IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 62/07
5047694

	BETWEEN	MALCOLM WOOD Applicant
	AND	CARDINAL FREIGHT DISTRIBUTION LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	David Caldwell and Amy Shakespeare, Counsel for the Applicant Anthony Gorton, Advocate for the Respondent
Investigation Meeting:	Christchurch, 22 March 2007 and 20 April 2007
Determination:	14 June 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Wood) alleges that his dismissal for redundancy was an unjustified dismissal and the respondent, Cardinal Freight Distribution Limited (Cardinal) says that the dismissal was a genuine redundancy, that it was effected in a procedurally fair manner and that in any event, Mr Wood cannot raise a personal grievance in relation to his allegedly unjustified dismissal because he is out of time.

[2] Mr Wood was employed by Cardinal in June 2005 as a salesperson with a business development focus. Mr Wood had a background in logistics management and distribution and Cardinal saw an opportunity for Mr Wood to develop its business, particularly in respect of the leasing of space in a large warehouse which Cardinal operated in Christchurch.

[3] Neither party could produce a signed individual employment agreement covering the employment relationship. Mr Wood said that he had asked for one but it

had never been provided and Cardinal put into evidence an unsigned copy of an agreement which it said applied to Mr Wood's employment.

[4] On 9 February 2006, Mr Wood attended a meeting with Cardinal's managing director, Mr Gorton, at which Mr Gorton indicated to Mr Wood that Cardinal no longer needed Mr Wood's position. Mr Wood was offered an alternative position, the details of which are in dispute between the parties, and he was offered the opportunity of considering that alternative position and reverting to Cardinal about it.

[5] Mr Wood met with his wife to discuss the alternative position, returned to meet with Cardinal's Mr Gorton the same afternoon and indicated that he was not interested in the alternative position.

[6] A letter was produced by Mr Gorton from Cardinal indicating to Mr Wood that his redundancy would be effective immediately although a period of notice down to 2 March 2006 was to be paid for.

[7] Mr Wood sought alternative employment immediately but in the result was unemployed from 9 February 2006 down to August 2006. In addition, Mr Wood was forced to accept employment in Australia because he was unable to obtain suitable employment in New Zealand.

[8] Mr Wood raised his personal grievance with Cardinal by letter dated 16 May 2006 having found evidence which he considered called into question the genuineness of the original redundancy.

[9] Cardinal says that the raising of the grievance falls outside the time allowed by the statute in that time should run for 90 days from 9 February 2006 being the date that Mr Wood was made redundant. Mr Wood says that time should run from the date that he became aware of evidence which would suggest that his redundancy was not, in fact, genuine and that in any event, time ought to run not from the date at which the redundancy was declared but from the date at which the employment relationship actually ended.

Issues

[10] The first issue that falls for determination is the question whether Cardinal is right to allege that Mr Wood has not raised his personal grievance within time.

[11] Next, assuming that I find that the personal grievance has been raised within time, I need to consider whether the complaint made by Mr Wood in his personal grievance has been made out. In particular, I need to determine whether the redundancy has been effected in accordance with the law.

Meeting the 90 day rule

[12] Mr Wood was notified of his redundancy on 9 February 2006 and he ceased actual work on that day by direction of Cardinal. However, the letter confirming the redundancy of even date clearly sets out that a period of paid notice will apply. The penultimate paragraph commences with this sentence: *You will receive redundancy notice of three weeks at normal pay rates*. The effect of that provision would be to take the notice period and thus the employment relationship down to 2 March 2006.

[13] Mr Wood raised his personal grievance by letter dated 16 May 2006. In the factual matrix that applies here, I am satisfied that the operative date from which time is to run is the date at which the employment relationship ended. i.e. 2 March 2006 rather than 9 February 2006. It follows that the grievance was raised within the 90 days.

[14] However, in the alternative the question is when time runs from and in the particular circumstances of this case, it is clear on Mr Wood's own evidence, which was unchallenged at the investigation meeting that, at the point at which he was made redundant, he had no intention of challenging the dismissal. It was only when he discovered evidence which he considered raised the prospect that the redundancy was not a genuine one that he sought to bring the matter into contention.

[15] On this alternative basis, I consider that the time runs from the date on which Mr Wood first became aware of the nature of the evidence for which he now relies to ground his claim that the redundancy was not in fact a genuine one. On the evidence available, it would seem that that date is probably 10 May 2006 which, on Mr Wood's

evidence, is the day that he discovered an advertisement for a position which appeared to be an advertisement for his own position.

[16] I mention for the sake of completeness that, on the evidence, it was not clear that the advertisement Mr Wood saw was indeed from Cardinal; the point is, the advertisement put the doubt in Mr Wood's mind that his redundancy may not have been genuine.

[17] In the alternative then I am satisfied that time on the 90 days could run from 10 May 2006, the likely date on which Mr Wood became aware for the first time of the possibility that the redundancy was not, in truth, a genuine one.

[18] It follows that I am not persuaded that Cardinal has made out its claim that the raising of the grievance is out of time, on either basis.

Was the dismissal unjustified?

[19] I am satisfied on the balance of probabilities that the dismissal was indeed unjustified. It is plain that the process followed by Cardinal did not comply with the law. In particular, in terms of s 4(1A) and s 4(4)(e) of the Employment Relations Act 2000 there is no evidence whatever of any *consultation* in respect of the proposed redundancy nor could the wider process be properly construed as the actions of a fair and reasonable employer: s 103A Employment Relations Act *Simpsons Farms Ltd v Aberhart (unreported) ARC 13/06* applied. The factual position is that Mr Wood was summoned to a meeting, which admittedly he was given seven days' notice of, but he was not told that the meeting might result in the termination of his employment. Without that notification, it was impossible for Mr Wood to make proper plans including taking appropriate advice. When Mr Wood presented at the 9 February 2006 meeting, he was told without any consultation that his position had been disestablished and he was offered an alternative position to consider.

[20] It was clear from the evidence for Cardinal that it had been planning the disestablishment of Mr Wood's position for some two months prior to the 9 February 2006 meeting. That being the position, there was ample opportunity for Cardinal to provide Mr Wood with a genuine opportunity to be involved, in a meaningful way, in the process of the restructure.

[21] That did not happen and Mr Wood was simply presented with a fait accompli which he had no genuine opportunity to respond to. There was no … *genuine effort to accommodate the views of the employee* or *to at least seek consensus*: cited with approval in the *Simpsons Farms Ltd* case.

[22] I am not satisfied that the conflict in the evidence about the genuineness or otherwise of the redundancy can be adequately resolved nor do I think it necessary to do so. I am satisfied to rest my decision squarely on the footing that the process adopted by Cardinal in making Mr Wood's position surplus to its requirements and terminating his employment as a consequence, was so flawed as to be unsafe and accordingly I determine that Mr Wood has a personal grievance on the grounds of an unjustified dismissal.

Determination

[23] Having reached the finding that Mr Wood has a personal grievance by reason of having sustained an unjustified dismissal, I need now to consider the question of whether Mr Wood has contributed in any meaningful way in finding himself in that position: s 124, Employment Relations Act applied.

[24] Because of Cardinal's serious procedural shortcomings I am satisfied that Mr Wood made no contribution whatever to the loss of his position. During the course of the investigation meeting, Cardinal sought to raise questions about Mr Wood's competence and the quality of his performance in his role. While that line of argument did tend to add weight to Mr Wood's view that he was not dismissed for genuine redundancy reasons at all, it certainly added nothing to the issue of whether Mr Wood contributed to his own misfortunes. Mr Wood was dismissed for redundancy and not for any alleged performance deficits. The complete failure to consult means there can be no possible basis for a finding of contribution.

[25] The effect of the dismissal on Mr Wood was grave indeed. He gave graphic evidence of the impact on his family and in particular his wife who did not enjoy good health and who suffered further stress and ill health as a consequence of Mr Wood being made redundant.

[26] That familial distress was exacerbated by Mr Wood's difficulty in obtaining alternative employment. He gave evidence, which was not challenged, that he applied for 33 positions after being dismissed by Cardinal. In the result, he was only able to obtain a position offshore and he now works in Brisbane. A consequence of that change in his physical location is that he is separated from many of his family members who remain in Christchurch.

[27] Allowing for the fact that he was effectively paid for almost a month after he was dismissed from his position by Cardinal, he was out of work for six months.

[28] It may be that one of the reasons that Mr Wood was unable to obtain employment is a reference given in respect of Mr Wood by his immediate manager at Cardinal, Mr Walker. This was a situation where a recruiting agency had contacted Mr Wood's immediate manager by telephone and sought his verbal response to various standard questions and then recorded the answers.

[29] Mr Walker, when he gave his evidence to the Authority, indicated that he thought that the telephone discussion that he had with the personnel consultant was confidential and that he gave his answers on that basis. He was plainly embarrassed that Mr Wood had obtained a copy of the document from the personnel consultant and had put that document into evidence.

[30] Mr Walker might well have been embarrassed by the production of the document in question. It reflects no credit on him. It seems rather to pursue a personal vendetta and on the face of it is neither balanced nor fair and certainly was never put to Mr Wood by Cardinal before or after Mr Wood was made redundant.

[31] If, as seems at least possible, this view of Mr Wood was being actively circulated in the marketplace in which he was endeavouring to obtain fresh employment, then it is little wonder that he applied for 33 positions and was unsuccessful in all of those applications, notwithstanding that he had 20 years' relevant experience in the industry. That such a *reference* should be circulated on behalf of Cardinal to even one personnel consultant is a disgraceful lapse of the good employer principle which must inform all employment relationships. Given that the *reference* was advanced by a Cardinal manager and in the course of that manager's duties, I must take that document into account in assessing the measure of compensation to which Mr Wood is entitled.

[32] The final issue that I need to consider is the question whether a penalty should apply given the apparent failure to provide a written employment agreement. On the face of it, s 135(5) of the Employment Relations Act applies and so this claim is statute barred. Even if that were not the legal position, I would not be disposed to award a penalty; the evidence on whether there was or was not an employment agreement provided is equivocal although plainly neither party could provide the Authority with a signed employment agreement. I am satisfied that the employer's deficits can be properly dealt with by a single award of compensation.

[33] Having considered the nature of the hurt that has been done to Mr Wood by the unsatisfactory nature of the process that the employer has used in declaring Mr Wood surplus to its requirements, and by further considering the subsequent actions of Mr Walker, acting on behalf of Cardinal in providing to the personnel consultant a so-called reference which in effect constitutes a low personal attack on Mr Wood without any ability for Mr Wood to respond, I am disposed to award a more than usually significant quantum of compensation.

[34] Cardinal is directed to pay to Mr Wood the sum of $14,000 as compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.

[35] On the matter of Mr Wood's arrears of wages, I am satisfied this is a proper case for making an award for the total amount that Mr Wood has lost by way of unpaid wages for the six month period from March through to August. Mr Wood says that he lost $26,442.30 in that period. I award Mr Wood the sum of $26,442.30 gross in lost salary.

Costs

[36] Costs are reserved.

James Crichton
Member of Employment Relations Authority