

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2011] NZERA Auckland 493
5335556**

BETWEEN

IAN BISSET
Applicant

AND

CANAM CONSTRUCTION
LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in person
Loukas Petrou for Respondent

Investigation Meeting: 22 September 2011 at Auckland

Submissions received: 29 September 2011 from Applicant
29 September 2011 from Respondent

Determination: 15 November 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Ian Bisset, claims that he was unjustifiably dismissed by the Respondent, Canam Construction Limited (“Canam”). Specifically, Mr Bisset claims that his dismissal on the grounds of redundancy was procedurally flawed in that there was no consultation with him, and that the dismissal was unjustifiable.

[2] Canam claims that the dismissal of Mr Bisset was a justifiable dismissal which arose within the context of a genuine redundancy situation, and denies that there was no consultation with Mr Bisset.

Issues

[3] The following issues require determination:

- a. Whether the position of Mr Bisset was genuinely redundant

b. Whether Canam followed a fair procedure in making Mr Bisset redundant

Background Facts

[4] Canam is a construction company with four divisions: construction, interiors, building and joinery, employing approximately 100 employees.

[5] In March 2010 Mr Bisset contacted Mr Loukas Petrou, Managing Director of Canam, and enquired about the possibility of a position with Canam. Mr Bisset and Mr Petrou had a prior good working relationship and Mr Petrou agreed to meet with Mr Bisset.

[6] Mr Petrou said that at the time of their meeting in March 2010 he had told Mr Bisset that although Canam had not been seeking to make any employee appointments, there was a project in Papua New Guinea which had just commenced and that Mr Bisset could begin with managing that project.

[7] Mr Petrou explained that it had been Canam's intention to grow its business in Auckland. At the time of Mr Bisset's appointment to the position in Papua New Guinea, Mr Nicholas Page was the Construction Manager and Director, but once business growth in Auckland had increased, Mr Petrou said the intention was that Mr Bisset would move into managing the Auckland based projects instead of Mr Page. As a consequence of the future plans Mr Petrou said it had been decided to call the position Mr Bisset would undertake in Papua New Guinea 'Construction Manager'.

[8] Following the meeting in March 2010 Mr Bisset commenced employment with Canam as Construction Manager on 12 April 2010. Mr Bisset agreed that initially he worked in Papua New Guinea although his position was based in Auckland, but he did not become involved in any Auckland-based projects until September 2010.

[9] Mr Bisset explained that although Mr Page was the Construction Manager and Director, he (Mr Bisset) initially reported to Mr Petrou in respect of the Papua New Guinea project.

[10] Mr Petrou stated that shortly after Mr Bisset had joined Canam, Mr Bisset had said that he would prefer to have a particular 4 wheel drive vehicle which was a more expensive model of vehicle than that which had been supplied by Canam. Mr Bisset said that in his discussions on this subject with Ms Lara Francis, Canam's Administration Manager, he had been informed that the vehicle he wanted was too expensive.

[11] Mr Bisset said that he had offered to reduce his salary in order to have his preferred type of vehicle, but had been informed that this was not acceptable, and he had therefore accepted a less expensive vehicle.

[12] During June 2010 Mr Andrew Clark commenced employment with Canam as General Manager with management responsibility for Construction, and Mr Bisset thereafter reported to Mr Clark.

[13] Mr Clark explained that he had been appointed to the position of General Manager on the basis of his taking an equity stake in Canam, and in addition Mr Petrou and Mr Page had been supportive of the proposed employment relationship because it aligned with their intentions in respect of succession planning.

[14] Mr Petrou explained that Canam held regular monthly management meetings. The minutes of the meeting held on 12 August 2010 record under the 'Business Reports' construction section at point 2.1(e): "*Overall profitability – The company is losing money and urgently requires profitable projects*", further noting that it was for Mr Bisset, Mr Clark, Mr John Rydwanski, Canam's Commercial Manager, and Mr Page to take action immediately.

