and experience. Other factors being considered are the type of work we are receiving and the ability of the current staff to undertake this work. ...*

*The work situation*

*The jobs coming in currently are smaller one man jobs of a service call nature requiring high skill and communication levels.*

...

*The date we will make a decision.*

*Friday 21<sup>st</sup> August 2009 with the notice of the decision being that day.*

*Candidates will receive 2 weeks notice.*

[10] Following the 18 August meeting, and in a letter dated 20 August, Mr Gallagher set out his response in writing (attachment to statement of problem). Amongst other things he expressed the view that the respondent had already identified the employees it intended laying off. He also recorded Mr Brennan's advice it would be unfair to give notice to employees it did not intend to layoff. Mr Gallagher

expressed the view the respondent had predetermined his dismissal; he also set out his criticism of the consultation process, namely it was not wide enough and did not allow opportunity for feedback or alternative solutions. Mr Gallagher said staff with lesser skill sets than his were being kept on. He sought mediation.

[11] At the meeting on 21 August, and amongst other things, Mr Gallagher was advised of the redundancy of his position.

[12] In a reply dated 25 August Mr Brennan responded to the applicant's letter of 20 August (which he said he had received after the 21 August meeting) by rejecting the applicant's criticisms. He provided various explanations including the advice that, notwithstanding notifying all staff on 27 July and 4 August it was considering layoffs, the respondent had no intention of laying off all staff and instead was advising only those who it felt it had insufficient work for. No feedback had been received from Mr Gallagher or other employees (as to how redundancies might be avoided).

[13] In a letter dated 13 September Mr Gallagher set out his grievance. In it he expressed the belief his employer did not have a genuine work-related reason for making his position redundant and did not act in good faith in the process of determining who in the Company should be made redundant.

### **Mr Gallagher's Position Summarised**

[14] Mr Gallagher says all of the Company's employees (10) should have been affected by the economic downturn relied on by the respondent. Instead, the Company identified four staff, including himself as candidates for redundancy; the respondent thereby predetermined the outcome of its review.

[15] He says he was not given an opportunity to make a meaningful contribution to the respondent's process, and was not given an opportunity to comment before the final decision was made.

[16] The Company did not demonstrate how the economic downturn had affected business and no concrete evidence was provided that redundancies were required.

[17] Within two days of termination the Company advertised for more staff.

### **The Company's Position Summarised**

[18] Mr Brennan's sworn evidence to the Authority was that turn-over in 2009 had declined from \$190,000 to \$100,000. The reduction of work volumes had seen the end of two-men teams. In particular, the work available to the Company did not suit Mr Gallagher's skill-set or the other two staff laid off as redundant, whereas those retained were able to do the work the respondent was able to obtain.

[19] Another employee had left and had not been replaced.

[20] Key employees were not prepared to work a three-day work (as an alternative to making others redundant): without their skill-sets the Company would not have been able to bring in and keep the work.

[21] In comparison with others, Mr Gallagher was able to do a lesser range of work and was less qualified. He was not bringing in extra work; while a bonus of \$50 was offered staff if they brought in extra work through the distribution of flyers, all 50 flyers issued to the applicant were found in his van after he left.

[22] Mr Brennan said he sought and obtained, and applied, advice on an appropriate redundancy process to follow: it included holding several meetings with staff collectively and on a 1 on 1 basis, discussing what had to be done to avoid receivership, issuing notices to staff, providing Mr Gallagher with two references and lining up two other employers to take him on, and providing him with two weeks off on pay to find work (which he believed he started within the notice period).

[23] A judgement was required on a person's ability to do the job, taking account not just of the work required but also inter-customer skills. Other staff were at least as experienced as Mr Gallagher but were better qualified. Mr Gallagher was reluctant to do roofing work, did not have pricing and bathroom skills and had communication issues with customers.

[24] In evidence provided in writing (but otherwise not sworn) dated 1 April 2010 Mr Brennan said the Company had not initiated any new situations vacant advertising until two other employees left their employment 3 and 1/2 months after the applicant was made redundant. On 1 February 2010 a new employee was taken on; he had skills and experience none of the current team had which has enabled the respondent to take on different types of work. Other advertising referred to by the applicant was not placed by the Company but had been recycled by Master Plumbers Inc when they updated their website.

### **Discussion and Findings**

[25] In determining this matter I apply the observation of the full Employment Court, set out at para [37] in *Air New Zealand Ltd v V* (2009) 9 NZELC 93,209 and 6 NZELR 582, namely that the Authority is required to objectively review all the actions of an employer up to and including the decision to dismiss, against the test of what a fair and reasonable employer would have done in all the circumstances.

[26] For the reasons set out below I find that Mr Gallagher was not unjustifiably dismissed or unjustifiably disadvantaged in the circumstances leading up to the termination of his employment, following his position being made redundant.

[27] Mr Brennan's evidence of the reduction of economic downturn (nearly 50%) and much diminished turnover was not challenged by Mr Gallagher; the Authority's investigation established no evidence to conclude other than that the Company experienced significant economic decline during the period in question. The number of Company employees remains significantly less than those employed prior to the three redundancies (and non replacement of a staff resignation).

[28] I do not accept Mr Gallagher's claim that the Company predetermined his selection as not all staff were notified their positions were at jeopardy or that they were affected. Mr Gallagher sees evidence of the predetermination in the letters of 10 August 2009, which set up meetings with only four affected individuals. He says that, as a result, his feedback enjoyed no consideration. I reach my conclusion because the evidence before the Authority is of a small employment situation in which one of its directors, Mr Brennan, worked closely with all staff including the applicant. I have no

reasons to doubt his (broadly unchallenged) knowledge of staff skills levels, experience and qualifications. I am therefore satisfied that the respondent's selection criteria were "... *properly formulated and applied according to the standard of a reasonable employer acting fairly and in good faith towards the employee*": *Coutts Cars v Baguley* [2001] ERNZ 660, 671.

[29] It follows that I find no unfairness resulted to Mr Gallagher in the application of that knowledge, and the exclusion of some staff from what would have been a pointless redundancy exercise.

[30] I am satisfied that a consultative opportunity was given to all staff, including the applicant, in respect of the serious problem the Company faced, and an opportunity to comment on what might be done about it (see the records of 28 July, and 4, 10 & 18 August 2009): "*Sufficiently precise information was... given to allow employees to state a view, together with a reasonable time and opportunity to do so. ... Genuine efforts (were) made to accommodate the views of employees ... The employer, while quite entitled to have a working plan already in mind, had ... an open mind and (was ready) to change or even start anew*", *Simpsons Farms v Aberhart*, [2006] ERNZ 825, para 62.

[31] While I accept the decision making moved swiftly from 10 August to the meeting on 21 August, when Mr Gallagher's termination was confirmed, I do not find this to be evidence of predetermination of the substantive outcome, or that the applicant was unjustifiably disadvantaged in any way.

[32] In reality, few options were available to either Mr Gallagher or Mr Brennan.

### **Determination**

[33] Mr Gallagher does not succeed with his claims.

[34] As requested, costs are reserved. I note here that both parties represented themselves and there would have to be good reason for costs not to fall where they lie.

**Denis Asher**

**Member of the Employment Relations Authority**