

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 111
5594060

BETWEEN KIERON McALISTER
 Applicant

A N D TALLEY'S GROUP LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Maree Kirk, Counsel for Applicant
 Graeme Malone, Counsel for Respondent

Investigation Meeting: 16 June and 5 July 2016 at Nelson

Date of Determination: 15 July 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr McAlister) alleges that he was unjustifiably dismissed for redundancy, that the redundancy was not genuine, that the process followed by the respondent employer (Talley's) was not fair, and that Talley's failed to act in good faith and breached the employment agreement.

[2] Talley's resists all of those allegations. It says that the redundancy was entirely genuine, that the process followed was a stock standard process and that the employer behaved throughout in good faith.

[3] Mr McAlister completed a Bachelor of Commerce degree at the Nelson-Marlborough Institute of Technology (NMIT) in December 2013 and, in consequence of that qualification, sought a role utilising his human resources training.

[4] He applied for and was appointed to a role with Talley's as a graduate human resources and health and safety officer. This was in September 2014.

[5] The job description for the role Mr McAlister was appointed to contains the following relevant paragraph:

The HR/health and safety graduate will be trained to competently perform many of the administrative aspects of the department so as to initially assist the HR manager and to then take on a number of those responsibilities within the department so that the HR manager can manage on Group wide projects and needs.

[6] Mr McAlister commenced his duties on 20 October 2014 after giving notice to his then existing role, and his unchallenged evidence is that he developed in the position, was valued by Talley's, and that he developed a good working relationship with the HR manager, Mr Greg Cox. Mr McAlister also told me that he enjoyed the role and saw it as a long term opportunity.

[7] Part of Mr McAlister's role involved him meeting daily with Mr Cox to discuss work-related matters. At one of these meetings on 9 April 2015, there was a discussion between Mr McAlister and Mr Cox about the prospect that Mr McAlister's position might be disestablished. Mr McAlister's evidence is that Mr Cox told him that his position had been disestablished while Mr Cox was adamant, as was the other Talley's witness, that the message at that meeting was only that the position might be disestablished.

[8] By the time of the investigation meeting, Mr Cox had left Talley's employ and was not, as a consequence, readily available to Talley's to give evidence. Notwithstanding that, I decided that it would be of assistance to me to hear from Mr Cox and accordingly I subpoenaed him to help me understand Talley's position in respect to this first meeting between Mr Cox and Mr McAlister and the following series of meetings between the two protagonists.

[9] What Mr Cox said was consistent with what Mr Dane Gerrard, a Talley's senior manager, said about that first meeting, namely that Mr Cox had been told by the directors of Talley's that they wanted him doing more recruitment (in effect to have a more hands-on role) but that whether that change ought to affect Mr McAlister's position, was a matter for Mr Cox to resolve.

[10] That interpretation of the initial meeting as well as being Mr Cox's sworn evidence, is consistent with Mr Cox's contemporaneous written notes of the first meeting where Mr Cox indicates what the directors required (that they wanted him "spending time doing recruitment and on the floor health and safety more") and that it was "up to me how I do it". Further on in the notes of that same meeting on 9 April 2015, Mr Cox records this sentence:

They have left me with the decision on final structure but made the required outcomes clear.

[11] Conversely, Mr McAlister's evidence is that:

The decision to make my position redundant was made by the time I first heard of it. ... The directors made that decision before Greg [Mr Cox] ever spoke to me. It is a farce to say that Greg [Mr Cox] was not told how to implement the directors' decision ... The only way that could happen was by me losing my job.

[12] Moreover, Mr McAlister presents his own contemporaneous written notes which appear to support that view of the meeting.

[13] For the sake of completeness on this point, I record Mr Gerrard gave evidence on the matter and although not present at this meeting or indeed any of the subsequent meetings between Mr Cox and Mr McAlister, was very clear about Talley's position as he was part of the decision-making process. Mr Gerrard said in his evidence to the Authority:

I agree that a decision had been made at executive level that Greg Cox should not be limiting himself to policy matters and development but needed to be involved in day-to-day HR and HS (health and safety) matters at plant level and across the Group. ... I do not accept however, that in making that decision the executive also made a decision to make Kieron [Mr McAlister] redundant. ... How [Mr Cox] best achieved that was over to him.

