New Zealand Employment Relations Authority Decisions

Selwyn v ID Erceg Plumbing Limited (Auckland) [2007] NZERA 176 (15 August 2007)

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 249/07 5082799

BETWEEN MARK SELWYN

Applicant

AND ID ERCEG PLUMBING

LIMITED

Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person

Dion Erceg for Respondent

Investigation Meeting: 3 August 2007 at Auckland
Determination: 15 August 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant says his dismissal for redundancy on 12 January 2007 was unjustified. He claims the redundancy was neither for a genuine reason nor carried out fairly. He seeks lost earnings and compensation for distress caused by the redundancy.

[2] The respondent accepts the process of redundancy was not carried out properly but insists the decision was made for genuine commercial reasons.

[3] The issues for resolution are:

(i) Was the decision to dismiss the applicant for redundancy made for genuine commercial reasons; and

(ii) If not, what remedies are due to the applicant; or

(iii) If so, what remedies are due to the applicant for the way that his dismissal for redundancy was carried out?

Investigation

[4] The matter was not resolved in prior mediation. For the purposes of investigation I had witness statements from the applicant, the respondent's director Dion Erceg, and Dan Bruce, a drainlayer employed by the respondent a month after the applicant was laid off. Sue Wright, the respondent's office administrator and Mr Erceg's mother-in-law, attended the investigation meeting with Mr Erceg where they and the applicant answered questions. Mr Bruce also answered questions by telephone as he was at home recovering from a broken leg. I also had a written statement from Heather Wyse, a West Auckland accountant who employs Mr Erceg's wife, Elizabeth Erceg. Ms Wyse had given advice about business arrangements

between Mr Erceg and Dan Bruce.

[5] By agreement, I accepted Ms Wyse's statement as evidence that Mr Erceg and Mr Bruce had advice from her in February 2007 about setting up a profit share partnership for local authority drainage work they wanted to seek in Manukau City and Waitakere City. The two men were said at the time to be planning to set up a company, but meanwhile had arranged for Mr Bruce to work as an employee of the respondent and be paid a profit share on jobs he brought to the company or new public drainage work from Manukau City or Waitakere City Councils.

[6] Neither party was represented but the applicant and Mr Erceg each provided a summary of argument at the conclusion of the investigation meeting.

Legal framework

[7] The applicant worked for the respondent for about two years from 2004. During that time he trained and became registered as a drainlayer. He left the job for around a month in May 2006, but began work again for the respondent from 25 May 2006.

[8] At that time he was presented with an employment agreement. He did not sign or return it but agrees that he was employed under the terms set out in that agreement, which was in a form provided by the Master Plumbers Association. The agreement sets out the following terms for redundancy:

It is acknowledged and agreed between the parties that redundancy payments will not be made to the Employee if his/her position within the company becomes surplus to requirements.

The Employee shall be entitled to and shall receive notice not less than in accordance with clause 10.2 in this Employment Agreement.

[9] The notice period referred to is one week.

[10] Under s103A of the Employment Relations Act 2000 ("the Act"), the respondent's decision to make the applicant's position redundant, and how it went about dealing with him over any proposal, decision and consequences of redundancy, is justifiable if its actions were what a fair and reasonable employer would have done in all the circumstances at the time of the decision and dealings around it.

[11] The application of s103A to personal grievances involving redundancy was described in this way in *Simpsons Farms Ltd v. Aberhart* (unreported, EC Auckland, ARC13/06, 14 September 2006):

[65] ... the statutory obligations of good faith dealing and, in particular, those under s4(1A)(c) inform the decision under s103A about how the employer acted. A fair and reasonable employer must, if challenged, be able to establish that he or she or it has complied with the statutory obligations of good faith dealing in s4 including as to consultation because a fair and reasonable employer will comply with the law.

[67] ... so long as an employer acts genuinely and not out of ulterior motives, a business decision to make positions or employees redundant is for the employer to make and not for the Authority or the Court, even under s1 03A.

[12] So the Authority must be satisfied on two general points - whether the business decision to make a position redundant in this case was made genuinely and not for ulterior motives; and whether the respondent acted in a fair and open way in carrying out that decision - particularly did it consult properly about the proposal to make the applicant's position redundant and otherwise act in a way that was not likely to mislead or deceive him, that is in good faith?

[13] The Authority or the Court does not substitute its judgment for that of an employer as to whether there are genuine commercial reasons for a redundancy. As stated by the Court of Appeal in *GNH Hale & Sons Ltd v Wellington Caretakers and Cleaners Union* [1990] 2 NZILR 1079:

An employer is entitled to make his business more efficient, as for example by automation, abandonment of unprofitable activities, reorganisation or other cost saving steps, no matter whether or not

the business would otherwise go to the wall. A worker does not have the right to continued employment if the business can be run more efficiently without him. The personal grievance provisions ... should not be treated as derogating from the rights of employers to make management decisions genuinely on such grounds.

[14] Rather, as stated by the Court of Appeal in *Aoraki Corporation Ltd v McGavin* [1998] 1ERNZ601:

Where it is decided as a matter of commercial judgement that there are too many employees in the particular area or overall, it is for the employer as a matter of business judgement to decide on the strategy to be adopted in the restructuring exercise and what position or positions should be dispensed with in the implementation of that strategy. ...

Genuineness of the redundancy

[15] Mr Erceg's evidence was that during the period of Christmas 2006 and New Year 2007 he realised the company was in a difficult financial position with cashflow problems and needed to reduce costs. He decided that cost savings could best be achieved by reducing staff through restructuring.

[16] He ran two teams doing drainage work - each comprising a registered drainlayer and two labourers. One team did "private" work - that is drains and other pipe work on private residential and commercial properties. The other team did "public" work - that is for local authorities.

[17] Mr Erceg, himself a registered drainlayer, decided that he could have the private work done largely by his labourers with any specialist work being done by him, or if necessary another drainlayer, when required. In short he planned to reduce the amount of office work he did and *"go back on the tools"* when required. He decided that making the applicant's position redundant would provide the biggest saving of wages, which would not be achieved by cutting one of the labourer's positions. He did not consider cutting the job of the drainlayer leading the public work team as he considered that drainlayer was better at carrying out the larger and more precise requirements for public works.

[18] He did not consider offering the applicant continued work as a labourer as the applicant had previously made it clear that he preferred doing only skilled work. During the investigation meeting the applicant confirmed that if he had been offered a

labouring position he would have rejected it unless it was offered at the same rate of pay as a more skilled registered drainlayer would receive. He accepted that the respondent would not have offered a position on such a basis.

[19] I accept that Mr Erceg's decision - as sole director of the respondent - to *"go back on the tools"* made the applicant's position surplus to the respondent's requirements, bringing it within the definition of redundancy in the employment agreement.

[20] The issue of genuineness now turns to be considered in the light of the subsequent conduct of the respondent.

[21] Having carefully considered all the evidence available to me in this case, I do not accept the argument advanced by the applicant - who points to arrangements for the employment of four men after he was made redundant - as establishing that the alleged reasons for his redundancy were not genuine.

[22] Two labourers who had been working on a cash payment trial basis were said to have been employed on a full-time basis after the applicant's redundancy. Similarly the respondent is said to have taken on a new staff member as a truck driver and labourer. All three men were doing labouring work which was paid at a lower rate than that received by the applicant and involved less skilled work which he would not have been prepared to do at the pay rate they received. I consider that the respondent was entitled, at law, to make his business more efficient in respect of staff costs by engaging labourers. None of them were able to do the work that the applicant would have done as a registered drainlayer.

[23] The fourth man was Mr Bruce, employed from mid February 2007. Mr Erceg's explanation was that in early February 2007 he talked to Mr Bruce about work opportunities doing public work in Manukau City for which Mr Bruce had the necessary licence. Mr Erceg did not have a licence to do public drainage work in Manukau City. The two men planned a business partnership where Mr Bruce would bring his existing contracts and extensive contacts in Manukau and Waitakere Cities. They planned a profit share business partnership to be formalised through establishment of a company but, until that was set up, Mr Bruce would work as an employee of the respondent.

[24] The applicant accepted, in response to a question during the investigation meeting, that the role taken by Mr Bruce as a senior registered drainlayer with existing contracts for public work and extensive contacts which could be used to bring in further work, was quite different from the role that he had with the respondent. I am satisfied from the answers given by Mr Erceg and Mr Bruce that the majority of work done by Mr Bruce for the respondent is significantly different from that undertaken by the applicant in his previous job.

[25] For these reasons I find that the respondent's decision to make the applicant's position redundant was one made for genuine commercial reasons which have not been changed by subsequent staffing decisions.

Unfair process

[26] Having decided to make the applicant's position redundant, the respondent unfortunately failed to proceed to consider and carry out that decision in a fair way.

[27] Quite properly, Mr Erceg - as he put it in his evidence - now *"puts his hand up"* and acknowledges that failure.

[28] On 12 January 2007 Mr Erceg arrives unannounced at the applicant's house. He had been in the habit of calling in when he needed to talk to the applicant outside of work hours. The applicant had been off work from 18 December due to a work injury and was on ACC at the time. The two men talked in the driveway. Mr Erceg told the applicant that he had decided to restructure the business and *"go back on the tools"* himself, so there was no longer a job for the applicant. The applicant admits that he made no protest or comment at the time but says that he was shocked by the news and needed time to think about it.

[29] Although Mr Erceg says that he left the meeting feeling that he had done the right thing by going around and seeing the applicant face-to-face, he now accepts that he failed to consult properly with the applicant on the restructuring before the decision was made.

[30] An employer acting fairly and reasonably - and observing the good faith obligations under s4 of the Act to consult with employees likely to be affected by a change to the business, including proposals for redundancy - would have given the applicant some time to comment on the proposal, and then, if the redundancy of his position went ahead, a chance to talk about ways in which the impact of that redundancy on him might be minimised.

[31] For that reason the dismissal was not carried out in a fair way and the applicant does have a personal grievance which requires remedy. However, because I have found that the redundancy was made for genuine reasons, any remedies awarded cannot include reimbursement of lost earnings. I note, however, that the applicant had minimised loss of earnings in any event and was back in work with another employer on similar or better pay within a fortnight.

[32] I am satisfied that the applicant suffered hurt and humiliation from the way that his dismissal for redundancy was carried out. It was clear from his evidence during the investigation meeting that he felt humiliated by being suddenly removed from a skilled position which he has specifically trained with the respondent to do. He continued to have social contact with some of the respondent's staff and felt embarrassed about the circumstances of the sudden termination of his employment.

[33] Having regard to the range of award in cases of this type and the particular circumstances of this matter, I consider that the appropriate award of compensation for hurt and humiliation under s123(1)(c)(i) is $3,000.

[34] The applicant is also entitled to reimbursement of his filing fee of $70.

[35] Accordingly, the respondent is ordered to pay to the applicant the sum of $3,070 without deduction.

Robin Arthur

Member of the Employment Relations Authority
