Determination Number: AA 443/05
File Number: AEA 911/02

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Dennis Peter Radovanovich (Applicant)
AND	Ocean and Merchant Pty Ltd (Respondent)
REPRESENTATIVES	Megan Leaf for Applicant No appearance for Respondent
MEMBER OF AUTHORITY	Janet Scott
INVESTIGATION MEETING	26 October 2003
DATE OF DETERMINATION	17 November 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

The applicant asks the Authority to investigation and determine matters relating to his dismissal from his employment with the respondent. Mr Radovanovich submits that at the time he was dismissed the respondent contended that he was being made redundant. However, the applicant believes this is an unjustified dismissal dressed up as a redundancy.

In the alternative, the applicant submits that if his dismissal was founded on a genuine redundancy then it was implemented in a procedurally unfair manner.

To remedy his alleged grievance the applicant seeks lost remuneration, lost benefits, compensation pursuant to s.123 (1)(c)(i) and costs in the matter.

The respondent did file a Statement in Reply in which it states the termination was due to a genuine redundancy. It denies the redundancy was affected in a procedurally unfair manner.

Note (1): This application has a relatively long history in that the identity of the respondent has been subject to a previous Determination of the Authority (AA 239/03) and appeal to the Employment Court (AC 34/05). The Authority made a Determination that Merchant Tiles Ltd was the employer of the applicant. As that company had been struck off the Authority declined to hear and determine the applicant's alleged grievance. On challenge the Court determined that Ocean and Merchant Pty Ltd,. an Australian company, was Mr Radovanovich's employer. The matter was referred back to the Authority for investigation and determination.

Note (2): There was no appearance at the investigation meeting by or on behalf of the respondent. I am satisfied the respondent has been served with the Statement of Problem and Notice of Investigation Meeting.

The meeting was delayed to allow for the situation that the respondent had been unavoidably detained. However, as there was neither an appearance for nor contact from the respondent to explain its absence I have proceeded to hear and determine the matter in accordance with Clause 12 of the Second Schedule of the Employment Relations Act 2000.

Background

Mr Radovanovich commenced employment with the respondent on 24 July 2000. He was employed to run the warehouse and trade sales area of the respondent's retail tile business (Merchant Tiles Ltd.) based in Mt Maunganui. There was no written employment agreement but the terms of Mr Radovanovich's employment were set out in a letter of appointment. He was to be paid a salary of $31,500 per annum. He was to work 8.30am – 5.00pm Monday to Friday and Saturdays 9am-12 noon (later agreed to be alternate Saturdays). There was a probationary period of 3 months and a promise that after 6 months employment the parties would discuss a bonus (based on commission on sales over an agreed budget).

The only other employee employed in the Mt Maunganui business was Murray Morrision who was the Sales Manager. However, it is clear on the evidence that Richard McKenzie (a director common to both Merchant Tiles Ltd and the respondent company and who is based in Sydney) played a significant role in managing the New Zealand business.

It was Mr Radovanovich's evidence that changes to the operation of the business were discussed and implemented from very early in his employment. When he started the business premises comprised a warehouse and small show room. The first change involved extending the showroom and displaying tiles on shelving for customers to view and select. Later the business was rebranded as a tile clearance depot and called the "Tile Clearance Depot". On 31 May 2001 Mr Radovanovich was told he would become a sales representative and that he would be paid a mileage allowance, and that the business trading hours would be changed from 10am – 3pm.

Early in June Mr Radovanovich was told by Mr Morrision to dismantle the showroom pursuant to the plan that the business would thereafter brand itself as a tile clearance depot where tiles would be presented on pallets in the warehouse. There was a heated discussion between Mr Radovanovich and Mr Morrision with regard to this proposal. Mr Radovanovich wished to wait until he heard back from Mr McKenzie regarding some proposals he had submitted relating to the future direction of the business.

Mr Radovanovich walked out of the business that day. He was telephoned later by Mr McKenzie who was not pleased that Mr Radovanovich had walked off the job. He confirmed the instruction that the business would be a tile clearance depot. On 6 June Mr Radovanovich received a verbal warning for walking off the job.

On 8 November 2002 Mr Radovanovich found a final written warning which had been placed on his desk by Mr Morrison. It related to alleged complaints from two customers. There had been no discussion about the alleged complaints prior to this warning being placed on his desk.

Mr Radovanovich's evidence was that by that time a rift had developed between him and Mr Morrision He said it originated in Mr Radovanovich's concern about Mr Morrison's lack of industry

experience and the fact that he was left to provide this expertise while Mr Morrision was being paid more than him. He believes that Mr Morrision embarked on a plan to set him up with Mr McKenzie as the person who was letting the team down with the view to having him dismissed. In support of this allegation Mr Radovanovich produced written communications from Mr Morrison to Mr McKenzie which were highly critical of Mr Radovanovich's work ethic and performance. Mr Radovanovich had come across this documentation and copied it. The documentation also included a summary of advice received from the Regional Manager of the Retail Merchants Association. One interpretation of this memo from Mr Morrision to Mr McKenzie could be that it sets out a scenario to get rid of a poor employee under the guise of a dismissal on the grounds of redundancy.

Following receipt of the final written warning Mr Radovanovich had his lawyer write to his employer challenging the warning. No formal response was received in answer to the issues raised but on 27 November Mr McKenzie advised Mr Radovanovich's lawyer that the business was undergoing a review and that once decisions had been made the two staff members at Mt Maunganui would be notified of the outcome.

On 3 December Mr Radovanovich received a letter informing him that as consequence of poor business performance the warehouse and trade side of the business would close on 15 December and that there would be no position for him from that date. The letter stated these facilities would be moved to Auckland. This letter was simply left on Mr Radovanovich's desk.

Mr Radovanovich said that there was no discussion or consultation with him prior to the receipt of notice of the termination of his employment. Neither was there any discussion of alternatives to termination. He would have been happy to have considered reduced hours or even a transfer to Auckland.

Mr Radovanovich said that in January or February 2002 he visited the respondent's premises. Nothing had changed in terms of signage. Someone else was employed there and to the best of his knowledge a warehouse and trade supplies business was still operating from the premises.

Discussion & Findings

Mr Radovanovich presented as a credible witness.

As noted the respondent did not attend the Investigation Meeting and therefore has not discharged the burden of establishing that this termination was justified. The dismissal of Mr Radovanovich was unjustified.

One matter that does require consideration (because it goes to remedies) is the question of whether it is more probable than not that this was a dismissal for cause dressed up as a termination brought about by a genuine need to restructure the business – a redundancy.

On the totality of the evidence before me I must find that it is more probable than not that the respondent decided to terminate the employment of an employee it saw as "troublesome" under the guise as an termination for redundancy. This is an aggravating feature of the dismissal.

Finally before I turn to the consideration of remedies I find that in all its dealings with Mr Radovanovich relevant to the warnings and termination of his employment the respondent (through its managers) presented decisions as a fait accompli. There was a complete absence of any discussion with the applicant in relation to his alleged poor performance/misconduct or later in

respect to the proposed restructuring of the business. Workers are entitled to fair and reasonable treatment in their employment and the concept of good faith is a cornerstone of the Act. It is essential that where an employee's continued employment may be in jeopardy (for whatever reason) they are entitled to a fair hearing in respect of the employer's concerns or on any proposals for restructuring. The issues of concern or the proposal for restructuring should be put to the worker, he or she should be advised of their right to representation and should be given the opportunity to explain their conduct or provide input into any proposals for restructuring including the consideration of alternative roles. Any explanation given by the worker or suggestions relating to a proposed restructuring should be considered with an open mind. None of this happened in the case before me.

Determination

Mr Radovanovich was unjustifiably dismissed from his employment with the respondent and he has a personal grievance against his former employer.

Remedies

Lost Remuneration s.123 (1) (b)

The applicant seeks lost remuneration from the date of his dismissal until 27 April 2004 when he obtained permanent employment. However, the applicant also gave evidence that he gave up a job because it was not worthwhile given it led to a reduction in his benefit. That shows a failure to mitigate his loss.

Nevertheless I am satisfied that Mr Radovanovich did not find alternative employment for some time after his dismissal and I consider it appropriate to award him three months lost remuneration.

I therefore direct the respondent to pay to the applicant the sum of $8,775 gross to reimburse him for remuneration lost as a result of his grievance.

Loss of a Benefit s.123 (1) (c) (ii) & s.128

Mr Radovanovich seeks $5,000 to reimburse him for the loss of the benefit of commission on sales he was promised at the commencement of his employment.

I note the letter of appointment promises only to discuss a bonus based on a commission on sales over an agreed budget. This discussion was to take place after six months employment. It might be that the respondent was in breach of its agreement with Mr Radovanovich in not discussing a bonus arrangement. I find, however, there was no agreement reached on a bonus to be paid to Mr Radovanovich such that he has a right to a remedy under this head.

Compensation under s.123 (1) (c) (i)

The respondent did not meet its obligations of good faith and fair and reasonable treatment in this case and the dismissal had a seriously deleterious effect on the applicant.

In all the circumstances of this case I direct the respondent to pay to the applicant the sum of $10,000 net to compensate him for the effect the dismissal had on him.

Costs

Costs are reserved. The parties are directed invited to file and serve submissions on the subject and the matter will be determined

Janet Scott
Member of Employment Relations Authority