

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 80
3000243

BETWEEN GRAHAM PINER
Applicant

AND BLAKELY MINING LIMITED
Respondent

Member of Authority: Christine Hickey

Representatives: Anna Oberndorfer, Advocate for the Applicant
Edward Blakely, Advocate for the Respondent

Investigation meeting: 28 April 2017

Submissions: From the applicant on 5 May 2017 and further evidence
on 22 May 2017

Determination: 24 May 2017

DETERMINATION OF THE AUTHORITY

A. Within 28 days of the date of this determination, Blakely Mining Limited is to pay Graham Piner:

- **Lost wages of \$15,818.40 gross;**
- **Compensation of \$10,000.00; and**
- **Representation costs of \$3,500.00 plus \$71.56 filing fee reimbursement.**

Employment relationship problem

[1] Graham Piner worked for Blakely Mining Limited (Blakely's) from July 2014 until 15 April 2016. Mr Piner's main role was as a bulldozer operator. He claims that Blakely's unjustifiably dismissed him and breached its duty of good faith to him.

[2] Mr Piner seeks remedies of:

- Lost wages;
- Compensation of \$18,000 for humiliation, loss of dignity and injury to his feelings; and
- Costs of \$4,000 and reimbursement of the filing fee of \$71.56.

[3] Edward Blakely, Blakely's managing director, says that Mr Piner was made redundant because the mining claim at Woods Creek was ending and Blakely's did not require a bulldozer driver any longer. There was also a suggestion that Mr Piner had told Mr Blakely that he did not mind being the first to go if work dried up.

Procedural history

[4] Blakely's did not lodge a statement in reply or participate in the case management conference despite being invited to attend. Blakely's did not lodge any documents or make a written witness statement for Edward Blakely, although I directed it to do so in advance of the investigation meeting.

[5] Mr Blakely attended the investigation meeting, the start of which I delayed to allow him to deal with a vehicle related issue.

[6] I heard affirmed or sworn evidence from Mr Piner, Beverly Piner, his wife, and Mr Blakely. Each party had the opportunity to cross-examine the other's witness/es, and did so.

[7] Mr Blakely provided some documents at the meeting which he asked me to take into account and asked for an opportunity to provide a letter after the meeting. I gave him that opportunity and he provided the letter.

[8] I set a timetable for written submissions, as Ms Oberndorfer naturally wanted the opportunity to adjust her submissions in light of Mr Blakely's oral evidence, submissions and new documents, as well as the letter yet to come. I offered Mr Blakey the opportunity to respond once he had read Ms Oberndorfer's submissions. Mr Blakely told me he had said everything he had to say and would not want to respond any further.

[9] The Authority received Ms Oberndorfer's submissions on 5 May 2017. She also sent them to Mr Blakely. As at the date of this determination, Mr Blakely had not responded.

[10] Therefore, I have proceeded to determine this matter based on the evidence and views Mr Blakely gave at the investigation meeting, and the provision of the letter after the meeting.

[11] The Authority determines matters on the civil standard of proof, which is the balance of probabilities. In other words, I need to make findings about what was more likely than not to have occurred.

[12] In addition, in cases where an employer has dismissed an employee the employer bears the burden of proving that it has acted in a justifiable manner and for a justifiable reason.

The issues

[13] The issues I need to investigate and determine are:

- (a) What was the reason Blakely's dismissed Mr Piner?
- (b) Was the dismissal justified?
- (c) Did Blakely's breach its duty of good faith to Mr Piner?
- (d) If so, should I impose a penalty?
- (e) What remedies may Mr Piner be entitled to?
- (f) Did Mr Piner contribute in a blameworthy way to his dismissal?
- (g) Costs.

Why was Mr Piner dismissed?

[14] Mr Blakely's evidence is that all employees at Woods Creek, including Mr Piner, were aware from discussions at the work site that the operation was ending and the company would not need so many employees for its upcoming work.

[15] At the investigation meeting, Mr Blakely produced some minutes of toolbox meetings at which Mr Piner was present. In the minutes of the meeting on 15 February 2016, in the response to the issue "site activities for period discussed", the minutes record "Management Restructure discussed." No more details are recorded.

It is the only toolbox meeting minutes that note any discussion of a restructure. There is no mention of redundancy in any of the minutes.

[16] According to the recorded attendance in the minutes, Mr Blakely was not present at the 15 February 2016 toolbox meeting. However, it is his evidence that the minutes show that the ending of the claim operation was discussed and the need for employee redundancies. Mr Piner, who was present, says that he does not recall job losses being discussed and thinks, instead, that the discussion was about who was in charge of the site and who had the required 'tickets'.

[17] Mr Blakely disputes that and says that Geoff Havill was always in charge at the site and that did not change.