[14] The evidence is that there were a succession of subsequent meetings dated variously 10 April 2015, 13 April 2015 (two meetings), 14 April 2015, 16 April 2015, 17 April 2015, 21 April 2015, 29 April 2015, 5 May 2015, and 12 May 2015.

[15] However, the key meetings were the first one on 9 April 2015 which I have already referred to, the second meeting on 13 April 2015 where there appears to have been discussion around "why his position could be redundant" and the meeting on 16 April 2015 where Mr Cox's notes record:

... agreed no alternative. Confirmed that position will be disestablished and agreed four weeks' notice per agreement noting last day Friday 15 May 2015.

[16] Mr McAlister protests that even if he were to accept that the first meeting only postulated the disestablishment of his position, the process between that point (9 April 2015) and the decision to confirm the disestablishment of the role on 16 April 2015 "took six working days" and that is too short a time to constitute a proper reflective process.

[17] A letter signed by Mr Cox and dated 17 April 2015 confirmed the disestablishment of Mr McAlister's position and by letter dated 8 July 2015, Mr McAlister raised a personal grievance.

The issues

[18] It will be useful if I consider and answer the following questions:

- (a) Was the redundancy a genuine one;
- (b) Was the process used by Talley's fair in all the circumstances;
- (c) Did the employer act in good faith; and
- (d) Was there a breach of Mr McAlister's employment agreement?

Was the redundancy genuine?

[19] The starting point in any consideration of the genuineness of a redundancy usefully commences with a consideration of the principles derived from the Court of Appeal decision in *GN Hale & Son Ltd v. Wellington Caretakers IUOW* [1990] 2 NZILR 1079.

[20] Two principal propositions can be drawn from that case. The first is that an employer is entitled to make its business more efficient and an employee does not have the right to continuity of employment if the business is capable of operating more efficiently without him.

[21] A further proposition usually derived from *Hale* is that it is not for the Court or the Authority to substitute its view about how a business should be operated; that is

a matter for the management of the business and the Authority ought not to interfere with that decision provided it is made for “genuine commercial reasons”.

[22] However, that second proposition must now be qualified by reference to Chief Judge Colgan’s observations in *Michael Rittson-Thomas t/a Totara Hills Farm v. Hamish Davidson* [2013] NZEmpC 39 (*Rittson-Thomas*) where His Honour had this to say:

It will be insufficient under s 103A, where an employer is challenged to justify a dismissal or disadvantage in employment, for the employer to say that this was a genuine business reason and the Court (or Authority) is not entitled to inquire into the merits of it. The Court (or Authority) will need to do so to determine whether the decision, and how it was reached, were what a fair and reasonable employer would/could have done in all the relevant circumstances.

[23] The evidence for Talley’s is simple enough. Talley’s says it had concluded at director level that Mr Cox was not as actively involved in staff recruitment matters as he needed to be in order to properly advise Talley’s directors. Talley’s had reached this conclusion because there were a number of occasions when Mr Cox had been asked to provide more detailed information about certain recruitment matters to the directors and he had been unable to do so because he no longer had the hands-on experience that he would have previously had.

[24] This was because, since the arrival of Mr McAlister, Mr Cox had stepped aside from doing the day-to-day recruitment and had become more intimately involved in developing human resources and health and safety policies and procedures for the wider group. While Talley’s accepted that that work was important of itself, it wanted to place reliance on Mr Cox’s significant experience and longevity in the business and his expertise in recruitment especially, and it was unable to do that because Mr Cox had lost focus on that aspect when he delegated much of that work to Mr McAlister.

[25] I am satisfied on the evidence I heard that the directors of Talley’s did not direct Mr Cox to dismiss Mr McAlister but simply required Mr Cox to refocus his personal energies on the recruitment of staff. How Mr Cox was to achieve that change in duties was, I am satisfied, left entirely to him.

[26] In reaching that significant conclusion, I prefer the evidence of Mr Gerrard and Mr Cox to the evidence tendered by Mr McAlister. Mr Gerrard was part of the

directors' decision-making which resulted in Talley's reaching the conclusion that Mr Cox needed to refocus his energies on recruitment. Mr Gerrard's evidence was as plain as can be that that was all that the directors decided; in particular, he was adamant that the directors did not also decide that Mr McAlister's services needed to be dispensed with.

