New Zealand Employment Relations Authority Decisions

Ballingall v Telco Asset Management Limited [2011] NZERA 106; [2011] NZERA Auckland 94 (14 March 2011)

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Last Updated: 3 June 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 94 5306127

BETWEEN

AND

JOHN BALLINGALL Applicant

TELCO ASSET MANAGEMENT LIMITED Respondent

Member of Authority: Representatives:

Investigation Meeting: Submissions Received:

Vicki Campbell

Catherine Murray for Applicant Kevin Thompson for Respondent

24 November and 17 December 2010

24 December 2010 from Applicant 23 December 2010 from Respondent

Determination:

14 March 2011

DETERMINATION OF THE AUTHORITY

A The termination of Mr Ballingall's employment by reason of redundancy was for genuine commercial reasons but was unjustified due to the failure of Telco Asset Management to properly consult with Mr Ballingall prior to making a decision to terminate his employment.

B Mr Ballingall's personal grievance claim for unjustified disadvantage has not been upheld.

[1] Telco Asset Management Limited (Telco) operates a business providing professional property and technology related services to its clients. Mr John Ballingall began working for Telco on 15 January 2007 as a Project Manager within the fit-out projects team. Mr Ballingall was involved in providing project management services relating to the fit out of the premises of Telco's clients including partitioning and fittings.

[2] In October 2009 Telco appointed Mr Gareth Skirrow as the National Manager Projects, a newly established role. It was anticipated that a client or clients would come with the appointment which would mean an increase in the workload for the company, including the fit-out team.

[3] On Monday, 1 March 2010 Mr Ballingall and the only other project manager in the office were invited to attend a meeting with Mr Richard Hansen, Executive Director of Telco. There was no indication as to what the meeting would involve.

[4] The two men were advised that the upcoming workload was such that their employment was no longer viable and their employment would end in 1 month, during which time they would be required to work, although time off would be allowed to enable them to attend interviews. A letter to this effect was provided to both men at the meeting.

[5] On 5 March 2010 Mr Ballingall enquired as to the reasons for the termination of his employment. He was advised that it was due to redundancy. On the following Tuesday, 9 March 2010, Mr Ballingall emailed Mr Hansen and asked whether Telco had followed the correct legal process regarding the redundancy. Mr Hansen responded with an assurance that Telco had not breached its obligations of good faith toward Mr Ballingall and its legal obligations had been discharged.

[6] Mr Ballingall claims the termination of his employment by reason of redundancy was unjustified and that he was disadvantaged in his employment. He seeks remedies including lost wages and compensation for hurt and humiliation.

[7] Telco denies the claims and says that at monthly meetings attended by Mr Ballingall, and also as a result of general discussions, Mr Ballingall would have been aware of the absence of fit-out project work for the fit-out team sufficient to keep Mr Ballingall and the second project manager fully occupied.

[8] Telco says that in discussions and/or meetings prior to 1 March 2010 Mr Ballingall was aware that the lack of work for his role was of concern and that as a consequence, Mr Ballingall's employment was at risk of redundancy.

[9] The issues to be determined are:

- was Mr Ballingall's dismissal justified;
- did Mr Ballingall suffer from a disadvantage during his employment; and
- what, if any, remedies will follow. **Was the dismissal justified**

[10] In reaching its conclusions the Authority is required to scrutinise Telco's actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The section states:

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was 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 or action occurred.

[11] The test of justification does not change the longstanding principles about justification for redundancy[1].

[12] The Authority must be satisfied on two general points - that the business decision to make a position redundant was made genuinely and not for ulterior motives; and that the respondent acted in a fair and open way in carrying out that decision - particularly, did it consult properly about the proposal to make Mr Ballingall redundant and otherwise act in a way that was not likely to mislead or deceive him, that is, in good faith?

Was the redundancy for genuine commercial reasons
[13] The Court of Appeal in *GNHale & Son Ltd v Wellington Caretakers IUOW*[2], cemented an employers right to:

.. .make his business more efficient, as for example by automation, abandonment of unprofitable activities, re-organisation or other cost-saving steps, no matter whether or not the business would otherwise go to the wall. A worker does not have the right to continued employment if the business could be run more efficiently without him.

[14] Further, the Employment Court in *Simpsons Farms*[3] reiterated the right of an employer to make genuine commercial decisions relating to how its business operations will function including decisions to make positions or employees redundant.

[15] I do not understand Mr Ballingall to be arguing that the reason for the redundancy was anything other than for genuine commercial reasons. There is no evidence that Mr Ballingall claims the redundancy was a sham or for any ulterior motives.

[16] I am satisfied that the redundancy was for genuine commercial reasons. The evidence shows there was a large decline in revenue for the work undertaken by Mr Ballingall over at least an 18 month period.

[17] There was a significant loss attributable to the team in the end of year accounts up to 31 March 2010 in excess of $200,000. Further, and of concern to Mr Hansen, was the lack of any forecast revenue for the latter part of 2009 and leading into 2010. Mr Ballingall himself acknowledged that he had $0 revenue forecasted from

December 2009.

