

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 191
5306041

BETWEEN	JASON WAREHAM Applicant
AND	GARY ROOKE T/A CASEY PANELBEATERS First Respondent
AND	SIGMA HOLDINGS LIMITED T/A CASEY PANELBEATERS Second Respondent

Member of Authority: Robin Arthur

Representatives: Patricia Cole for Applicant
Stephen Tee for Respondent

Investigation Meeting: 20 April 2011

Determination: 9 May 2011

DETERMINATION OF THE AUTHORITY

- A. Sigma Holdings Limited made a genuine commercial decision to disestablish the position of tow truck driver held by Mr Wareham but did not make that decision and select him in the way that a fair and reasonable employer would have.**
- B. The manner of the decision and the dismissal caused distress to Mr Wareham for which SHL is ordered to pay him \$2,500 as compensation under s123(1)(c)(i) of the Employment Relations Act 2000.**

Employment Relationship Problem

[1] Jason Wareham claimed the decision to dismiss him for redundancy from a position as a tow truck driver was not made for genuine business reasons. Instead he

believed the decision was made because he had insisted on being paid for sick leave he took to recover from a non-work injury.

[2] He worked for a North Shore business trading under the name “*Casey Panelbeaters*” and run by Gary Rooke. Mr Rooke said the tow-truck position was disestablished because of insufficient work and he made that decision after having discussed the situation with Mr Wareham over several months. Mr Rooke said alternatives were considered but he had no commercially viable option other than to dismiss Mr Wareham.

Issues and investigation

[3] The issues for investigation were:

- (i) Was Mr Wareham employed personally by Gary Rooke trading as “Casey Panelbeaters” or Sigma Holdings Limited (SHL) trading as “Casey Panelbeaters”, and if the latter, was the existence of SHL as his employer disclosed to him?
- (ii) Was the decision to make Mr Wareham’s position redundant, and the selection of Mr Wareham for redundancy, done for genuine business reasons or, predominantly, for an ulterior motive (to do with his injury and taking sick leave)?
- (iii) Was the decision, and how it was made, fairly done?
- (iv) If not genuine or not fairly done, what remedies are due to Mr Wareham (after allowing for mitigation if lost wages are available as a remedy)?

[4] Mr Wareham and Mr Rooke lodged written witness statements for the investigation meeting. At the meeting both men, under oath or affirmation, confirmed their written statements and answered questions from the Authority member and the representatives. The representatives gave oral closing submissions.

[5] As provided for under s174 of the Employment Relations Act 2000 (the Act), this determination does not set out all evidence and submissions received but records only relevant findings of fact and law and expresses conclusions on the issues for determination.

Identity of the employer

[6] I accept the evidence of Mr Rooke that “*Casey Panelbeaters*” is the trading name of SHL, a registered company of which he is the director and a shareholder. Mr Rooke does not trade in his personal capacity under that name.

[7] I also accept Mr Wareham’s evidence that he did not know of the existence of SHL when he was employed. He was not provided with a written employment agreement identifying SHL as the employer. Mr Rooke said none of SHL’s employees had written agreements.

[8] Instead Mr Wareham had drafted a one-page “*wage agreement*”, which Mr Rooke said was probably typed up by the “*office lady*”. Both men signed it. It bore the heading “*Casey Panelbeaters*” but made no reference to SHL.

[9] However Mr Wareham accepted he had learnt of the existence of SHL after he was employed. The company’s name was on the top of his pay slips and he had continued to work for the business without taking issue over the true identity of his employer. Accordingly I find SHL was not an undisclosed principal and Mr Wareham is not entitled to elect to proceed against its agent Mr Rooke in his personal capacity. Rather SHL was Mr Wareham’s employer and is the appropriate respondent in this matter.

Motivation for redundancy dismissal

[10] Mr Wareham accepted that he and Mr Rooke had a number of discussions in the period between October 2009 and March 2010 about the low level of towing work and the need to generate more business. He recalled two discussions – one during December 2009 over “*a few beers*” and another in early January 2010 – where Mr Rooke had said that if the industry continued to struggle, another younger worker employed as a car groomer “*would be the first to go*”.

[11] His evidence was that he was shocked to be told by Mr Rooke on 10 March 2010 that his tow truck job was to end and he was given two weeks notice.

[12] Mr Wareham believed the decision followed a disagreement in the previous weeks over whether he could take paid sick leave for a non-work injury. Mr Rooke had asked why the leave was not covered by ACC and got Mr Wareham to check. When Mr Wareham reported that his advice from ACC was that pay was at the employer's discretion, Mr Rooke said he would not pay for the leave if it was at his discretion. Mr Rooke recalled that Mr Wareham came to work the following day with some written information obtained from the Department of Labour suggesting Mr Wareham could take paid sick leave and Mr Rooke responded that it would be paid.

[13] Both men agree that Mr Rooke then raised the subject of the future of Mr Wareham's job. Mr Rooke said that he said "*while we're here, we'll have to talk about this job and it looks like I have to make redundancies and I'll have to choose you*". The conversation took place at the door of the workshop and Mr Wareham recalled Mr Rooke saying: "*I will have to let you go*". Both agree that they talked for about half an hour during which Mr Rooke said the reason for the decision was the economic downturn. Mr Rooke recalled Mr Wareham saying he thought the younger car groomer would have been chosen but Mr Rooke said that employee could do other work in the workshop which Mr Wareham was not capable of carrying out.

[14] In alleging an ulterior motive Mr Wareham had the onus of proving the decision was made predominantly for other than genuine commercial reasons. I find he did not meet that burden.

[15] The discussion about the sick leave coincided in time with the decision on the redundancy but I accept Mr Rooke's evidence on the genuine commercial reasons for disestablishing the tow truck driving position. Even allowing for his dissatisfaction at the outcome of the dispute over sick leave, I find on the balance of probabilities that the reason for the decision was predominantly a business one.

[16] For many months the outgoings on running the towing operation – including fuel, licences, truck maintenance and Mr Wareham's wages – had exceeded the income generated by it. Attempts to generate further business had not yielded sufficient results and the panel beating staff were doing 'make work' such as painting fences at Mr Rooke's house.

Was the decision and selection fairly made and carried out?

[17] In making a necessary commercial decision on the redundancy of positions, a fair and reasonable employer would give notice of any such proposal to the worker affected, provide relevant information about the proposal and an opportunity to comment and suggest alternatives or options, consider any responses given and possible alternatives with an open mind, select workers for redundancy on reasonable criteria and take steps to minimise the impact of the decision on selected workers by measures such as providing counselling and allowing time off for job interviews. The level of assistance offered may vary with the capacity and resources of the employer. The statutory test of whether an employer's actions met those standards – for a dismissal for redundancy made in March 2010 – is that set by s103A of the Act as it was at that time, not the current wording which came into effect from 1 April 2011.

[18] In this case Mr Wareham was aware for some months that the towing operation was financially shaky however he was shocked by the sudden decision about his position, without notice, and his selection for dismissal. He had not anticipated it because he was led to believe another worker would go first and that had not yet happened.

[19] Mr Rooke explained that he had decided that the younger worker was more versatile, cost considerably less in wages, and could do work in the workshop that Mr Wareham could not do, and the tow truck work could be done by the panel beaters and Mr Rooke – who each had towing licences – as it had been before Mr Wareham was employed. Those were commercial decisions I accept Mr Rooke was entitled to make but how he went about it was less than what a fair and reasonable employer would have done.

[20] Mr Wareham was not given fair notice of the proposal or enough time to suggest alternatives. He was advised of Mr Rooke's decision on the morning of 10 March and issued with a letter of termination before he left work that day. There was limited consideration of alternatives. Mr Wareham said he would have looked at changing his wages if he had the opportunity to take up an apprenticeship in the business and was prepared to do a range of duties which included those of the younger

car groomer. While none of these may have been ultimately acceptable or viable for SHL, he was not given the opportunity to explore them, even overnight.

[21] Although Mr Rooke offered to provide a reference for Mr Wareham – and later gave a verbal reference to one prospective employer – he was not offered any job placement assistance.

[22] Accordingly I accept Mr Wareham was disadvantaged by how SHL went about making and implementing the redundancy of his position and his dismissal. He has a personal grievance on that account, but not for the loss of the job itself.

Remedies

[23] Because the Authority accepted the redundancy decision was made for genuine business reasons, no award for lost wages could be made. Compensation under s123(1)(c)(i) was available but only for the humiliation, loss of dignity and injury to the feelings of Mr Wareham that arose from how the decision was made.

[24] Mr Wareham gave evidence on the decision coming “*out of the blue*”, being “*put on the spot*” and being “*blind sided*”. He was distressed at having a very limited period in which to make alternative arrangements for himself, his wife and child. He also found it hard to “*front up at work*” during the two week notice period.

[25] I accept SHL’s submission that some of those consequences were an inevitable result of the redundancy made for genuine commercial reasons and for which distress compensation could not be awarded. However other of those consequences were a result of the less than satisfactory process followed by SHL, even allowing for its limited resources.

[26] Accordingly the award of compensation is limited to the distress arising from the shock to Mr Wareham of the suddenness of the news of the decision about the position and his selection for redundancy rather than another worker. Considering the general range of awards and the particular circumstances of the case, SHL is ordered to pay Mr Wareham \$2500 as compensation under s123(1)(c)(i) of the Act.

[27] There was no blameworthy conduct by Mr Wareham requiring reduction of that remedy under s124 of the Act.

Costs

[28] Costs are reserved with the parties encouraged to agree any matter of costs between themselves. If they are not able to agree, and an Authority determination of costs is necessary, Mr Wareham may lodge and serve a memorandum on costs within 28 days of the date of this determination. SHL would then have 14 days, from date of service, to lodge a reply memorandum. Subject to what might be said in memoranda, my preliminary view is that this was a straight forward case to which the Authority's notional daily rate would usually apply so that for the half-day taken, costs would be around \$1500. Unless prior leave is granted, no application for costs will be considered outside this timetable.

Robin Arthur
Member of the Employment Relations Authority