

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2011] NZERA Auckland 364
5308860**

BETWEEN MOHI METE
 Applicant

AND EURO ELECTRICAL
 SOLUTIONS LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Kerry Single, Advocate for Applicant
 Keith Hargis, Advocate for Respondent

Investigation Meeting: 14 July 2011 at Auckland

Submissions received: 22 July 2011 from Applicant and Respondent

Determination: 18 August 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Mohi Mete, claims that he was unjustifiably dismissed by reason of redundancy by the Respondent, Euro Electrical Solutions Limited (“Euro”). Mr Mete claims that the dismissal was substantively and procedurally unjustifiable.

[2] Mr Mete further claims that Euro failed to pay him overtime in breach of the provision related to overtime in the employment agreement.

[3] Euro denies it terminated Mr Mete’s employment and claims that Mr Mete abandoned his employment.

Issues

[4] The issues for determination are:

- (i) Whether Mr Mete’s employment was terminated on the basis of redundancy by Euro or whether Mr Mete abandoned his employment.

- (ii) If Mr Mete's employment was terminated on the basis of redundancy, whether Euro followed a fair procedure.
- (iii) Whether Mr Mete is owed monies in respect of overtime.

Background Facts

Events in 2008

[5] In April 2008 Mr Mete and his then business partner, Mr Tyree, sold an electrical business which they owned to Euro.

[6] Mr Mete said that it was agreed that he and Mr Tyree would remain as employees of Euro for a minimum period of two years. This condition of sale was specified in the Sale and Purchase Agreement which was initialled but not signed by Mr Nik Badrov, the owner of Euro, Mr Mete and Mr Tyree on 21 February 2008. The relevant clause states:

***Employment of Vendor's Directors:** The Directors of the Vendor **KENNETH GAVIN TYREE** and **MOHI DANIEL METE** will be employed by the Purchaser for a period of two (2) years from the Possession Date. This Agreement is conditional upon the Purchaser and the Vendor reaching agreement on the terms of their employment contracts. This condition is inserted for the benefit of both parties and shall be satisfied on or before 15 February 2008.*

[7] Mr Mete was provided with an employment agreement, an unsigned copy of which was provided in evidence. The commencement date of Mr Mete's employment is stated to be 7 April 2008. Mr Badrov did not dispute that the employment agreement had been provided to Mr Mete. The employment agreement contains no reference to a fixed term of employment of two years as is contained in the Sale and Purchase Agreement, and is of an open ended employment nature.

[8] Mr Mete said that in November 2008 there was a meeting between himself, Mr Bardov and Mr Tyree. The minutes of the meeting dated 8 December 2008 produced in evidence, and which Mr Badrov said Mr Mete had been responsible for taking, a fact not disputed by Mr Mete, record that Mr Badrov informed Mr Tyree and Mr Mete that due to the financial condition of Euro, it was necessary to terminate the employment of several employees, and that Mr Badrov proposed that both Mr Tyree and Mr Mete's employment should be terminated. The minutes conclude:

Action points

1 Draw up formalised termination package for Ken.

2 Mohi to discuss termination/continuation with whānau.

[9] Negotiations with Mr Tyree resulted in an agreement for the termination of the relationship between himself and Euro. However Mr Mete said that due to his wife being pregnant with their first child, he had not wanted to leave the employment of Euro. Mr Mete's employment had consequently continued with Euro until the events in 2010, approximately 14 months later.

Events in 2010

[10] Mr Gregory Hines, a subcontractor working for Euro at that time, operated in the position of Mr Badrov's appointed deputy. On or about 26 January 2010, Mr Hines said that Mr Badrov had spoken to him and asked him to inform the workforce that due to a shortage of work, there would be a need to reduce the staff numbers, and that they would be receiving a letter confirming the details. Mr Hines said he had spoken in general terms about this issue to Mr Mete, but that he had not informed Mr Mete that it would be his job which would be made redundant.

