

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 194
3047060

BETWEEN TAMATI KINGI
Applicant

AND BCM LIMITED
Respondent

Member of Authority: TG Tetitaha

Representatives: S Leftley, advocate for the Applicant
A Mackie, advocate for the Respondent

Investigation Meeting: 22 March 2019 at Whangarei

Submissions Received: 22 March 2019 from the Applicant
22 March 2019 from the Respondent

Record of Oral Determination: 3 April 2019

ORAL DETERMINATION OF THE AUTHORITY

A. This application is dismissed.

B. The parties are to meet their own costs.

Employment Relationship Problem

[1] Tamati Kingi alleges his former employer, BCM Limited, unjustifiably dismissed for redundancy. He also alleges he was disadvantaged in his employment by various actions. He also alleges he is owed wage arrears as a consequence for the disadvantage of his reduced hours of work and for a day's bereavement leave taken for a work colleague's funeral. BCM Limited denies this is the case.

Relevant Facts

[2] Mr Kingi was employed as a waterproofing labourer by BCM Limited on or about 10 July 2017. As part of his employment he signed an employment agreement. The employment agreement had several material clauses to this dispute.

Employment Agreement

[3] Clause 6 sets out Mr Kingi's hours of work as follows:

6 Hours of work

6.1 Variation to hours of work

The employee's hours of work may be varied as follows:

- (a) by mutual agreement between the employee and employer; or
- (b) if agreement cannot be reached, by the employer, following consultation with the employee, provided that the employee's minimum hours of work are not reduced below ten (hours) and that any increase in hours is reasonable.

6.2 When seeking to vary the employee's hours, the employer shall act reasonably, and shall take into account the employee's personal circumstances and commitments.

[4] The agreement also sets out the terms and conditions for bereavement leave:

8.5 Bereavement leave as set out in the Holidays Act.

The Employee is entitled after six months employment to paid bereavement leave of up to three days in relation to the death of their parent, grandparent, sibling, child, grandchild, spouse or parent of their spouse.

The Employee is entitled to one days paid bereavement leave if the employer considers the employee has suffered a bereavement through the death of another person.

[5] The agreement had provisions for redundancy. This included the definition of redundancy, the redundancy process and his notice of termination due to redundancy of one week:

12.4 Redundancy

Redundancy is a situation where the position of an employee is or will become surplus to the requirements of the Employers business.

12.5 Redundancy process

In the event the Employer considers that the Employee's position of employment could be affected by the 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's 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.

12.6 Notice of termination due to redundancy

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

12.7 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 be entitled to any additional payment, whether by way of redundancy compensation or otherwise.

Travel time

[6] In May 2018 Mr Kingi noticed a change in attitude when BCM became difficult about payment of his travel time to jobs in the Bay of Islands. Mr Mackie accepted that there were difficulties because his clients refused to pay for the time his workers took to travel to their job from Whangarei. He negotiated an agreement with clients to pay for travel time one way. If the job was in the Bay of Islands his workers would be paid on the clock from the time they got into the work vehicle. However they would not be paid for the time required for the return journey. Essentially when they finished working on site the clock would stop and they would not receive any further remuneration. Mr Mackie alleges he told Mr Kingi this at the time of his employment.

[7] Mr Kingi has also not sought reimbursement for any travel time in his statement of problem. I am not able to look this matter as a consequence.

Redundancy

[8] It is also around this time Mr Mackie alleges that he began consulting Mr Kingi and others about potential redundancy.

[9] This coincides with the time in June 2018 that Mr Kingi noticed his hours of work began declining. Although he made himself available for work, he alleges he was not offered any. He believed he was being treated more like a casual employee rather than a permanent one.

[10] Mr Mackie denies he was not offered or paid for work. He had however raised with Mr Kingi problems with finding him work due to his skills and the company's financial problems.

[11] The parties accept that they met on 6 August 2018. Mr Kingi tells me it was not about redundancy or restructuring. He says Mr Mackie alleged that he had turned up late for jobs. Mr Mackie says the purpose of the meeting was to speak to Mr Kingi one-on-one about potential redundancy and seeking feedback. Mr Kingi does not have any recall of that meeting at all.

[12] Both parties agree they met on 12 August 2018. It is accepted that Mr Mackie spoke to Mr Kingi about the possibility of becoming a contractor or purchasing the business. Mr Kingi wanted to think about those options.

[13] A copy of the email dated 13 August 2018 that Mr Mackie sent to Mr Kingi setting out those two options was filed. It details the two options of subcontracting and purchasing the business and before each option it contains the words: "you can work for the next two weeks. After that period I will pay out your holiday pay".

[14] Mr Kingi admitted he was attracted to the proposition of subcontracting. He believed that this may give him more hours of work and lead to potentially a better outcome than employment had provided.

Approaches to staff

[15] Mr Kingi purchased a motor vehicle and drove it onto BCM Limited's property. Whilst there he spoke to an employee of BCM. This discussion prompted the employee to contact Mr Mackie about Mr Kingi's presence. The text messaging between Mr Kingi and Mr Mackie is set out below:

- AM How's it Tamati. James reckons you turned up to do some shopping??
- TK Na just test driving my new wagon. Seem him cleaning up spilled primer in the ute. Shopping done for now, pick up the new ute on Friday.
Got a 2015 BT50... same as a Ford Ranger.
- AM For your new company
Just don't do any shopping at the container
- TK Never bro. You should know my honesty by now. Always return what is not mine. Have no intention of ripping anyone.
- Mr Kingi then sent a photo of his ute to Mr Mackie.
- AM That all looks good for your new company.
- TK All good for whatever the F show has in mind aye arsehole!

[16] From the evidence it appeared Mr Kingi had been speaking to James about the possibility of coming to work for him. This was the reason for Mr Mackie's upset by his presence on the property. The "shopping" referred to wasn't an allegation of potential theft of property. It appears to be an allegation of theft of employees.

[17] There are later text exchanges that reinforce this view. A further exchange occurs where Mr Mackie raises an issue about another employee. The text messaging goes as follows:

- AM Cody tells me you have a business proposal for him? Man you're one funny guy.
- TK Sharks in the park my bro.

[18] It is immediately following this exchange that Mr Mackie then sends Mr Kingi a letter terminating his employment for redundancy with two weeks' notice. Mr Kingi was understandably unhappy with that.

[19] There are a number of texts which are exchanged following the termination which are not complimentary of either gentlemen and there is also an allegation around Mr Mackie putting a photograph of a shark on his Facebook page. Mr Kingi alleges certainly the text messaging and the photograph of the shark caused him some distress.

[20] On 30 August 2018 Mr Kingi raises a personal grievance for unjustified dismissal and disadvantage.

[21] Mr Kingi became unwell. He had visited his doctor and obtained a medical certificate. The medical certificate provided that he was to be off work for a month from the 4th of September. It is accepted he did not look for employment until October/November.

Issues

[22] Both parties appeared before me at an earlier telephone conference. At that conference the following issues were set down for determination:

- (a) Was the applicant unjustifiably dismissed for redundancy? Now this raises two sub-issues:
 - (i) Were there genuine reasons for the redundancy?
 - (ii) Was the process leading to termination for redundancy what a fair and reasonable employer could have done in all the circumstances?
- (b) Was the applicant unjustifiably disadvantaged by:
 - (i) the reduction of his hours of work from the promised full-time hours to less; and
 - (ii) the offer of a zero hours contract?
- (c) Are there wage arrears of \$935 owed for:
 - (i) one day's bereavement leave taken but not paid for?
 - (ii) if the applicant is successful in proving that he was unjustifiably disadvantaged by the reduction of his hours of work (34.5 hours at \$22 per hour is sought)?

Was the applicant unjustifiably dismissed for redundancy?

Law

[23] The law of redundancy is relatively well known. Redundancy arises where an employee is superfluous to the business's needs. This could arise where an employer seeks to make the business more efficient.

