

approach on behalf of his then-employer. Mr Hawkins was not happy in his current position, and discussions turned to the possibility of his employment as sales and marketing manager with Malcove and the negotiation of an acceptable package.

[5] A written employment agreement was signed on 16 June 2009. It provided for redundancy as follows:

“13.1 Possibility of redundancy

In the event of a possible redundancy, the Employer agrees to consult with the Employee to the fullest extent commercially possible and, where appropriate, to consider alternative roles for the employee.

13.2 Redundancy

Where the Employee’s role is redundant, the Employee shall be provided with four weeks’ notice in writing. ...

13.3 Redundancy Compensation

The Employee shall not be entitled to any redundancy compensation.”

[6] On reaching agreement with Malcove Mr Hawkins resigned from his existing employment. He began work at Malcove on 6 July 2009.

[7] Alan Pilbrow, Malcove’s managing director, said in evidence that he told Mr Hawkins there had been redundancies in the company in May. Even so there were sales opportunities he was unable to address himself, and he sought to employ someone in a sales management role for that purpose. He said he believed Mr Hawkins was perfect for the job, having the strong sales and marketing background Malcove sought in order to boost its sales and in turn financial performance.

[8] Mr Hawkins denied being told in May that there had already been redundancies at Malcove. He said he was ‘lured’ into his employment at Malcove, but did not make any separate claim in respect of that matter.

[9] I accept that Mr Pilbrow had genuine commercial reasons for seeking to employ Mr Hawkins. This conclusion is not affected by whether or not Mr Hawkins was told there had already been redundancies.

[10] On or about 23 October 2009 a major customer in terms of money spent gave Mr Pilbrow one month's oral notice that it would no longer be seeking Malcove's services. Mr Pilbrow described this as a major blow, and said the news was the final straw as Malcove had already been experiencing a downward turn. Financial material produced in support confirms significant nett losses each month in the second half of 2009, accumulating to a substantial total by December 2009. Mr Pilbrow had reason to view the loss of a major customer, both in itself and against the accumulating nett losses, as a major blow.

[11] Mr Pilbrow consulted with his financial and business advisors about how to reduce costs in the business. The resulting discussions assessed the monthly losses, the amount of forward work available and the lack of new work, measured against the possible sale of assets, renegotiation of a lease and other cost-cutting measures of that kind.

[12] Although Mr Pilbrow sought to avoid redundancies there was also a need to review staffing, leading to an assessment of whether positions were necessary to the company or whether the company could disestablish them without compromising its obligations to its clients. At or about that time the staffing structure comprised Mr Hawkins as sales and marketing manager having three staff members reporting to him, as well as finance and operations staff, with an overall total of 25 employees including Mr Pilbrow.

[13] The finance manager decided to resign for personal reasons in late October. Although the possibility of reducing the number of finance staff was canvassed, the resignation meant the finance manager was not replaced and there was no further need to impose a redundancy in that area. A review of operational staff needs indicated a storeperson's position affected by a local merger in Christchurch could be disestablished, and the incumbent was made redundant accordingly. A review of the sales staff led to a conclusion that the company could not afford to continue Mr Hawkins' employment, and that Mr Hawkins' duties could be shared by Mr Pilbrow, the business analyst and the operations manager.

[14] On 29 October 2009 Mr Pilbrow spoke to Mr Hawkins about the possibility of redundancy in general terms, saying the company's position was serious and he was

considering redundancies. He intended that as a warning to Mr Hawkins of the possibility of Mr Hawkins' own redundancy. He should have given the warning in express terms to Mr Hawkins, together with further information about why with particular reference to the recent loss of the major client and its implications, as well as more detail about the company's plans to restructure. He should then have offered Mr Hawkins an opportunity to provide feedback on the information and on the proposed restructuring.

[15] At the same time Mr Hawkins was unduly dismissive of the information he did receive, characterising it as a vague threat, commenting in evidence that the whole business was sick of hearing Mr Pilbrow talk about redundancy and saying he did not take the information seriously because he had heard it before. Mr Hawkins should not have been so dismissive of the messages that were being communicated to the staff, and for genuine reasons. By then he knew that staff had already left or been made redundant, although he sought to attribute the departures to dissatisfaction with Mr Pilbrow, and also said Mr Pilbrow advised him on 29 October of the possible redundancy in Christchurch. He even said he left the discussion with the impression that someone was to be fired, but had no inkling it would be him.

[16] On 30 October Mr Pilbrow called Mr Hawkins into his office, where he told Mr Hawkins his position was to be made redundant. Mr Hawkins was to remain on garden leave during the notice period. In evidence Mr Pilbrow explained his approach to implementing the redundancy by saying, in effect, that he considers a lengthy redundancy process is like drip torture for the employee involved and is unsettling and disruptive for fellow employees.

[17] By letter to Mr Hawkins, also dated 30 October 2009, the redundancy was confirmed and written notice of termination given.

Determination

[18] The test of the justification for this, and any, dismissal is whether in the circumstances at the time dismissal was an action an employer acting fairly and reasonably would have taken. In redundancy situations a fair and reasonable employer must, if challenged, be able to establish that he or she has complied with the

statutory obligations of good faith dealing in s 4 of the Employment Relations Act 2000, including as to consultation because a fair and reasonable employer will comply with the law.¹

[19] Although Mr Hawkins has questioned why Mr Pilbrow raised the matter of redundancy with him apparently out of the blue on 29 October, and doubted the alleged loss of business from a major client, I find the business was lost and that the loss prompted Mr Pilbrow's approach.

[20] In a related argument Mr Hawkins said Mr Pilbrow told him during subsequent attempts to resolve the employment relationship problem that the decision to dismiss was made because of Mr Pilbrow's dissatisfaction with Mr Hawkins' performance. Mr Hawkins was referring to exchanges during a meeting held on 18 November 2009 with a view to resolving Mr Hawkins' personal grievance. In support he pointed to two exchanges, both of which were recorded in notes of the meeting.

[21] The first exchange concerned Mr Pilbrow's explanation of why the sales manager's position had been disestablished. Although there were comments to the effect that the position was not working, it is taking them out of context to portray them as statements that Mr Hawkins' poor performance was the real reason for the dismissal. Mr Pilbrow was saying the creation of the position had not achieved the hoped-for result, but this was a reason why the position could be disestablished from an objective point of view rather than a personal comment that Mr Hawkins' performance had not been adequate. The two notions are separate. Mr Pilbrow's comments did not amount to a statement that Mr Hawkins was dismissed because of his poor performance

[22] Secondly, it is unfortunate that by then Mr Pilbrow had lost patience and went on to make some gratuitous and blunt comments about Mr Hawkins' attitude. Again, however, they were not statements that Mr Hawkins' employment had ended because of that attitude. They reflected his angry feelings at the time, while Mr Hawkins interpreted them through his distraught feelings. However there was no evidence that an adverse view of Mr Hawkins' performance, or of his attitude, played any part in the decision to impose the redundancy.

¹ **Simpson's Farms Limited v Aberhart** [2006] ERNZ 825, 842

[23] Finally Mr Hawkins felt profoundly let down in that he believed he was lured to work for Malcove, only to be made redundant a relatively short time afterwards. However even if Mr Hawkins was 'lured' to work for Malcove, there was nothing to indicate that matter had any bearing on the genuineness of the redundancy. Mr Pilbrow's intention when recruiting Mr Hawkins was to address the company's financial position by strengthening its approach to sales. That the strategy was not successful does not mean the redundancy was not genuine.

[24] Overall I find the redundancy was genuine. The difficulty for Malcove lies in the consultation and implementation process.

[25] The general legal obligation to consult encompasses obligations of the kind expressed in clause 13.1 of the employment agreement. There was no consultation here at all. Mr Pilbrow did not rely on any commercial imperative as a reason for the procedure he followed, rather he made the observation I have set out. While the observation may reflect practical experience in some workplaces, unless there are pressing circumstances of a kind not present here the law requires that a consultation process be followed.

[26] Mr Hawkins submitted further that there was a breach of clause 13.1 in that no consideration was given to the possibility of alternative positions. However the clause also said this was to occur 'where appropriate'. Malcove was a business with a relatively small number of staff members, which was under financial pressure such that cost cutting was required and staff numbers needed to be reduced. Any associated restructuring was not of a kind to open up possible alternative employed positions, or contract positions. There was no breach of the agreement or any wider obligation in that respect.

[27] Even so, the lack of consultation means I conclude that the dismissal for redundancy was unjustified on the ground of that failure.

Remedies

[28] One of the remedies available under the Employment Relations Act 2000 for an unjustified dismissal is an order for the reimbursement of remuneration lost as a

result of the associated grievance. However Mr Hawkins' position was genuinely redundant, and would have been disestablished even if an adequate consultation process had been followed. Accordingly there will be no order for the reimbursement of lost remuneration.

[29] Mr Hawkins seeks 'compensation'. The Act provides for compensation for injury to feelings caused by a personal grievance. Mr Hawkins' personal grievance arises out of the failure to consult over his redundancy, not because of the fact of redundancy itself, and compensation for injury to his feelings must be assessed accordingly.

[30] Clearly there has been injury to Mr Hawkins' feelings, but not all of the injury arises out of the grievance. Much of it arises because Mr Hawkins had left an employed position to work for Malcove, and because he is angry and feels he was misled over several matters not concerned with the personal grievance in respect of the redundancy. I assess compensation for injury to feelings caused by the personal grievance at \$4,000.

[31] Malcove is therefore ordered to pay to Mr Hawkins the sum of \$4,000 as compensation for injury to his feelings caused by the personal grievance.

Costs

[32] Costs are reserved.

[33] The parties are invited to agree on the matter. If they seek a determination from the Authority any party seeking an order shall have 28 days from the date of this determination in which to file and serve a memorandum setting out what is sought and why. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority