IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 86
5342797

	BETWEEN	ALLAN RAYMON HUMPHRIES Applicant
	A N D	EARTHWORKS AORAKI LIMITED Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Christie O'Driscoll, counsel for Applicant Craig O'Connor, counsel for Respondent
Investigation Meeting:	5 April 2012
Date of Determination:	8 May 2012

DETERMINATION OF THE AUTHORITY

A. The applicant has a personal grievance; he was unjustifiably dismissed or disadvantaged by the respondent.

B. As remedies for his grievance the applicant is awarded three months lost wages and compensation of $6,000 under s 123(1)(c)(i) of the Employment Relations Act 2000.

C. He also recovers an underpayment of one days pay and any holiday pay due.

D. Costs are reserved.

Employment relationship problem

[1] The applicant, Mr Allan Humphries, was employed by the respondent, Earthworks Aoraki Limited (EAL), to operate machines including excavators, and to drive trucks and be a general labourer for EAL's earthmoving business. He commenced work in September 2009, when the company had been in operation for about 4 years.

[2] On 11 March 2011, Mr Humphries was notified by letter from Mr Mark Talbot, EAL's director and owner, that his position was "surplus to requirements." The letter included the following advice:

> *… as a consequence, I hereby give you four weeks notice of termination of your employment for reasons of redundancy. Your finish date is 8th of April 2011.*
>
> *I offer you the option of working out some or all of the notice period. You may wish to finish up sooner, which would enable you to focus on finding another job. If you prefer to finish up sooner than the 8th of April, then please let me know. You will of course continue to be paid fortnightly through to the 8th of April.*
>
> *Your final holiday pay will be paid promptly after the 8th April finish date.*

[3] Mr Humphries instructed solicitors who promptly raised on his behalf a personal grievance claim before the notified 8 April finish date.

[4] In particular, the grievance challenged the "process" leading to Mr Humphries's dismissal which was complained of as being unjustified.

[5] The grievance was not resolved, even after mediation between the parties, and consequently an investigation was commenced in the Authority.

[6] The Authority heard evidence from Mr Humphries and Mr Talbot, and also Mr Craig Gilbert a friend and supporter of the applicant, and from Mr Talbot's partner Ms Jessica Patterson. A number of letters and other documents relevant to the grievance claim were provided, and counsel Ms O'Driscoll and Mr O'Connor examined and cross examined the witnesses and provided comprehensive legal submissions.

[7] I find from the un-contradicted evidence of Mr Talbot that by early 2011 his company EAL was falling under increasing pressure in servicing its debt. The company owed its bank a large amount of money, secured against Mr Talbot's house property, and in addition EAL had obtained extensions to its overdraft as well as borrowing funds privately from members of Mr Talbot's family. With his accountant he reviewed the performance of EAL in the light of the ongoing tight liquidity situation. The accountant confirmed in writing that lease payments for the firm's heavy machinery and other equipment were not being met and neither were loan repayments. The accountant urged Mr Talbot to take "decisive action" by restructuring his company and pointed out in his letter:

> *As you know, your past two years Financial Performance Statements have shown marginal returns and this is after financial concessions for plant rental repayments.*

[8] Mr Talbot was advised by the accountant that in particular he should reduce the number of staff employed and lower the wage bill of the company. Mr Talbot was urged to take immediate action to control or limit the damage to his company. He viewed the advice he had been given by the accountant as being clear that in order for EAL to continue trading he needed to rationalise its staffing arrangements. The effect of the advice was as he put it, "in short, I was required to retrench one full-time employee, or the equivalent thereof".

[9] On 28 February 2011 notice of a proposed restructuring was given by Mr Talbot to Mr Humphries. A meeting was held on 9 March at Mr Talbot's house. Mr Humphries attended with Mr Gilbert who is a businessman and sometime employer.

[10] The conclusion of the Authority is that at this time, 9 March, Mr Talbot's motive in considering restructuring was solely to prevent his company from failing with the consequences that would bring for his investment in the company and to the employment of Mr Humphries and another employee.

[11] This was not a situation, I find, where the restructuring proposals were simply to disguise other reasons an employer might have to dismiss an employee, such as for bad conduct or poor performance, as distinct from genuine commercial reasons. There is no serious suggestion of that in this case.

[12] Although the genuine existence of a potential redundancy situation as at 9 March has not been challenged, the grievance claim has in several respects attacked strongly the "process" used by EAL. The complaints include, that alternatives to redundancy such as reducing the hours of all the employees, were not properly considered by Mr Talbot, and there was no selection process to decide which one of three employees of EAL and an associated company should be made redundant.

[13] A third matter of complaint about the dismissal was raised by Mr Humphries' solicitor when the personal grievance was raised in writing on 4 April 2011, as follows:

> *a. A job identical to our client's (which by virtue of redundancy you have deemed surplus to your businesses requirement) has been*

> *advertised in both the Timaru Herald and the Press. Mr Humphries' notice period has not even ended yet, and yet you are advertising a job identical to his. You have not offered him the job.*
>
> *It appears that you do not understand the nature of a redundancy. You cannot make someone redundant, and then offer an apparently identical job to someone else. This is contrary to the concept of redundancy and strongly indicates that – rather than this matter being a genuine redundancy – you have simply used a pseudo-redundancy process to dismiss our client from employment.*
>
> *Our client is willing to consider reinstatement or employment in the advertised position as part of the remedies sought.*

[14] I find from the evidence that the advertising of the position referred to in the solicitor's letter was EAL's response to the sudden resignation, unforeseen by Mr Talbot, of another employee after Mr Humphries had been given notice on 11 March.

[15] Mr Talbot's evidence was that immediately after the resignation of that employee (Jonno), which occurred without warning, he had advertised to replace him. He said of this:

> *I do not believe I was under any obligation to offer the vacancy created by Jonno's resignation to* [Mr Humphries]. *There was no agreement as to any right of first refusal regarding any subsequent vacancy. I was expecting* [Mr Humphries] *to apply for the job or at the very least contact me to clarify matters; however he did not do so. Accordingly I filled the vacancy with what I considered to be the best and most qualified person that applied for the position.*

[16] Mr Humphries was advised that he was welcome to apply for the vacancy and, without the need for a face to face interview, he would be considered alongside all other applicants. However he was not offered the position.

[17] From these circumstances I find that a personal grievance of Mr Humphries has been established.

[18] When the advertisement was placed in the Timaru Herald on 26 March for an "Excavator Operator," Mr Humphries was still an employee of EAL although under notice of dismissal. The test of when an employment agreement ends after notice has been given by an employer was considered by the Court of Appeal in *GFW Agri-Products Ltd v Gibson* [1995] 2 ERNZ 323. It is a question of mixed fact and law.

[19] I find that although Mr Humphries was no longer performing work for EAL, the parties had intended that he would remain contractually employed until the end of the notice period, at which time he was to receive his final fortnightly pay together with holiday pay due to him. Another indication of the parties' intention is the fact that Mr Humphries retained the use of a company vehicle, at least without protest or an attempt to take it off him, and a fuel card. He was given the option of working out his notice or not and had chosen the latter, although he would not be receiving his final pay until 8 April, as advised by Mr Talbot in his letter of 11 March.

[20] As there was a continuing employment relationship until that date, EAL remained under the obligation the parties to an employment relationship have to deal with each other in good faith. This a requirement of s 4 of the Employment Relations Act 2000, s 4(1A) of which provides in particular that the duty of good faith:

> *i. Requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.*

[21] I find that the duty of EAL to maintain the employment relationship it still had with Mr Humphries in late March 2011 required it to redeploy Mr Humphries into the identical or very similar position Jonno had vacated. EAL was required to be responsive to the vacancy having arisen and to be communicative about it more concertedly than treating Mr Humphries as a person outside employment by EAL who, if he wished, could apply for the position on the same footing as any other applicant. Mr Humphries advised Mr Talbot of his interest in the position but was not even consulted about redeployment to it.

[22] I do not agree with Mr Talbot that EAL was not under any obligation to offer the vacancy to Mr Humphries. He was under an obligation to maintain the previously productive employment relationship he had with Mr Talbot and which was only ending because of reasons of redundancy and not any fault on the part of Mr Humphries.

[23] There was a further breach in my view of s 4(1A) of the Act. It arose from the circumstances where Mr Talbot did not provide to Mr Humphries or Mr Gilbert information relevant to the continuation of the employment about the decision that EAL was preparing to make with regard to the continuation of Mr Humphries'

position. EAL did not provide Mr Humphries with that information or an opportunity to comment on it before the decision was made.

[24] Mr Talbot had in his possession a letter dated 2 March 2011 from his accountant which plainly and simply set out the need for restructuring. The accountant's information, no doubt, was based on his knowledge of the company books and the loans it had taken out and some or all of that information may also have been required to be provided to Mr Humphries for him to comment on. If Mr Talbot had felt that there was good reason to maintain confidentiality over that sort of information, then under the Act he may have had a reason for not providing it. While Mr Talbot, I am satisfied, did not misrepresent any of the information or conceal it with what he said about the EAL's financial situation it seems to me that Mr Humphries was entitled to the source information unless there was good reason to maintain the confidentiality of it.

[25] I consider that the failure to deploy Mr Humphries to the position vacated by Jonno was the primary breach of good faith under s 4 of the Act. Mr Humphries said in evidence that his main disagreement about what happened was that "his" job was advertised. He said he did not apply for it because he was still employed by EAL at that time. In any event, either one or both breaches of s 4 leads me to conclude that the termination of Mr Humphries' position was not justifiable under s 103A of the Employment Relations Act.

