

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 63/09
5141802

BETWEEN

GEORGE IPSILOS
Applicant

AND

TOOL TEAM LIMITED
PREVIOUSLY PARAPINE
PARTNERS LIMITED
Respondent

Member of Authority: P R Stapp

Representatives: Peter Cranney for Applicant
Wayne Gazley for Respondent

Investigation Meeting: 26 March 2009 at Wellington

Determination: 15 May 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] George Ipsilos has claimed his dismissal on 28 April 2008 for redundancy was linked maliciously to a discussion held with Wayne Gazley on 18 April 2008. Mr Ipsilos claimed that in that discussion Mr Gazley got agitated and angry and told him *"If you can't help you might as well f*** off."* Mr Ipsilos claimed that Mr Gazley's abuse was unjustified.

[2] Mr Ipsilos and his union representative meet with Mr Gazley on 28 April for what they thought was a meeting to clarify Mr Ipsilos's duties and role and to discuss Mr Gazley's abuse. At the meeting Mr Gazley produced a letter announcing that the workshop would close and made Mr Ipsilos's job redundant. Mr Ipsilos claimed this was unjustified and unfair.

[3] Mr Gazley denied all the claims.

Prohibition on publication

[4] During the investigation I requested Mr Gazley to produce a record of financial performance and wages and sales figures, and he did so. I prohibited the publication of both documents because the information was commercial information and Mr Gazley wanted it treated confidentially. Mr Ipsilos agreed. I now make a permanent order prohibiting the publishing of the documents.

The name of the employer

[5] It was common ground that the name of the employer was previously Parapine Partners Limited but was changed to Tool Team Limited on 18 May 2007. I have amended the name of the respondent accordingly.

Issues

[6] Was there adequate consultation on redundancy with Mr Ipsilos before 28 April 2008? Did Mr Gazley ask Mr Ipsilos on many occasions to work in the shop on an "*as needed*" basis until workload increased, and thereby reducing the cost of employing another full time sales assistant? Did Mr Ipsilos flatly refuse?

[7] Was Mr Gazley's conduct on 18 April 2008 unjustified?

[8] Were Mr Ipsilos's employment and or terms and conditions of employment affected to his disadvantage by Mr Gazley's conduct on 18 April 2008?

[9] Was Mr Ipsilos prepared to work in the shop over the days the store manager was away?

[10] How was consultation, if any, conducted by Mr Gazley?

[11] Was the redundancy genuine and fair?

[12] I am required to scrutinise the genuineness of the employer's decision to dismiss Mr Ipsilos for redundancy and whether or not the dismissal was fair in all the

circumstances: s 103A of the Employment Relations Act applied. The application of s 103A has been dealt with by the Employment Court in *Simpsons Farms v Aberhart* [2006] ERNZ 825: Chief Judge Colgan discussed the consultation obligations (p840) and summarised the “new justification test in redundancy cases” (at p842).

The facts

[13] Mr Ipsilos was employed by Tool Team Limited. The parties had an employment agreement. This made provision for the following terms:

Clause 1 Application of the Agreement

...

The employee agrees to act at all times in good faith, to give proper care and attention to the job, to use their skills and knowledge to perform the job to the best of their ability. The employee also agrees to obey all reasonable and lawful instructions of the company.

Clause 4 Duties

The employee is responsible for all duties normally associated with the position of service technician together with such other duties as can reasonably be regarded as incidental thereto.

From time to time the duties and responsibilities may be varied by the employer in order to cover sickness, absence or other similar situations.

Where permanent changes to duties and responsibilities are made the employer shall give the employee as much notice as is possible.

Clause 10 Termination

If the employee's position is declared surplus to the requirements of the employer, the employee shall receive not less than four weeks notice of termination of their employment. No other redundancy compensation is payable.

...

[14] Mr Ipsilos was employed as a service technician based in Petone. He was paid \$19.50 per hour for 40 hours per week. He was paid \$25 monthly petrol allowance.

[15] In early 2007 Mr Gazley consolidated the business in Petone after he closed a Wellington store. However, due to the departure of a business partner Mr Gazley had to take over the day to day running of the business in Petone, and at the same time the amount of workshop service and repair work decreased. Mr Gazley says that the survival of the workshop depended on maintaining shop sales and reducing costs.

[16] Mr Gazley says he worked close by Mr Ipsilos in the Petone premises and they talked about jobs in the workshop, workflow decreasing and reducing costs. Mr Ipsilos denied ever being informed by Mr Gazley that he faced any redundancy and that the workshop could be closed.

[17] I accept that Mr Gazley reviewed the performance of the workshop. He produced the financial information and wages and sales data that he says he referred to, but did not give to Mr Ipsilos at the time. His store manager confirmed being asked by Mr Gazley to investigate the possibility of out sourcing repair work.