[18] Mr Ballingall confirmed at the investigation meeting that he was aware other employees including project managers had either been made redundant or left the business with no replacements being employed.

[19] Further, Mr Ballingall told the Authority that his monthly target was to achieve billings of between $30,000-$35,000 but was only achieving between $10,000 to $12,000. Mr Ballingall also told the Authority that he was aware he was being asked to help generate more work but declined to do so on the basis that business development was not part of his job description and he was no good at sales work. He also acknowledged that his services were being sold at a reduced rate to try and secure more work.

Was the process used fair and reasonable and carried out in good faith? [20] Section 4 of the Employment Relations Act 2000 requires Telco to deal with Mr Ballingall in good faith. This duty is to be exercised not only generally but in specific situations including redundancy.

[21] Under the duty of good faith Telco was required to provide Mr Ballingall with access to information:

- relevant to the continuation of his employment,
- about the decision, and
- an opportunity to comment on the information

before a decision adversely affecting his employment was made.

[22] Mr Hansen told the Authority that both project managers would have to have had blinkers on to be blind to what was happening in the business. He believed that Mr Ballingall would interpret the market, as he [Mr Hansen] did, and therefore the decision to declare his position surplus should not have come as any surprise.

[23] I am satisfied Mr Hansen and Mr Ballingall had discussions which indicated the business was not doing well. Also, other employees were either being made redundant or were leaving and not being replaced. But this is not the same thing as specifically advising an employee that a decision to declare their position surplus is going to be made, and providing the

employee with an opportunity to comment on it before the decision is made final.

[24] Consultation requires more than mere notification. There must be sufficient time for a two way dialogue over a proposal which has not yet been acted on. Employees must know what is proposed before they can be expected to give their view. An employer is entitled to have a working plan in mind but must have an open mind and be ready to change or even start anew. [4]

[25] The evidence shows that in this case consultation as contemplated by the Court in *Communication & Engergy Workers Union Inc v Telecom NZ Ltd* did not take place. A decision was made and was notified to Mr Ballingall without any opportunity for Mr Ballingall to have input. Mr Hansen told the Authority that there didn't seem much point as there were no options other than to terminate the employment of the two project managers.

[26] The evidence of Mr Hardgrave was significant as it confirmed much of Mr Ballingall's evidence with respect to his knowledge of a possible redundancy in early 2010. Mr Hardgrave gave his evidence on a separate day to others and he had not had the benefit of hearing what others had had to say. Mr Hardgrave confirmed Mr Ballingall's evidence that the decision to terminate his and Mr Ballingall's employment came as a shock to him and that Mr Ballingall seemed angry about the decision.

[27] Both Mr Ballingall and Mr Hardgrave told the Authority they understood from Mr Hansen that there was "an abundance" of work coming in. Mr Hardgrave confirmed Mr Ballingall's evidence that they understood Mr Hansen had taken his holidays during the Christmas break because everyone was going to be so busy they would not have time to take holidays at any other time.

[28] As a result of my finding on the lack of consultation, I find Mr Ballingall's dismissal by reason of redundancy is unjustified and he is entitled to a consideration of remedies.

Redeployment
[29] Telco has an obligation as a fair and reasonable employer, to consider alternatives to making Mr Ballingall redundant. Mr Ballingall says that during March, and before his notice period had expired, he overheard Mr Skirrow having a telephone conversation with a recruitment consultant in Christchurch. Mr Ballingall told the Authority that Mr Skirrow detailed the requirements of a new position which Mr Ballingall strongly feels was the same as the role he had been filling. Mr Ballingall says he raised the matter with Mr Skirrow and voiced his concerns that he had not been considered for the role. He says that the next day he was asked if he was interested in the role and he indicated he was.

[30] Mr Skirrow told the Authority he did make contact with a recruitment consultant in Christchurch to search for a qualified interior designer. He discussed the position with Mr Ballingall out of courtesy but denies asking Mr Ballingall if he would be interested in the position. The Authority accepts the evidence of Mr Skirrow who says the position was for a qualified interior designer and was for a short term contract only. Mr Ballingall was not a qualified interior designer and therefore it doesn't make sense that he would be offered the position.

[31] During his final week of his notice, Mr Hansen advised Mr Ballingall that Telco had secured another job and that it had been given to Mr Hardgrave. The evidence from Mr Hardgrave is that the work required a formal qualification in quantity surveying, something Mr Ballingall does not have. Mr Hardgrave told the Authority that he was offered the role but that it was only a short term role and the work had to be done quickly.

[32] Mr Ballingall completed the notice period and left Telco on 31 March 2010. The evidence was that Mr Ballingall was in the office infrequently during his notice period however, nothing turns on that.

[33] On 7 April 2010, while searching for new employment opportunities, Mr Ballingall found an advertisement for two positions based in Christchurch. One of the positions was for a three month contract with the possibility of becoming permanent. He was advised by the recruitment consultant that this position was with Telco.

[34] On 14 April 2010 the recruitment consultant contacted Mr Ballingall and advised him that the role as advertised was not correct and required someone with design experience. Mr Ballingall was advised that the advertisement would be removed and re-worded to reflect the correct requirements for the job. The consultant apologised to Mr Ballingall for any inconvenience the original wording of the add may have caused him. In any event, Mr Ballingall did not apply for the position even though he contends that he was fully qualified and well suited for the position.

[35] I find that while there was an obligation on Telco to consider redeployment opportunities both positions that became available during Mr Ballingall's notice period were short term positions requiring skills and qualifications Mr Ballingall did not possess.

Conclusion
[36] Mr Ballingall's redundancy came about through genuine commercial needs of the business, however, I have found the failure by Telco to consult with Mr Ballingall about the proposal to make him redundant before a decision was made, was not

what an employer acting fairly and reasonably would have done in all the circumstances of this case.

Unjustified disadvantage

[37] Mr Ballingall claims his employment was disadvantaged by an unjustifiable action of Telco when it failed to consult before making the decision to dismiss him by reason of redundancy.

[38] There is a two step test to establish a disadvantage grievance. Firstly, I must ascertain whether Telco's actions disadvantaged Mr Ballingall in his employment, and secondly, whether that disadvantage has been shown to be justified or unjustified pursuant to section 103A of the Act.[5]

[39] Disadvantage alone is not prohibited by law. It must be a disadvantage that is unjustified. If Telco can establish justification for a disadvantageous action, there is no grievance.[6]

[40] Finally, disadvantage is not identified narrowly and solely in terms of wages and conditions of employment. Rather it broadly considers effects on the total environment of the employee's employment. A claim for disadvantage depends upon an act or omission by an employer causing disadvantageous consequences, not merely an employee's subjective dissatisfaction at their circumstances.[7]

[41] Mr Ballingall says that had Telco followed its usual process of consultation before giving him notice that his employment was to be terminated, he would have remained in employment for a further two weeks.

[42] Mr Ballingall says that instead of making the decision at the end of February, Telco would have embarked on a consultation process which would have started at the end of February and would have taken at least two weeks, at which time Telco would have been fully entitled to decide his position would be surplus to its requirements.

[43] I have already found that the decision to dismiss Mr Ballingall for reasons of redundancy was made for genuine commercial reasons. I am satisfied that had the parties become properly involved in a consultation process, based on the lack of work available and forecasted, it is more likely than not, that the process would have started earlier than 1 March 2010. I have made this finding based on the evidence which shows that Mr Ballingall was not forecasted bring in any revenue for January or
February 2010.

[44] Discussions over the dire financial situation faced by the company had been had with Mr Ballingall for some time. Telco believed that from September 2009 it was sending a very strong message to Mr Ballingall. I have formed the view, that had Telco realised that sending the messages in the way it did was not enough, it would have embarked on a quite different process well before January or February 2010.

[45] Mr Ballingall's claim under this heading has not been established to my satisfaction and I can be of no further assistance to him.

Remedies

[46] As set out above, this was a redundancy carried out for genuine commercial reasons. It follows that Mr Ballingall can not be compensated for the loss of his job. However, he can be compensated for the failure by Telco to act fairly and reasonably in implementing its decision.

[47] In all the circumstances of this case an appropriate award is $5,000. Telco Asset Management Limited is ordered to pay to Mr Ballingall the sum of $5,000 pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000 within 28 days of the date of this determination.

[48] When determining remedies the Authority is required to take into account any contribution by Mr Ballingall to the actions giving rise to his grievance. Mr Ballingall has not contributed to the actions of Telco in this case and therefore the remedies will not be reduced.

Costs

[49] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If they are not able to reach agreement on the matter of costs, Mr Ballingall may lodge and serve a memorandum as to costs within 28 days of the date of this determination. Telco will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[50] In order to assist the parties with resolving costs themselves, I can indicate (subject to any submissions) that a tariff based approach to costs is likely. In which case the usual starting point would be around $3,000 (GST inclusive) per day. That figure would then be adjusted in light of the particular circumstances of this case.

Vicki Campbell
Member of Employment Relations Authority

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[1] *Simpson Farms v Aberhart,* unreported, Employment Court, Colgan CJ[2006] NZEmpC 92; , [2006] 1 ERNZ 825.
[2] [1991] 1 NZLR 151.
[3] Supra n 1.
[4] Communication & Engergy Workers Union Inc v Telecom NZ Ltd [1992] NZCA 577; [1993] 2 ERNZ 429.
[5] Mason v Health Waikato [1998] 1 ERNZ 84
[6] McCosh v National Bank, unreported, AC49/04, 13 September 2004
[7] NZ Storeworkers IUW v South Pacific Tyres (NZ) Ltd [1990] 3 NZILR 452; *Bilkey v Imagepac Partners,* unreported, AC65/02, 7 October 2000