[18] The 15 February toolbox meeting notes do not assist Mr Blakely's case because even if something about a restructure was discussed it appears to have been a restructure of management. Mr Piner was not a manager.

[19] Mr Blakely also produced a letter, dated 15 February 2016, a number of copies of which he says were put on a table after the toolbox meeting. It is headed "Woods Creek Claim end" and says:

Dear Staff member,

As you are all aware and we have spoken of at previous meeting we are nearing the end of our claim at Woods Creek.

At this point we do not have a guaranteed mining claim to go to. For the foreseeable future I want to bulk test and drill some ground to try and find a minable resource.

This testing will require a smaller number of staff. We will be parking up some of the larger equipment until we have a guaranteed resource to mine. At this point in time I am unsure when that will be.

I will need to look further into and consult with each of you who stays and who will have to be let go. Would you all please have a think about your individual circumstances and come back to me with any ideas or other opportunities that we have not already discussed.

The current site only has a few weeks to go and we need to plan ahead to be fair to everyone.

[20] Mr Piner's evidence is that he never saw or got a letter signalling job losses in the near future. He says he knew the Woods Creek site was ending but that there was still restoration to do at the site and he understood Blakely's to be drilling and testing other sites. He understood he would continue to work for Blakely's at other sites.

[21] One of the documents that Mr Blakely brought to the investigation meeting is minutes from a toolbox meeting “conducted for Foleys creek road”, on 8 March 2016. Mr Piner was present at that meeting which was a “safety induction into drilling programme” at which significant hazards and controls specific to the Foley’s Creek site were discussed for “site activities” of “drilling, taking samples and initial onsite processing”. This meeting was three weeks after the 15 February 2016 letter, and less than two weeks before Mr Piner was given notice. This induction may have contributed to his view he would be kept on at a different site or sites.

[22] In her submissions, Ms Oberndorfer questions the validity of the 15 February 2015 letter, particularly the date it was created.

[23] Even if someone gave Mr Piner the letter, or he picked it up, it says that Mr Blakely would “consult with each of you who stays and who has to go”. No such consultation occurred; not even any discussion between Mr Blakely and Mr Piner took place.

[24] On Friday, 18 March 2016, a day that Mr Piner was on annual leave, Mr Blakely held a meeting at the Woods Creek site. He says that he told the employees that the claim was ending and that job losses would be necessary.

[25] On Monday, 21 March 2016, a manager for one of Mr Blakely’s companies told Mr Piner that his job would finish in four weeks. Mr Piner was not given written notice.

Mr Piner’s understanding of why he was dismissed

[26] Mr Piner’s evidence was that he was not told that he was being made redundant because the site was nearing the end of its operations. Instead, he was told that on the Friday Mr Blakely had been very angry about a grader that Mr Piner had been driving that got stuck off-road. Mr Piner’s evidence is that the person that gave him notice gave him the clear impression that he was being dismissed because of the grader incident.

[27] Mrs Piner’s evidence is that when Mr Piner came home on Monday, 21 March, he told her he had been fired for the grader incident.

[28] On Mr Piner's last day, he asked Rodney Grant, a Blakely's manager, to ask Mr Blakely for a letter outlining the reason for his dismissal, that is, the grader incident. He says he wanted the details of the incident recorded in writing. He says he also hoped for some kind of reference. However, Mr Piner has not received a letter of reasons for his dismissal.

[29] Mr Blakely's evidence is that Mr Grant passed on Mr Piner's request but he did not write Mr Piner a letter setting out the reasons for his dismissal because that is not what he was asked for. Instead, he says he was asked to write Mr Piner a letter that set out the grader incident and recording that incident as the reason for his dismissal. Mr Blakely says that was not the reason for dismissal instead, it was simply a redundancy.

[30] Mr Piner says that around his last day Geoff Havill asked him if he would stay on as a casual employee to help with the restoration of the site. He says he refused for two reasons. First, he did not understand why, if he was not good enough to keep his job he was good enough to be a casual employee. Secondly, he was sure that Mr Havill did not have permission from Mr Blakely to keep him on as a casual employee.

Blakely's reasoning for the dismissal

[31] Mr Blakely's evidence is that all staff knew that work on the site would end. It had been discussed a number of times. Mr Blakely said that in the past he had twice heard Mr Piner say something to the effect of acknowledging that Blakely's would need to reduce staff and he would not be totally upset if he was one of the people to go. Mr Blakely also says Mr Piner said "I'm happy to move on if there is no more work for me". Mr Blakely did not follow this up one-on-one with Mr Piner but assumed he meant that younger employees had more need to retain their jobs than he did.

[32] Mr Blakely says he was annoyed about the grader when he heard about it on 18 March 2016 but that was not the reason Blakely's gave Mr Piner notice. He says the only reason Mr Piner was dismissed was that Blakely's did not need a bulldozer operator once the operations at the site ended.

