IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 9
5371320

	BETWEEN	LAWRENCE JUNGE Applicant
	A N D	SERVICE ENGINEERS LIMITED Respondent

Member of Authority:	K J Anderson
Representatives:	S Tee, Counsel for Applicant S Lodge, Advocate for Respondent
Investigation Meeting:	13 September 2012 at Auckland
Submissions Received:	28 September 2012 from Applicant 12 October 2012 from Respondent
Date of Determination:	9 January 2013

DETERMINATION OF THE AUTHORITY

Introduction

[1] The applicant, Mr Lawrence Junge, claims that he was unjustifiably dismissed on 8 November 2011. Mr Junge asks the Authority to find that he has a personal grievance and award him various remedies. Mr Junge also claims that the sum of $596.16 was unlawfully deducted from his wages and he seeks reimbursement of this amount.

[2] Conversely, Service Engineers Limited (SEL) says that the termination of Mr Junge's employment was due to a genuine redundancy of his position and was justified. SEL also says that the deduction of monies from Mr Junge's wages was as agreed with him.

Background

[3] Mr Junge commenced his employment with SEL in November 2004 as a fitter/welder and was also a leading hand. In more recent times, Mr Junge was trained and worked as a crane operator for SEL. The evidence of Mr Junge is that no issues were ever raised with him about the standard of his work. But I note that two warnings were issued to him on 26 January 2005. There was also the matter more recently of faulty workmanship by Mr Junge that led to the deduction of monies from his wages. This is the subject matter of a claim currently before the Authority. The matters pertaining to the warnings and the deduction of moneys is not relevant to the termination of Mr Junge's employment but it does raise an issue about the credibility of his evidence, at least in regard to his overall work record.

Redundancy

[4] The evidence of Mr Junge is that on 12 October 2011, he was informed by another employee of SEL that he was required to meet with Ms Sally Reid, the Human Resources manager for the company. Mr Junge met with Ms Reid at about 3.30p.m. on that day whereby he was informed that a decision had been made to make his position redundant. This was confirmed by a letter (also dated 12 October 2011) given to him at the meeting. The letter was entitled "**NOTICE OF REDUNDANCY**" and informed Mr Junge that:

> As you may be aware we have been unsuccessful with our tendering to date, despite recent efforts. Because of this we have had limited work available and unfortunately we have an abundance of people to do the work. Given this significant shortfall in workload we cannot sustain your position any longer and have no choice but to make it redundant. With that said, should conditions change we would like to be able to offer to re-employ you if you were available. At this stage we don't know when or if this is likely to be. As per the terms of your employment agreement, we are providing you with one week's notice of termination from the date of this letter, making your final working day Tuesday 18th October 2011. You are expected to work out this notice period, however should you choose not to work any or all of this notice period, under the terms of your employment agreement we reserve the right to deduct any unworked time and unauthorised absences from your final pay.

[5] The evidence of Ms Reid is reasonably consistent with that of Mr Junge in regard to how he was informed of the redundancy of his position. Mr Junge says that he was in "a total state of shock" as he had no idea that his position was at risk. Mr Junge says that there had been no prior discussion or consultation about the loss of

his employment. On the other hand, the evidence of Mr Stewart Lodge, the Managing Director of SEL, is that during the course of the period June-September 2011, employees of the company had been made aware at "toolbox" meetings that the company was employing an excess number of staff, relative to the light workload that existed. I conclude that while Mr Junge may have been aware that there was a light workload, it is clear that receiving notice of the redundancy of his position was unanticipated by him and came as a surprise accordingly; as it did for the other four employees who were notified of the redundancy of their positions on 12 October 2011;[1] albeit employees may have had an inkling when the site supervisor's position was made redundant just one week previously.

[6] While the letter dated 12 October 2011 indicated that Mr Junge was given one week's notice, upon obtaining a copy of his employment agreement on 14 October 2011, Mr Junge realised that he was entitled to four weeks' notice of the termination of his employment. Upon informing Ms Reid of this, she acknowledged that a mistake had been made and she gave Mr Junge another letter with the notice period amended to four weeks accordingly. Apparently, Mr Junge's employment agreement was different from those given to employees employed more recently by SEL, whereby the later agreements only provided for one week's notice.

