

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 190  
5366432

BETWEEN

KERROD SPRATT  
Applicant

A N D

CLAN CONSTRUCTION  
LIMITED  
Respondent

Member of Authority: James Crichton

Representatives: Jenny Guthrie, Counsel for Applicant  
Simon Anderson, Counsel for Respondent

Investigation Meeting: 16 August 2012 at Dunedin

Date of Determination: 31 August 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant (Mr Spratt) alleges that he was unjustifiably dismissed from his employment by the respondent (Clan). Clan resists that claim.

[2] Mr Spratt commenced his employment as an apprentice carpenter on 1 April 2010 and the parties signed an employment agreement covering the employment on 8 April 2010. That agreement was for a one year fixed term but also provided that the employment would continue in force until terminated by either party. The agreement has no provision in respect to redundancy.

[3] On 26 September 2011, Mr Spratt was asked to attend the first of two meetings which culminated in his position being declared surplus to Clan's requirements and in consequence, Mr Spratt was made redundant.

[4] The parties attended mediation but were unable to resolve their differences and the matter proceeded to the Authority in the usual way.

**Issues**

[5] It will be convenient if the Authority considers the following questions:

- a. Was Mr Spratt's redundancy genuine?
- b. Was the process followed by the employer a fair and just one?
- c. Was the notice paid to Mr Spratt adequate?

***Was the redundancy genuine?***

[6] The Authority is satisfied the redundancy was a genuine one. The Managing Director of Clan, Mr Laurie Mains, gave evidence that normally Clan sold two or three new homes a month but that the year 2011 was "very slow". Indeed, the company's financial year which began on 1 April 2011 had a single sale for each of April and May, no sale at all in June, two in July but then none at all in August 2011.

[7] Given that Clan is the GJ Gardner franchise builder for Dunedin, the failure to secure an adequate number of contracts for building starts in the period leading up to the redundancy created a pretty bleak picture for Clan and, the Authority is absolutely satisfied, provided a context in which any fair and reasonable employer would need to reflect on the deteriorating situation and potentially make some hard decisions.

[8] The evidence before the Authority is that Clan decided in early September (having had only four new contracts in the first five months of the new financial year instead of ten or fifteen which would have been usual), to consider reducing staff numbers. The evidence the Authority heard confirmed that it was the failure to secure any sales in August that compelled action. Mr Mains and his fellow directors of Clan satisfied the Authority that they were genuine in their attempts to avoid redundancy at all costs but the trading figures were so bleak that a reduction in overhead was inevitable. The Authority is satisfied that the nature of the building industry is such that the principal overhead of a building firm is its labour cost.

[9] Clan's evidence described to the Authority how the directors met regularly and had already made all the obvious cost reductions in the earlier part of the trading year 2011/2012 such as cancelling overtime, removing all unnecessary expenditure, and carefully assessing all cost centres. But by August, it became clear that more dramatic savings needed to be made in order to secure the ongoing health of Clan into

the future and, more particularly, in order to more closely align the labour resource available to the commercial demand for it.

[10] Clan's directors identified that a number of areas would potentially need to have reduced labour input and the determination that Mr Spratt's position was surplus to Clan's requirements was thought to be the first of a number of redundancies. In the result, Mr Spratt's position was the only one declared surplus to Clan's requirements because of a very large number of staff (nine in fact) who left the employment from the point when Mr Spratt was made redundant down to the middle of April 2012.

[11] In the context of the global financial crisis and the self evident effects on the New Zealand economy and the building trading particularly, Clan's difficulties as the GJ Gardner builder for Dunedin was plain to see. The Authority is satisfied that there was a downturn, that Clan responded to that downturn first by making all of the obvious changes to overhead short of declaring redundancy and then ultimately by considering whether there needed to be staff reductions.

[12] In the context of a reduction in sales of fully two-thirds for the financial year from 1 April 2011, it is difficult to see how Clan could have done anything other than consider its staffing levels.

