

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 4
5387917

BETWEEN	COLM BUFFINI Applicant
AND	NZ TAX RETURNS LIMITED First Respondent
	NZ LABOUR HIRE LIMITED Second Respondent

Member of Authority:	R A Monaghan
Representatives:	A Goldstone, advocate for applicant T Yeoman, advocate for respondents
Investigation meeting:	11 October and 6 November 2012
Determination:	4 January 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Colm Buffini works in the recruitment industry. NZ Tax Returns Ltd (TRL) and NZ Labour Hire Limited (LHL) are in business in that industry and are associated with each other, but TRL says it was Mr Buffini's employer. In January 2012 it dismissed Mr Buffini by reason of redundancy.

[2] Tim Yeoman, the director of the companies, said the companies had been doing well, particularly in the lead up to the Rugby World Cup in 2011. However after the Rugby World Cup ended there was a large drop in business, and in late 2011 the branch where Mr Buffini worked was not achieving the number of billable hours required to be profitable. Accordingly in December 2011 and January 2012 Mr Yeoman turned his mind to restructuring of that branch and other parts of the business.

[3] On 16 January 2012 Mr Yeoman advised the three staff at Mr Buffini's branch that the branch was losing money, and restructuring was possible. There was also a possibility of redundancies. On 18 January he met with the staff to raise his concerns about the tough economic climate, and the low sales and revenue being achieved by the branch. He advised the staff of his intention to have another meeting on 20 January, when their feedback and proposals for addressing the concerns would be sought.

[4] Mr Buffini suggested during his meeting that he could resign if that would assist. Mr Yeoman responded that was not necessary as he was embarking on a process in order to identify how the difficulties should be addressed. As a result the suggestion was not acted on.

[5] On 20 January 2012 Mr Yeoman met again with the staff. He had a more detailed discussion with Mr Buffini about the activities at and performance of the branch. The two men discussed the future workload and prospective sales, how operational efficiencies might be achieved and financial improvements made, and the roles of the other two staff members.

[6] Mr Yeoman concluded that the lack of new sales, and his view of the low likelihood that the prospects discussed with Mr Buffini would be converted to sales, meant redundancies were necessary. He would retain one staff member, R, and Mr Buffini and the third staff member would be made redundant.

[7] That afternoon Mr Yeoman advised Mr Buffini his position was to be disestablished with immediate effect. Mr Buffini received payment in lieu of notice.

[8] The Manukau branch has since closed, and R has transferred to another office.

[9] The issues are:

- Was TRL or LHL the employer;
- Was the dismissal justified in that,
 - the redundancy was genuine; and
 - the consultation process was fair and reasonable; and

- dismissal was the action a fair and reasonable employer could have taken;
- If the dismissal was not justified, what is the remedy for Buffini; and
- Was there a breach of good faith for which a penalty is payable.

Was TRL or LHL the employer

[10] TRL employs the managers and administrative staff for LHL and other companies associated with Mr Yeoman. It contracts with the companies to provide those services. LHL is in the business of providing blue collar workers on temporary engagements to the construction and roading industries. It does not employ any of its own management or administrative staff.

[11] Mr Buffini was employed initially to provide services to LHL as a business development manager, based at Penrose. His written employment agreement cited TRL as the employer.

[12] In August or September 2011 Mr Yeoman decided that LHL clients other than those in the construction industry would be serviced separately, under the name New Zealand Personnel Hire. The effect would be more involvement in recruiting white collar workers. A branch office was opened in Manukau for that purpose, and New Zealand Personnel Hire Limited (PHL) was registered in August 2011. PHL, too, contracts with TRL to obtain management services. Mr Buffini transferred to Manukau in September 2011. No amendment was made to his written employment agreement, and no new agreement was entered into.

[13] I was not pressed strongly to find that LHL was the employer, and PHL was not cited as a party to this employment relationship problem. I am satisfied that TRL was the employer and find accordingly.

Was the dismissal justified

[14] The test of the justification for the termination of Mr Buffini's employment is contained in s 103A of the Employment Relations Act, as amended with effect on 1 April 2011.

[15] The test requires a determination, on an objective basis, of whether the employer's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. In applying the test the Authority must consider whether the employer:

- having regard to the resources available to it, sufficiently investigated the allegations against the employee;
- raised concerns the employer had with the employee before dismissing the employee;
- gave the employee a reasonable opportunity to respond to the concerns before dismissing the employee; and
- generally considered the explanation of any allegations made against the employee.

[16] Further to 'how' the employer acted, a full court of the Employment Court observed in *Angus v Ports of Auckland Limited*¹ that, applied literally, the considerations listed in s 103A may not be appropriate to a determination of justification for a dismissal on the ground of redundancy.² However it found that: an employer must investigate the circumstances in question; where concerns are held about those circumstances, the concerns must be raised with the employee before a decision is made; and the employee must be given a reasonable opportunity to respond. This obligation extends to redundancies.

[17] Secondly, provided an employer acts genuinely and not out of ulterior motives, a business decision to make employees redundant is for the employer to make and not the Authority³.

[18] Finally, the duty of good faith set out in s 4(1) and 4(1A) also applies. The duty includes requirements: that the parties be responsive and communicative in their relationship; and that employees be given access to information relevant to the continuation of their employment when the employer is proposing to make a decision that is likely to, or will, affect the continuation of that employment.

¹ [2011] NZEmpC 160

² At [46]

³ *Simpson's Farms Limited v Aberhart* [2006] 3 ERNZ 825

1. Was the redundancy genuine

[19] Mr Buffini disagreed with Mr Yeoman's view of the recent performance at the branch as well as Mr Yeoman's assessment of the likely performance in the immediate future. Mr Buffini said the sales margins on which Mr Yeoman relied in late 2011 and 2012, when forming a view of the performance at the Manukau branch, were inaccurate and he did not agree that Mr Yeoman's pessimistic view of likely sales to April 2012 was justified. He accepted that the number of billable hours was well below target over the Christmas-New Year period in 2011-2012, but said that was to be expected given the time of year. In his view, activity was likely to increase later in January 2012.

[20] Because of this Mr Buffini believes the real reason for his redundancy was a wish to replace him with a lower-paid employee, namely R. He noted that R's employment as 'relationship manager' began in November 2011, and she had no background in or knowledge or experience of the recruitment industry.

[21] R was employed to service existing customers and leave Mr Buffini free to focus on new business. Less experience was required, and she was paid significantly less than Mr Buffini. At the time, Mr Yeoman believed the downturn in business was best addressed by putting effort into generating new business.

[22] Mr Yeoman acknowledged that cost played a large part in selecting Mr Buffini for redundancy rather than R, but noted that Mr Buffini's remuneration reflected his role of developing new business. The emphasis on new business was to end, and R was to be retained in the role of servicing existing clients.

[23] In those circumstances I accept at least that the redundancy situation facing the Manukau branch was genuine. Even if Mr Yeoman's view in late 2011 of the sales margins being achieved was based on inaccurate information, it remained common ground that a certain number of hours had to be billed per week for the branch to achieve a profit. It was also common ground that the hours being billed fell far short of that figure. There was disagreement about the likelihood of improvement in the three months following Mr Buffini's redundancy, but the test of justification for a dismissal is concerned with the circumstances at the time of the dismissal. As at the

date of the dismissal neither party could know whether there would be an improvement, or of the extent of any improvement. I accept that Mr Yeoman's pessimistic view was genuinely held.

[24] That the redundancy situation was genuine has been borne out by the closure of the branch, and R's transfer.

[25] Secondly, in that there were genuine reasons for the selection of Mr Buffini for redundancy - namely the comparative cost of his salary and R's, the areas of business on which each had been employed to focus, and the area of business to be focussed on in the immediate future - I accept that the redundancy was genuine.

3. Did TRL conduct a fair and reasonable consultation process

[26] Mr Buffini was advised during the discussions in January: restructuring was being considered; there was a possibility of redundancies; and of the reasons for this. Because of his position he was able to access information on which to base a response, to the extent that he was able to identify the inaccuracy in Mr Yeoman's information. He also had an opportunity to provide input into how the performance of the Manukau branch could be addressed. To that extent TRL met its obligation to raise its concerns with Mr Buffini, and allow him to respond, before dismissing him.

