

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Daniel Torrance (Applicant)
AND Grace Removals Group Limited (Respondent)
REPRESENTATIVES John Scott Fairclough, Counsel for Applicant
Neil McPhail, Advocate for Respondent
MEMBER OF AUTHORITY Paul Montgomery
INVESTIGATION MEETING 28 September 2005
DATE OF DETERMINATION 8 March 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant claims he was disadvantaged by the unjustifiable action of the respondent in that upon receiving a promotion he was not given the appropriate wage increase. Further, Mr Torrance claims he was unjustifiably dismissed on the ground of redundancy which he says on reflection could not have been genuine.

[2] Mr Torrance asks for a declaration that upon being promoted to the role of Operations Manager he was entitled to a wage rise and a declaration as to the quantum of that increase. He seeks recovery of the sum in question and interest on the quantum established. Further, the applicant wants compensation for hurt and humiliation in respect to the alleged disadvantage. In addition he asks for compensation for hurt and humiliation in respect of the unjustified dismissal and a contribution to his legal costs.

[3] The respondent denies the claims and in spite of efforts to resolve the issues in mediation, the parties have been unable to resolve their differences.

A brief history

[4] The applicant began employment with the respondent as a casual employee in early July 2003. On 13 October 2003 he became a permanent employee as a Grade 3 removalist on an hourly rate of \$13.18 gross. Later in January 2004, following the departure of the Operations Manager, Mr Torrance was promoted to that position. Some days after this promotion the applicant approached the then Branch Manager requesting an increase to compensate him for his additional responsibilities. The applicant says that Mr Fahey did not respond to his request.

[5] Mr Fahey resigned his position and left the respondent on 9 July 2004 according to his statement of evidence. He was replaced by Mr Darryl White in mid July that same year. Mr White accepts that at the time of his arrival the applicant was already in the Operations Manager role. Mr White says he never discussed remuneration with the applicant, nor did he put the applicant on a one month trial period as Mr Torrance had alleged. The applicant says Mr White did put him on a trial period saying that after a month he (Mr White) would review his wages.

[6] Almost a month to the day later, on 10 August 2004 Mr White met with Mr Torrance in the yard and requested the applicant attend a meeting with him on Friday 13 August 2004. The applicant says Mr White did not tell him the purpose of the meeting. Mr White says he told the applicant “about the company’s problems and that we were looking at restructuring, which could affect his job ... and that he was entitled to bring a support person with him.”

[7] The applicant says he told Mr White that as there were two containers booked for unloading on the Friday, that day would not suit. He says that as a result the meeting was brought forward to after smoko that same afternoon. Mr Torrance says that he was not told what the meeting was about, nor was he advised of his right to bring a support person or representative.

[8] Mr White says in evidence that “not long afterwards he [the applicant] came back to see me and said “I don’t want to wait until Friday, I want to know where I stand”. Mr White appears to be saying that the anticipated work on Friday 13 August 2004 had no bearing on the meeting being held earlier, but that the applicant sought it earlier to establish where he stood given the alleged advice given him by Mr White regarding the restructuring.

[9] The meeting, given the circumstances, is notable because the respondent was represented by Mr White, the applicant represented himself. No third party was present, even in the capacity of a minute taker to provide a record of what took place.

[10] Essentially, Mr Torrance was told that his position was being made redundant, that the company was prepared to offer him a package even though the agreement states at s.9.4 “Redundancy – the company does not have a redundancy policy”.

[11] The applicant says that an offer was put to him on a “take it or leave it” basis, and that given his financial commitments he accepted it rather than leave with only pay in lieu of notice. The respondent says the severance was mutually agreed and signed off by both parties and a witness.

The issues

[12] The Authority is required to resolve the following issues in relation to this matter:

- Was the applicant entitled to a wage increase when he was promoted to Operations Manager; and
- Was the respondent entitled to declare the role of the applicant redundant while retaining casual employees; and
- Was the respondent entitled to later appoint a member of the casual staff to the role of Operations Manager on 6 December 2004; and
- What is to be made of the events of 10 August 2004 including the reason for bringing the meeting forward; and
- If the applicant is successful in his application, what if any remedies are due to him.

Analysis and discussion

[13] Addressing the claim entitlement to a wage increase, there is no dispute that the applicant was a permanent employee. The applicant claims that he was promoted to the position of Operations Manager in January 2004 although Mr Fahey's evidence on this point was "I was Manager when Daniel Torrance was appointed to the role of Operations Manager. It was not a formal promotion and there was no increase in remuneration that went with it. Rather, Daniel continued as a driver but took over some of the operational responsibilities and the day to day running of staff. This meant that he was able to determine what hours he needed to work from week to week." Mr Fahey goes on to say "I did not promise any increase to go with the new duties, but he did ask and I said to him we will see how you go and look at it in the future".

[14] The respondent operates a system known as the Grace Removals Group Skills Accreditation Programme and the document is appended to the applicant's employment agreement as Schedule A. The agreement dated 24 October 2003 is signed by Mr Torrance and Murray Green, the then Operations Manager, and each page of the schedule has been initialled by each man.

[15] Section 1.1 states that the applicant is employed as a Grade 3 removalist while the third page of the Schedule states "your present grade level has been mutually agreed to be Grade 2." At each progressive step promotion is "at the discretion of the Branch or General Manager" provided the requisite skills have been developed and exhibited.

[16] The Schedule states that Grade 4 removalist is equivalent to a supervisor. The hourly rate for Grade 3 is \$13.18 gross while Grade 4 (Supervisor) attracts a rate of \$14.00 gross. The hourly difference is thus \$0.82 gross.

[17] The Authority is unable to discover where exactly the Operations Manager fits into the Schedule, but it is safe to assume that is above that of the supervisor. The only information in the document refers to Grade 5 which is remunerated by a "negotiated salary".

[18] From the evidence of the respondent it is clear that Mr Torrance, while not taking on the full role vacated by Mr Green, none the less was asked to pick up some of the administrative tasks previously carried out by Mr Green. I note that Mr White says that "when I started Daniel was already in the Operations Manager role".

[19] Turning to the basis for the applicant's redundancy, the respondent says it was necessary because there was a serious downturn in work and the branch was operating at a loss in the three months preceding the applicant's termination. As the highest paid removalist the applicant was selected for redundancy ahead of the casual workers.

[20] The respondent is entitled to arrange its affairs to its best advantage and to address its financial performance in ways it sees as appropriate. The proviso is that in doing so it has serious regard to its obligations to affected staff. Thus the reducing of staff is legitimate. Part of the applicant's alleged grievance is that he was targeted ahead of casual staff. The respondent defends its decision on the basis that casual, on call staff provide greater flexibility and that the paperwork being undertaken by Mr Torrance was taken over by the Branch Manager.

[21] I think it fair to observe that while the respondent's view may have some currency, the respondent needed to have particular regard for its obligations to its sole permanent full time removalist.

[22] The applicant also complains that some months after his departure the respondent appointed one of the casual employees a Mr Jason Jerry as a permanent member of staff. Mr Torrance argues that this action on the part of the company nullified its argument regarding flexibility which was used at the time of his redundancy. I understand from the evidence put before the Authority that following the lodging of Mr Torrance's personal grievance, this employee was returned to casual status.

[23] The matter to which the Authority has directed its mind relates to the informal manner in which the respondent approached the applicant, regardless of whose version of events is correct.

[24] Mr White at para.10 of his statement of evidence says, "Daniel agreed to meet me on Friday. However, not long afterwards he came back to see me and said, I don't want to wait until Friday, I want to know where I stand."

[25] At para.11 Mr White goes on, "Daniel now says he had to change the Friday meeting because he had some work on that day. Attached to my evidence as "A" is an extract from my diary, which shows that that job had been cancelled. It was cancelled about one and half weeks before I asked for the meeting with Daniel". Having had the opportunity to study the diary entry for 13 August 2004, it is clear that one job had been cancelled while the other remained in place.

[26] Mr Torrance was approached while going about his tasks on behalf of the respondent. He says he was approached by Mr White in the yard, that he was not given a written proposal regarding restructuring the Christchurch Branch, let alone a letter advising him that the proposed restructuring may put his employment at risk. His evidence is that he was not informed of the purpose of the meeting, not advised his position could be at risk and was not told that he had the opportunity to bring a support or representative person with him. He says Mr White told him that he had been told to make the applicant redundant and that Mr White had offered him a severance package. The employment agreement stipulates one weeks written notice of termination is to be given by either party but as noted above, there is no provision for payment of redundancy compensation. Mr Torrance said that Mr White offered him the package on a take it or leave it basis and that given his financial situation at the time he thought it preferable to accept that package rather than go with simply a weeks payment in lieu.

[27] What is curious is that having approached the applicant in an informal manner and having conducted an unrecorded meeting with Mr Torrance, Mr White was at pains then to commit the terms of settlement with the applicant to paper, have it signed by both parties and to have it witnessed by another member of staff.

[28] Upon reflection it appears that Mr White was under instructions to meet with Mr Torrance and to advise him of his impending redundancy and that the documentation was required by Head Office for both payroll and record keeping purposes.

[29] Both men attending this meeting agree that the applicant was told at the beginning of the meeting that he had the right to a support person. However, even at that point the applicant was unaware of the purpose of the meeting and could not see any reason to call a support person to assist him. That is regrettable because an experienced advocate may well have influenced the company's decision and ensured that a thorough consultation process took place. In those circumstances the outcome may well have been different.

[30] Counsel for the respondent has urged me to consider that Mr Torrance "short circuited the consultation process". I have considered the submission but think it more likely that, faced with an offer in excess of his contractual entitlements, Mr Torrance accepted his departure as inevitable and wished to secure some payment for his redundancy. In addition there is no evidence put before the

Authority that anybody else in the Christchurch branch was involved in any form of consultation. This raises the questions as to fairness of the selection criteria. To put it another way, Mr Torrance lost the chance to prepare for the meeting and to perhaps persuade the company to retain him had Mr White openly advised him prior to the meeting of the meetings purpose and the applicant's entitlement to representation at it.

[31] In the course of the investigation meeting some issues regarding post-employment incidents were put in evidence. I have considered these and find that they do not assist in determining the matter.

The determination

[32] I find that the applicant was entitled to be paid at Grade 4 of the company scale from the date of his appointment as supervisor in January 2004 until 13 August 2004.

[33] I find the applicant was unjustifiably disadvantaged by the respondent's failure to pay him correctly.

[34] I find the applicant has been unjustifiably dismissed by the respondent because of its failure to adopt a fair procedure effectively denying Mr Torrance the opportunity to save his employment.

[35] The application for penalty is declined as there was insufficient evidence of a breach of good faith, and I have addressed the breach of the agreement under the unjustified disadvantage claim.

[36] I turn now to the matter of remedies.

Remedies

[37] In respect to the underpayment I directed the parties to calculate the sum owed to the applicant based on \$0.82 gross per hour actually worked by the applicant and to pay him interest on this sum at the rate of 8% pa for the relevant period. If the parties are unable to agree, leave is reserved for them to return to the Authority on this matter.

[38] The respondent is to pay the applicant nine weeks normal wages as reimbursement for wages lost as a result of the grievance. The nine weeks is the balance due to the applicant given that he was paid four weeks at 40 hours at the time of his dismissal. The wages due to Mr Torrance are \$5,040.00 gross. That is calculated \$14 x 40 hours x 9 weeks.

[39] The respondent is to pay the applicant the sum of \$3,000 as compensation for hurt and humiliation arising from his personal grievances.

Costs

[40] Costs are reserved. The parties are directed to attempt to resolve this matter between them. In the event that this is not possible Mr Fairclough is to lodge and serve his memorandum on costs by Friday 14 April. Mr McPhail is to file his memorandum no later than Friday 28 April.