

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 31
5284302

BETWEEN	CLIFF WAENGA First Applicant
AND	PHILIP ISHERWOOD Second Applicant
AND	CLEMENCE DRILLING CONTRACTORS LIMITED Respondent

Member of Authority:	M B Loftus
Representatives:	Jonny Sanders, Advocate for Applicants John Shingleton, Counsel for Respondent
Investigation Meeting:	3 August 2010 at Christchurch
Submissions received:	At the investigation meeting
Determination:	21 February 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicants claim that their dismissal by the respondent, purportedly for redundancy, was both substantively and procedurally unjustified.

[2] In the alternative, and in the event it is found that the dismissals were substantively justified, the applicants claim that they were unjustifiably disadvantaged by virtue of ... *the manner in which their employment was terminated.*

[3] The respondent denies the claim and asserts that the environment in which it operated left it with no alternative but to shed staff and its conduct in respect to the applicants was appropriate.

Background

[4] The respondent is in the business of operating drilling rigs.

[5] Mr Waenga had been in the respondents employ for some five years. He says he was initially engaged as an off-side labourer and truck driver but after a year came to operate a rig. He says he also gained ancillary skills and performed other tasks such as installing pumps. Mr Isherwood has just over two years service and was employed as a Drillers Assistant, though he also claims to have developed his skills to a level where he could operate a rig when required.

[6] Both applicants say that on 23 March 2009 they received a letter from Mr Dave Clemence, a Director of the respondent company. The letter advised:

Unfortunately as is obvious to all, the economic downturn and credit squeeze is having a major impact on business and ours is not immune to this.

Due to the downturn, I will be looking at every facet of the business in relation to efficiency and whether they are cost effective.

Workshop, drilling, maintenance and pumping will be now undergoing review as I will be having to take some action with regards to focus and direction of the company.

There will be redundancies due to the diminishing work, enquiries, contracts and the credit squeeze.

If anyone has any ideas or meaningful contributions towards efficiencies, savings and increase of sales etc please fill in the enclosed form and return by the 30th March.

[7] Copies of the letter were given to all staff with delivery being affected by it being left in each employees' locker and Mr Isherwood's was accompanied by a warning for having failed to advise the employer of an absence occasioned by illness. The respondent says it uses this method of delivery so as to ensure everyone receives correspondence.

[8] Both applicants state they were surprised to receive the letter as, using Mr Isherwood's words, *there appeared to be lots of work to do*. The respondent's view about work availability differs, with Mr Clemence saying:

Not only were rigs parked up in the yard, but also at the Monday morning staff meetings I was bringing up the fact that the company was facing quite a challenge because of the lack of work and that there might be layoffs, but I was hoping to avoid this if possible. These meetings were information meetings where I was keeping everybody up to date as to the workflow for the week and any other work related events e.g. Health and Safety issues.

[9] Neither employee acted on the request they may make a *meaningful contribution*, relying instead on what they understood other staff were suggesting. Both did, however, choose to speak to Mr Clemence with Mr Isherwood saying *I approached Mr Clemence and ... asked if I was one of people to be made redundant. He was very vague in his answer and said that redundancies may not happen.* Mr Waenga reports a similar response.

[10] Mr Clemence has a different view. He says:

I recall more than one conversation with Phil regarding whether redundancies may happen. I totally deny being vague, in fact I was very clear in saying that I wasn't certain whether there would be a need for redundancies as jobs could come in tomorrow thus creating a need for some drilling work, but I did say that the redundancies may not happen depending on how things would pan out with the recession. I would also like to add that I would have conversations with Phil and Cliff while they were in the yard and I would comment there wasn't much work on, but I would say to them I was hopeful to keep them on and that I didn't want to lay people off unless I had to.

[11] Both employees say nothing further was heard until 5 May when another memo was placed in their locker. It read:

TO ALL STAFF

Due to the fact there appears to be no let up to the economic recession, I am continuing with re-structuring in our business. It is unfortunate that we have no alternative to instigate our first tier of redundancies. These persons will be contacted personally by Dave.

Yours faithfully

Dave Clemence

[12] Mr Waenga says:

The letter was not personally addressed to me, and I did not believe that my job was at risk. There were other people doing the same work as me that started since I did. I assumed that if anyone was doing what I did was made redundant, it would be them. However, not long after I received the letter, Mr Clemence came to me and told me that I was being made redundant. He gave me two weeks notice.

[13] Mr Isherwood's recollection is almost identical.

[14] Mr Clemence denies nothing was said between 23 March and 5 May and again refers to both the Monday morning meetings and conversations he had in the yard with various staff including Messrs Waenga and Isherwood. He does, however, accept that he left the 5 May notices in their lockers and subsequently approached the two and gave them notice.

[15] The conversations were followed by a further letter dated 8 June. Aside from the addressee the letters were identical and read:

Dear ...

Following on from our discussions and letters dated 23 March and 5th May, 2009.

As you are aware, that due to the economic climate, we are restructuring. Unfortunately for these reasons your position is now redundant and there are no alternate positions.

*There are options and you may wish to take up some of the following:-
Independent legal advice.
Or a support person during the consultation process.*

There are benefits available to help with career advice/benefits and I have enclosed some options available to you.

Yours faithfully...

[16] Cessation subsequently occurred though incoming work meant that Mr Waenga was retained for a couple of extra weeks.

Determination

[17] The applicants are adopting a multifaceted approach to this claim. They claim that their dismissal was unjustified, both substantively and procedurally. They contend that the Company provided only general and simplistic information and that neither applicant understood his position was at risk. Ancillary to this is a claim that notwithstanding the above position and if the redundancies were necessary, others should have been chosen.

[18] 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

[19] Central to the applicants assertion that the redundancies were not genuine is their belief that the company engaged additional staff at around the time they were declared surplus and that it advertised vacancies soon after their demise (on 1 August to be exact).

[20] The company's position is that the additional staff were casuals engaged prior to the redundancies to perform a specific contract. The work was temporary and required skills including a class 5 truck and rollers licence which neither applicant held. I accept this evidence and conclude that the presence of the casual employees does not undermine the respondent's argument that redundancies were substantively justified. Neither do the subsequent advertisements undermine the company's substantive position. The advertisements were a reaction to a contract won after the applicants termination. There is also evidence that Mr Waenga could not be contacted and Mr Isherwood had previously made it well known that he would not perform work under the type of conditions the contract in question would have required.

[21] Mr Clemence's evidence that the company was facing difficulties and that underutilised equipment was sitting in their yard went largely unchallenged. Also unchallenged was the evidence of the company's accountant and business advisor. He described a situation where a deteriorating economic situation had left the company with a significant reduction in forward orders and capital equipment with limited work available. He commented on an extremely large blowout in debt funding and the fact that the bank had reacted by replacing the account manager with another tasked with delivering a clear message to the company, before going on to say:

This bank's message supported the company's effort to right size itself ... It can be challenging for a business to "get small enough fast enough" ... With underutilised equipment having no work, an operator for such equipment is not required. A business "stay alive" strategy is

to park equipment up and reduce the business labour requirements. An alternative could be to sell assets, but this is challenging in a depressed market.

[22] The situation portrayed, and the fact that evidence remained almost totally unchallenged, leads me to conclude that the company had a substantive justification for considering the redundancies that ultimately eventuated.

[23] That leaves procedural issues and, in particular, the applicants assertion that they should not have been selected.

[24] *Employment agreements contain an implied obligation on parties to an employment agreement to deal with one another in good faith. The actions of an employer must meet the standard required of a reasonable employer acting fairly: Coutts Cars Ltd v Baguley [2001] 1 ERNZ 660; [2002] 2 NZLR 533 (CA).*
Kevin Leary (ed) *Employment Law* (looseleaf ed, Brookers) at ER103.17

[25] The obligation referred to above is reflected in the test of justification contained in section 103A of the Employment Relations Act 2000. Whether the decision to dismiss 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.*

[26] In this instance there are questions about the adequacy of the information supplied, the communication process and the rationale for selecting the applicants. Here it should be noted that the last point raises the possibility that the applicants dismissals were substantively unjustified – if others should have been chosen, their dismissals can not be justified and for that reason I shall treat this as an unjustified dismissal claim and not as a possible unjustified action as was pleaded in the alternate.