[15] The meeting minutes also record under the 'General' section at point 7.4:

All managers to review overhead structure and the need for restructuring to reduce costs. Unless profitable work is secured the current overhead can not be supported. Manager to provide suggestions in reducing costs.

[16] Mr Petrou said that at the meeting there was extensive discussion concerning the need to reduce costs and the fact that the overhead structure was top heavy.

[17] Mr Bisset agreed that he was in attendance at this meeting, but said that he did not recall any discussion about the overhead structure and the need to reduce costs.

[18] Mr Clark who was also in attendance at the meeting said that he did recall the discussion, explaining that the current work being undertaken by the construction division was coming to an end and that from the management perspective the overhead cost was too high.

[19] Mr Bisset stated that he had been approached by Mr Clark during September 2010 and that they had discussed their concerns in relation to the structure of the business, which they both believed to be unsustainable. Mr Bisset said that he and Mr Clark had agreed to talk about their concerns with Mr Petrou.

[20] Mr Clark said that although he recalled this discussion with Mr Bisset, no meeting with Mr Petrou took place as a result of that meeting.

[21] During September 2010 Mr Bisset said that he and Mr Rydwanski had set up profit assessment meetings with the project staff.

[22] In early October 2010 Mr Bisset said that Canam had been successful in obtaining three new projects which had reasonable profit margins at the tendering stage, and as a result of this new work two new site managers were engaged.

[23] Mr Petrou said that he had had discussions with Mr Bisset on several occasions concerning the need to restructure. On 11 October 2010 Mr Petrou said he had sent a memorandum to Mr Bisset, Mr Clark and Mr Rydwanski. The memorandum stated:

Construction Restructuring

Further to our last monthly executive meeting and as I have briefly discussed with each one of you we have no other option but to restructure Construction to reduce overhead costs to better reflect market conditions.

Currently the way it is structured is top heavy and unsustainable. We must find ways to deliver projects more efficiently and effectively. The company is losing (sic) significant amounts of money every month and unless we pick up much more work very soon the current overhead structure can no longer be supported.

The same restructuring process will take place for Administration, Interiors, Building and Joinery. We must reduce our cost structure across all companies and divisions.

Prior to finalising this restructuring I would like to receive your individual (or collective) comments and ideas that you may have to deliver projects more effectively and at a lower cost.

Please email me or come and see me with any ideas that you may have and I would appreciate it if you can provide feedback by the end of next week. I would also like you to critically assess your own position whether is(sic) sustainable and/or required.

The finalisation of the restructuring will be completed by the end of November 2010 and will be advised accordingly.

Looking forward to a more efficient, effective and lean structure that will enable us to return to profitability again.

[24] Mr Bisset said that he did not recall:

- (i) having any discussion with Mr Petrou concerning the restructuring requirement; or
- (ii) which had alerted him to the fact that his position was in jeopardy; or
- (iii) receiving the memorandum dated 11 October 2010.

[25] Mr Clark stated that he did not recall the memorandum of 11 October 2010, but that he did recall having a meeting with Mr Petrou and Mr Page in which restructuring was discussed. Mr Clark explained that resolving the structure had been his prime challenge

[26] Mr Clark said that he recalled a meeting with Mr Page and Mr Bisset on or about late October 2010 at which ideas for the proposed new company structure had been discussed. These ideas were written on a white board which Mr Clark had photographed. Mr Clark also said that the proposed new structure did not contain a Construction Manager position.

[27] Mr Bisset stated that he did not recall there not being a Construction Manager position in the proposed new structure, and that had this been the case he would have commented on the fact that his current position had disappeared.

[28] Mr Petrou stated that the proposed structure, as outlined in the photographic prints of the white board which were produced in evidence, showed the proposed structure as being that of a General Manager reporting to the Managing Director, with two Contracts Managers reporting to the General Manager.

[29] This structure had been agreed subsequently and as a result the positions of Commercial Manager and Construction Manager were made redundant.

[30] Mr Petrou said he and Mr Bisset had met following the meeting in late October 2010 when he had discussed the need for Mr Bisset to have a more active involvement in projects.

Mr Petrou stated that Mr Bisset had informed him that he did not wish to have a detailed involvement on projects.

[31] Mr Bisset stated that he had had no recollection of this discussion and that in fact he had taken on the project management of a Ports of Auckland project which had been experiencing difficulties. Mr Clark confirmed that Mr Bisset had taken on this role.

[32] Mr Petrou stated that once the new structure was confirmed, he had met with Mr Bisset, Mr Page and Mr Rydwanski to discuss the role of Contracts Manager, but that Mr Bisset had been inflexible and had refused to consider the position on the basis that it was a retrogressive career move for him.

[33] Mr Petrou said that in considering who to appoint to the Contract Manager positions, he had not only considered the level of interest, but skills and service to Canam. In this respect, Mr Page was a director and had 22 years service with Canam; Mr Rydwanski who had 30 years service with Canam, had been Contracts Manager prior to his appointment as Commercial Manager, a position in which he had performed well. In contrast, Mr Bisset had approximately 6 months service. Subsequently Mr Page and Mr Rydwanski had been appointed to those positions.

[34] Mr Bisset said that on 26 November 2010 he had been off-site, and about to leave for home, when he received a call from Mr Petrou at approximately 5 p.m. Mr Bisset said Mr Petrou had asked him to return to the office for “*a catch-up*”.

[35] Mr Bisset returned to the office and met with Mr Petrou at approximately 5.30 p.m. Mr Bisset said that Mr Petrou had informed him that he “*had to be let go*” and had passed a letter to him advising of the redundancy of his position as Construction Manager and that Canam would pay him one month’s salary in lieu of his working his contractual notice period.

[36] Mr Petrou said that there had been a discussion with Mr Bisset in which he had advised him that three positions were made redundant in the Construction division and that one of these was that of Construction Manager. Mr Petrou said that he had offered Mr Bisset an alternative job to manage the Papua New Guinea project, but that Mr Bisset had refused this.

[37] Mr Bisset stated that Mr Petrou had offered him the Papua New Guinea project management position after he had confirmed that Mr Bisset’s position as Construction

Manager was redundant. Mr Bisset further stated that as a Project Manager had just been appointed for the Papua New Guinea project, there was in fact no position available.

[38] Mr Bisset said that he had raised the question of his bonus payment and that Mr Petrou had said he would look into the matter. Mr Bisset's letter of appointment stated that Mr Bisset would be entitled to: "*20% of your salary in bonus based on annually agreed yearly key performance targets*". Mr Petrou explained at the Investigation Meeting that key performance targets were neither set nor agreed, and that there had been insufficient time in which to assess whether or not Mr Bisset was entitled to a bonus.

[39] Mr Bisset said that he had asked Mr Petrou if he could retain the company vehicle and the telephone until the end of his contractual notice period in late December 2010 and Mr Petrou had agreed to this.

[40] Mr Petrou said he had agreed to Mr Bisset retaining the company vehicle until it was convenient for him to return it, but that he believed the company telephone should be returned during the following week.

[41] On 2 December 2010 Mr Bisset said he had received a call from Ms Francis who had asked when he would be returning the "*bits and bobs*" and that he had advised her that it had been agreed with Mr Petrou that he could retain the company vehicle and the telephone until the end of the month.

[42] It was agreed that Mr Bisset and Mr Petrou had had a discussion on the telephone the same day, however Mr Bisset and Mr Petrou disagreed on what occurred during the telephone call between them. Mr Bisset said that Mr Petrou had called him and informed him that he wanted the company vehicle returning immediately, and had referred to the taking of legal advice.

[43] Mr Petrou said that Mr Bisset had become irritated and abusive during the telephone call and he denied that he had asked Mr Bisset to return the company vehicle immediately, stating that he had asked Mr Bisset when he wanted to return the company vehicle, but he did confirm that he had asked Mr Bisset to return the company telephone. .

[44] Mr Bisset explained that because he did not want to become embroiled in a legal dispute with Canam he had accordingly returned the company vehicle and all company property on 6 December 2010.

[45] Mr Petrou agreed that the vehicle was returned on 6 December 2010, which had disappointed him. Mr Petrou said that Mr Bisset had called him that day and told him that he was leaving the company vehicle in Canam's car-park. Mr Petrou said he had asked Mr Bisset to come and see him for a coffee and a chat, but that Mr Bisset had refused to do so.

Determination

Whether the position of Mr Bisset was genuinely redundant

[46] The Court of Appeal in *GN Hale & Son Ltd v Wellington Caretakers IUOW*¹ clarified that:

An employer is entitled 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 a right to continued employment if the business can be run more efficiently without him.

[47] The onus of proving that there were genuine commercial grounds for redundancy rests upon the employer.

[48] Canam is a construction company. Mr Petrou stated, and I accept, that this is an industry sector which has been adversely affected by the economic downturn with property developers exiting the industry and profit margins being reduced.

[49] I consider it relevant given this background that Mr Clark had been appointed in June 2010, not only for succession management planning purposes, but to inject capital into Canam.

[50] The minutes of the Management Meeting on 12 August 2010 clearly set out that the construction division of Canam was experiencing financial difficulties, and that a restructuring exercise would be necessary in order to reduce costs unless more profitable work was secured. In particular it had been discussed at that meeting that the overhead structure was top heavy.

¹ [1991] 1 NZLR 151

[51] It is also apparent that despite some additional project work being obtained, the overhead structure remained unviable, and Mr Bisset confirmed that he and Mr Clark had discussed concerns about the unsustainable structure of Canam during September 2010.

[52] During the meeting In October 2010 there was a meeting to discuss the proposed new company structure which Mr Bisset attended. The meeting was attended by Mr Clark who had explained at the Investigation Meeting that resolving the structure had been his main priority.

[53] The photographic prints of the white board taken by Mr Clark at the meeting indicate the structure which was subsequently adopted, namely with the positions of Commercial and Construction Managers replaced by the lower positions of Contract Managers.

[54] It is also significant that the position of Construction Manager was not the only management level position to be made redundant at the same time. Although Mr Bisset said he recalled only one other person being made redundant at the same time as he was, I accept Mr Petrou's evidence that five managerial positions were made redundant, these being the Commercial Manager, the Construction Manager, the Health and Safety Administrator, the Building QS Manager, and the Administration Manager.

[55] I determine that Canam had genuine commercial reasons for undertaking a restructuring exercise, and that Mr Bisset's position of Construction Manager was genuinely redundant.

Whether Canam followed a fair procedure in making Mr Bisset redundant

[56] Section 103A of the Employment Relations Act 2000 ("the Act") sets out the test of justification:

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.

[57] Other provisions of the Act govern questions of justification for dismissal and, in particular, by reason of redundancy. Section 4 of the Act addresses the requirement for parties to the employment relationship to deal with each other in good faith. Section 4(1A)(c) in particular is relevant to a redundancy situation and requires an employer who is proposing

to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of an employee to provide to the employee affected:

“(i) *access to information, relevant to the continuation of the employees’ employment, about the decision; and*

(ii) an opportunity to comment on the information to their employer before a decision is made.” s4 (1A)(i) and (ii).

[58] In a redundancy situation a fair and reasonable employer must, if challenged, be able to establish that he or she has complied with the statutory obligations of good faith dealing in s4 of the Act. His Honour Chief Judge Colgan in *Simpsons Farms Limited v Aberhart*² noted that this compliance with good faith dealing includes consultation “*as the fair and reasonable employer will comply with the law*”³

[59] From the evidence, I consider that by mid-September 2010 Mr Bisset was aware that Canam was experiencing financial difficulties and that the overhead structure was considered to be unsustainable, a view that Mr Bisset stated that he had shared and discussed with Mr Clark during September 2010.

[60] However I am not persuaded that Canam fulfilled the statutory obligations of good faith dealing in s4 of the Act as regards consultation with Mr Bisset.

