IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 138/09
5145093

	BETWEEN	KURTIS BANDY Applicant
	AND	COLLINS HOMES LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Pat Norris, Advocate for Applicant No appearance for Respondent
Investigation Meeting:	25 August 2009 at Nelson
Determination:	31 August 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Bandy) alleges that he was unjustifiably dismissed by the respondent (Collins Homes) when he was dismissed for redundancy, and also alleges he was short paid wages and holiday pay.

[2] Collins Homes say the redundancy was genuine and was undertaken in a fair manner and that there are no wages owing.

[3] Mr Bandy was employed as a builder by Collins Homes from 8 January 2008 down to 19 September 2008. With effect from that latter date Mr Bandy was dismissed for redundancy and he now brings his claim before the Authority as a consequence of the termination of the employment.

[4] The parties attended unsuccessful mediation and the matter proceeded to the Authority from there.

[5] Collins Homes participated in the Authority's process until 10 August 2009 at which point counsel for Collins Homes advised the Authority he no longer had instructions, would not be participating in the investigation meeting and nor would his former client. Mr Bandy alleges that Collins Homes have been difficult to deal with throughout the process and there is even a claim of a personal assault on Mr Bandy by the principal of Collins Homes and another individual. While that matter, if true, hardly exhibits the kind of interpersonal behaviour one would expect of responsible adults, it is not a matter for the Authority and presently reposes with the Police who are the appropriate agency for dealing with allegations of assault.

[6] When the investigation meeting proceeded at Nelson, having already been advised by former counsel for Collins Homes that the respondent was not attending, I nonetheless waited for a period before commencing the meeting to see if Collins Homes thought better of their earlier declared intention not to participate. In the result, there was no attendance and because it seemed to me that Collins Homes' failure to participate was a considered action, I decided to proceed in their absence.

Issues

[7] The Authority needs to inquire into the following matters to reach a determination:

(a) The nature of the redundancy;

(b) The underpayment of wages;

(c) Payment for travelling time;

(d) Payment of holiday pay.

Was the redundancy genuine?

[8] I am satisfied on the evidence before the Authority that the redundancy was indeed a genuine one occasioned by an absence of paying work.

[9] I have considered Mr Bandy's suggestion that the redundancy might not have been necessary had Mr Collins, the proprietor of Collins Homes, devoted more energy to marketing that business and less energy to other unrelated matters. I accept there is some obligation on employers to maintain, so far as is possible, the work of

employees, but it cannot be an obligation of an employer to satisfy a test that it has adequately marketed a struggling business in order to satisfy the genuineness of a redundancy.

[10] In the end, the only proper inquiry for the Authority in a matter of this kind is the factual inquiry of whether or not the business has fallen upon hard times and if it has then it is likely that the Authority will be satisfied as to the genuineness of the redundancy.

[11] Here, even the evidence of Mr Bandy was unequivocal that he noticed work drying up and even if there is an argument that Mr Collins may have been able to promote more work if he had been more assiduous in that regard, the fact is that, for whatever reason, the business did cease to trade and as a matter of fact the position occupied by Mr Bandy no longer exists. Nor is there any prospect of that position being reinstated in the foreseeable future.

[12] It follows that in my judgement, the redundancy of Mr Bandy was a genuine one.

Was the process of the redundancy fair?

[13] The legal position is clear that even if a redundancy is genuine, the process by which the redundancy is effected must still be a fair one or it is capable of being challenged.

[14] In this particular case, Mr Bandy alleges that the dismissal for redundancy was effected in an unfair manner. He says that he was simply rung at 6.41am on 10 September 2008 and was told that he was out of work because the principal of Collins Homes had *closed down his business*. That telephone call was followed by a meeting on 11 September 2008 at which the same message was delivered.

[15] When he gave his oral evidence, Mr Bandy told me that in fact the presentation of Mr Collins both in the telephone discussion on 10 September and at the meeting on 11 September 2008 was, to say the least, confused. Notwithstanding that, the bottom line of both communications was that the business was closing down and that in consequence, there was no position for Mr Bandy beyond the date of the closure of the business.

[16] Mr Bandy was adamant in his oral evidence before the Authority that there had been no previous consultation about the prospects of redundancy and no suggestion whatever from the employer that the business was in any difficulty. This assertion was made despite the contention in both the statement in reply and the correspondence furnished on behalf of Collins Homes that the converse was the position. Mr Bandy accepted, responding to a question from me, that his own observations had led him to be concerned about the future of the company but he was absolutely unequivocal that at no time did Collins Homes ever engage with him on the prospects for, or the possible need for, a restructure or retrenching of the business. I thought Mr Bandy was a credible and intelligent young man and I believed his evidence.

[17] In the absence of the employer, for reasons I have already explained, I make a finding that there was no consultation and so, at the very least, the redundancy came as a shock.

[18] I am satisfied that Collins Homes would not have been in a position to offer alternative employment or to consider alternatives to redundancy because the business was too small and the opportunities too limited for that to be a realistic possibility. However, the fact that the redundancy was declared without warning and without any consultation leading up to the final day of employment, leads me to conclude that the consequences of the loss of the employment would have been far more disturbing for Mr Bandy than would otherwise have been the case.

[19] I am satisfied then on the balance of probabilities that this was a redundancy that was effected in an unfair and unjust manner because the process adopted by Collins Homes was so devoid of consultation and warning as to exacerbate the hurt occasioned by the loss of the employment. If Collins Homes had alerted Mr Bandy at an earlier date to the possibility of retrenchment that would have limited the shock of the loss of the employment for Mr Bandy. As it was, I accept as a fact that the redundancy was first spoken about by Collins Homes in the telephone discussion with Mr Bandy on 10 September 2008 and the last day of Mr Bandy's employment was just eight days later on 18 September 2008. It cannot be the position that Collins Homes only knew of the failure of its business eight days before it took effect. There must have been some warning of the likely outcome and I hold that Collins Homes failed in its obligation to be a good and fair employer by not giving Mr Bandy

whatever earlier notification might have been available. That being my finding, I conclude that Mr Bandy might well have grounds for a personal grievance in respect to the want of process in the declaration of Mr Bandy's redundancy.

[20] The question though is whether that matter was ever put to Collins Homes fairly and squarely. The closest that Mr Bandy gets to raising the matter within time is a letter from his advocate to Collins Homes dated 6 November 2008. That date is well within the 90 day statutory limitation period, but the real question is the content of that letter and whether it adequately identifies that a personal grievance is raised. I reach the conclusion that it does not. The letter I refer to (6 November 2008) is the only written communication before the Authority which refers to there being any issue with the redundancy consultation process. The bulk of the communication, naturally enough, relates to unpaid wages. Indeed, that is the focus of this letter as well but there is nothing in the letter about the redundancy matter which does anything other than protest the alleged absence of consultation. As I have already made clear, I accept that there was an absence of consultation. For present purposes though, the letter does not satisfactorily convey that Mr Bandy raises a personal grievance, that he identifies what it is that he thinks Collins Homes have done wrongly, and then indicates the relief that he seeks.

[21] Even if it could be said that the words in the 6 November letter identify what Collins Homes have done wrongly in relation to redundancy, there is no suggestion that Mr Bandy is sufficiently aggrieved by their alleged wrongdoing to raise a personal grievance nor is there any indication of what relief might be sought to remedy the default. In those circumstances, I must conclude that a personal grievance has not been raised and therefore, although on the facts available to me, I reach the conclusion that I could have made a finding of personal grievance in respect to the redundancy, I am precluded from making that finding because I hold that Mr Bandy never put that to the employer within 90 days of the dismissal.

Was Mr Bandy underpaid wages?

[22] The employment agreement governing the relationship between the parties provides for 40 hours work per week. Then it goes on to prescribe the usual hours of work and to provide for special arrangements where the employee is required to work *outside normal working hours* and finally there is a provision which allows for changes to the hours of work to be agreed between the parties after consultation duly

undertaken and after *one week's written notice of changes* from Collins Homes to the employee.

[23] Throughout the employment, Mr Bandy says that he was not paid for 40 hours work per week and Collins Homes wage records confirm that. Unusually though in the present case, Mr Bandy has kept careful handwritten records of the alleged shortfall for at least part of the course of the employment.

[24] Collins Homes alleged in correspondence that Mr Bandy frequently did not turn up for work, particularly when it was raining, and therefore was not entitled to pay for those lost hours, and further that the employer could alter the hours of work using one or other of the provisos to the hours of work clause.

[25] As to the first, Mr Bandy absolutely denied on oath that he had ever failed to turn up for work, either for rain or for any other reason, of his own motion. As to the second issue, Mr Bandy argues, and I agree, that the wording of the employment agreement requires the employer to pay for 40 hours work and that understanding cannot be abrogated unilaterally. Indeed, the only basis on which Collins Homes could reduce the usual hours of work is on the basis that there had been consultation with Mr Bandy and that consultation had been followed up with written notice. I accept Mr Bandy's evidence that no such written notice was ever received. Mr Bandy was adamant that he was never asked to agree to a change of hours and equally adamant that he never received written notification of change of hours as the same provision also requires.

[26] The contention that Collins Homes could adjust the hours of work down by relying on the provision that allows the parties to work *outside normal working hours*, is entirely misconceived. That provision allows for work outside the hours between 8am and 5pm Monday to Friday. Mr Bandy did not work outside those normal working hours and his claim is for payment within those normal working hours. The provision Collins Homes seek to rely on provides for circumstances where extra hours will have to be worked beyond the norm, to meet extraordinary demand. It does not create a facility to reduce hours.

[27] One final matter that needs to be dealt with is Collins Homes' contention that Mr Bandy never raised these shortfalls in pay during the employment. I put this question to Mr Bandy during his oral evidence at my investigation meeting and he

agreed with me that it was likely that he did not specifically raise the matter. He did tell me, and I accept, that he was regularly complaining to Collins Homes about being *underpaid*, but he is not sure that he specifically related that general complaint to a complaint about the actual hours for which he received payment.

[28] I do not think anything turns on whether Mr Bandy drew this default to the attention of Collins Homes or not. Certainly, in the normal course of events, it would be appropriate for an employee who was aggrieved by a particular matter such as this, to point it out to the employer and to seek redress. But Mr Bandy is a young man starting out in life and he is entitled to some latitude. Even though I accept, on Mr Bandy's own evidence, that he probably did not make it clear to the employer that he was aggrieved about being short paid, that does not, in my judgement, obviate the obligation of an employer to pay an employee in accordance with the applicable employment agreement.

Should Mr Bandy have been paid for travelling time?

[29] Mr Bandy was not paid for an extensive amount of time undertaken by him in travelling to the job site. Collins Homes say, in correspondence, that there was no provision in the employment agreement for the payment of travelling time and therefore it was Mr Bandy's obligation to get himself to the work site in his own time.

[30] I do not see it that way at all. It is true that the employment agreement has no provision relating to travelling time. However, the employment agreement does provide, as the law dictates, that work will be attended to at a particular identified work place. Mr Bandy did not always work at that address, which in fact was the address of the employer. Indeed, for the last several months of the employment, Mr Bandy was working some 125kms away from the identified place of the employment. I was told in evidence, and I accept, that on average the journey to the building site in question took 1½ hours each way. It follows that Mr Bandy would lose typically 3 hours a working day and Collins Homes' perspective is that that is down to him.

[31] I do not accept that logic at all. The employment agreement provides for 40 hours per week within usual hours of 8am to 5pm Monday to Friday and there is nothing in the agreement in respect to travelling time. I think the proper approach is to treat Mr Bandy as *clocking on* at 8am each morning. It cannot be the action of a

fair and reasonable employer acting in good faith in accordance with s.4 of the Act to not allow an employee to clock on until he has driven for 1½ hours in order to get to a work site and then similarly deduct a like amount of time from the employee at the end of the day as well, on the same logic.

[32] Accordingly, I reached the conclusion that Mr Bandy is entitled to be paid for travelling time.

Is Mr Bandy due holiday pay?

[33] When Mr Bandy's final pay was prepared, Collins Homes deducted 81 hours holiday pay from that final pay (which equates to the sum of $1,134) on the footing that Mr Bandy had taken annual leave in advance during the employment.

[34] Of course, an employee cannot be paid twice for the same annual leave. If annual leave is taken during the employment then it will be paid for at the time and will not accrue as an entitlement at the end of the engagement. However, the difficulty in the present case is that Mr Bandy was adamant in his oral evidence before the Authority that he never took annual leave during the period of the employment and he was very clear that he was never ever paid for time off except for statutory holidays. Furthermore, he correctly noted that the amount of time deducted amounted to over two weeks and he was quite sure that that amount of time was never taken by him as any sort of leave.

[35] In the absence of any contrary evidence from Collins Homes, I accept Mr Bandy's evidence at face value and I will make the appropriate order in respect to holiday pay as well.

Determination

[36] For reasons I have already made clear, I am satisfied no personal grievance was ever notified to Collins Homes and so there can be no finding in that regard.

[37] However, it is plain that there are significant wages owing and to remedy the arrears of wages claim brought by Mr Bandy I direct that Collins Homes Limited are to pay him the following sums:

(a) In respect to the underpayment of wages by Collins Homes failing to pay Mr Bandy for 243 hours worked but not paid for, I direct that Collins Homes are to pay to Mr Bandy the gross sum of $3,402.

(b) In respect of Collins Homes refusal to pay wages to Mr Bandy while he was travelling to the job site, I direct that Collins Homes Limited are to pay to Mr Bandy the gross sum of $1,617.

(c) In respect to unpaid holiday pay I direct that Collins Homes Limited is to pay to Mr Bandy the gross sum of $1,134.

Costs

[38] Mr Bandy seeks costs. He indicates that he has expended $7,326 in costs and offers to substantiate that if required.

[39] Such an amount is, not in my opinion, a reasonable sum to incur in a matter of this kind and, in consequence, I can only award a modest contribution to costs which would be more in keeping with the usual run of costs awards in arrears of wages cases.

[40] I direct that Collins Homes Limited is to pay to Mr Bandy the sum of $1,000 as a contribution to his representation costs.

James Crichton
Member of the Employment Relations Authority