

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 88
5527146

BETWEEN GRANT ROGERSON
Applicant

AND TRENOWA HOLDINGS
LIMITED t/a BLOCKBUSTER
VIDEO
Respondent

Member of Authority: Trish MacKinnon

Representatives: Applicant in person
No appearance for Respondent

Investigation Meeting: 29 July 2015 at Wanganui

Determination: 7 September 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Grant Rogerson was employed as manager of Blockbuster Video for approximately six years until 11 September 2014. On that day, representatives of his employer arrived at the workplace shortly after the shop had opened. Mr Rogerson says they informed him he had 30 minutes to gather his personal belongings and leave and that the shop would be closing down that day.

[2] Mr Rogerson claims he has been unjustifiably dismissed. He seeks lost wages, compensation for lost earnings and for the hurt and humiliation he suffered. Mr Rogerson also claims a personal grievance in respect of a period he referred to as "*forced leave*" in 2013. He further seeks wage arrears for unpaid bonuses to which he claims a contractual entitlement. In Mr Rogerson's statement of problem he raised a number of other issues, which he agreed in the course of the investigation were more

properly considered as part of the factual matrix of his personal grievances rather than as claims in their own right.

[3] Trenowa Holdings Limited, the owner of Blockbuster Video, responded to the Statement of Problem through its accountant, Glenn Brown of Balance Chartered Accountants. Mr Brown advised that Trenowa Holdings Limited was no longer trading, had no assets, and had taken the decision not to defend Mr Rogerson's personal grievance. Mr Brown said the dire financial situation of Blockbuster Video was the reason for the closure of the video shop. He noted a number of concerns he had been asked to record on behalf of Trenowa Holdings Limited. These were:

- *The bulk of Mr Rogerson's complaints are historic and therefore outside the 90 days allowed to him to raise by way of personal grievance;*
- *Other complaints relate to the owner's prerogative to run its business in its own manner and cannot be the basis for a personal grievance;*
- *It is highly questionable whether Mr Rogerson in fact raised his personal grievance within the 90 days allowed. Legal advice suggests that his letter of 23 October 2014 does not raise a personal grievance and so the filing of the Statement of Problem, relating to his dismissal in September 2014, is outside the 90 days allowed to him;*
- *Mr Rogerson's dismissal was because the business closed and whilst the process may not have been "perfect" it was a genuine redundancy;*
- *Attached is the final payslip signed by Mr Rogerson on 9 October 2014 confirming his acceptance of that pay as full and final settlement of his entitlements;*
- *Should any determinations be made in favour of Mr Rogerson against Trenowa it has no assets to meet them.*

[4] Trenowa Holdings Limited did not participate in the telephone conference convened by the Authority for 20 May 2015 and nor did it participate in the investigation meeting held on 29 July 2015. I am satisfied the respondent received a copy of the notice of investigation meeting dated 27 May 2015 which was sent to the company director, Peter John Cullen, at the company's registered address in Whanganui. Mr Brown clearly received a copy of the notice of investigation meeting as he responded by email that the company was unlikely to attend.

[5] In the absence of the respondent I proceeded with the investigation in accordance with the provisions of clause 12, Schedule 2 to the Employment Relations Act 2000 (the Act).

Background

[6] It is Mr Rogerson's evidence that he was able to build up the business of Blockbuster Video in the first three years of his employment. After that, it became more difficult because, in his view, the owner of the business removed his ability to manage the business on a day-to-day basis. From January 2013 onwards, Mr Rogerson says his relationship with the business owner, Mr Cullen, became more difficult as Mr Cullen refused to communicate with him effectively. He cancelled advertising and would not allow Mr Rogerson to change the layout of the store in a way his research of such matters informed him would ensure a better experience for customers.

[7] In 2013, Mr Rogerson says he was twice instructed to take annual leave by Mr Cullen. He agreed to take two weeks' leave as instructed in April 2013 and was then instructed to take a further three weeks' leave in August/September the same year. Mr Rogerson says he resisted this on the basis he had been planning to take his leave during the forthcoming school holidays. Mr Rogerson raised a personal grievance on the basis of this requirement.

