

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2018] NZERA Wellington 45
3025811

BETWEEN BLAIR HODGSON
 Applicant

AND ASV UNITED LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Applicant in Person
 Alisha Vatua for Respondent

Investigation Meeting: 25 May 2018

Oral Determination: 25 May 2018

Record of Oral
Determination: 28 May 2018

RECORD OF ORAL DETERMINATION OF THE AUTHORITY

- A. Mr Hodgson was unjustifiably dismissed and ASV United Limited is ordered to pay to Mr Hodgson the following amounts within 28 days of the date of this determination:**
- a) Reimbursement of lost wages in the sum of \$8,840 under s 123(1)(b) of the Act;**
 - b) The sum of \$6,000 under s 123(1)(c)(i) of the Act.**
- B. ASV United Limited is ordered to reimburse Mr Hodgson the sum of \$71.56 within 28 days of the date of this determination.**

Employment relationship problem

[1] ASV United Limited operates a business providing full service cleaning of heat pumps for domestic and commercial clients throughout New Zealand. Mr Hodgson worked as a heat pump cleaner from 9 August 2017 and was based in Wellington.

[2] The terms of Mr Hodgson's employment were set out in a written employment agreement which he signed on 8 August 2017.

[3] ASV gave notice to Mr Hodgson on 8 November that his employment would end by reason of redundancy on 22 November. Mr Hodgson says his dismissal was unjustified and seeks remedies for his personal grievance.

Issue

[4] In order to resolve Mr Hodgson's employment relationship problems I must determine whether Mr Hodgson's dismissal by reason of redundancy was justified and if not, what if any remedies should be awarded.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence received from Mr Hodgson and ASV but has stated findings of fact, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result.

The dismissal

[6] In order for a redundancy to be justified ASV must demonstrate that the dismissal was what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. I must consider whether ASV met the minimum standards of procedural fairness outlined in s 103A of the Act and whether it made a decision to terminate the employment relationship on substantively justified grounds.

[7] The Court of Appeal considered the application of section 103A in a redundancy setting in *Grace Team Accounting Limited v Brake*.¹ That decision upheld the earlier Employment Court decision where the Court confirmed employers must show that a decision to make an employee redundant is genuine and based on

¹ [2014] NZCA 541.

business requirements.² This requires the Authority to scrutinise the reasons relied on by the employer in making its decision to dismiss.

[8] Section 4 of the Act requires parties to an employment relationship to deal with each other in good faith when restructuring. Parties are to be active and constructive in establishing and maintaining a productive employment relationship in which they are responsive and communicative. The statutory obligations of good faith require employers to provide affected employees with access to information relevant to the continuation of the employee's employment and an opportunity to comment on the information before the decision is made.

Was the redundancy for genuine commercial reasons?

[9] Mr Hodgson was told by telephone on 8 November that his employment would end on 22 November. Initially ASV attempted to rely on the 90-day trial provision set out in Mr Hodgson's employment agreement to terminate his employment. Mr Hodgson, correctly, reminded ASV that the 90-day period lapsed on 7 November and had no effect. Mr Hodgson says he was then told he was being made redundant.

[10] Mr Andrew Alfaitele told me

[11] he had a discussion with Mr Hodgson in Wellington where he discussed with Mr Hodgson that work was slow. Mr Hodgson denies they had that discussion and told me the meeting took place to discuss his employment agreement. In particular Mr Hodgson wanted 40 hours work rather than 30 hours. Mr Alfaitele agrees they discussed Mr Hodgson's hours and that Mr Hodgson wanted to increase his hours to 40 per week.

[12] Mr Alfaitele told me that Mr Hodgson knew that business was slow in Wellington so the redundancy should not have come as a surprise. Mr Alfaitele told me the number of hours Mr Hodgson worked for clients was out of proportion to the number of hours he was being paid. Mr Hodgson told me he worked within the greater Wellington region and had to drive from one client to another. This means he spent a considerable amount of time travelling between jobs. He said it was not possible to work for customers eight hours a day but he did work a full day every day.

² [2013] NZEmpC 81.