[18] In March 2008 one of the two shop assistants decided to resign leaving one person in the shop and two service technicians. Mr Gazley considered that a positive solution to the problems he faced in running his business was to ask Mr Ipsilos to work in the shop on an "*as needed*" basis until workload increased, and thereby reducing the cost of employing another full time sales assistant.

[19] Mr Gazley says he asked Mr Ipsilos on many occasions to do that, but he flatly refused to help. Mr Ipsilos denied these claims.

[20] On 16 April Mr Gazley says he asked Mr Ipsilos for assistance in the shop for four days while the store manager was away. Mr Ipsilos confirmed that he had been asked to help in the shop, and after thinking about it, he approached Mr Gazley on 18 April at 7.45am, to clarify his role in the company. He says he was concerned about filling in for the sales worker who had left and that Mr Gazley said "*that may occur.*" They differ over whether or not Mr Ipsilos said that he was prepared and willing to help during the period the store manager was away for three days.

[21] At that point Mr Gazley walked away and shouted out that *“If you can’t help you might as well f*** off.”* Mr Gazley says this was a *“minor flare up.”* Mr Ipsilos resumed work for the rest of the day, but was upset. He wrote out what he thought the facts and issues were.

[22] He contacted his union and arranged a meeting with Mr Gazley and for his union representative to be present. Mr Ipsilos says that Mr Gazley said to him *“Are you sure that you want to go ahead with this?”* Mr Gazley could not recall saying this, but told me he did say *“I didn’t know you were a member of the union “bring it on!””*.

[23] The meeting occurred on 28 April 2008. The parties agreed to Mr Gazley’s request to video the meeting. During the meeting Mr Ipsilos handed Mr Gazley his written outline of what he thought the facts and issues were. Mr Gazley asked Mr Ipsilos what his problem was. Mr Gazley then handed over the employment agreement, which they discussed. Then Mr Gazley announced *“I’ve decided that we’re going to make the workshop redundant. We’re closing it down. So from the end of May that’s it. And I’m just going to contract all the work out”*. Mr Ipsilos replied: *“That’s fine”*, which Mr Gazley says was Mr Ipsilos’s acceptance of the situation. Mr Gazley handed Mr Ipsilos a prepared letter and they had a further discussion on that. The letter read as follows:

Dear George

Over the past few months I have undertaken an exercise to determine the revenue generated from the various areas within the Tool Team Business. This has shown that the workshop is not covering its costs. In particular, the amount of warranty work being undertaken does not justify the effort and resources engaged for the small return they provide. I therefore decided that the company needs to concentrate on the sale of new product, and to contract out the repair and service side of the business.

In accordance with the terms in your employment contract, your position has been declared surplus to requirements. You are hereby given four weeks notice of your termination of employment

[24] The other service technician was also given notice of termination. Mr Ipsilos worked out his notice and the service repair workshop was closed and work contracted out after the notice period ended. Another person was employed as a sales assistant, which Mr Gazley says Mr Ipsilos could have done if he was more flexible.

Determination

[25] Mr Gazley probably was not happy and was agitated and angry on 18 April because he walked out and told Mr Ipsilos “*If you can’t help you might as well f*** off.*” Mr Gazley told me that his reaction was a flare up and that it had not happened before. I am satisfied that Mr Ipsilos was prepared to help during the three day period and I can only conclude that if Mr Ipsilos said that, then Mr Gazley did not hear it. It was covered by Mr Ipsilos in his written statement dated 18 April recounting his version of the facts, which included:

Date 18/04/08 7.45 approx

On 16/04/08 Wayne told me to help in the shop for three days while Dan was away for three days on holiday. After some thought I approached Wayne on 18/04/08 at the above time and asked Wayne to clarify my role in the company and asked the following:

Am I going to be a “fill in” for Brian (a co-worker that had recently left the company as a shop worker)? His reply was that may occur. My reply was that I was prepared to help during the period of the three days but not to act as a “fill in” for another person... (Emphasis added).

[26] Mr Ipsilos wrote the above statement after the flare up and before the meeting on 28 April. I accept it is an accurate recollection of what happened.

[27] Mr Gazley’s comment and action of walking out were inappropriate and fall short of the standard of behaviour expected of a good employer, despite a one off flare up. Whatever the reason was that caused Mr Gazley to make his comment, “*If you can’t help you might as well f*** off*” and walk away it does not amount to an unjustified action to Mr Ipsilos’s disadvantage. Mr Ipsilos quite rightly took offence,

but that was not enough to claim that Mr Gazley's behaviour was unjustified, and if it was, there was no disadvantage because:

- Their discussion on 18 April left it unclear whether Mr Ipsilos was willing to work the days the store manager was away and there was an issue to clarify on whether Mr Ipsilos would fill in as needed without replacing the worker who had left.
- Mr Ipsilos did request a meeting, which Mr Gazley agreed to, and was allowed to bring a representative, quite properly so.
- If Mr Ipsilos was willing to work the few days then he did little subsequently to reinforce that, especially when Mr Gazley closed the store.
- Mr Ipsilos took no initiative to follow up his willingness to help over the three days and did not challenge the evidence from Mr Gazley and the store manager that they telephoned the business a number of times without there being any reply.
- Mr Ipsilos continued to work until the end of his notice.
- Mr Ipsilos continued to get paid, even when the shop was closed for 3 days.