[33] Initially, Mr Blakely said that three or four other employees had also been made redundant because the Woods Creek operation ended without viable claims to go to. However, under close questioning it became clear that after Mr Piner's employment ended the mechanic left voluntarily for immigration and family reasons, and two or three others left to take on other job opportunities. They may have known that work would dry up soon. However, no other employees were given notice due to the redundancy of their roles at Woods Creek. I accept they may have been made redundant somewhat later if they had not left of their own accord.

[34] In addition, the facts establish that Mr Piner's role as bulldozer driver was not entirely redundant at the time his employment ended; there was still restoration work to do for which the bulldozer was required. Mr Blakely's evidence is that the dozer has been used for less than 200 hours since Mr Piner left Blakely's employment.

Was the dismissal justified?

[35] The Employment Relations Act 2000 (the Act) sets out the test for justification of the dismissal. I must ask, from an objective view, whether, in all the circumstances, Blakely's acted as a fair and reasonable employer could have acted¹.

[36] In addition, the Authority must consider the four procedural fairness factors set out in s 103A(3) of the Act, so far as they apply to redundancy². At a minimum Blakely's needed to ensure:

- the potential redundancy was raised with Mr Piner before deciding to dismiss him,
- Mr Piner had a reasonable opportunity to respond to the potential redundancy, and
- it genuinely considered his feedback before deciding to dismiss him.

[37] This is reflected and emphasised by s 4(1A) of the Act. When an employer proposes to make a decision that will, or is likely to, have an impact on the continuation of an employee's employment the employer must give that employee:

¹ Section 103A of the Act.

² Dismissal for the grader incident could not have been the actions of a fair and reasonable employer because no part of the minimum requirements of fair process set out in s 103A(3) of the Act was carried out.

- access to information relevant to the continuation of employment, and
- an opportunity to comment on the information before the employer makes the decision³.

[38] The Authority may take into account other factors as it thinks appropriate. It must not determine an action to be unjustified solely because of defects in the process, set out in s 103A(3) if they were minor and did not result in the employee being treated unfairly.

[39] An employer who does not act as a fair and reasonable employer could act in all the circumstances will be in breach of its duty of good faith to its employee.

[40] Throughout the employment relationship, both parties have a responsibility to deal with each other in good faith. They need to establish and maintain a relationship in which they are responsive and communicative⁴.

[41] Even if Mr Blakely did decide to dismiss Mr Piner because work was going to run out for him as a bulldozer driver, Blakely's remained obliged to carry out a fair process and consultation with Mr Piner. It failed to do so.

[42] Blakely's was obliged to let Mr Piner know, directly and personally, that it was considering making his role redundant. It needed to disclose the particular circumstances of the company that led it to the view it would soon no longer need a bulldozer driver. Even if Mr Piner saw the 15 February 2016 letter, I consider that to be insufficient information to allow him to give specific feedback on the proposal.

[43] Mr Blakely said he considered Mr Piner's personal circumstances before deciding to make him redundant. He knew Mr Piner was receiving national superannuation and knew that he had a spare bedroom in his house that he could rent out.

[44] Had Mr Blakely actually spoken to or consulted Mr Piner he would have discovered that Mr and Mrs Piner still have a mortgage on their home and relied greatly on Mr Piner's income from Blakely's. They already had a boarder in the spare

³ Section 1A(1)(c) of the Act.

⁴ Sections 4 and 4 (1A) of the Act

room and so could not increase their income once Mr Piner lost his job by renting out the spare bedroom.

[45] In addition, Mr Piner denies having earlier volunteered to be made redundant if that became necessary. Mr Blakely was unable to point to details of when Mr Piner had said that. Mr Blakely has not proved Mr Piner ever volunteered for redundancy. Even if, at some earlier date, he made a general remark as reported by Mr Blakely, Blakely's was not discharged from its obligation to specifically consult Mr Piner about the proposed redundancy once it became a firm proposal.

[46] It is entirely understandable that Mr Piner believed his dismissal to be for cause and not because of redundancy.

[47] Blakely's did not act as a fair and reasonable employer could have acted in all the circumstances at the time it decided to make Mr Piner's role redundant and give him notice. Blakely's unjustifiably dismissed Mr Piner.

Breach of good faith?

[48] Blakely's breached its general duty of good faith by failing to be adequately communicative with Mr Piner both before and after he was given verbal notice. All unjustified dismissals involve a breach of good faith by the employer, as a fair and reasonable employer will always deal with its employees in good faith.

[49] More specifically, Blakely's breached its specific duty of good faith to give Mr Piner specific information about the proposed redundancy and a reasonable opportunity to respond to the proposal, and to consider his feedback when making a decision to make him redundant.

Should I impose a penalty?

[50] Section 4A of the Act provides that a penalty may be imposed for a breach of good faith that is "deliberate, serious and sustained". I consider Blakely's breach of good faith in failing to give Mr Piner sufficient information and to consult him was deliberate. The letter of 15 February 2016 recognised the employer's duty to consult with potentially affected individual employees, yet it failed to do so in Mr Piner's case.

[51] The breach was also serious. The effect of being aware in advance that he may be made redundant and being able to have some input into that potential decision, may have been unsettling and disappointing for Mr Piner. However, it would not have been as serious as the impact of believing he had been dismissed for cause.

[52] However, to attract a penalty the breach must also have been “sustained”. In comparison with other cases in which penalties for breaches of good faith have been imposed I do not consider this to have been a sustained breach. It was a one-off breach.

[53] I do not consider this a suitable situation to impose a penalty.

Remedies

[54] Mr Piner has a personal grievance and is entitled to a consideration of remedies.

Lost wages

[55] Section 128 of the Act means that when an employee with a personal grievance has lost remuneration because of the grievance, the Authority must order the employer to pay the lesser of a sum equal either to the lost remuneration or three months ordinary time remuneration.

[56] Mr Piner started a new full-time job three weeks before the investigation meeting. That is the first full-time role he has had since his dismissal.

[57] Ms Oberndorfer submits that the actual losses suffered until the end of February 2017 are \$59,623.46 gross for 49 weeks, less income received over that period of \$48,778.71 net. However, Mr Piner claims the lesser sum of \$15,818.40 gross, being three months wages ordinary time remuneration.

[58] Blakely’s must pay Mr Piner \$15,818.40 gross in lost wages.

Compensation for humiliation, loss of dignity and injury to feelings

[59] Mr Piner claims \$18,000 in compensation for humiliation, loss of dignity and injury to his feelings arising out of his dismissal. I take into account that the first time Mr Piner heard Mr Blakely’s claim that he had been dismissed by way of redundancy,

was when Mr Blakely wrote a response to Ms Oberndorfer on 7 June 2016. Until then, the only reason Mr Piner had been told was Mr Blakely's anger over the grader incident. Even then, Mr Piner's belief that he was dismissed over the grader incident was unshakeable.

[60] Mr and Mrs Piner both gave evidence about Mr Piner's feelings of unfairness over his dismissal, because he understood it to be for the grader incident.

[61] Mr Piner felt particularly aggrieved that he did not get to talk to Mr Blakely at all.

[62] He says he felt a bit numb as he worked out his notice as well as embarrassed and belittled by his dismissal.

[63] He had trouble sleeping after his dismissal, which remained a problem for a long time. Sometime after his dismissal, his GP prescribed anti-depressants for the impact of the dismissal on him. As of January of this year, he was still having trouble sleeping and was prescribed sleeping pills.

[64] Mr Piner told me that losing his job made him feel useless and frustrated.

[65] Mrs Piner's evidence was that Mr Piner became hurt, angry, and suffered bitterness. She says that for a long time they did not tell their friends or family that Mr Piner had been dismissed, as they felt ashamed especially because the cause seemed to be "something so paltry and embarrassing – what a way to end your working life."

[66] I consider the impact on Mr Piner of emotional harm and suffering because of his dismissal was moderately serious. It is reasonable that Blakely's pay Mr Piner \$10,000 in compensation.

Contribution

[67] Mr Piner's behaviour did not contribute to the situation leading to his personal grievance at all. Therefore, there is no reason to reduce any of the remedies I have awarded.

Costs

[68] The Authority has discretion to award costs. The general principle is that the unsuccessful party should pay a contribution to the successful party's costs. Mr Piner is the successful party, so Blakely's should make a reasonable contribution to his costs.

[69] The Authority considers costs based on a daily tariff amount of \$4,500.00 per day. The meeting was due to start at 9.30 am, but was delayed for Mr Blakely. It went until 1.15 pm, somewhat more than half a day.

[70] Ms Oberndorfer submits that Mr Piner has incurred modest costs of \$4,125 plus GST since attending mediation. She claims that an award of \$4,000 is reasonable.

[71] Mr Blakely had an opportunity to present evidence after the investigation meeting. That evidence, and new evidence presented at the meeting, meant that although Ms Oberndorfer had prepared submissions to present at the meeting, she was unable to do so and had to amend her submissions after the meeting and after Mr Blakely provided the letter.

[72] I have taken into account the principles set out by the Employment Court in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*⁵ and the more recent case *Fagotti v Acme & Co Limited*.⁶

[73] I consider it reasonable that Blakely's pay Mr Piner \$3,500 towards his representation costs as well as reimbursing him \$71.56 for the filing fee he paid to bring his application to the Authority.

Christine Hickey
Member of the Employment Relations Authority

⁵ [2005] ERNZ 808, at page 819.

⁶ [2015] NZEmpC 135.