[7] Mr Junge met with Ms Reid again on or about 17 October 2011. It is the evidence of Ms Reid that Mr Junge became verbally aggressive to the extent that she felt it necessary to request the presence of Mr Lodge. Mr Junge then raised his concerns about the lack of due process and the failure to consult with him about the redundancy of his position. As I understand the evidence of Mr Junge, he was seeking more information about why his role had been made redundant. Mr Junge says that Mr Lodge informed him that there was an issue about the insufficient billable hours that Mr Junge had achieved. But Ms Reid and Mr Lodge categorically deny that there was any discussion about this. The evidence of Mr Lodge is that he and Ms Reid listened to what Mr Junge had to say and provided some explanation for the loss of his employment; but, according to Mr Lodge, Mr Junge was not responsive.

[1] Another employee's position was also disestablished but he resigned prior to being notified of the proposed redundancy of his position.

The matter of possible alternative employment

[8] There is some conflict in the evidence in regard to whether Mr Junge was offered alternative employment, prior to ceasing his employment on 8 November 2011. The evidence of Mr Lodge is that during the week commencing 31 October 2011, he discussed with Mr Wayne Erskine, the Operations Manager for SEL, the possibility of offering Mr Junge a new temporary role with SEL as a crane driver. While Mr Erskine did not attend the investigation meeting he provided a written statement whereby he confirms a discussion that he had with Mr Junge. However, apart from Mr Erskine not being present at the investigation meeting, the written statement is unreliable and cannot be given any weight. This is largely because it records that Mr Erskine had his discussion with Mr Junge on 13 October 2012 which is clearly mistaken as to the date of the discussion in October and as to the year, albeit the latter is most probably just a mistake in the typing. Nonetheless, I accept that Mr Lodge did ask Mr Erskine to discuss with Mr Junge the possibility of employment (crane driving) on a temporary basis; and that Mr Erskine did so. However, the date of when this occurred is inconclusive. The evidence of Mr Lodge is that Mr Erskine informed him that Mr Junge rejected the idea of alternative employment and he informed Mr Erskine that he was going to return to Christchurch as Mr Junge owned property there (apparently) and had secured employment. Mr Lodge attests that despite this, SEL offered Mr Junge a temporary employment agreement and he followed up the alternative employment possibility with Mr Junge. The evidence of Mr Lodge is that Mr Junge advised that: "… we could stick it up our ass [sic]."

[9] The evidence of Mr Junge is that while acknowledging that Mr Erskine did speak to him about alternative work, this was at about 1.30pm on 8 November 2011; the last day of his employment with SEL. Mr Junge says that Mr Erskine "verbally offered" him one week of work as a crane driver and as a contractor, at the hourly rate of $30. Mr Junge attests that because there was only one week of work on offer it was not worth having to make the necessary arrangements to become a self-employed contractor. Just quite why Mr Junge perceived that he would be required to be self-employed remains unclear – perhaps it was how it was put to him by Mr Erskine.

[10] While the evidence is inconclusive in regard to the timing of the offer of temporary alternative employment for Mr Junge, I found the overall evidence of Ms Reid to be the most reliable. Ms Reid attests that during the week commencing 31

October 2011, Mr Erskine "floated" the opportunity of retaining Mr Junge on a temporary contract to provide him with income while he looked for another job. Ms Reid says that she drew up a formal contract offer of employment and she attempted to discuss this with Mr Junge on the last day of his employment (8 November 2011). Ms Reid says that she was unaware that Mr Junge had already made plans to return to Christchurch to work, or that he had declined the offer made by Mr Erskine. Ms Reid attests that Mr Junge would have remained as an employee had he accepted the alternative offer of employment. Ms Reid says that Mr Junge told her that SEL would have to pay him $40 per hour if he was to stay with the company as opposed to his current rate of $24 per hour.

[11] The evidence of Ms Reid is supported by the existence of a letter dated 8 November 2011, signed by her, and offering Mr Junge "short term continued employment on a temporary basis as a crane driver." Attached to the letter was an individual employment agreement for temporary staff. It provides (at clause 5) that the employment is of a temporary nature "…governed by current and future work flows" on an as work requires basis.

[12] Mr Junge denies that he was ever presented with the letter and the accompanying employment agreement; but I prefer the evidence of Ms Reid. However, given the overall uncertainty about the tenure of the employment and the last minute attempt by SEL to formalise this offer of temporary alternative employment; and given that Mr Junge had accepted a position in Christchurch, the offer of alternative employment is really only relevant to the extent that Mr Junge has claimed for reimbursement of wages. However, it also appears that SEL made some attempt to assuage the affect of the loss of his employment for Mr Junge. I will address these matters again in due course.

Analysis and conclusions

[13] As with any dismissal, the test the Authority must apply is whether the decision to dismiss Mr Junge on the ground of redundancy was what a fair and reasonable employer could have done in the circumstances[2].

[2] Section 103A, Employment Relations Act 2000

[14] And then, as was held by the Employment Court in *Simpsons Farm Ltd v. Aberhart* [3]:

> So long as an employer acts genuinely and not out of ulterior motives, a business decision to make positions or employees redundant is for the employer to make and not for the Authority or the Court, even under s.103A.

[15] The above statement from the Employment Court is consistent with the findings of the Court of Appeal in *GN Hale & Son Ltd v. Wellington etc Caretakers etc IUOW* [4] where the Court held that:

> An employer is entitled to make his business more efficient, as for example by automation, abandonment of unprofitable activities, reorganisation or other cost saving steps, no matter whether or not the business would go to the wall. A worker does not have a right to continued employment if the business can be run more efficiently without him.[5]

[16] Further:

> When a dismissal is based on redundancy, it is the good faith of that basis and the fairness of the procedure followed that may fall to be examined on a complaint of unjustified dismissal.

[17] Then, in a discussion about the statutory concept of unjustified dismissal, Richardson J. stated that:

> The statutory concept of unjustified dismissal is concerned with both the reason for the dismissal and the manner in which it was handled; with the substantive justification and with procedural fairness.

Application of the law to the circumstances of Mr Junge

[18] As set out above, the inquiry of the Authority is into the substantive justification of the dismissal of Mr Junge and with procedural fairness. In the circumstances pertaining to Mr Junge, it is clear that the failure by SEL to observe even a basic procedural process means that the dismissal must be found to be unjustifiable. For as was held in *Simpsons Farms*[6]:

> Following the new s103A, the Authority or the Court must consider, on an objective basis, whether the decisions made by an employer, and the employer's manner of making those decisions, were what a fair and reasonable employer would [could] have done in the

[3] [2006] ERNZ 825
[4] [1990] 2 NZILR 1079
[5] Cooke P, delivering the leading judgment
[6] Ibid at para [65].

> circumstances at the relevant time. The statutory obligations of good faith dealing and, in particular, those under s4(1A)(c) inform the decision under s103A about how the employer acted. A fair and reasonable employer must, if challenged, be able to establish that he or she or it has complied with the statutory obligations of good faith dealing in s4 including as to consultation because a fair and reasonable employer will comply with the law.

[19] The above finding refers to the statutory requirement under s.4(1A)(c) of the Employment Relations Act 2000 (the Act), whereby an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of an employee's employment, must give the employee access to relevant information and an opportunity to comment to the employer before the decision is made.

[20] The submissions for SEL defend the failure to adequately consult with Mr Junge by advancing the argument that the company's employees, including Mr Junge, were aware that the business was under financial pressure and that consultation and discussion took place at weekly toolbox meetings.

[21] Mr Lodge has provided the minutes of the meeting that took place on 6 September 2011 where it is recorded that Mr Lodge's:

> [… door is open for discussion on how to improve performance and thus everyone's future.

[22] While I accept that Mr Junge probably was aware that the business was under some financial pressure, there is no evidence that he would have been anticipating the loss of his position so suddenly. The submissions for SEL also refer to an Authority determination, *Subritzky v. Mullins Tyres*[7] but the circumstances that applied to Mr Subritzky were quite different from Mr Junge's situation; as the Authority found that there had been individual consultation with Mr Subritzky.