[13] ASV has not established to my satisfaction that the reason for Mr Hodgson's dismissal was for a genuine commercial reason.

Procedure

[14] ASV confirmed Mr Hodgson's redundancy in a letter dated 8 November. In that letter Ms Vatua refers to a review having been undertaken. At the investigation meeting Ms Vatua told me there was a written record of the review but Mr Hodgson was not given a copy and neither was the content of the review discussed with him prior to the decision to dismiss him by reason of redundancy being made.

[15] There were no consultation meetings with Mr Hodgson regarding the possibility of redundancy. Redundancy became the reason for terminating his employment after Mr Hodgson raised with ASV that it could not rely on the 90-day trial provision in his employment agreement.

Conclusion

[16] For the following reasons the decision to dismiss Mr Hodgson by reason of redundancy was not a decision an employer acting fairly and reasonably could make in all the circumstances.

[17] The procedure followed by ASV was flawed, even having regard to the small size of the company. ASV failed to follow the requirements prescribed by the Act. There was no consultation with Mr Hodgson prior to the decision being made to terminate his employment. There was no evidence Mr Hodgson knew or ought to have known that work was so slow it could result in his employment being terminated. There was no opportunity for Mr Hodgson to provide any response to the reasons for the redundancy or have any input into the decision made by ASV.

[18] There was no exploration of alternatives to redundancy. ASV had determined prior to 8 November that Mr Hodgson's employment would terminate and attempted to do so in reliance on the 90-day trial period provision.

[19] ASV's failure to comply with the statutory requirements were not minor and resulted in Mr Hodgson being treated unfairly. The procedural failings contributed to the lack of justification for the dismissal. I find therefore Mr Hodgson was

unjustifiably dismissed from his employment with ASV and is entitled to a consideration of remedies.

Remedies

[20] Mr Hodgson seeks payment of lost wages and \$6,000 compensation for injury to feelings and humiliation.

[21] Section 123(1)(b) of the Act provides for the reimbursement by ASV of the whole or any part of wages lost by Mr Hodgson as a result of his personal grievance. Section 128(2) requires me to order the lesser of a sum equal to Mr Hodgson's lost remuneration or to three months' ordinary time remuneration.

[22] Mr Hodgson is entitled to be reimbursed three months lost wages. Mr Hodgson told me he worked in some temporary roles after his dismissal but is now the full time caregiver for his daughter because his wife has returned to full time employment.

[23] The wages lost as a result of Mr Hodgson's personal grievance amount to \$8,840 gross. This sum is calculated by multiplying Mr Hodgson's agreed hours of work of 40 hours each week by his hourly rate of \$17.00 per hour. Extrapolated out over the 3 months (13 weeks) equals \$8,840. Mr Hodgson had some temporary work after his dismissal but that work fell outside the three month period and has not been taken into account in assessing the amount for lost wages.

[24] Mr Hodgson gave evidence of the impact the dismissal had on him. He told me it was a stressful time as it was right before Christmas and he and his wife were in the process of moving house. To compound matters ASV did not pay him his final pay when it was due which added to the stressful situation.

[25] Mr Hodgson seeks payment of \$6,000 for compensation and I am satisfied that this amount is appropriate in this case.

Contribution

[26] Having found Mr Hodgson is entitled remedies for his personal grievance for unjustified dismissal, I am required by s 124 of the Act, despite this being a

redundancy situation, to consider whether he contributed to the situation giving rise to his grievance.

[27] There was no evidence of any conduct by Mr Hodgson which contributed to the termination of his employment by ASV. Accordingly, no reduction for contribution is needed.

[28] ASV United Limited is ordered to pay to Mr Hodgson the following amounts within 28 days of the date of this determination:

- c) Reimbursement of lost wages in the sum of \$8,840 under s 123(1)(b) of the Act;
- d) The sum of \$6,000 under s 123(1)(c)(i) of the Act.

Costs

[29] Mr Hodgson was not represented at the Authority and is entitled to reimbursement of his filing fee in this matter.

[30] ASV United Limited is ordered to reimburse Mr Hodgson the sum of \$71.56 within 28 days of the date of this determination.

Vicki Campbell
Member of the Employment Relations Authority