

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 299/09
5148593

BETWEEN PETER CHARLES HILLIARD
Applicant

AND MCADAM HOLDINGS
LIMITED T/A DIRECT
OFFICE FURNITURE
Respondent

Member of Authority: K J Anderson

Representatives: Peter Hilliard in Person
 Robert McAdam for Respondent

Investigation Meeting: 18 August 2009 at Auckland

Determination: 25 August 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Peter Hilliard, claims that he was unjustifiably dismissed on the grounds of redundancy. Mr Hilliard claims that the redundancy of his position was effectively a sham and that his dismissal was for other reasons related to performance issues which had been discussed prior to the termination of his employment. He seeks that the Authority find that he has a personal grievance and award him the remedies of reimbursement of lost wages and compensation for humiliation, loss of dignity and injury to feelings.

[2] Mr Robert McAdam is the Managing Director of the respondent company, trading as Direct Office Furniture (“DOF”). He denies that Mr Hilliard was unjustifiably dismissed. Mr McAdam says that the termination of Mr Hilliard’s

employment was an informed business decision based on the economic factors affecting the business at that time.

Background facts and Evidence

[3] Mr Hilliard commenced his employment with DOF on 16th July 2007. He was employed as a Trainee Sales Manager. The business was sold to Mr McAdam who directed it from 1st August 2007. Mr Hilliard was one of the employees who had their employment transferred to the new owner. He reported directly to Mr McAdam.

[4] Mr Hilliard was given a new employment contract which he signed on 1st September 2007. He says he signed it under duress. Mr McAdam denies that there was any pressure on Mr Hilliard to sign the contract but he recalled that there was an issue about requiring Mr Hilliard to work one Saturday in every five. I find that while Mr Hilliard may have had some reservations about signing the new contract, there is no evidence that he did so under any degree of duress. Nor is there any evidence that he was subsequently unhappy about the general terms and conditions of the contract.

[5] On or about 30th November 2007, Mr Hilliard received a job description for the role of Sales Manager. Mr McAdam says that he was tentatively looking at giving Mr Hilliard this role based on the CV which Mr Hilliard had presented to the former owner of the business. However, Mr McAdam subsequently discovered that the sales figures for Mr Hilliard were not at a satisfactory level and he decided it would be better for Mr Hilliard to concentrate solely on sales rather than have any management responsibility. Mr Hilliard does not appear to have taken issue with this decision.

[6] Following some earlier discussions, in March 2008 a meeting took place between Mr Hilliard and Mr McAdam at which Mr McAdam raised his concerns about the unsatisfactory level of Mr Hilliard's sales figures. It seems that Mr McAdam expressed his concerns about the level of salary being paid to Mr Hilliard (\$60,000) as compared with other sales people (average \$46,000 - \$50,000), and the fact that other sales people were achieving higher sales figures. There was some discussion about gross profit margins and Mr McAdam instructed Mr Hilliard to lower the profit margins in order to achieve higher sales. A further meeting took place on 1st May 2009 at which Mr McAdam presented Mr Hilliard with an email of the

same date. Mr McAdam expressed his further concerns about the sales figures being achieved by Mr Hilliard and gave him a formal warning. Following some further discussion between the two men, the reasons for the warning were confirmed in an email dated 7th May 2008.

[7] A further meeting took place on 10th July 2008. Mr Hilliard had been employed for almost 12 months. This meeting appears to have been the one year performance review. Mr Hilliard says that he left the meeting unclear whether he was being made redundant or dismissed and sent an email to Mr McAdam on 11th July accordingly. Mr McAdam responded with a return email the same day which summarised his view of where matters had got to in regard to the sales performance of Mr Hilliard.

[8] Mr McAdam expressed his dissatisfaction about the sales performance of Mr Hilliard and his failure to achieve the average monthly sales target during the past year. Mr McAdam pointed out that the salary Mr Hilliard was receiving, as agreed to by the previous owner of the business, for a trainee sales manager, was significantly higher than could be justified for a sales position, particularly given the poor performance of Mr Hilliard. Mr McAdam proposed that a more appropriate salary for a salesman role would be \$48,000 along with a review of monthly bonus targets and a subsequent review of the remuneration should Mr Hilliard improve his sales record. Mr McAdam proposed that there should be a further meeting the following week to discuss this proposal.