[27] That is not the end of the matter because the decision to focus on existing business was a key decision affecting the future of Mr Buffini's employment. In principle it was a business decision which Mr Yeoman was entitled to make, but its implications for Mr Buffini's employment meant the change in focus should have been raised during the consultation process. This is particularly so because R's employment had commenced so recently.

[28] However Mr Buffini was not consulted about the decision to focus on existing business only, or on the implications of the decision for his continuing employment. In turn he was not able to make representations on the matter. In making the decision and moving immediately to implement it, Mr Yeoman missed out a key step in the process. In terms of s 103A the concern about the future of the role of new business

development was not raised, and correspondingly the obligations under s 4(1A) were not met. I regard this as a defect in the process.

4. Was the dismissal justified

[29] I have found there was a genuine redundancy situation, and decisions made in respect of it were made for genuine reasons. Further, there was a consultation process, although I have found it defective.

[30] Section 103A(5) provides that the Authority must not determine a dismissal to be unjustified under the section solely because of defects in the process if the defects were minor and did not result in the employee being treated unfairly. I consider the step in the process which Mr Yeoman missed was not minor and did result in Mr Buffini being treated unfairly.

[31] The remaining question is whether, in such circumstances, dismissal was an action a fair and reasonable employer could have taken. The above findings mean I conclude dismissal was not an action a fair and reasonable employer could have taken. Mr Buffini's dismissal was therefore unjustified.

Remedies

[32] Mr Buffini seeks the reimbursement of remuneration lost as a result of his personal grievance, and compensation for injury to his feelings caused by the grievance.

1. Reimbursement of lost remuneration

[33] After his dismissal Mr Buffini began an association with another recruitment business. He calculated his lost remuneration as the amount he would have earned in the 3 month period following the termination of his employment at TRL, less the amount he actually earned in that period. The amount is:

$\$27,000 - \$8,195.03 = \$18,805.56.$

[34] I have found the redundancy situation was genuine, and consider that in the circumstances Mr Buffini's position would probably have disappeared even without the defect in the consultation process. Accordingly Mr Buffini's loss of remuneration flows not from the personal grievance but from the economic circumstances facing his employer. For that reason there will be no order for the reimbursement of lost remuneration.

2. Compensation for injury to feelings

[35] The evidence of injury to Mr Buffini's feelings was limited. To the extent there was any such evidence, much of it was concerned with the parties' subsequent dispute about whether the obligations contained in the restraint of trade in their employment agreement had been waived as Mr Buffini said was the case. That matter was also before the Authority, and was to be heard after the present matter. It was withdrawn shortly before the scheduled investigation meeting.

[36] Aside from the limited evidence in support of any injury to his feelings caused by the personal grievance, Mr Buffini knew the branch was not profitable, and offered to resign. Not only was the loss of his job no shock to him, but he was willing to consider leaving. No more than a modest award of compensation is warranted.

[37] TRL is therefore ordered to compensate Mr Buffini for injury to his feelings in the sum of \$2,000.

Penalty

[38] The claim for a penalty was identified in the statement of problem as a claim for a penalty for a breach of Mr Buffini's 'legal rights', or for a generalised breach of s 4 of the Act. The precise identification of the grounds on which penalties are sought is important, and too often overlooked. When I asked about the matter it transpired that the claim centred on s 4 and was concerned with the consultation process. No other allegation of breach of good faith was specified or pursued in the course of this employment relationship problem.

[39] A penalty for a failure to comply with the duty of good faith in s 4 may awarded under s 4A of the Act if:

- the failure was deliberate, serious or sustained; or
- was intended to undermine,
 - bargaining for an employment agreement, or
 - an employment agreement, or
 - an employment relationship.

[40] The defect in the consultation process did not meet the above tests. If I am wrong in this I would say that the defect has already been reflected in the findings in respect of the personal grievance, and there is no need to further penalise the employer.

[41] There will be no order for the payment of a penalty.

Summary of orders

[42] TRL is ordered to pay the Mr Buffini the sum of \$2,000 as compensation for the injury to his feelings arising from his personal grievance.

Costs

[43] Costs are reserved.

[44] The parties are invited to reach agreement on the matter. If they are unable to do so any party seeking costs shall have 28 days from the date of this determination in which to file and serve memoranda on the matter. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority