

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 117
5314694

BETWEEN JAE GREEN
 Applicant

AND ENVIRO WASTE SERVICES
 LIMITED
 Respondent

Member of Authority: Philip Cheyne

Representatives: Jeff Goldstein, Counsel for applicant
 R O Parmenter, Counsel for respondent

Investigation Meeting: 10 August 2011

Determination: 13 June 2012

DETERMINATION OF THE AUTHORITY

Acknowledgement

[1] Regrettably, the completion of this investigation has been delayed.

[2] An investigation meeting scheduled for March 2011 had to be adjourned because of the February 2011 earthquake. The parties helpfully provided a replacement copy of the file and a new date was arranged. Unfortunately we could not progress matters on that date because travel for the respondent was disrupted by volcanic ash. We were able to convene an investigation meeting in August 2011. Work on this determination was deferred while I attended to other matters either delayed as a result of the September 2010 and February 2011 earthquakes or which have been accorded priority. Preparation of the determination has also been affected by the issue referred to by the Chief of the Authority in his memorandum dated 7 May 2012.

[3] Since recently turning my attention to this matter, I have reread the statement of problem, statement in reply, statements of evidence, all the exhibits, my full notes

of the evidence and the parties' written submissions provided during the investigation meeting.

[4] I acknowledge the parties' patience and understanding and sincerely regret any difficulties caused by the delay.

Employment relationship problem

[5] Jae Green worked for Enviro Waste Services Limited as operations manager from May 2007 until his employment was terminated in June 2010. He reported to the branch manager (Craig Stevens) who in turn reported to the South Island manager (Kevin Edgar).

[6] On 3 June 2010 Mr Green was advised about a restructuring proposal that would affect his and another employee's positions. The proposal included disestablishing those two positions, transferring some responsibilities to the branch manager and establishing an additional customer service representative (CSR) position. Later Mr Green spoke to one of the managers involved in presenting this proposal (Mr Edgar) and told him that he wanted the matter resolved immediately and that he was prepared to leave. Enviro Waste then gave Mr Green a letter on 4 June 2010 confirming the end of his employment that day, payment of 1 month's salary in lieu of notice, an additional payment and some other support. There was then some further communication before Mr Green received his final payment and returned his company vehicle in early July 2010.

[7] Enviro Waste advertised two CSR positions in early July 2010 and Mr Green saw the advertisement on 12 July 2010. Mr Green instructed a solicitor who wrote to Enviro Waste on 26 July 2010 raising a personal grievance of unjustified dismissal. As detailed in the letter Mr Green's grievance is that he was not offered any alternative position with Enviro Waste, that one of the advertised positions was Mr Green's job with a new title, that Enviro Waste did not follow clause 19.3 of Mr Green's employment agreement, that the restructuring was a sham and that Enviro Waste breached its good faith obligations. The grievance is similarly described in Mr Green's statement of problem.

[8] Because Mr Green's employment was terminated in 2010 justification must be determined objectively 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. However, it is convenient to start with the various elements of Mr Green's grievance claim.

A sham restructuring?

[9] There is a submission for Enviro Waste that Mr Green bears the onus of proof on this point. However, in his letter of 4 June 2010 to Mr Green, Mr Edgar conveyed the decision to implement the proposed restructuring after feedback from Mr Green and the other affected employee (Jayde Wilkinson – service co-ordination manager) and that *therefore confirm that your employment with EnviroWaste will finish*. That decision about the restructuring is part of Enviro Waste's actions and how it acted that must be objectively assessed.

[10] Having said that, so long as an employer acts genuinely and not out of ulterior motives, a business decision to make positions or employees redundant is for the employer to make and not for the Authority or the Court: see *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825.

[11] The evidence amply establishes that it was a genuine business decision without ulterior motive.

[12] The existing structure involved 12 drivers reporting to the operations manager (Mr Green) and 2 CSRs reporting to the service co-ordination manager (Mr Wilkinson). Mr Green, Mr Wilkinson and 2 sales staff in turn reported to the branch manager (Mr Stevens). The proposed structure removed the 2 management positions so that all positions reported directly to the branch manager. It also added an additional CSR position. Some of the tasks of the 2 disestablished positions were to be transferred to the branch manager and others to the CSRs. The change was anticipated to generate reduced overheads of more than \$80,000.00. This was a classic cost saving and efficiency measure. Indeed, in evidence Mr Green agreed that he had said at the time that he could see the logic in the proposal.

[13] I note that Mr Edgar gave wrong evidence about the costs associated with the service co-ordination manager's position but acknowledged this when questioned by counsel. Nothing turns on the point.

