IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 65/08
5103431

	BETWEEN	LEYTON HUNT, KIM CROOKS, CHRISTOPHER GUNN, KENT HUNT and STAN JACKSON Applicants
	AND	CHRISTCHURCH & CANTERBURY MARKETING LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Ian Thompson, Advocate for Applicants Phil James, Counsel for Respondent
Investigation Meeting:	20 February 2008 at Christchurch
Determination:	12 May 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicants (the applicants) say they were unjustifiably dismissed and that the respondent employer (CCM) breached its good faith obligation toward them and breached an express term of their employment agreement.

[2] CCM denies all of those allegations.

[3] The applicants were all employed on individual employment agreements and there were two separate templates of agreement used for the applicants with Messrs Kent Hunt, Christopher Gunn and Stan Jackson employed on the terms of an individual agreement which, for convenience, I will refer to as agreement A; and

Messrs Tim Crooks and Leyton Hunt being employed on the terms of a separate and different individual agreement which I will refer to as agreement B.

[4] It is alleged by the applicants that all of those agreements were deficient in that none of them provided appropriately for all the matters required to be dealt with by the Employment Relations Act 2000.

[5] On 17 September 2007, the applicants were instructed to attend a meeting at which they were handed a letter dated 12 September in which they were told unequivocally that their positions were redundant. The letter goes on to say that CCM would endeavour to find alternative positions within its own organisation or engage an incoming purchaser in discussion in the hope that employment might be offered.

[6] It is alleged that there was no warning of this meeting and thus no opportunity for the applicants to obtain advice or counsel. CCM says that some of the applicants anyway ought to have known that there were discussions about the sale of the business in which the applicants worked.

[7] The applicants say they were sent letters to their homes on 20 September 2007 (that is three days after the meeting just referred to) in which they were told that they were redundant and that their last day of work would be 19 October 2007.

[8] The essence of CCM's position is that it dealt with the matter as expeditiously as it could, it told the employees just as soon as it was able to and that in any event one of the possible purchase parties was one of the applicants, so the expectation was that the applicants would know or ought to know that there were discussions going on.

[9] On the question of whether the applicants' employment agreements met the requirements of the Employment Relations Act 2000, Mr Martin Brice, who was the finance and operations manager of CCM, gave evidence that he realised the employment agreements did not comply with the law at the point at which CCM contemplated the takeover of another entity. Mr Brice said that CCM produced a standard form contract complete with all the legal requirements in it, made that available on line and put a copy of the contract and of the email on the noticeboard and work desk of the applicants. Mr Brice says that he personally attended to this on 31 August 2007, that is some 12 days before the date of the letter which the applicants all received by hand on 17 September, notifying them of their potential redundancy.

[10] Mr Brice confirmed to me at the investigation meeting that he had made no attempt to obtain the buy-in of the applicants to these changes to their employment agreements, that he had not sent copies of the proposed changes to their home addresses, and that he did not believe there was any need for these changes to be signed up to or agreed by the applicants.

Issues

[11] The first issue for determination is whether the applicants were unjustifiably dismissed from their employment. Next the Authority needs to consider whether there has indeed been a breach of good faith as the applicants claim. Finally, the Authority needs to consider the effect of the various employment agreements.

Were the applicants unjustifiably dismissed?

[12] CCM says that it was negotiating with a number of parties (including one of the applicants) for a short period and that as soon as it was reasonably able to advise the applicants of potential redundancy, it did so. The decision to effectively sell the business unit in which the applicants worked was to be made at board level and so the first indication that CCM was able to give to the applicants was no more than an intimation that the matter was to be considered at Board level.

[13] On 12 September 2007, a letter was drafted by CCM in the following terms:

> *Following a recent review of Punting on the Avon* (the business unit in which the applicants were employed) *and its fit with the core business of Christchurch and Canterbury Tourism, it has been decided to divest this operation. We have received proposals from two interested parties and the board will be selecting the best offer at their next meeting.*
>
> *While we have not prejudged the outcome of this decision it is inevitable that the business will be changing ownership. The effect of this will be that your position with our organisation will be redundant. In accordance with our stated policy we will endeavour to find a suitable alternative position within CCT or engage the purchaser in discussions to have them offer you employment.*
>
> *Should you wish to discuss this further you are welcome to do so either with the finance manager or myself.*

[14] That letter, although dated 12 September, was not made available to the applicants until 17 September. On 12 September, CCM made arrangements for the applicants to attend a meeting on 17 September but took no other steps. I am satisfied

on the basis of the evidence that I heard that the applicants were not advised of the nature of the 17 September meeting before it happened. Indeed, I accept the applicants' evidence that they thought the 17 September meeting was a normal operational meeting of the sort that they had from time to time.

[15] When the meeting actually took place, the evidence suggests that Mr Brice, the finance manager at CCM, and Christine Prince, the chief executive of CCM, effectively addressed the applicants. In his evidence before the Authority, Mr Brice said he told the meeting CCM was considering other operators for the business unit employing the applicants, said that no decision had been made and that the decision would need to be made by the board, said that in the event of a change of ownership CCM had secured agreement that its staff could apply for positions, and said that there was a possibility of redeployment within its own organisation for redundant staff.

[16] If those observations were indeed made at the 17 September meeting, those messages were certainly not received by the applicants and indeed, with the greatest respect to Mr Brice's recollection of what he may have said, his observations are in a number of respects inconsistent with the letter of 12 September 2007, the text of which I included in para.13 above. The letter is quite explicit that the applicants will be redundant and the only promise is that the employer *will endeavour* to find suitable alternative employment either within its own organisation or by way of encouraging the incoming purchaser to make positions available for application by the applicants.

[17] I am satisfied that the applicants could reasonably have been expected to receive and internalise the message in the letter rather than anything that Mr Brice may have said and accordingly I think it proper to conclude that it is the terms of the letter that I must rely upon for the purposes of reaching decisions in this matter.

[18] What happened next was that at CCM's board meeting on 19 September, the decision was taken to sell the business in which the applicants worked, to a third party.

[19] The following day, Ms Prince, the chief executive, wrote again to the applicants confirming that a decision had been taken by the board and indicating that the applicants' position would be disestablished with effect from 18 October 2007. The letter then goes on to record that as the applicants were entitled to four weeks' notice of termination of employment, they would effectively work that period of

notice out and that no redundancy compensation would be payable. The letter also records that the incoming purchaser will contact the applicants about employment opportunities and that contractors had been appointed to assist the applicants with CV preparation and employment search strategies.

[20] The applicants say in their statement of problem that this process was *a total omission of any fair and reasonable procedure*. I am inclined to agree. CCM, by its own admission, gave the applicants no advance notice of the nature of the 17 September meeting (Mr Brice confirmed this in his oral evidence in response to a question from me), although clearly it was within CCM's power, at the very least, to send out to the applicants' homes the 12 September letter rather than to hand it out at the 17 September meeting.

[21] Because CCM failed to give any proper notification to the applicants about the nature of this first intimation that their jobs were at risk, the applicants were not in the position to take advice, not in a position to think through the consequences of possible job loss before the meeting and thus effectively caught flat-footed at the meeting itself.

[22] Despite Mr Brice's attempts to put a gloss on his unsatisfactory process, the evidence suggests that there was no opportunity definitively provided for the applicants to engage with CCM, either individually or collectively, to explore what options might be available to avoid the necessity for their positions being disestablished or at least to mitigate the consequence of that disestablishment. In reality, CCM gave the applicants no real prospect of having any input into the process of disestablishing their roles and in my view that is fatal to the requirement that there be consultation in a process such as this.

[23] Consultation, as the Courts have consistently held, requires a real opportunity for the responding party to be heard and for his, her or their views and issues to be considered by the initiating party. Plainly there was no opportunity here for such a process.

[24] Even if CCM had definitively required that there be an engagement between itself and the applicants (which I hold it did not, although it allowed of that possibility), the timeframe was so tight as to completely preclude any reasonable prospect of engagement. In truth, even if there had been consultation provided for

and genuinely engaged in between the parties, the fact that the first intimation of possible redundancy happened on 17 September 2007 and the notification of the termination of the applicants' employment was conveyed by letter on 20 September, literally three days later, suggests that there was really no prospect at all of any genuine consultation.

[25] CCM claims that commercial imperatives made it impossible for it to notify its staff earlier, although it also says that as it was negotiating with one of the applicants, that applicant anyway ought not to be able to claim any grievance as a consequence of not being aware of the situation because he knew or ought to have known that the sale was in the wind. It seems to me CCM wants to have it both ways; on the one hand it wants to claim that commercial sensitivity meant that it was unable to give early advice to the applicants generally, and on the other hand it wants to allege that because one of the applicants knew about the possible sale (because he was negotiating with CCM at the time about the possible purchase), then that applicant cannot have a personal grievance.

[26] In my opinion, CCM has failed absolutely to fulfil its legal obligations to its former staff. That obligation takes precedence over any commercial sensitivities. CCM could easily have advised the applicants that there were discussions going on, or that those discussions were in prospect, without naming names. No one, including third parties, would be prejudiced by such an announcement. Clearly the applicant who was in negotiation with CCM behaved absolutely responsibly and did not tell his colleagues about those negotiations because they gave evidence that they knew nothing of that and I accept that evidence as truthful.

[27] It follows from the foregoing analysis that I am persuaded that the applicants have a personal grievance because of having been unjustifiably dismissed by reason of redundancy, CCM having failed absolutely to manage the redundancy using a fair and proper process: s.103A of the Employment Relations Act 2000 applied.

[28] CCM advances the argument in relation to Kent Hunt in particular but to a lesser extent Leyton Hunt, Mr Kent Hunt's brother, that Mr Kent Hunt cannot have a personal grievance because he knew or ought to have known that the business was for sale, he being one of the potential purchasers.

[29] Two matters require to be determined here. The first is whether Mr Kent Hunt told his brother, Mr Leyton Hunt, or not about these negotiations. I am satisfied on the evidence I heard that Mr Leyton Hunt was not privy to the information that Mr Kent Hunt was negotiating with CCM despite Mr Brice's evidence that Mr Kent Hunt had told his brother about the negotiations. Mr Kent Hunt's evidence on the matter was absolutely unequivocal; he said that he was involved in negotiations, that he was asked not to tell anyone else and that he did not, including his brother. I accept that evidence as truthful.

[30] It follows that the only issue then relating to CCM's claim relates to Mr Kent Hunt. I am unmoved by the suggestion that because Mr Kent Hunt might have known that the business was potentially for sale, that that excuses CCM from its legal obligation to advise its staff (including Mr Kent Hunt) in a timely way that there are potential redundancies. Accordingly, I reject CCM's contention that Mr Kent Hunt should be treated differently from the other applicants because he would have known, for other reasons, that the business was for sale.

Breach of good faith

[31] I consider CCM has acted in breach of good faith to the applicants as employees, but do not intend to deal with that matter as a separate head of damage preferring to deal with the issues in the context of a personal grievance.

The employment agreements

[32] There was a great deal of confusion about the applicable employment agreements that applied to the applicants. Each had an employment agreement but, as I indicated earlier in this determination, the applicants were effectively in two batches, one group covered by agreement A and one group covered by agreement B.

[33] As an additional layer on top of that, CCM sought to impose unilaterally another standard agreement which Mr Brice physically delivered to the applicants' work desk on 31 August 2007. The applicants all made clear in their evidence that they either did not know about this 31 August document until the present proceedings were on foot and/or that they had never agreed to the changes contemplated by the new document.

[34] Again, CCM seems to have completely failed to engage properly with its staff on something that is actually of significant importance. There was no effort made to send a copy of the proposed new agreement to the applicants' homes and no engagement with the applicants in relation to the proposed new document. It is a truism that employment agreements are bilateral documents rather than unilateral ones and it certainly is not appropriate for employers to try and impose new terms and conditions of employment on others, even where the intention may be to try to meet the obligations imposed on both parties by the Employment Relations Act 2000.

[35] Because the intention was to try to deal with the obvious failure of CCM to meet its obligations in terms of the Employment Relations Act 2000, I do not propose to order any penalty to be paid in respect of the default but I do hold that the agreements which apply to the applicants are their existing documents and not the 31 August 2007 replacement. I accept that some of the conditions in the 31 August document (including notice for instance), may be more generous than those that applied to some of the applicants' applicable employment agreements. However, the reality is that the only agreements which have been *agreed to* by the parties are the original A and B agreements.

Determination

[36] I am satisfied that the applicants have made out their case for each of them having a personal grievance by reason of having been unjustifiably dismissed from their employment and that in consequence they are entitled to remedies in terms of compensation, lost wages and according to the tenor of the applicable employment agreements, redundancy compensation.

[37] In the particular circumstances of this case, I think the appropriate decision for the Authority is to refer the matter back to the parties' representatives to have them consult with each other and seek to reach agreement about the nature of each of the applicants' entitlements. In the event that those discussions are unsuccessful, leave is reserved for the parties to revert to the Authority with submissions strictly on the issue of remedies with the counsel for CCM having two weeks from the date that the advocate for the applicants files his submissions, to respond.

[38] CCM encourages me in the view that the applicants (or some of them) contributed to their grievances by, in particular, not engaging with the employer in

respect of possible redeployment, by not applying for new positions with the new owner, and by failing to pick up the employer's offer to assist with CV writing and job placement advice.

[39] I do not accept that submission. In the normal course of events, it might have merit, but given the timeframe imposed by CCM in respect of the effecting of this redundancy arrangement, one can only imagine that the applicants would have been absolutely distrusting of the initiatives taken by CCM and thus sought not to engage at all in its processes.

[40] A secondary reason for reaching the conclusion that it is not appropriate to factor that behaviour into the contribution issue is the evidence (albeit contested) that the proposed new employment would have resulted in significantly less money than the applicants had been paid by CCM.

[41] It follows that I am not persuaded that contribution is in issue in the present case and accordingly I direct that the parties' representatives are to take that into account when they seek to resolve the matter of remedies between them.

Costs

[42] Costs are also reserved but the parties are urged to seek to resolve costs between themselves by negotiation.

James Crichton
Member of the Employment Relations Authority