[27] Mr Cox's evidence supported that view. Like Mr Gerrard, I thought Mr Cox was a straightforward and reliable witness. Mr Cox was the recipient of the directors' decision. He was very clear what the directors had told him to do and equally clear what they had not told him to do. His evidence was that he had been told to, in effect, return to the coalface by doing the recruitment himself in order that he could advise the directors of what was going on in that important area of the business. He was told to implement that change but given *carte blanche* as to how he did that.

[28] While it might be argued that Mr Gerrard has an axe to grind because he is still involved with Talley's senior management, I have no reason to doubt the evidence he gave me. Moreover, Mr Gerrard's evidence is supported by the evidence of Mr Cox who has now left the business and has been employed elsewhere for over six months. It follows that Mr Cox has no reason to manufacture his evidence and I am satisfied that his evidence was honestly given and straightforward.

[29] Mr Cox's evidence is also supported by the notes that he took of the various meetings that he had with Mr McAlister and in particular the notes of the first meeting held on 9 April 2015 where Mr Cox records himself making clear to Mr McAlister that he had been told to return to the coalface and that he had to implement that decision as best he could and that a consequence of that might be that Mr McAlister's position was disestablished.

[30] Those notes and the evidence Mr Cox gave on affirmation have to be contrasted with the evidence from Mr McAlister who also took notes of the various meetings and also gave evidence on affirmation. Mr McAlister's evidence was, both derived from his notes and from his testimony proper, to the effect that he was told at the meeting on 9 April 2015 that his job had gone, that is that the matter was not a possibility but had been decided and that the decision had been made not by Mr Cox at all but by the directors.

[31] Lest the matter be in any doubt, I do not accept Mr McAlister's categorisation of that first meeting and prefer the evidence from Talley's. That means that I am satisfied the 9 April 2015 meeting did not present a *fait accompli* but rather was the first meeting in a series of meetings to explore whether there was an alternative to the possibility, already flagged, that Mr McAlister's position needed to be disestablished.

[32] Of course, Mr McAlister's position is in effect an argument in the alternative. On the first hand, he argues that the decision to disestablish his role was taken by the directors and was not taken by Mr Cox after consultation with him and I have rejected that contention for reasons just explained. In the second place though, Mr McAlister contends that even if the decision was not made by the directors, the practical effect of the decision that the directors did make (that Mr Cox must return to the coalface), was to ensure that Mr McAlister's role was disestablished because practically, Mr Cox would be taking over work which he had previously delegated to Mr McAlister and if Mr McAlister was not sufficiently senior to do the policy work which Mr Cox had been doing, then there was no job for Mr McAlister.

[33] I am not persuaded by this second contention either. Mr Cox was very clear in the evidence he gave to me that he explored with Mr McAlister a range of possible outcomes which may have resulted in Mr McAlister continuing in the employment. Amongst other things, there was a discussion about whether Mr McAlister might be able to work at one of Talley's other plants and/or whether Mr Cox himself might undertake the coalface at one of Talley's other sites such as Blenheim.

[34] Moreover, Mr Cox does not accept the contention that there were only six working days between the first meeting on 9 April 2015 and the meeting of 16 April 2015 where the final decision was made to disestablish the role as being the total time devoted to the exercise. His evidence, which I have no reason to doubt, is that he started thinking about the issue and trying to identify the options that might be available before he even spoke to Mr McAlister. In other words, as soon as Mr Cox got the message from the directors that he needed to return to the coalface, he started to consider what the options might be and it was not until he had done some thinking on the subject that he raised the matter first with Mr McAlister on 9 April 2015. I was not able to establish from the witnesses exactly when the directors had made their decision or communicated it to Mr Cox, but I think it likely that it was made at the beginning of the month of April 2015.

[35] Applying *Rittson-Thomas*, it is clear that what the Authority must do is consider whether the decision Talley's took was a decision that a fair and reasonable employer could take in the particular circumstances of the case. This is not a situation where costs needed to be taken out of the business or the business has fallen upon hard times and needs to shed staff in order to survive. Mr McAlister's evidence proceeded in part on the mistaken belief that, in the absence of financial imperatives, an employer could not justify the genuineness of a redundancy situation.

[36] That cannot be right. Certainly, the taking of costs out of a business is a common reason for a restructure, but equally, a restructure brought about because the work previously done by an employee is picked up by another employee is an equally valid basis on which an employer may undertake a restructure.

