Determination Number: AA 104/01
File Number: AEA 419/01

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Mike Whitson (Applicant)
AND	Sabre Corporation Limited (Respondent)
REPRESENTATIVES	Mr Peter Elder for Applicant Mr Garry Pollak for Respondent
MEMBER OF AUTHORITY	W R C Gardiner
INVESTIGATION MEETING	6 August 2001
DATE OF DETERMINATION	8 August 2001

DETERMINATION OF THE AUTHORITY

Mr Whitson's Problem

In the statement of problem filed for Mr Whitson, the problem was described as:

> *"A personal grievance claim that Mr Whitson did not receive appropriate payments following his notification to the company that he was resigning and that he was unjustifiably dismissed following such notification."*

When I examined the statement of problem and the statement in reply, it became apparent that key facts were not in dispute.

(1) Mr Mike Whitson was employed by Sabre Corporation Ltd pursuant to an individual employment contract (now called an agreement).

(2) Concerning termination, the agreement provided that *"This [agreement] may be terminated by either party giving four weeks' notice. Wages in lieu of notice may be paid or forfeited as the case may be. However, in instances of serious misconduct, employment may be terminated without notice."*

(3) On 20 March 2001 Mr Whitson gave his manager (John Dooley) nine weeks' notice of his intention to resign.

(4) The Respondent was not accepting of this length of notice. There was some discussion between the parties (initiated by the Respondent) to see if agreement could be reached to curtail the proffered period of notice. No meeting of the minds was achieved.

(5) On 21 March 2001 the Respondent (via Mr Dooley) advised Mr Whitson that his employment was to cease that day and that he was to be paid four weeks' pay in lieu of notice of termination. Thus, Mr Whitson's employment came to an end at the initiative of the employer nine weeks' earlier than the date on which Mr Whitson had himself sought to end the employment relationship. And, instead of working the notice out as he was prepared to do, and being paid for nine weeks, he found his employment was immediately at end with four weeks' pay instead.

Remedies Sought By Mr Whitson

Via the statement of problem filed on his behalf, Mr Whitson said that he wished to have the problem resolved in the following way:

> *"An amount equal to five weeks' loss of salary for the period of the notice, which was not honoured by the company. Additional payments include allowances relating to the vehicle $1212 and cellphone $272.*
>
> *A reference on Company letterhead, noting that he resigned from the company of his own free will and the term of his employment. This is to be signed by Mr Dooley.*
>
> *Damages to the value of $12,000 pursuant to Section 123c(i) of the Employment Relations Act 2000.*
>
> *Costs to be determined."*

During the conference call, which was held to discuss scheduling of this matter, I pointed out to Mr Elder that the Employment Relations Authority has no statutory ability in a personal grievance setting to order a Respondent to supply a reference to an Applicant. Mr Elder, a labour relations person of long-standing, already knew that of course but presumably Mr Whitson did not.

When briefs of evidence were filed by both parties on 1 August, Mr Whitson amended his remedies to the following:

> *"1. An amount equal to five weeks loss of salary for the period of the notice which was not honoured by the company. This amounts to $5,300 gross. Additional payments include loss of vehicle privileges, i.e. $1212 and cellphone usage $272.*
>
> *2. Damages to the value of $12,000 pursuant to Section 123(c)(i) of the ER Act.*
>
> *3. A sum of $2,500 as the incentive payment he would have received had he stayed in the company, for achieving his monthly budget as noted in his Agreement of Employment.*
>
> *4. Costs of $2,500."*

At the investigation meeting, the cell phone claim ($272) and the incentive payment claim ($2,500) were withdrawn.

Can an employee give longer notice than is provided for in the Agreement?

The short answer to the above question is Yes.

In Auckland and Gisborne Amalgamated Society of Shop Employees and Related Trades (Other Than Auckland Butchers, Grocers And Chemists Employees) Industrial Union Of Workers v Bos Upholstery Limited [1985] ACJ 477 Finnigan J, dealing with a case which has many similarities to that with which I am now concerned, held that:

> *"The Court is of the view that what occurred was a dismissal. In our view the employee finished reluctantly on a day chosen by the employer. This in our view was a dismissal by the employer which forestalled the employee's announced desire to resign on 24 December, and the only reason which has been given to the Court in evidence for the imposition of an earlier date unilaterally by the employer was the fact that the employee had given notice of his intention to terminate his own employment. The fact was that the date did not meet the approval of the employer, and so the employer imposed its own date. In our view the worker was entitled to resign on 24 December, and he was entitled to give notice longer than seven days and there is no evidence of anything that justified the employer in unilaterally deciding that he would be sent away immediately.* (my emphasis)

Was Mr Whitson dismissed by Sabre Corporation Ltd?

The short answer to the above question is also Yes.

And the reason the answer is yes, is the same reason that the Court (see quotation above) found that the worker concerned had been dismissed in the Bos Upholstery case. That aside, the Respondent accepted at the investigation meeting that Mr Whitson had been dismissed by Sabre Corporation Ltd.

Where does that bring us to?

It means that we have reached the point which is usually reached at the beginning (or soon thereafter) in most personal grievance cases:

(i) The Respondent accepts that the Applicant was dismissed.

(ii) The Applicant has established a prima facie case of lack of justification.

(iii) The onus of justifying the dismissal has shifted to the Respondent.

Was this a summary dismissal?

The Applicant's representative says it was, the Respondent's representative says it wasn't.

It is common ground that Mr Whitson was required to go on 21 March and was paid in lieu of notice.

Mr Pollak says that the dismissal cannot be categorised as a summary dismissal because:

(i) The agreement provides the option of paying in lieu of notice;

and

(ii) Payment in lieu of notice was made to him.

Mr Elder says that the right to pay in lieu of notice and the fact that the notice was paid are not the determining factors. Mr Elder says that it was the employer's requirement that Mr Whitson finish up on the day of dismissal which makes the dismissal a summary dismissal.

In Wynn Schollum v Peter Andrew and Others, t/a Coastal Communications, unreported decision AEC 45/96 dated 12 August 1996, Colgan J says of the dismissal in that case that:

> *"On 23 May 1994 he was summarily dismissed in the sense that although paid three months' salary in lieu of notice of termination of his employment, this ended on the day that he was advised of the fact of it."* (my emphasis)

Which rather begs the question, doesn't it.

In Gibson v GFW Agri-Products Ltd [1994] 2 ERNZ 309, Goddard CJ held that:

> *"The making of a payment of wages in lieu of notice may not save the dismissal from being unjustifiable, but it does fix the date on which the contract will end in exactly the same way as would have happened if the employer had, instead of making the lump sum payment in lieu of notice, elected to give the notice and to pay the wages periodically upon their falling due. A dismissal is not summary merely because it is unceremonious. It is summary only when unaccompanied by any period of notice or payment in lieu of notice."* (my emphasis)

However, on appeal (see [1995] 2 ERNZ 323) the Court of Appeal said that:

> *"…we do not agree with the statement of the Chief Judge as a general proposition that a dismissal is summary only when unaccompanied by any payment in lieu of notice…"*

I think the appropriate thing with Mr Whitson's dismissal is to put myself in company with Judge Colgan and find that on 21 March 2001 Mr Whitson was summarily dismissed in the sense that although paid four weeks' salary in lieu of notice of termination of his employment, this ended on the day that he was advised of the fact of it.

Whether the dismissal can or cannot properly be categorised as summary, while of esoteric interest, is not really what is at issue in this case. It was abundantly clear to me that Mr Whitson was aggrieved that, having given his employer nine weeks' notice of resignation, his employer's response was to dismiss him on four weeks' notice instead. As I say, that much was abundantly clear to me. However, I also needed to understand where Mr Whitson stood on a related issue so I asked him, man to man as it were, whether it was of concern to him that he was paid notice rather than asked to work the notice.

Mr Whitson's response was that, while he for his part was quite prepared to work notice, being paid in lieu was not an issue in the case which he had brought to the Authority. That response was entirely appropriate given that the employment agreement between the parties provided the option of payment in lieu of notice. The issues which vex Mr Whitson, are that he was dismissed and (in particular) that the notice he had proffered of nine weeks, was more than halved by the Respondent to four weeks.

Was this dismissal justified?

Both representatives argued that the case Coca-Cola Amatil (NZ) Ltd v Kaczorowski [1998] 1 ERNZ 276 CA supported their position. Mr Pollak drew my attention to the fact that the Court of Appeal held that:

> *"If the employer in this case was dissatisfied with the length of the notice, it had its own rights and remedies to seek an earlier termination…"*

So what do I make of that? The answer to that rhetorical question is this:

(1) An employee is entitled to give longer notice than that stipulated in the agreement (see Bos Upholstery case).

(2) An employer, in receipt of longer notice, has the right to seek an earlier termination. That is what Sabre Corporation did. They initiated a negotiation with Mr Whitson to seek an earlier termination. But the parties were unable to reach an accord.

(3) Sabre Corporation then implemented a right which it has always had under the agreement. At its initiative, Sabre Corporation terminated the agreement by giving Mr Whitson four weeks' notice which (also a right) Sabre Corporation chose to pay in lieu.

(4) But at that stage Sabre Corporation ran into a right which was available to Mr Whitson under the agreement. That is the right available to him to challenge the justification for the dismissal via the personal grievance procedure.

(5) For the avoidance of doubt, what I am saying is that I do not accept that in the above quotation from the Coca-Cola case, the Court of Appeal is saying that a worker giving longer notice than the agreement calls for, is justifiable grounds for termination at the initiative of the employer.

When Mr Dooley received Mr Whitson's notice of resignation, he personally was immediately unaccepting of the period proposed. He indicated to Mr Whitson that his superiors on the West Island would likely be similarly unaccepting. He (Mr Dooley) phoned Australia. No, they didn't like the sound of nine weeks' notice. They referred to the agreement. It said four weeks. That's what it should be, said Australia. Mr Dooley was given some small negotiating room by Australia. He negotiated with Mr Whitson. The parameters of the parties in the negotiation are now irrelevant because no meeting of the minds occurred. Mr Dooley told me that the decision to dismiss on four weeks' notice (paid in lieu) was made not by him but by Australia. However, Mr Dooley told me that he agreed with the decision.

In his brief of evidence, Mr Whitson described how he was notified of the company's decision on the morning of 21 March:

> *"At approximately 9:30am Mr Whitson was in Leanne Goodchap's (Sabre's National Sales Manager, Salon Division) office, having a discussion with her when Mr Dooley walked in and closed the door.*
>
> *Mr Dooley said: 'This is going to make your day. Leanne, I would like you to hear this as well. I have just been speaking with Anton Starling (Sabre Chief Executive) and his wife, Susan, on their cellphone in Australia. Anton has said Mike can finish today, we*

> *will pay him four weeks and he can take us to court if he wants. I thought I had talked Vasco around, but Anton is now involved, and he has made this decision.' "*

I asked Mr Dooley whether that accurately described what happened. He said it did.

There seem to be three grounds advanced to justify the dismissal.

The first is that the agreement allows the employer to terminate the agreement by giving (or paying in lieu) four weeks' notice. Yes, that is a contractual right but not one which in itself will justify the resultant dismissal.

The next I take from Mr Dooley's brief of evidence. He said (brief 6):

> *"The reasons why I did not wish Mr Whitson to be working for nine weeks with us was because in my experience employees (and not particularly Mr Whitson) become generally unproductive while they are working out a notice period…"*

Well, that is a basis for deciding to pay a worker in lieu of notice rather than have the worker work the notice. It is not, however, a justifiable reason to dismiss a worker. If the company didn't want Mr Whitson on the job for nine weeks because they were apprehensive his performance might slacken off, they had the option of paying him the nine weeks in lieu. If that option was unacceptable to Sabre Corporation, they did not have the right to sack him then and there because of an apprehension or anticipation that his performance was about to go into decline.

It is not the law in this country that a worker can be sacked because his employer fears the worker's performance is about to deteriorate. Quite the reverse. First, performance has to actually fall off. Then and only then can an employer take steps to either bring about improvement or to take disciplinary action.

Thirdly, it seems that once Mr Whitson tendered his resignation, Mr Dooley made an immediate decision as to how he would cope when Mr Whitson was gone. In short, Mr Dooley decided he would not replace Mr Whitson, he (Mr Dooley) would himself take on most of Mr Whitson's duties.

What I do not accept (and I said this at the investigation meeting) is that Mr Whitson was thus dismissed by Sabre Corporation by reason of redundancy. That would indeed be to put the cart before the horse. There was no discussion with Mr Whitson on 20/21 March about redundancy.

In Michael Baguley v Coutts Cars Ltd, unreported decision of the Employment Court AC 25/01 dated 3 April 2001, the Employment Court held that:

> *"the jurisprudence developed under the Employment Contracts Act 1991 focused on the presence or absence of an obligation to consult as a term of the employment contract. Now that the spotlight is on the employment relationship, it is not necessary or permissible to speak in terms of consultation being mandatory in all cases or of never being required. Usually it will be. The Employment Relations Act 2000 strongly suggests so. It does so not only in the provisions already set out but in altered provisions governing the personal grievance remedy. So s.101, dealing with the object of Part 9 of the Act, highlights the importance of access to information and places it in a hierarchy different from and superior to adherence to rigid formal procedures."*

It is basic to the personal grievance jurisdiction that if an employee is to be dismissed, he must be told why. Mr Whitson was never told that he was facing redundancy. Nor was he told that he was being dismissed by reason of redundancy. It is entirely apparent in this case that the reason for the dismissal was because the Respondent was unaccepting of the duration of notice tendered to Sabre Corporation by Mr Whitson. That is what all the discussion was about on 20/21 March. Redundancy was never raised.

In Aoraki Corporation Ltd v Colin Keith McGavin [1998] 1 ERNZ 601, the Court of Appeal held that:

> "*A just employer, subject to the mutual obligations of confidence, trust and fair dealing, will implement the redundancy decisions in a fair and sensitive way.*" (my emphasis)

How can an employer implement a redundancy decision in a fair and sensitive way, if the employer does not even let on to the employee that he is in fact being made redundant?

Mr Whitson was not dismissed wholly or in part because he was redundant. If that had been the reason (wholly or in part) then for reasons which I have outlined above, such a redundancy dismissal implemented in the circumstances of Mr Whitson's dismissal would most certainly have been unjustifiable.

The reality is, that as with the Bos Upholstery case, Mr Whitson was entitled to give notice longer than four weeks and there is no evidence of anything that justified the employer in unilaterally deciding that he would be sent away immediately with payment of the minimum notice provision contained in the employment agreement.

Determination of the Authority in this case

The determination of the Authority is that the dismissal of Mike Whitson by Sabre Corporation Ltd was unjustified.

Remedies

Contribution

Mr Whitson cannot be said to have contributed to the situation which gave rise to his personal grievance. Remedies will not be reduced for contribution

Lost remuneration

The order of the Authority is that Sabre Corporation Ltd will pay Mr Mike Whitson five weeks' wages in reimbursement to him for wages lost by him as a result of the grievance. The sum involved is $5,300 gross.

Loss of benefit

The order of the Authority is that Sabre Corporation Ltd will pay Mr Mike Whitson $1,212 (without deduction) in respect to the loss of vehicle privileges experienced by him. It is common ground that Mr Whitson drove a company allocated car. It is also common ground that Mr Whitson, as part of his salary package, enjoyed private use of the company allocated car.

Compensation

Mr Whitson sought an award of $12,000 pursuant to section 123(c)(i) of the Employment Relations Act. With respect, that figure is entirely too ambitious given the circumstances of this case and taking into account awards which have been made in other cases by the Employment Court, the Employment Relations Authority and the Employment Tribunal.

The relationship between Mr Dooley and Mr Whitson was good and continues to be good. There was no personal "needle" between them on 20/21 March. While Mr Whitson was required to go on 21 March, I have in part addressed that fact under an earlier heading and I add here that it is common ground that there was no element of being stood over, frog-marched out and any similar aggravation which the Court, the Authority, and the Tribunal have discovered in other cases.

Mr Whitson is said to have been angry and frustrated by what occurred. No doubt that is so, but none of that requires other than a very modest award of compensation.

The order of the Authority is that Sabre Corporation Ltd shall pay Mr Mike Whitson $2,000 (without deduction) as compensation. This payment ordered pursuant to section 123(c)(i) of the Employment Relations Act 2000.

Costs

I ask Mr Elder to confer with Mr Pollak so as hopefully to resolve this matter as between the parties. If they are unable to bring it off I shall be sad but will then resolve the matter for them. If that is what it comes to, I make the following schedule available.

Mr Elder shall have 21 days from the date of this determination in which to file cost submissions with the Authority. I ask him to send a copy to Mr Pollak at that time.

Mr Pollak shall then have 14 days in which to file response submissions. I ask him to send a copy to Mr Elder at that time.

W R C Gardiner
Member
The Employment Relations Authority