

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA159/08
5040450

BETWEEN GRAEME JOHN FRASER
 Applicant

AND HERITAGE TRAVEL GROUP
 LIMITED
 Respondent

Member of Authority: Paul Montgomery

Representatives: Graeme Fraser in person
 Rodney Russ, Advocate for Respondent

Investigation Meeting: 28 May 2008 at Christchurch

Submissions received: 11 June 2008 from Applicant
 10 June 2008 from Respondent

Determination: 23 October 2008

DETERMINATION OF THE AUTHORITY

[1] Mr Fraser says he was unjustifiably dismissed from his position as manager of the respondent's Wild Earth Travel division on the ground of redundancy. Further, he says there was no consultation with him prior to the company advising him of his dismissal on 6 June 2006. Mr Fraser seeks three months' salary in lost remuneration, compensation of \$10,000 and costs.

[2] For the company, Mr Russ says the decision to terminate Mr Fraser's employment was made after careful consideration of the options and alternatives available to the directors. Further, he says the company followed proper procedures involving Mr Fraser in those procedures. Given its views, the company declines to provide the remedies Mr Fraser requires.

[3] The parties attended mediation with the Mediation Service but were unable to resolve their differences.

The issues

[4] To determine this matter, the Authority needs to make findings on the following issues:

- Was the position held by the applicant surplus to the respondent's requirements;
- Was the procedure adopted by the respondent appropriate in all the circumstances;
- Was the applicant unjustifiably dismissed; and
- If so, what remedies ought to be paid to Mr Fraser?

The history

[5] The company provides travel services to customers interested in expedition-type experiences to various destinations in the world, but particularly in the Antarctic region. Mr Fraser was recruited to develop a range of alternative destinations for the business under a separate operating division within the existing company structure. He began his employment on 4 July 2005 as manager of the Wild Earth division.

[6] Mr Fraser, an experienced travel consultant, set about identifying suitable destinations, preparing marketing and sales promotion material in association with other managers and liaising with other company personnel to establish a Wild Earth brand for the respondent.

[7] For considerable periods, Mr Russ was away from the business, either leading tour groups or making necessary arrangements regarding vessel charter and other organisational requirements. In his absence, his wife, who is also a director of the company, oversaw operations.

[8] The applicant says that on several occasions following his recruitment, Mr Russ acknowledged it may take some two years for Wild Earth to generate sufficient income to stand on its own feet. Mr Fraser's view concurred with this analysis on the basis of his 16 years experience. A performance review was undertaken in November 2005 and Mr Fraser says Mr Russ asserted he was *highly satisfied* with the progress being made. He says, *Mr Russ scored me higher on*

several categories than I did myself. This review followed the publication of a brochure in October 2005 marketing the division's product range, most being offered for the first time.

[9] On 18 May 2006 Mr Fraser says he was advised the division's performance was so poor that the company was considering his ongoing employment. He says this came thoroughly unexpectedly but accepted a review of the division scheduled for completion on 6 June 2006 would objectively assess the progress made.

[10] The applicant submitted written analysis of the division's performance to date and spoke to those issues with Mr Russ on two occasions but says the company was simply not interested in what he had written and had to say. Frustrated at this lack of openness on his employer's part, and with his position likely to vanish because of its refusal to acknowledge the progress made, Mr Fraser requested the assistance of the Mediation Service. The company agreed to this proposal and 14 June 2006 was set for mediation assistance.

[11] The company announced Mr Fraser's redundancy to him on 6 June 2006 without providing him any information including the review report or figures to justify its decision. The mediation was deferred and Mr Fraser finished work on 23 June 2006. At the actual mediation, he says, no information supporting the decision to dismiss him was made available.

[12] Mr Fraser told the Authority, *the last months since May 2006 have been a period of immense strain on me both professionally and personally. I was deeply shocked by the claims made against me by the company and by the uncompromising attitude towards my appeals against their decision. The company's recent threat of legal action unless I dropped my claim, leaves me with an immense feeling of the injustice of my situation and the treatment I have received from them.*

[13] The applicant's view was briefly summarised in the statement of problem:

Quite simply, following the creation of the Wild Earth Division, Mr Rodney Russ had a big change of mind. After appointing three key managers in July 2005, he gradually realised that he did not actually like ceding authority or responsibility to them. Consequently, he reneged on the promises made to them on their recruitment and subsequently undertook two acts of restructuring to regain his control.

[14] The respondent, through Mr Russ said in its statement in reply:

While the outcome might not have been what Mr Fraser wanted, the owners can very clearly demonstrate that there was really not option but to restructure the division which he was responsible for or face the reality of continued loss of investment. We considered options of investing more money to try and turn it around but at the end of the day we felt we had invested enough and the only responsible commercial decision was to make the position of manager redundant and re-absorb the division back into the existing structure from where it had come and acknowledge that we had failed – which is not always easy. We felt that it was better to acknowledge failure at this point than later.

[15] Mr Russ also says that prior to the establishment of the division much of the work had already been undertaken over some six years. He said the reasons for appointing a manager were essentially that the owners were involved in expanding their own ship programme into the Pacific and the Russian Far East and did not have the time needed to develop the division's business, and the owners anticipated that within two years a manager could re-brand the division into a *stand-alone business that could, if decided, be sold off*.

[16] Mr Russ says in April/May 2006 he became a little concerned when advised by Mr Fraser that he had cancelled a number of scheduled expeditions which had previously sold out. Upon checking bank statements and other files he says it was obvious that the newly formed division was struggling to even match previous seasons sales figure. He says in the light of this he instigated a formal review which was to coincide with the anniversary of the decision to split the division off from the company proper. He says the company involved Mr David Shackleton, their accountant and director and also consulted others within the industry. Mr Russ also says the company invited Mr Fraser to sit down with them for an open and frank discussion but said *unfortunately he declined opting instead to send a few written comments. Unfortunately this did limit his involvement*.

[17] Further, Mr Russ says a confidential report prepared by an unidentified person or persons for the company directors found the division had experienced very poor financial performance over the previous twelve months and that the outlook for forward bookings was well down on expectations. That report recommended declaring the position of the manager redundant, reducing the number of expeditions offered by Wild Earth to focus on some key destinations and that the name Wild Earth be retained, but the work be undertaken by existing staff as had been the case prior to the appointment of Mr Fraser, was adopted by the respondent.

[18] In summing up the situation Mr Russ says *We have been open, honest and co-operative with Mr Fraser throughout the review period, there was [sic] no hidden agendas, no preconceived ideas – it was a commercial review based on a financial investment we had made.*

The investigation meeting

[19] The Authority heard evidence from Mr Fraser, Mr Paul Fitzpatrick, the then Sales and Reservations Manager, and Ms Nicola Olds, the then Accounts Manager, in support of the applicant's claims. The Authority also received a written statement provided by Ms Nicola Vallance, formerly the Communications and Marketing Manager for the company. For the respondent Mr Russ provided evidence in opposition to Mr Fraser's claims.

[20] Of considerable importance to the Authority was the appearance of Mr Fitzpatrick in support of Mr Fraser. Mr Russ had advised the Authority that he *would call under oath Mr Paul Fitzpatrick* to support the basis of the decision to remove the applicant's position. This witness impressed with his detailed and calm manner under questioning. The evidence of Ms Olds was taken by telephone. The witness provided confirmation that, on the instructions of Mr Russ, she was not to provide Mr Fraser with accounting data and also confirmed views regarding the frequent interference of the Russ family members in matters they had delegated to various managers.

[21] The applicant's witnesses told of an *unhealthy atmosphere* pervading the organisation, Ms Vallance endorsing Mr Fraser's view that:

The company's behaviour reflected

- (1) *A lack of basic trust in its paid employees, at times to the point of paranoia;*
- (2) *A repeated lack of respect for their professional integrity and abilities; and*
- (3) *Continual disregard for the scope of each manager's responsibilities and overstepping of these by Mr Russ.*

[22] The evidence of Mr Russ on behalf of the company was essentially that the division was not performing up to expectation and became a drain on the financial resources of the company as a whole. He says the decision to disestablish Mr Fraser's

role was a collective one taken by the Board and it was a decision the company was entitled to take given the circumstances.