[27] Both Mr Waenga and Mr Isherwood initially claimed that they considered there was plenty of work and that the severity of the situation was never made clear to them. That is not a contention with which I can agree. As has already been said, the uncontested evidence of both Mr Clemence and the accountant make it clear that there had been a significant reduction in the amount of work being performed by the company and that equipment was underutilised and standing idle in the yard.

[28] That the applicants were, or at least should have been, aware of the situation is also clear. A number of their colleagues appeared and gave evidence that the problem was apparent and being openly discussed at the Monday morning meetings and amidst staff less formally. One illustrative example was a statement that:

I clearly remember from the Monday meetings that things were getting harder. Then we got letters regarding redundancies and then at the following Monday meetings, Dave would give us continuous updates in regards to workload. I can remember Dave talking about the possibility there might be lay-offs, but he would try his best for that not to happen.

[29] There was also evidence that both applicants had spent the weeks prior to termination around the yard as there was no drilling work for them to perform and when answering questions both resiled, to some extent, from their initial position and accepted things had slowed considerably. Both, however, continued to state that the seriousness did not register though Mr Isherwood undermined even that assertion by also saying he *knew it was bad*.

[30] The applicants second contention, namely that the communication process was deficient, does however have merit. The evidence is that when Mr Clemence ultimately decided that there were to be redundancies, he also decided who would be dismissed, distributed the letter of 5 May and advised the selected staff of their imminent termination without any consultation about those selections. This is a significant procedural deficiency and not, in my view, the actions of a fair employer dealing with its staff in good faith.

[31] This deficiency raises the ancillary question of whether or not a different outcome would have ensued and employees other than the applicants been made redundant had consultation occurred (refer 26 above). I conclude the answer is no.

[32] Mr Clemence gave a considerable amount of evidence about his selection criteria and the reasons for choosing the applicants. While he was challenged by the applicants' representative about other matters, particularly procedural, this evidence went largely unchallenged. The decision was made on the basis of work availability and skills held by each employee and here it should be noted that there is absolutely

no question about the work ethic of either applicant. Mr Clemence portrayed both as good workers but a simplistic summary of his selection rationale is that the machine on which Mr Waenga spent his working time and to which his skills limited him remained in the yard totally unused during the weeks leading up to the decision to dismiss and that Mr Isherwood had a limited range of skills and uses vis-à-vis the other remaining employees. While Mr Waenga initially said that he was busy up until termination he subsequently agreed that the rig did not move for at least the last three weeks, while Mr Isherwood also became less assertive about the range of skills he possessed and the range of tasks performed under questioning. It should also be noted that there were less redundancies than originally planned at this point as another employee had an accident leading to a long term absence.

[33] Having heard Mr Clemence's largely unchallenged evidence and the applicants responses to relevant questions, I conclude that neither would have avoided selection had consultation occurred.

[34] That a failure to consult and/or disclose selection criteria is a procedural deficiency rendering a dismissal unjustified is clear (see *Coutts Cars Ltd v Baguley* [2001] 1 ERNZ 660; [2002] 2 NZLR 533 (CA)) and that means a consideration of remedies must now follow.

[35] Notwithstanding the finding that the dismissals were unjustified, I must also consider my conclusion that the applicants termination would have occurred notwithstanding the consultative deficiency that gave rise to a finding of unjustified dismissal. This means that there is no resulting wage loss and that 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)). In this respect neither applicant offered any substantial evidence with both concentrating on their subsequently undermined claims that the hurt emanated from dismissals that neither expected. In such circumstances I conclude that limited compensation is payable and that \$3,000 is an appropriate amount for each applicant.

[36] The conclusion that remedies accrue means that the issue of contribution should be discussed. These dismissals were for redundancy. Redundancy is, by

definition and from the applicants perspective, a no fault situation to which they could not have contributed.

[37] Lastly I conclude recent decisions requiring that redeployment options be considered are also irrelevant in the present circumstances (see for example *Wang v Hamilton Multicultural Services Trust* [2010] NZEMPC 142). The respondent's commercial situation meant that this was a downsizing with no deployment options available.

Orders

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

The respondent, Clemence Drilling Contractors Limited, is to pay to each of the applicants Mr Cliff Waenga and Mr Philip Isherwood, the sum of \$3,000.00 (three 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 the applicants wish to seek costs, they are required to file their 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