

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 444
5340059

BETWEEN

KENNETH HEYWOOD
Applicant

AND

RONANYE CONSTRUCTION
LIMITED
Respondent

Member of Authority: R A Monaghan
Representatives: K Heywood, in person
R Thomas, advocate for respondent
Investigation meeting: 31 August 2011 at Rotorua
Additional information provided: 5 and 8 September 2011
Determination: 13 October 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Kenneth Heywood says his former employer, Ronayne Construction Limited (RCL) dismissed him unjustifiably by reason of redundancy.

[2] RCL says the dismissal was justified, but also that Mr Heywood's personal grievance was raised outside the 90-day period specified in s 114 of the Employment Relations Act 2000. It says the grievance cannot proceed and it does not consent to the raising of the grievance out of time.

[3] I heard the issues arising out of s 114 together with the merits of the justification for the dismissal.

Whether the grievance can proceed

[4] Section 114 obliges employees wishing to raise a personal grievance with an employer to do so within the period of 90 days beginning with the date on which the action amounting to the grievance occurred or came to the notice of the employee, unless the employer consents to its later raising.

[5] If a grievance has not been raised with the employer in time, in the absence of consent from the employer it cannot be pursued without a grant of leave to raise the grievance.

1. Whether the grievance was raised in time

[6] The action amounting to the grievance here concerned Mr Heywood's dismissal, which took effect on 28 September 2010. Mr Heywood did not raise his grievance in direct communication with the employer at all. He set out the grievance in a letter to the Authority dated 10 March 2011. That did not amount to the raising of a grievance with his employer under s 114. To the extent that the filing of the statement of problem, and its service on RCL, amounted to the raising of the grievance, then the grievance was not raised until the statement of problem was served on the employer on 5 April 2011. Even then it is arguable whether that action sufficed to raise the grievance with the employer for the purposes of s 114, but in any event no grievance was raised until well outside the required 90-day period.

2. Whether grievance may be raised out of time

[7] Section 114(3) of the Act permits an employee to apply for leave to raise a grievance out of time. Section 114(4) allows the Authority to grant leave if:

- . it is satisfied that exceptional circumstances exist; and
- . it is just to do so.

[8] 'Exceptional circumstances' are defined in general as circumstances which are unusual, uncommon or out of the ordinary course of events. They are more than

special, but less than extraordinary.¹ Mr Heywood relied on his reaction to the dismissal as an exceptional circumstance. While I accept Mr Heywood was distressed and felt traumatised as a result of the dismissal, and that his reaction was understandable, such a reaction is commonly reported by people experiencing dismissals they consider unjustified. It has not prevented them from raising their grievances in time. To amount to an exceptional circumstance the reaction would have to be far more severe than the evidence indicated was the case for Mr Heywood. Accordingly I do not accept that his reaction to the dismissal amounted to an exceptional circumstance.

[9] Section 115 of the Act lists certain specific circumstances which amount to exceptional circumstances. One of these occurs when the employee's employment agreement does not contain the explanation concerning the resolution of employment relationship problems required under the Act.² The required explanation includes information about the 90-day time limit on raising grievances.

[10] Mr Heywood said there was no written employment agreement between himself and RCL, and that no such agreement was ever discussed with him. The required explanation was not included in his employment agreement.

[11] The company's managing director, Rob Thomas, said there was an employment agreement and Mr Heywood was taken through it at the commencement of his employment. The agreement contained the required explanation.

[12] The document produced in support was described as 'the employment agreement that all employment relationships are based on'. It was no more than a template. It was unsigned and undated, and did not even include Mr Heywood's name. On its own it is not adequate evidence of the existence of a written employment agreement between RCL and Mr Heywood. Mr Thomas' evidence that he showed the document to Mr Heywood at the commencement of his employment was denied and was otherwise unsupported, so does not cure the difficulty. I am not satisfied that there was a written employment agreement between the parties.

¹ *Creedy v Commissioner of Police* [2008] NZSC 31

² s 115(c)

[13] In turn, although the document contains the required explanation, the additional information did not persuade me the document should be viewed as evidence of the terms of any oral agreement between the parties. There was nothing else to establish that any agreement between the parties contained the required explanation. Accordingly I am not satisfied that the agreement between the parties contained the explanation.

[14] On that ground I find exceptional circumstances exist for the purposes of an application under s 114(3) and (4).

[15] The second limb of s 114 requires a consideration of whether, despite the above finding, it is just to grant leave. That consideration usually requires an assessment of the merits of the grievance, with the merits sometimes being addressed on a preliminary basis. However since I have heard the merits in full I now address them in a separate section of this determination.

Events leading to the termination of employment

[16] RCL specialises in the construction of schools and industrial buildings in the Rotorua/Taupo area. It deploys construction gangs on each site, and the gangs are headed by project supervisors. Gangs usually move from project to project, with smaller 'jobbing' work being allocated as appropriate during or between projects. Mr Heywood was employed as a project supervisor, commencing in or about 2004.

[17] The company's workforce peaked in about 2007, but afterwards staff numbers began to reduce as the economic downturn took effect. There was less work available for tender, and increased competition for the work which was available. RCL's annual accounts for the year ended 31 March 2010 revealed a substantial drop in construction income from the previous year, and reflected the reduction in staff numbers. By 2010 the workforce numbered approximately one half of the number employed at the peak in 2007. The employment of at least 10 people had been terminated on the ground of redundancy. Further, it was common ground that Mr Heywood's hours of work were reduced in or about September 2009 because of the shortage of work.

[18] In or about mid-2010 Mr Thomas was planning to tender for two significant projects. He intended to allocate one of the sites to Mr Heywood, as the other supervisors were already deployed on other projects. Although Mr Thomas took what he considered to be a very competitive approach to the pricing of the tender for the project he intended to allocate to Mr Heywood, he was notified by letter dated 21 September 2010 that the tender was not successful. At or about the same time RCL was advised of its lack of success in the tender for the second project.

[19] At the time of receipt of this notification there were no other projects for which RCL was even planning to tender. Mr Thomas said that on other occasions when the company faced a few weeks' down time between projects employees would be asked to and did take annual leave until the new project commenced. However this time there were no upcoming projects at all. Mr Thomas also said and I accept that, had the company been successful in obtaining one of the two tenders, the continued employment of Mr Heywood might have been possible. As matters stood, during the period of several months following the completion of his last project Mr Heywood had already been doing jobbing work and there was nothing left to offer him.

[20] For those reasons, Mr Thomas called Mr Heywood to his office on 22 September 2010 to advise that there was no work, and Mr Heywood's employment was to be terminated on a week's notice.

[21] Mr Heywood said he was devastated, and the termination was a shock he did not see coming. He relied in particular on a conversation with Mr Thomas in or about early 2008, in association with redundancies being imposed at that time. He said Mr Thomas told him he would be 'one of the last to go'. At the heart of his grievance is his view that, at the time of his redundancy in September 2010 he was not 'one of the last to go', since a workforce remained.

[22] Even so, Mr Heywood acknowledged there were other redundancies after he left. For his part Mr Thomas said that a second project supervisor was made redundant in November, and the remaining two were doing jobbing work only.

[23] Mr Heywood has been reinforced in his view that he should have been retained in his employment by his observations that one previously-redundant

labourer was re-employed in early 2011, and two new builders/labourers were engaged on a project in Rotorua at about the same time. Mr Thomas said that the previously-redundant labourer was engaged as a casual labourer, and one new person was engaged for a period of only 4 – 5 weeks.

[24] Finally Mr Heywood referred to alleged comments of Mr Thomas along the lines that Mr Thomas sought to protect the employment of younger staff members, although he did not attempt to raise a more directly-focussed grievance in respect of them. For completeness, I address the matter.

[25] Mr Thomas said he made comments intended as observations on the respective financial circumstances of younger and older employees, and the implications for their ability to weather a redundancy. The comments were not meant to indicate that he intended to offer suitable available work to younger people in preference to Mr Heywood. The evidence about the position Mr Heywood was employed to hold, the continuing absence of any work suitable for that position, the efforts to keep Mr Heywood employed, and the continuing lack of work in general, mean I would not accept that Mr Heywood's redundancy was imposed by reason of his age. Accordingly I do not take that matter any further.

The merits of the claim of unjustified dismissal

[26] Broadly speaking, the termination of employment on the ground of redundancy is justified if the employer acts genuinely in deciding a position is to be made redundant, and meets its duty to act fairly and reasonably to the affected employee.

[27] In that I accept Mr Thomas' evidence regarding the availability of work and its allocation to staff members, I find RCL acted genuinely in concluding Mr Heywood's position was to be made redundant.

[28] Regarding the duty to act fairly and reasonably, I do not accept that anything in the indication given to Mr Heywood in 2008 means there was unfair treatment of him in September 2010. Among my reasons are that the company could not be bound by a two-year old indication intended as reassuring rather than binding, and which

was not legally binding. Further, economic and other circumstances change, as they did here, and RCL was entitled to respond as it considered necessary in the interests of its business. Its duty to act fairly did not extend to an obligation to act on that indication and retain Mr Heywood when there was no work for him, or to dispense with the services of someone else to accommodate Mr Heywood when Mr Heywood was already effectively on make-work activities.

[29] Similarly, I do not accept that the engagement of the individuals in or about early 2011 and under the limited arrangements described meant that Mr Heywood's redundancy in September 2010 was unfair or unjustified.

[30] A particularly important aspect of the duty to act fairly and reasonably is the obligation to deal with Mr Heywood in good faith by consulting with him about the termination of his employment.³ Mr Thomas did not consult with Mr Heywood – rather he called Mr Heywood into the office and announced the termination.

[31] As to what might have been achieved by consultation, Mr Heywood pointed out that people had taken leave between projects before and said that, had he been given the opportunity, he would have taken up to a month or two of unpaid leave while he waited for new work to become available to RCL. A suitable process of consultation would at least have allowed Mr Heywood to make that suggestion.

[32] On the other hand Mr Thomas did not consider an arrangement of that kind to be fair or reasonable to the employee. He considered it better to make a clean break so that the employee was free to look for work elsewhere rather than waiting for a period of months for work from RCL that may not eventuate. Hindsight illustrates the point in that Mr Heywood would have lost the waiting time for no good reason, since no suitable work did become available in the month or two following the termination of his employment and there were more redundancies.

[33] Accordingly while the lack of consultation meant that alternatives to the termination of employment were not discussed before the decision was made, as they should have been, I find the alternative now suggested could reasonably have been rejected by the employer.

³ *Simpsons Farms Limited v Aberhart* [2006] ERNZ 825

[34] More generally, even in the light of the commercial constraints under which RCL was then operating, Mr Thomas should not have announced the redundancy as suddenly as he did. He should at least have given Mr Heywood some warning of the possibility, and should have discussed with Mr Heywood more comprehensively than he did the reasons why RCL could not continue Mr Heywood's employment. As Mr Heywood said, he would have had time to prepare.

[35] Even so, although Mr Heywood was not in possession of RCL's detailed financial information, he was aware of the continuing decline in available work, that RCL had already been imposing redundancies as a result of the decline, and that work was being made available to him in the form of small jobs on an ad hoc basis. The trigger for his own redundancy was the most recent lack of success in tendering. In believing he would not be made redundant in the face of these developments, he was relying on the indication given to him in 2008. This was not realistic.

[36] Overall I find that a proper process of consultation would not have avoided the redundancy, rather at most it would have softened the blow to Mr Heywood. However there was nothing to suggest RCL was in danger of failing unless it acted immediately on Mr Heywood's redundancy. I find that a long-serving and loyal employee like Mr Heywood deserved at least some warning of the possibility, rather than having it announced as suddenly as from his point of view it was. In that respect RCL failed to act as a fair and reasonable employer to the extent that Mr Heywood's dismissal was unjustified.

Conclusions

1. Grant of leave to raise the grievance

[37] I have found that 'exceptional circumstances' exist under s 115 of the Act. In that there was a failure to consult I also find to a preliminary level that Mr Heywood's grievance has merit, so that in all of the circumstances it is just to grant leave to raise the grievance.

[38] Leave is granted accordingly.

2. Justification for the dismissal

[39] Finding that a grievance has merit for preliminary purposes is not the same as making a substantive finding that the dismissal in question was unjustified. In the preceding sections of this determination I went beyond identifying the failure to consult, and made further findings about the significance and effect of that failure. I also addressed the other concerns Mr Heywood raised. That discussion in its entirety forms the basis for my conclusion in respect of the grievance itself, and in particular the finding that Mr Heywood's dismissal was unjustified.

Remedies

[40] Mr Heywood's position was genuinely redundant, and Mr Heywood would have lost it even if the implementation process had been fairer. Accordingly any loss of remuneration he has suffered flows from that loss, rather than from the deficiencies in the implementation process. For that reason there will be no order for the reimbursement of remuneration lost as a result of the personal grievance.

[41] Mr Heywood also sought compensation for the injury to his feelings caused by his grievance. I accept that he was devastated, but again his entitlement to compensation results from the way in which the redundancy was implemented rather than from the loss of employment itself.

[42] RCL is therefore ordered to compensate Mr Heywood under s 123(1)(c)(i) of the Act for injury to his feelings in the sum of \$3,000.

Summary of orders

[43] RCL is ordered to compensate Mr Heywood for injury to his feelings in the sum of \$3,000.

Costs

[44] Costs are reserved.

[45] For the information of the parties, the usual approach to costs is to find that the successful party is entitled to a contribution to costs incurred in bringing or defending a claim. Not all costs are capable of being reimbursed, and for the most part the substantial proportion of the costs able to be claimed are those incurred in obtaining professional advice or representation in respect of the proceeding in the Authority. Such costs are rarely awarded in full. There was no indication here that Mr Heywood has received professional input.

[46] On the information currently available to me I would be likely to order that RCL reimburse Mr Heywood for the filing fee of \$71.56. If I do not hear further from the parties, that is the order of the Authority.

[47] If the parties wish to address me further on costs, any party seeking an order costs shall have 28 days from the date of this determination in which to file in the Authority and copy to the other party a written statement of what is sought and why. The other party shall have a further 14 days in which to file and copy a reply.

R A Monaghan

Member of the Employment Relations Authority