

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 75
5427709

BETWEEN CAMPBELL WINTER
 Applicant

AND SANDRA and JOHN HANSEN t/a
 THE GAS CENTRE, HASTINGS
 Respondent

Member of Authority: P R Stapp

Representatives: Doug Abraham, Advocate for the Applicant
 Sandra and John Hansen in person

Investigation Meeting: 12 June 2014 at Napier

Submissions Received: 12 June 2014 at investigation meeting

Determination: 16 July 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is an employment relationship problem about a redundancy. Mr Campbell Winter (Mr Winter) is claiming that he was unjustifiably dismissed from his employment as a plumber/gas fitter on 24 June 2013. He is seeking lost wages and holiday pay on the amount, the balance of his notice required under his employment agreement in the sum of \$960, compensation for hurt and humiliation in the sum of \$15,000 and costs (including the filing fee of \$71.56).

[2] The claims have been denied by Mr and Mrs Hansen.

The issues

[3] There are five primary issues, as follows:

(a) How did Mr Winter's employment end?

- (b) Did Mr Winter reasonably understand that he was being dismissed on 24 June 2013?
- (c) Did Mr and Mrs Hansen reasonably understand that Mr Winter decided to accept their proposal for redundancy and the disestablishment of his position? Was it open to a fair and reasonable employer to do this?
- (d) If there is redundancy, was it genuine and justified? Was there a proper procedure followed?
- (e) Has Mr Winter been correctly paid wages and holiday pay?

The facts

[4] Mr and Mrs Hansen trade as the Gas Centre based in Hastings. Their business involves a retail outlet and installations. Mr Winter was employed to carry out extra work for Mr Hansen on the installation work side of the business. Mr Hansen also was responsible to the payment of Mr Winter's wages and the company tax and bills. Mrs Hansen looks after the retail outlet.

[5] On Monday 24 June 2013 Mr Winter was unable to work because his car had been broken into when he was in Auckland completing exams. He had been on leave for four days attending to his exams. He was supposed to have five days leave, but on the Monday Mr Hansen required him to work because they were busy. On 23 June Mr Winter was asked by Mr Hansen to meet with him on 24 June that he described to Mr Winter as a meeting where he had good and bad things to say. The arrangement involved telephone calls between Mr Hansen and Mr Winter and Mr Gary Winter (Mr Winter's father). Mr Hansen refused to tell the Winters the details of the reasons for the meeting. Instead, the Winters concluded that there was nothing wrong and/or amiss, and at the least that there was no redundancy issue on the horizon. This is despite Mr Winter's father informing Mr Hansen that Mr Winter had been involved in three previous redundancies elsewhere and that Mr Winter was upset at the time of those redundancies and that he was worried it would be repeating itself again. Despite this Mr Hansen refused to provide any information to Mr Winter's father; because Mr Hansen says it was confidential to Mr Winter, even although Mr Winter's father informed Mr Hansen he was supporting his son and acting as his support person come representative. Mr Hansen did say that there were good things and some bad things to

discuss, without providing any more detail. The Winters concluded that the meeting would cover performance matters and have nothing to do with redundancy.

[6] At the meeting on 24 June the Hansens took along a friend who is a consultant (health and safety consultant) that they had received from. The Winters did not know there would be someone else present and I accept that they were surprised by the person being at the meeting. Mr Winter was handed a letter dated 24 June 2013 at the meeting that outlined a proposal for redundancy and the disestablishment of his position. This letter was prepared with the assistance of Mr and Mrs Hansen's friend, the consultant. The friend seems to have done a lot of the talking at the meeting, along with Mr Winter's father on behalf of his son. Each of the parties reached their own different conclusions on the outcome of the meeting. The meeting was difficult but nothing untoward seems to have occurred between the participants.

[7] Mr Winter formed the view that a decision had been made to dismiss him based on the proposal that he was provided with in regard to the disestablishment of his position. He believes that he was "sacked on 24 June". Mr and Mrs Hansen and their consultant friend say that as an outcome of the meeting the Winters had an opportunity to provide their comments and input on the proposal before any decision was made and that the parties would meet again on Friday 28 June. The consultant confirmed that her understanding also was that this was - (a) a consultation meeting; and (b) an opportunity for Mr Winter to respond before a decision was made later in the week. This is despite the letter saying the decision had been made to disestablish the position and this is the basis upon which Mr Winter believed he had been dismissed.

[8] On Tuesday 26 June 2013 Mr Winter telephoned Mr Hansen (twice) and asked for his tools for work he wanted to do at home. Mr Winter adamantly denies that he asked Mr Hansen for a certificate of service/reference at the same time. There were no other witnesses to this. Mr Hansen says that on the basis of Mr Winter asking for his tools and a certificate of service he came to the conclusion that Mr Winter had decided to accept the situation in regard to the disestablishment of his position because of redundancy. He says that he is supported in this conclusion when he learnt that Mr Winter was looking for other work.

[9] There were no arrangements agreed as to how and where Mr Winter could retrieve his tools. Instead, he arrived at the Hansens' home and found that his tools

had been left in the middle of the driveway under the cover of a tarpaulin. He proved this at the Authority's investigation meeting by producing his own photos taken at the time on his cell phone. On top of the tarpaulin was an envelope with a certificate of service inside. There was also a yellow sticky label wishing Mr Winter all the best for the future. Mr Winter telephoned his mother as he was upset about what he found.

[10] The Winters decided to attend the meeting that had been arranged for Friday 28 June. At that meeting Mr Winter was given two cheques for his final pay that had been pre-prepared because Mr Hansen believed that Mr Winter had accepted the situation. There was no discussion in regard to any consultation on the proposal to disestablish the position for redundancy. There was no discussion about any notice and no discussion about any redundancy pay. Mr Hansen made his own decisions about these.

[11] The parties attended mediation and it now falls to the Authority to make a determination.

Determination

[12] There was a dismissal and it was caused at the employer's initiative. The dismissal actually occurred on 26 June when the employer decided wrongly that Mr Winter had decided to accept redundancy, and failed subsequently to complete the consultation process. It was Mr Hansen's own misfortune that he decided to believe that Mr Winter had decided to accept the situation, when Mr Winter had not done so, although he believed, based on Mr Hansen's letter, that his job had been disestablished. Mr Winter was entitled to look for other work during his employment, since the employer had decided to restructure and there could be an impact on Mr Winter's position. The impact of the risk was clearly conveyed in Mr Hansen's letter. Also, Mr Winter was entitled to ask for his tools to enable him to do some work from home. On both of these factors Mr Hansen could not have reasonably believed that Mr Winter had accepted the situation. Mr Hansen had a process he had set to follow and needed to keep to it and remain steadfastly focussed, but instead his wrong belief about what Mr Winter was doing, affected the process. I hold that Mr Hansen formed the wrong impression that Mr Winter accepted the situation from these matters. Indeed it was Mr Hansen's decision to send Mr Winter home for the week when he did not have to as it was a redundancy situation. In deciding to send Mr Winter home for the rest of the week Mr Hansen heightened Mr Winter's concerns about his job to

the extent that he considered he had been dismissed. It was likely that nothing would have changed Mr Hansen's view anyway given the letter, sending Mr Winter home and how the tools were left to be collected.

[13] On the matter of redundancy the respondent has just been able to justify it on the basis that the quotes from the home show were not followed up with new work. During the Authority's investigation meeting Mr Hansen explained that during a home show he gave out a number of quotes for work that later did not eventuate as actual work. Without the work coming to fruition he did not have extra work for Mr Winter and he could carry out the work in hand by himself. I accept that at least Mr Hansen would have a working knowledge of the financials and availability of work in his own business without having the financial accounts and details at hand at the time. Also, this is a small employer with one employee doing the extra work and where the business is almost entirely run by the owners alone. In such circumstances I accept that the employer did enough to raise its concerns about the business with Mr Winter based on the Hansens' own knowledge of what was happening with their business. I accept that the letter handed to Mr Winter was enough to put Mr Winter on notice of the employer's proposal to restructure and disestablish the role and for Mr Winter to comment on it. Mr Winter was entitled to believe that a decision had been made, but that does not mean that he was correct in his conclusion. The letter was a proposal and Mr Winter had been given time to reply and respond to the proposal with his own ideas. This conclusion is supported by the involvement of the consultant friend and a date for another meeting being fixed. Mr Hansen had a closed mind as to the conclusion on what Mr Winter thought the outcome would be. Mr Winter correctly returned for the final meeting with his father, but was unfairly treated when Mr Hansen decided wrongly not to proceed with the consultation that was required, despite Mr Winter wrongly thinking he had been dismissed and Mr Hansen thinking wrongly that Mr Winter had decided to accept the situation.

[14] Furthermore Mr Hansen made a decision without any input from Mr Winter on paying two weeks redundancy pay. There was no provision for this in the parties' employment agreement. On first sight it may seem to be a modest payment in the absence of such a provision, but Mr Hansen neglected to check the notice provision which was for three weeks' pay. Thus, there is a balance due for the notice that was not applied correctly and in breach of the terms of the employment agreement. Mr Winter is entitled to the extra week of notice not paid.

[15] Mr Winter has a personal grievance and is entitled to remedies, except that as I have found there was a genuine redundancy there cannot be any lost wages because the outcome of losing his employment would not have changed. This distinguishes this matter from other cases involving redundancy where there was not a genuine redundancy because the employer could not prove it and had to pay lost wages for such a personal grievance. Mr Winter's hourly rate of pay was \$20 per hour. He was required to work 40 hours per week. He is entitled to an extra week's notice plus holiday pay on the notice. The amount owing is \$864. He has claimed compensation for hurt and humiliation. As I pointed out he cannot claim compensation for redundancy, but can claim for the employer's failure in the process as it impacted on him. Mr Hansen's mistakes, omissions and manner in dealing with the situation have exacerbated and aggravated Mr Winter's hurt feelings. Mr Winter's evidence was supported by his mother and father. I set the sum of compensation at \$5,000 for hurt and humiliation.

[16] As to contribution there is only Mr Winter's action of reaching a wrong decision that he thought he had been dismissed on 24 June when he was given the restructuring and redundancy letter. This was a wrong conclusion, and while he was entitled to ask for his tools and had the right to look for other work in anticipation of an adverse outcome, he should have kept his mind open also, even if the outcome might not have been any different. Given that he did attend the meeting on 28 June to hear Mr Hansen's explanation and it was a difficult meeting, because Mr Hansen thought that Mr Winter had agreed to leave and the consultation did not happen, I find Mr Winter has not contributed to the situation, as the employer is in charge of its own process.

[17] There were claims for wage arrears and holiday pay in the statement of problem, but these were clarified and put to one side during the investigation meeting. The explanation on the pay seems to have been accepted by Mr Winter. Leave is available for the parties to return to the Authority if it is necessary.

[18] Sandra and John Hansen are required to pay Campbell Winter the following

- a. \$864 wages and holiday pay; and
- b. \$5,000 compensation.

Costs

[19] Costs are reserved.

P R Stapp
Member of the Authority