[14] To some extent the challenge to the genuineness is based on Mr Green's view that savings could have been achieved in other ways. There were two CSR positions, one of which was vacant from about April 2010 or perhaps earlier. The remaining CSR and Mr Wilkinson mostly covered those duties and Mr Green also helped. In evidence Mr Edgar agreed that they were saving about \$38,000.00 pa as a result of the vacancy but he said that they did not have the skills to do the administrative work. Hence they filled the vacancy in May 2010 shortly before the restructuring proposal was announced. Whether it was better to derive savings by keeping the existing structure with a CSR vacancy or by disestablishing two management positions (and filling the CSR vacancy) was a matter for Enviro Waste's business judgement. I do not accept that it impugns the genuineness of the restructuring decision.

[15] The time from termination of employment until the Authority's investigation means that there is a longer period than usual to check what Enviro Waste said it would do against it actually did.

[16] There was some change to the business structure shortly before the Authority's investigation meeting. Mr Stevens' evidence is that this was the result of the change in the nature of Enviro Waste's business due to the earthquakes. There is no reason to doubt that evidence.

[17] I will summarise rather repeat Mr Edgar's evidence about the implementation of the restructuring proposal. The additional CSR role was largely administrative with little autonomy and no supervisory or management responsibility. Remuneration for the position was more than \$40,000.00 less than for Mr Green's position. Following the restructuring there was another CSR vacancy because an incumbent transferred to Auckland - hence the July 2010 advertisement for two CSRs. The CSRs performed some operational work but the positions are significantly different to Mr Green's position. Neither Mr Green nor Mr Wilkinson was replaced and the management aspects of their roles were transferred to the branch manager. Other tasks were transferred to the CSRs. There is no reason to doubt any of this evidence.

I further note that Mr Green acknowledged when questioned that this was how the branch had operated after his departure as far as he knew.

[18] I am satisfied that the restructuring was a genuine business decision.

Redeployment

[19] Mr Green had a written employment agreement which provided for redundancy and redeployment partly as follows (my emphasis):

If your position is made redundant as a result of restructuring and/or a change in the direction of the whole or any parts of EnviroWaste's operation and EnviroWaste is unable to offer you a substantially similar position, you will be given one month's notice of your redundancy.

[20] I agree with counsel for Mr Green that cases such as *Jinkinson v Oceania Gold (NZ) Ltd* [2010] NZEmpC 102 and *Wang v Hamilton Multicultural Services Trust* [2010] ERNZ 468 mean that an employer's failure to offer suitable redeployment opportunities will make a subsequent dismissal for redundancy unjustified, at least on the presently relevant test. *Wang* in particular shows that the principle is not limited to redeployment to *substantially similar* positions.

[21] There is a submission that *substantially similar* refers to the duties of a position rather than the terms and conditions of the position. I disagree. The employment institutions have always interpreted this phrase to include the terms and conditions as well as the duties attached to a position. There is no reason to apply a different meaning in the present case.

[22] The findings about the genuineness of the restructuring and the nature of the CSR positions mean that Enviro Waste had no *substantially similar* positions to offer. That means that Enviro Waste did not breach clause 19.3 of the employment agreement. Nonetheless Mr Green's evidence is that he would have accepted a CSR role if it had been offered. Mr Green's evidence, which I accept, is that he did not know about the CSR pay rates at the time. He still says, now knowing the lower rates, that he would have accepted a CSR role. That potentially makes *Wang* relevant but there is some dispute in the evidence about precisely what happened, to which I now turn.

[23] Mr Green met with Mr Edgar and Mr Stevens on 3 June 2010. Mr Wilkinson was also present. A detailed written restructuring proposal (including details of the proposed consultation) was provided and there was some discussion about both matters. Only one aspect need be mentioned at present. Mr Edgar's evidence is that he indicated that Mr Green and Mr Wilkinson could both apply for the proposed new CSR role. He says that he indicated that the pay was nowhere near their current rate. There are notes of this meeting made by Mr Stevens. They note Mr Edgar saying that both men could apply for the CSR roles. However, the written proposal is silent on this point.

[24] In his prepared evidence Mr Green did not mention this aspect of the meeting. In some additional evidence in chief he said that he was not offered a CSR role during the 3 June 2010 meeting. However, in response to my question Mr Green said that he could not exactly recall but he thought it was said during the 3 June meeting that he could apply for a CSR role with a lower salary.

[25] On balance I accept Mr Edgar's evidence about what was said on this point during the 3 June meeting. The evidence is partly supported by Mr Stevens' notes and not contradicted by Mr Green's oral evidence. I also note that there is no evidence that Mr Green expressed any interest in the CSR role.