[28] Mr Gazley could have relied on the terms under the parties' employment agreement, particularly clause 4, to request Mr Ipsilos to undertake work. It states:

"...together with such other duties as can reasonably be regarded as incidental thereto.

From time to time the duties and responsibilities may be varied by the employer in order to cover sickness, absence or other similar situations."

[29] It is more than likely that Mr Ipsilos's decision to get his union involved and ask to meet with Mr Gazley caused his employment to become less secure, especially when Mr Gazley decided to close the workshop and make Mr Ipsilos redundant before the meeting. That was not part of the claim for an unjustified disadvantage personal grievance, but is relevant as background to the claim for unjustified dismissal. Since there was no unjustified action causing disadvantage there cannot be a finding that Mr Ipsilos has a personal grievance on the first claim arising out of the cause of action alleged on 18 April.

[30] It is likely that there was a genuine misunderstanding arising out of the issue of filling in “*as needed*” and working in the shop when the store manager was away because Mr Ipsilos requested a meeting to clarify his role in the company. He was concerned about filling in for the sales worker who had left. Therefore I am satisfied that this option had been raised by Mr Gazley previously. Mr Gazley’s reply to Mr Ipsilos that “*that may occur*”, caused some uncertainty. I am satisfied that Mr Gazley had considered not replacing the person who had left. Mr Ipsilos was genuinely unclear about Mr Gazley’s intentions.

[31] The next event related to Mr Gazley’s comment that Mr Ipsilos considered was said by Mr Gazley to intimidate him. Mr Ipsilos says Mr Gazley said “*Are you sure that you want to go ahead with this?*” Mr Gazley could not recall saying this, but did say “*I didn’t know you were a member of the union “bring it on!”*”. Mr Gazley says he did not know that Mr Ipsilos was a member of the union that was not challenged. Mr Gazley’s choice of words was unfortunate. However I hold that they fell short of intimidation because the meeting went ahead and there was no other matters relied on to establish that Mr Gazley was acting improperly to prevent Mr Ipsilos exercising his right to representation or to bow to any demand from Mr Gazley.

[32] However, Mr Gazley’s response, “*bring it on!*” makes it more than likely that he then made a decision to close the workshop. He did not tell Mr Ipsilos that he had made the decision before the meeting. He pre-prepared a letter before the meeting occurred. He held back the decision until the meeting and decided on an appropriate time during the meeting to hand it over without any prior notice. Mr Gazley says he conveyed his decision at the meeting because it was appropriate to do so with Mr Ipsilos’s representative present. I have some difficulty with that because Mr Ipsilos and his union representative had asked for the meeting for an entirely different purpose, i. e. to sort out his role and discuss Mr Gazley’s abusive comment. There was nothing to prevent Mr Gazley adding other matters to the agenda, such as a consultation on what possibly could happen and the alternatives before making a decision if he wanted to. A fair and reasonable employer would have given notice of a proposal for discussion. Where Mr Gazley went wrong has been to make the decision without any prior notice that he was even considering making such a decision

to close the workshop, and informed Mr Ipsilos at the meeting which had a different purpose. Mr Gazley's reliance on talks and discussions prior to these incidents does not meet the standard required for consultation because Mr Gazley has not been able to contradict Mr Ipsilos's evidence that he had no knowledge of Mr Gazley's intention to close the workshop and that there was a possibility of redundancy.

[33] Mr Ipsilos has a personal grievance because:

- Mr Gazley made his decision without any adequate notice of the decision being made before 28 April. Any discussions and talks between Mr Gazley and Mr Ipsilos were not adequate to be taken into account as prior notice because Mr Ipsilos denied that Mr Gazley raised with him a possibility of redundancy, did not properly tell him he planned to close the workshop and did not discuss alternatives and the reasons for them.
- The decision came as a genuine surprise to Mr Ipsilos (video). He said that was "*fine*" in reply, but that cannot imply his acceptance of how the employer has carried out the matter. Mr Gazley gave no indication that he was prepared to change his mind on anything.
- Mr Ipsilos requested the meeting to clarify his role and duties and to discuss Mr Gazley's abusive comment "*If you can't help you might as well f*** off.*"
- Mr Ipsilos would not have reasonably expected to discuss at that meeting a decision made to close the workshop and make his position redundant.
- Mr Gazley deliberately acted to surprise Mr Ipsilos with the decision during the meeting held on 28 April, without giving him any prior notice of an intention to raise it for discussion at the meeting.
- A fair and reasonable employer would have provided Mr Ipsilos with details such as the information that Mr Gazley had reviewed from the wages and sales records and financial records to base a decision on, especially where during the meeting Mr Ipsilos disagreed with Mr Gazley's percentages and "*begged to differ*".
- A fair and reasonable employer would have given Mr Ipsilos the proper opportunity to consider alternatives such as contracting, and a job in sales, both of which were raised in the Authority's investigation

meeting and the latter discussed by Mr Gazley when he referred to off setting a \$25 petrol allowance paid to Mr Ipsilos for Mr Ipsilos to undertake some sales work. Mr Ipsilos agreed that he was paid the allowance. I am not satisfied that the alternatives were properly discussed at the time although Mr Gazley and Mr Ipsilos did refer to the request for Mr Ipsilos to fill in without replacing the person who had left because Mr Ipsilos had prior retail experience. This was more to do with an explanation why Mr Gazley had focussed on asking Mr Ipsilos instead of the other technician. There was no discussion about Mr Ipsilos's reasons for his negative feelings associated with returning to retail sales. Mr Ipsilos talked about this during the Authority's investigation, but could not establish he had any agreement with Mr Gazley when he started work not to work in retail. This is supported by the signed employment agreement, which did make provision for flexible duties and the employer's right to make changes so long as reasonable notice was given.

- No decision was reached on Mr Ipsilos's role because there was no conclusion on Mr Ipsilos filling in as needed in retail and not replacing the sales employee who had left.

[34] It must follow that the company has breached the duty to deal in good faith, particularly under section 4 (1A) of the Employment Relations Act that provides for good faith and says:

(a) is wider in scope than the implied mutual obligations of trust and confidence; and

(b) 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, amongst other things, responsive and communicative; and

(c) without limiting paragraph (b), an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected-

- i. access to information, relevant to the continuation of the employees' employment, about the decision; and*

- ii. *an opportunity to comment on the information to their employer **before the decision is made.** (Emphasis added)*

[35] The duty of good faith applies to making employees redundant under s 4 (4) (e) of the Act. The employer is required to be communicative (s 4 (1A) (b) of the Act), and the way Mr Gazley decided to communicate his decision did not meet that standard.

[36] Mr Gazley failed to be constructive and communicative. The catalyst for his decision was made when Mr Ipsilos wanted clarity behind Mr Gazley's intentions and requested a meeting, which included his union representative attending. This caused Mr Gazley to react with the comment "*I didn't know you were a member of the union "bring it on!"*". As such Mr Gazley could have relied on information available but instead undermined the existence of a genuine reason relating to redundancy.

Remedies

[37] Mr Ipsilos has a personal grievance for unjustified dismissal. This is a matter which if it had been properly handled Mr Gazley would have been able to justify on the grounds of redundancy supported by:

- Deficits in the financial accounts.
- Wage costs and sales returns.
- The other service technician's position was surplus and his employment was terminated at the same time.
- Mr Ipsilos made it clear he would not work in the retail shop and fill in instead of replacing a sales employee who had left.
- The workshop was closed and the repair and warranty work contracted out to other businesses.

[38] Mr Ipsilos worked out his notice and the repair shop was closed. Mr Ipsilos very clearly was not prepared to work in retail and sales. This means that given that redundancy would have been inevitable Mr Ipsilos cannot be awarded compensation for lost wages as claimed.

[39] Mr Ipsilos has claimed compensation for humiliation, loss of dignity and injury to feelings without any supporting evidence from any one else. His loss was minimised by working out his notice. He has not contributed in the situation giving rise to the personal grievance. I accept that his feelings were affected by Mr Gazley's manner in dealing with the situation and Mr Gazley's decision being made without proper and reasonable consultation. However, any award of compensation must be within the range stipulated by various courts: e g *Coutts Cars Ltd v Baguley* [2002] 1 NZLR and *Simpsons Farms v Aberhart* [2006] ERNZ 825. It is my decision to award Mr Ipsilos \$6,000 compensation to be paid by Tool Team Limited under section 123 (1) (c) (i) of the Employment Relations Act.

[40] Mr Ipsilos is also entitled to costs to pay the union standing behind him. The union engaged legal counsel to represent him at the hearing. There has been preparation and attendance.

[41] This is a matter for a tariff approach to costs and I award Mr Ipsilos \$2,750 contribution to costs and the \$70 filing fee. Tool Team Limited is to pay these sums to Mr Ipsilos as a contribution to his costs.

P R Stapp
Member of the Employment Relations Authority