[24] The Authority may review the business decision to determine whether the decision, and how it was reached, were what a fair and reasonable employer could have done in all the relevant circumstances.¹

[25] A decision to make an employee redundant must be shown to be genuine where genuine means the decision is based on business requirements and not used as a pretext for dismissing a disliked employee. If an employer can show the redundancy is genuine and that the notice and consultation requirements of s 4 of the Employment Relations Act 2000 (the Act) have been duly complied with, that could be expected to satisfy the s 103A test. The subjective findings about what the particular employer has done in any case still have to be measured against the Authority's assessment of what a fair and reasonable employer could have done in the circumstances.²

[26] Once it is accepted employment was terminated the evidential burden falls upon the employer to justify if its action were what a fair and reasonable could have done in all the circumstances at the time the dismissal or action occurred (s 103A(2)). In applying this test the Authority must consider the matter set out in s 103A(3). These matters include whether having regard to the resources available, an employer sufficiently investigated the allegations, raised the concerns with the employee, gave the employee a reasonable opportunity to respond and genuinely considered the employee's explanation prior to dismissal.

[27] The genuineness of the redundancy remains a key focus. Once that is established, if an employer concludes that the employee is surplus to its needs, the Authority is not to substitute its business judgment for that of the employer.³

¹ *Ritson-Thomas T/A Totara Hills Farm v. Davidson* [2013] NZEmpC 39 at [53] – [54].

² *Grace v Brake Team Accounting* [2014] NZCA 541, [2015] 2 NZLR 494, (2014) 10 NZELC 79-049, [2014] ERNZ 129, (2014) 12 NZELR 219 at [85].

³ *Scarborough v Micron Security Products Ltd* [2015] NZEmpC 39 at [37]

Were the reasons for redundancy genuine?

[28] BCM alleges the redundancy occurred for financial reasons. It has produced its bank account statements showing that it was in overdraft by \$8,823.27 as at 31 August 2018, around the same time that it made Mr Kingi redundant. Two other employees were also redundant but two other employees were retained.

[29] When I asked Mr Mackie about his reasons for selecting Mr Kingi for redundancy, he stated it was because he was highly paid but had less skill than the other two workers retained.

[30] Mr Kingi started with no experience in the industry, as well. There is evidence from Mr Kingi's performance reviews that there were issues about his skills on the job. I accept Mr Mackie's evidence that Mr Kingi required supervision while the other workers did not. His selection appears to be about the need to make his business more efficient. Those workers who were retained could work unsupervised but Mr Kingi could not.

[31] Given the business was in financial trouble, decisions about the efficient use of its labour were pivotal to its survival. Mr Kingi required supervision to undertake the majority of work the company did. The company could not afford to have two labourers on the same site. Mr Mackie gave evidence that, at the time, he was using company funds "to survive" because he had no other income.

[32] In my view there were genuine reasons for considering Mr Kingi's redundancy as a consequence.

Was the process leading to redundancy fair and reasonable?

[33] BCM states it told Mr Kingi about the possibility of his redundancy on 6 and 12 August 2018. From the evidence Mr Kingi must have known his employment was in jeopardy. This is especially when he purchased his motor vehicle and considered becoming a contractor.

[34] The purchase of his vehicle and the proposals to the other BCM employees suggests he understood he would be no longer working for BCM Ltd as a result of the proposal. I do

not accept his evidence he was unaware his employment may be ending. This is especially when he replies “sharks in the park” when questioned about his approaches to the BCM employees.

[35] I prefer Mr Mackie’s evidence that the issue of redundancy was discussed at some time prior to 16 August 2018.

[36] However the termination occurs during a dispute between Mr Kingi and Mr Mackie regarding his approaching BCM employees. Mr Kingi accepted that he approached at least one BCM employee to ask him to consider working for him on 15 August 2018. This was a conflict of interest and breach of his duty of fidelity. When questioned about his approaches to employees Mr Kingi’s reply “sharks in the park” indicated he was going to do what he pleased. This reply would not have reassured his employer that he would continue to act in its best interests.

[37] During this time Mr Kingi also sought further time to consider the option of contracting. There is no evidence he had any further feedback regarding redundancy.

[38] Upon finding out that Mr Kingi was making approaches to his workers Mr Mackie withdrew his offers to assist Mr Kingi after his redundancy to obtain contracting work. It is then that he sends out the final redundancy letters on 16 August 2018.

[39] There may be issues about the shortness of the consultation process given the dispute. However I am also required by law to consider whether this defect was minor and if it really caused unfairness to Mr Kingi. I have come to the conclusion it did not. This is because:

- a) I have concluded Mr Kingi knew or ought to have known his employment was to be terminated for redundancy by 12 August 2018;
- b) Although he sought further time to consider the options offered post-redundancy, he had no realistic feedback to offer about the reasons for redundancy or alternative options that would have prevented his redundancy, even at hearing;
- c) In the circumstances further time for consultation would not have made any significant difference to his situation; and
- d) Given there was a genuine reason for redundancy any defect was also minor.

[40] Therefore Mr Kingi was not unjustifiably dismissed for redundancy.

Was the applicant disadvantaged by the reduction of his hours of work from the promised full-time hours?

[41] Mr Kingi's terms and conditions of employment do not promise him "full time hours" or 40 hours per week as alleged. Clause 6 sets out his hours of work as being set by a process of mutual agreement but "the Employee's minimum hours of work are not reduced below 10 (ten) hours and that any increase in hours is reasonable."

[42] Although Mr Kingi asserted he had been promised full time hours, there is no detail about when this promise was made. It is also not reflected in the terms of his employment agreement.

[43] His evidence also did not support full time hours being offered regularly. He confirmed he rang in each day to find out the work that was available. The payslips he produced show a great variance in the hours he worked from 21.50 to 38.50 hours. No one week has the same amount of hours. Mr Mackie referred to difficulties such as bad weather when no work would be available. Mr Kingi accepted that if there was rain or adverse weather conditions it is likely there would be no work offered unless they could work inside.

[44] It appears more likely Mr Mackie could only guarantee minimum hours, not any maximum hours. Mr Kingi accepted he was aware of this clause in his contract but needed the job at the time so raised no concerns.

[45] In my view there were no guaranteed full time hours or 40 hours per week because of the nature of the waterproofing industry. Therefore any variation in hours must comply with clause 6 consultation requirements. The daily ringing in by Mr Kingi was evidence of how this clause worked between the parties.

[46] In these circumstances there has not been any disadvantage by any reduced hours of work. Therefore Mr Kingi was not unjustifiably disadvantaged by any reduced hours of work.

Was Mr Kingi disadvantaged by the offer of a zero hours contract?

[47] This was not a zero hours contract. It was a contract with variable working hours. There is no evidence Mr Kingi was never paid whether he worked or not. Again for the same reasons above the operation of the contract especially clause 6 did not unjustifiably disadvantage Mr Kingi in his employment. Therefore Mr Kingi was not unjustifiably disadvantaged by a zero hours contract.

Wage arrears – Bereavement leave/reduced hours

[48] The bereavement leave sought by Mr Kingi to be paid was never actually granted by BCM Ltd. The leave sought was for a work colleagues death. This death does not fall within the classes of persons that gives rise to an entitlement to bereavement leave.

[49] His contract requires that his employer must consider if “the employee has suffered a bereavement through the death of another person.” His employer did not believe Mr Kingi had suffered a bereavement and did not grant leave. The evidence showed Mr Kingi attended because other work colleagues were. No one else appeared to have been granted leave to attend. Based upon the evidence there is little to show the employer’s decision disadvantaged Mr Kingi or gave rise to any wage arrears.

[50] Given the disadvantage of reduced hours has been dismissed Mr Kingi cannot have any actionable claim in respect of those hours he says are owed.

[51] This application is dismissed.

Costs

[52] Mr Mackie represented his company and has not incurred any legal costs. The parties are to meet their own costs.