

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 116
5342973

BETWEEN DAVID NOAKES
 Applicant

A N D MARINE & MOTOR HOME
 LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Applicant in Person
 Barry Chamberlain for Respondent

Investigation Meeting 22 July 2011 at Dunedin

Date of Determination: 29 July 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Noakes) alleges that he was unjustifiably dismissed by the respondent (Marine & Motor Home) when the latter declared his position redundant effective 25 February 2011.

[2] Marine & Motor Home resists Mr Noakes's claim and maintain that the dismissal was genuine and conducted in a procedurally fair manner.

[3] Mr Noakes commenced employment with Marine & Motor Home in March 2010 performing the role of a general tradesman and a sales and service person. Marine & Motor Home is a small trading entity in Dunedin and when Mr Noakes was employed, Marine & Motor Home sought a multi-talented individual who could do a variety of things. Mr Noakes was such a person and indeed, with the skill set that he had, Marine & Motor Home was convinced that it could develop new parts of its business using the skills that Mr Noakes brought to the firm.

[4] As a consequence, Mr Noakes was employed at a rate of pay significantly greater than the hourly rate which Marine & Motor Home was originally contemplating applying to the position because it was felt that Mr Noakes's additional skills would be profitable for the employer.

[5] As a matter of fact, Marine & Motor Home paid Mr Noakes the hourly rate of \$21 in recognition of those additional skills and in the belief that Mr Noakes' additional skills, primarily his electrical service technician qualification, would enable Marine & Motor Home to grow its business.

[6] Mr Noakes complains that during the employment, there were only two occasions that he could recall when Marine & Motor Home advertised for work within his particular specialty (that is, his possession of an electrical service technician certificate), although he acknowledges that on each of the two occasions he can recall the employer advertising, only one job resulted from each advertisement.

[7] At the beginning of calendar 2011, there was a dramatic downturn in available work. Mr Noakes had broken his ankle in a work accident at the Ohai Mine and he was off work recovering from that injury until early in the new year. Mr Noakes' evidence is that he was back at work in the second week of January but that by late January *"it went very quiet"*. Gary Hornby, the manager of Marine & Motor Home, called Mr Noakes into the office on 25 January 2011 and there was a brief discussion in which Mr Noakes recollects Mr Hornby complaining that Mr Noakes was not *"fixing anything"* and Mr Noakes responded by indicating that *"if there's nothing to fix I can't fix it"*.

[8] The discussion continued with Mr Hornby suggesting to Mr Noakes that Marine & Motor Home might have to drop Mr Noakes' hourly rate from \$21 to \$15. Mr Noakes told me that he had said to Mr Hornby something to the effect *"Gary – I can't afford to live on what you pay me now"*. Mr Hornby then talked some more about *"paying industry rates"*. He also told Mr Noakes that the company was in debt and Mr Noakes undertook to try to think of ways that he could make money for the company. Mr Hornby agreed with that approach.

[9] On 2 February 2011 there was a subsequent discussion between the two men. Mr Hornby asked Mr Noakes if the latter had come up with any ideas for making money and Mr Noakes said *"I've racked my brains and can't think of anything"*.

Mr Noakes is adamant that Mr Hornby then went to the filing cabinet, pulled out an already typed up letter of redundancy effective 25 February 2011 and handed that to Mr Noakes.

[10] Since the redundancy, Mr Noakes has seen the job advertised on more than one occasion and he protests that if the position is not in fact redundant, then his dismissal must be unjustified.

Issues

[11] The first question is whether this redundancy was a genuine one or not, and the following question for the Authority to decide is whether the procedure adopted by the employer was a fair and just one in all the circumstances.

Was the redundancy genuine?

[12] While, as I have just noted, Mr Noakes maintained that the redundancy was not genuine because the job had not in fact disappeared, Mr Chamberlain urged on me the proposition that the job that Mr Noakes was doing and the pay rate that Mr Noakes was receiving was indeed redundant for the employer's purpose and that the new position within the company, while substantially the same as the job Mr Noakes had been doing, had none of the specialist work within it nor, critically, any of the parties' aspirations about growing the business in any particular direction and the lower rate of pay for the incoming employee reflected those considerations.

[13] Mr Noakes says that while he acknowledges the fact that the new employee was not being asked to do any of the trades work that he was particularly qualified to do, the reality was that he had only performed, to his recollection, two jobs of that sort during his period of employment. It followed that the vast bulk of the work that he performed was exactly the same as the work that was performed by the new employee, but at a much lower rate of pay. Mr Noakes maintained, of course, that those two specialised jobs that he did in 11 months of employment could hardly justify the employer's conclusion that this was a different job.

[14] But what about the hourly rate difference? The difference in the hourly rate which Mr Chamberlain particularly drew to my attention, was a function of Marine & Motor Home believing that Mr Noakes was worth that amount of money and that he could, with his exceptional skills, make money for the employer in his particular area

of expertise, as well as performing the mundane functions. In fact, that plan did not materialise. Mr Noakes was a valued employee who clearly was trusted by Mr Chamberlain but despite the best efforts of both parties, it was impossible, to use Mr Chamberlain's words, "*make it work*". Indeed, Mr Chamberlain told me in his evidence that the position occupied by Mr Noakes cost the company \$7 per hour for every hour that they paid Mr Noakes and that that was simply unsustainable.

[15] I am satisfied on the balance of probabilities that Mr Noakes is mistaken in his contention that the job that he left continued after his dismissal for redundancy. I am satisfied on the evidence before the Authority that the position that continued after Mr Noakes' departure was in truth a different position. The material difference, of course, is not just the rate of pay which applied (and that is material enough) but also and more importantly, the real difference is in the aspirations and expectations of the parties. When the employment agreement between Mr Noakes and Marine & Motor Home was inaugurated, the parties both of them had an expectation that the particular skills that Mr Noakes would bring to the employment relationship could be used to advantage for the benefit of both parties to the relationship and through no fault of either party, that simply did not work out. The new employment relationship between Marine & Motor Home and the new employee did not have any of those grand aspirations, nor the elevated rate of pay. The new employment relationship involved nothing more than a handyman who would do the odd jobs that were necessary on a day-to-day basis but without any trade qualification whatever.

[16] I am satisfied then that these two positions were in truth, as a matter of law, different positions. But the next question that arises is why was Mr Noakes not given the opportunity to continue in the employment, albeit at the lower rate of pay and without the necessity to develop new lines of work as was previously anticipated when the higher rate of pay was in place?

[17] The answer to that question is, first that Mr Noakes was thought to have comprehensively and categorically rejected the idea of working for \$15 an hour when he spoke to the manager, Mr Hornby, in the first meeting on 25 January 2011, and said in effect that he was not able to live on what he was earning then (that is, \$21 per hour) and so by implication would not be interested in a lower rate of pay. I am satisfied that Marine & Motor Home understood that that was the unequivocal message from Mr Noakes' statement on 25 January and so it did not consider

seriously the prospect of offering him the job at the rate of pay which it could afford. Mr Chamberlain also told me that he had thought it would be unwise to try to talk Mr Noakes into accepting the lower paid alternative position because Mr Noakes would be dissatisfied with that, and understandably so, and would seek to get an alternative position as quickly as he could. Mr Chamberlain told me that he genuinely believed that Mr Noakes would be better off getting a new position in a new organisation that could afford what he was worth. I accept that those sentiments I have just expressed from Mr Chamberlain were honestly and sincerely held views. Both these men impressed me as being honest and straightforward and having a reasonable respect for each other. The difference really between them came about because of a different understanding of their respective entitlements and probably different expectations.

[18] However, the short point is that this restructure undertaken by the employer was necessary to stop the losses being sustained in the business. The wages paid to Mr Noakes were, according to Mr Chamberlain whose evidence I accept, costing the employer \$7 an hour for each hour worked. Given that the business was already making losses, costs had to be trimmed and removing this continuing wage cost which was not able to be afforded, had to be a factor in the repair of the business. There was no wish to use the necessity to make this change to “*get rid of*” Mr Noakes. Mr Chamberlain was quite straightforward and entirely believable in indicating to me that he would have much preferred to retain Mr Noakes because he was an exceptional employee but the business simply could not afford to do so.

[19] So should Marine & Motor Home have offered Mr Noakes the position at the lower rate of pay? I think the answer to that question is yes it should, but that does not go to the genuineness of the redundancy but only to aspects of the procedure used by the employer in effecting it. It is an understandable mistake I think that an employer confronted with an employee who appears to be saying unequivocally that they will not consider a lower rate of pay is not then offered the position at the lower rate of pay, but it is nonetheless I think a mistake and I consider that a fair and reasonable employer in the circumstances that Marine & Motor Home was in ought to have offered the alternative position to Mr Noakes fair and square and he could then have had a genuine opportunity to consider whether he wanted to take the new position or not.

Was the procedure adopted by the employer a fair one?

[20] I have already noted that the failure of the employer to offer Mr Noakes the new position was, I think, a mistake and so I would identify that as a procedural infelicity. However, I think there are other procedural irregularities, although perhaps not of the same significance as this one.

[21] While it is plain that the employer went through a consultation process of sorts in the declaration of the redundancy, there is nonetheless evidence that that consultation was more apparent than real. It is true that there were two meetings, the first on 25 January when the issue was raised for the first time, and then a second meeting on 2 February where the issue was discussed again and resolved by the declaration of redundancy, but the process adopted really does not give any comfort that the employer was intending to turn its mind to alternatives. This conclusion is particularly suggested by the fact that, as soon as Mr Noakes made clear that he had no suggestions to make in respect of generating more income for the business, Mr Hornby, the manager, pulled out an already typed up letter of redundancy and handed that to Mr Noakes. One has to ask what steps Mr Hornby would have taken if Mr Noakes had come back to the second meeting with a raft of new ideas for making money. Would he still have produced the letter which clearly had been prepared in advance, or would he have taken time to reflect on what Mr Noakes had said? In any event, those are hypothetical questions. What seems to have happened here though is that the employer had made its decision to dismiss Mr Noakes for redundancy before it had even found what, if anything, Mr Noakes might have been able to offer by way of ideas for increasing the revenue of the business. In my judgment, that is unfair and suggests predetermination which is not the action of a fair and just employer.

Determination

[22] I have already determined that this is a genuine redundancy, but equally I have found that the process adopted by the employer was without justification. I am satisfied then that Mr Noakes has proved that he has a personal grievance but it is only about the way that he was treated, not about the genuineness of the redundancy.

[23] I have identified two aspects that trouble me about the employer's behaviour, namely the failure to offer Mr Noakes the new position and the sense of predetermination in the way in which the redundancy notification was handled.

[24] I am satisfied Mr Noakes has not contributed in any way to the circumstances giving rise to his personal grievance and therefore he is entitled to the consideration of remedies.

[25] Because Mr Noakes has been successful in his claim of a personal grievance but because the law only allows him to be compensated for the procedural irregularities and not for the wider loss of the position which I have found was disestablished as a consequence of a genuine redundancy, the compensation must, of necessity, be modest.

[26] I direct then that Marine & Motor Home pay to Mr Noakes the sum of \$2,000 as compensation under s.123(1)(c)(i) of the Employment Relations Act 2000, together with a sum of \$71.56 being the Employment Relations Authority's filing fee.

[27] Because I am satisfied this is a genuine redundancy but implemented unfairly, there is no award of lost wages that can appropriately be made.

Costs

[28] Costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority