

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 56
5321473

BETWEEN PAUL NEWTON
 Applicant

AND SANDBLASTING
 SPECIALIST OTAGO
 LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Jenny Guthrie, Counsel for the Applicant
 Cliff Saunders, for the Respondent

Investigation Meeting: 15 April 2011 at Dunedin

Submissions received: At the investigation meeting

Determination: 27 April 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Paul Newton, claims that he was twice dismissed by the respondent, Sandblasting Specialists Otago Limited (Sandblasting Specialists).

[2] Mr Newton states the first dismissal, purportedly a redundancy, occurred on 11 June 2010. Sandblasting Specialists accepts it dismissed Mr Newton that day but contends the dismissal was justified.

[3] Mr Newton claims he was rehired by Sandblasting Specialists on an unspecified date in late July but again dismissed on 2 August 2010 (approximately a week after the reengagement). Sandblasting Specialists deny re-hiring Mr Newton.

Background

[4] Sandblasting Specialists is, as its name suggests, a commercial sandblaster and painter and is owned by its Managing Director, Mr Cliff Saunders. Mr Saunders also has a majority interest in another company, C J Saunders Engineering Ltd.

[5] Mr Newton was engaged by Sandblasting Specialists as a Foreman and commenced on 22 January 2008. At the time Sandblasting Specialists had four staff but, over time, this number reduced with two employees remaining as at June 2010. The other employee, who shall be referred to as "A", was the son of a friend. He had originally been employed by the engineering firm as a favour, but subsequently transferred to Sandblasting Specialists.

[6] Mr Newton attributes the reduction in staff numbers to various issues but accepts that his views are based on second hand information gleaned from A. Mr Saunders claims the reduction was by way of non-replacement and the result of a significant reduction in work occasioned by the financial downturn which occurred in the later half of 2008.

[7] On Friday 11 June Mr Newton was working away from Sandblasting Specialists' yard and upon his return, around 4pm, he was approached by A. A told Mr Newton that Mr Saunders wanted to meet with him at the offices of CJ Saunders Engineering at 4 and that he, A, was going to a similar meeting at 4.30. Mr Newton says he asked what it was about but that no answer was given.

[8] Upon arriving Mr Newton was handed a memorandum dated 9 June. It was headed *BUSINESS CLOSURE* and advised:

We are all fully aware that the economic downturn has affected Sandblasting Specialists Otago Ltd dramatically and due to the continued lack of work we have constantly been losing money.

Whilst we have been trying to keep the doors open, the reality is this is no longer sustainable and has left [sic] with no other option but to shut the doors until the economy and our work load picks up.

This unfortunately means that your position with Sandblasting Specialists Otago Ltd will be made redundant.

I would like to have a meeting with you to discuss this in more dept, [sic] you are welcome to have a support person or representative present and are encouraged to do so.

This meeting will take place in the office at C J Saunders Engineering Ltd on Thursday 10.06 at 9.30am.

[9] Mr Newton was then given a weeks' notice. Mr Saunders states that Mr Newton responded by advising that he understood, that he had seen *this* coming for a long time and that he appreciated being retained for as long as he had. Mr Newton accepts that he said he understood. He can not remember making the other two comments but accepts it was possible he did. He says his response must be seen in light of the fact that while it was obvious that work had reduced, he never appreciated that that might lead to his redundancy and that he was, for want of another word, shocked. It did not register that his job had gone until he got home that evening.

[10] Mr Newton worked the following Monday, had Tuesday off to look for another job, and worked the remaining three days before finishing on Friday 18 June.

[11] Mr Newton claims that on the Monday (14 June) A advised that he had received the same letter but there was a difference in that he, A, might have something to fall back upon.

[12] Mr Saunders has a different view of A's situation. He refers to A's previous experience with the engineering company and skills as a plant operator. Those experiences along with the impending retirement of the engineering company's plant operator meant there was a vacancy A could fill. Mr Saunders states that A was offered the opportunity of returning to the engineering company, that he accepted and that as a result A was never given a copy of the memorandum. His comments regarding A never having received notice of redundancy were supported by Ms Woodhouse, an employee of the engineering company who prepares all correspondence for both firms. She claims she typed the memorandum given to Mr Newton but is adamant a similar document was never prepared for A.

[13] Notwithstanding the above dispute about A's status, it is Mr Newton's contention that Sandblasting Specialists did not close as advised and that A continued working for it.

[14] Mr Saunders disagrees. He states that Sandblasting Specialists effectively closed. I use the word *effectively* as some activity continued. This was occasioned by the fact that the premises occupied by Sandblasting Specialists were covered by a lease that he, Mr Saunders, could not vacate and that he retained the capital equipment

previously used by Sandblasting Specialists. As a result the premises were used to store that equipment along with some of the engineering company's property and the retention of Sandblasting Specialists equipment meant that he was capable of accepting a couple of sandblasting jobs that came his way. That work was performed by A, though he did it as an employee of CJ Saunders Engineering.

[15] Mr Newton goes on to say that about a month later he was still looking for work and, given he had a young family, felt himself to be in a desperate situation. He says that he was telephoned by Ms Woodhouse, told there may be more work and asked if he might be interested. He was and agreed to meet Mr Saunders forthwith.

[16] Mr Newton claims that when they met Mr Saunders told him that he was going to get rid of A and therefore wanted Mr Newton to return. Mr Newton says he readily accepted what he saw as an offer of work and that they agreed to discuss details the following week. He adds that while he was there, Ms Woodhouse took a phone call about a small job the prospective client wanted completed that afternoon. He says Mr Saunders asked if he wanted to do it, but that he had to decline due to childcare responsibilities. Whilst Mr Saunders agrees with Mr Newton's comments about the last occurrence, he has divergent views about the other claims.

[17] Mr Saunders says that he was approached about tendering for a major sandblasting and painting job on the new Dunedin stadium. The possibility of getting the job was, given its size, attractive but he could not express interest without staff capable of performing the work. A's skills were not sufficiently well honed while Mr Newton's were. Mr Saunders therefore asked Ms Woodhouse to contact Mr Newton, see if he might be interested and if so, willing to come in to discuss the possibilities. Mr Saunders is clear that it was never more than a possible engagement dependent on a successful tender and that he made that clear. He goes on to say that as events transpired his price was not accepted and he telephoned Mr Newton about a week later (2 August is an agreed date) to *say sorry*.

[18] Mr Newton has a different view of the conversation of 2 August. He claims that Mr Saunders telephoned *...to say he couldn't get rid of A and so 'the job no longer existed'*.

Determination

[19] As said in opening, Mr Newton claims to have been dismissed twice – on 11 June 2010 and again on 2 August 2010.

Dismissal of 11 June 2010

[20] Sandblasting Specialists accepts it dismissed Mr Newton on 11 June but contends the dismissal was a justifiable redundancy. The fact Sandblasting Specialists accepts it dismissed Mr Newton means it also accepts the onus of justifying the dismissal.

[21] Section 103A of the Employment Relations Act 2000 (the Act) provides that the question of whether a dismissal is justifiable

... must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal ... occurred.

[22] The above [21] is the test of justification as it existed prior to an amended version coming into force on 1 April 2011. It is used as the dismissal being considered here occurred prior to the change coming into force. Section 7 of the Interpretation Act 1999 provides *An enactment does not have retrospective effect*. Section 4 makes it clear that all enactments are subject to the Interpretation Act 1999 unless the enactment provides otherwise. Applying the new statutory test to this dismissal would be giving it retrospective effect without that being expressly or impliedly provided for in the Act (as amended). I conclude that justification must be assessed in accordance with the law prior to 1 April 2011.

[23] It is well established that:

When reviewing an employer's decision to make employees redundant, the Authority or Court will generally look at two initial factors: the genuineness of the redundancy; and whether the dismissal was carried out in a procedurally fair manner.

In [Coutts Cars Ltd v Baguley \[2001\] 1 ERNZ 660](#); [2002] 2 NZLR 533 (CA), the Court of Appeal in reviewing the approach of the Employment Court decision ([Baguley v Coutts Cars Ltd \[2000\] 2 ERNZ 409](#)) emphasised the need to consider the two factors (genuineness and process) separately ...

Kevin Leary (ed) Employment Law (looseleaf ed, Brookers) at ER103.17

[24] Before examining the substantive justification I must first address Mr Newton's contention that Sandblasting Specialists did not close, but continued to operate with A as its sole employee (see 13 and 14 above). I conclude that Sandblasting Specialists did close. I reach this conclusion for four reasons. First, Mr Newton's contention was nothing more than a suspicion. Second, Mr Saunders explanation was both plausible and went unchallenged. Third, it was supported by unchallenged evidence from Ms Woodhouse. Fourth, and perhaps most importantly, Sandblasting Specialists' financial records show no activity after September 2010.

[25] Returning to the substantive justification. Mr Saunders' evidence that Sandblasting Specialists was facing difficulties went unchallenged and the accounts proffered in support would confirm the situation was grim. Sandblasting Specialists made a loss in each of the fourteen months preceding the decision to close and whilst a profit was recorded in June 2010 that was occasioned by the sale of capital equipment (namely two vehicles) and a trading loss was recorded. As Mr Saunders put it, he was supporting the business from his pocket and could not allow the situation to continue.

[26] Given Mr Saunders evidence about the state of the business and the financial records; Ms Woodhouse's supporting evidence that the seriousness of the situation was apparent to and known by all including Mr Newton who had commented to her about it; the lack of any challenge to the evidence of either Mr Saunders or Ms Woodhouse and Mr Newton's statements that while he failed to understand that a potential redundancy loomed he accepted things were bad, I conclude that the decision to close was substantively justified.

[27] Turning to the procedural challenge. In this instance Mr Newton challenges the adequacy of the consultation process and the rationale for his selection. Mr Newton's concerns about selection are founded in his belief that Sandblasting Specialists did not close. My conclusion that the business did close, means that no positions remained and the issue of selection is irrelevant.

[28] However Mr Newton's contention that the consultation process was deficient has merit. The written evidence, confirmed by Mr Saunders' oral presentation, is that notwithstanding the invitation to discuss the situation on Thursday 17 June (see memo of 9 June and note the discussion did not ultimately occur), the decision had been made. As the memo clearly advises, there was *no other option but to shut the doors* and that Mr Newton's *position with Sandblasting Specialists Otago Ltd will be made redundant*.

[29] At the point the decision was made, there had been no discussion or consultation and therefore no consideration of any alternative (no matter how remote) such consultation may have elicited. That a failure to consult is a procedural deficiency rendering a redundancy dismissal unjustified is clear (see [Coutts Cars Ltd v Baguley](#) [2001] 1 ERNZ 660; [2002] 2 NZLR 533 (CA)).

Dismissal of 2 August 2010

[30] Mr Newton claims he was offered, and accepted, reemployment with Sandblasting Specialists in late July but was then telephoned on 2 August and advised that his re-engagement was no longer possible.

[31] Mr Newton's claim that he was dismissed relies upon a conclusion that he was re-employed. That is not a conclusion I can reach.

[32] Ms Woodhouse was also present when Mr Saunders spoke to Mr Newton about the possibility of work at the stadium. While she is of the view that Mr Saunders got side tracked and emphasised his view that A's work was deficient (and that this may have coloured Mr Newton's recollection of the conversation), she is adamant that the discussion was about possible work dependant upon a successful tender and that there was no firm commitment. Her evidence went unchallenged and must therefore be accepted.

[33] The claim that Mr Newton was dismissed on 2 August therefore fails.

Remedies

[34] The conclusion the dismissal of 11 June must be unjustified (see 29 above) means a consideration of remedies must follow. That said and notwithstanding the finding that the dismissal was unjustified, I must also consider my conclusion that there was a substantive justification for Mr Newton's redundancy. That, along with the fact Sandblasting Specialists actually closed, means termination would undoubtedly have occurred notwithstanding the consultative deficiency that gave rise to finding of unjustified dismissal. This means that there is no resulting wage loss and remedies are limited to compensation for the hurt emanating from the failure to consult and not from the dismissals that would have occurred in any event (see for example *Aoraki Corp Ltd v McGavin* [1998] 1 ERNZ 601; [1998] 3 NZLR 276 (CA)).

[35] Whilst he clearly exhibited angst, Mr Newton's evidence in this respect was emphasised his need to relocate to another town in order to gain alternative employment and that he had to leave his family in Dunedin. That situation would have arisen regardless and is the result of choices Mr Newton made. In such circumstances I conclude that a compensation payment of \$2,000 is appropriate.

[36] The conclusion that remedies accrue means that the issue of contribution should be discussed. The dismissal of 11 June was for redundancy. Redundancy is, by definition and from the applicants' perspective, a no fault situation to which he could not have contributed.

[37] Lastly I note that the closure nullifies the need to consider recent decisions requiring that redeployment options be considered (see for example *Wang v Hamilton Multicultural Services Trust* [2010] NZEMPC 142).

Orders

[38] For the reasons given the following order is made:

The respondent, Sandblasting Specialists Otago Limited, is to pay to the applicant, Mr Paul Newton, the sum of \$2,000.00 (two thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

Costs

[39] I reserve the issue of costs. I ask that the parties try to resolve the issue but failing that, and in the event Mr Newton seeks an order for costs, he is required to file his application within 28 days of this determination. A copy shall be served on the respondent who is to file any response within 14 days of the application.

Mike Loftus
Member of the Employment Relations Authority