

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 85
3032773

BETWEEN ELIYA IKUNDABOSE
 Applicant

AND MCWATT GROUP LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
 Philip Howard-Smith, Counsel for the Respondent

Investigation Meeting: 22 November 2018

Determination: 19 February 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 8 May 2018 McWatt Group Limited (MGL) dismissed Eliya Ikundabose from his position as workshop mechanic on the grounds of redundancy. MGL's director Murray McWatt had decided the business no longer needed the position and there were no viable alternative position into which Mr Ikundabose could be redeployed.

[2] Mr Ikundabose had worked as MGL's workshop mechanic since August 2016. His employment agreement required one month's notice of redundancy but provided for no redundancy compensation. The company paid Mr Ikundabose four weeks' wages and did not require him to work out the notice period.

[3] Mr Ikundabose raised a personal grievance saying he was unjustifiably dismissed. He questioned the business case for the redundancy; suggested the decision was made for ulterior purposes to do with dissatisfaction with how he did his

work, clashes with his supervisor and because he had asked questions about his sick leave entitlements. He also said the company had not done enough to consider alternative work for him.

[4] MGL, in reply, insisted it had fairly consulted Mr Ikundabose and made the decision about his position for genuine commercial reasons unaffected by other considerations.

The Authority's investigation

[5] Mr Ikundabose and Mr McWatt provided written evidence for the investigation along with the following four MGL employees: Catherine McWatt, the payroll manager and wife of Mr McWatt; Laurel McWatt, the office manager and daughter-in-law of Mr McWatt; Jason Rose, the dispatch manager; and Ian Baxter, a driver. Each witness attended the investigation meeting and, under oath or affirmation, answered questions about their written evidence. Mr Ikundabose and MGL's representative also provided oral closing submissions on the issues for determination.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[7] The issues for investigation were:

- (i) Was the decision to disestablish the position held by Mr Ikundabose justified, including considering whether:
 - (a) It was made for genuine business reasons; and
 - (b) It was not made predominantly for ulterior purposes (concerning dissatisfaction with Mr Ikundabose's work, because he raised concerns about not being paid sick leave, or due to difficulties in his working relationship with Jason Rose); and
 - (c) Alternatives to termination of his employment had been genuinely considered and none were available?

- (ii) If the company's actions were not justified (in respect of disadvantage and/or dismissal), what remedies should be awarded, considering:
 - (a) Lost wages (subject to evidence of reasonable endeavours to mitigate his loss); and
 - (b) Compensation under s123(1)(c)(i) of the Act?
- (iii) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Ikundabose that contributed to the situation giving rise to his grievance?
- (iv) Should either party contribute to the costs of representation of the other party?

Legal principles

[8] A dismissal for redundancy, where the employer is said to no longer need or to be able to afford a person working in the position held by the employee, is described as a 'no fault' dismissal.

[9] In making its decision about the future of the position held by Mr Ikundabose and to dismiss him for redundancy, MGL was required to do what a fair and reasonable employer could have done in all the circumstances at the time.¹

[10] MGL's decision will have fallen below the necessary standard set by this statutory test of justification if it was not made for genuine business requirements but was used as a pretext for dismissing an employee disliked for reasons such as personality or performance.² A decision predominantly made for such ulterior purposes will be unjustified.

[11] MGL must also have followed a fair process before reaching its decision. Those procedural obligations required the company to comply with its statutory duty of good faith and the terms of its employment agreement with Mr Ikundabose.³

[12] Under those obligations MGL had to provide Mr Ikundabose with relevant information and the opportunity to comment on the information, and then genuinely consider any comments he made before making its decision. An employer acting fairly will also make genuine efforts to consider how to lessen the impact on the employee.

¹ Employment Relations Act 2000, s 103A.

² *Grace Team Accounting Limited v Brake* [2014] NZCA 541 (CA) at [85].

³ Employment Relations Act 2000, s 4(1A)(c).

These will include considering alternatives to redundancy or the prospect of redeployment to other available positions.⁴

[13] The term about redundancy process in MGL's employment agreement with Mr Ikundabose clearly set out those obligations:

In the event the Employer considers that the Employee's position of employment could be affected by redundancy or could be made redundant, the Employer shall, except in exceptional circumstances, consult with the Employee regarding the possibility of redundancy and, before a decision to proceed with redundancy is made, whether there are any alternatives to dismissal (such as redeployment to another role). In the course of this consultation the Employer shall provide to the Employee sufficient information to enable understanding and meaningful consultation, and shall consider the views of the Employee with an open mind before making a decision as to whether to make the Employee's position of employment redundant. Nothing in this clause limits the legal rights and obligations of the parties.

[14] Their employment agreement also included the following three relevant terms:

Definition of redundancy

Redundancy is a situation where the position of employment of an employee is or will become surplus to the requirements of the Employer's business.

Notice of termination due to redundancy

In the event the Employee's employment is to be terminated by reason of redundancy, the Employee shall be provided with one month notice in writing. This notice is in substitution for and not in addition to the notice set out in the general termination clause.

No redundancy compensation payable

In the event the Employee's employment is terminated on the basis of redundancy, the Employee shall be entitled to notice of termination of employment as specified in the termination clause, but shall not be entitled to any additional payment, whether by way of redundancy compensation or otherwise.

[15] The general termination clause, referred to in the notice clause above, included a provision that MGL could, at its discretion, pay remuneration in lieu of some or all of the notice period.

⁴ *Wang v Hamilton Multicultural Services Trust* [2010] NZEmpC 142 at [42].

The redundancy decision: genuine business reasons?

[16] Mr McWatt had a letter hand delivered to Mr Ikundabose on 3 May calling him to a meeting to discuss whether his position was, or would become, superfluous to the company's needs.

[17] Review of the viability of Mr Ikundabose's position arose from a wider review MGL undertook in February of ways to improve the efficiency of its business. As part of that review Laurel McWatt analysed the work done by Mr Ikundabose. Since he began work in August 2016 MGL had sold five of the vehicles he serviced and had purchased 11 new vehicles and three diggers. All the newly purchased vehicles were under warranty or service agreements so servicing of them was primarily done outside of the business. In the case of vehicles under warranty arrangements, internal servicing could breach those warranties.

[18] Ms McWatts' analysis noted Mr Ikundabose's remaining work required servicing of three diggers and nine other vehicles. Two of the three diggers were due to be replaced shortly with their replacements having external warranty service arrangements. The servicing schedule for the other nine vehicles planned for that work to be done twice a year.

[19] Ms McWatt also analysed Mr Ikundabose's timesheets and identified periods where he did not appear to be carrying out mechanical duties. She made an assessment of the value of hours worked, for the tasks recorded on the timesheets, against the total hours paid to Mr Ikundabose over the previous year. She estimated the work was worth around \$36,000. By contrast paying Mr Ikundabose cost the company more than \$98,000 a year.

[20] The letter given to Mr Ikundabose explained the effect of replacing vehicles and machinery under warranty. It stated he would be aware his workload for repair and maintenance of MGL's fleet had significantly reduced. It noted he was also carrying out some driving duties that could be undertaken by other employees but were sometimes given to him to give him something to do.

[21] Mr McWatt met with Mr Ikundabose on 8 May to talk about the prospect of redundancy. The evidence of both men established that Mr Ikundabose did not challenge the business rationale for the proposal. Rather Mr Ikundabose accepted this

was something he had seen coming. Their discussion had quickly turned to what money he would be due to be paid if his employment ended and his prospects for getting a job elsewhere. Those aspects are discussed later in this determination.

[22] Subsequently however, as part of his application to the Authority, Mr Ikundabose questioned whether Ms McWatt's analysis had fairly considered all the work he did. He considered there were significant differences in what was recorded on his timesheets, his work diaries and his recall of work on various tasks, including greasing of trucks. Some time was spent during the investigation meeting comparing information in those documents. However that exercise did not shake the fundamental proposition in MGL's redundancy proposal that the value of the work Mr Ikundabose did was significantly less than the cost of employing him. In that sense his position had become surplus to the requirements of the business. Ms McWatt and Mr Rose also gave compelling evidence of periods where Mr Ikundabose was observed "sitting around", not working on mechanical tasks or on other tasks he was asked to do from time to time.

The redundancy decision: mostly made for other reasons?

[23] While the evidence established MGL had genuine business reasons to disestablish the mechanic's position, Mr Ikundabose identified three other reasons which he said were the actual ulterior purpose of its decision to dismiss him for redundancy.

[24] Firstly, he suggested the decision masked dissatisfaction with his work, or how he carried it out, that the company had not fairly addressed with him. This related to the second reason – clashes with Mr Rose who supervised his work.

[25] There were no criticisms about the quality of Mr Ikundabose's work as a mechanic. He held qualifications from Zimbabwe and Britain. There was no suggestion he had not acquitted his duties as a mechanic for MGL skilfully and well. There was however evidence from him, Mr Rose, Mr McWatt and Mr Baxter about tensions between Mr Ikundabose and Mr Rose.

[26] Mr Rose was under directions from Mr McWatt to ensure Mr Ikundabose had enough work to do. This included not only duties as a mechanic but also, where needed, as a driver of vehicles and doing other tasks at the depot.

[27] Mr Ikundabose's employment agreement described his position as a mechanic but included a clause whereby he agreed to "perform all other reasonable duties and comply with reasonable instructions". He accepted that, from the outset of his employment, he had carried out driving duties from time to time. However Mr Ikundabose's written and oral evidence also quite clearly showed that he resented directions given to him by Mr Rose to carry out tasks other than as a mechanic or to delay mechanical duties until he had completed other tasks.

[28] One illustrative instance occurred when Mr Rose told Mr Ikundabose to wash a truck. Mr Ikundabose said the driver would normally do that task and he should not be asked to do it. However, in his evidence, Mr Rose said he had already sent the driver off in another truck and he wanted the truck cleaned before it was taken for a certificate of fitness. Although Mr Ikundabose had not accepted the truck needed to be cleaned for that purpose, what Mr Rose had asked him to do was clearly within the scope of a reasonable instruction from his supervisor.

[29] On another occasion the two men had a stand-up argument. Mr Rose accepted he had shouted at Mr Ikundabose over him refusing to do a task. However the evidence, on the balance of probabilities, did not support Mr Ikundabose's suggestion of any physical threat to him or that, on other occasions, he had been called a monkey and told to "go home".

[30] Mr Rose's explanations were more likely. In August 2017 Mr Ikundabose had complained that when he had been asked to drain some oil from a vehicle, he heard Mr Rose tell a visiting oil products supplier "that's what we have monkeys for". Mr Rose said Mr Ikundabose was working underneath a truck at the time, collecting an oil sample for the supplier to take away for testing, and had not heard his actual words, which were "that why we have mechanics".

[31] Similarly, Mr Rose accepted that was an occasion when he told Mr Ikundabose to "go home". It was an instance where he had asked Mr Ikundabose to do some tasks Mr Ikundabose did not want to do and Mr Rose had told him he might as well go home and spend time with his family. His comment clearly meant Mr Ikundabose's house in Auckland, not Mr Ikundabose's home nation of Zimbabwe. It did not bear the racist implication that Mr Ikundabose's reference to it suggested.

[32] Overall the evidence of both men established Mr Ikundabose resented being told to do tasks he considered menial and below his status as a qualified mechanic. He did not like being told by Mr Rose, who was his supervisor but not a mechanic, to carry out those tasks before doing any duties he might have as a mechanic that day. Mr Rose considered Mr Ikundabose should do as he was asked.

[33] While both men had complained or talked to Mr McWatt about this tension, an assessment on the balance of probabilities did not support a conclusion that the decision on the future of the mechanic's position was predominantly motivated by Mr Rose's dissatisfaction with Mr Ikundabose's attitude.

[34] The remaining, third reason Mr Ikundabose said his dismissal was for ulterior motives arose from an incident concerning payment of sick leave. He said MGL had wrongly refused him sick leave and resented him insisting he should be paid it.

[35] In March 2018 Mr Ikundabose's wife gave birth to twins by caesarean section. Some days later hospital staff discovered one baby had suffered a broken leg, probably during delivery but not detected at the time. Mr Ikundabose took time off work for several days in late March and during April to attend hospital appointments for the baby. He was not paid sick leave for those days. He said he asked Mr McWatt about this and was told he could not take time off for wife and children being sick. This was obviously incorrect. His employment agreement referred expressly to the Holiday Act provision that an employee could take sick leave where a spouse or dependent person was sick or injured.⁵ However it emerged that Mr McWatt did not know of the baby's injury at the time of Mr Ikundabose's query. Mrs McWatt, who dealt with payroll matters, had also checked at the time with an employment advisor and Ministry of Business call centre and said she was told absence for appointments associated with the birth of a baby were not covered by sick leave provisions. She said other employees used annual leave for those circumstances.

[36] On the third occasion Mr Ikundabose took leave to attend a hospital appointment with his injured baby he told Mr McWatt about the baby's broken leg. On learning of what had happened to the baby Mr McWatt told Mr Ikundabose he would be paid sick leave for that day and the earlier days.

⁵ Holidays Act 2003 s 65.

[37] The evidence, overall, did not support any conclusion that the redundancy decision was in any way motivated by any resentment about Mr Ikundabose asking for sick leave for those days of absence from work. The answer on that point is supported by the following extract from part of the written evidence Mr Ikundabose provided for the Authority investigation:

I received the full pay after talking to [Mr McWatt]. I don't know if they hesitated because of our relationship which was getting bad, or if they really didn't know. I can't comment much because I don't really know. But finally [Mr McWatt] showed understanding. And he was sorry for my baby who was suffering.

[38] A similar misunderstanding arose when Mr Ikundabose asked Mr McWatt to sign the employer declaration section of an IRD application form for paid parental leave. Mr Ikundabose said Mrs McWatt told him that he was not eligible for the leave because he was male. However, her evidence was that she had tried to explain that paid parental leave was for the primary caregiver. Mrs McWatt understood Mrs Ikundabose was the primary caregiver. On that basis Mr Ikundabose would not be eligible but he had misunderstood what Mrs McWatt meant. Mr McWatt signed the form anyway.

The redundancy process: adequate consultation and alternatives considered?

[39] There was no real doubt Mr Ikundabose was provided with adequate information and the opportunity to comment about the company's reason for considering disestablishing his position.

[40] At the 8 May meeting he had not questioned the business reasoning or asked for more information. Despite what he has subsequently have said, at the time he had been given the relevant information about workloads and had a clear explanation from MGL about why it was considering redundancy of his position. He then had a fair opportunity to make any comments he wanted to and to have those comments considered before any final decision was made.

[41] The discussion at the meeting had however quickly turned to the basis on which he could leave the business. Mr McWatt got Mrs McWatt to check what Mr Ikundabose would receive, in wages and outstanding leave, if he was not required to work out his notice period. He was told the amount was around \$11,000.

[42] They discussed the availability of jobs elsewhere, with Mr McWatt mentioning one business which he knew was looking for mechanics. The meeting was adjourned while Mr Ikundabose went to that business and asked about work there. As Mr Ikundabose explained in his written evidence, the employer of that other business was waiting for him when he arrived. The employer welcomed him and said Mr McWatt had already rung to say Mr Ikundabose was looking for a job. He was offered a job on a three day trial, which he subsequently took up. Mr Ikundabose then returned to the MGL office and told Mr McWatt about the job offer. They arranged for Mr Ikundabose to return the following day to sign a form confirming the end of his employment with MGL, immediately and with four weeks' paid notice.

[43] When Mr Ikundabose returned the next day he saw his final pay, including his holiday pay entitlements and four weeks' notice, totalled \$11,233 gross but would be subject to the usual tax rate. The net pay due to him was around \$7,400. Mr Ikundabose refused to sign the agreement ending his employment immediately on four weeks' paid notice. He then began text and email correspondence with Mr McWatt seeking agreement to be paid the net amount of \$11,000. He said that was the amount they had agreed the previous day. Mr McWatt did not agree with that description. He said he had referred to the amount due as pay and Mr Ikundabose knew this was subject to normal income tax.

[44] During those exchanges of texts Mr Ikundabose said he should be given \$11,000 because of "a serious grievance" with Mr Rose which had occurred with Mr McWatt's support. Mr McWatt declined to make the payment sought. He took the position, which was legally correct, that the final payment of leave, wages and notice was subject to income tax. He also confirmed that the four week's pay in lieu of notice being worked out was intended to give Mr Ikundabose time to search for alternative employment without a loss of wages.

[45] It was also clear that MGL had considered whether Mr Ikundabose could have been redeployed to another role in the business. The only potentially available work was driving. A driver would typically be paid at a lower rate than MGL paid for a mechanic, Mr Ikundabose would not have wanted to take a pay cut and it did not make business sense for MGL to employ him in an ongoing driving role on a higher hourly rate. Instead Mr Ikundabose secured a new job as a mechanic, without any

delay, in another business, starting on a similar but slightly lower hourly rate than he received at MGL. He was still working in that job at the time of the Authority investigation meeting.

[46] Accordingly MGL had met its obligations to consult about the prospect of redundancy, to consider alternatives and to assist Mr Ikundabose in limiting the impact on him of dismissal for redundancy.

Outcome

[47] For the reasons given MGL had established it acted as a fair and reasonable employer could have done in all the circumstances at the time. Mr Ikundabose has failed to establish a personal grievance for unjustified dismissal. As a result the Authority need not consider his claim for remedies. Mr Ikundabose's application to the Authority is dismissed.

Costs

[48] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[49] If they are not able to do so and an Authority determination on costs is needed MGL may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Mr Ikundabose would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[50] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁶

Robin Arthur
Member of the Employment Relations Authority

⁶ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].