[61] Mr Petrou produced an email dated 11 October 2010 in support of his assertion that he had several conversations with Mr Bisset concerning the sustainability of the position of Construction Manager. Mr Bisset said that these discussions did not take place and that he did not receive the memorandum in the form of an email dated 11 October 2010 which Mr Petrou claimed to have sent to Mr Clark, Mr Bisset and Mr Rydwanski.

[62] Mr Clark said that he also did not recall this email. I consider that Mr Clark and Mr Bisset would have recalled clearly an email which asked them to critically assess whether their own positions were required in the future structure.

[63] The email requested that the recipients provided Mr Petrou with comments and feedback, however there is no evidence to substantiate that Mr Bisset provided such feedback, or written confirmation that it was discussed between himself and Mr Petrou.

² [2006] ERNZ 825,842

³ Ibid at para [40]

[64] Although Mr Bisset was present at the meeting in late October 2010 in which the proposed new structure was discussed, Mr Bisset said that he had not realised his own position was affected by this. Whilst I find that Mr Bisset should have been aware from the discussion that his position might be affected, there is no evidence that either Mr Clark or Mr Petrou discussed this with him either at, or immediately following, the meeting. Further, although the Contracts Manager positions were confirmed in the later finalised structure, these positions are referred to by initials only on the white board diagram and it is possible that Mr Bisset believed the letters “CM” referred to the Construction and Commercial Manager positions

[65] Mr Petrou said that following this meeting that he had discussed Mr Bisset having a more active involvement in projects but that Mr Bisset had been adverse to this suggestion. However Mr Bisset’s contradictory evidence that he had taken over and was actively managing the Ports of Auckland project was supported by the evidence of Mr Clark.

[66] In *Cammish v Parliamentary Service*⁴ His Honour Judge Goddard observed:

“Consultation is to be a reality, not a charade. The party to be consulted must be told what is proposed and must be given sufficiently precise information to allow a reasonable opportunity to respond.”

[67] I find that while Mr Bisset was aware of the reasons for a restructuring exercise, and indeed was in accord with this requirement, there is insufficient evidence that Canam complied with the statutory good faith requirements as regards consultation.

[68] I further find that the manner in which Mr Bisset was advised of the termination of his employment falls short of the statutory requirements in respect of good faith dealings expected of a fair and reasonable employer.

[69] The meeting with Mr Bisset did not take place until 26 November 2010, approximately one month following the restructuring proposal meeting. Mr Bisset was:

- (i) given no advance notification of the reason for the meeting, he was asked to return to the office for “a catch-up” at the close of his working day and when he had been working off-site;

⁴ [1996] 1ERNZ 404

- (ii) Mr Bisset was not advised that he could have a support person present;
- (iii) The letter terminating Mr Bisset's employment had been pre-prepared with no opportunity for Mr Bisset to provide any feedback on why his position should not be terminated.

[70] I find that this procedure falls short of that expected of the fair and reasonable employer.

[71] Although Mr Bisset was offered the position of Project Manager for the Papua New Guinea project, I find not to have been a genuine offer. Not only did it take place following the notice of the termination of his employment, but another employee had been appointed to that position, and there was no position available.

[72] I find that Canam did not follow a fair procedure in making Mr Bisset redundant.

[73] I determine that Mr Bisset has been unjustifiably dismissed.

REMEDIES

Lost Wages

[74] Mr Bisset's employment at Canam was terminated on the basis of redundancy. I have found Mr Bisset was dismissed on the grounds of a genuine redundancy. Consequently no remedy can be awarded for the loss of a job⁵.

[75] Mr Bisset was paid his contractual notice period.

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[76] Mr Bisset is seeking compensation for hurt and humiliation as outlined in his filing papers. I consider that, in accordance with natural justice, Mr Bisset is also entitled to compensation for humiliation and distress due to the unfair manner of the termination of his employment.

[77] In respect of the dismissal grievances, Canam is to pay Mr Bisset the sum of \$3,000.00, pursuant to s 123(1) (c) (i).

⁵ *Aoraki Corporation Limited v McGavin* [1998] 1 ERNZ 601

Compensation for Loss of a Benefit under s 123 (1)(c)(ii)

[78] Mr Bisset is claiming compensation in respect of bonus payments, loss of the use of a vehicle and relocation costs.

Bonus

[79] Mr Bisset claims that he has not been paid a bonus payment in accordance with the provision in his letter of appointment.

[80] The Letter of Appointment dated 31 March 2010 and signed by Mr Petrou states:

Salary/Remuneration:

\$150,000 per annum plus vehicle plus 20% of your salary in bonus based on mutually agreed yearly key performance targets.

[81] Mr Petrou said that no performance targets were agreed between himself and Mr Bisset. Mr Bisset agreed this was correct.

[82] Mr Petrou further submitted that the bonus was to be based on yearly performance targets which Canam had not achieved. In what I have found to have been a genuine redundancy situation, I find this submission credible.

[83] In all the circumstances I find it is not possible to determine whether Mr Bisset is entitled to any bonus, or at what level this would be calculated, and accordingly make no order for payment of a bonus entitlement..

Loss of a vehicle

[84] Mr Bisset was provided with the use of a vehicle for work purposes in accordance with the Letter of Appointment.

[85] Mr Bisset was dismissed by reason of redundancy with notice. A dismissal with notice can take two forms, one being a dismissal in which the employee is given notice, but is made a payment in lieu of having to work the notice period, the other being an immediate dismissal with a payment being made to recompense the employee for being deprived of the right to work the notice.

[86] The letter of 26 November 2010 which confirmed the termination of Mr Bisset's employment on the grounds of redundancy stated:

In accordance with your employment agreement the company will pay you one month's salary in lieu of notice. This will allow you to pursue and seek other opportunities in the industry.

[87] The then Chief Judge Goddard observed in *Candle New Zealand Limited v Riley*⁶ that “*It has long been recognised that payment of wages in lieu of notice, accompanied by a sending away, is a dismissal.*”

[88] I find that Mr Bisset’s employment with Canam ended on 26 November 2010, and not at the end of his period of notice.

[89] The Letter of Appointment stated:

Return of Company Property:

All documents equipment and other materials (whether relating to the business of the company or its clients and customers) supplied to you or otherwise acquired by you in the course of your employment with the company belong to the company and must be returned on termination of employment.

[90] In accordance with this clause I find that Mr Bisset was obliged to return the company vehicle on the day his employment was terminated. However prior to 2 December 2010 Mr Petrou had agreed to waive this requirement and had agreed to Mr Bisset keeping the company vehicle during the contractual notice period until he wished to return it.

[91] There is a clear divergence of opinion on what took place during the telephone call between Mr Bisset and Mr Petrou on 2 December 2010, however it is clear that Mr Bisset returned the company vehicle of his own volition on 6 December 2010. In these circumstances I make no order in respect of loss of a benefit, being the company vehicle, for the remainder of Mr Bisset’s notice period.

Relocation Costs

[92] Mr Bisset claims relocation costs from Australia to take up employment with Canam, and relocation costs back to Australia following the termination of his employment with Canam.

⁶ [1999] 1 ERNZ 251 (EMC)

[93] There is no contractual entitlement to relocation expenses, because the Letter of Appointment does not contain a relocation clause. Consequently I make no order for refund of relocation costs.

Recommendation

[94] Mr Bisset submits that Canam owes him outstanding monies in respect of expenses incurred but not reimbursed. The Letter of Appointment states that Mr Bisset would be entitled to reimbursement for “*reasonable expenses*” incurred in the course of his work “*upon receipt of satisfactory documentary evidence,*”. Canam submits that it has not received justification for the expenses claimed despite requests that Mr Bisset provide it. I recommend that the parties meet to try to resolve this issue.

Costs

[95] While costs are reserved, I note here that, subject to his submissions, Mr Bisset represented himself and, unless he incurred legal costs, it is therefore unlikely he has grounds to claim a contribution to any fair and reasonable costs.

Eleanor Robinson
Member of the Employment Relations Authority