[26] Next, Mr Green asked to speak to Mr Edgar. No-one else was present during their discussion which was on 3 June at about 3.30 pm. Mr Edgar made some specific notes of this discussion but Mr Green did not. Mr Green's evidence is that he requested Mr Edgar to put a deal on the table. He denies asking for an *exit package* however his statement of problem states:

At this meeting the Applicant explained that he wanted the matter resolved immediately and that he was prepared to leave.

[27] If the words *exit package* were not used Mr Green nonetheless raised the concept. By *exit package* is usually meant some payment and/or benefit in addition to contractual and statutory entitlements to facilitate a non-contentious termination of employment. I will use those words to describe the concept.

[28] It is common ground that Mr Edgar encouraged Mr Green to reconsider. Mr Green's evidence is that Mr Edgar introduced the possibility of a senior

driver/supervisor position which he would try and work to have remunerated at a similar level to Mr Green's existing position. He also says that at no time was a CSR role offered to him. Mr Edgar denies asking Mr Green if he would be interested in a senior driver/supervisor role or discussing that role at similar remuneration. His evidence is that he said that opportunities for redeployment or a change in the proposal could emerge during consultation. However, Mr Edgar's notes record there being some discussion that *there may be a need for a leading or senior driver* role as a go between the drivers and the manager. I accept that note as an accurate record of the discussion.

[29] The position for Mr Green is that the meeting finished with Mr Edgar to reply within 24 hours on any alternative position. However I do not accept that this accurately reflects the situation. There was discussion that there may be a senior driver/supervisor position and Mr Green was also asking Mr Edgar to come back with an exit package for his consideration. Mr Green was still keen to consider leaving rather than engage in a consultation process or stay on in another role (if one was available). Mr Edgar correctly perceived this to be Mr Green's attitude. The meeting was not acrimonious and it ended at about 4.20 pm with Mr Edgar to revert the following day.

[30] Mr Green's evidence is that Mr Edgar did not come back within 24 hours. However, as just mentioned, the undertaking was to revert the following day.

[31] Mr Green attended work as usual on Friday 4 June 2010. Mr Green complains that Mr Stevens *barely acknowledged* him that morning. I attach no significance to this point. There was a discussion between the two men at some point although there is a dispute in the evidence about how it was initiated. There is some difference between Mr Green and Mr Stevens about the content of their discussion. Mr Steven either said there was no senior driver/supervisor position (his account) or that if there was no such position that Mr Edgar would try and negotiate a redundancy package with head office for Mr Green (Mr Green's account). Either then or soon after Mr Steven offered Mr Green the opportunity to go home on pay and Mr Green left work. Mr Stevens was aware of the gist of the discussion the previous day between Mr Green and Mr Edgar and understood from his exchanges that Mr Green was still

looking for an exit package to consider. Mr Stevens reported that understanding to Mr Edgar.

[32] It is common ground that Mr Stevens rang Mr Green at about 3.30 pm that day and outlined the contents of a letter from Mr Edgar to Mr Green. Mr Stevens also emailed a copy of the letter to Mr Green who read it some time later. The 4 June 2010 letter refers to the joint meeting the previous day, Mr Green's approach to Mr Edgar where he indicated a preference to consider an exit package, Mr Edgar's advice to think it over rather than act rashly and Mr Edgar's understanding that Mr Green had still favoured his initial preference. The letter advises that there was no present need for a senior driver/supervisor, that as a result of the feedback from both affected staff members about not wanting to wait for further consultation Enviro Waste had decided to proceed with the restructuring. It goes on to say that Mr Green's employment would terminate that day, that Mr Green would not need to work out the notice period, that Enviro Waste would pay an additional six weeks salary to recognise Mr Green's service and effort, that it would fund some career advice and that Mr Edgar would be happy to be a referee for Mr Green.

[33] During their phone discussion Mr Stevens either expressly told Mr Green that there was no senior driver/supervisor position as outlined in the letter or it was implicit in the response about an exit package. As noted that occurred at about 3.30 pm on 4 June 2010.

[34] I have already found that there was no *substantially similar position* for redeployment. Mr Edgar did reply about the possibility of a senior driver/supervisor position both via Mr Stevens' discussion with Mr Green and in the 4 June 2010 letter. The only other redeployment possibility was to a CSR role. That possibility was signalled to Mr Green on 3 June 2010 but he chose to pursue an exit payment instead. I do not accept Mr Green's evidence that he would have accepted a CSR role if it had been offered to him. He was told that it involved a lower salary. He decided to seek an exit payment rather than the possibility of remaining on at a lower salary. If he was interested in a CSR role he could have raised that during the email exchanges about his exit package. The evidence given now that he would have accepted such a position might reflect Mr Green's view in hindsight about what he should have done but it is not accurate as to his thinking at the time.

