

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 526/10
5289236

BETWEEN DAVID BATEMAN
 Applicant

AND RUSH SECURITY SERVICES
 LIMITED T/A DARIEN RUSH
 SECURITY
 Respondent

Member of Authority: Robin Arthur

Representatives: Lorne Campbell for Applicant
 Alison Maelzer for Respondent

Investigation Meeting: 13 August 2010

Determination: 23 December 2010

DETERMINATION OF THE AUTHORITY

- A. David Bateman has a personal grievance arising from how Rush Security Services Limited (RSSL) decided and went about disestablishing his position and dismissing him for redundancy.**

- B. RSSL wrongfully deducted \$2000 from wages owed to Mr Bateman for an insurance excess incurred by the company.**

- C RSSL is ordered to pay Mr Bateman distress compensation of \$6000 and refund him for the deductions from his wages.**

Employment Relationship Problem

[1] David Bateman worked for Rush Security Services Limited (RSSL) for two years up to September 2006 and was then re-employed from 1 May 2007 as a security technician. His work was to install and maintain security systems in residential and

commercial premises in Auckland. In October 2007 he was promoted to the position of technical supervisor.

[2] In June 2009 RSSL proposed restructuring which would have resulted in the disestablishment of Mr Bateman's position. Instead, RSSL opted to pay for Mr Bateman to undergo extra training in a computer networking course.

[3] There is disagreement between the parties on who was responsible for making the arrangements for Mr Bateman to enrol in the identified programme. After some delay he made the contact with the course organiser. At that point he was told that he needed to do a pre-requisite course. However, when informed of this, RSSL did not want to meet the full cost of both the pre-requisite course and the network course.

[4] Around this time a company vehicle which Mr Bateman used for work was damaged. He was asked to sign a form consenting to deductions from his wages to repay an excess incurred by RSSL under an insurance policy which covered the cost of repairs for the damage. He signed the form but subsequently challenged RSSL's right to get such a repayment from him.

[5] In early September 2009 RSSL employed Phillip Tarrant to a new role as senior security systems and network engineer. Mr Bateman described Mr Tarrant as his "boss" and he was then assigned to tasks which did not have the same supervisory or technical responsibilities as he had before Mr Tarrant's appointment.

[6] On 14 September Mr Bateman met with RSSL's managing director Darien Rush. He told Mr Rush he was not satisfied with his position at work and intended leaving by the end of October or early November. Mr Rush said that he mentioned during that conversation that Mr Bateman's role might not be required by RSSL in the future. Mr Bateman said his "*future resignation*" was accepted by Mr Rush.

[7] On 18 September Mr Bateman was given a written invitation to meet over a "*restructuring proposal*" being considered for this reason:

Regretfully, based on the current market conditions and next

quarter's outlook the company does not have enough installation orders to support your position through this time and has no choice but to consider making your role redundant.

[8] At a meeting on 22 September with RSSL general manager Larissa Rush and technical manager Leon Chin, Mr Bateman was told his position was redundant. During the meeting he suggested that rather than dismissing him, RSSL should lay off one of its cabling. He also raised the issue of whether he should have to pay the insurance excess and said he had decided to resign on 13 November as discussed previously with Mr Rush.

[9] The following day Mr Bateman received a letter giving him notice of dismissal for redundancy – with a requirement to work until 2 October and be paid a further two weeks pay after that without having to work. The letter also stated that it was not cost efficient for the company to make a cabling redundant instead of him and his redundancy was “*based on the current commercial situation*” as most projects were finished for the year and “*nothing of substance is at hand*”.

[10] Mr Bateman complained about the decision and the notice as being less than his contractual entitlement. He and his father met with Ms Rush and Mr Chin on 24 September. Following that meeting he was given a letter extending the notice to 23 October. Mr Bateman argued that his notice should run until 13 November but Ms Rush said RSSL, including Mr Rush, had not known Mr Bateman intended leaving on that date.

[11] Ms Rush agreed to review the situation over deductions for the insurance excess.

[12] In the following days there were some testy exchanges between Mr Rush and Mr Bateman's father about the arrangements for notice and wage deductions. Mr Bateman worked through to 23 October. In early October he cancelled the weekly \$50 automatic deduction from his wages for the cost of the insurance excess. However at the end of his employment RSSL deducted \$1300 from his final pay as what it regarded as owed on the balance of the \$2000 insurance excess. RSSL relied on a term in his employment agreement authorising deduction from final pay of

“whatever monies it may be owed under the employment relationship”.

[13] In March 2010 RSSL advertised a vacancy for a security systems technician on a salary and benefits which Mr Bateman thought was similar to what he had received.

[14] Mr Bateman challenged his dismissal for redundancy as not being for genuine commercial reasons, believing he was simply replaced, and said he was treated unfairly. He sought lost wages, distress compensation and costs.

Issues

[15] The issues for investigation and determination were:

- (i) was the decision to make Mr Bateman’s position redundant made for genuine commercial reasons or was he simply replaced; and
- (ii) was his dismissal for redundancy done in a fair way; and
- (iii) was RSSL entitled to deduct an insurance excess for damage to a company car; and
- (iv) should any penalties be imposed on RSSL; and
- (v) if Mr Bateman’s dismissal was unjustified, what remedies should be awarded to him?

[16] An issue regarding outstanding holiday pay was resolved directly between the parties and required no determination by the Authority.

The investigation

[17] For the purpose of the investigation written witness statements were lodged by Mr Bateman, Mr Chin, Ms Rush, Mr Rush and RSSL commercial manager Tom Bricklebank. Each witness attended the investigation meeting. Under oath or affirmation, they confirmed their statements and answered questions from the Authority member and additional questions from the representatives. The representatives also provided closing submissions.

[18] In preparing this determination I reviewed the witnesses' written and oral evidence, the parties' closing submissions, and the relevant background documents provided. As allowed for under s174 of the Employment Relations Act 2000 (the Act), I have not recorded here all evidence and submissions received but state findings of facts and law and express conclusions on the issues for determination.

Was the redundancy genuine?

Legal framework

[19] Mr Bateman's employment agreement had the following terms regarding redundancy:

A redundancy situation arises when the employment is terminated due to the fact that the position held by the employee is, or will become, superfluous to the needs of the employer.

In such cases, the employer will follow a fair procedure, will consult with the affected employees and explore any alternative options before terminating the employment.

If the employment is terminated on the grounds of redundancy, the employer will give not less than the notice period specified in clause 36 ["not less than 1 months notice in writing"]. The employer may, at its discretion, pay wages in lieu of some or all of this notice period.

[20] In making decisions about the future of the position held by Mr Bateman, and his employment, RSSL was bound by those terms and certain statutory obligations. Its decision to make the technical supervisor position redundant – and how it went about dealing with Mr Bateman about any proposal, decision and consequences of redundancy – were justifiable if its actions were what a fair and reasonable employer would have done in all the circumstances at the time of the decision and dealings around it: s103A of the Act.

[21] The application of s103A to the personal grievances involving redundancy was described in this way in *Simpsons Farms Limited v Aberhart* [2006] ERNZ 825:

[65] ... The statutory obligations of good faith dealing and, in particular, those under s4(1A)(c) inform the decision under s103A about how the employer acted. A fair and reasonable employer must,

if challenged, be able to establish that he or she or it has complied with the statutory obligations of good faith dealing in s4 including as to consultation because a fair and reasonable employer will comply with the law.

...

[67] ... So long as an employer acts genuinely and not out of ulterior motives, a business decision to make positions or employees redundant is for the employer to make and not for the Authority or the Court, even under s103A.

[22] So satisfactory answers are needed to two general questions. Firstly, was the business decision to make a position redundant in this case made genuinely and not for ulterior motives? Secondly, did RSSL act in a fair and open way in carrying out that decision – particularly did it consult properly about the proposal to make Mr Bateman’s position redundant and otherwise act in a way that was not likely to mislead or deceive him, that is in good faith?

[23] The integrity of a restructuring scheme, even where motivated by genuine operational requirements, may be compromised by its application to particular individuals for reasons other than that their jobs have gone. Where the selection of an employer for redundancy is “*tainted by some inappropriate motive*” and the redundancy is “*masking another and different reason*”, the worker will have a valid grievance.¹

[24] Mr Bateman, having raised an allegation of an engineered dismissal has the burden of convincing the Authority that the theory has substance.