[11] On 26 January 2010 Mr Mete, in addition to all Euro employees, received a detailed letter from Mr Badrov. The letter was headed "Restructuring Proposal" and explained the current work situation, the proposal for disestablishing some of the registered engineer positions, the proposed selection criteria to be used, and advised that there would be a consultation meeting on 2 February 2010 to which the employees were invited to bring a representative.

[12] Mr Badrov explained that an employee had left Euro prior to the scheduled meeting on 2 February 2010, and this had alleviated the need for redundancies. Consequently the proposed meeting had not taken place.

[13] In March 2010 Mr Mete took annual leave, returning to work on 22 March 2010. Mr Mete said that there was a discussion with Mr Hines on 23 March 2010, during which Mr Hines had advised him that Euro was down-sizing and that he ought to look for other employment. Mr Mete said that Mr Hines had not specified a timeframe for this occurrence. Accordingly Mr Mete had taken no action in the matter.

[14] Mr Hines said that he had had a conversation with Mr Mete whom he had heard was interested in returning to teaching. Mr Hines said Mr Mete had confirmed to him that he was

interested in returning to teaching at some stage but that he intended to stay with Euro until he found a teaching position. Mr Hines was adamant that he had not mentioned redundancy to Mr Mete, and this is confirmed by Mr Mete at the Investigation Meeting when he stated that it had been a general conversation with Mr Hines, and that there had been no conversation about his employment being in jeopardy.

[15] Mr Badrov and Mr Hines stated that there being a shortfall in the work load, Mr Mete had been asked to take annual leave on or about Easter 2010.

[16] Mr Mete denied that he had been asked to take annual leave, stating that on 6 April 2010 he met with Mr Badrov, who advised him that he would be finishing on Friday 9 April 2010, and that he could take the rest of the week off as annual leave, being paid for any additional holiday pay outstanding. Mr Mete said he had asked about the 4 weeks redundancy notice as set out in the employment agreement, but Mr Badrov had told him he would not receive it. Mr Mete stated that Mr Badrov had told him to remove his personal effects from the Euro van that day and to return all company property to Euro.

[17] Mr Badrov recalled talking to Mr Mete on 6 April 2010, but denied that it had been a formal meeting and further stated that a formal meeting would have been documented. Mr Badrov said that he had not discussed redundancy with Mr Mete and would not have done so since he required Mr Mete at work, Mr Mete being responsible for issuing the tenders.

[18] Mr Badrov agreed that Mr Mete had been asked to leave the Euro van at work during his leave as this was standard practice. Mr Hines confirmed that it was standard practice to do a stock check and clean the vehicles when employees were on annual leave.

[19] Mr Mete said that his wife could not collect him from work that night so he had spoken to Mr Hines, who had agreed that he could take the van home and it would be collected the following day.

[20] Mr Mete said that he had taken all his personal effects out of the van that night and then given it a thorough clean. The van, the company mobile telephone, and Euro uniforms were collected by Mr Hines the following day, 7 April 2010.

[21] Mr Hines said he had gone to Mr Mete's home to collect the van but not the mobile telephone or the Euro uniform; however as he had proceeded to clean the van he had found some dirty company shirts, which he had assumed from their condition were to be disposed of and which he had accordingly thrown away, and Mr Mete's mobile telephone. Mr Hines said

that in the process of cleaning the van, he had also discovered an invoice relating to goods supplied on an account belonging to a company called Golden Electrical.

[22] Mr Hines had shown this invoice to Mr Badrov and they had then checked the GPS records for the van, and these records showed that the van had been parked at the premises of Golden Homes, a company to which Golden Electrical provided services. Mr Hines said the address was familiar to him since he had some time earlier taken a telephone call from a lady who had given that address, and who had enquired when Mr Mete would be returning to finish some work

[23] Mr Badrov said he had been very concerned at this discovery since Golden Electrical had previously been associated with Mr Tyree, and he was concerned that it appeared that Mr Mete had been doing some work for Golden Electrical whilst employed by Euro.

[24] Mr Mete said that, not having heard from Mr Badrov by Friday 9 April 2011, he had written to Mr Badrov on 12 April 2011. In the letter Mr Mete set out a summary of the holidays he had taken and his calculation of the outstanding balance. Mr Mete wrote:

I have yet to receive a written notification of the termination of my employment with your company. As you have retrieved the van and phone from my residence it is clear you don't want to employ me, however, a written notification is required.

[25] Mr Mete concluded the letter by setting out his expectations:

To be able to have some level of certainty in being able to plan ahead I require written confirmation that:

- *My employment has been terminated by reason of redundancy.*
- *Confirmation of my termination date and redundancy notice period.*
- *My photo and profile will be removed from your company website (within 7 days)*
- *Confirmation of the outstanding holidays/sick days owing as per my spreadsheet.*
- *The schedule of payments for the outstanding holidays and redundancy notification period.*

[26] Mr Badrov explained that he thought Mr Mete was asking for redundancy. Mr Badrov responded by letter on 16 April 2010, acknowledging receipt of Mr Mete's letter regarding employment termination and requirements, and raising the issue of the Golden Electrical invoice. Mr Badrov stated that this could constitute a serious breach of employee

obligations. The letter concluded with a request for a response to the Golden Electrical issue and the statement that: “*You are also welcome to come and see me about above.*”

[27] Mr Mete’s letter in response dated 19 April 2010 stated his view that the matter raised by Mr Badrov was a delaying tactic and that until such time as he received written notification of the nature and reason for his employment termination, he was: “*still technically employed by Euro Electrical Solutions Ltd.*”

[28] Mr Badrov responded on 21 April 2010. In that letter Mr Badrov opened by stating that Mr Mete did not appear to understand his concern and that: “*Terminations and redundancy are not the issue at present.*” Mr Badrov requested Mr Mete to call him to arrange a meeting to discuss the matter and invited him to bring a support person with him.

[29] Mr Mete replied by letter dated 27 April 2010 addressing the allegations regarding Golden Electrical Ltd. Mr Mete concluded by stating that he was still awaiting written confirmation of the matters referred to in his letter of 12 April 2010, and requested payslips for the previous 12 months.

[30] Mr Badrov replied by letter dated 29 April 2010. In the letter Mr Badrov stated:

Moses, I strongly suggest that you call me and make a time to come and discuss this matter with me, and bring a support person with you. However if I don’t hear from you this matter will be discussed in your absence, and a decision could be made about your instant dismissal as per your contract.

[31] A meeting was subsequently arranged to take place on 6 May 2010, Mr Mete confirming by email dated 5 May 2010 that he was organising a support person to attend with him. The support person was Mr Kerry Single, whom Mr Mete had appointed as his representative. Acting on advice from Mr Single, Mr Mete did not attend the meeting on 6 May 2010, advising Mr Badrov of this fact by email and advising Mr Badrov to communicate with his representative, Mr Single.

[32] Mr Badrov replied by email to both Mr Mete and Mr Single that same day, 6 May 2010. Mr Badrov wrote:

Hi

We have asked Moses 4 times over past 3-4 weeks to arrange time for meeting with us regarding serious matters (as per our letters). Please arrange suitable time for next week to set meeting. We have given

*Moses plenty opportunity's (sic) to arrange time so we ask to have this meeting in reasonable time (next week).
Regards
Nik*

[33] Later that day Mr Badrov sent an email to Mr Mete which said: *“Please confirm you are coming to work on Monday morning as you have used your holiday pay”*.

[34] Mr Mete did not return to work as instructed to do in the email dated 6 May 2010. However on the following day, 7 May 2010, Mr Single wrote to Mr Badrov raising a personal grievance on behalf of Mr Mete for failure to follow a fair procedure, in particular alleging that Euro failed to consult with Mr Mete. The letter also claimed that Mr Badrov had unjustifiably withheld payments for wages due in respect of Mr Mete having worked nightshift hours.

[35] In the letter dated 7 May 2010 Mr Single had written: *“As from the 9th April 2010, our client was no longer employed by your company”*.

Determination

Was Mr Mete’s employment terminated on the basis of redundancy by Euro or did Mr Mete abandon his employment?