[26] Terminating employment with an accompanying material breach of the Act, is not the action of a fair and reasonable employer. I find that, viewed objectively, EAL's actions in this regard and how the company acted, were not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred. The relevant time in this regard is when EAL failed to deploy, or offer to deploy, Mr Humphries to the position vacated by Jonno. Alternatively, the relevant time was 8 April when EAL allowed the notice period given to Mr Humphries to expire without withdrawing the notice and deploying him to Jonno's position.

[27] As held by the Employment Court in *Wang v Multicultural Services Trust* [2010] NZEmpC 142, a failure to consider redeployment in the context of the test of justification under s 103A of the Act may lead to the conclusion that an employer has failed to act in a way that a fair and reasonable employer, judged objectively, "would"

have done in all the circumstances at the time the dismissal occurred. Dismissal in the present case occurred on 8 April 2011, although notice of that action had been given to Mr Humphries a month earlier. Therefore the notice period straddled the change to s 103A on 1 April 2011 from "would" to "could," but I am satisfied that should make no appreciable difference to the lack of justification.

[28] Although the claim has been advanced as one of unjustified dismissal, the Authority is not precluded from finding a grievance is other than that claimed; s 122 of the Act. I consider that the grievance is either one of unjustifiable dismissal or unjustifiable action to the disadvantage of Mr Humphries in his employment. I consider it makes little difference in terms of the remedies that Mr Humphries should be entitled to in the circumstances.

[29] In assessing those, I find this is not a situation where there was any fault on the part of Mr Humphries that added to any degree to EAL's failure to act with justification. It has not been claimed that there was any contribution by him in terms of s 124 of the Act.

[30] Mr Humphries seeks the remedies of reimbursement of lost wages for the three month period following his dismissal and compensation for humiliation, loss of dignity and injury to feelings suffered by him. The loss of wages is calculated at $10,178.62, and the compensation sought is $10,000.

[31] There is also a claim for an additional one day's work because EAL counted the day on which it gave Mr Humphries notice, 11 March 2011, as the first day of the four week notice period. Mr Humphries was at work that day in the morning to receive notice and I find that notice should have been in clear working days or weeks rather than including a day on which an employee had commenced working, even if it was a matter of only a few hours before being given notice.

[32] In the circumstances I do not consider that Mr Humphries failed in any way to mitigate his loss by taking all steps to find other employment. It is understandable that he was reluctant to apply to EAL for other jobs it had advertised after he left. He clearly had strong attachments to the South Canterbury district, including a home that he owned or had recently taken over the financial responsibility for, and I accept that he intended to take such other work as he could find but thee difficulties that had led

EAL to restructure also affected other businesses and limited the opportunities for Mr Humphries.

[33] In cases of genuine redundancy but where there has been a procedural failure rendering the dismissal unjustified, the amount of lost wages may be limited, as such loss has not been caused by the personal grievance. I am satisfied that is not the position here, for although there was a genuine redundancy situation at the time EAL gave notice to Mr Humphries that changed during the period of notice and I am satisfied that Mr Humphries' position was not genuinely surplus to requirements by the time the notice period expired. The situation changed when Jonno suddenly resigned during that time and, as I have found, the employer was obliged in good faith to deploy, or offer to deploy Mr Humphries into that position which was an identical or very similar one. Redeployment to it became a viable alternative to redundancy and the position ought to have been made available to Mr Humphries.

[34] I note that the downsizing at the time of Mr Humphries' departure has since been reversed, as EAL now has six employees. Had he been deployed to Jonno's position it is likely his employment would have continued for at least three months and probably much longer. This is a case where the loss of wages for three months is attributable to the grievance

[35] Accordingly, I find Mr Humphries is entitled to the reimbursement of three months ordinary time remuneration under s 128(2) of the Act, less earnings he advised the Authority had been received by him.

[36] The exact amount should be agreed upon by the parties or, if not, a further order sought from the Authority. I do not understand the inclusion of "mileage" and "ACC costs" in the amount claimed. The calculation is to be based on s 128(2) to give Mr Humphries ordinary time remuneration for a period of three months, less any earnings by him during that period. Independently of s 128(2) he is entitled to recover any unpaid holiday pay due to him at termination, and he is also entitled to recover the pay for 11 March, the day he worked but which was included in the notice period.

[37] In all the circumstances I consider that compensation of $6,000 is appropriate as a remedy under s 123(1)(c)(i) of the Act. In particular, I consider that Mr Humphries was left quite perplexed when he found out that the same position as his that Jonno resigned from had been advertised, but he was not offered it but merely

told he was welcome to apply. I think it was reasonable for him to infer that for some reason EAL did not wish to continue or maintain his employment, yet his dismissal was supposed to be for no fault of his, not conduct or performance based.

[38] Costs are reserved. If the parties, through their representatives, cannot settle costs, Mr Humphries may apply for an order within 14 days of the date of this determination, and EAL shall have a further 14 days in which to reply.

A Dumbleton
Member of the Employment Relations Authority