

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 145
5306863

BETWEEN SHANE GALL
Applicant

A N D THE DEREK CORPORATION
LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Jenny Guthrie, Counsel for Applicant
Mark Kamphorst, Advocate for Respondent

Investigation Meeting On the papers

Recommendation: 3 October 2011

DETERMINATION OF THE AUTHORITY

Introduction

[1] This determination records a recommendation of the Authority issued to the parties on 10 August 2011 under S173A of the Employment Relations Act 2000 (the Act).

[2] The statement of problem in this matter was filed on behalf of the applicant (Mr Gall) on 14 March 2011 and a statement in reply filed on behalf of the respondent (Derek Corporation) on 30 March 2011.

[3] During the course of the Authority's engagement with the representatives about setting the matter down for an investigation meeting, there was discussion between those representatives about whether the Authority might be asked for a recommendation instead of conducting an investigation leading to a determination of the Authority.

[4] By notice of direction dated 28 June 2011, the Authority recorded the agreement of the parties to vacate the investigation meeting set down for 16 and 17 August 2011 and to have the Authority prepare a recommendation pursuant to s.173A of the Act .

[5] It was agreed that the full documentation provided to the Authority in conjunction with the filing of the statement of problem and statement in reply was sufficient for the Authority to complete a recommendation, and timing of the issue of the recommendation was also agreed to fit in with the representatives' other commitments.

[6] It is the nature of the particular circumstances of this recommendation process that the Authority has not had the benefit of hearing any of the witnesses give their evidence nor of questioning those witnesses about that evidence nor of hearing the representatives ask their questions of the witnesses. It follows that the Authority's conclusions are, of necessity, based exclusively on the documents filed by the parties in the Authority. That documentation, however, is fulsome and provides an adequate picture of the employment relationship problem so as to enable the Authority to formulate this recommendation.

Employment relationship problem

[7] Mr Gall was employed by Derek Corporation as a sales person, given a particular product line, and a territory covering the lower South Island. A sales budget was developed but within a short period of the employment commencing on 21 May 2009, Derek Corporation were indicating their dissatisfaction with the results that Mr Gall was achieving.

[8] There were a series of telephone meetings (that is meetings conducted not on a face-to-face basis but with each party at the end of the telephone) through until August 2009 at which the parties discussed the performance of Mr Gall in the role and Derek Corporation's expectations of his performance. The intention was that the sales performance would be reviewed again with effect from 30 September 2009, but it is common ground that that review did not take place.

[9] By letter dated 25 September 2009, Mr Gall was notified of a potential redundancy affecting his role. A restructuring consultation process was undertaken,

but by letter dated 19 October 2009, Mr Gall was notified of the disestablishing of his position. He was dismissed for redundancy as a consequence.

Issues

[10] The essence of the task for the Authority is to assess whether or not Derek Corporation fulfilled its obligations to Mr Gall in dismissing him from its service for redundancy. However, there are a number of allegations wrapped up in the statement of problem filed by Mr Gall which it is convenient for the Authority to address.

[11] Accordingly, the Authority proposes to deal with matters by considering the following questions:

- (a) Was Mr Gall adequately supported by the employer?
- (b) Did Derek Corporation appropriately manage its performance concerns?
- (c) Was Mr Gall's position genuinely redundant?
- (d) Was the redundancy process fair?

Did Mr Gall get adequate support?

[12] It seems apparent to the Authority that the employer had reasonably robust support networks in place for its sales team. There were weekly phone conferences with Auckland management and Mr Gall was offered the opportunity of consulting with Auckland management whenever he wished, although the documents before the Authority do not disclose whether he took that opportunity or not. What is clear from those documents is that the offer was made and that there were regular telephone meetings between the sales team and Auckland management, as regularly as weekly.

[13] Given that Mr Gall was, at the time of his recruitment, an experienced sales executive, it does not seem to the Authority unreasonable for Derek Corporation to imagine that Mr Gall would be relatively self supporting and would be able to "foot it" with the other sales executives after a reasonably short introductory period. Notwithstanding that possible assumption on the part of Derek Corporation, I am satisfied that the supports in place were appropriate for the nature of the role.