***Was the process used by Clan fair and just?***

[13] The Authority has already referred to the early steps taken by Clan to address the decline in its commercial fortunes as a consequence of the general slowdown. When it came to a detailed consideration of possible declarations of redundancy, the evidence is clear that Clan contemplated far wider redundancies than the one that affected Mr Spratt but those wider reductions in staffing levels did not prove necessary because of the number of staff who left in the six months following Mr Spratt's departure for redundancy.

[14] As the Authority has already noted, it was the failure of the firm to pick up a sale in August 2011 which precipitated the discussions amongst the Clan directors about staffing cuts. Those discussions eventually focused on the number of second year carpentry apprentices that Clan employed, one of whom was Mr Spratt. Clan identified that it only had work now for two such second year apprentices and in consequence, one position would have to be identified as being surplus to

requirements. It is the process that Clan used to identify that surplus position that is the kernel of the case for Mr Spratt.

[15] What Clan did was they ranked the three second year apprentices and, concluding that Mr Spratt was the third of the three second year apprentices, they engaged with him in respect of a possible redundancy of his position. In the simplest terms, Mr Spratt says that Clan ought to have engaged with all three of the second year apprentices and decided as a consequence of that wider engagement which of them ought to go.

[16] Mr Mains as the Managing Director of Clan was adamant in his evidence before the Authority that the approach recommended by Mr Spratt would have had the effect of setting up three separate consultation processes where Clan would be asking each of the three affected employees what amounted to this question (in Mr Mains' own words): "Someone has to be made redundant. Tell me why it should not be you?"

[17] Mr Mains was very clear that such an approach would be dishonest and far more destructive of working relationships than the process that Clan actually adopted. He told the Authority that he thought he knew something about man management and that the approach recommended by Mr Spratt would have had a disastrous affect on moral across the whole organisation.

[18] Furthermore, Mr Mains maintained that such an approach would, in all the circumstances, have been patently dishonest because although all three of the two year apprentices were able and very good at their jobs, one of them (Mr Spratt) was less able than the other two. Clan say that it is their right and their obligation as employer to make those judgments about the skill set, experience and talent of the business needs into the future and that having made those judgments, they ought to be allowed to convey them honestly and frankly to the affected employee.

[19] It was plain from the evidence from Clan that, contrary to Mr Spratt's evidence, Clan had a running assessment of the ranking of the three two year apprentices and that part of the management effort was about ensuring that the owners of the business knew where each of the apprentices stood relative to the others. On the evidence the Authority heard, it does not seem to have been the case that Clan worked up the ranking of the three apprentices in order to identify that Mr Spratt was

the third of three but rather that that was always their judgment. And it was Clan's judgment not based on any impure motives or unreasonable considerations but rather on the basis of regular assessment, both formal and informal, and in particular the opinions of the supervisory staff with whom the three apprentices worked.

[20] Mr Spratt sought to encourage the Authority in the view that he was supervised exclusively by a foreman called Brent Elliott and that Mr Elliott was unaware of the redundancy. But the Authority is satisfied that actually neither of those propositions are correct; Mr Elliott was not the only person who supervised Mr Spratt who worked with a number of supervisory staff at Clan and second, Mr Elliott was well aware of the redundancy but simply chose not to engage with Mr Spratt in relation to it.

[21] Mr McCormack who is the construction manager of Clan was the principal conduit through which opinions of the supervisory staff were conveyed to Clan management. He struck the Authority as a straightforward and honourable man who gave clear, thoughtful evidence. He confirmed that Mr Spratt had worked with a number of foremen and that all of the foremen had been consulted about rankings of the three apprentices and that all agreed with the rankings including Mr Elliott.

[22] Mr Mains, the Managing Director of Clan also impressed the Authority as a straightforward and honourable man whose evidence could be relied upon. Mr Mains said that he had personally consulted with Mr Elliott in relation to the possible redundancy of Mr Spratt and that he was absolutely satisfied that Mr Elliott agreed with the ranking that Clan had come up with (particularly as it was not new and not developed especially for the possible redundancy). Equally, Mr Mains was clear that Mr Elliott was the sort of man who would prefer to avoid conflict and would not want to engage with Mr Spratt in relation to the redundancy possibility.

[23] Nor does the Authority find anything in Mr Spratt's contention that he was singled out for redundancy because he had recently sought a pay increase. The factual position is that he had had a performance review in June 2011 which was very satisfactory and that he had subsequently sought a wage increase in August 2011. He was granted that wage increase at the time and in his evidence of the Authority, Mr Mains was gracious enough to admit that in fact that increase might well have been implemented sooner given Mr Spratt's ongoing performance. But there was simply no evidence that Mr Spratt's selection for redundancy was a consequence of

him asking for a wage increase. Clan witnesses made clear that workers regularly asked them for wage increases and if they are justified, they are granted. The very fact that the increase was granted seems to rather diminish Mr Spratt's argument that he was dismissed for asking for more because his request was granted at the time that he asked and the evidence of the employer was actually that it might have been granted earlier if he had asked earlier.

[24] Everybody agreed that Mr Spratt was an excellent employee who worked hard and was well liked and clearly Clan did everything in their power to avoid making anybody redundant but the dramatic decline in business opportunities in 2011 made cost cutting an absolute necessity.

[25] The Authority is not satisfied that the approach adopted by Clan to rank the three second year apprentices and then consult only with the third ranked is an unreasonable and unfair process for redundancy purposes. Certainly it is true that the alternative proposed by Mr Spratt might have been adopted but on the face of it, if the employer had a view about the ranking of the three apprentices then it is difficult to see how the actual results of the alternative strategy proposed by Mr Spratt, would have achieved a different result.

[26] The Authority is satisfied that it is within management prerogative for an employer to rank employees performing the same role in order of their utility to the business. If that were not so, it is difficult to see how an employer could properly decide that an employee with particular skills that were needed in the business could be selected over another employee who in all other respects was similarly skilled and similarly qualified to the other individuals.

[27] Here, of the three apprentices one had a material advantage (Guy Archibald) because in addition to being a second year apprentice, he was also more experienced as a worker than either of the other two because he had worked for his father in the building industry for four years without a qualification prior to taking up the apprenticeship with Clan. It follows that to use Mr McCormack's weighting, Mr Archibald was gold and sadly, Mr Spratt was bronze.

[28] If the Authority is satisfied that an employer can rank employees in the way that Clan did, the next question is whether Clan adequately consulted with Mr Spratt. Mr Spratt says that the consultation was a sham because he had already been selected

for redundancy by the time the meetings actually took place. There were two meetings, the first on 26 September 2011 and the second on 3 October 2011. In the first meeting, Mr Spratt was told that his position had been identified as potentially being surplus to requirements and he was asked to consider the position over the ensuing week and let Clan know in the second meeting, which was a week later, what feedback he had.

[29] It is common ground that Mr Spratt offered nothing of substance in response to that request although it is clear from the notes of the meetings which were provided to the Authority which were contemporaneous, that Mr Spratt was provided with further information by Clan at the second meeting. At the first meeting, Clan had given an overview of the current economic climate, referred to the decline in work and noted that it had to downsize its workforce. It identified second year apprentices as being an area of overstaffing and noted that Mr Spratt fell within that group.

[30] Mr Spratt was asked to consider any ideas for how to create additional work or any alternative work that he might perform within the company and in response to that Mr Spratt referred to him not being the last apprentice employed in the context of the “last on, first off” principle.

[31] Mr Mains told the Authority that he went away from the first meeting and considered that last on, first off principle and in particular sought legal advice as to whether he ought to, or was bound to, apply that principle to this situation. He told the Authority that he was advised he did not have to apply that principle and he says that he communicated that to Mr Spratt at the second meeting.

[32] As the Authority has noted, at the second meeting, Mr Spratt offered no alternatives to the possible redundancy. But he was provided with further particulars by Clan, specifically he was told that Clan had three very competent second year apprentices but that unfortunately Mr Spratt was the third of those.

[33] Mr Spratt says that this contemplation was a sham because Clan had made up their minds about which position was to be disestablished. But the Authority is satisfied that Clan is able to reach a provisional conclusion on that matter provided it has an open mind to anything that the effected employee may say. It was available to Mr Spratt to suggest that Clan should talk to the other two apprentices, which he did not do, or to indicate to Clan (as he implied at the investigation meeting) that he had a

qualification which one of his compatriots did not have. Equally, he chose not to indicate to Clan that one of his compatriots might be about to leave. It appears from Mr Spratt's evidence at the Authority investigation meeting that he knew that one of the other second year apprentices was intending to leave the business within the short future. Had he communicated that to Clan, they might have chosen to confirm if that was the position and that may have changed their minds.

[34] In any event, it is plain on the evidence, both of Clan and of Mr Spratt himself, that he took no steps at all to advance any alternative to the proposed disestablishment of his position and in those circumstances, it is difficult for him to maintain his claim that he was treated unfairly. The Authority is satisfied that the employer was entitled to form a provisional view before it engages with an employee and provided it is prepared to consider anything the employee says with an open mind, the Authority considers that complies with the law.

[35] It follows from the foregoing analysis that the Authority is not satisfied that Clan have failed in their obligations to conduct the redundancy process fairly and appropriately. In particular, the Authority is satisfied that it was available to Clan to reach a provisional conclusion about the way forward (by way of ranking the affected staff) and that by telling Mr Spratt of that ranking, they discharged that obligation although it would have been better if they had done that in the first meeting than in the second. But Mr Spratt did not assist his cause any by failing to give the employer any alternatives to the proposed redundancy although it is clear on his evidence to the Authority that there were matters that he could have raised but for various reasons chose not to. Those being the Authority's conclusions, the process used by Clan in the Authority's opinion conforms with them all.

***Was Mr Spratt given adequate notice?***

[36] Mr Spratt says that the notice of redundancy given to him was insufficient. He claims four weeks' notice. Conversely, Clan say that the notice given to Mr Spratt was reasonable in the circumstances and that in any event he suffered no loss because he started a new position on the next working day after his last working day with Clan.

[37] The employment agreement makes no provision in respect to notice for redundancy. Indeed, it is silent on the whole question of redundancy.

[38] There are however a variety of other indicators of notice in the employment agreement. First, salary is payable fortnightly and the common law position of course was that in the absence of other specific provisions, notice should equate to the extent of the pay period interval.

[39] Further, in the provisions relating to the termination of the employment for cause, the employer is required to give two weeks' notice while on the termination of the employment on medical grounds and termination by the employee, four weeks' notice is required.

[40] The Authority is not attracted by Clan's argument that notice was "immaterial" because Mr Spratt immediately started a new job. He is still entitled to a proper period of notice, irrespective of his ongoing employment position. That he was fortunate enough to obtain fresh employment immediately does not obviate Clan's obligation to treat him properly in respect of the termination of his employment.

[41] It is true that there is no provision in the agreement for notice in respect of redundancy but as the Authority has just recited, there are a number of other pointers to notice in a variety of different circumstances. The commonest provision (by number) is for four weeks' notice which is provided for should the employee resign and should the employment come to an end through medical incapacity. It seems difficult to understand why Clan should think it appropriate to give Mr Spratt only one week's notice in respect to his redundancy (a dismissal through no fault of his own) but if Mr Spratt had brought his own employment to an end by resignation, he would be required to give four weeks' notice of that intention.

[42] In those circumstances, the Authority thinks that Clan have underpaid Mr Spratt for notice and that they owe him three weeks salary at the appropriate rate.

### **Determination**

[43] The Authority has not been persuaded that Mr Spratt has been unjustifiably dismissed from his employment and considers that his dismissal for redundancy was justified. The Authority has been satisfied that the redundancy was a genuine one by the considerable evidence before it of the downturn in the building trade generally and in the fortunes of the employer Clan in particular, by the context of the prospects of further redundancies being in contemplation and by the evidence that the position

formerly occupied by Mr Spratt has not been replaced by another like employee performing like work.

[44] Furthermore, the Authority's considered view is that the process adopted by Clan was one of the responses that a good and fair employer could have made to the situation that Clan found itself in (Clan's decision to rank the affected employees) and that Clan adequately consulted with Mr Spratt, having regard to the size and nature of its operation.

[45] The Act sets out the test for justification in section 103A. It is now clear law that the test in place since the statutory amendment which took effect on 1 April 2011 contemplates that an employer can justify its employment decision by reference to more than one different option. In the present case, it is conceivable that Clan might have developed a number of strategies for addressing the issue of how to identify which position would become surplus to requirements. The evidence the Authority heard advanced two different strategies, the one adopted by Clan and the alternative suggested by Mr Spratt. For reasons enunciated earlier, the Authority is satisfied that by adopting the strategy it did, Clan satisfied the legal test. That is not to say that the alternative advanced by Mr Spratt may not also have been assessed as providing justification for the employer's decision but the law is clear that more than one alternative can be found to justify an employer's decision: *Angus v Ports of Auckland* [ 2011 ] NZ Emp C 160 applied.

[46] Furthermore, the statute requires the Authority to reflect on the process adopted by the employer and not to find the employer's action to be unjustifiable solely because of procedural defects if those defects were minor and did not result in the employee being treated unfairly.

[47] In the present case, there were minor infelicities in the approach used by Clan. Clan might well have provided further and better particulars to Mr Spratt during the consultation meetings. Mr Spratt complained at the Authority meeting that he was not given sufficient information about the nature of the firm's predicament and in particular was not given details about the dramatic collapse in sales over the financial year in question. Clan would be well advised to provide that information should such consultation processes be necessary in the future with other staff, notwithstanding the commercial sensitivity that that information may have. Similarly, it would have been better if Clan had provided the detail of the ranking of the three apprentices in the first

consultation meeting rather than in the second. But those are minor deficits only and the Authority is not satisfied that they resulted in unfairness.

[48] However, though, both of those matters just referred to also go to the question of whether the employee has been properly provided with all the information that is relevant to the decision to determine redundancy: *Massey University v Wrigley* [2011] NZ Emp 37 applied. In essence, the decision in *Wrigley* requires the employer undertaking a redundancy consultation process to provide to the employee all of the information on which the employer relied to reach whatever conclusion it did. In the present case, that was the ranking of the three apprentices. The Authority is satisfied there is no paper trail or documentation relating to that ranking issue. Given the nature of the employer and its size, that is not surprising. But clearly, the employer has an obligation to explain to the employee how it was that the employer concluded that the position to be disestablished was the position occupied by the employee. As the Authority has already noted, that was done in this case although it happened during the second consultation meeting rather than the first.

[49] While the Authority has not been persuaded that Mr Spratt has a personal grievance, the Authority does accept his argument that he has been underpaid for notice in respect to his dismissal and he is entitled to be paid another three weeks salary. Counsel are to confer on the amount outstanding and arrange for that amount to be paid by Clan to Mr Spratt.

### **Costs**

[50] Costs are reserved. Given the issues around whether Mr Spratt's legal aid remains in place for the purposes of the Authority's investigation meeting, it may be practical if counsel can confer in relation to costs to see if the matter may perhaps be settled by agreement. Failing that, application may be made by either party to the Authority for costs to be fixed.

**James Crichton**  
**Member of the Employment Relations Authority**