[25] If the Authority finds ‘mixed motives’ – such as genuine business reasons but with underlying personality or performance concerns² – the employer bears the burden of persuading the Authority that the redundancy was both genuine and the predominant motive or reason for dismissal.

[26] If the predominant motive was a genuine commercial decision, the dismissal will be justified if carried out in a fair manner. However if the predominant motive

¹ *Savage v Unlimited Architecture Ltd* [1999] 2 ERNZ 40, 49-50 (EC).

² The example given in *Nelson Aero Club Inc v Palmer* (unreported, EC Wellington, 7 March 2000, WC10A/00, Judge Shaw).

was for another reason, the dismissal will be unjustified.³

[27] An important indicator of whether a redundancy was for genuine commercial reasons is whether the employer can show “*a significant paper trail or other solid foundation of evidence demonstrating its consideration of a reorganisation*”.⁴

Predominantly ulterior motive not established

[28] I find Mr Bateman has not established sufficient substance to his allegation of an engineered dismissal for a predominantly ulterior motive.

[29] The establishment of a senior engineer’s position, to which Mr Tarrant was appointed, was for sound commercial reasons relating to the requirements of a particular service contract. There was no real prospect of Mr Bateman being appointed to that role. As a close examination of the job description showed, that role required experience and qualifications – specifically network engineering – at a level which Mr Bateman did not have, even if he had been able to undertake the network training he was promised. Mr Tarrant did.

[30] Similarly I do not accept the ‘Trade Me’ job advertisement posted in March 2010 – more than four months after Mr Bateman’s dismissal – was for a job directly comparable with his former position at RSSL. It was a technician’s role, which he had carried out earlier in his work for RSSL, but I accept Mr Chin’s evidence that the advertisement placed at that time was to do with support work which had become available on a particular contract.

[31] Mr Bateman alleged the motive for his dismissal came from two arguments he had with RSSL managers – one over payment for lieu days and another over being required to pay the insurance excess. While that is possible I do not accept mere assertion is enough to establish the necessary level of probability. Some evidential basis is needed to support an inference that those disagreements provoked a revival of earlier restructuring proposals primarily so RSSL could rid itself of Mr Bateman. I do

³ *Forest Park (NZ) Ltd v Adams* [2000] 2 ERNZ 310, 322 (EC).

⁴ *Rolls v Wellington Gas Co* [1998] 3 ERNZ 116, 123 (EC).

not see it in the evidence before the Authority.

[32] However there are three factors of concern in considering the genuineness of RSSL's rationale for the redundancy.

[33] Firstly, there was no compelling explanation for the difference in the reasons for restructuring advanced in June and September. In June the reason was given as the need for a "*different skill set*" to "*service the current workload and the future outlook*". In September it was said that "*current market conditions and next quarter's outlook*" meant there were not enough installation orders.

[34] Secondly, the training programme agreed in June was an alternative to redundancy at that stage. RSSL placed responsibility solely on Mr Bateman for not having undertaken that training – a position I do not accept is supported by the evidence. There was genuine confusion over the need for a pre-requisite course. Mr Bateman was entitled to rely on the advice of the course co-ordinator on that point. Mr Chin was overseas and Mr Bateman was, I find, told by Ms Rush to wait for Mr Chin's return to sort it out but Mr Bateman was then criticised for the delay. If RSSL had been more active in arranging the training, alternatives to Mr Bateman's dismissal for redundancy may have been available.

[35] Thirdly, the evidential paper trail for demonstrating the rationale for commercial reorganisation is thin. Mr Chin said in evidence at the Authority investigation that he had prepared spreadsheets on forecast and actual work, including costings, but not shown them to Mr Bateman because he did not ask.

[36] However I was not persuaded those doubts were sufficient to determine the removal of the technical supervisor position was not decided for the genuine commercial motive of cost saving which is permitted provided it does not camouflage an unfair purpose.⁵

⁵ *GNH Hale & Sons Ltd v Wellington Caretakers and Cleaners Union* ERNZ Sel Cas 843, 849 (per Cooke P).

[37] The availability of work – either at the time or forecast – does not really appear to have been disputed by Mr Bateman at the time. He did not argue about the commercial reality, just how long his notice period should be.

