

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN George Craig (Applicant)
AND Otago Hospitality Ltd (Respondent)
REPRESENTATIVES George Craig in person
Samuel Guest, counsel for the respondent
MEMBER OF AUTHORITY Paul Montgomery
INVESTIGATION MEETING Dunedin, Tuesday 5 December 2006
DATE OF DETERMINATION 29 March 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, George Craig, claims he was unjustifiably dismissed on the ground of redundancy from his employment at the Morningson Tavern. He claims that he was not advised of any restructuring nor was he told of the proposed sale of the tavern by his then employer. Mr Craig says that he first became aware of his dismissal when he was told by the new owners *there's no job for you here*. The applicant says he had no opportunity to negotiate a redundancy package.

[2] Mr Craig is asking the Authority to investigate the circumstances of his loss of employment, the loss of the opportunity to negotiate a redundancy package, lost remuneration and compensation for humiliation, loss of dignity and financial hardship resulting from the dismissal. He also seeks outstanding holiday pay.

[3] The respondent, by its director Michael Cates, denies the applicant was dismissed saying Mr Craig resigned from his employment during a conversation the pair had at the applicant's home in late September 2005. The respondent also says that when the purchasers advised that they would not require Mr Craig's services, the applicant was paid his holiday pay entitlement on 11 October 2005 but was not entitled to a redundancy payment. The respondent resists the applicant's claim and declines to meet the remedies he seeks.

What caused the problem

[4] Mr Craig had suffered a workplace accident and was admitted to hospital for a lumbar fusion on 6 October 2005. The parties agree that Mr Cates went to the applicant's home on either 28 or 29 September 2005. Mr Cates, in his affidavit, says his purpose was:

... to discuss the likelihood and ramifications of the restructuring at the Morningson Tavern. It was at this visit that I inquired whether the applicant intended on returning to work and I said that there was the real potential for his position to be disestablished if the prospective new employer did not accept the transfer of his

position. I believe the applicant was well aware of what was being proposed and was further aware of the potential outcome.

[5] In his oral evidence, Mr Cates told the Authority *I took the conversation with George to be a verbal resignation.*

[6] Mr Craig's evidence was:

The problem regarding my discussion with Michael Cates prior to my admission to hospital is that there was no discussion. Mr Cates came to my home at 3pm on 28 or 29 September 2005 and asked me what I was going to do after I came out of hospital. I said that as soon as I had a clearance from the specialist I would be returning to work. At this stage Mr Cates started to mutter something about six months and work conditions but was extremely vague and so I said to him Michael we can't discuss things like that when I will be on ACC. I do not know what you are talking about and anyway it will have to wait until I get a clearance from the specialist. Mr Cates stood and left the house saying nothing further.

[7] The respondent says the applicant never signed an individual employment agreement in spite of being asked on a number of occasions to do so. Mr Craig says he did sign an agreement *in early 2003* and that a Mr Hyde could confirm this. The applicant says that agreement had provisions for redundancy payments and was a four page document. The agreement used prior to this issue arising between the parties and submitted as an attachment to his affidavit by Mr Cates, is an 11 page document.

The issues

[8] In order to determine this matter, the Authority must resolve the following issues:

- Did the applicant resign or state an intention to resign; and
- Was his position declared surplus to the needs of the incoming lessee; and
- Did the respondent genuinely consult with the applicant; and
- Upon notice from the new lessee, did the respondent advise the applicant of his redundancy and issue him with four weeks' notice; and
- Was the applicant entitled to a redundancy payment; and
- Was the dismissal unjustified and if so, what remedies are due to the applicant?

The investigation meeting

[9] Mr Craig gave his evidence orally speaking to the statement of problem he had lodged with the Authority. Mr Cates had filed an affidavit and his evidence was taken at a distance by telephone.

[10] The applicant contested that he had ever been asked to sign the 11 page agreement, maintaining he had signed an earlier version which he had taken home to read. He then returned it to *the girls in the office*. Mr Craig says he was not given a copy of the signed agreement.

[11] On the issue of what took place when Mr Cates called at his home, Mr Craig said that his visitor stayed only a few minutes and asked him when he intended coming back to work after his operation. The applicant told Mr Cates that that depended on clearance by the specialist.

He was adamant that he did not give notice, that he was not given notice by Mr Cates, or that the sale or restructuring was a possibility that could affect his job.

[12] Further, the applicant expressed his anger at the respondent paying his holiday pay into his bank account without his knowledge and which resulted in his ACC payments being stopped for a time. Essentially, his ACC was stopped until he had used his holiday pay. The Authority is unable to assist Mr Craig on this matter.

[13] Mr Cates gave evidence of the applicant's refusal to sign the employment agreement and asserted that Mr Craig was employed under the standard agreement used by the respondent. As he said, that agreement had no provision for redundancy compensation.

[14] Mr Craig told the Authority that at the time of the severance he was not paid the four weeks in lieu of notice, but only wages due and holiday pay. The applicant's evidence was that he was never told of his redundancy until his meeting with the new lessee and became aware of the respondent's discussion regarding his transfer to a position with them when the statement in reply was received by him.

[15] On that issue, he strongly contested Mr Cates's evidence that he was not wanted by the new operators because although *the duties that the applicant undertook in his employment included general bar work, but in the main he was employed in the bottle store attached to the Mornington Tavern*. Mr Craig's response was that about five hours a week was deployed in the bottle store and was *the smallest part of the day*.

Discussion and analysis

[16] The respondent says Mr Craig was employed under the terms of its standard agreement. Clause 9 of the agreement reads:

Redundancy

9.1 In the event of the employee being made redundant (i.e. the position becomes surplus to labour requirements and no similar position is available) the employee shall receive four weeks' notice of termination, if such notice is reasonably practicable.

9.2 No compensation will be payable for redundancy.

[17] The section which follows is headed *Employee protection*. Section 10.4 reads as follows:

If the employee has not been offered employment with the new employer, the employer will consult with him or her over entitlements (if any). The scope of such consultation may include:

10.4.1 Any opportunities for redeployment within the employer's organisation.

10.4.2 If no such opportunities exist, with the result that the employee's position is redundant, the possibilities of career advisory services or other counselling being made available, time off for job search purposes, the extent (if any) to which pay in lieu of notice may be provided enabling early release from employment.

10.4.3 Notwithstanding the above, no compensation will be payable to an employee whose position is made redundant as a result of restructuring.

[18] A difficulty the Authority faces in this particular case is that neither the applicant nor the respondent was able to provide me with a copy of the earlier agreement. On the surface of the evidence, it looks likely that an earlier document did exist but the Authority is not prepared to hazard a guess as to what the contents of any clause relating to redundancy might have been included. I am therefore able to work only on the basis of the template agreement provided by Mr Cates and which he says forms the basis of the employment for all his workers.

[19] Reading the clauses set out above in this determination, it is clear that under this agreement no redundancy payment is contemplated. However, the issue of the four weeks notice is particularly explicit. The respondent says that the requisite four weeks notice was given at the meeting in late September at which stage Mr Craig could not confirm he was intending on returning to work. In considering this submission in the light of Mr Cates' affidavit at paras.12 and 13 where there is no mention of his giving notice to the applicant, and also in the light of his oral evidence in reply to a question from the Authority, Mr Cates says he took from the conversation with Mr Craig a verbal resignation. When the Authority challenged this, given its absence also from the affidavit, Mr Cates was unable to give a coherent explanation.

[20] In reviewing the evidence, I have found that where there is a conflict of evidence on key issues, I have preferred Mr Craig's straightforward, unpolished evidence to that of Mr Cates. I do so on the basis that, on a number of points, Mr Cates, in his oral evidence, contradicted or sought to add to the evidence provided in his affidavit.

[21] In a situation where an employee's position is possibly to be disestablished, the employer is obliged, in the majority of situations, to consult with that employee. The employer is required to put a proposal in front of the employee and to provide an opportunity for the employee to consider the proposal and to make representations on alternatives to the proposal as it stands. From the evidence in front of the Authority, there was sparse evidence in respect of a consultative process of this type in the present case. If there had been, it is fairly clear that Mr Craig would have been in no doubt as to the fact that his employment was coming to an end, given that the business had been sold and the new lessees would not require his services.

[22] Standing back and looking at the issue, it seems to me that this is a case of a redundancy brought about by the sale of a business and where the new employer intends to work as a working proprietor with the consequent reduction in requirements for staff. Once the incoming employer had notified the respondent that he had no need for Mr Craig's services, the onus was on the respondent to ensure that Mr Craig was treated appropriately and in line with the contractual arrangements between them.

[23] In a situation such as this, where the disappearance of the job is inevitable, the applicant does not have a sustainable claim for wages beyond the period of notice. I am therefore unable to entertain a claim for lost remuneration save within the period of notice.

[24] Even if, as Mr Cates says, Mr Craig was employed under the template agreement terms, the respondent has failed to honour the terms set out in ss.9 and 10 of that agreement.

[25] In his submissions to the Authority, Mr Guest said:

The applicant gave evidence (and also sets out in his statement of problem) that he was told by Mr K Galliven (the new lessee) on 23 December 2005 that 'because of the restructuring he had no job to return to'. It was not however until 17 February 2006, on a chance meeting, that the applicant raised the issue of his employment with the respondent. The respondent submits that the delay in making contact or raising a grievance corroborates the respondent's claim that the applicant was aware that his employment had come to an end.

[26] That submission fails to take into account Mr Craig's evidence that Mr Cates was approached by him several times but was rebuffed on each occasion. He says that he first had the personal meeting with Mr Cates over the Carisbrook stock issue, but continued to pursue him by telephone calls on 18 and 21 March 2006 and finally on 5 April 2006. It also fails to explain the method by which the applicant became aware that his employment had ended.

[27] Mr Guest also addresses the applicant's claim for compensation saying the claim is strongly refuted by the respondent. I have carefully looked at his submissions on this matter, and I accept that this was in fact a bona fide sale to a third party and falls under the heading

of a technical redundancy. However, I do not accept Mr Cates' evidence on what took place when he visited the applicant's home. For the avoidance of doubt, I do not accept that Mr Craig said he was not returning to work and thereby tendered a verbal resignation to Mr Cates. I accept the applicant's evidence that he told Mr Cates that once he received clearance from his specialist, he would return to work. I am reassured in that point of view by contradictory evidence given by Mr Cates and in particular the differences between his sworn affidavit and his affirmed evidence by telephone from Auckland.

[28] Mr Craig was affected by the manner in which his employer handled the situation and in spite of him socialising on a weekly basis at the tavern, that socialisation after 31 years service to various owners of that worthy establishment, is hardly surprising.

Determination

[29] Returning to the issues set out above in this determination, I find:

- The applicant did not resign nor did he state an intention to resign when Mr Cates met with him at his home.
- The applicant's position was declared surplus to the needs of the incoming lessee and that decision on the part of the incoming proprietor was its to make.
- The respondent did not genuinely and openly consult with the applicant, nor did it comply with the terms of the employment agreement the respondent itself says applied to the circumstances.
- In the circumstances, the applicant is not entitled to redundancy compensation on the basis of the agreement said by the respondent to cover his (the applicant's) terms of employment.
- The dismissal was unjustified as the respondent failed to comply with its own terms of employment and failed to follow its own procedures.

Remedies

[30] Having found that Mr Craig has a personal grievance, I now make the following orders in respect of remedies.

[31] The respondent is to pay to Mr Craig the sum of \$2,016 gross being the four weeks due to him in lieu of notice. The respondent is to also pay the applicant the holiday pay calculated on this sum at 6%, namely, \$120.96 gross. Further, the respondent is to pay the applicant interest on these sums at the rate of 9% per annum for the period between 12 October 2005 and the date of issue of this determination.

[32] I order the respondent to pay to the applicant the sum of \$4,000 as compensation for the hurt and humiliation he has suffered as a result of the dismissal.

[33] Considering the issue as a whole, I find Mr Craig did not contribute to the events which gave rise to his dismissal.

Costs

[34] Mr Craig represented himself in this matter and has therefore incurred no legal costs. He has, however, paid the \$70 filing fee to have his case lodged with the Authority. I direct that the respondent recompense Mr Craig for that expense.

Paul Montgomery
Member of Employment Relations Authority