The Law

[36] A termination of employment by an employer must be justifiable. The Test of Justification prior to the amendment on 1 April 2011 and which is applicable in this case, is set out at s 103A of the Act which states:

For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[37] Other provisions of the Act are also relevant when considering the issue involved in the termination of Mr Mete’s employment relationship with Euro. Section 4 of the Act addresses the requirement for parties to the employment relationship to deal with each other

in good faith. Section 4(1A)(c) in particular is relevant to a redundancy situation and requires 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 an employee to provide to the employee 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 a decision is made.” s4 (1A)(i) and (ii).

[38] In a redundancy situation a fair and reasonable employer must, if challenged, be able to establish that he or she has complied with the statutory obligations of good faith dealing in s4 of the Act. His Honour Chief Judge Colgan in *Simpsons Farms Limited v Aberhart*¹ noted that this compliance with good faith dealing includes consultation “*as the fair and reasonable employer will comply with the law*”²

[39] Following the termination of Mr Tyree’s employment with Euro in December 2008, Mr Mete said that he had acted as site manager for Euro and had felt secure in his role during 2009. Mr Mete also confirmed that his relationship with Mr Badrov during the early part of 2010 was “*reasonably amicable*”. On this basis there is no reason to conclude that, other than redundancy, there was an underlying reason for Mr Badrov to terminate Mr Mete’s employment with Euro.

[40] Mr Mete pointed to the two year minimum employment period specified in the Sale and Purchase Agreement, which ended on 21 February 2010, as being an explanation for the termination of his employment. I do not consider that the 2 year employment period contained in the Sale and Purchase Agreement to be relevant since I find that it had been superseded by the employment agreement which had been accepted as having been entered into by the parties. Moreover I find that there is no indication from the dealings of the parties following the meeting on 8 December 2008, that there was an intention to terminate Mr Mete’s employment on 6 April 2010.

[41] Mr Mete’s employment agreement at clause 12.5 states that should a redundancy situation arise: “*the Employer shall, except in exceptional circumstances, consult with the Employee*”. At clause 13.4 entitled ‘Abandonment of Employment’ is stated:

¹ [2006] ERNZ 825,842

² Ibid at para [40]

In the event that the Employee has been absent from work for three consecutive working days without any notification to the Employer and the Employer has made reasonable efforts to contact the Employee, this agreement shall automatically terminate on the expiry of the third day without the need for notice of termination of employment.

[42] In January 2010 when a potential redundancy situation arose, Mr Badrov asked Mr Hines to inform the employees that there was a potential redundancy situation. Mr Badrov subsequently issued a letter to the employees providing information as required under s4 (1A)(c) (i) and (ii) of the Act. Mr Badrov did not give evidence on this point but I consider it more likely than not from the wording of the letter that Mr Badrov had taken advice on the procedure to be followed in a redundancy situation.

[43] Mr Mete pointed to the conversation with Mr Hines on 23 March 2010 as explaining his later belief that he had been made redundant by Mr Badrov on 6 April 2010. Apart from Mr Hines's evidence that he had not informed Mr Mete that he was at risk of redundancy during this conversation, I find it significant that Mr Mete had not sought confirmation on the subject from Mr Badrov as the owner of Euro and the decision-maker in the matter, and with whom he said he had had a good relationship. I further find the fact that Mr Mete stated that he had taken no action in the matter to substantiate my conclusion that Mr Mete being made redundant had not been referred to by Mr Hines in the conversation on 23 March 2010.

[44] Mr Mete and Mr Badrov have a fundamental disagreement over what took place at the meeting on 6 April 2010 and there is no documentary evidence to confirm what took place. However on the basis of the record of meeting with Mr Tyree and Mr Mete on 8 December 2008 and the redundancy advisory letter of 26 January 2010, I am of the view that Mr Badrov would have consulted with Mr Mete before confirming his employment was to be terminated on the basis of redundancy, and would also have confirmed this in writing to Mr Mete.

Annual Leave

[45] I have considered whether it was credible that Mr Mete was asked to take annual leave on or about Easter 2010, (Good Friday falling on 2 April and Easter Monday on 6 April 2010) having returned from 15 days annual leave on 22 March 2010.

[46] In this context I note from Mr Mete's statement of holiday leave as set out in the letter dated 12 April 2010 that at the alleged conclusion of his employment on 9 April 2010 he set out that he had 12 days outstanding annual leave entitlement, and that this was after the deduction of what he had itemised as 3 annual leave days taken from 7 to 9 April 2010. In the

situation in which an employer is faced with a shortfall in the work available for the employees, it is not unusual for employees to be required to use any outstanding annual leave.

[47] The pay records for the pay week ending 11 April 2010 records Mr Mete as having been paid for 1 statutory holiday, 1 day sick leave and 3 days annual leave. The pay records for the weeks ending 18 April and 25 April 2010 confirm that Mr Mete was paid annual leave for these weeks. I consider that the pay records are support of Mr Badrov's statement that Mr Mete was on annual leave during the period from 6 April 2010 onwards, rather than Mr Mete's claim that he had been dismissed on the grounds of redundancy.

Return of the company van and property

[48] I find that the evidence of the return of the van and company property is not determinative of the employment having been terminated by Mr Badrov in the situation in which Mr Hines's evidence supports Mr Badrov's contention that retention of the company vehicles for cleaning during periods of annual leave was standard procedure. Indeed Mr Mete himself conceded when questioned at the Investigation Meeting that leaving the vehicle at the Euro premises whilst an employee was on annual leave depended on the situation, but did occur at times.

[49] The return of the uniform and the mobile telephone may indicate Mr Mete's understanding that his employment had been terminated but Mr Badrov denied that these were left at his request, Mr Hines stated that he was surprised to find the mobile telephone in the van, but not at finding some shirts which he described as in poor condition, and which he had thrown away.

[50] Mr Mete stated that he had removed his personal effects from the van, however Mr Badrov explained that employees would remove their personal tools and items from the vans when they were on annual leave and the vehicles were left at Euro for cleaning and restocking, in order to avoid theft, which I consider to be a plausible explanation for Mr Mete removing his personal effects. Taking these matters into consideration, I am unable to reach the conclusion that Mr Mete's understanding of the situation was the correct one.

Correspondence between the parties

[51] I find the correspondence between the parties to be illuminative. Mr Mete, who said that he believed he had been made redundant by Mr Badrov on 6 April 2010, does not contact Mr Badrov until 12 April 2010.

[52] On 12 April 2010 Mr Mete sent a letter to Mr Badrov stating that he had expected to receive written notification of his termination. Mr Mete writes: “As you have retrieved the van and phone from my residence it is clear that you don’t want to employ me...” I find it significant that Mr Mete does not refer to the alleged redundancy notification conversation with Mr Badrov on 6 April 2010, but rather appears to indicate that the collection of the van and mobile telephone acted as the triggers for his belief that his employment had been terminated.

[53] Mr Mete continued in the letter of 12 April 2010 to request that Mr Badrov confirm that his employment had been terminated on the grounds of redundancy and to confirm his termination date and redundancy notice period.

[54] Mr Badrov in his reply on 16 April 2010 acknowledged the issues raised by Mr Mete’s letter, but does not address the issue of Mr Mete having been terminated, either by reason of redundancy or otherwise. Rather Mr Badrov outlined the concerns regarding Golden Electrical and referred to a breach of employee obligations. Mr Badrov concluded the letter by inviting Mr Mete to respond within 7 days and to come to see him to discuss the issues. I find that the nature of Mr Badrov’s response to be consistent with his stated understanding that Mr Mete was the initiator of a redundancy request.

[55] Mr Mete responded on 19 April 2010 accusing Mr Badrov of using delaying techniques and reiterating that he required written notification of the nature and reasons for the termination of his employment, stating that until he received this he regarded himself as “*still technically employed by Euro Electrical Solutions Ltd*”

[56] By response on 21 April 2010 Mr Badrov stated clearly that “*Terminations and redundancy are not the issue at present.*”, and again invited Mr Mete to meet with him, bringing a representative with him. However Mr Mete did not respond to this repeated invitation to meet with Mr Badrov, which may have clarified the situation at this point, but responded in writing on 27 April 2010 addressing and denying the connection with Golden Electrical.