[14] If that confidence were misplaced, Derek Corporation imposed a probationary period of employment on Mr Gall, as apparently it did with all its incoming sales staff. The purpose of the probationary period, according to the documentation before the Authority, was to give both parties the opportunity to establish if there was a “fit”.

[15] I am satisfied that Mr Gall received the level of support that would have been appropriate for an experienced sales executive, which he represented that he was. There is not sufficient evidence for the Authority to conclude that Mr Gall was not properly supported in his role; all the evidence suggests that Mr Gall got the same measure of support as other sales executives and, given Mr Gall’s experience in the industry, that ought to have been sufficient.

Did Derek Corporation appropriately manage its performance concerns?

[16] It is apparent from the documents before the Authority that Derek Corporation had an early intimation that Mr Gall’s performance was less than they had expected, or indeed desired. The documents suggest that Derek Corporation endeavoured to manage Mr Gall’s performance deficits through the regular informal contact (particularly the weekly contact that I referred to above), but because there was still little improvement, it was decided that a more formal meeting was required. This was organised for 13 July 2009 and during that telephone meeting, the parties were able to have a discussion about their relative expectations.

[17] That first formal meeting, taking place as it did on 13 July 2009, was nearly two-thirds of the way through Mr Gall’s probationary period of employment. It is not, I think, unreasonable for an employer in Derek Corporation’s position to expect that an employee with sales experience would be meeting target (or at least approaching that figure) after two months’ employment.

[18] Having carefully studied the minutes of that meeting, which have been supplied to the Authority, I note first that Mr Gall was represented at that meeting by counsel. Second, Mr Gall’s own responses during the meeting suggest that he accepted Derek Corporation’s concern about his performance and that he would try to do better. Third, given the deficit in terms of target which Derek Corporation was attempting to address, it is difficult to be critical of their approach. Mr Gall’s target was to achieve sales of \$10,000 per week, but he was managing only \$3,500 per week. Notwithstanding that significant deficit, Derek Corporation agreed to extend

by a further three weeks the review process so that Mr Gall had a further three weeks to produce some reasonable improvement in his figures.

[19] An email from Derek Corporation to Mr Gall followed promptly after that meeting, dated 14 July 2009. The email attached the notes of the meeting, which I have just reviewed, and identified the key tasks both for Derek Corporation and for Mr Gall.

[20] Consistent with the agreement to review performance three weeks later, Derek Corporation wrote to Mr Gall by letter dated 28 July 2009 setting out a proposed date for the second formal meeting of 7 August 2009. The letter is also important because it contains an implicit statement by Derek Corporation that if Mr Gall's performance *"had not improved to a satisfactory level, termination of your employment under the probationary provisions of your employment agreement will be a likely outcome"*. Mr Gall relies on that statement to ground an argument that in effect Derek Corporation had *"jumped the gun"* and failed to give him the benefit of the additional second formal meeting and performance review.

[21] However, I am satisfied that Mr Gall's contention is misplaced; the letter in question from Derek Corporation does no more than set up the arrangements for the second formal meeting, but also makes clear that a failure by Mr Gall to meet a reasonable standard would result in the employer exercising its options under the probationary period of employment. To say that is to do no more than to remind Mr Gall of the terms and conditions under which he accepted employment in the first place. There is nothing improper in an employer (or an employee for that matter) reminding the other party of the terms and conditions under which the employment relationship subsists.

[22] The second formal meeting proceeded, as arranged, on 7 August 2009 and again Mr Gall was represented by counsel and again there was a frank discussion between the parties about the level of sales that Mr Gall was achieving, but again the response was positive for Mr Gall in that Derek Corporation undertook to extend Mr Gall's probationary period of employment to 30 September 2009 and further proposed a reduction in Mr Gall's target from \$10,000 per week of sales to \$8,000 per week of sales. That extension of the probationary period of employment and the reduction of the sales target appear to have been accepted by Mr Gall's counsel by an email of even date.

[23] On the face of then, it seems that Derek Corporation did everything it reasonably could to allow Mr Gall to perform and, despite his continuing failure to meet target and the other performance concerns that Derek Corporation had, Derek Corporation not once but twice agreed to extend the time in which Mr Gall was to meet target and it even agreed to reduce that target to try to make the process more achievable by Mr Gall.

[24] In all the circumstances then, and looking at matters in the round, I do not think Derek Corporation can be criticised for the approach that it has taken in trying to manage Mr Gall's performance issues.

Was Mr Gall's redundancy genuine?

[25] Mr Gall says that the redundancy was a sham and that the "*restructure presented itself as a convenient vehicle through which to terminate his employment*". Derek Corporation, on the other hand, says quite simply that the restructure was occasioned by the resignation of another sales representative in the South Island, quite unconnected with Mr Gall, but that resignation gave it the opportunity of looking at how it might take costs out of the business without damaging income. That, of course, is a legitimate aim of any business and, ironically, is accepted as a proper course of action by Mr Gall's own counsel in her email to the employer on 16 October 2009 when she says – "*... we accept that the company is entitled to restructure and that this is resulting in the redundancy of Shane's position*".

[26] That being the position, it is difficult to see how Mr Gall can maintain through counsel in October 2009 that Derek Corporation is entitled to restructure and yet in his statement of problem filed on 14 March 2011 he wants the Authority to accept that the redundancy is a sham.

[27] There is no evidence the redundancy was a sham. I am satisfied what happened was the Derek Corporation got an opportunity to look at its costs structure because of the unexpected resignation of another sales representative. If the motive for the restructure was in any doubt, that must have been clarified by the information provided to Mr Gall by letter dated 23 December 2009. It was made quite clear that having been given the opportunity of looking at taking costs of the business by this unexpected resignation, Derek Corporation did precisely that and concluded that Mr Gall's position might be at risk.

[28] On the documentary evidence available to the Authority, it seems apparent that issues around Mr Gall's performance were immediately suspended once the restructure was on foot and there was no further engagement between the parties about Mr Gall's performance thereafter.

[29] I am satisfied on the documentary evidence before the Authority that Derek Corporation undertook a full and fair consultation process with Mr Gall engaging with him appropriately during the process, encouraging him to continue to be represented and indeed providing his counsel with information as the process went forward. Mr Gall was given an opportunity to provide any alternatives to the restructure of his position, but could provide none. His counsel also confirmed that she could think of no alternative to the suggested removal of the position.

[30] There does not seem to have been any doubt in either Mr Gall's mind or in the mind of his experienced counsel about what exactly the proposal entailed, so it seems difficult to accept the proposition now that the redundancy was somehow a sham as Mr Gall maintains. Plainly, the employer sought to take costs out of the business by removing one South Island representative completely (in effect taking advantage of the resignation of another sales representative) and then restructuring Mr Gall's role to have it located in Christchurch rather than Dunedin and to deal only with apparel rather than textiles and apparel. Under the new proposal, textiles was to be dealt with across the whole of the South Island from a North Island base.

[31] On the basis of the evidence before the Authority, this appears to be a genuine redundancy.

Was the process fair?

[32] I have already commented to some extent on the process which Derek Corporation adopted and it is consistent with the views I have already expressed that I find nothing improper in the way in which Derek Corporation dealt with the matter. As I have already noted, they gave Mr Gall an opportunity to be involved and they considered what little he had to say on the subject both personally and through counsel before making a decision. Indeed, the only criticism that Mr Gall seems to make of the process of the redundancy is to allege that Mr Gall's position was the only one affected (plainly not correct) and to complain that one of Mr Gall's colleagues was taking over Mr Gall's work (again plainly incorrect). The restructure

affected Mr Gall's position and the vacant position elsewhere in the South Island and Mr Gall's colleague who took on selling apparel did so on a temporary basis only to tide the company over while they were putting in place the new arrangements.

[33] Mr Gall's principal concern seems to be that he was not given the opportunity of taking on the replacement position in Christchurch, and it is certainly true that Derek Corporation does not appear to have offered him the position which it could have done if it chose. But equally, Mr Gall did not ask to be considered for the position, as he could have chosen to do, if he wished. In the end, I am not persuaded that either party has failed the other by not making this request.

Recommendation

[34] It follows from the foregoing narrative that the Authority is not persuaded that Mr Gall has any complaint at all about the behaviour of Derek Corporation, and accordingly the Authority's recommendation is that:

- (a) Mr Gall's claim of having been unjustifiably dismissed by reason of redundancy should fail.
- (b) Mr Gall's claim of having suffered an unjustified disadvantage should fail.
- (c) Mr Gall's claim that Derek Corporation did not act in good faith towards him should also fail.

Costs

[35] In the original recommendation of 10 August 2011, the Authority reserved costs (paragraph 34 of the recommendation).

[36] Subsequent to the acceptance of the recommendation by both parties, costs were unable to be resolved by agreement. The Authority was asked to fix costs as a consequence.

The application for costs

[37] The respondent employer (Derek Corporation) seeks costs in the round of \$2,000 inclusive of a non-refundable airfare (Auckland to Dunedin and return) of \$242. In essence, Derek Corporation says that the case brought by Mr Gall had no merit, that that was clear from the outset and that by persevering with his claim even on the reduced basis of the recommendation process, it was put to trouble and expense which it seek to have Mr Gall contribute to.

[38] The countervailing view from Mr Gall is that by dealing with the matter by way of a recommendation rather than requiring an investigation meeting with all the preparatory costs that that involved, the applicant, while seeking to exercise his legal rights in having the terms of his dismissal reviewed by the Authority, was also prudently adopting a process which put the parties to the least cost. While accepting that the recommendation was wholly unfavourable to him, Mr Gall asserts that he is entitled to the credit for taking a “*pragmatic*” approach to the whole matter.

[39] Since the passing into law of the Amendment Act, including s.173A, there has been little in the way of costs determinations of the Authority relating to the recommendatory process. Notwithstanding that, I am persuaded that the general rules apply, that is, the rules of guidance set out in the leading case of *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808. After all, the recommendation process is no more than another approach to the resolution of the parties’ employment relationship problem which, in the normal course, can be expected to incur costs for the parties.

[40] There is nothing in principle to suggest that the rules that applied to the fixing of costs in relation to determinations ought not to apply, according to their tenor, in respect of recommendations as well. Principles such as costs following the event, costs fixing in the Authority being modest, and the Authority retaining a discretion are all relevant.

[41] In the present case, I agree with the submissions for Mr Gall that he has throughout adopted a pragmatic and sensible approach in endeavouring to address his employment relationship problem in the most cost-effective way possible. I also agree that he is entitled to the benefit of that pragmatism.

[42] While accepting that Derek Corporation incurred costs in defending its position, and was wholly successful, the question then must be whether costs should

follow the event. My conclusion in the present case is that this is indeed a case where the Authority should exercise its discretion and allow costs to lie where they fall. Both parties would have incurred modest costs in dealing with the matter in this commonsense way and while, in the normal course of events, the successful party might look to an award of costs, the typical approach taken by the Authority using the daily tariff rate must, of necessity, be difficult to apply in the case of a recommendation where there is no hearing at all.

[43] Looking at the matter another way, if there were to be a modest contribution to Derek Corporation's costs, assuming the \$2,000 expended was reasonable, and it is difficult to assess that with the amount of material that Derek Corporation has made available to the Authority in support of its claim, the maximum amount that Derek Corporation might perhaps expect would be a few hundred dollars only.

[44] In all the circumstances, I do not think it appropriate to make such an award and direct that costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority