

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 35
5519263

BETWEEN RICHARD WALKLIN
 Applicant

A N D ALBANY GROUP 1 LIMITED
 (In Liquidation) (formerly Drain
 Surgeons Limited)
 Respondent

Member of Authority: Helen Doyle

Representatives: Adam Gallagher, Counsel for the Applicant
 No appearance for the Respondent

Investigation Meeting: 26 February 2015 at Christchurch

Date of Determination: 13 March 2015

DETERMINATION OF THE AUTHORITY

- A. Albany Group 1 Limited (in liquidation) (formerly known as Drain Surgeons Limited) is ordered to pay to Richard Walklin redundancy compensation of six months' salary from 31 July 2014 including the employer Kiwi Saver contribution in the \$76,500.20 gross.**
- B. Albany Group 1 Limited (in liquidation) (formerly known as Drain Surgeons Limited) is ordered to pay to Richard Walklin one further week's salary in the sum of \$2884.61 gross being notice.**
- C. The substantial merits of this case concerned a finding as to redundancy entitlements. The personal grievances alleged are either unjustified actions deriving solely from a disputed interpretation or they concern a grievance of unjustified dismissal**

which would properly be considered in the alternative if the Authority had not found Mr Walklin entitled to redundancy compensation.

D. There is no award of a penalty for a breach of the duty of good faith.

F. Albany Group 1 Limited (in liquidation) (formerly known as Drain Surgeons Limited) is ordered to pay to Richard Walklin costs in the sum of \$1200 together with reimbursement of the filing fee in the sum of \$71.56.

Continuation of the proceedings against the respondent

[1] Rowan Chapman and Amanda-Jane Atkins, Chartered Accountants, were appointed as liquidators of Albany Group 1 Limited (In Liquidation) (Formerly Drain Surgeons Limited) by special resolution of shareholders on Tuesday 9 December 2014. This was the day before an investigation meeting was scheduled in this matter on 10 December 2014.

[2] James Caird, a partner in Simpson Grierson, represents the liquidators. Mr Caird advised in a letter to Mr Gallagher dated 9 Decembers 2014 that the liquidators were unaware of the claim by Mr Walklin and requested an adjournment until February 2015 so they could assess the claim. Copies of the proceedings were requested. By consent the Authority granted an adjournment until February 2015 to enable the liquidators to consider the claim.

[3] By letter dated 4 February 2015 Mr Caird wrote to Mr Gallagher and advised that the liquidators agreed to the proceedings by Mr Walklin continuing pursuant to s 248(1)(c) of the Companies Act 1993. Mr Caird advised in his letter that the liquidators will adopt a neutral stance and, accordingly, will take no steps to oppose Mr Walklin's claim. The liquidators requested that they be copied into any correspondence and the Authority has accordingly copied the liquidators through Mr Caird into all correspondence including the investigation meeting notice.

[4] The Authority appreciates the prompt and constructive way in which the liquidators and their advisers have dealt with this matter.

Description of the respondent

[5] Mr Walklin entered into a written employment agreement with Drain Surgeons Limited and I consider it sensible therefore to refer to the respondent in this determination as DSL.

Employment relationship problem

[6] Mr Walklin says that his position was redundant as at 31 July 2014 and that he became entitled from that date under his written employment agreement to six months' salary by way of redundancy compensation. He says that after receiving advice that his position was redundant various actions of DSL affected his employment to his disadvantage and he was then unjustifiably dismissed having suggested that the dispute over his redundancy entitlements be resolved. Mr Walklin further says that there was a breach by the respondent of the statutory duty of good faith.

[7] Mr Walklin seeks compensation for humiliation, loss of dignity and injury to feelings arising from the unjustified disadvantage and dismissal claim in the sum of \$12,000, compensation for loss of benefits for the use of his work vehicle and employer Kiwi Saver contributions. Mr Walklin seeks a penalty for the alleged breach of good faith and costs.

[8] DSL says that Mr Walklin was entitled to six months' notice only in the event of redundancy and it says that he would not accept an offer to work out his six month notice period and therefore was deemed to have resigned.

The Issues

[9] The Authority needs to determine the following issues:

- (i) What does the employment agreement provide about redundancy entitlements?
- (ii) Was Mr Walklin disadvantaged in his employment by unjustified actions of DSL and was he dismissed by letter dated 12 August 2014 and if so what remedies should be awarded?

- (iii) Was there a breach of the statutory obligations of good faith and should there be a penalty awarded?
- (iv) Costs.

What does the employment agreement provide about redundancy entitlements?

[10] Mr Walklin was employed by DSL in the position of Program Manager from August 2013 until his employment terminated. DSL carried on business as a residential and commercial drainage specialist.

[11] A written individual employment agreement was entered into between DSL and Mr Walklin. It was dated 20 July 2013 and signed on 21 July 2013 by Mr Walklin. It does not appear to have been signed by DSL although it has never been suggested that the employment agreement did not contain Mr Walklin's terms and conditions of employment. The terms of Mr Walklin's employment were expressed to be contained in several documents. These were the individual terms of employment, job description, general terms of employment (version March 13), the health and safety manual and the drug and alcohol policy.

[12] The individual terms of employment contain a page headed *The Main Terms of Your Employment* and another two pages headed *Our Agreement*. The reference to *6 month redundancy* and the focus for the Authority is on the page headed *The Main Terms of Your Employment* as below:

Notice Periods:	
(a) During trial period	1 Week
(b) In the event of redundancy	6 month redundancy (the redundancy if required would be paid out weekly over the period not in a lump sum)
(c) Normally	4 weeks
(d) Annual leave requests must be approved by your manager two weeks in advance of the start date of the leave requested	2 weeks

[13] There are other relevant clauses that it is useful to set out. The general terms of employment provides in clause 6.11 that *in the event that your employment is terminated due to redundancy, you will be provided with notice of termination set out in Part*

1 to this Agreement and further in clause 6.13 no compensation is payable in the event of redundancy.

[14] Both clause 1.2 of the individual terms and clause 1.2 of the general terms of employment provide; *If there is a conflict between these individual terms of employment and our general terms of employment, these individual terms of employment shall apply.*

[15] Clause 8.8 which is material for current purposes deals with selling or transferring all of part of the business and it provides; *If no offer or employment is made by either the prospective new employer or us you will be made redundant and any redundancy entitlements conferred by this agreement will apply.*

[16] Mr Walklin says that although the provision in the individual employment agreement is for a notice period in the event of redundancy that was not the actual intention of the parties and what was intended was redundancy compensation. DSL says that in the event of redundancy the employment agreement provides for a six month notice period.

[17] The Authority needs to interpret the employment agreement. The Authority is concerned with the objective meaning of the words used rather than subjective intentions or understanding and does not take into account evidence about what the parties intended the words to mean or what they thought the words meant. The starting point is the words used and then the objectively relevant surrounding circumstances to check the first impression and that nothing requires modification.

[18] The Employment Court outlined the principles of interpretation of employment agreements in *Chief Executive Officer of the Department of Corrections v Corrections Association of New Zealand Inc*:¹

Agreements are interpreted with reference to their factual matrix or Surrounding circumstances. This includes matters such as the background to the transaction and the practice of the industry or sector in question.

One considers, first, the words used - they must obviously be a starting point - and then the surrounding circumstances to make sure that the first impression of the meaning is correct and nothing in the circumstances requires modification of that most natural meaning of the words.

The Court is required to adopt an objective approach to interpretation:

¹ [2005] ERNZ 984 at [15]

what matters is not what the parties say they intended the words to mean but what a reasonable person in the field, knowing all the background, would take them to mean.

Evidence is not admissible of what one party thought the words meant or of preliminary negotiations or earlier drafts.

Evidence of relevant conduct of the parties after the contract came into existence may sometimes assist in interpreting it, at least in the case of employment agreements.

Interpretation of an employment agreement should not be narrowly literal but should accord with business common sense: the "business" in this case is that of employment relations in prisons. The interpretation should fulfil the purpose of the agreement and be based not simply on dictionary meanings or grammar. Even if the drafting is inept, the Court should attempt to give effect to the underlying intent. If a literal interpretation gives rise to nonsense in practice, the Court should endeavour to find an interpretation that satisfied business common sense and fulfils the parties' purpose.

Nevertheless, if the words are clear and can have only one possible meaning, that should generally determine the matter. The Court will need to be very sure of what business common sense requires when interpreting a contract if that does not accord with the clear words.

[19] The other events under the notice period in Mr Walklin's employment agreement have beside them a period of 1, 4 or 2 weeks for trials, normally and annual leave requests without further explanation but that is not the case in the event of redundancy. The word redundancy follows the reference to 6 month. There is then reference in the employment agreement to the redundancy if required being paid out weekly over the period not in a lump sum. The other notice periods make no such reference to how they are to be paid although clause 7.1 of the general terms provides a payment in lieu provision for termination of employment on notice.

[20] Objectively assessed a reasonable person would associate the words lump sum with a payment occurring at a particular time rather than over a period of time but the words do support that there may be requirements where there would not be a lump sum payment. When the notice period is read as a whole the words used are different to those used for other notice periods.

[21] I turn to the surrounding circumstances. I have only heard from Mr Walklin in this case and therefore some caution is required. There are two documents that are objectively relevant and the contents were mutually known to both Mr Walklin and DSL at the time the employment agreement was entered into.

[22] The first is a letter to Mr Walklin from Grant Hall, General Manager of DSL, dated 17 July 2013. The letter is described as *a letter of offer*. It sets out the details of the offer of employment and with respect to redundancy states as follows; *6 month redundancy (the redundancy if required would be paid out weekly over the period not in a lump sum)*.

[23] The second is a letter from Mr Walklin to Mr Hall dated 18 July 2013 in which he accepts matters offered to him including as he sets out in full *6 month redundancy (the redundancy if required would be paid out weekly over the period not in a lump sum)*.

[24] Three days later on 21 July 2013 Mr Walklin signed the employment agreement and the words alongside *in the event of redundancy* are identical to what was offered by DSL in its letter of 17 July 2013 and what was accepted by Mr Walklin in his letter of 18 July 2013 about redundancy. There is no mention of the words notice or compensation in the offer and acceptance letters or in the employment agreement. There is however the placement of the words under notice period provision in the employment agreement.

[25] Sometimes conduct after the employment agreement is signed may assist the Authority in an interpretation issue. The same rules apply regarding admissibility of such evidence in that it cannot be subjective evidence relating to the intention of one party. There has to be some elements of mutual conduct that would assist the Authority in the meaning of the redundancy entitlement. I find a letter dated 10 July 2014 from DSL to Mr Walklin after the employment agreement was signed and Mr Walklin's response to be objectively relevant.

[26] The letter dated 10 July 2014 was provided to Mr Walklin by directors of DSL William Whitelegg and Marc Ciochetto and confirmed that DSL had secured a proposed buyer for the business and that the new owners had agreed to take on all staff on existing terms and conditions except for those named in the letter which included Mr Walklin. The letter stated there were two reasons the buyer was not prepared to take on Mr Walklin. The first was that they had indicated they were not comfortable with the 6 month redundancy provision and secondly they were unsure of a position that would suit him. In the letter Mr Walklin was advised that he could remain employed by DSL on a fixed term three month contract, on the same terms and conditions he was currently on which would enable him to work closely with the

proposed new owners and an existing management team. He was further advised that his position in the company would have to be made redundant as at 31 July 2014.

[27] That letter does not provide Mr Walklin with 6 months' notice of the date of the redundancy of his position or make any reference to the notice. Any work after 31 July 2014 was offered under a fixed term agreement. That is at variance with the interpretation advanced by DSL that six months' notice was to be given in the event of redundancy in which case employment would be expected to simply continue.

[28] It was only after Mr Walklin responded to that letter on 22 July 2014 in which he amongst other matter expressed reluctance to accept the fixed term offer as he would not then be entitled to the 6 month redundancy compensation that Mr Whitelegg and Mr Ciochetto in a letter dated 28 July to Mr Walklin stated that was a 6 month notice period to be worked out and not a 6 month *redundancy payout*.

[29] I turn to what meaning a reasonable person with the relevant background knowledge available to Mr Walklin and DSL at the time of the employment agreement would take from the employment agreement in the event of redundancy. The relevant reference to redundancy sits within the notice period provision in the individual terms of employment however unlike the other notice periods there is reference to more matters than simply a notice period. For example it does not simply provide 6 months as a notice period. It refers to 6 month redundancy.

[30] It is then stated in the clause that the redundancy if required would be paid out weekly over the period not in a lump sum [Mr Walklin was paid weekly]. That would seem unnecessary with a notice period and such detail is not included beside the other notice periods in the provision of the employment agreement. A lump sum is not normally associated with a notice period although payment of wages or salary in lieu may be. The letters of offer and acceptance provide relevant background knowledge and they only refer to 6 month redundancy which if required would be paid out weekly over the period not in a lump sum. A reasonable person would conclude that the offer and acceptance about redundancy in those letters would mean redundancy compensation rather than notice. When advised of his redundancy Mr Walklin was given only a three week notice period and not six months' notice.

[31] I find that a reasonable person knowing all the background would take the meaning in the event of redundancy that Mr Walklin was to be provided with six

month redundancy compensation rather than 6 months' notice. A reasonable person would conclude that from the wording in the employment agreement against the background of the offer and acceptance letters further supported by conduct after the signing of the employment agreement when there was a redundancy event. A reasonable person would conclude that the compensation would be based on six months' salary which could if required be paid out weekly over the six month period after the event of redundancy.

[32] Mr Walklin is entitled to six month redundancy compensation being six month salary under his employment agreement from the date his position was declared redundant on 31 July 2014. DSL contributed under the employment agreement to Mr Walklin's Kiwi Saver scheme at 2% which was \$57.70 per week.

[33] Mr Walklin was paid a salary by DSL of \$150,000 which I have divided in half to arrive at the figure for six month redundancy compensation of \$75,000. I have then added DSL's Kiwi Saver contribution to Mr Walklin's scheme by multiplying \$57.70 by 26 weeks to arrive at a figure of \$1500.20. I have then added \$75,000 to \$1500.20 to arrive at the figure of \$76,500.20 gross for redundancy compensation.

[34] I order Albany Group 1 Limited (in liquidation) (formerly known as Drain Surgeons Limited) to pay to Richard Walklin redundancy compensation of six months' salary from 31 July 2014 including the employer Kiwi Saver contribution in the sum of \$76,500.20 gross.

Notice

[35] Mr Gallagher submits that if I find the meaning of the entitlements in the event of redundancy is for six months' redundancy compensation that will mean the notice period for redundancy was in fact redundancy compensation and a reasonable period for notice must be inferred.

[36] Mr Walklin was given notice of his redundancy on 10 July 2014. His position was redundant as at 31 July 2014 three weeks later. I accept there was no consent by Mr Walklin to any variation to that date and that the work which he undertook for a week after 31 July 2014 was under protest and pending resolution of a dispute about the interpretation of his entitlements. The evidence supports that Mr Walklin's position was superfluous to DSL from 31 July 2014 as a result of the sale of the

business. He understood that other DSL staff transferred to the new business after that date.

[37] I accept Mr Gallagher's submission that Mr Walklin was entitled to four weeks' notice because it is in line with the general notice of termination in the employment agreement. He received three weeks' notice and is therefore entitled to one further weeks' notice.

[38] I order Albany Group 1 Limited (in liquidation) (formerly known as Drain Surgeons Limited) to pay to Richard Walklin one week's salary in the sum of \$2884.61 gross being notice.

Disadvantage and dismissal grievances

[39] Mr Gallagher submits that Mr Walklin's was disadvantaged when he was advised on 10 July that his position would be redundant on 31 July 2014 but was then told he was required to work out his notice period on 28 July 2014 and advised that he would be seconded to the new business which did not have a role for him. Mr Gallagher argued that Mr Walklin's terms and conditions were unilaterally changed.

[40] Whilst such changes were proposed it is clear when Mr Gallagher became involved and Mr Walklin did work one week after 31 July it was only under protest and pending suggested resolution of a dispute about redundancy entitlements.

[41] As Mr Gallagher stated correctly in his email to DSL dated 31 July 2014 that having identified a dispute neither party can use the other's stance as a ground for dismissal or resignation. Section 103(3) of the Employment Relations Act 2000 (the Act) provides that an unjustified action by the employer does not include an action deriving solely from the disputed interpretation, application or operation of any provision of any employment agreement.

[42] Looking at this disadvantage claim in the round it was about an action deriving from the disputed interpretation about whether Mr Walklin was entitled to six months' notice in the event of redundancy or six months' redundancy compensation. DSL maintained that Mr Walklin should work out a notice period and suggested various ways in which he could do that and Mr Walklin sought payment of compensation.

[43] I find that up until 12 August there were attempts albeit unsuccessfully to resolve issues between the parties about redundancy entitlements. Mr Gallagher had suggested urgent mediation.

[44] On 12 August 2014 Mr Whitelegg wrote to Mr Gallagher by email and advised amongst other matters that there were genuine grounds for Mr Walklin's redundancy and they were confident that he could get ongoing work for at least three months to give Mr Walklin a chance to obtain an ongoing offer from the new owners. Mr Whitelegg stated Mr Walklin had decided not to do that. The letter advised that Mr Walklin's rejection of ongoing work was to be treated as a resignation effective immediately and that he would be paid up until the end of 8 August with all accrued holiday entitlements.

[45] Mr Gallagher by email dated 31 July 2014 to DSL's representative advised that his client would attend work and await direction from DSL after 31 July 2014, but under protest and reserve his legal rights. There was no further communication from DSL.

[46] Mr Gallagher submits that the email communication from Mr Whitelegg on 12 August 2014 summarily dismissed Mr Walklin. Mr Walklin performed no further work for the company after 8 August 2014.

[47] If there had been a finding that in the event of redundancy there was a six month notice period there could have been an alternative argument that Mr Walklin had been dismissed during that notice period unjustifiably. That is not however the finding I have made.

[48] The role of the Authority under s 157 of the Act is to establish the facts and make a determination according to the substantial merits of the case, without regard to technicalities.

[49] The substantial merits of this case concerned a finding as to redundancy entitlements. The personal grievances alleged are either unjustified actions deriving solely from a disputed interpretation or they concern a grievance of unjustified dismissal which would properly be considered in the alternative if the Authority had not found Mr Walklin entitled to redundancy compensation. Whilst I accept that the failure to comply with the contractual entitlements caused Mr Walklin's considerable stress and concern the finding that Mr Walklin is entitled to six months' salary by way

of redundancy compensation is the Authority's determination of the substantial merits of the case.

Breach of the statutory duty of good faith

[50] Mr Gallagher submits that the action of DSL in preparing the employment agreement in a manner that was not consistent with the pre-contractual negotiations was misleading and deceptive conduct or likely to mislead and deceive Mr Walklin and that this was on-going and crystallised at the time that the business was sold.

[51] He submits that DSL's actions at the time that Mr Walklin's entitlements became an issue were deliberate, serious and sustained and justify the imposition of a penalty.

[52] A penalty for a breach of the duty of good faith under s 4A of the Act requires a failure that is deliberate, serious and sustained. I could not be satisfied that there was a deliberate attempt by DSL to prepare the employment agreement and include the redundancy entitlement under a notice period so as to mislead and deceive Mr Walklin or be likely to have done so. This was particularly where the wording used for the entitlement was the same as that used in pre-contractual offer and acceptance letters and therefore obviously different to the other notice periods.

[53] DSL from 28 July 2014 maintained that the redundancy entitlements required a notice period to be worked out but there was no evidence of any work that could be carried out. That could be said to have been a breach of the duty of good faith. There was then a failure by DSL to comply with good faith duties by its suggestion on 12 August that the termination for reason of redundancy was in fact a resignation because Mr Walklin had not accepted the offer of employment.

[54] There was I find some deliberateness about those matters and they were serious but they were against a background of a disputed interpretation and I could not be satisfied, as I must be, if a penalty is to be awarded that the breaches were sustained.

[55] I do not award a penalty for a breach of good faith.

Costs

[56] Mr Gallagher has provided submissions as to costs. Mr Gallagher submits a cost award of \$1200 would be fair and reasonable in all the circumstances where the meeting lasted about two hours but there was an earlier adjournment and relevant correspondence at that time.

[57] I agree that \$1200 would be a fair and reasonable award together with the filing fee of \$71.56.

[58] I order Albany Group 1 Limited (in liquidation) (formerly known as Drain Surgeons Limited) to pay to Richard Walklin costs in the sum of \$1200 together with reimbursement of the filing fee of \$71.56.

Helen Doyle
Member of the Employment Relations Authority