

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Francis John Muller (John) (Applicant)

AND Taam Gardens Limited (First Respondent)
AND Alison Lowe and Terence Gregory Lowe (Second Respondent)

REPRESENTATIVES Yvonne Muller, Counsel for Applicant
Rodney K Wood, Advocate for First and second Respondents

MEMBER OF AUTHORITY Y S Oldfield

INVESTIGATION MEETING 20 June 2005

DATE OF DETERMINATION 21 June 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

- [1] Mr Muller lost his job at Taam Gardens in early 2005 when he was told the business could no longer afford to employ him on the same terms and conditions as before. He says that there was no consultation with him, he received no notice, and his holiday pay was incorrect. In his statement of problem he seeks compensation for what he says was the unfair manner in which he was made redundant as well as four weeks pay in lieu of notice, and the balance of the holiday pay owed.
- [2] Taam Gardens Limited was originally cited as sole respondent, but Mr Muller later became uncertain about just who had employed him and sought to join its directors, Mr and Mrs Lowe as second respondents. Although it was not possible to serve papers on them in time for the investigation meeting they agreed this morning to be joined by consent so that the Authority could dispose of all matters today. In addition, Mr Wood advised that he would be on record as representing all respondents.
- [3] In the event, after hearing their evidence about how the business was operated, Mr Muller conceded that he was employed by their company, the first respondent Taam Gardens Ltd. Mr Muller also told me that the issue of holiday pay had been addressed by a further payment to him. This means that the remaining issues for determination are whether the employment ended by means of a fair process, whether pay in lieu of notice is owed, and costs.

Determination

- [4] Mr Muller went to work for Taam Gardens Ltd in early 2004 when the previous owners sold the business. By September Taam Gardens Ltd was facing difficulties and Mr Muller agreed to

reduce his hours of work from full time to a four day week. For this he received \$440.00 gross per week.

- [5] In January 2005 Mr Muller returned home from his Christmas holidays to find a message from Mr Lowe. When he returned the call (on Sunday 9 January) he was told that the business was still struggling and his hours would have to be cut further, from four days per week to three. He was told that because of this, he would not be needed at work until the Tuesday. The only other worker (who did two days per week) was to lose her job completely.
- [6] Mr Muller told Mr Lowe that he would think over the proposal. He did so and decided he could not live on three days wages per week. On the Monday he rang and told Mr Lowe that he would not be able to accept the reduced hours and considered himself to be redundant. He received the balance of his holiday pay (wrongly calculated as we have seen) and that was that.
- [7] Mr Lowe told me that he considered that Mr Muller had abandoned his employment by not coming in to work on the Tuesday, as he could have done. He felt therefore that Mr Muller was not entitled to pay in lieu of notice.
- [8] However, Mr Lowe had already changed the terms and conditions of Mr Muller's job by telling him not to come in on Monday. The effect of this was, just as Mr Muller thought, that he was already redundant. Mr Muller should have received reasonable notice of this pursuant to his existing terms and conditions of employment. He is therefore entitled to pay in lieu of notice.
- [9] I conclude that a reasonable period of notice in the circumstances would have been one week, at a rate of \$440.00 gross for a four day week. The respondent is therefore ordered to pay to Mr Muller the sum of \$440.00 gross pay in lieu of notice.
- [10] The other claim Mr Muller makes is that the procedure by which he was made redundant was unfair. He is partly correct in this because the failure to give notice was unfair in itself. Mr Muller should have been given time to consider the proposal before his hours were cut and if he rejected the suggestion, he should then have been given a full weeks notice.
- [11] However, I do not accept that anything more extensive than this was required in the way of consultation. The level of consultation which is appropriate in a redundancy depends on the situation. This was a tiny business (as it was it had only a little over one full time equivalent of staffing) and it was going broke. It ceased trading very soon after Mr Lowe finished work. There were not many options to be explored and the proposal Mr Lowe suggested was a reasonable one in all the circumstances.
- [12] Mr Muller is therefore entitled to compensation for distress but only for that arising out of the failure to pay notice. I order compensation for this distress in the sum of \$500.00 (in addition to the pay in lieu of notice itself.)
- [13] On the issue of costs, I heard that Mr Muller's costs so far have reached around \$2,200.00. For their part, the respondents have incurred approximately \$1,000.00 costs. They say much of this resulted from having to demonstrate that Mr and Mrs Lowe did not personally employ Mr Muller.
- [14] The situation with costs is that Mr Muller is entitled to a modest payment from the first respondent, Taam Gardens Ltd while Mr and Mrs Lowe are entitled to a modest payment from Mr Muller. Since Mr and Mrs Lowe are directors of the first respondent and since the

respondents' costs have not been separately broken down, I have decided that the fairest way to deal with costs is to let them lie where they fall. **There will be no awards of costs.**

Summary of orders:

[15] The first respondent, Taam Gardens Limited, is ordered to pay to Mr Muller the following sums:

- **\$440.00 gross pay in lieu of notice;**
- **\$500.00 compensation for distress arising out of the manner of the termination of employment.**

[16] Mr and Mrs Lowe bear no liability towards Mr Muller.

Y S Oldfield
Member of Employment Relations Authority