

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 464/09
5154777

BETWEEN TROY JARED ALLAN
 THICKPENNY
 Applicant

AND SUPERIOR SHEETMETALS
 LIMITED
 Respondent

Member of Authority: Dzintra King

Representatives: Amy Heinrich, Counsel for Applicant
 Allan Fursdon, Advocate for Respondent

Investigation Meeting: 23 September 2009

Submissions Received 24 November 2009 from Applicant
 8 December 2009 from Respondent

Determination: 21 December 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

- [1] The applicant, Mr Troy Thickpenny, says he has been unjustifiably dismissed by the respondent, Superior Sheetmetals Limited (“SSL” or “the company”).
- [2] Mr Thickpenny seeks compensation and reimbursement of lost wages.
- [3] Mr Thickpenny’s employment was terminated on the grounds of redundancy in February 2009.
- [4] The respondent admits that the process whereby Mr Thickpenny was made redundant could have been handled better but says the redundancy was genuine.

Background

[5] Mr Thickpenny was employed in 2002, originally as a labourer, then promoted in 2006 to the foreman's position.

[6] Mr Justin Oink, the sole director of the company, said that in November 2008 the volume of work at SSL had reduced and he approached Mr Simon Richards at Protech Stainless Steel Limited ("Protech") to ask whether there was any work available at Protech for Mr Thickpenny on a temporary basis. Mr Oink wished to continue Mr Thickpenny's employment and hoped that SSL's position would improve.

[7] Mr Richards said Protech has just secured a significant contract and would be able to provide work for Mr Thickpenny.

[8] Mr Oink approached Mr Thickpenny, discussed the situation facing the company and said he had arranged for him to work at Protech on a temporary basis but he would remain an employee of SSL. Mr Thickpenny said he was not aware he was being moved because of a downturn in SSL's business, although he did know that another employee had carried out some work shortly before for Protech. He said he was just told to go. Mr Thickpenny was paid \$8 more per hour than other Protech employees.

[9] I find it more likely that Mr Oink did tell Mr Thickpenny that SSL was not in a good position and that was why he was going to work at Protech.

[10] At about the end of January Mr Richards told Mr Oink that the work Mr Thickpenny was doing would be coming to an end in about two or three weeks. Mr Oink understood that Mr Richards had offered Mr Thickpenny a full time tradesperson's position at Protech.

[11] On 9 February Mr Oink asked Mr Thickpenny to meet him at Protech's offices. He also asked Mr Richards and Mr Anthony Brinkworth to be present at the meeting, given his understanding that Mr Thickpenny had been offered full time employment.

[12] At the meeting Mr Oink advised Mr Thickpenny that SSL's position had not improved regarding current and projected workload and that Protech only had a

couple of weeks' work for him on the project. He told Mr Thickpenny his employment with SSL would end in two weeks. He gave Mr Thickpenny a pre-written letter giving him two weeks' notice.

[13] Mr Richards advised Mr Ooink later that Mr Thickpenny had turned down the employment offer with Protech.

[14] Mr Ooink employed two staff around the time of the redundancy. One was employed in January 2009 as a replacement for a labourer who had resigned without giving notice; another labourer was employed on 8 February 2009 on a temporary basis. Both these people were employed on the minimum wage and the temporary employee's work had come to an end after two months.

[15] Mr Ooink said there was a decline in average company income of about \$30,000 in the period December 2008 to May 2009. He said the company's biggest client, who contributed about 60% to the workload, was ordering less.

[16] Mr Ooink said he believed Mr Thickpenny enjoyed working at Protech. Mr Thickpenny said he had not but agreed he had not conveyed this to Mr Ooink and had instead "put on an act".

[17] Mr Thickpenny says the reason for the redundancy – a downturn in the business – was not genuine and that his employment was terminated because Mr Ooink did not like him. Mr Ooink had employed Mr Thickpenny for 6 years and promoted him. He had given Mr Thickpenny time off (he finished early on Wednesdays) to study for an additional qualification which was not necessary for his position and had paid petrol for Mr Thickpenny to drive to Auckland from Hamilton and attend the course. Mr Ooink agreed the two had had some disagreements.

[18] Mr Ooink said he did not offer Mr Thickpenny the labourer's job as Mr Thickpenny was working at Protech at the time and he did not think Mr Thickpenny would have wanted a position at that level and that rate of pay. Mr Thickpenny said he would have considered it but it was clear that he would not have taken the job if it had been offered because the pay rate was too low.

[19] Mr Ooink has taken over the work that had been carried out by Mr Thickpenny.

Decision

[20] Mr Thickpenny was unjustifiably dismissed. The decision was predetermined and there was no consultation. Nor was Mr Thickpenny informed of the purpose of the meeting or given an opportunity to obtain representation and advice.

[21] The reason for the redundancy was that there were problems with the business not that Mr Ooink wanted to get rid of Mr Thickpenny because he disliked him.

Remedies

[22] This was a genuine redundancy and given that Mr Thickpenny would not have worked for the reduced pay rate of a labourer there was no alternative position he could have taken up. Any remedies, therefore, can only be awarded because of the unfair process.

[23] In any event, Mr Thickpenny was offered alternative employment by Protech which he declined.

[24] Mr Richards said the termination meeting was upsetting and unpleasant. Mr Thickpenny gave evidence of the effect of the dismissal upon him and I do not doubt that he has been hurt and humiliated by what happened. It was only at the hearing that Mr Thickpenny learned that he had been made redundant because he was the highest paid employee.

[25] The respondent is to pay the applicant the sum of \$4,500 pursuant to s 123 (1) (c) (i).

[26] There was no contribution on Mr Thickpenny's part.

Costs

[27] If the parties are unable to resolve the issue of costs the applicant should file a memorandum within 42 days of the date of this determination. The respondent should file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King
Member of the Employment Relations Authority

