

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 67
5467065

BETWEEN AARON BIDOIS
 Applicant

AND FSP PACIFIC LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: David Vinnicombe for the Applicant
 Adam Sagar for the Respondent

Investigation Meeting: 23 October 2014 in Tauranga

Determination: 9 March 2015

DETERMINATION OF THE AUTHORITY

- A. FSP Pacific Limited (FSP) acted unjustifiably in how it decided and carried out its dismissal for redundancy of Aaron Bidois.**
- B. In settlement of his personal grievance for unjustified dismissal FSP must pay Mr Bidois the following sums within 28 days of the date of this determination:**
- (i) \$7800 for lost wages; and**
 - (ii) \$5000 as compensation for humiliation, loss of dignity and injury to his feelings.**
- C. Within 28 days of the date of this determination FSP must also pay Mr Bidois the further sums of:**
- (i) \$1200 as pay-in-lieu for the two week notice period provided in his employment agreement for a dismissal for redundancy; and**
 - (ii) \$3500 for his costs of representation in pursuing his personal grievance claim in the Authority.**

Employment relationship problem

[1] Aaron Bidois was employed from 16 October 2013 to 25 March 2014 as a production worker at a plastic moulding plant operated by FSP Pacific Limited (FSP) in Mount Maunganui.

[2] On 24 March 2014 FSP owner Stephan Hewitt and production manager Adam Sagar visited the plant. They had travelled there from the company's head office in Brisbane. Soon after their arrival they issued instructions for Mr Bidois and some other production workers to take the day off. That evening Bronson Tuporo, an FSP supervisor, rang Mr Bidois at home. Mr Tuporo told Mr Bidois he had been asked to pass on a message, which was that there was no work until further notice. Mr Bidois told Mr Tuporo that he was going to come to work the next morning anyway to find out what was happening.

[3] On the morning of 25 March Mr Bidois went to the plant and spoke to Mr Hewitt who told him to speak to the newly appointed plant manager, Scott Lee. Mr Lee, in turn, told Mr Bidois to speak to Mr Sagar. Mr Sagar told Mr Bidois that the company would call him and other staff the next day to let them know what was happening. Mr Bidois asked why he was being sent home when some other production staff – who he had trained to do their jobs – were still working but Mr Sagar told him that all would be clarified the next day.

[4] However in the evening of 25 March Mr Tuporo rang with a message that FSP had decided to end its employment of Mr Bidois. Mr Bidois recalled that Mr Tuporo had told him he was “*let go*”. In his evidence at the Authority investigation meeting Mr Tuporo confirmed Mr Sagar asked him to give that message to Mr Bidois and two other workers.

[5] Company pay records show Mr Bidois was paid by direct credit on 26 March for the previous week's work and his final holiday pay. Mr Sagar's evidence confirmed Mr Bidois was one of three workers laid off around this time.

[6] Through an advocate Mr Bidois raised a personal grievance on 31 March. In an email of response to that personal grievance, sent to Mr Bidois' advocate on 11

April, FSP general manager Stuart McGill wrote that FSP had experienced a major decline in sales orders from January to March and that “*the decision to terminate Mr Bidois employment [was] due to the sudden downturn in business*”.

[7] In his application to the Authority Mr Bidois said he was unjustifiably dismissed and FSP had breached good faith obligations to consult him before deciding to end his employment. He said he was paid only one of two weeks’ notice due to him. He sought remedies of lost wages and compensation for humiliation and loss of dignity resulting from his dismissal.

[8] In its reply, lodged by Mr McGill, FSP denied the termination was unjustified and said Mr Bidois was offered his position back about two weeks later but he did not return to work and so had failed to mitigate his loss of income.

[9] The content of witness statements lodged by Mr Tuporo, Mr Sagar and Mr Hewitt raised two further issues not addressed in FSP’s statement of reply. Mr Sagar and Mr Hewitt referred to being told by a local manager – on the day before they made a decision to lay off three workers – that some staff, including Mr Bidois, had used illegal drugs at work. In response to questions at the Authority investigation Mr Sagar said the particular manager who had made that comment referred only to “*the boys*” using drugs at work. The reference to “*the boys*” was taken to include Mr Bidois. This raised the prospect that his selection for dismissal was decided, or at least unfairly influenced, by that allegation.

[10] Mr Sagar also said the arrangement for Mr Bidois to be told of his dismissal by telephone was necessary because Mr Bidois was known to have “*anger management issues*” and could be a threat to the safety of Mr Sagar and Mr Hewitt when he was told the news. This allegation raised the issue of whether FSP had acted reasonably in not meeting with Mr Bidois in person to discuss the prospect of his dismissal for redundancy and by telling him of that decision by telephone.

Investigation and issues

[11] As permitted by s174 of the Employment Relations Act 2000 (the Act) this determination has not recorded all evidence and submissions received in the Authority

investigation but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

[12] In reaching those conclusions I have considered the written and oral evidence from Mr Bidois, Mr Sagar, Mr Tuporo and Mr McGill, as tested by questioning during the investigation meeting. Mr McGill gave his evidence by telephone from Australia.

[13] Arrangements had also been made to interview Mr Hewitt by telephone in Australia to spare FSP the cost and inconvenience in having him travel to Tauranga for the investigation meeting. During the meeting several calls were made, between 11.30am and 2.50pm, to the telephone number given for Mr Hewitt but without any success in connecting with him. Mr McGill had told me, while he was being interviewed by telephone between 2.15 pm and 2.45pm, that he had spoken to Mr Hewitt around 2pm and believed he would be available. Two further attempts were made to contact Mr Hewitt by telephone around 2.50pm but he did not answer. As a result I was not able to have Mr Hewitt affirm his written statement or answer questions testing its contents. For that reason I have taken account of it only in respect of uncontested facts but evidence of the events of 24 and 25 March – from the company’s perspective – was nevertheless before the Authority through the tested evidence of Mr Sagar, Mr McGill and Mr Tuporo.

[14] The representatives of both parties had the opportunity to ask additional questions of the witnesses and provide closing submissions on the issues for resolution by the Authority. I have taken account of their submissions.

Failure to meet the test of justification

[15] FSP’s limited evidence on its business rationale for its sudden decision to disestablish three production positions at the plant (as a result of falling sales and overproduction in the first quarter of 2014) was not under any significant challenge. Rather the statutory test of justification, in light of Mr Bidois’ claim about his selection and dismissal for redundancy, required FSP to establish it had made those

decisions in the way that a fair and reasonable employer could have done in all the circumstances at the time.¹

[16] FSP could only have satisfied that objective test if it met its statutory good faith obligations to Mr Bidois in how it went about making those decisions. As such a decision would or was likely to have an adverse effect on the continuation of his employment, FSP had to be active and constructive in providing Mr Bidois with all relevant information about what it proposed doing and giving him a real opportunity to comment on that information before any decision was made.²

[17] It failed to meet that standard in the following ways:

- (i) FSP did not tell Mr Bidois that it was considering cutting positions – rather he was simply told to stay away from work and wait for news.
- (ii) FSP did not tell Mr Bidois of its decision to cut three positions and give him an opportunity to comment on whether he should be one of three production line staff to be selected for dismissal as a result or should one of three who would remain employed.
- (iii) FSP did not tell Mr Bidois of the allegation that he, and others, had used illegal drugs while at work and did not give him the opportunity to comment on that (including an opportunity to dispel it as a factor that might affect whether he was selected for redundancy).
- (iv) FSP did not give Mr Bidois the opportunity to comment on any other information about his work or conduct that was gathered by the managers making the decision and that might affect whether or not he was selected.

[18] Mr Sagar said the selection of Mr Bidois was based on “*reports and feedback*” from the plant’s sales manager and an FSP supervisor (not Mr Tuporo) but he could not recall any details of the content of that information. Mr Bidois got no opportunity to check or correct whatever that information was or to provide any context and information about factors that made him a more suitable candidate for retention in employment than others.

¹ Section 103A of the Employment Relations Act 2000 (the Act).

² Section 4(1A)(b) and (c) and s4(4)(d) and (e) of the Act.

[19] Mr Sagar also said some other workers were asked on 24 March about the drug use allegations but, as they were “*fiercely denied*” by those he spoke to, no further account was taken of those allegations in subsequent decisions about who was selected for redundancy. As a matter of common sense and reasonable inference I considered his explanation inadequate and unlikely. If the allegation of drug use was not a factor of any relevance, Mr Sagar and Mr Hewitt would not have referred to it in their written witness statements to the Authority. Rather I considered it was, more likely than not, a factor that did weigh (with others) in the minds of Mr Hewitt and Mr Sagar when they decided which three workers to lay off. It was unfair because there was no specific evidence about what was said to have happened and no opportunity for Mr Bidois to address any negative perceptions that were created by the inadequately described and investigated allegation.

[20] The evidence of Mr Bidois having “*anger management issues*” was similarly inadequate to justify the failure to provide him with information and the opportunity to comment before decisions about the redundancies and dismissals were made. When pressed neither Mr Sagar nor Mr Tuporo could provide specific information about any actual or likely physical threat Mr Bidois had posed to them or anyone else. Mr Tuporo said that Mr Bidois had verbally abused two other production workers on some earlier occasion but could not remember any specific details. He also said Mr Bidois appeared “*agitated*” when he visited the plant on 25 March but described that as being because Mr Bidois was angry and frustrated about what was happening.

[21] Mr Sagar’s explanation for not meeting with Mr Bidois to discuss his possible redundancy related to Mr Sagar’s experience of having carried out other redundancy processes in manufacturing plants in Australia. He said he had received death threats when he had to lay people off in that country. He said Mr Hewitt also had similar experiences and it was not a risk he was prepared to take. It was an inadequate explanation for denying Mr Bidois his rights to information and the opportunity to meet and talk about whether he should be selected for redundancy and whether there were alternatives to that happening or being necessary. The failure to consult Mr Bidois and (as far as I could tell from the evidence) any of the other affected workers, deprived them and the company of proper consideration of alternative measures such as voluntary redundancies or sharing reduced working hours. It was, in that respect, not what a fair and reasonable employer could have done in all the circumstances at

the time. Instead FSP – through the actions of Mr Hewitt and Mr Sagar – misled and deceived Mr Bidois about what was happening, in a way that breached FSP’s good faith obligations to him.³

[22] FSP’s actions also breached a term of its written employment agreement with Mr Bidois that required the company, in a redundancy situation, to “*consider ... whether there is an alternative position available for the Employee in the business*” and, if no such position was available, to “*provide the Employee with a reference stating clearly that the Employee was terminated because of efficiency considerations and not due to any breach of the Employee’s terms of employment*”. There was no evidence FSP met either requirement.

[23] These failures by FSP to treat Mr Bidois fairly while considering its decisions to make positions redundant, and then selecting him for dismissal on that basis, were more than minor defects in its process. They resulted in him being denied a substantive opportunity to continue his employment.⁴ Those actions (or omissions) established the grounds of his personal grievance for unjustified dismissal and the need to consider the remedies he sought for it.

Remedies

[24] Before considering Mr Bidois’ claim for lost wages, it was necessary to address whether he was paid for the two week notice period provided in his employment agreement in the circumstances of redundancy (where not required to work out the notice). The payment was relevant to his subsequent period of loss up to the date of the investigation meeting.

[25] While Mr Bidois’ statement of problem had claimed for a second week of notice, the evidence in the Authority investigation indicated that the one week’s wages he received on his dismissal was payment for the previous week’s work, not for a week’s notice. As a consequence, and as directed in the orders made at the head of this determination, Mr Bidois was due wage arrears of \$1200 as pay-in-lieu of two weeks’ notice.

³ Section 4(1)(b) of the Act.

⁴ Section 103A(5) of the Act

Lost wages

[26] The result of the wages arrears order is that Mr Bidois is to be paid for the two weeks' notice period from his dismissal on 25 March until 8 April 2014. Consequently the period for assessing his lost wages claim ran from that latter date until the date of the investigation meeting – a period of 28 weeks. However Mr Bidois sought an order for 13 weeks of lost wages, which I have agreed is the appropriate period for the following reasons.

[27] Mr Bidois was under a duty to make reasonable endeavours to mitigate his loss of wages by seeking other work and income. His evidence of having done so in the weeks immediately following his dismissal was inadequate. However Mr Bidois was able to establish that in the months immediately before the Authority investigation meeting he had been involved in a systematic job search with WINZ assistance and had gained interviews for potential jobs.

[28] I have not accepted FSP's argument that Mr Bidois could have further mitigated his loss by returning to a job at its plant said to have been offered to him around two weeks after his dismissal. Mr Tuporo's evidence established that no formal or clear offer of a job was put to Mr Bidois. Instead, some weeks after Mr Bidois' dismissal, Mr Lee and Mr Tuporo had discussed the possibility of hiring some additional production workers. During a social occasion – where Mr Tuporo visited Mr Bidois' flat to see another person who worked for FSP – Mr Tuporo asked Mr Bidois if he would be interested in coming back to FSP. Mr Tuporo confirmed that he was not asked by Mr Lee to make that inquiry but he did tell Mr Lee about the conversation during the following week. He had no authority to offer a job to Mr Bidois and there was no reliable evidence to confirm that, even if Mr Bidois had been positive about such a prospect and pursued it, FSP would have re-employed him.

[29] I have also taken account of the fact that there was no certainty that Mr Bidois would have retained his job if FSP had fairly carried out its selection process for redundancies in March 2014. He was the worker on the production or assembly area who had trained others but it was possible that, if fairly carried out, there may have been factors reasonably favouring the selection of the other workers over him for

continued employment. The resulting chance factor is reflected in the award of wages for less than half the total period of loss (that is 13 weeks, not 28).

[30] I have also considered contingency factors that might have seen Mr Bidois lose his job at a later stage if he had not been unfairly dismissed in March. Mr Sagar's evidence was that by October 2014 only two people worked in the production area where Mr Bidois and five others had worked in March.

[31] I calculated the award of 13 weeks lost wages on the basis of Mr Bidois' hourly pay rate of \$15 and his standard 40-hour week. There was inadequate information to calculate an additional element reflecting his average actual weekly pay that had included some varying overtime hours. The award under s123(1)(b) and s128 of the Act totalled \$7800.

Compensation under s123(1)(c)(i) of the Act

[32] I have accepted Mr Bidois' submission that he should be awarded \$5000 as compensation for humiliation, loss of dignity and injury to his feelings caused by his dismissal and how FSP carried it out. It was an appropriate amount in the particular circumstances and within the general range of awards in such cases.

[33] Mr Bidois described a crash of personal confidence resulting from his dismissal. His job at FSP had followed a previous period of unemployment. He said the job "*made me feel good*" but being fired "*made me feel like a shit worker*". He said he felt like he "*can't get out in the workforce and feel like a good worker*".

[34] I also considered that the circumstances of being told indirectly of his dismissal for redundancy by a supervisor and by telephone, rather than directly from the manager responsible, was demeaning and inherently humiliating for him.

No reduction for contributory behaviour

[35] As required by s124 of the Act I considered whether any reduction of the remedies awarded to Mr Bidois should be made due to actions by him that contributed to the situation giving rise to his grievance. I concluded no reduction was warranted.

[36] Potential factors included the allegations of drug use and his supposed angry behaviour.

[37] There was no evidence to substantiate any involvement of Mr Bidois with the use of illegal drugs at the workplace. His own evidence, not sought by his employer at the time that the allegation was made, was that he was not involved with the use of illegal drugs at the time of his employment with FSP. He admitted to some “*history*” with the use of drugs when he was a teenager but he was now aged 27.

[38] There was no evidence before the Authority sufficient to substantiate any incidents of violent or aggressive behaviour by Mr Bidois that might have warranted FSP’s failure to meet with him or provide him information about his potential redundancy.

[39] Mr Bidois was not responsible for, or involved in, the decisions that resulted in his selection for redundancy so did not contribute in any blameworthy way, by action or omission, in the unfair way that was carried out. Neither was he responsible for FSP’s sales difficulties or overproduction of stock in the first quarter of 2014 that were its reasons for disestablishing his position. Dismissal for redundancy is, by its nature, on a ‘no fault’ basis.

Costs

[40] Mr Bidois was successful in his claim in the Authority. As a result he was entitled to have the Authority consider requiring FSP to contribute to his costs of representation in pursuing his personal grievance. He sought, through his advocate, the Authority’s usual daily tariff of \$3500 for a one-day investigation meeting. I was satisfied that there were no particular factors or applicable principles in this case that required an adjustment upwards or downwards of that amount which FSP must pay Mr Bidois as costs.⁵

Robin Arthur
Member of the Employment Relations Authority

⁵ *PBO v Da Cruz* [2005] ERNZ 808, 819-820 and clause 15 of Schedule 2 of the Act.