

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 287/09
5127216

BETWEEN BARRY SAUNDERS
 Applicant

AND NORTHLAND SPARS AND
 RIGGING
 Respondent

Member of Authority: Yvonne Oldfield

Representatives: Barry Saunders in person
 Les Pipe and Athol Hutton Directors, for Respondent

Investigation Meeting: 22 April 2009

Determination: 19 August 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Saunders had been employed as the respondent's Operations Manager for less than a year when he was told he was redundant. He alleges that his dismissal was unjustified or that, at the least, he suffered an unjustified disadvantage. Mr Saunders received a month's pay in lieu of notice and found a new job within seven weeks of the termination. He therefore seeks three weeks lost earnings as well as compensation for the hurt and humiliation associated with his grievances.

Issues

- [2] The issues for determination are:
- i. whether the respondent complied with its obligations to consult with Mr Saunders about the disestablishment of his position;

- ii. whether redeployment options were properly considered;
- iii. whether the dismissal itself was procedurally fair, and
- iv. whether the redundancy was genuine.

(i) Consultation

[3] Northland Rigging and Spars Ltd operates a boat rigging business from sites in Whangarei and Opua. The business was originally owned and operated by a pair of companies belonging to Mr Saunders and his wife. Mr Saunders was an experienced rigger but by late 2006 the business (in particular the Whangarei branch) was facing financial problems, and the decision was made to put it on the market.

[4] On 30 April 2007 Mr and Mrs Saunders sold both parts of the business to the newly formed respondent company. Its directors, Mr Pipe and Mr Hutton were both confident and experienced businessmen who knew the Whangarei branch had never made money. However they saw it as having potential. They were keen yachtsman but had not worked in the industry and did not propose to work full time in the business after the purchase. The deal was therefore premised on the fact that Mr Saunders would stay on to provide rigging expertise and industry knowledge while the directors provided management oversight. The agreement for sale and purchase contained a provision that from 1 May 2007 Mr Saunders would be employed by the new company as Operations Manager, based in the Whangarei branch with two staff (one rigger and a part time administrative worker) although the senior rigger at the Opua site (Paul Smith) would report to him also.

[5] Over the winter of 2007 the new directors introduced procedures to address the timing and recording of purchases and to ensure that hours worked were billed and invoiced. Unfortunately, however, it soon became clear that the problems which beset the Whangarei branch were not going to be fixed quickly or easily. By spring the busy season for the industry had arrived but the directors were still finding it necessary to inject cash into the business each month to keep it afloat.

[6] The directors' told Mr Saunders that their concern was that the Whangarei branch was pulling the whole operation down, as indeed it had when it was his business. They told him that if it did not start breaking even over the busy period, its on going operation would be in jeopardy.

[7] By New Year 2008 the figures for October-December 2007 were out: each month showed a loss. On 14 January 2008 the directors informed Mr Saunders that they had decided to close the Whangarei site. It was envisaged that most operations would relocate to Opuia, with a presence in Whangarei to be maintained though a mobile service and the lease of a portacabin to provide a small base. It was intended for this to occur by April, at which time there would be an opportunity to get out of the lease for the land occupied by the Whangarei business.

[8] The Whangarei rigger and part-time administrative worker were immediately given notice that their employment would terminate as a result of the planned closure. The administrative worker soon found another job and left, at which point all the administration was transferred to the Opuia site.

[9] In January 2008, when the closure plan was first set out by the directors, they had proposed to Mr Saunders that once he had wound things up in Whangarei he would be transferred to the Opuia site. In itself this was not a problem as his home was in Opuia. However the terms on which he would transfer proved a source of dispute. The directors proposed that the position of Operations Manager would be disestablished and Mr Saunders would take up the new role of Chief Rigger on a salary \$5,000.00 less than he had previously received. (If need be, to accommodate this arrangement the respondent was prepared to lay off a rigger off at the Opuia site.)

[10] Mr Pipe told me that Mr Saunders had never really functioned as Operations Manager for the whole business. Despite the title, he had left Paul Smith to run Opuia and Mr Pipe felt that "Chief Rigger" was a more accurate reflection of what Mr Saunders actually did. Mr Pipe also wanted to equalise Mr Saunders' pay with that of Mr Smith (whose base salary was \$5,000.00 less than that of Mr Saunders) in recognition of what he felt were their equal contributions to the business. Mr Pipe did however offer an incentive based pay system for both men which would have the potential to bring Mr Saunders' total remuneration up to or beyond its original level.

[11] Mr Saunders did not argue the case for the role of Operations Manager and seems to have accepted that he never really functioned as such. He told Mr Pipe that he was prepared to take on the title of “Chief Rigger” but was not prepared to take a pay cut. Mr Pipe told me he then adopted a “wait and see” approach, hoping that Mr Saunders might come round to the idea. He was also hopeful that the mobile rigging unit would take off, and generate ongoing work. Either way, in early 2008 his intention was still to keep Mr Saunders on as riggers with his level of experience were hard to find.

[12] The title of Operations Manager was dropped from January. Mr Saunders was away on sick leave from 26 February to 12 March and soon after his return all administrative functions (including scheduling) were moved to Opuia. From that point on he had effectively ceased to be Operations Manager even for Whangarei: the job he was originally hired to fill no longer existed. Until he left he was in what Mr Pipe describes as a transition role, with his job consisting of rigging work and liaison with customers.

Determination

[13] As is often the case in a small business, communications between Mr Pipe, Mr Hutton and Mr Saunders were informal. Notwithstanding this they were clear. From the time the directors took over until the closure plan in January, Mr Saunders knew that the Whangarei business was doing no better under the new ownership than it had under his. He knew that the respondent sought to reduce costs and rationalise services by moving first administration, and then other functions onto one site. He had been involved in the discussions around the implementation of this change, including the redundancies of two staff. He also knew that the business continued to lose money, and was only staying afloat because the directors were injecting further capital into it.

[14] Finally he knew, also, that the role he had been carrying out did not match his job title and that this was in part a result of the way he had shaped his own job. Despite knowing this, he took no steps to exercise the functions of an Operations/General Manager, or to argue the case for its retention.

[15] In short, Mr Saunders was well informed about what was happening and had been engaged in all the changes which had taken place up to May 16. Although the directors operated in an informal way, I am satisfied that the consultation was adequate. No unfairness arises out of the decision to disestablish the position of Operations Manager or the way it was reached.

(ii) Redeployment

[16] As set out above, the directors made an offer to redeploy Mr Saunders when they first set out their closure plan. If that plan had unfolded as intended, matters regarding his ongoing employment would have come to a head by April. As things turned out, however, the Whangarei site did not close its doors then. Approximately a month before the planned closure date the directors realised there were a number of jobs in the Whangarei yard which had not been completed and could not be moved. Some of this work had been taken on by Mr Saunders after the January decision to close. The directors felt that it was enough to justify an extension to the lease, particularly as some of the customers involved brought their business to the company each year. They negotiated a three month extension to the end of June.

[17] Nonetheless, by May the quieter winter months were approaching and work was winding down. In early May Mr Hutton spoke with Mr Saunders and reiterated that the option of staying on as Chief Rigger was still open to him. By this time, the rigger who assisted Mr Saunders in Whangarei had left. Besides Mr Smith and Mr Saunders the respondent employed two riggers, with extra assistance provided by a contractor as required. The Opuia administrative worker was the only other staff member. Mr Saunders could have been accommodated without laying anyone else off. Once again however Mr Saunders rejected the proposal and the pay cut that went with it.

Determination

[18] The suggestion that Mr Saunders take up the role of Chief Rigger was an attempt to create a job for Mr Saunders that reflected the reality of what he actually did, as well as filling a real need for the respondent. The redeployment offered was to a substantially similar job to the one he was doing and was at a comparable level of

remuneration (with the opportunity to make up the salary shortfall with performance based pay.) I accept that the offer was a reasonable one.

[19] In such a small company, it was also the only redeployment opportunity available. I am satisfied that the respondent met its obligations in relation to consideration of redeployment options.

(iii) The termination of employment: procedural fairness

[20] Having heard that Mr Saunders was still not prepared to accept the redeployment option, Mr Pipe decided it was time to bring the transition arrangement to an end. On 16 May he prepared a letter to Mr Saunders telling him that even although the closure of the Whangarei site had been postponed, further cost reductions were needed. The letter went on:

“sadly it is our intention to eliminate the position of General Manager¹. Existing senior staff members who will be supported by myself in a full-time management position, will absorb your day-to-day responsibilities...

I propose that your redundancy will take effect from 13 June 2008. The Board are proposing a timetable for this process, which will allow your input and for you to air your views on this matter. I would suggest a meeting within 7 days, which gives you adequate time to prepare...

I would appreciate an early response so that meeting can be convened.”

[21] Mr Saunders was on sick leave on 16 May with the result that this letter was not presented to him until Monday 19 May. He decided to visit Auckland the following weekend to seek advice from his daughter (a human resources practitioner.) However, Mr Pipe called him to a meeting on Thursday 22 May. Mr Pipe proposed that he be made redundant with one months notice from that day, but with the final day of work yet to be decided. Mr Pipe told me he understood that Mr Saunders

¹ It appears to be accepted that the reference to the position of General Manager is an error. The original title of Mr Saunders role was Operations Manager, and this is the role that was being disestablished.

agreed to all this, but Mr Saunders says he was simply told this was the way it would be.

[22] The next day, Friday, Mr Saunders left for Auckland to see his daughter as he had originally planned. On the Friday afternoon Mr Pipe received a customer complaint. The client was about to leave on the Auckland-Fiji yacht race and had booked in for work to be done on his boat before he left. Now Mr Saunders had told him that he could not undertake the work because he was no longer employed by the company. Mr Saunders did not refer the customer to Mr Pipe or anyone else from the respondent company and no-one but Mr Saunders had known of the booking.

[23] Mr Pipe decided that Mr Saunders could not be trusted to work out his notice period and should go straight away. When Mr Saunders returned to Opuia on 26 May he was asked to return his keys and other company property and was given a letter confirming that his employment was ended as at 23 May, with 30 day's pay in lieu of notice.

[24] Also on 26 May Mr Saunders handed Mr Pipe a letter protesting the redundancy. An exchange of communications followed which resulted in the resolution of some issues about the correct sum due in final pay, but which did not resolve the issues Mr Saunders had about what he felt was an unfair dismissal. On 29 May Mr Saunders therefore raised a personal grievance through a letter from his solicitor.

Determination

[25] From 19 May events accelerated rapidly. Mr Saunders notes that the letter of 16 May presents the redundancy as a *fait accompli* and further feels aggrieved that the directors moved to meet with him on 22 May without allowing him more time to obtain advice and support.

[26] In response the directors say that because Mr Saunders turned down the offer of redeployment, they proceeded to terminate for redundancy. Looking over the whole sequence of events it is easy to see why they take this view. Nonetheless I accept that from 19 May onwards they moved with undue haste. The letter did indeed present the

decision as having been made and it was not unreasonable for Mr Saunders to take the view that there was nothing he could say to influence matters after that.

[27] Mr Saunders should have had a final opportunity to respond after taking advice. Had he had this it may well have addressed some of his sense of grievance.

(iv) Genuineness of redundancy

[28] As things turned out, it proved possible to keep the Whangarei site open using staff from Opuia along with one new rigger. Because the business did not close as originally planned, and because Mr Pipe came to hold, and express, a strong view that Mr Saunders lacked management skills, Mr Saunders doubts the genuineness of the redundancy. In response, Mr Pipe has pointed out that two staff had already been made redundant in early 2008. He also noted that the person taken on after Mr Saunders left was a rigger and would not have been hired if Mr Saunders had accepted the Chief Rigger position which was left open to him right through from January to May. No other new staff (of any sort) had been recruited since October 2008.

[29] I have already set out (above) my conclusions in relation to the disestablishment of the Operations Manger role. The role existed in name only and was clearly superfluous to the respondent's needs. I am satisfied that that position was genuinely redundant. I have also found that the respondents made a reasonable offer of redeployment. The redundancy process was marred only by the speed of its latter stages, after 19 May, and the failure to provide an opportunity to Mr Saunders to give a final, formal response. I do not consider this to be more than a minor defect that would not have changed the outcome.

[30] I am satisfied that the redundancy was genuine.

Contributory Conduct and Remedies

[31] Because the redundancy was genuine, there is no entitlement to lost earnings. That leaves only the claim for compensation for hurt and humiliation. I have accepted that there were minor defects in the process at the very end. I accept also that this

caused Mr Saunders added distress, over and above what he would have experienced from the loss of the job itself.

[32] A small award of compensation would be in order in such circumstances. However, I am obliged, pursuant to s. 124 of the Employment Relations Act, to reduce remedies where I am satisfied that there has been contributing behaviour by the employee. I accept the respondent's evidence about the complaint it received and what Mr Saunders told the client concerned. Receipt of the complaint precipitated the hasty ending of the employment, with no notice worked and no chance of an amicable departure.

[33] I accept that by his behaviour to this client (which had the potential to seriously undermine the business) Mr Saunders contributed to the unfortunate way in which the employment finally ended. After taking this contributory conduct into account, and in all the circumstances, I conclude that no award of compensation is called for.

Costs

[34] This issue is reserved. Any request for an order for costs should be made within 28 days of the date of this decision and should be supported by submissions.

Yvonne Oldfield

Member of the Employment Relations Authority