

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN David Ernest Watson (Applicant)

AND New Zealand Electrical Traders Limited t/a Bray Switchgear
(Respondent)

REPRESENTATIVES Danny Jacobson, for Applicant
Bill Nabney, for Respondent

MEMBER OF AUTHORITY Vicki Campbell

INVESTIGATION MEETING 30 May 2006

**ADDITIONAL
INFORMATION RECEIVED** 8 June 2006

SUBMISSIONS RECEIVED 16 June 2006 from Applicant
14 June 2006 from Respondent

DATE OF DETERMINATION 23 June 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Dave Watson was employed by New Zealand Electrical Traders Limited trading as Bray Switchgear (“Bray Switchgear”) on 23 February 2004 as an electrician.

[2] According to witnesses for the respondent, the business of Bray Switchgear is cyclical. I was told that the busy time for the business is from January to April of each year with work dropping off in May until about August or September. Business usually starts to pick up again in about November. It was not disputed that Mr Bray worked hard to ensure staff remained in employment during the slow periods and that this was achieved by finding additional work outside the company or having staff work on other non Bray Switchgear projects.

[3] On 15 July 2005 Mr Watson was declared redundant and his employment terminated. Mr Watson says the redundancy was neither genuine nor carried out in a fair manner.

[4] Bray Switchgear denies the redundancy wasn't genuine and Mr Alan Bray, managing director, says he followed a fair procedure when implementing the redundancy.

[5] The issues for this determination are whether:

- The redundancy was genuine; and
- The process used by the respondent was fair and reasonable.

Was the redundancy genuine?

The Law

[6] The Court of Appeal in *GN Hale & Son Ltd v Wellington Caretakers IUOW* [1991] 1 NZLR 151, cemented an employer's right to:

...make his business more efficient, as for example by automation, abandonment or unprofitable activities, re-organisation or other cost-saving steps, no matter whether or not the business would otherwise go to the wall. A worker does not have the right to continued employment if the business could be run more efficiently without him. [my emphasis]

[7] Genuineness is considered by the Court in relation to whether or not the redundancy was the actual reason for dismissal rather than being a sham (see *Staykov v Cap Gemini Ernst & Young NZ Ltd*, unreported, Travis J, AC 18/05, 20 April 2005), and must be the predominant reason for termination (see *Nelson Aero Club Inv v Palmer*, unreported 7 March 2000, WC 10A/00, Shaw, J).

[8] Redundancy pertains to 'positions' of employment and not to the individuals who are employed to occupy them. It is unlikely to be a genuine redundancy if the same duties and responsibilities are substantially retained in the same position. There is a redundancy if a significant proportion of the duties and responsibilities are transferred or reassigned to one or more other positions.

The business

[9] Bray Switchgear makes large switchboards for commercial operations such as kiwifruit packhouses, and large engineering workshops. Mr Bray told me the company is reliant on industry investing in new plant, or upgrading existing plant.

The employment relationship

[10] Mr Watson was taken on by Bray Switchgear in February 2004. No written agreement has been signed by the parties. Mr Bray says he went through an employment agreement at the interview with Mr Watson and that he took it away with him to look over before signing it. Mr Watson denies taking an employment agreement away with him from the interview and says Mr

Bray did not go through a written agreement with him at the interview. At the investigation meeting I asked a number of questions of Mr Bray in relation to the wording in the individual agreement which Mr Bray says, was the document he provided to Mr Watson at the interview. Mr Bray wasn't clear about what the wording in the document meant and appeared confused. What became clear to me was that the wording in the agreement did not reflect the reality of the work practice.

[11] Having had the benefit of reviewing all the evidence on this point, I am satisfied that Mr Bray did discuss with Mr Watson the terms and conditions applicable to his employment, however, it is more likely than not, given Mr Bray's obvious confusion over the areas of the agreement that I raised with him, that he could not have taken Mr Watson through the agreement clause by clause. I am also satisfied that it is more likely than not that no written agreement was provided to Mr Watson at the interview.

[12] On commencement of his employment, February 2004, Mr Watson received \$17.00 per hour for each hour worked up to 40 hours per week. The payment for hours worked in excess of 40 hours each week is paid at time and a half the ordinary rate. One month after his commencement, on 30 March 2004, Mr Watson received a pay increase to \$18.00 per hour (just over 5.5% increase). On 20 September 2004 Mr Watson received a second increase to \$19.31 per hour (just over 7% increase). On 8 February 2005 he received a further increase to \$20.75 per hour (a 7.5% increase). From 28 June 2005 Mr Watson was also in receipt of a non-taxable tool allowance of \$1.50 per hour. By my calculations for the period February 2004 to February 2005 Mr Watson received an increase in his hourly rate of more than 20%. This was a significant increase and was followed four months later with the payment of a new non-taxable allowance of \$1.50 per hour paid as a tool allowance.

[13] In answer to questions at the investigation meeting about the frequency of the increases Mr Bray told me that the increase in March was as a result of a review due to Mr Watson at the end of his first month of employment. Mr Bray told me the increase in September was due to Mr Bray believing Mr Watson was coming up to speed in his work and that it was the going rate for tradesmen. He then told me that in February 2005 Mr Watson, Mr Tappin and Mr Morrow had each discussed with him the rates of pay being paid and that there was considerable unrest in the staff, so he had increased the rates.

[14] He told me that as a result of losing too many tools from the workshop, Mr Bray decided to require staff to provide their own tools and in exchange for this requirement he began paying a tool allowance. From records provided to the Authority the tool allowance first began being paid on or about 27 June 2005.

[15] It is significant that at the same time as the new tool allowance was implemented, Mr Bray says he was experiencing serious concerns about the downturn in work. He was so concerned in fact, that at the time he was implementing the new payment he contacted a colleague and was successful in sourcing work outside of Bray Switchgear for July which Mr Tappin and an apprentice undertook. Mr Bray told me he paid the tool allowance because he had promised it to staff in February. In answer to questions at the investigation meeting Mr Bray told me he was not concerned about the additional costs associated with the payment of the tool allowance. I found this surprising given that Mr Watson was dismissed for redundancy three weeks later.

July 2004 Redundancies

[16] It was common ground that in mid 2004 Mr Graham Judkins, was made redundant. Mr Watson told me he was made redundant in 2004 at the same time and that he was subsequently told he wasn't redundant and that the redundancy had been instigated to get rid of Mr Judkins. At the investigation meeting Mr Bray told me he had discussed some performance issues with Mr Judkins and he [Mr Judkins] had asked to be made redundant due to a lack of work being available and therefore Mr Judkins redundancy was by agreement.

[17] Mr Bray denies he told Mr Watson he would be redundant at the time and says that he spoke to Mr Watson in July 2004 and told him he ...may have to terminate due to a downturn in work. It was common ground that during that discussion, the two men talked about a new fence which Mr Watson was to build for his daughter. The two men discussed the possibility of Mr Watson spending a couple of weeks doing that. It seems to me that this is just the kind of discussion one would have when it is looking likely that a redundancy is in the pipeline and an employee is attempting to save his job by considering alternatives to redundancy.

[18] It was common ground that about an hour after telling Mr Watson he was redundant in July 2004, Mr Bray advised Mr Watson he could undertake a project to build a smoko room on the work site. Mr Watson agreed to do the work until Switchgear work picked up again. Mr Watson did work on the smoko room, but did not complete it as other work came in for him to do for Bray Switchgear.

Events leading to 2005 redundancy

[19] On 27 May 2005, Mr Watson took annual leave and travelled to Australia. He says that prior to him leaving for Australia, he was aware that Mr Mark Tappin had decided to move to England permanently at the end of June 2005. Mr Watson told me Mr Tappin had resigned his employment. While Mr Watson was away in Australia, Mr Tappin fell ill and was away from 10 to 24 June 2005 inclusive.

[20] Mr Tappin returned from sick leave on 27 June 2005. On that day Mr Tappin advised Mr Bray that he and his wife had reconsidered their approaching move to England and advised that he would not be going to England. Mr Bray says he had never considered Mr Tappin had resigned in any event, and simply considered his notification as a continuation of the employment agreement which was already in place between the two. Mr Bray made offers of assistance to Mr Tappin to assist in his recovery and his return to work.

[21] Mr Watson says that given that he was made redundant the following week, whether Mr Tappin had resigned or not, and was then allowed to rescind the resignation or not, is critical to the question of whether his redundancy was genuine. He says that Mr Tappin should never have been allowed to withdraw his resignation because that had a direct impact on him being made redundant.

[22] Mr Tappin was unequivocal in his evidence that he had provided four weeks notice of his resignation. Mr Tappin and his wife had purchased tickets to England on 27 May 2005. I find it unlikely that Mr Tappin would have paid for tickets to England at a cost of more than \$4,000 if he had not intended to be leaving his employment.

[23] Also, Mr Bray's evidence at the investigation meeting was that he had taken no steps to replace Mr Tappin because he wasn't sure what the company would be doing and that that is not unusual in their industry. He told me he wasn't under any pressure to employ someone. These comments indicate Mr Bray was aware Mr Tappin was leaving his employment. I find that Mr Tappin had resigned from his employment and fully intended leaving at the end of June 2005.

[24] While Mr Tappin was away on sick leave, he and his wife reconsidered their plans to relocate overseas and he returned to work on 27 June 2005 in the hope that he could persuade Mr Bray to keep him employed. As events transpired, he succeeded and retained his employment.

[25] Mr Watson returned from his leave, on 27 June 2005, the same day as Mr Tappin. On his return from leave Mr Watson met with Mr Bray and Mr Paul Higgins, production manager, and advised them he had been offered two employment opportunities and found the prospect of working in Australia of interest.

[26] On the Friday of that same week, on 1 July 2005, Mr Syd Morrow, who had previously left his employment with Bray Switchgear to work for competing firm, Bremca, contacted Mr Watson and they discussed the opportunities Mr Watson had been presented with on his holiday. During the discussion Mr Morrow raised the possibility of an opportunity existing at Bremca. The two met at Burger King during Mr Watson's lunch break that day, where an offer of employment with Bremca was made to Mr Watson.

[27] When he returned to work, Mr Watson advised Mr Bray that Mr Morrow had contacted him and had made him an offer of employment. Mr Watson then disclosed to Mr Bray the specific details of the offer made to him. I am satisfied that Mr Bray told Mr Watson he could not match the offer and that he should consider it. Mr Watson told me that the reason he told Mr Bray about the offer from Mr Morrow was because Mr Bray had instructed him to tell him if he was approached by anyone from Bremca. Mr Bray denies this and says he saw Mr Watson's approach and discussion as an attempt to coerce Mr Bray into paying him more money.

[28] Mr Watson did consider the offer from Bremca, but he declined it. He notified Mr Morrow on Saturday 2 July 2005 of his decision not to accept the offer of employment.

[29] It is common ground that on Monday, 4 July 2005 Mr Watson attended a meeting with Mr Bray. Mr Watson says that Mr Bray advised that as a result of a downturn in work his employment would be terminating. Mr Watson says he became angry and told Mr Bray his actions were unethical. Mr Watson says that after some discussion Mr Bray eventually apologised and indicated to Mr Watson that his work would continue as normal.

[30] Of that same meeting Mr Bray says that at about 12.00noon Mr Watson and he met for the purpose of Mr Bray advising Mr Watson that his employment was at risk of redundancy as a result of there being no future orders. Mr Bray denies telling Mr Watson that his employment would be terminated, but agrees that Mr Watson became angry.

[31] At the investigation meeting Mr Bray told me, in answer to questions, that he was surprised at Mr Watson's angry reaction to the news of a possible redundancy, as he says he had told him the previous Friday that he should consider the offer by Bremca because there was not a lot of work on. Mr Watson denies Mr Bray talked to him about a lack of work the previous Friday. I accept Mr Watson's evidence that if there had been such a discussion, and given the offer of employment which had been made to him that day, he would simply have taken the new job. Instead, he declined the offer. I am satisfied that in such a situation had any discussion about possible redundancy taken place on that Friday, it seems most unlikely that Mr Watson would turn down the offer of employment which was, by all accounts, considerably better than he had at Bray Switchgear.

[32] So – was Mr Watson told he was redundant on 4 July and was that notice retracted by Mr Bray? I believe so – yes. It was common ground that Mr Watson became angry. From my experience this is a common reaction to being told you no longer have a job, particularly when it comes out of the blue. In Mr Watson's case it was a double blow – he had only two days earlier rejected a very good offer of employment. Also, if there was a discussion about the possibility of a redundancy one would expect Mr Bray to meet with all staff – not just Mr Watson. Also, the evidence shows that on that same day, Monday 4 July Mr Bray had assured Mr Tappin that his job was secure.

[33] The next event occurred on 11 July 2005. On that day, Mr Bray met with all the staff, including Mr Watson, and advised them of the financial position of the company. Mr Bray says he invited staff to take leave for a period of time to get through the difficult time, but at the same time he confirmed that the company could work through the downturn. No-one volunteered to take leave. I am satisfied that at that meeting there was no mention of the possibility of redundancies. Mr Bray's evidence was that it was after the meeting, when no-one had taken up the opportunity of taking annual leave that he made the decision that he would ...need to consider dismissals by way of redundancy.

[34] On 15 July 2005 Mr Bray met once again with Mr Watson and told him his employment would be terminated on that day due to the downturn in work. Mr Watson was not told why he was chosen, nor given the opportunity to discuss alternatives to redundancy. There was also no explanation as to the criteria against which Mr Watson had been judged the most suitable candidate for redundancy.

The financial position

[35] Copies of profit and loss accounts for the months of August 2004, and July to November 2005 inclusive were filed in the Authority by Mr Bray to support his assertions regarding the business necessity of the redundancies. At the investigation meeting I requested copies of similar statements for the financial year 2004/2005 and for the full financial year 2005/2006. These were provided in graph format following the investigation meeting.

[36] In his evidence Mr Bray says that in the 15 years of operating his business he had never experienced such a down turn for such an extended period of time. Having reviewed the profit and loss information provided by Mr Bray I find it difficult to accept that evidence. At the time Mr Bray made Mr Watson redundant the company had made profits for each of the months January, March, April, May and June 2005. It was the period July to November that the records show the company was in loss. This was after Mr Watson was made redundant. A comparison of the prior year figures (2004/2005) produced by Mr Bray show that the number of months where losses were experienced were the same as for the 2005/2006 period. Also, an approximate comparison of the losses attributable to each period shows that the losses for 2004/2005 were twice that of 2005/2006.

Conclusion about whether the redundancy was genuine

[37] It was open to Bray Switchgear to make a decision for valid commercial reasons that Mr Watson's position was surplus to the company's needs and therefore a genuine redundancy. The evidence in my view falls well short of establishing that the dismissal of Mr Watson was for the reason that there was a genuine restructuring or redundancy. I consider that Mr Bray had determined that, for whatever reason, he no longer wanted Mr Watson working for him and saw redundancy as a way to achieve that end.

Was the decision to dismiss Mr Watson justified?

[38] I have found that Mr Watson was dismissed for reasons of redundancy but that it was not a genuine redundancy. I find therefore that the dismissal is unjustified. Mr Watson has a personal grievance that he was unjustifiably dismissed and is entitled to remedies.

Remedies

[39] On 4 May 2006, Mr Jacobson filed an amendment to the remedies sought by Mr Watson in his statement of problem. Mr Watson seeks lost wages, \$10,000 for hurt and humiliation pursuant to section 123(1)(c)(i), compensation for a lost benefit pursuant to section 123(1)(c)(ii) in the event of a finding that the redundancy was genuine, and costs.

Lost wages

[40] It was common ground that Mr Watson received one weeks pay in lieu of notice. He was employed by Bremca two weeks and one day after his dismissal from Bray Switchgear, on 2 August 2005, at a higher rate of pay than he had received at Bray Switchgear.

[41] Mr Watson's actual loss of wages amounts to one week and one day and he is entitled to reimbursement for that period. Mr Watson was paid \$644.80 per week (nett of tax) plus \$60.00 Tool Allowance making a total weekly wage of \$704.80 nett of tax. One day's wages is equivalent to \$140.96 nett of tax.

New Zealand Electrical Traders Limited t/a Bray Switchgear is ordered to pay to Mr Watson an amount of \$845.76 nett of tax, pursuant to section 123(1)(b) of the Employment Relations Act 2000.

Compensation

[42] Mr Watson sought compensation of \$10,000 for distress arising out of the way he was made redundant and the failure of the company to properly consult with him. Mr Watson gave evidence that he was shocked, hurt and humiliated by the dismissal. The situation was exacerbated by the fact that Mr Watson had received a very good offer of new employment on Friday 1 July 2005 which he declined in the face of not knowing he would be made redundant 14 days later. I have found that the process adopted by Mr Bray was inadequate and in reality there was no genuine process of consultation as required under the Employment Relations Act.

[43] Although Mr Watson was distressed by his dismissal, he was robustly able to deal with the situation and as already mentioned above, obtained alternative employment very quickly. I therefore award him the sum of \$5,000 under this head.

[44] As required by section 124 of the Act I have given consideration as to whether it could be said that there was contributory conduct which would reduce the remedies. I am satisfied that there was none.

New Zealand Electrical Traders Limited t/a Bray Switchgear is ordered to pay to Mr Watson an amount of \$5,000 nett of tax, pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000

Lost benefit

[45] This claim was contingent on a finding that the redundancy was genuine. I have found that not to be the case and therefore am not required to consider an award under this heading.

Costs

[46] The parties are encouraged to discuss and resolve the matter of costs between them. In the event that they are unable to do so they may lodge and serve memorandum in the Authority for consideration.

Vicki Campbell
Member of Employment Relations Authority