[38] In reaching that view I also note that Mr Bateman had intended leaving the job – by his own account – by 13 November at the latest. In his witness statement he gave a broader time span for his intended departure, which he said he told Mr Rush, starting from late October. In either event the number of weeks for which lost wages could be awarded for a non-genuine redundancy was between one and three. After that point he was not intending to work for RSSL and cannot have lost wages from being denied the opportunity to do so.

Was the redundancy fairly carried out?

[39] A just employer – subject to mutual obligations of confidence, trust and fair dealing and the statutory duty of good faith – will consult on a redundancy proposal and implement any redundancy decision in a fair and sensitive way.

[40] Fair treatment may call for counselling, career and financial advice, retraining and related financial support.⁶ This requires more than “*going through the motions*” and will not justify a course of conduct carried out in a way that bruises rather than reasonably minimises the impact on the employee.⁷

[41] The good faith obligations of the Act required RSSL to be active and constructive, responsive and communicative in consulting Mr Bateman about changes to the business and proposals which might impact on him, including redundancy: s4, s4(1A) and s4(4). This included providing access to relevant information and an opportunity to comment on the information before the redundancy decision was made: s4(1A)(c).

[42] The June decision to support Mr Bateman training for skills which were needed by RSSL was a good but short-lived start to exploring alternatives to

⁶ *Aoraki Corporation Limited v McGavin* [1998] 1 ERNZ 601, at 619 and 631 (CA).

⁷ *Coutts Cars Ltd v Baguley* [2001] 1 ERNZ 660, 673 (CA).

redundancy. Unfortunately it was not put into action and Mr Bateman was blamed for the problems in doing so.

[43] At the time of the September restructuring there seems to have been no real attention paid to the prospect of alternatives to redundancy.

[44] RSSL also failed to properly inform Mr Bateman about the commercial situation before giving him the opportunity to comment on the restructuring proposal.

[45] Mr Chin said he did not show Mr Bateman information about the business case for the change because Mr Bateman did not ask for it. That is less than what is required of an employer subject to good faith obligations to be active and communicative when consulting a worker about a potential redundancy. Mr Chin and Ms Rush should not have waited to be asked and Mr Bateman was denied the opportunity to really consider the company's analysis of the situation before being asked to comment on it and how he might be affected.

[46] Because Mr Bateman was initially told he would get a shorter period of notice than he was entitled to, the redundancy process became acrimonious and stressful. Having secured notice for the full period, he then had to work in a tense environment. During this period Mr Bateman felt ostracised by RSSL managers and was required to do what he regarded as menial tasks. He was not farewelled or thanked in any way for his service. I accept his evidence of finding that distressing. He reacted to that situation by being short-tempered, which affected his home life.

[47] RSSL could have eased that distress by offering counselling and job search assistance as would an employer seeking to minimise the impact on a worker losing his job in what was supposed to be a 'no fault' redundancy situation. It did not.

[48] For that reason I find its treatment of Mr Bateman, in how it carried out the decision on redundancy was less than what a fair and reasonable employer would do in all the circumstances. He has a personal grievance which requires remedies for the manner of the dismissal but not the fact of losing the job.

Were wages legitimately deducted for the insurance excess?

[49] In early June a brand new van provided by RSSL to Mr Bateman for work purposes was damaged. Mr Bateman said this happened when the van was parked in a school car park. Building work was going on at the school at the time and Mr Bateman said he found damage to the rear bumper and tailgate when he returned to the van. He reported the damage to the RSSL office on the following day.

[50] RSSL lodged an insurance claim for the damage.

[51] In early July Mr Bateman was asked to sign a form authorising deductions of \$50 a week from his wages for a total amount of \$2000. This was said to be the excess payable by RSSL on the insurance claim.

[52] Ms Rush explained the requirement for him to pay RSSL's excess as matching the insurance company's practice that the insured party is responsible to pay the excess if no other party is identified as being at fault. As no other party was identified as causing the damage to the van driven by Mr Bateman, he should assume responsibility.

[53] An RSSL policy document – headed “*company vehicles – accident reports/insurance claims*” and distributed to staff about a fortnight after the damage to Mr Bateman's car – stated: “*The minimum excess payable by an employee is set at \$2000 and will be recoverable if the employee is responsible for the accident/incident*”.

[54] Another RSSL policy on company vehicles included the following “*rules and regulations*”:

- *You must pay any excess on the insurance and any amount not covered by insurance*
- *The amount of insurance excess is subject to change and is set by the company from time to time*
- *Where you are involved in any accident you may be required to pay the insurance excess at the company's discretion*

[55] These requirements are contradictory – with the first bullet point stating payment of the excess is mandatory and the third bullet point stating a discretion in the case of an accident. Either way RSSL said Mr Bateman was bound by a term of his employment agreement to comply with such policies which could be amended from time to time.

[56] However such policies are only enforceable against workers to the extent they are consistent with all the terms of their employment agreement. In this case the operation of the above two policies are limited by the following terms of Mr Bateman’s employment agreement:

31.0 x The Employer reserves the right to recover costs from the Employee where the vehicle has sustained damage and was being used in a manner that it is uninsured.

7.3 The Employer is entitled to make a rateable deduction from the Employee’s pay for [...] damage cause by the Employee’s negligence.

[57] RSSL’s statement in reply alleged both that it was “*highly likely*” Mr Bateman himself damaged the vehicle and that “*it is unclear who caused the actual damage*”.

[58] Ms Rush’s evidence to the Authority went further and alleged the damage may have happened on a Saturday rather than a work day and in breach of Mr Bateman’s obligation not to use the vehicle for private purposes.

[59] These allegations were, I find, mere supposition based on a different loss date noted on an email from an insurance consultant in November 2009. They lacked any corroboration and, in fact, conflicted with the insurer’s assessment report which showed the date of loss being the same date identified by Mr Bateman as when the damage occurred. Those documents gave no good reason for RSSL to doubt Mr Bateman’s report on the damage and when and where it happened.

[60] I note too that the insurance documents provided to the Authority showed that the excess charged by the insurer on this claim was \$1000. Despite this RSSL throughout demanded payment of \$2000 from Mr Bateman.

[61] Mr Bateman did sign the deduction form but did so, I find, on the mistaken belief that he was obliged to do so.

[62] I further find that the deduction was not required. Even if RSSL's June 2009 policy on the \$2000 were enforceable, RSSL did not establish that Mr Bateman was "*responsible for the accident/incident*". Simply being the allocated user of the vehicle is not sufficient to fix him with the fault and cost for damage where there was no actual evidence that Mr Bateman was responsible for the incident or that it was caused by his negligence. Consequently a requirement to pay the excess was outside both the terms of RSSL's staff policy on insurance claims and Mr Bateman's employment agreement.

[63] It follows that the deduction from Mr Bateman's final pay of \$1350 as the balance for the excess was illegal. He is entitled to reimbursement of both that amount and the \$650 deducted before he finished work.

Remedies

[64] Because of RSSL's unjustified actions in how it made and carried out the redundancy decision, I find Mr Bateman suffered humiliation, loss of dignity and injury to feelings. Having regard to the particular circumstances of this case and the general range of awards in matters of this kind, I consider an award of \$6000 is warranted as compensation under s123(1)(c)(i) of the Act.

[65] Mr Bateman is entitled to a full refund of all the amounts deducted from his wages for the insurance excess. If RSSL has not already done so, it is ordered to repay the sum of \$2000 as arrears of wages under s131 of the Act.

[66] Mr Bateman sought penalties for breaches by RSSL of its obligations of good faith and under the Wages Protection Act 1983. I consider the deductions from wages was an action by RSSL which proceeded on a mistaken or misconceived basis but not so knowingly wrong that it would warrant a penalty in the circumstances. I consider the other remedies sufficiently resolve this matter and a penalty in respect of good

faith obligations would not assist further assist that purpose.

Costs

[67] Costs are reserved. The parties are encouraged to agree any issue as to costs between themselves. If they are not able to do so and a determination of costs by the Authority is necessary, Mr Bateman may lodge and serve a memorandum as to costs by no later than 42 days after the date of this determination. RSSL will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this timetable unless prior leave has been sought.

Robin Arthur
Member of the Employment Relations Authority