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Determination Number: AA 1/00
File Number: AEA 1/00

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Michael Baguley, Applicant

AND Coutts Cars Limited, Respondent

DETERMINATION OF THE AUTHORITY

Steps taken in reaching this Determination

The Employment Relations Authority was established on 2 October 2000 when the Employment Relations Act 2000 came into force. As this is one of the first cases to be dealt with under the new Act, so that others besides the parties who have any interest in the Authority may be better informed as to how it will operate, briefly set out below are the steps taken from the commencement of this case to its conclusion.

Statement of problem

On Wednesday 4 October 2000 a formal request was received from Mr Michael Baguley, an employee, to resolve an employment relationship problem of his. He made this request by completing and lodging with the Authority an application in the form (Form 1) contained in the Employment Relations Authority Regulations 2000. In the application papers Mr Baguley's problem was described (by his representative) as follows:

The applicant has been dismissed from his position with the respondent [Coutts Cars Ltd]. He believes that the dismissal has been unjustified.

In particular, the following complaint was made;

...his dismissal has been predetermined andhis dismissal has been based on criteria the applicant has not been advised of or been able to reply to.

In his application Mr Baguley stated the way he wanted his problem resolved. He said he wished to remain in his job and that he was therefore applying for interim reinstatement. It was clear from the application that at the time of its lodgement Mr Baguley had not ceased working for his employer, Coutts Cars Ltd, but had been given four weeks written notice of termination. Redundancy was put forward as the reason. By letter of 3 October 2000 the employer had required Mr Baguley to work out the notice period which was expressed to



expire on 31 October 2000. Further in his application, Mr Baguley said he wanted to know what criteria his employer had used to select him for redundancy. He also sought compensation of an unspecified amount for his dismissal.

Mediation

Under s.159 of the Employment Relations Act 2000, where any problem comes before the Authority it must consider whether an attempt has been made to resolve the matter by mediation. If there has been no mediation at all, or even if there has been but further mediation may be productive, the Authority must direct that such mediation or further mediation be used before any investigation takes place. There are limited circumstances in which a direction to mediation need not be given and these are set out in s.159.

Preliminary Conferencing

In observing the duty of the Authority under s.159, after lodgement of the problem I requested the representatives of Mr Baguley and Coutts Cars Ltd to take part in a telephone conference. The purpose of this was to consider what directions, if any, should be made to require the parties to undertake mediation, and to generally discuss and prepare for an investigation meeting. As it happened directions were not required because the parties had arranged voluntarily to undertake mediation. The Mediation Service of the Department of Labour had offered to provide this on Wednesday 18 October.

As Mr Baguley was to remain employed until 31 October there was no immediate need to consider the interim reinstatement application, at least not until after the result of the mediation was known.

On Wednesday 18 October the Authority was advised by Mr Baguley's representative that the mediation undertaken by them earlier that day had not successfully resolved the employment relationship problem.

A further telephone conference was then arranged with Ms Ryan, the representative of Mr Baguley, and Mr Meyland, the representative of Coutts Cars Ltd. This took place on the afternoon of Wednesday 18 October. The purpose of the conference was to discuss the procedure to be followed at meeting to be held in the future where the employment relationship problem would be investigated by the Authority. Also for discussion were preliminary matters such as disclosure of relevant documents, and any other step that either of the parties or the Authority might consider should be taken. Another purpose of the directions conference was to settle the date, time, and place for the investigation meeting. Friday 27 October was fixed as the date for this.

Once it was established that the Authority was able to investigate Mr Baguley's problem before his dismissal became effective, the need to consider the interim reinstatement application disappeared.

The approach of the Authority was and is to endeavour to get the parties agreement on such preliminary matters, but if that is not possible then the Authority will consider giving specific directions. Under the Act, at s.221, the Authority is able to give such directions as are

necessary or expedient in the circumstances, especially if this will enable the Authority to more effectually dispose of any matter before it.

It was also a purpose of the preliminary or pre-investigation conference to outline the procedure that would be followed in conducting the investigation meeting. I advised the parties that the investigation would commence by obtaining information from Mr Paul Trenberth, the General Manager of Coutts Cars Ltd and the person who had advised Mr Baguley of his termination. He was apparently the decision maker in this regard and was therefore best placed to explain how he had made the decision and also how the employer had implemented it. After Mr Trenberth, I anticipated that information would be obtained from Mr Baguley.

I advised that the procedure at the investigation meeting would not require either party to present an "opening". Mr Trenberth, who I advised would have his information taken in the form of sworn or affirmed evidence, could commence by reading a prepared written statement, or alternatively he could make an oral statement. He could add to the statement or alter any part of it if he saw a need, and his representative could assist with further questioning to see that the presentation of his statement was clear and complete. I advised that I would ask Mr Trenberth questions about his statement or about any matter I considered to be relevant to the investigation. There would be no "cross-examination" of Mr Trenberth by Mr Baguley or his representative, although I would consider any lines of enquiry proposed by Mr Baguley or his representative for me to follow in that regard.

The same procedure, I advised, would be applied to all persons giving information to the Authority. I also advised that "closing submissions" would not be required but that the representatives of the parties could make points about the information obtained and of course refer me to any legal principles that might apply.

It was emphasised to the parties that an investigation before the Authority is clearly not intended by the Act to be the same as the process of trial by adjudication in the Employment Tribunal.

Statement in reply

As required by the Regulations, Coutts Cars Ltd lodged a statement in reply (in Form 2) to the problem expressed by Mr Baguley. The reply was given within the time allowed of 14 days. In summary, the company asserted that the termination of Mr Baguley was a consequence of a genuine redundancy and that his selection had been achieved by the application of a fair process. In the circumstances the dismissal was justified, the employer claimed.

Request for adjournment

On Thursday 26 October, the day before the investigation meeting was to be held, a further telephone conference took place. This was for the purpose of considering an application for adjournment of the investigation meeting made on behalf of the respondent. A new representative advised that he had very recently been asked to act for Coutts Cars Ltd and he put forward various reasons in support of his application for an adjournment of about one

weeks duration. Among his reasons were his unavailability, because of other commitments, to attend the investigation meeting on 27 October.

The new representative should not have accepted instructions to act if he was unable to represent the respondent on a date already agreed to by the previous representative, a date which was barely a day away. Parties before the Authority will need to avoid selecting as representatives busy professional people whose commitments may be such as to prevent them from being available in the Authority at reasonable times for meetings. As far as possible meeting dates and times will be set as a balancing exercise according to the needs of the parties, the nature of their cases and the need for efficiency in the operations of the Authority. To be able to represent properly, representatives will need to be able to meet tight schedules, as speedy justice is a statutory objective the Authority is required to meet.

The application for adjournment was declined by the Authority.

Investigation Meeting

Members of the general public should be entitled to observe the administration of justice unless there is good reason to exclude them from doing that. No good reason was raised in this case by either party and the meeting of 27 October was therefore held in public.

At the meeting the procedure that I had previously outlined to the parties and their representatives was followed. The Authority began by obtaining information from Mr Trenberth. Following him were Mr Fulton and Mr Harvey, also of the respondent's management, and then Ms Ryan and Mr Baguley. All except Mr Fulton and Mr Harvey, whose evidence was quite short, presented a written statement and it was helpful to the Authority to receive information in this form. Each witness was sworn or affirmed before giving information. Several documents were presented as well.

Practice note

Shortly the Authority will publish and circulate widely a note outlining the steps parties can expect will generally be taken from the time proceedings in the Authority are commenced until they are determined. In this case the steps to be set out in the note were followed, although with some minor but necessary variations to suit the particular circumstances.

Determination

Having considered the employment relationship problem raised by Mr Baguley, the reply of Coutts Cars Ltd to it, and the information obtained during the investigation of 27 October, I am now in a position to make a determination of this case. In doing so I am guided by s.174 of the Act as to the content of determinations generally. For the purpose of delivering speedy, informal, and practical justice to the parties, in determinations of the Authority there are certain matters which must be addressed and there are other matters which need not be.

The required coverage is made clear in s.174 and the more detailed account given up to this point in this particular determination is unlikely to be a usual feature. As previously explained, it has only been given because this is an early decision of the Authority and some

description of the process may assist those having any interest in the way this institution will operate. Otherwise there is nothing about this particular case requiring any analysis or elaboration beyond the standards set by the Act.

Findings of Fact

The relevant facts of this case I find are as follows:

- 1) Mr Baguley was an employee of Coutts Cars Ltd. He was given four weeks notice of termination by his employer. The termination was expressed to be... *due to redundancy.*
- 2) As well as using its own team of four groomers, which Mr Baguley was part of, the employer had for some time been contracting with another firm to have this work done. There were cost savings to be made because this method provided more flexibility – the contracting firm could be engaged as and when shipments of vehicles arrived and the vehicles could be handled faster than the in-house grooming team could often manage. Peaks and troughs in the demand for grooming could be better levelled through contracting some of this work out.
- 3) The respondent's management, principally Mr Trenberth, made a decision to reduce the number of grooming positions from four to two. Mr Trenberth took into account a report from the company accountant as to the cost effectiveness of this reduction.
- 4) Mr Baguley was not consulted before a decision to reduce staff was made.
- 5) The employer obtained specialist advice (from the Auckland Employers and Manufacturers Association) about the implementation of redundancy generally and in particular about the method of selecting the employees who would be affected by redundancy.
- 6) Three of the groomers including Mr Baguley were informed of the possibility of job reduction and they were advised that further discussion would take place.
- 7) The employer obtained assessment forms from its advisors to enable it to evaluate each groomer and provide a basis for selection for redundancy. The forms provided several heads of assessment, such as quality and quantity of work, job knowledge, initiative, communication, adaptability and co-operation, attendance and qualifications. There was also space for general comment to be made by the assessor.
- 8) Mr Fulton, company sales manager, and Mr Trenberth the general manager, independently of each other filled in an assessment form for each groomer. Later the two managers compared and discussed their evaluations. They identified two employees who were to be consulted further about the possibility of redundancy, one of these being Mr Baguley. He was asked to meet with Mr Trenberth and

was told that the meeting would be about the future of his job. He was informed that he could have a support person with him at the meeting.

- 9) A meeting duly took place between Mr Trenberth and Mr Baguley and his representative, Ms Ryan. This was on 29 September 2000. Mr Harvey, another senior manager, was also present to take minutes.
- 10) At the meeting it was announced by Mr Trenberth that the number of groomers was to be reduced to two positions and that a selection process had been used to determine which two were to stay, although no decision had at that time been made. A request by Ms Ryan to be told the selection criteria used was rejected by Mr Trenberth. He maintained that the criteria were confidential and that the employer was entitled to exercise a management prerogative in deciding which positions were surplus. This became a defining issue and generated some heat between Ms Ryan and Mr Trenberth, with the latter remaining firmly opposed to providing the information sought.
- 11) The employer at this meeting of 29 September sought Mr Baguley's views and advice about the proposed redundancy and the need for it. In response Mr Baguley gave a number of reasons why he should be retained in his position.
- 12) Following this meeting Mr Trenberth made the decision that Mr Baguley and another groomer were redundant. Notice of this was given in writing to Mr Baguley on 3 October.
- 13) Mr Baguley wishes to remain employed at Coutts Cars despite his termination leaving him feeling aggrieved. Reinstatement of Mr Baguley would cause some disruption to the employer's operations because there is no grooming work for him and there is no other comparable work or position available within the company.
- 14) The two employees that were retained under this selection process had longer periods of service than Mr Baguley.
- 15) The predominant, if not sole, motive of the employer in dismissing Mr Baguley was to reduce cost and achieve greater efficiency in its operations. The decision to reduce staff by two was taken for commercial reasons and was not based on personal considerations to do with either the performance or the conduct of Mr Baguley. There had been no performance or conduct issues previously identified with him.
- 16) The selection of the redundant employees was carried out by an objectively fair method. The use of differing selection criteria was capable of ranking employees according to skills, knowledge and other attributes relevant to the positions under consideration.
- 17) The selection criteria (which I have found in themselves were fair), were also applied fairly to Mr Baguley. Differences in ratings given between Mr Fulton

and Mr Trenberth were only to be expected and the variations are not so great as to raise a question of the objectivity of either assessor.

Findings on relevant issues of law

An issue of law raised in this case was the extent to which established leading cases in the area of redundancy dismissals, cases such as *Aoraki Corporation Ltd v McGavin* [1998] 1 ERNZ 601 and *Thwaites v NZ Fasteners Stainless Ltd*, unreported, 17 May 2000, CA 10/99, must be revisited under the new law of the Employment Relations Act 2000. In particular, there is an issue whether the good faith thread which runs throughout the new legislation would lead to a different outcome in the same factual circumstances the Court of Appeal had before it in these cases. Here there are two points to be made. First, any major review of leading case law must ultimately be carried out by the Court of Appeal itself when a suitable case comes before it. But second, requirements of good faith under the Act that apply in relation to the operation of employment contracts, rather than to the bargaining for terms of employment or to the entry into new employment, were already long and well established in law before the new laws were passed. In this regard the current statutory rights and obligations were previously provided by operation of the term implied into every contract of employment for fair dealing between employer and employee. Reciprocal duties of trust and confidence between employer and employee, also bolstered good faith. The requirement of mutual trust and confidence has long been a necessary component of the employment relationship. This much is clear even from *Aoraki* and *Thwaites*.

As usual in any inquiry made into a dismissal, the overall question is whether the action taken by the employer was justified. The answer depends on whether in law there were grounds for the dismissal and whether the dismissal was carried out in a fair and reasonable way having regard to all the circumstances.

As the Court of Appeal held in *Aoraki* (above);

Where it is decided as a matter of commercial judgment that there are too many employees in the particular area or overall, it is for the employer as a matter of business judgment to decide on the strategy to be adopted in the restructuring exercise and what position or positions should be dispensed with in the implementation of that strategy and whether an employee whose job has disappeared should be offered another position elsewhere in the business.

and;

It cannot be mandatory for the employer to consult with all potentially affected employees in making any redundancy decision.

and further;

...the next question is whether the steps taken to implement that termination of employment were unjustifiable. 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.

In *Thwaites* (above) the Court of Appeal reviewed its decision in *Aoraki* and amongst other things said the following with regard to redundancy dismissals;

[22] The principles are clear enough. Redundancy is determined in relation to the position not the incumbent. Whether a position is truly redundant is a matter of business judgment for the employer. The genuineness of any determination of redundancy can be reviewed. If it is not one the employer acting reasonably and in good faith could have reached it may be impeached. In any such review it may be relevant that the employer did not consult with affected employees or consider whether the redundancy might have been avoided by redeployment or otherwise. Absence of such steps might in particular circumstances indicate absence of genuineness in the determination. Where there is a genuine redundancy that will justify termination of the employment of the person in the position. In the course of the employer's consideration of the position and in carrying out the dismissal the obligation of good faith and fair treatment applies. Any failure to discharge that obligation that itself is unjustifiable may result in remedies appropriate to the breach.

My finding that the dismissal was for commercial reasons disposes of the first question. The employer genuinely reached a decision that Mr Baguley's position was one of two identified as surplus to requirements. This was not an attempt to dress up as something else, a problem the employer had with Mr Baguley personally.

A further attack made on the justification for dismissal was in relation to the adamant refusal of the employer to answer Mr Baguley's request that he be given the selection criteria and the assessments made under those by Mr Fulton and Mr Trenberth. I was referred to two decisions in particular of the Employment Court, each of which arrive at a different conclusion on this or a similar point. To the extent that there may be conflict between the two decisions, I prefer that of Palmer J, in *Mastertrade Ltd v Te Kooro*, unreported 17 November 1998, CC43/98 to that of Finnigan J. in *Apiata v Telecom NZ Ltd* [1998] 2 ERNZ 130. *Te Kooro* was a case in which the employer had not advised the employee as to the selection criteria used to choose him for redundancy. On appeal the Court rejected the approach taken below it in the Tribunal, that the level of the employer's duty to disclose information was so high that "every last bit" of information as to how the employer had made the decision to dismiss was to be given.

I conclude that *Te Kooro* (above) remains good law in the circumstances of this particular case. It has not been affected by the recent enactment of the Employment Relations Act.

A further matter raised by Mr Pollak on behalf of Mr Baguley was the failure by Coutts Cars Ltd to look at the possibility of redeployment among a wider group of companies the respondent is apparently part of. I reject that submission. The employer was not under any express or implied obligation to look beyond its own self to see whether other employment was a possibility for Mr Baguley. The submission ignores the personality of the employer, which in this case is legal rather than natural personality. Other companies in the group will be separate legal persons, just as their directors and shareholders will be a mixture of separate legal and natural people. Taken to its logical conclusion the submission would mean that a

similar position available with a director or shareholder of Coutts Cars Ltd, whether a natural person or a company, might have to be offered to Mr Baguley. That is clearly not the law.

Conclusions

Standing back and reviewing the overall fairness of the employers actions, while the ideal of perfection was not achieved (it rarely is) the level of fairness and reasonableness accompanying this dismissal was sufficient for it to be justified.

Mr Baguley's problem, which is a very real, prevalent and human problem, does not require determination by imposition of a legal remedy under the Employment Relations Act 2000. According to the substantial merits of this case Coutts Cars Ltd acted lawfully I find. As has been stated in many cases determined by the Employment Tribunal and the Employment Court, whatever system of selection is used in a redundancy and whatever criteria are applied, and regardless of who makes the decision, those employees on the receiving end will feel that they are the victims of an injustice.

Accordingly, the matter is disposed of in favour of Coutts Cars Ltd.

Suppression Order

During the investigation meeting of 27 October 2000, I ordered the suppression of the names of the three groomers who in addition to Mr Baguley are the subject of the performance assessment rating charts supplied to the Authority in accordance with its direction. The order was made under Clause 10 of Schedule 2 of the Act. That order will remain in force permanently. The names of the persons are not to be published in any way.

Costs

These will be reserved. I anticipate that advocates of the calibre of Mr Pollak and Mr Meyland will do all they can to settle any issue of costs between them without the necessity for seeking any order of this Authority. As with other areas of practice in the Authority, the question of costs and cost awards generally will undergo development and is awaiting further review soon by the members of the Authority. Therefore if the Authority is required to deal with the question some time may be needed before an answer can be given. The only direction I make is that the parties advise the Authority in the event they are not able to settle any question of costs arising between them. If that advice is received the Authority will give further directions as to how it will consider any application for costs and any reply.

DATED: 2 November 2000



A Dumbleton
Member of Employment Relations Authority