[57] Mr Badrov’s response on 29 April 2010 referred to Mr Mete’s continued lack of response to the invitation to meet as a breach of his obligations to Euro, and indicated that unless Mr Mete, and his representative, met with him he might reach a decision in Mr Mete’s absence as to the termination of his employment.

[58] Although Mr Badrov requested an immediate response in this letter, there is no further correspondence until the emails in early May 2010 referring to a scheduled meeting between the parties on 6 May 2010, which did not subsequently take place.

[59] I find that the correspondence indicates that whilst Mr Mete may have believed his employment had been terminated on the basis of redundancy, this belief was not reasonable based on the evidence of the correspondence between the parties. Mr Badrov in his first response to Mr Mete on 16 April 2010 requested Mr Mete to meet with him, a request which was repeated twice in the letters of 21 April, 29 April 2010 and with the request for the proposed meeting on 6 May 2010. I find these requests to be consistent with an ongoing employment situation.

[60] The statutory duty of good faith is also relevant to the consideration of this issue. Employers and employees have a duty to deal with each other in good faith under s 4(1A) of the Act which states:

The duty of good faith in subsection (1) –

- 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, among other things, responsive and communicative ...”*

[61] The good faith requirements of the Act are in the nature of a two-edged sword in that they apply equally to the employer and the employee. Mr Mete was under a duty to be “*responsive and communicative*”³ and I find that by not responding to Mr Badrov’s invitations to meet with him, Mr Mete failed to act in good faith. Had Mr Mete attended a meeting with Mr Badrov, accompanied by a representative, he would undoubtedly have had the situation regarding either the on-going nature of his employment, or termination of his employment on the basis of redundancy, clarified.

[62] I equally regard Mr Badrov as having failed to some extent to fulfil the good faith requirements of the Act by not disbursing Mr Mete of his mistaken belief that he had been made redundant, but I consider that this is explained in part by Mr Badrov’s equally mistaken belief that Mr Mete was seeking redundancy, and is compensated by his repeatedly urging Mr

³ Section 4 (1A)(b) of the Act

Mete to meet with him, which would have resulted in this misunderstanding on both parts being addressed.

[63] I find that the correspondence indicates that Mr Badrov regarded there as being an ongoing employment relationship, albeit one in which there were various issues of a disciplinary nature to be addressed.

[64] I determine that Mr Mete's employment was not terminated on the basis of redundancy.

[65] Regarding the issue of whether Mr Mete abandoned his employment, Mr Badrov claimed that Mr Mete was on annual leave as requested during the Easter week. Mr Mete did not return to work after 9 April 2010. The letter of 7 May 2011 raising a personal grievance stated that Euro no longer employed Mr Mete with effect from 9 April 2010.

[66] On the basis that I have determined that Euro did not make Mr Mete redundant, I find that by failing to attend the meeting scheduled for 6 May 2010 as requested and by virtue of the statement in the letter dated 7 May 2010, Mr Mete effectively abandoned his employment with Euro.

Did Euro follow a fair procedure in making Mr Mete redundant?

[67] As I have determined that Mr Mete was not made redundant, this issue no longer requires addressing.

Is Mr Mete owed monies in respect of overtime?

[68] Mr Mete claimed that he had not been reimbursed for night shifts worked in respect of work at McDonalds in Queen Street, but was unable to produce documentation in support of this claim.

[69] Mr Badrov said that when employees worked overtime it was usual for time off in lieu to be granted, and that this had happened on previous occasions with Mr Mete. Mr Badrov agreed that Mr Mete had mentioned working overtime 3 months after he claimed he had done so, although he was not convinced this was in relation to work at McDonalds on Queen Street, and that this had been compensated by Mr Mete taking time off in lieu.

[70] Given the lack of documentation and the conflicting nature of the evidence on the matter, I do not find sufficient evidence to substantiate the claim to unpaid overtime made by Mr Mete.

Costs

[71] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority