

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Levi David Leggett (Applicant)  
**AND** Ben McMaster (Respondent)  
**REPRESENTATIVES** Robert Davidson, Counsel for the Applicant  
Stephen Caradus, Counsel for the Respondent  
**MEMBER OF AUTHORITY** James Crichton  
**INVESTIGATION MEETING** 16 February 2007  
**DATE OF DETERMINATION** 12 April 2007

DETERMINATION OF THE AUTHORITY

***Employment relationship problem***

[1] The applicant (Mr Leggett) claims he was both unjustifiably dismissed and suffered unjustified disadvantages and unlawful discrimination by the respondent (Mr McMaster).

[2] There are really two separate sets of facts on which Mr Leggett seeks to rely. In relation to the unjustified dismissal claim, Mr Leggett relies on the circumstances in which his employment was terminated by Mr McMaster on the grounds of redundancy.

[3] In relation to the allegations of unjustified disadvantage and of unlawful discrimination, Mr Leggett relies on the way that Mr McMaster allegedly responded to claims by Mr Leggett that he was the subject of sexually charged verbal abuse and harassment by a co-worker.

[4] Mr McMaster resists all of the claims made by Mr Leggett contending that the redundancy of Mr Leggett was a genuine one attended to in a procedurally fair manner and also denies any unjustifiable disadvantage and any unlawful discrimination.

[5] Mr Leggett was employed by Mr McMaster on 28 February 2005. Mr McMaster runs a landscape gardening practice and as part of that, Mr McMaster had developed some clients who sought a garden maintenance service. It was in this role that Mr Leggett was employed.

[6] There was some evidence about the nature of the relationship between the parties prior to the employment relationship commencing. At the very least, it seems that Mr McMaster and Mr Leggett were friends when the employment relationship commenced.

[7] Mr McMaster said in his evidence that when the employment relationship commenced, he had plenty of garden maintenance work for Mr Leggett. However, Mr McMaster's evidence was that within a few months of Mr Leggett's engagement, Mr McMaster was receiving calls from unhappy clients identifying Mr Leggett as the principal source of their complaint.

[8] Mr Leggett says that he knew nothing of these difficulties but Mr McMaster is adamant that he raised the complaints (or at least some of them) with Mr Leggett.

[9] In any event, a consequence of this string of complaints was that Mr McMaster lost six major contracts thus making the garden maintenance side of the business uneconomic.

[10] Mr McMaster says that he spoke with all of his staff in June, July and August 2005 about this restructuring situation and in particular about the apparent consequences of it for Mr Leggett's position given that Mr Leggett was exclusively engaged on garden maintenance duties.

[11] In contrast, Mr Leggett, while appearing to acknowledge in his evidence that there was some commentary from Mr McMaster about the possibility of the business being downsized, talks about that information in a way that does not suggest a particularly structured or robust process was in place.

[12] For instance, Mr Leggett says in his written brief that Mr McMaster ... *would often comment that he was considering closing the business down.*

[13] According to his written brief of evidence, Mr Leggett asked Mr McMaster about purchasing a home with his partner. Mr Leggett's evidence is that he and his partner contemplated this purchase at the end of July or the beginning of August 2005 and so presumably it would have been after that in principle decision was taken that Mr Leggett asked Mr McMaster for reassurance. However, this evidence was called into question during the investigation meeting when it was revealed that Mr Leggett and his partner had already had their new property transferred to them in June 2005.

[14] Mr McMaster's evidence is that after consulting with his staff on the need to retrench (which Mr McMaster said included getting two distinct propositions from Mr Leggett about how the retrenchment could be addressed), he indicated verbally to both Mr Leggett and another employee, Mr Stack, that they would both be made redundant. Mr Leggett denies that he received that message, although Mr Stack's evidence is equally clear that he does remember being told by Mr McMaster that there was to be retrenchment affecting him personally.

[15] Mr McMaster then wrote a letter to Mr Leggett dated 15 August 2005 which is in the following terms:

*Dear Levi*

*It is with carefully (sic) consideration and much regret that due to circumstances beyond our control, we will have to terminate your employment with Inside Out Design on 26 August 2005.*

*Its been great having your involvement with the Inside Out Design team, but unfortunately things have not quiet (sic) worked out the way we all wanted.*

*I would like to wish you the very best for the future in moving forward.*

*Kind regards,*

*Ben McMaster*

[16] Mr McMaster's evidence is that he left that letter at the workplace where pay slips and the like were left for employees in the expectation that Mr Leggett would collect the letter. Mr Leggett says that he did not see the letter until later that month. Later, in his oral evidence, Mr McMaster appeared to accept that Mr Leggett may not have collected the letter when it was written, but he said that Mr Leggett *chose not to pick it up.*

[17] On 26 August 2005, Mr Leggett was working at a Clearwater Estate property with Mr Stack. They were advised by another employee of Mr McMaster that their employment was at an end and they were to return their vehicles to Mr McMaster.

[18] Mr Leggett's evidence is that he went home after this discussion and that he subsequently attended at Mr McMaster's home the following day (Saturday 27 August 2005) in company with a friend, Shelly Beaumont.

[19] Whether Mr Leggett received a copy of the 15 August letter earlier, it is clear that he was given a copy of the letter at this meeting.

[20] There was a discussion between the parties on this occasion which culminated in an agreement by Mr McMaster to make an additional payment to Mr Leggett in consideration of the alleged redundancy. To that end, the following words were added in Mr McMaster's handwriting to the bottom of the 15 August letter:

*27 August 2005*

*Ben McMaster will pay Levi Leggett two week redundancy + last week pay.*

*Signed Ben McMaster*

[21] This addendum to the 15 August letter coupled with a subsequent undated letter which appears to have been sent about 1 September 2005 is pleaded by Mr McMaster as *accord and satisfaction*.

[22] The text of the letter sent about 1 September 2005 is as follows:

*Dear Levi Leggett*

*Due to the fact that you have been made redundant from Inside Out Design, and your final redundancy pay has been put into your bank account, we no longer require your services at Inside Out Degin (sic).*

*Please find enclosed with this letter your final payment for work carried out from August 22 to August 29, which accumulated to 43 hours. This payment was not made with your redundancy due to the fact we did not have your time sheet, to calculate your hours.*

*Please find enclosed a cheque for your full and final payment.*

*Regards,*

*Ben McMaster*

[23] Mr Leggett also alleges that he suffered disadvantage and discrimination as a consequence of Mr McMaster's inability to adequately deal with Mr Leggett's complaints about verbal abuse and harassment from Mr Stack, his co-worker. The allegation against Mr Stack was that he called Mr Leggett derogatory names because of Mr Leggett's sexual orientation and it is alleged that he also made comments and suggestions about various sexual practices which he would like to perform on Mr Leggett or have Mr Leggett perform on him.

[24] It is important to separate the two allegations made against Mr Stack. Mr Stack readily pleads to having insulted Mr Leggett from time to time but he puts it in the context of *giving as good as he got*. He says that Mr Leggett regularly insulted him and he was simply retaliating. In his brief of evidence, Mr Stack has this to say: *... the reality was that Levi (Mr Leggett) was the one who made constant lewd remarks. I do not deny that I made occasionally derogatory remarks, however these were typically in response to Levi's inappropriate behaviour.*

[25] Mr Stack absolutely denies any sexual interest in Mr Leggett and denies harassing him for sex in any way.

[26] Mr McMaster acknowledges that he received a complaint from Mr Leggett about Mr Stack but it was only in relation to Mr Stack *insulting* Mr Leggett. There was never any complaint (according to Mr McMaster) about Mr Stack sexually harassing Mr Leggett.

[27] When Mr McMaster put the complaint to Mr Stack, Mr Stack said that he objected to the way that Mr Leggett *brushed up against him, eyed him up, and talked about gay sex with him*. Mr McMaster also gave evidence that Mr Leggett had told him *on numerous occasions* that he thought Mr Stack *was hot* and that he had said the same things to Mr Stack directly.

[28] On Mr McMaster's evidence then, the only complaint that he received was about insulting language and Mr McMaster said that he dealt with this by asking Mr Stack to behave himself. When, on Mr McMaster's evidence, there was a further complaint from Mr Leggett some two weeks later, Mr McMaster determined to separate Mr Stack and Mr Leggett so that they would no longer work together. However, Mr Leggett then asked Mr McMaster to be allowed to work again with Mr Stack which suggested to Mr McMaster that there was little in Mr Stack's behaviour that Mr Leggett could legitimately complain about.

### ***Issues***

[29] It will be helpful to address a series of questions as follows:

- (a) Was Mr Leggett's redundancy genuine?
- (b) Was the redundancy effected in a procedurally fair manner?
- (c) Was there accord and satisfaction?
- (d) What was Mr Leggett's complaint to Mr McMaster?
- (e) Did Mr McMaster deal appropriately with Mr Leggett's complaint?

### ***Was the redundancy genuine?***

[30] I am satisfied on the basis of the evidence I heard that the redundancy was a genuine one. I accept Mr McMaster's evidence that, at the point at which he hired Mr Leggett, there was a viable business in garden maintenance and at the point at which Mr Leggett was made redundant from his employment there was not.

[31] There was in fact no credible evidence before the Authority that the redundancy was not a genuine one.

### ***Was the redundancy effected in a procedurally fair manner?***

[32] I am satisfied that a genuine attempt was made by Mr McMaster to meet his obligations of procedural fairness but I have reached the conclusion that his efforts in this regard came up short.

[33] I prefer Mr McMaster's evidence on the consultation process (such as it was) to the evidence of Mr Leggett who did not recall any consultation. Mr McMaster was clear that he had spoken regularly to his staff about the possibility of a retrenchment and that he had spoken particularly to Mr Leggett about the deficits that the client base were alluding to in their complaints about the service. Mr Leggett has no recollection of those discussions, but as I say, I prefer Mr McMaster's recollection of events.

[34] I also prefer Mr McMaster's recollection that he discussed the possible retrenchment sufficiently specifically with Mr Leggett to actually obtain from Mr Leggett some proposals about how the impact of that retrenchment could be minimised on Mr Leggett himself. It seems to me inconceivable that Mr McMaster would invent proposals as coming from Mr Leggett when in fact they did not.

[35] I also prefer Mr McMaster's recollection in relation to the verbal notification of the upcoming redundancy on 8 August 2005. Mr Leggett has no recollection of this, but Mr Stack remembers it, although he does not remember the date.

[36] I think the choice of Mr Leggett as the person to be made redundant is hardly surprising in the circumstances. It was his part of the business that had fallen upon hard times and he was the only person employed to do garden maintenance.

[37] I think it is fair to say that all the elements of a satisfactory process are present, but the difficulty for Mr McMaster is that by reason of the slightly informal way in which he has approached matters, there is less documentation than might ordinarily be expected and therefore more controversy about what was actually decided.

***Was there accord and satisfaction?***

[38] I am satisfied on the evidence available to the Authority that there was accord and satisfaction. The exchange of documents between the parties coupled with the explicit statement in Mr McMaster's evidence that *Levi (Mr Leggett) said he would not seek any other compensation from me ...* satisfies me that the parties intended that the additional payment agreed to by Mr McMaster at Mr Leggett's request was to be treated as *in full and final settlement* and thus, if there were any deficit in the procedure, as I have concluded above, such deficit would be cured by the payment of the sum agreed to between the parties as in full and final settlement.

***What was Mr Leggett's complaint?***

[39] I am satisfied that Mr Leggett's only complaint was on Mr Stack *insulting* him and that Mr Leggett never complained to his employer about any sexual harassment.

[40] In this respect, I prefer the evidence of Mr McMaster and Mr Stack in their recollection of events to the evidence of Mr Leggett.

***Did Mr McMaster deal appropriately with Mr Leggett's complaint?***

[41] I am satisfied that Mr McMaster did deal appropriately with the complaint that Mr Leggett actually made, that is of insulting language. It is clear from Mr Stack's evidence that he admits insulting Mr Leggett but I accept Mr Stack's testimony that his language in this regard was simply retaliatory of Mr Leggett's own behaviour.

[42] Mr McMaster asked Mr Stack to desist and when, two weeks later, he had a further complaint from Mr Leggett, he determined to separate the parties. In the circumstances, I accept that those are the actions of a fair and prudent employer in the circumstances Mr McMaster was confronted with.

***Determination***

[43] For reasons which I have enunciated above, I am not persuaded that Mr Leggett has made out his claim. In the end, his claim relies in its entirety on his own evidence and in a number of significant points, I found the weight of evidence was against his recollection of events. It follows that Mr Leggett's claim fails in its entirety.

***Costs***

[44] Costs are reserved.

James Crichton  
Member of Employment Relations Authority