[35] Part of Mr Green's complaint is that he was not told that the new CSR position would have an operational role. His evidence is that he would have been interested in such a position if he had been told this. However, as explained above, I do not accept this evidence. I accept that Mr Green would have been interested in a senior driver/supervisor role but there was no such role. The CSR position that was advertised included administrative tasks associated with the fleet and drivers but without any supervisory or senior responsibilities. As advertised it also included management of the branch health and safety programme. However, in reality, that involved administrative rather than management responsibilities. For the purposes of this personal grievance claim Mr Green says the CSR role was his old position but I do not accept that evidence as explained above. Nor was the role operational in any sense that Mr Green would have been interested in. Finally, and most importantly, Mr Green wanted to obtain a payment and leave the employment, which is what he did.

[36] There is a complaint of unfairness because Mr Green had no opportunity to comment on Enviro Waste's decision about the senior driver/supervisor role or a wider branch review. I do not accept this submission. Matters started with Enviro Waste wanting to consult Mr Green about a restructuring that might affect his position. Mr Green indicated a preference to receive an exit payment and leave rather than engage in a consultation process. Mr Eager encouraged Mr Green to reconsider and there was mention about the possibility of a senior driver/supervisor role. However, Mr Green expressed his preference for an exit package to be offered. Enviro Waste facilitated that request and there was in short order agreement about the package. There was no further consultation with Mr Green at his not Enviro Waste's initiative. There was accordingly no unfairness to Mr Green.

[37] Enviro Waste did what any fair and reasonable employer would have done in those circumstances.

Access to information

[38] There is a submission that Mr Green was not given access to all the information relevant to Enviro Waste's decision about the restructuring and that there was a breach of s.4(1A)(c) of the Employment Relations Act 2000. It is not clear what relevant material was not disclosed to Mr Green except for the detailed calculations by which Enviro Waste had calculated likely costs savings. Details about the Dunedin branch and Christchurch branch overheads may have been relevant.

[39] The reason that the intended consultation process was foreshortened was to accommodate Mr Green's request for an exit package. But for that Enviro Waste would have provided any further relevant information and Mr Green would have had an opportunity to comment prior to any decision. In those circumstances I do not accept that there was any breach of s.4(1A)(c) of the Employment Relations Act 2000.

All the circumstances

[40] I should consider more broadly whether Enviro Waste's actions and how it acted were what a fair and reasonable employer would have done.

[41] I have already canvassed how Enviro Waste acted regarding the initiation of consultation about a proposed restructuring and its response to Mr Green's request for an exit package for his consideration up to 4 June 2010.

[42] There is no dispute about what happened after Mr Green received the 4 June 2010 letter as it mostly involved email exchanges between Mr Green and Mr Edgar. It started with Mr Green wanting to follow up on a suggestion for a meeting or communication by phone or email *to finalise the contents of this letter*. There must have been a phone discussion because Mr Edgar sent Mr Green an email on 8 June 2010 *just confirming phone conversation and clarifying final pay details*. That documents an arrangement about returning keys and phone, Mr Green retaining use of the company vehicle until 2 July and timeframes for final payments. Several days later Mr Green initiated an email exchange about accessing the career advice and a written reference. Mr Edgar needed to be reminded about the reference near the end of June and later Mr Green asked for several corrections to be made. These exchanges finished in early July, Enviro Waste paid Mr Green in accordance with the

4 June letter and subsequent exchanges and heard nothing more until it received the 26 July 2010 letter raising Mr Green's personal grievance.

[43] Mr Green is critical about an aspect of these arrangements.

[44] Under his employment agreement Mr Green was paid monthly on the 15th of each month. He received a payment on 15 June 2010 as usual. The arrangement was that he would be paid a final pay including the extra six weeks pay in the week commencing 5 July 2010. That was confirmed by Mr Edgar on 5 July 2010 in one of the emails. However, the final payment was not made on time. Mr Green followed up on 11 July 2010 and was told on 13 July 2010 that the payment would be made on 15 July 2010 which is what happened. Mr Green was paid his final pay about a week later than was arranged. However I am not satisfied that this resulted in any substantive unfairness with respect to the termination of Mr Green's employment.

[45] Aside from the delay in the final pay, how Enviro Waste acted was how a fair and reasonable employer would have acted. I have already found that the restructuring proposal was not a sham and that Enviro Waste's actions regarding redeployment were those of a fair and reasonable employer.

[46] It follows that Mr Green was justifiably dismissed.

Summary

[47] For the reasons explained above I do not accept that Mr Green has a personal grievance of unjustified dismissal.

[48] Costs are reserved. Any claim for costs must be made by lodging and serving a memorandum within 28 days. The other party may have 14 days in which to lodge and serve any reply.

Philip Cheyne
Member of the Employment Relations Authority