

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 167
5405069

BETWEEN MICHAEL STOCKER
 Applicant

AND CAR GIANT LIMITED
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Michael Stocker in person
 Greg Philpott for the Respondent

Investigation Meeting: 1 October 2013

Determination: 24 December 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Michael Stocker was employed by Car Giant Limited (CGL) as IT Manager from September 2011 until his summary dismissal on 2 May 2012. Mr Stocker had been called to a meeting with CGL's new Chief Executive Officer but was not told what the meeting was about. In dismissing him, the CEO, Greg Philpott, told him he would be paid only up to that day because he was a contractor.

[2] Mr Stocker raised a personal grievance after the expiry of the statutory 90 day period. This was originally queried by CGL. However, in the course of a telephone conference with the parties on 9 April 2013, CGL notified the Authority that it took no issue with the timing of Mr Stocker's raising of the matter.

[3] In my determination of 5 July 2013, I found that Mr Stocker was, and had been from the start of his employment, an employee not a contractor. Mr Stocker says

that his dismissal was unjustifiable and he seeks reimbursement of lost wages, compensation for hurt and humiliation, and costs.

[4] CGL, which had provided a statement in reply, participated in a telephone conference, and made submissions in relation to the preliminary matter of Mr Stocker's employment status. It did not take part in the telephone conference scheduled after the release of my determination on the preliminary matter. CGL provided no witness statements or documentation and made no attempt to contact the Authority until the afternoon of 30 September 2013, which was the day immediately before the scheduled investigation meeting. On that day, Mr Philpott advised the Authority he would not be attending the investigation meeting as he was not available. He said no one from CGL would be attending.

[5] After being informed that it was the Authority's intention to proceed with the investigation meeting without CGL being present, Mr Philpott emailed the Authority to request that it be rescheduled. His reason was that he was currently involved with another business in the far north and it was impossible to be in Wellington on the day of the investigation meeting. The Authority confirmed that the investigation meeting would proceed as scheduled. Mr Philpott did attend the investigation meeting, along with two representatives of CGL.

Issue

[6] The issue for the Authority to determine is whether Mr Stocker's dismissal was justifiable.

Evidence of the parties

[7] Mr Stocker gave evidence on his own behalf, describing the process of his dismissal and the consequences of it on him and his family. He had been head-hunted by CGL in September 2011, shortly after leaving his former employment, to play a major role in the establishment of the newly formed business. He says he was proud to be a part of the business and very enthusiastic about it.

[8] Mr Stocker said it was planned from the outset of his discussions about employment with CGL that his role would change as the business evolved from its set-up phase. He expected that to happen and was quite happy with the prospect. Mr Stocker said things changed from January 2012 when Mr Philpott took over as

CEO of CGL. He said that he heard office talk of possible lay offs of lower level staff but he did not expect this to involve him as he was a senior member of the CGL team.

[9] Mr Stocker says that, totally unexpectedly, he was asked to attend a meeting with Mr Philpott with one day's notice. This was the meeting of 2 May 2012 at which Mr Philpott informed Mr Stocker he was to be dismissed immediately and that, as he was a contractor, he would receive no further payments from the company. Mr Stocker was asked to clear out his work space, hand over his cellphone, and hand in his company vehicle. Transport would be arranged for him to get home.

[10] Mr Stocker says he protested the decision and also informed Mr Philpott that he was owed outstanding holiday pay. Mr Philpott debated this but agreed to investigate the matter. He then asked Mr Stocker to return the next day to train another employee in the IT work he had been undertaking for CGL, agreeing that Mr Stocker could take a company vehicle and retain his company cellphone until this task was completed.

[11] Mr Stocker cleared his work space and left the premises in a company vehicle shortly thereafter. He told the Authority that he stopped the vehicle and made a phone call to Mr Philpott on his way home, asking that the decision about his dismissal be provided to him in writing. Mr Philpott at first declined the request but agreed to reconsider.

[12] Mr Stocker did not return to the company premises to train his replacement. He says that, with Mr Philpott's agreement, he retained the company vehicle until his letter of dismissal was prepared. At this point, he returned to the premises to meet Mr Philpott and receive the letter. The letter, dated 3 May 2012, was headed *cessation of engagement*. It referred to CGL's "*precarious financial position*" which meant that it needed to make "*rapid and radical changes in order to survive*". One element of that was reviewing people resources and reassessing the minimum resources required to continue running the business. Mr Philpott's letter informed Mr Stocker of his regret that Mr Stocker's "*engagement*" with the company had to come to an end.

[13] The letter also contained the following paragraph regarding Mr Stocker's status:

“There is some confusion as to the status of our engagement as it appears to sit somewhere between a contractor and a permanent part timer. The key determining factors being

- (a) The absence of any form of engagement agreement*
- (b) The fact that you have been picking and choosing your own work hours*
- (c) The rate of remuneration you have been receiving is commensurate with that of an independent contractor.”*

[14] The letter noted that CGL had prepared Mr Stocker’s final pay *“including 8% of earnings to cover holiday provision”*. After informing Mr Stocker that loans and advances would be deducted from his final pay as well as personal calls from his mobile phone bill, the letter went on to offer him *“ongoing independent engagement as a weekend sales consultant”*.

[15] Mr Stocker says he did not regard this as a genuine offer of ongoing, reliable work. He believed it was a strategy to *“marginalise my involvement with the company and would have in no way provided a sustainable income to support my family”*. He also said he believed the offer to be disingenuous.

[16] Mr Stocker gave evidence of the effect of his dismissal on him and his family. As well as the loss of a substantial regular income, a vehicle for business and personal use, full use of a cell phone and computer, his sudden loss of income required him to apply immediately for the unemployment benefit in order to support his partner and two young children. Mr Stocker said the impact on his family was immediate as they adjusted from an average weekly income of \$1,656.50 to nothing. He gave evidence that six other employees were terminated at the same time as him, all of whom, to his knowledge, received an average of five weeks’ pay in lieu of notice to allow them to look for alternative employment. Mr Stocker received pay only to the date he was told of his dismissal with immediate effect.

[17] Mr Stocker also gave evidence of the substantial hurt and humiliation he suffered as a result of his dismissal. His confidence was shaken, which affected his ability to find alternative employment in the months following his dismissal. He had suffered the death of his wife shortly after the loss of his employment, and was responsible for bringing up his two children as a solo father. Mr Stocker said he felt dishevelled and unemployable. He had known that changes were coming in CGL, and was prepared for a conversation about the evolution of his role. He said he was

appalled to be given no notice and told to pack up his desk and leave with no further salary payment.

[18] Mr Philpott was the only witness for CGL. As he had provided no written statement, his evidence was by way of responding to questions put to him by the Authority and then under cross-examination by Mr Stocker.

[19] Mr Philpott said he was pulled into the company in late 2011 to assist the company which, he said, had before then been very poorly managed and run like “*a holiday camp*”. He said he immediately implemented an 8-point plan designed to increase revenue/sales and decrease costs. By early April 2012, he says the company was insolvent and unable to meet its debts. In the last week of April and first week of May, Mr Philpott began engaging with individual employees over a programme of redundancy. He said that employees on CGL’s standard individual employment agreement had a provision for four weeks’ notice, or pay in lieu of notice, in such situations. They had no provision for redundancy compensation.

[20] Mr Philpott says his discussion with Mr Stocker was different because he believed Mr Stocker to have been a contractor from the commencement of his engagement with CGL. He also said that contacting Mr Stocker was difficult as he rarely came into work on working days and was difficult to reach at home. Mr Philpott said he had not been involved in Mr Stocker’s original engagement, and the advice he had received was that he was a contractor.

[21] When asked whether he thought his treatment of Mr Stocker on 2 May 2012 had been fair and reasonable, Mr Philpott answered that, in the circumstances, he thought it had been. He says if he had known that Mr Stocker was an employee, he would have given him notice on the same basis as all other employees who were made redundant. Mr Philpott confirmed that he was aware there was some doubt over Mr Stocker’s status, as evidenced in his letter of 3 May 2012 confirming Mr Stocker’s dismissal. That was not sufficient, however, to make him review his decision to terminate Mr Stocker’s engagement/employment with the company without notice. He told the Authority that, at the time, he thought his decision was a good one.

[22] Mr Philpott confirmed he had made no attempt to approach Mr Stocker following the Authority’s determination of his employment status in July 2013. He

says that by this stage events had gone too far and it was better to let matters take their course in the Authority.

[23] In the course of the investigation meeting, Mr Philpott confirmed that CGL was still trading and acknowledged that the process he followed in dismissing Mr Stocker was “*probably flawed*”.

Discussion

[24] The test for determining whether a dismissal is justifiable is that of s.103A of the Employment Relations Act 2000 (the Act). The test is whether what the employer did, and how it did it, was the action that a fair and reasonable employer could have taken in all the circumstances at the time.

[25] In applying the test, the Authority must consider a number of factors specified in s.103A (3) that relate to the process followed by the employer and may also consider any other factors it considers appropriate.

[26] It is clear to me from the evidence of both Mr Stocker and Mr Philpott that CGL did not apply a fair procedure in dismissing Mr Stocker. Mr Philpott embarked on a process with a complete disregard for the requirements of natural justice and good faith. He gave Mr Stocker no advance notification that CGL was considering making his position redundant. Accordingly Mr Stocker had no opportunity to attempt to persuade his employer of the merits of retaining him, or of putting forward any alternatives to redundancy.

[27] At the time Mr Philpott says he was acting under the impression that Mr Stocker was a contractor. He did not use the terminology of redundancy and simply informed Mr Stocker that he no longer had a job, effective immediately. Nonetheless it appears from his evidence that, had he given Mr Stocker the benefit of the doubt he had over his status, the conversation would have been over the need to make his position redundant.

[28] In *Rittson-Thomas t/a Totara Hills Farm*¹ Colgan CJ found that s. 103A required an inquiry into “*a decision to declare an employee’s position redundant and to either affect the holder of that position to his or her disadvantage or to dismiss that*

¹ [2013] NZEmpC 39

employee, if the personal grievance alleges that these acts by the employer were unjustified’.

[29] The Chief Judge also held that:

“It will be insufficient under s. 103A, where an employer is challenged to justify a dismissal or disadvantage in employment, for the employer simply to say that this was a genuine business decision and the Court (or the Authority) is not entitled to inquire into the merits of it. The Court (or the Authority) will need to do so to determine whether the decision, and how it was reached, were what a fair and reasonable employer would/could have done in all the relevant circumstances.”²

[30] Mr Philpott advanced CGL’s financial position as justification for Mr Stocker’s dismissal, although no financial data was provided to Mr Stocker to verify the dire straits in which the company allegedly found itself. Mr Philpott’s request to Mr Stocker to train his replacement also suggests that the position was not genuinely redundant.

[31] In these circumstances I have no hesitation in finding that Mr Stocker’s dismissal was unjustifiable. I have taken into account Mr Philpott’s assertion that he made an honest mistake in believing Mr Stocker to be a contractor, and therefore not someone entitled to the protection of employment legislation. I note, however that Mr Philpott’s letter of dismissal evidenced his lack of certainty over Mr Stocker’s status as an employee or a contractor. It behoved him to resolve that uncertainty before taking action that would sever Mr Stocker’s employment, and his remuneration, with immediate effect.

Contribution, remedies and mitigation

[32] Mr Stocker did not contribute to the situation that gave rise to his personal grievance for unjustifiable dismissal.

[33] The effect of his dismissal was particularly severe because of his difficult family situation at the time. That, and the loss of self-confidence brought about by his dismissal, made it difficult for Mr Stocker to seek alternative employment immediately in an effort to mitigate his loss. The loss of his wife shortly after that made alternative employment virtually impossible with the increased family commitments he was forced to take on.

² Ibid, paragraph 54

Determination

[34] Car Giant Limited is ordered to pay Michael Stocker:

- (a) Three months' wages in accordance with s. 128 of the Act at his average monthly rate of \$6,626.44, totalling \$19,878.72 gross
- (b) \$8,000 compensation in accordance with s. 123(1)(c)(i) of the Act.

Costs

[35] Mr Stocker represented himself in the Authority. However he provided evidence of the legal assistance he had obtained during the process. He also requested the reimbursement of the costs of flights from Nelson, where he lives, and other incidental expenses related for the investigation meeting for himself and a support person.

[36] I find it reasonable that Mr Stocker is reimbursed the modest legal expenses he incurred, and the cost of the Authority's filing fee. It is Mr Stocker's choice to live in Nelson but it would not be reasonable to require CGL to pay the costs incurred by him as a result of that choice.

[37] CGL is ordered to pay Mr Stocker the sum of \$303.52 comprising legal costs and the Authority's filing fee.

Trish MacKinnon
Member of the Employment Relations Authority