[23] When responding to questions put to him by Mr Fraser I found the evidence of Mr Russ less than satisfactory. For example, when asked why Mr Russ had not given him targets and sales guidelines and a budget for expenditure in the division, Mr Russ replied *it was already there, the division had been running for some years*. When Mr Fraser put to him that Mr Russ had not shared with him his view that North Island sales had declined Mr Russ agreed he had not given that information to the applicant.

[24] Of particular interest to the Authority was Mr Russ's demeanour when Ms Olds was giving her evidence. When the answers to his questions to Ms Olds did not suit Mr Russ's purposes, he attempted to speak over the witness and to debate issues with her. The witness was clearly quite accustomed to this happening and made it clear to Mr Russ she would not be talked down. That inter-change reinforced my tentative view, formed during the teleconference and on the basis of Mr Russ's interaction with support staff, that he is a man who operates in an autocratic style unwilling to accommodate opposing views.

Discussion and analysis

[25] The Authority has no reliable documentary evidence from the respondent to determine the substantive basis for Mr Fraser's dismissal. When determining the legitimacy of a redundancy, the principle in such a case is that no Court or Authority will interfere with a company's decision declaring a position redundant on financial grounds or in what the company sees as its best financial interests.

[26] What is patently lacking in this case however, is any consultation process engaging Mr Fraser on the matter of his continued employment, prior to his dismissal. It is clear that after being dismissed, Mr Fraser was offered the opportunity to apply for another role, but this is the classic *too little too late*. It will not save the respondent from its obligation to consult with Mr Fraser prior to a decision about his position, giving him the opportunity to propose outcomes short of dismissal. I am satisfied this was not done.

[27] The Authority accepts that in the context of a family business operated by Mr and Mrs Russ and their two sons, hired specialist managerial personnel tend to become more expendable than family when plans go awry.

[28] In the final analysis, it appears that the directors changed their minds on operational aspects of the business and sought to regain control. As directors they have that right, but only if the obligations to staff are met. In this case, those obligations to Mr Fraser were not met.

Determination

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

- The company was entitled to declare Mr Fraser's position redundant and disperse his duties to others already employed;
- The company failed to engage Mr Fraser in a process of consultation regarding his position and failed, prior to dismissing him, to offer any alternatives;
- I find Mr Fraser was unjustifiably dismissed.

Remedies

[30] In his claim put before the Authority the applicant sought three months salary for reimbursement of lost income. In his evidence Mr Fraser told the Authority that while with the respondent, he was on a salary of \$50,000 gross and five weeks following his redundancy from the respondent secured other work but as at an annual salary of \$40,000. It is evident that Mr Fraser mitigated his loss and accordingly he is awarded under s.123(1)(b) and s.128(2) thirteen weeks lost earnings.

[31] The sum is comprised of five weeks gross salary at \$961.54 gross and eight weeks salary at \$192.31, this being the difference between his salary with the respondent and that which he was paid by his new employer. The total award under the heading of lost remuneration as a result of the grievance is \$6,346.18.

[32] Turning now to matter of compensation, I have borne in mind the respondent's staunch view that the redundancy was in no way occasioned by performance issues it had with Mr Fraser. I have also been mindful that while the applicant did not expect this outcome and was looking for long term employment stability, he was in fact employed for a little over one year. Alongside this I have considered the stress and humiliation Mr Fraser endured following his dismissal. In this I include the threat of legal action against him made, but not followed through by the company.

[33] Weighing these factors I think it just in the circumstances to award the applicant the sum of \$7,500 under s.123(1)(c)(i).

[34] I find that Mr Fraser did not contribute to the circumstances which gave rise to his dismissal.

Costs

[35] As each party represented itself at the investigation meeting the issue of costs is unlikely to arise. If Mr Fraser has incurred legal costs in respect to the Authority's investigation or incidental costs such as photocopying and the like, leave is reserved for him to submit those costs within 14 days of the date of this determination's issue. Notwithstanding that leave, I order the respondent to refund the \$70 filing fee to Mr Fraser. In the event that Mr Fraser makes a submission on legal costs, he is to serve a copy on Heritage Travel Group. The respondent has a right of reply to be lodged and served on Mr Fraser within 14 days of receiving the applicant's memorandum.

Paul Montgomery
Member of the Employment Relations Authority