[37] This, after all, was a situation where after the consultation between the two protagonists, it became evident that there was no alternative to the disestablishment of Mr McAlister's role and accordingly the redundancy was declared, but the reason for the disestablishment of the role was because Mr Cox was going to pick up the work that Mr McAlister had previously been doing and Mr McAlister was too junior to take on the work that Mr Cox had been attending to after he delegated the coalface work to Mr McAlister. Put shortly, the work that Mr McAlister had been doing was going to become part and parcel of Mr Cox's work and therefore, having not found any other opportunities for Mr McAlister to continue in the employment, effectively the work that Mr McAlister had previously performed was no longer available to him to perform and therefore his job had gone.

[38] Moreover, despite Mr Cox's subsequent departure from Talley's, there has been no recruitment of anyone into the position that Mr McAlister previously filled, that is the structure that continues to this day, notwithstanding Mr Cox's departure also, is the same structure as Mr Cox implemented after declaring Mr McAlister's position surplus to Talley's requirements.

[39] On the face of it then, this is an absolutely ordinary restructuring arrangement where a job has genuinely gone from a structure and there is nothing in the evidence I heard which would suggest any mixed or improper motive activating Talley's decision to disestablish Mr McAlister's role. In particular, there is no evidence that Talley's wanted to get rid of Mr McAlister per se and no evidence that that formed part of the rationale for the decision to dismiss for redundancy.

[40] Indeed, Mr McAlister had made a good impression in the short time that he had been employed at Talley's, was regarded positively by the people with whom he worked and had made no particular impact, either positively or negatively, with the directors so it is difficult to see why they might have wanted him gone.

[41] All of the evidence from both parties was that Mr Cox and Mr McAlister had a good working relationship and it was Mr Cox who made the decision to disestablish Mr McAlister's role so it is difficult to see how there can be any improper motive to the decision to terminate for redundancy.

[42] This is so even though Mr McAlister draws my attention to the plain words in the position description for his role, given to him when he was engaged, which refers to his responsibilities as including

... to initially assist the HR manager (Mr Cox) and to then take on a number of those responsibilities within the department so that the HR manager can focus on Group wide projects and needs.

[43] Clearly, that provision contemplates precisely the sort of engagement that Mr McAlister understood from his engagement by Talley's and, more importantly, is the very antithesis of the decision that Talley's subsequently made to get Mr Cox back at the coalface.

[44] But that only emphasises the bald reality that an employer is entitled to change the business settings, to trial new arrangements and to change them if they do not work out. No doubt Mr McAlister can be profoundly disappointed that this new opportunity for him did not turn into a permanent position, but there is nothing in our legal rules which requires an employer to predict in advance whether a new position will be a permanent one or not.

[45] There is nothing before me to suggest that Talley's knew at the time it engaged Mr McAlister or indeed ought to have known that the position he was being recruited for was only temporary. I am satisfied on the evidence I heard that the expectation of everyone at the time of Mr McAlister's engagement was that the new position would be a permanent part of the Talley's structure and I fancy that the fact that Mr Cox lost touch with the day-to-day recruitment realities was probably no more and no less than an unintended consequence of the creation of the new position.

Was the process of effecting the redundancy unfair?

[46] I am not satisfied that the process used by Talley's was unfair either. I accept Mr Cox's evidence that he started thinking about the problem that was presented to him by the directors before he met first with Mr McAlister and I have already made clear that I am not persuaded that the 9 April 2015 meeting did anything more than indicate there was a possibility of the disestablishment of Mr McAlister's role.

[47] Given that Mr Cox, on his evidence, had already started thinking about the matter before he first met with Mr McAlister, and that he was satisfied that he had explored all of the possible permutations with Mr McAlister, it is difficult to see what else he could have done, even if the elapsed time was comparatively short.

[48] Mr Cox disputed Mr McAlister's contention in evidence that he had not been given sufficient information to properly engage with Talley's around the possible disestablishment of his role; Mr Cox's evidence was that far from not knowing why Talley's wanted Mr Cox back at the coalface, the truth of it was that Mr McAlister did not agree with Talley's desire to have Mr Cox return to active recruitment.

[49] Mr Cox was very clear with me that he had told Mr McAlister why Talley's wanted him back at the coalface, specifically because there had been occasions since the change in duties where Mr Cox had been unable to answer the directors on specific recruitment issues because he was no longer currently up to date with those matters and the directors wanted him to be.

[50] The notes kept by Mr Cox of the meetings between the two protagonists starting with the meeting on 9 April 2015 down to the meeting of 16 April 2015, augmented by the recollections of both the protagonists in their evidence before me, suggests that all the viable alternatives to the disestablishment of the role were explored and that by 16 April 2015, there really was nothing else for the parties to discuss. Certainly there is nothing in the evidence to suggest that there were any unexplored options still on the table so the fact that it was a relatively short period of consultation is neither here nor there.

[51] Moreover, both Mr Cox and Mr McAlister confirmed in their oral evidence that the notes supplied by Mr Cox were broadly accurate although, again, both of them referred to some elements of the discussion (like what I might refer to as the

Blenheim option) as not being documented in the notes, although there is no doubt that option was explored.

[52] As it is apparent on the evidence that Mr Cox was the decision-maker, it was available to Mr McAlister to persuade Mr Cox that there were alternatives to the disestablishment of his position, if there were any such alternatives, and given that the two men had a good relationship, it seems to me inconceivable that Mr McAlister would not have been able to persuade Mr Cox of such an alternative were there one.

Was there a breach of good faith?

[53] I have not been persuaded there has been a breach of good faith in this matter. The alleged breach of good faith seems to proceed on the footing that Talley's misled and deceived Mr McAlister in recruiting him to a position which appeared to be permanent when it was no such thing.

[54] I have already commented on that aspect and made the point that there is simply no evidence at all that Talley's intended to create a short term position. Indeed quite the reverse is the case. All the evidence suggests that it was looking to create a permanent position but it appears that an unintended consequence of that position was to affect the quality of the advice that Mr Cox was giving the directors and that was something that the directors could not allow to continue.

[55] As I have already noted, an employer is allowed to change its business to meet operational requirements and it cannot be right that an employer is bound in perpetuity to persevere with the employment of a person in a particular role if the consequences of that continued employment, properly analysed by a reasonable and objective third party, is that there are unintended consequences which cannot be avoided save by the disestablishment of the subject role.

Has there been a breach of the employment agreement?

[56] This claim appears to proceed on the basis of a contention that the strict terms of the employment agreement have not been followed in regard to the implementation of the redundancy.

[57] This is so, it is said, in respect of the putative failure of Talley's to consult with Mr McAlister a reasonable time before the redundancy and the alleged failure of Talley's to cite the operational reasons for the redundancy.

[58] I do not accept either of those contentions nor the associated contention that it was never clear to Mr McAlister why he was the employee selected for dismissal for redundancy.

[59] Dealing with each of those in turn, I have already commented on the timeliness aspect. I agree that the elapsed time involved in consultation between the parties was short, but there is nothing in the law which mandates a particular span of days over which consultation must take place. It is a matter of looking at the particular circumstances of each case and deciding whether, in all the circumstances, the extent of the consultation is sufficient to provide both parties with all of the relevant information that might inform decision-making and allowing each to engage with the other such that there is a genuine opportunity for the parties to influence the other's decision-making.

[60] Having regard to the evidence before me in this case, I am satisfied that Mr McAlister was given a reasonable time in advance of the decision to disestablish the role to consult with the employer about the alternatives to that course of action.

[61] Next, I deal with the issue of "operational reasons" and again refer to my earlier observations. I am satisfied that Mr McAlister was given the only operational reasons for the possible disestablishment of his role, namely the decision made by Talley's directorate that Mr Cox needed to get back to the coalface so that he was able to give the directors appropriate advice about recruitment matters.

[62] That was the only operational reason and Mr Cox, in answer to a specific question, confirmed that he had told Mr McAlister that was the reason.

[63] Of course, it was the consequence of that reason which potentially put Mr McAlister's position in jeopardy.

[64] Thirdly and finally, the reason for selecting Mr McAlister as the person whose position needed to go is or ought to be self-evident. As Mr Cox expressed it in his evidence to me, Mr McAlister was in the only position whose disestablishment would

achieve the desired outcome of enabling Mr Cox himself to return to doing the basic recruiting work.

[65] Accordingly, I have not been persuaded there is any breach of the employment agreement either.

Determination

[66] For reasons which I have advanced in the earlier sections of this determination, I am not persuaded that Mr McAlister has any viable personal grievance and his case therefore fails in its entirety.

Costs

[67] Costs are reserved but in the event the parties are unable to resolve costs on their own terms, Talley's as the successful party may file and serve a memorandum asking the Authority to fix costs and Mr McAlister has 14 days from his receipt of that memorandum to respond.

James Crichton
Chief of the Employment Relations Authority