

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 50
5396276

BETWEEN

STACEY TASKER
Applicant

A N D

MOMENTUM BRANDS (NZ)
LIMITED
Respondent

Member of Authority: G J Wood

Representatives: Stuart Webster for Applicant
Clive Smith for Respondent

Investigation Meeting: 4 April 2013 at Napier

Submissions Received: 4 April 2013

Date of Determination: 9 May 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

1. The applicant, Mr Stacey Tasker, claims that his dismissal for redundancy by Momentum Brands (NZ) Limited (Momentum Brands) was not genuine and that he was not consulted over it. Momentum Brands claims that its dismissal of Mr Tasker was justified because the company ceased trading and is currently only a shell company.

Factual discussion

2. Mr Tasker was employed by Momentum Brands as its Hawke's Bay Area Sales Manager. Momentum Brands existed to market and sell wines and spirits for Independent Liquor New Zealand Limited, and is a full subsidiary

of that company. Independent Liquor New Zealand Limited (Independent Liquor) is a fully owned subsidiary of Asahi Holdings Australasia Limited.

3. Mr Tasker had previously worked for Independent Liquor as an Area Sales Manager between 2008 and 2009, until he was made redundant. As part of that redundancy process he was consulted over whether his position would be made redundant before his redundancy took place.
4. In August 2008 Mr Tasker was offered work with another division of Independent Liquor, Independent Wines and Spirits. He commenced work on 1 September 2009. His employment was transferred, with his agreement, to Momentum Brands in the same month. Mr Tasker was responsible for sales in the Hawke's Bay region of some brands of wines and spirits marketed by Independent Liquor.
5. Between February and June 2012 a select group of senior managers of Independent Liquor decided on how to best implement a strategy to more directly take on the beer market duopoly held by Lion and Dominion Breweries. This was to be achieved in particular through the creation of a new sales force focused on beer, employed by Independent Liquor. These employees were soon to become employees of Boundary Road Brewery Limited. As a result Momentum Brands was to close.
6. While Mr Clive Smith, Human Resources Director for Independent Liquor, gave evidence that the 2012 restructuring had to be kept absolutely confidential because otherwise it could have led to counter strategies by DB and Lion, there was clear evidence that the strategy to take on the two main beer companies had been publicly championed by the Chief Executive of Independent Liquor on a number of occasions from November 2011 onwards. In particular, the CEO had stated over the next few months that
 - it would be launching an aggressive market entry to shake up “the cosy duopoly”,
 - Independent Liquor was fully committed to this move for the long term,
 - it had the full backing of the Asahi Group,

- it looked forward to growing significant market share over time,
 - traditional overseas brands were being brought to the New Zealand draft beer market, and
 - unlike the other breweries it would not be implementing price increases.
7. It therefore follows that the only new initiative was the creation of a dedicated sales force to back up the other initiatives that Independent Liquor had already progressed.
 8. This initiative was kept so secret that even executives of Momentum Brands were not told about these changes until Friday 13 July 2012. For example, Momentum Brands' own National Sales Manager was not told of the changes (which involved the closure of Momentum Brands and the offer of six of its nine sales staff roles with Independent Liquor/Boundary Road Brewery) until his return from holiday on Monday 16 July. The National Sales Manager was offered a new job as Field Sales Manager with Independent Liquor/Boundary Road Brewery by Mr Brendan Smith, Independent Liquor's Sales Director, who was a key figure behind the plan.
 9. While the National Sales Manager had not decided to take up the role, he was instructed by Mr Brendan Smith to ring Mr Tasker and tell him to come to a meeting the next day, which was to result in Mr Tasker's redundancy, because he was one of the three staff that Independent Liquor did not wish to retain. Essentially the Momentum Brands' portfolio was going to be dealt with in the future by Independent Liquor staff already looking after alcopops, and that the new beer team (trading as Boundary Road Brewery) would be separate.
 10. Mr Tasker was accordingly rung and told to attend the meeting. He was also told that he could bring a support person to the meeting. When he asked what the meeting was about, he was told simply that it was about "redundancy".
 11. Mr Tasker attended at the meeting the next day with his wife, who secretly tape recorded the meeting. At the meeting, a letter that had been pre-prepared by Momentum Brands was discussed. The letter, dated 17 July, which covers many of the essential points of the meeting, stated as follows:

This will confirm the verbal advice to you today that we have made the decision to close Momentum Brands effective 1 August 2012 and as a result your role will no longer be required from that date.

We have reviewed our employment needs and our restructured sales operations and while we have been successful in placing some of our MB employees in alternative sales roles, we have been unable to find a suitable position for you in Hawkes Bay.

Accordingly, you are therefore redundant as at 31 July 2012 and you will be provided with one month's notice and compensated in accordance with our redundancy policy. You will not be required to work out the notice period and will be paid in lieu ...

12. At the commencement of the meeting Mr Tasker was advised that his role would no longer be required from 1 August, that there was no suitable position available for him and that he was redundant as at 31 July. He was told that two other staff would be made redundant as well as him. The National Sales Manager was unable to answer any questions about the process that had led to this decision including the important question to Mr Tasker of why, given his background in the industry, he had been selected for redundancy, because he had not been involved. Nor could he explain why Momentum Brands had appointed a new person to the Gisborne area within the last fortnight.
13. There was then a discussion over the terms of the redundancy compensation, whether or not he would be able to retain his car and work out his notice. The National Sales Manager agreed to phone Mr Brendan Smith to ask him about the use of the car, the notice period, the absence of consultation and what would happen if staff chose not to take up offers of employment with Independent Liquor/Boundary Road Brewery.
14. When the National Sales Manager returned to the meeting, he told Mr Tasker that Momentum Brands wanted the company car and its other equipment back and that it was compensating Mr Tasker for the loss of the car. He was also told that if anybody declined a new job offer, then it would be advertised externally and that there was no room for any consultation. The National Sales Manager was asked how long Mr Tasker had to decide in regard to this.

15. Mr Tasker was then told that

if he chooses to seek legal advice, he is well within his rights under New Zealand law. In terms of the payment, it will be made, the money will be released once the equipment has been passed back to the business.

16. Mr and Mrs Tasker then took an adjournment. They saw that there was no room to manoeuvre and that the best option at that point was to agree to the offer of redundancy compensation. Mr Tasker informed Momentum Brands of that upon their return and the parties then went away to facilitate the return of company equipment. During the course of the meeting, if not before, access to Mr Tasker's company phone and computer had been cut off.

17. When the National Sales Manager returned to Auckland that day he was informed that there were going to be three additional positions created, above the six originally envisaged at Independent Liquor/Boundary Road Brewery, but that they would all be advertised externally. The first of them was advertised on 23 July.

18. Mr Tasker was specifically told that his redundancy was not a reflection on his performance. However, that was not the case. He was one of two not selected for performance reasons, even although he had not been informed that he was about to be placed on performance management. Mr Tasker was also informed there were no other sales positions to be created yet the National Sales Manager was told the same day that there were to be three new positions. Clearly these statements made on Momentum Brands' behalf were misleading and deceptive.

19. Clause 21 of the parties' employment agreement dealt with termination and redundancy and states amongst other things:

In the event that your position becomes surplus to the needs of the company, you shall be given 4 weeks notice of termination of your employment or at the discretion of the company, be paid in lieu thereof. The notice period as specified shall be inclusive of the notice period specified in the termination clause above. Should you be made redundant, a redundancy payment shall be payable in the event that you have been employed fulltime for a minimum of one year. In such a case, the redundancy payment

shall be four weeks base salary plus an additional two weeks paid salary for every additional full year employed after the first year.

20. Clause 22 provides for protection for employees affected by “restructuring” situations and states:

In the event of the sale, transfer, merger or reconstruction (excluding share sales), of all or part of the company, which will affect your continued employment, we will meet with the purchaser or any other party to the sale, transfer, merger or reconstruction to determine whether you will be offered employment by that party and (if so) on what terms that employment will be and whether your service with us will be treated as continuous service with that other party.

Where the termination of your employment is attributable wholly or mainly to a sale, transfer, merger or reconstruction, of all or part of the company and the fact that the other party to that transaction will not be offering you employment, we will consider your views and advise you of your entitlements, if any, on termination.

21. On 21 August Mr Tasker raised a personal grievance and that personal grievance remains unresolved, despite mediation and efforts at the investigation meeting to resolve outstanding matters.

Determination

22. While I accept that Momentum Brands and Independent Liquor were restructuring for genuine reasons, in that Independent Liquor wanted to shift to a strong, large and dedicated beer sales task force, and that it wanted that to remain a secret, that did not extinguish its obligations to consult with employees, especially given that section 4(1A)(c) imposes an obligation to provide both information and an opportunity to comment on any proposal to make a decision that will or is likely to have an adverse effect on the continuation of employees’ employment. Given that Momentum Brands’ wines and spirits sales work was going to be now conducted by Independent Liquor, the opportunity of redeployment to that line of work had to be considered, but Mr Tasker was never given the opportunity to make representations about that. Furthermore, Mr Tasker may also have been able to assist in or may have had an interest in (and therefore should have been

consulted on) the actual date of transfer from one subsidiary of the company to another that was offered to other staff.

23. I accept that there were good reasons to keep the proposal confidential. There were no reasons however, why, once it had been determined to proceed, that there could not have been a short period of consultation with Mr Tasker about the sorts of issues raised above. Most importantly, Mr Tasker should have been consulted about redeployment opportunities, as he may have come up with some proposals, but Momentum Brands had closed its mind to this option, which was unfair and disadvantaged him in his employment.
24. Momentum Brands was required to meet the terms of clause 22 of the parties' employment agreement. It failed to do so because it did not consider his views once the decision had been made by independent Liquor not to offer him employment following the reorganisation. This breach of contract also disadvantaged him in his employment.
25. Momentum Brands was also under a duty not to mislead or deceive Mr Tasker. Its use of the National Sales Manager to convey the decision of dismissal when he had not been at work and was not privy to the proposal, resulted in Mr Tasker being misled about whether or not there were to be additional jobs, and the fact that the National Sales Manager was informed of three more on the same day that Mr Tasker was given notice of dismissal, and that he was informed that performance was not an issue, whereas in fact that was the reason he was not offered ongoing work by Independent Liquor/Boundary Road Brewery, all examples of misleading behaviour. I note that without ever informing Mr Tasker of this, the reasons Mr Tasker was not selected for redeployment were on alleged performance grounds, in that he was under a current warning for not attending a sales conference call (when he was at a friend's funeral) and because he was allegedly due to be placed on performance management soon, even though he had never been informed of the same.
26. Mr Tasker claimed that this was a "*camouflage restructure*" in that this was essentially a performance dismissal by way of restructuring of Independent Liquor's different businesses. I do not accept that the dismissal by Momentum Brands of allegedly non-performing staff was a significant reason

for the restructure. Rather, Independent Liquor decided to set up a dedicated beer sales team and it achieved that by closing the Momentum Brands wines and spirits sales team and absorbing those duties within Independent Liquor's alcopops sales team. This therefore allowed it to free up a number of new positions selling beer for Independent Liquor/ Boundary Road Brewing, and for it to recruit those staff it sought to from Momentum Brands. Accordingly, the work done by Mr Tasker actually went to staff in Independent Liquor, not Boundary Road Brewing, and there were no extra positions within Independent Liquor, which in any event was a different legal entity than Momentum Brands.

27. Thus while I accept that Independent Liquor could have achieved these objectives by refocusing on beer sales through Momentum Brands, it was entitled using its corporate structure to do so in the way that it did. The approach it took allowed it to clearly align its sales staff with Boundary Road Brewery, and this is the sort of commercial decision where it is not for the Authority to substitute its decision for the business decisions of Momentum Brands and Independent Liquor. Furthermore, Mr Tasker had no right to be redeployed into the employment of a separate company.
28. In summary, therefore, I conclude that Mr Tasker's employment with Momentum Brands was genuinely superfluous to Momentum Brands' needs when it was closed, and that Mr Tasker's work for Momentum Brands was absorbed within the parent company, Independent Liquor, where no new positions were established. Mr Tasker was therefore genuinely made redundant.
29. However, Mr Tasker was unjustifiably disadvantaged or dismissed by Momentum Brands because the procedure that Momentum Brands adopted was not one that a fair and reasonable employer could have done, because he was not consulted on when he would be made redundant or over redeployment options; because Momentum Brands were in breach of clause 22 of the parties' employment agreement which required it to consider his views if any new employer was not offering him employment, and because it misled him about what was happening to his position and the reasons for his dismissal.

Remedies

30. Mr Tasker is not entitled to remedies for the loss of his job because his position was lost as a result of a genuine redundancy situation, but is entitled to remedies for the way in which his employment was unfairly ended. In this regard I accept that Mr Tasker would have had a minimum of a two week consultation period, for which he is entitled to lost wages. Two weeks wages is \$3,115 gross. I also accept that he has been gravely affected by the way in which he lost his job, the speed of which made people think that he must have been involved in some form of misconduct, which was not the case. His evidence on this is unchallenged and was supported by that of his wife. I therefore consider that compensation in the sum of \$8,000 is appropriate.

31. Mr Tasker was made redundant because of the change of business operation by the parent company of Momentum Brands and Independent Liquor, leading to the subsequent closure of Momentum Brands' operations. Mr Tasker cannot be held to have in any way contributed to that decision by Momentum Brands, or to how Momentum Brands failed to treat him fairly. There can therefore be no deduction for contribution.

32. Finally, I record that Independent Liquor's Human Resources Director undertook at the investigation meeting that Independent Liquor, as the sole owner of Momentum Brands, would ensure that any award made against Momentum Brands would be met.

33. I therefore order the respondent, Momentum Brands (NZ) Limited, to pay to the applicant, Mr Stacey Tasker, the sum of \$3,115 gross in lost remuneration and \$8,000 in compensation under section 123(1)(c)(i).

Costs

34. Costs are reserved.

G J Wood
Member of the Employment Relations Authority