[8] Nonetheless, Mr Rogerson says he continued to manage the video shop to the best of his ability and was devastated on 11 September 2014 to be told by Mr Cullen and Mr Brown that the shop was going to close and he had 30 minutes to gather his personal belongings and leave. Mr Rogerson says he had been interested in purchasing the business from the respondent and was given the option of making an offer to purchase it within three days.

[9] Mr Rogerson says he told Mr Brown and Mr Cullen that closing the business would send the wrong message to customers and that he would not be interested in making an offer for the business. He asked them to reconsider what they were doing and offered to take over running the business until such time as he could arrange finance in order to purchase it. His offer was declined.

[10] Mr Rogerson telephoned his lawyer from the shop and explained the situation to him. His lawyer spoke to Mr Cullen and Mr Brown and informed them their

actions were unlawful. This occurred while Mr Rogerson was still in the shop and before he had packed his belongings. Mr Rogerson was told he would receive four weeks' garden leave. He said the shop did close that day but opened a week later for the purpose of selling all the stock, plant and machinery. Another staff member was employed for this purpose.

[11] Mr Rogerson received his final pay on 9 October 2014. I shall return to the matter of his payslip later.

Issues

[12] The issues for the Authority to determine are:

- (a) Whether Mr Rogerson raised his personal grievances in accordance within the statutory timeframe.
- (b) If so, whether he was:
 - i. unjustifiably disadvantaged by being instructed to take annual leave in 2013; and/or
 - ii. unjustifiably dismissed.
- (c) Whether he is precluded from pursuing a claim for unjustifiable dismissal because he signed his final payslip accepting the payment as "*full and final settlement*".
- (d) Whether Mr Rogerson is owed unpaid bonuses.

Did Mr Rogerson raise his personal grievance claim for unjustifiable disadvantage in time?

[13] The Act requires that an employee must raise a personal grievance with his or her employer within 90 days of the action alleged to amount to a personal grievance occurring or coming to the employee's attention.¹ A grievance is raised as soon as the employee has made the employer aware, or has taken reasonable steps to make the employer (or a representative of the employer) aware, that the employee alleges a personal grievance that the employee wishes the employer to address.

¹ Employment Relations Act, s 114.

[14] Mr Cullen wrote to Mr Rogerson on 12 August 2013 instructing him to take three weeks annual holidays. He noted his concern that Mr Rogerson had not taken any leave of significant duration since the commencement of his employment and had accumulated almost 10 weeks leave by April 2013. He also noted Mr Rogerson's tendency to come into work during periods of annual leave to do the banking for the business. He expressed the reason for his instruction to take leave in late August and the first half of September as partly based on concern for Mr Rogerson's health and wellbeing, and partly on financial reasons to prevent excess accumulation of leave.

[15] On 22 August 2013, Mr Rogerson's lawyer, Quentin Stratford, wrote to Messrs Cullen and Brown in respect of the instruction Mr Rogerson had received to take three weeks' annual leave. Mr Stratford told the employer the instruction was in breach of the Holidays Act 2003 which required an employer to agree with an employee when the employee would take annual holidays². It was only after the parties had failed to reach agreement that the employer was entitled to require the employee to take leave³.

[16] Mr Stratford notified the employer he had been instructed to lodge a personal grievance for the employer's unjustifiable action to the disadvantage of Mr Rogerson if the employer tried to enforce its unlawful instruction. The employer responded by raising "*serious matters of concern*" regarding Mr Rogerson which it intended to investigate. The first issue of concern was in relation to his reaction to the instruction to take annual leave. Other matters related to Mr Rogerson's management, both generally and in relation to staff. I will not elaborate on those allegations as they are not relevant to the current claims.

[17] Mr Rogerson complied with his employer's instruction and took annual leave at the time it had designated. Mr Stratford formally notified the respondent by letter dated 27 September 2014 of Mr Rogerson's personal grievance on the basis of the disadvantage he had suffered from his employer's actions. I am satisfied that Mr Rogerson's personal grievance for unjustifiable action was raised within 90 days as required by s.114 of the Act.

² Holidays Act 2003, s 18(3)

³ s 19

Was Mr Rogerson's employment affected to his disadvantage by being instructed to take annual holidays?

[18] Mr Rogerson said he was disadvantaged because he had intended to take leave during the school holidays in order to spend time with his children, which was important to him. He said he had been unable to do so, despite having had that leave approved in advance by his employer. When asked why he had been unable to take the leave that had been approved, it emerged that Mr Rogerson had put the interests of his staff ahead of his own interests. He had decided their applications to take annual during the school holidays should take priority because he had so recently had a period of annual leave.

[19] Mr Rogerson had sufficient leave owing to him, and had the approval of his employer to take it. I do not find he suffered the disadvantage he claimed from his employer's instruction. The only impediment to his taking leave during the school holidays was his own good nature and concern for his staff.

Did Mr Rogerson raise a personal grievance for unjustifiable dismissal within time?

[20] Mr Rogerson told me he had raised his personal grievance for unjustifiable dismissal both verbally and by email before he informed his employer in writing on 23 October 2014 that he intended to "*file*" his grievance. He said that was the reason his employer required him to sign his final payslip as being "*full and final settlement*" before it would release his final pay to him.

[21] I accept that evidence, although Mr Rogerson was unable to find and produce the email to which he referred. I do so because I have no reason to doubt his truthfulness, and because the fact that the employer required him to sign his final payslip indicates it wished to prevent him from continuing to pursue a grievance he had raised. I also take into account Mr Rogerson's awareness of the requirements for raising a grievance from his experience of raising one the previous year in relation to the requirement that he take annual holidays.

[22] I am further persuaded by the evidence of Mr Rogerson regarding Mr Stratford's telephone discussion on the morning Mr Rogerson was dismissed in which he informed the owner and his accountant of the unlawfulness of their actions. Mr Rogerson was privy to that telephone discussion and I accept his evidence of it.

[23] For these reasons I am satisfied that Mr Rogerson made his employer aware that he was aggrieved by his dismissal and the manner of his dismissal and that he wished his employer to address this matter. He did that before notifying his employer of his intention to file the matter, by which I accept he meant that he intended to lodge the matter in the Authority.

Was Mr Rogerson unjustifiably dismissed?

[24] Whether an employee has been unjustifiably dismissed is to be determined on an objective basis by applying the test of justification specified at s. 103A of the Act. The test is whether the employer's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time. A range of factors must be considered when applying the test, including the sufficiency of the employer's investigation, having regard to the resources available to it.

[25] I accept Mr Rogerson's evidence that there was no prior consultation or discussion with him before Mr Cullen and Mr Brown informed him on 11 September 2014 about the decision to close Blockbuster Video with immediate effect. While there may have been financial reasons for closing the shop, that does not relieve the employer of its obligations with respect to an employee affected by the decision.

[26] I have little information relating to the circumstances of Trenowa Holdings Limited t/a Blockbuster Video in light of the respondent's decision not to attend the Authority's investigation meeting. The company clearly has an accountant to assist with its financial affairs and, whatever its size, had an obligation to make itself aware of its responsibilities to its employees.

[27] In this instance, there was a complete lack of any fair process. Mr Rogerson should have been consulted about the possibility of closure and given an opportunity to have his views taken into account. Whatever the financial imperatives, it was unnecessary to deliver the news of the closure, and termination of his employment, in such an abrupt manner. The decision to require Mr Rogerson to collect his belongings and remove them and himself from the premises within 30 minutes was uncalled-for and harsh. I find his dismissal to have been unjustifiable on procedural grounds.

Does Mr Rogerson's signature on his final payslip preclude him from pursuing a grievance for unjustifiable dismissal?

[28] At the end of Mr Rogerson's final payslip are the following words:

Full and final settlement

Accepted by G Rogerson _____(signed)

Dated 09/10/14

[29] In Mr Brown's letter in response to Mr Rogerson's statement of problem, he included the final payslip stating that Mr Rogerson's signature confirmed his acceptance of that pay as full and final settlement of his entitlements.

[30] Mr Rogerson's evidence, which I accept, is that he was faced with the choice of either signing the payslip and receiving the remuneration to which he was entitled, or not signing it, and not receiving that money. He said he had no choice but to sign as he required the money owing to him in order to pay bills and feed his family. I note the itemisation of various amounts in the payslip shows they were standard payments for wages, holiday pay and payment for one alternative public holiday.

[31] The Wages Protection Act 1983 provides that an employer shall (with specified exceptions that are not relevant here), when any wages become payable to an employee, pay the entire amount of those wages to the employee without deduction.⁴

[32] Mr Rogerson was entitled to his final pay. There is no statutory sanction that allows an employer to require an employee to forego a statutory right to pursue a personal grievance in exchange for receiving remuneration to which the employee is entitled. I find Mr Rogerson is not precluded from pursuing his grievance because of the signature he was required to provide on his final pay slip.

Is Mr Rogerson owed bonuses?

[33] Mr Rogerson claims his employer failed to pay bonuses in accordance with his individual employment agreement (IEA). Schedule A to the IEA he signed on 30 April 2010 provided for an annual salary and the following bonuses:

⁴ Wages Protection Act 1983, s 4.

- *Plus bonus 1% of turnover paid two monthly;*
- *Plus bonus 5% of profit paid six monthly (with GST returns).*

[34] Mr Rogerson said he was paid the 1% of turnover bonus during his employment but says the last bonus he received was in August 2014 covering the months of June and July. He seeks payment of the outstanding bonus. As the video shop closed on 11 September 2014, he is entitled to a bonus equating to 1% of the turnover for the month of August 2014, and for the first 10 days of September 2014.

[35] Mr Rogerson said he did not ever receive the 5% bonus which was to be paid six monthly based on the nett profit of the business. He told me that whenever he asked about that bonus he was told by Mr Cullen or Mr Brown that the business did not make a profit.

[36] Mr Rogerson produced a document in the course of the investigation meeting which was a statement of financial performance for the years 2012, 2013 and 2014 for Trenowa Holdings Limited. Those statements, which had Trenowa Holdings Limited at the top of each page and Balance Chartered Accountants Limited at the bottom of each page, showed net profits of \$36,228, \$17,496 and \$780 respectively for each of the three years. Mr Rogerson's evidence, which I accept, was that he was provided with that information when he expressed an interest in purchasing the business.

[37] On the basis of the evidence before me I accept Mr Rogerson's claim to be paid bonuses for the years 2012 to 2014, based on 5% of nett profit. I calculate the amount for 2012 to be \$1,811.40; for 2013 to be \$874.80; and for 2014 to be \$39.

Determination and remedies

[38] I have found Mr Rogerson was not disadvantaged by his employer's instruction to take annual leave in August/September 2013 and therefore the question of remedies for that matter does not arise.

[39] I have found he was unjustifiably dismissed. He did not contribute to the situation that led to his personal grievance arising. Mr Rogerson gave evidence of the effect the loss of his employment has had on him and the hardship he and his family has subsequently suffered. He also gave evidence of his attempts to find alternative employment. Despite many job applications made through multiple sources he had not been successful at the date of the investigation meeting.

[40] Mr Rogerson's employment was terminated for redundancy. The declining profits of Blockbuster Video as shown in the financial statements Mr Rogerson provided to me suggest there were valid reasons for closing the business. In those circumstances an award of wages is not appropriate. Even if the employer had followed a fair and reasonable process, the outcome would have been the same for Mr Rogerson in that he would still have lost his employment.

[41] It is appropriate to award him compensation for the manner in which his employment was terminated. It was unnecessarily harsh and I accept that it had a significant impact on Mr Rogerson. I order the employer to pay him the sum of \$6,000 as compensation.

Orders

[42] Trenowa Holdings Limited t/a Blockbuster Video is ordered to pay the following sums to Mr Rogerson:

- a. \$6,000 (without deduction) under s. 123(1)(c)(i) of the Act in compensation for his unjustifiable dismissal;
- b. Arrears of wages comprising an unpaid bonus based on 1% of Blockbuster Video's turnover for August 2014 and 1-10 September 2014. The employer is to provide Mr Rogerson with the turnover amount to verify its calculation of the amount;
- c. Arrears of wages comprising unpaid bonuses for the years 2012 to 2014, totalling \$2,725.20 gross as specified in paragraph 38 above.

Costs

[43] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority