

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 37/08
5075698**

BETWEEN RATKO SAVIC
 Applicant

AND LEVANTE TECHNOLOGIES LIMITED
 T/A TIO PABLO
 First Respondent

AND GRANT KEATS
 Second Respondent

Member of Authority: Leon Robinson

Representatives: Clive Bennett for Applicant
 Rebecca Tierney for Respondents

Investigation Meeting: 7 September 2007

Submissions received: 20 September 2007
 25 September 2007

Determination: 11 February 2008

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Mr Ratko Savic ("Mr Savic") was employed by Levante Technologies Limited t/a Tio Pablo ("Levante") as its operations manager. By letter dated 30 October 2006 but emailed on the evening of 31 October 2006, a director of Levante Mr Grant Keats wrote to Mr Savic as follows:-

As discussed at our meeting 27/10/06, and following your comments and our considerations of such, Tio Pablo is making the position of Operations Manager redundant for commercial reasons. We will pay you 2 weeks in lieu of notice from the 3 November, noting you are on sick leave this week.

You will be paid as per the normal cycle this week. Next week you will receive salary for this week (30 October to 3 November), 2 weeks salary in lieu of notice (weeks 6-10 November and 13-17 November) plus holiday pay accrued. Your pay slip and calculations will be provided.

Please advise when you would like to collect your possessions from the factory and return your keys.

We thank you for your efforts and are happy to provide you a reference on request.

*Yours sincerely
Grant Keats
Director*

(the “termination letter”)

[2] Mr Savic says his dismissal was unjustifiable and asks the Authority to resolve the problem. He also asks the Authority to order Mr Keats be made to honour an alleged personal guarantee given to Mr Savic in respect of his salary. Both Levante and Mr Keats say Mr Savic's dismissal for redundancy was justifiable and that there is no enforceable personal guarantee. The parties were unable to resolve the problems between them by the use of mediation.

The facts

[3] Levante manufactures tortillas and trades as *Tio Pablo*. Mr Keats and Mr David Anderson ("Mr Anderson") are its directors.

[4] Mr Savic and Mr Keats were acquainted through their wives' friendship. Mr Savic and Mr Keats had known each other for ten years before Mr Savic was employed by Levante. Mr Savic had previously worked at Bakels for nine years before he and Mr Keats commenced discussions around Mr Savic working for Levante as its operations manager. Mr Keats sent this email to Mr Savic (known as Rale) on 15 May 2006 which materially stated:-

Hi Rale

As discussed, below I have put what I think the operations currently look like. Your thoughts appreciated.

However, based on our conversation I would like you to think hard whether you might be interested. Though the company has only been going 6 months, and 3 months as Tio Pablo - it is also cash flow positive, that it already pays the rent and salary of full time person with the 20 stores we supply. We have 20 stores waiting, we just need a reliable Operations Manager. David and I have the ability to fund this business and we would be prepared to guarantee your salary for 1 year personally, with a legal guarantee - for any circumstances other than serious misconduct by you - which is highly unlikely. This business is poised to take off and the first person we hire will be in a

position to grow with the company. Already we need a casual labourer 3 days a week, I think we can grow this business - we need someone with right skills and attitude to help manage and build it!

Currently we pay 40K salary plus a bonus. For you I would also look at offering a small portion of the company after say 6 months. If you earn more then you let me know what we would have to do to be competitive.

*I know you need stability. **And I think the personal guarantee for 1 year would give you that.** And this business is already doing well, people love the product. This could look great on your CV*

Please have a think about it, and let me know if you're interested. I have discussed with my business partner.

...

(emphasis added)

[5] Mr Savic was first offered a salary of \$40,000.00 together with a bonus. He asked for a salary equivalent to his then existing employment and Mr Keats agreed to pay Mr Savic a salary of \$52,000.00.

[6] On 24 May 2006 Mr Keats sent this email to Mr Savic attaching a draft individual employment agreement:-

Hi Rale

I prepared these from the Dept of Employment, should be straightforward. In terms of potential to get company equity, based on growing the company and being successful it would be 2.5% after 6 months, and another 2.5% after 12 months. This is a firm offer, so please think about and let me know if we are able to proceed. As I mentioned sales have taken off again this week, likely to 60% higher than last week.

Grant

[7] After amendments, Mr Savic accepted employment as Levante's Operations Manager on the terms and conditions set out in a written individual employment agreement which he signed on 27 May 2006 and Levante on 28 May 2006 ("the IEA"). It is not disputed that there was no position description or a description of the duties or work to be performed.

[8] Mr Savic tells the Authority he was never provided with a copy of his employment agreement despite repeated request and that the next time he saw the agreement was shortly before his employment was terminated.

[9] Mr Keats tells the Authority that from September 2006 he and Mr Anderson were becoming increasingly concerned about continuing losses being incurred by the company which they both personally had to finance. Mr Keats further says that he sent “multiple” emails to Mr Savic making it clear that sales were a concern and that Mr Savic’s salary was not sustainable on the prevailing figures. He produces one email dated 19 September 2006 evidencing the directors’ concern and the communication of it to Mr Savic:-

Hi Rale

...

It is almost three months since you started. Sales are not up much, and costs are up a lot. In May/June Mladdin, myself and Dragan could do 250-300 packs a week part time. David and I have full time jobs and we wanted someone so that we didn't have to spend much time in the factory, outside of new stores and accounting. Anything you want to communicate to us about ideas etc is best in email

To be able to produce 400 packs a weeks is not good enough to make the economics work – we need to use you where you said you had strength – contacts in Krean could be next opportunity. With the labeling and shopping (excluding gas) off you – what time will you have this week to visit Krean? I'm trying to free up this tasks that could be done by cheaper resource. We can easily find someone to label, cook etc, for \$14 per hour, but you need to bring your value and justify your salary. Both myself and David asked you about and offered you the salary thinking you could do more than baking/packing/delivering, but at the moment with sales staying at the same spot, we are taking the loss and having to pay money into the business every month. The sales/quality hasn't improved for you being there. Multitasking and speed is what we expect. If you think that you will produce 400 packets and pack them and it will be enough, that won't be sufficient with the time taken away from labeling and shopping, and outside of production – Try to 1.use your contacts, 2.bring more business, 3. then get more staff,4. then develop new products.

Lastly can you note in the production schedule who we've called each week

Thanks

Grant

[10] Mr Keats and Mr Anderson met on 23 October 2006 to discuss Levante’s continuing poor financial performance. They resolved not to liquidate the company but rather to restructure its operations. They were particularly aware of the legalities involved in continuing to trade while insolvent.

[11] On 24 October 2006, Mr Keats emailed Mr Savic advising of his and Mr Anderson’s meeting the previous day. He invited Mr Savic to meet with him on Friday 27 October 2006 at either 12.30pm or 1.30pm. Mr Savic responded that he could meet at 12.30pm.

[12] Mr Keats took advice and wrote again to Mr Savic in an email of Thursday 26 October 2006 as follows:-

Rale

Just confirming the 12.30pm meeting at the factory tomorrow. This meeting is to discuss the current status of Tio Pablo, including the financial position, options open to the company and proposed actions. I will explain what David and I discussed in terms of these options.

This meeting will be to provide information about the proposed changes, give you an opportunity to comment on the proposal and be an opportunity for us to consider and respond to your comments. As one of the outcomes may be a redundancy situation you entitled to bring a representative if you choose to do so.

Branka also mentioned today that you don't have a copy of your contract. I thought David and you had signed and retained a copy each when you commenced. I will bring the copy I have tomorrow for you.

Kind regards

Grant

[13] Mr Savic responded by email writing "OK 12.30". But later that evening he sent an email to Mr Anderson and Mr Keats at 9.21pm as follows:-

Hi Grant/David

Today at work when I was working at the back of the machine I had to twist my back so many times as machine is much faster now. I got a pain in my back which continued to increase during and after work. I was seen by doctor and he got me on ACC. Fully unfit for work from 26/10. Returned to normal work on 2/11. Someone has to come to pack of today staff (5 balls). Grant I will come for the meeting. Kind regards.

Rale

[14] At 10.11pm Mr Keats emailed Mr Savic:-

Hi Rale

I have organised cover. Please bring a copy of the doctors certificate and other paperwork. Kind regards

Grant

[15] The following day Friday 27 October 2006 at 10.00am Mr Savic emailed Mr Keats again:-

Hi Grant

Sorry Grant but I cant come on meeting today. My back is getting worst and painful. After consultations this morning Doctor told me to have a rest and not to move and walk too much. If I fill beater maybe we can organize meeting on Monday or some other day next

*week. Another option is if you have that in written form maybe someone can bring it to me so I can read it through and give my comments or suggestions. Sorry again. Kind regards
Rale*

[16] At 10.12am Mr Keats emailed Mr Savic back:-

*Rale
I will come to your house around 1.30-1.45pm. 1) Please have doctors name and contact details, doctors certificate, diagnosis and any other paperwork ready for me please 2) I will need you to complete and sign an incident and injury form outlining key details, times, previous conditions etc (for ACC purposes) 3) As outlined yesterday the meeting will be to provide information about the proposed company changes, give you as opportunity to comment on the proposal and be an opportunity for me to consider and respond to your comments. As one of the outcomes may be a redundancy situation you entitled to have a representative present if you choose to do so. Regards
Grant*

[17] At 10.16am Mr Savic replied:-

*That is OK
Rale*

[18] Mr Keats visited Mr Savic at his home at 1.30pm on Friday 27 October 2006. Mr Keats presented Mr Savic with a document referred to as the proposal which in essence proposed the directors taking over the operations manager function and thereby rendering that operations manager position redundant.

[19] Mr Savic tells the Authority Mr Keats asked his opinion but says that when he tried to comment raising the subject of a casual employee and cutting costs, he was abruptly interrupted. He also says he was told the decision was already made.

[20] Mr Keats in reply denies Mr Savic's evidence. He says he told Mr Savic the document was only a proposal and that he was interested in Mr Savic's input. He adamantly denies abruptly interrupting Mr Savic. He says he also told Mr Savic there was a further board meeting that weekend at which a final decision would be made. Mr Keats also says that Mr Savic did offer comment by way of stating that he had no comment to make about the proposal and further, that he and Mr Anderson were "idiots" and that the business would be bankrupt soon. Mr Keats says that Mr Savic

suggested the possibility of Levante selling its equipment to him. Mr Keats says he invited Mr Savic to give him an actual offer.

[21] I find that the session with Mr Savic was not lengthy. I prefer Mr Keats evidence where it is in conflict with Mr Savic and accordingly I find that Mr Savic was asked for his input and he offered no comment about the proposal.

[22] Subsequently, Mr Savic was advised of his redundancy by the termination letter.

The merits

The Guarantee

[23] Mr Savic relies on the email from Mr Keats of 15 May 2006 which materially stated:-

David and I have the ability to fund this business and we would be prepared to guarantee your salary for 1 year personally, with a legal guarantee - for any circumstances other than serious misconduct by you - which is highly unlikely.

...

I know you need stability. And I think the personal guarantee for 1 year would give you that.

[24] I find that Mr Savic relied on those statements. At the time he had existing employment and a secure income stream accompanying it. I have no doubt that these statements were intended to influence Mr Savic and did in fact induce him to accept employment with Levante.

[25] Relying on the statements, Mr Savic maintains he is entitled to a guaranteed salary for one year. He makes claim to the Authority for the unexpired portion of the annual salary being six months salary in the amount of \$26,000.00.

[26] I accept Ms Tierney's submission that as a result of the application of section 2 of the *Contracts Enforcement Act 1956* that any alleged contract of guaranteed relied on by Mr Savic is not enforceable. That enactment requires any such contract to be in writing and signed by the contended guarantor before it is enforceable.

[27] I consider the enactment determinative of the matter. Accordingly, because the contended guarantee is not signed by Mr Keats, it is not enforceable at law. I therefore decline on this basis to grant resolution in the manner sought by Mr Savic.

[28] I also note that the Legislature has not amended the historic legislation to recognise modern electronic communications or electronic signatures. Notwithstanding the absence of signature, I am also doubtful that there has been a "default" for which the guarantor is then liable to make good.

The Redundancy

[29] The test of whether a dismissal is justifiable falls to be determined according to the statutory prescribed test of justification at s103A of the *Employment Relations Act 2000* ("the Act"). That test is equally applicable to dismissals for redundancy. I must consider whether on an objective basis, the decisions made by Levante and how they were made were what a fair and reasonable employer would have done in all the circumstances at the relevant time.

[30] The statutory duty of good faith set out at section 4 of the Act emphasise the obligations of consultation and fair and sensitive treatment owed to an affected employee or employees.

[31] I accept the situation put before the Authority by Levante that its business continued to sustain financial losses and in the words of the directors the business "was going to the wall". This finding is evidenced by the directors' evidence and as corroborated by the profit and loss accounts tendered to the Authority. Mr Savic also agrees the business experienced poor financial performance. I accept therefore that Levante was faced with a situation that it had to address. As to the genuineness of the decision to terminate Mr Savic's employment, I am satisfied that it was genuinely a result of poor financial performance and not due to anything else.

[32] So while I find it was substantively genuine, Mr Savic is entitled to be treated in good faith and fairly and sensitively.

[33] Mr Savic was employed by Levante for only six or seven months when he was made redundant. The email of 19 September 2006 was I find the first communication that the economics were not working. Then there was a meeting of directors on 23 October 2006 where the directors reviewed the financial situation and formulated a proposed restructuring. It was only a week later that Mr Savic was formally informed of his termination.

[34] I accept that through Mr Keats, Levante did conduct some consultation with Mr Savic. But I conclude it was not effective bearing in mind the ultimate purpose of it. What is required is not consultation for sake of it. Consultation must be a reality and not a charade. Nor should it ever be treated as a mere formality.

[35] Only days after the directors proposed a restructure, there was a meeting with Mr Savic. That meeting was at his home, when Mr Savic was I accept, unwell and injured. The haste with which the session was thrust upon Mr Savic rather tends me to regard the consultation purportedly undertaken as hurried and contrived.

[36] The real purpose of consultation is to afford the employee a real opportunity to have input into the decision before the decision is actually taken. That is the essence of it. The enactment of section 4(1A)C of the Act underscores this purpose for only it can only be when the employee is provided with all the relevant and pertinent information that their input is likely to be meaningful.

[37] While the directors produced financial statements to the Authority, I find they did not do so with Mr Savic. What they did put before him at his home on Friday 27 October 2006 in the form of the proposal, was in my view wholly deficient. I consider that a fair and reasonable employer would have presented him with the financial statements and the information that was considered at the directors meeting held on 23 October 2006, being the impetus for the proposed restructure.

[38] The same notional fair and reasonable employer would have permitted Mr Savic some time to consider the material and to formulate a response, some suggestions or ideas. But Levante did not conduct itself this way and accordingly I conclude its

actions fall short of what was required.

[39] I also consider it unfair to have expected Mr Savic to take responsibility for new business, when his role was operations manager. I find that this was a significant and operating reason for the decision that the position was redundant. Moreover, there was no position description or statement of Mr Savic's duties and because of that, I am not persuaded this was properly a function of Mr Savic's employment. It was not fair to hold Mr Savic accountable for such matters if they were not agreed as part of his duties in the employment relationship. Nor can it be fair to terminate his employment if it was not agreed as his duty.

[40] The enforceability of the contended guarantee is an entirely different matter from the attendant good faith considerations surrounding it. I find that Mr Savic did rely on the guarantee referred to in entering the employment relationship with Levante. I do not criticise Mr Savic for regarding it as a security for his income, or more than that, as a gesture which reasonably and quite properly would have instilled in any receiver of it, a commitment and assurance by the employer to personally make good losses and further to continue, although it would be unreasonable to think indefinitely, to sustain such losses. Inherent in that stated view is my conclusion that the referred guarantee was indicative of Levante's expectation of unprofitability and contingent losses. I consider it not in good faith, unfair and insensitive to have permitted Mr Savic to rely on the assurance only to ultimately terminate his employment having not discussed with him beforehand the limits or parameters of the assurance.

[41] For all these reasons, while I find that the decision to terminate Mr Savic's employment was a genuine decision in terms of it being commercially justified, I find that it was not carried out in a way which treated Mr Savic fairly and sensitively. The information proffered to the Authority in justification of the decision to terminate was the very information which ought to have been put before Mr Savic by way of consultation with him, in advance of the decision being taken. That would have accorded with the obligations on Levante stipulated at section 4 of the Act.

The determination

[42] I conclude the dismissal does not satisfy the test of justification prescribed by section 103A of the Act. **I find that Mr Savic was unjustifiably dismissed. He is entitled to remedies in settlement of that personal grievance.**

The resolution

[43] Having made those findings and in considering both the nature and the extent of the remedies to be provided, I am bound by section 124 of the Act to consider the extent to which Mr Savic's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly. I find that Mr Savic did not contribute to the situation that led to the personal grievance I have found. There is therefore no basis to reduce either the nature and extent of remedies to be awarded to him.

Reimbursement

[44] I have found that Mr Savic cannot enforce the communicated intended guarantee. I decline to award him the balance of six months salary he asks for.

Compensation

[45] Mr Savic says that his redundancy, occurring as quickly as it did and without any real or proper consultation and consideration, was a great shock to him and his family. He says that Mr Keats was intimately aware of his personal circumstances at the time that he had a substantial mortgage to service and two young children. In particular, he points to his insistence on one year job security he made known at the outset of his employment. He says he and his family experienced a great deal of hardship after his termination and he found it extremely difficult to find a new job so close to Christmas and the New Year. He says his family struggled to meet everyday finances.

[46] Mr Savic says he tried to find a similar position to his nine year employment at Bakels but he was not successful. In May 2007 he established his own Pizza and Pasta takeaway shop financed entirely by bank loan.

[47] Mr Savic tells the Authority he has not fully recovered and he worries that the experience of the termination of his employment with Levante will haunt him for a long time.

[48] I accept that Mr Savic relied on the assurance underlying the intended guarantee. The guarantee itself was not perfected in terms of being executed legally, but additionally, its limits and parameters were not discussed with Mr Savic. I accept Mr Savic relied on the underlying assurance. That underlying assurance was revoked without prior warning to Mr Savic. I accept this situation as an aggravated feature of Mr Savic's termination.

[49] I find that Mr Savic has suffered hurt, humiliation and injury to his feelings arising out of the manner in which his employment with Levante was terminated. Having established this loss, I consider it just that he be compensated for it. Having regard to his evidence, the length of his service and the nature of the grievance, I award Mr Savic \$8,000.00 compensation. **I order Levante Technologies Levante Technologies Limited t/a Tio Pablo to pay to Ratko Savic the sum of \$8,000.00 compensation.**

Costs

[50] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Bennett is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Ms Tierney is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination.

Leon Robinson
Member of Employment Relations Authority