[23] Given the overall evidence and the fact that a number of other employees were made redundant, I conclude that it is more probable than not that the redundancy of Mr Junge's position was genuine. But given the complete absence of an appropriate process as required by common law and more particularly the good faith provisions of the Act, I am left with no alternative than to find that the failure to properly consult with Mr Junge, prior to informing him of the redundancy of his position, was not what a fair and reasonable employer could do in the circumstances. It follows that the dismissal of Mr Junge was unjustifiable; hence he has a personal grievance.

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[7] [2012] NZERA Auckland 231

Remedies

[24] Having found that Mr Junge has a personal grievance, pursuant to s.123(1) of the Act:

> Where the Authority or the Court determines that an employee has a personal grievance, it may, in settling the grievance, provide for one or more of the following remedies …

[25] Included in the remedies available is reimbursement of wages and compensation for humiliation, loss of dignity and injury to feelings.

Reimbursement of wages

[26] There is an absence of evidence or submission from Mr Junge in regard to any loss of income and it is the understanding of the Authority that Mr Junge obtained new employment immediately, and most probably during the notice period, hence there is no apparent loss of income that requires the consideration of reimbursement.

Compensation

[27] Mr Junge seeks an award of $15,000. In support of this, he gave evidence about feeling "belittled, humiliated and undervalued" because his employer made no prior effort to discuss with him the reasons for the termination of his employment before conveying the decision to him. Mr Junge also alludes to the affect upon him in regard to having to leave his family home and move to Christchurch to obtain work. But that cannot be considered a factor in regard to the actions of SEL. It is the affect of how the dismissal was implemented that falls for the consideration of compensation. However, I do accept that the shock to Mr Junge was compounded by the fact that he initially was only given one week of notice, the reality being that that would have left him with only four working days of notice. While the notice period was subsequently amended, but only after Mr Junge drew attention to it, it seems to me that such a fundamental error is inexcusable when an employee's livelihood is at stake. And just why the matter of temporary employment could not have been formally offered to Mr Junge at the time that he was told of his redundancy, or at least very shortly after, remains a mystery. Had the offer of temporary employment been discussed and clarified earlier with Mr Junge, this may have gone some way to assuaging the distress incurred in regard to how he was informed of the loss of his permanent employment.

[28] Taking into account all of the circumstances, particularly the inconsiderate and inexcusable manner in which Mr Junge was treated in regard to the announcement of the loss of his position and the general affect upon him, I conclude an award of compensation of the sum of $8,000 is appropriate.

Contribution

[29] Under the provisions of s.124 of the Employment Relations Act, where it is determined that an employee has a personal grievance, the Authority is obliged to consider the extent to which the actions of the employee contributed to the situation that gave rise to the personal grievance and if those actions so require, reduce the remedies that otherwise would have been awarded. The manner in which Mr Junge was informed of the loss of his employment and the affect upon him, warrants the remedy of an award of compensation as determined above. I have given consideration to whether a more reasonable approach by Mr Junge, toward the attempt made by SEL to offer him some temporary employment, may have reduced the overall affect of the sudden loss of his employment and the manner in which it was conveyed to him. However, I conclude that Mr Junge did not contribute to the situation that led to the breach of s.4A(c) of the Act that resulted in the unjustifiable dismissal. And I also conclude that damage had been done by the time the rather tenuous exploration of alternative employment was presented

The deductions from Mr Junge's pay

[30] The background to the wage deductions has been conveyed in the evidence of Mr Lodge and the circumstances appear to be generally accepted by Mr Junge, apart from his disagreement about repayment. Mr Junge was working with an apprentice making a silencer. Mr Junge had fabricated some flanges and fitted them to the ends of a short piece of pipe. It seems that the apprentice noticed that there were significant errors with the fabrication which would incur some cost to rectify. The evidence of Mr Lodge is that upon being aware of the faulty workmanship, he discussed it with Mr Junge and it was left to him to think about how he would rectify the problem. However, it seems that Mr Junge did not offer any solution.

[31] Mr Lodge says that the obvious answer would have been for Mr Junge to fix the faults in his own time; something that Mr Lodge says is common practice in the industry. The apprentice subsequently rectified the problem. The further evidence of

Mr Lodge is that he subsequently advised Mr Junge that given the "incompetence" shown and the seeming unwillingness of Mr Junge to assist in fixing the error, the company would be charging him the labour cost for the rectification. This is confirmed in a letter dated 23 September 2011 from Ms Reid to Mr Junge, whereby he was informed that the labour cost of the rework was $596.16. Ms Reid invited Mr Junge to come and discuss repayment arrangements.

[32] The evidence of Ms Reid is that she had at least three discussions with Mr Junge and had to "chase him up" twice in regard to when he wanted to start the repayments. Because Mr Junge never committed to any repayment of the sum in question, payments of $50 were deducted from Mr Junge's pay for four weeks beginning on the pay date of 31 October 2011, with a final deduction of $396.16 deducted from Mr Junge's final pay.

[33] It is submitted for SEL that Mr Junge agreed to the deductions from his pay but he denies this. Mr Junge says that the moneys were simply deducted from his wages without any agreement by him. But I note that the submissions for Mr Junge (para.21) inform that he did: "…subsequently ask for the deductions to be made weekly rather than in one lump sum …".

[34] When questioned about the legal or contractual right to make the deductions, SEL points to clause 25.5 of Mr Junge's employment agreement:

> Following consultation with the employee Service Engineers Limited shall be entitled to make a rateable deduction from the weekly wage for time lost through the employee's own default, sickness or accident, or at the employee's own request.

[35] But clearly this particular provision is not applicable to the circumstances pertaining to the issue in question here as it simply relates to an employee having deductions made in the event that they are absent from their employment for the particular reasons specified; or by request. I note that SEL has corrected the situation in the temporary employment agreement that was offered to Mr Junge and had the provision that is present at clause 22.5 of that employment agreement, been in Mr Junge's original employment agreement, then he would have had a contractual obligation to repay the amount in question. But of course, this is not so.

[36] While it appears to be commonly accepted that there was faulty workmanship on the part of Mr Junge and there was, most probably, some discussion about weekly

payments being made, it is clear that express consent for the pay deductions was not given by Mr Junge. In the absence of a contractual right, the matter of deductions from an employee's pay is covered by the Wages Protection Act 1983. Section 4 of that Act provides that:

> Subject to sections 5(1) and 6(2) of this Act, an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction.

[37] Then at s.5 of that Act it is provided:

> (1) An employer may, for any lawful purpose, -
>
> (a) With the written consent of a worker; or
>
> (b) On the written request of a worker –
>
> make deductions from wages payable to that worker.

[38] It goes without saying that there has to be *written consent* of the worker or a *written request* by a worker before deductions can be made from wages that are payable; as well as a lawful purpose. It follows that the moneys that were deducted from Mr Junge's wages, without his consent, was an act by SEL that was in breach of s.5 of the Wages Protection Act. That then takes us to s.11 of the Wages Protection Act whereby an employee may recover from their employer, by an action in the Employment Relations Authority, any deduction that has been made from the wages that have been paid where the deduction was not consented to or requested by the employee in writing. It follows that the sum that can be recovered by Mr Junge from SEL is the total sum of $596.16. In arriving at this conclusion I am cognisant of the fact that the workmanship of Mr Junge was proven to be faulty and it is understandable that the employer may feel aggrieved, particularly given Mr Junge's apparent failure to make any attempt to remedy the situation. Nonetheless, the Wages Protection Act must prevail in the absence of a contractual provision to recover monies for negligent workmanship.

Determination

[39] For the reasons set out above, I find that the dismissal of Mr Junge on the ground of redundancy was unjustifiable:

(a) Pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000, Service Engineers Limited is ordered to pay to Mr Junge the sum of $8,000;

(b) Pursuant to s.11 of the Wages Protection Act 2003, Service Engineers Limited is ordered to repay to Mr Junge the sum of $596.16;

(c) The above payments shall be made within 30 days of the date of this determination.

Costs

[40] Costs are reserved. The parties are invited to resolve this issue if they can, taking into account the overall outcome and the daily tariff approach of the Authority. In the event that a resolution cannot be reached, the applicant has 28 days from the date of this determination to file and serve submissions. The respondent has a further 14 days to respond.

K J Anderson
Member of the Employment Relations Authority