[9] A meeting took place on 15th July 2008. Mr McAdam produced for the Authority some typed notes which he says he prepared shortly after the meeting. Mr Hilliard expressed the view that rather than accepting a reduction in salary he should retain it and he produced details of a vacant sales manager role at the company he had previously worked for in Australia, attracting a salary of between \$70,000 and \$100,000. Mr Hilliard also gave some reasons as to why he considered his sales record was so poor. Mr McAdam says that Mr Hilliard stated that he would not accept a reduction in salary and in fact felt that he was due for a salary increase upon one year of service. The response of Mr McAdam was that while Mr Hilliard's CV showed he had the experience and knowledge to achieve the necessary sales, this had not been the reality.

[10] The evidence of Mr McAdam, as recorded in his notes (document `G'), is that he pointed out to Mr Hilliard that DOF was moving into a "difficult period currently running at a growing loss" and that all positions were "under evaluation." Mr Hilliard says Mr McAdam never mentioned at the meeting on 15th July that all positions were under evaluation. Mr McAdam says he made handwritten notes at the meeting and produced the typed version from those and then discarded them. I find the evidence of Mr McAdam on this matter to be credible. Indeed, Mr Hilliard has earlier accepted that Mr McAdam may have said at the meeting that all positions were under evaluation (see document `C' at page 2).

[11] In the meantime, Mr McAdam contacted the former employer of Mr Hilliard and discovered that Mr Hilliard had not achieved the sales figures (approximately \$110,000 per month) that he claimed in the CV he had presented to the former owner of DOF. The evidence of Mr McAdam is that Mr Hilliard never achieved \$40,000 of sales in any month of his employment with DOF, whereas other salesmen on a salary of \$46,000 to \$50,000 per annum were achieving, on average, sales of a value of between \$50,000 and \$100,000 per month.

[12] A further meeting took place later in July 2008. Mr Hilliard and Mr McAdam are not certain of the actual date. An email (document `J') to Mr Hilliard from Mr McAdam, refers to a meeting "today." The heading of the email is undated - there is a computer produced date at the bottom of the email - 29/07/2008. Mr Hilliard says the email should be dated 15th July 2008 but I do think this can be correct given the notes of the meeting on this date referred to earlier [para. 9 above]. Rather, I find that it is most probable that the meeting took place on 29th July 2008. Mr McAdam appears to have adopted a curious practice of preparing emails prior to his meetings with Mr Hilliard, then presenting a copy of the email at the meeting as a record of what is to be discussed albeit the context is lost to some degree. I conclude it is likely that Mr McAdam printed the email on this date and presented it to Mr Hilliard at the meeting.

[13] The email records that the purpose of the meeting was to discuss the future of Mr Hilliard with the company. Mr McAdam conveys that he has seriously considered all of his options regarding Mr Hilliard but economic conditions dictate that he makes an important decision. The decision is that he had chosen to make Mr Hilliard's position redundant, the reason being that the company is overstaffed in the sales

division and has to be reduced by one person. Mr McAdam selected Mr Hilliard to be made redundant because he was being paid more than the other sales staff but was less effective. Mr McAdam concluded by stating that his decision was not taken lightly but “economic conditions prevail” and he did not anticipate any improvement in the next 12 months.

[14] The two men met again on 1st August 2008. Mr Hilliard was given a letter of the same date. It opens: “Further to our consultation with you on this matter we regret that we will be proceeding with our original proposal and your present job as sales consultant has been made redundant.” Mr Hilliard is notified that he is being given four weeks notice and that his employment will cease on 29th August 2008. A “debilitating downturn in sales” and an urgent need to reduce the sales force are cited as the reasons for the redundancy.

[15] Mr Hilliard has produced a document (‘L’), being handwritten notes which he says he made at the 1st August meeting. The notes record that he put two questions to Mr McAdam. The first question related to whether Mr McAdam “colluded” with a manager within Santo Industries, the previous employer of Mr Hilliard, on the subject of Mr Hilliard’s previous salary and his sales turnover. The second question was whether Mr McAdam had “been participating in constructively dismissing” Mr Hilliard. Via tick boxes () in the notes it is recorded that Mr McAdam answered “Yes” to both questions rather than a “No” option.

[16] Mr McAdam says that he never saw Mr Hilliard taking any notes but he did recall telling Mr Hilliard that he had contacted his previous employer. Mr McAdam denies that there was any mention of constructive dismissal. Given the conflict in the evidence on this point I am bound to examine the credibility of the two versions. I find the format of Mr Hilliard’s notes to be most remarkable and not of the nature that one would normally expect in such circumstances. I have significant doubts as to reliability of the evidence of Mr Hilliard in this area and find it most improbable that the notes were prepared as Mr Hilliard says they were. I note that there is no mention of any such allegation in the *Statement of Problem* or the letter from Mr Hilliard’s lawyer raising the personal grievance. While Mr McAdam’s version of events is somewhat lacking in clarity I am disposed to accept that he did not engage in any discussion about constructive dismissal at the meeting on 1st August 2008.

[17] While Mr Hilliard could have worked out his notice up to 29th August 2008, he notified Mr McAdam on 13th August that he would be ceasing his employment on 15th August. Mr Hilliard firstly says that the reason he finished earlier was because Mr McAdam suggested he should. Mr McAdam denies this. Mr Hilliard also says that he finished earlier due to “extreme stress, ill health and generally working in a hostile work environment.” He cited an incident involving another employee. He acknowledged that this incident did not directly involve him but rather someone he had known for some time, Mr Mamia. While it can be generally accepted that being given notice of redundancy is usually a stressful and an unpleasant experience for most people, I find that there is no evidence to suggest that Mr McAdam prompted Mr Hilliard in any way to leave earlier. Indeed, the accepted evidence of Mr McAdam is that he was surprised when Mr Hilliard notified that he was leaving inside the notice period as he thought that Mr Hilliard would use the time to explore other work opportunities as had been offered.

The Issues

[18] There are two questions for determination:

Was the redundancy of Mr Hilliard for a genuine commercial reason and if so; was the process applied, including the selection of Mr Hilliard’s position to be made redundant, procedurally fair?

Was the redundancy for a genuine commercial reason?

[19] I find that there are a number of factors that support a genuine redundancy in this instance. Mr McAdam produced monthly profit and loss statements for the period January 2008 to August 2008, revealing continuing and accumulating losses for the company. Prior to the redundancy of Mr Hilliard, a marketing assistant and been made redundant (June 2008). Following Mr Hilliard (August 2008), from November 2008 to June 2009, eight more staff, five involved in sales, were made redundant; a total of 10 staff out of the 22 employed by the company. Mr McAdam says that currently, it is possible a further two staff will have to be made redundant. He also related that he had to sell his house in April this year, that the business is now technically insolvent, and its survival now hangs in the balance.

[20] Given the stark evidence produced by Mr McAdam, I can reach no other conclusion than that DOF is a business that has been dramatically affected by the severity of the economic circumstances currently facing many businesses and individuals.

[21] It is well established that an employer is entitled to reorganise a business or take other cost saving steps, whether or not the business would otherwise go to the wall, and that an employee does not have the right of continued employment if the business can run more efficiently without him.¹ As a business, it would seem that DOF is currently very close to going to the wall and in August 2008, as a matter of economic prudence, Mr McAdam was entitled to and indeed as it has transpired, required to, reduce his costs by reducing staff numbers. I find that the redundancy of Mr Hilliard's position was for genuine commercial reasons.

Was the redundancy dismissal procedurally fair?

[22] Having determined there was a genuine commercial reason for a redundancy, there is a requirement to examine the procedural factors relating to the redundancy of the position held by Mr Hilliard. This includes whether it was fair and reasonable that Mr Hilliard's position should be selected to be made redundant. While it is generally accepted that it is the position that is made redundant, not the incumbent,² when there are several positions of the same nature, inevitably, an employer must examine how effectual the holders of the positions are in regard to the overall efficacy of the business, including overall cost factors such as total remuneration.

[23] At the material time, DOF employed five sales representatives/consultants including Mr Hilliard. The evidence produced by Mr McAdam pertaining to the monthly sales figures for each sales representative for the months of April to August 2008, shows that Mr Hilliard achieved an average sales value that was lower than three of the other sales representatives but Mr Mamia was considerably below him, particularly given that Mr Hilliard only worked two weeks in August. Furthermore, in the months of May and June, Mr Hilliard achieved sales values that placed him second and third respectively. It seems to me that if the sole criteria for selection was

¹ *G N Hale & Son Ltd v Wellington Caretakers IUOW* [1991] 1 NZLR 151.

² *New Zealand Fasteners Ltd v Thwaites* [2000] 1 ERNZ 739.

just the achievement of a satisfactory sales value, one would have assumed that it would have been more fair and reasonable for Mr McAdam to have selected Mr Mamia to be made redundant.³ However, there was another key factor which Mr McAdam took into account. This was the level of the salary which Mr Hilliard was being paid. Mr Hilliard was being paid \$60,000 per annum while apparently the average salary for other sales people was between \$40-45,000 per annum. Mr McAdam attempted to get Mr Hilliard to agree to a reduction in salary to bring him into line with the other people. This proposal was rejected by Mr Hilliard. Rather, he suggested that he should be paid more despite his sales figures not reflecting any justification for such.

[24] There was too another factor in the mind of Mr McAdam. This was the information obtained from the previous employer of Mr Hilliard who conveyed that Mr Hilliard had never obtained the sales figures which he claimed. While Mr McAdam never put this directly to Mr Hilliard as being a possible misrepresentation, albeit he seems to have alluded to it, on the basis of Mr Hilliard's sales record during his year of employment and his previous employment sales record, he concluded that Mr Hilliard was never going to achieve a substantial improvement in his sales figures which might justify the higher salary that Mr Hilliard was receiving, as compared with the other sales people.

[25] Having examined the various criteria which Mr McAdam applied and given the parlous financial condition of the business, I conclude that it was fair and reasonable that he should select Mr Hilliard to be made redundant rather than any of the other sales representatives.

[26] Then there is the right of Mr Hilliard to be consulted before a final decision was made to make his job redundant. This is set out in common law⁴ and in statute, as it pertains to the parties to an employment relationship to act in good faith.⁵ Mr Hilliard is critical of the reference to consultation in the letter of 1st August 2008, giving him notice of the termination of his employment. He says that there was no consultation and that Mr McAdam had simply determined his redundancy based on performance issues without him having any input into the process. While there is

³ Mr Mamia was made redundant in June 2009.

⁴ For example, *Coutts Cars Ltd v Baguley* [2000] ERNZ (CA) 660.

⁵ Section 4, Employment Relations Act 2000.

some degree of justification for this perception as performance issues had been previously addressed, I do not find it to be entirely correct. I find that Mr Hilliard was well aware that his sales performance, as linked to his salary, was not satisfactory to Mr McAdam and that a salary reduction was sought in order to make his position more economical for the company. Indeed, following the meeting which took place on 10th July 2008, after discussing the matter with his partner, Mr Hilliard sought clarification via an email the next day as to whether dismissal or redundancy was a possibility. At this point, it does not appear that Mr McAdam had discussed redundancy, albeit it seems that Mr Hilliard understood that it was a possible option.

[27] Then there was the meeting which took place on 15th July 2008. The notes of this meeting record that the salary level paid to Mr Hilliard was discussed again in the context of his less than satisfactory sales record. And, Mr McAdam notes that he pointed out that: “Direct Office Furniture was moving into a difficult period, currently running at a growing loss and that all employment positions were under evaluation.” Mr Hilliard has disputed this was said but I have found his evidence to be inconsistent on this point and have accepted the evidence of Mr McAdam [para. 10 above].

[28] A further meeting took place on 29th July and Mr Hilliard was again informed of the difficult economic conditions faced by the company, that he had been selected to be made redundant and why. This is not one of those cases where an employee is caught completely unawares, given no indication that redundancy is a possibility, then told they are redundant and given immediate notice of termination. Ideally, Mr McAdam could have provided Mr Hilliard with more details relating to the financial position of the company and why a reduction in staff was necessary and then given Mr Hilliard an opportunity to propose some alternative. But as he said, the sales figures are commercially sensitive and he was conscious of not creating a fearful environment where key sales staff would leave and hence exacerbate the financial situation. Also, he had previously discussed with Mr Hilliard that his salary level and his sales record were incompatible given the financial position of the business and had not received a useful response.

[29] I find that while the consultation process applied to Mr Hilliard was not ideal and could have been improved upon, it was not so deficient as to make the

termination of the employment of Mr Hilliard procedurally unfair or unreasonable.

Determination

[30] Given the parlous financial position of Direct Office Furniture, and the overall circumstances pertaining to the sales representatives positions within the business at the material time, I find that the dismissal of Mr Hilliard, on the grounds of redundancy, was justified and pursuant to s.103A of the Employment Relations Act 2000, was what a fair and reasonable employer would have done at the time the dismissal occurred.

Costs

[31] Costs are reserved.

K J Anderson
Member of the Employment Relations Authority