

humiliation, etc. He also claimed payment for one month's notice of termination of his employment.

- [2] In its statements in reply filed on 17 August the Company said, amongst other things, that Mr Bolton was justifiably dismissed for redundancy.
- [3] The parties undertook mediation in respect of this aspect of their employment relationship problem but it remained unresolved.
- [4] Following a telephone conference of the parties it was agreed that this matter would proceed to an investigation in Wellington on Tuesday 6 November 2007. Efforts by the parties on the day to settle this matter on their own terms were unsuccessful.

Background

- [5] The parties agree that, by way of a written employment agreement entered into on 1 March 2007 (attached to the statement of problem), Mr Bolton was employed by the Company as its retail sale manager from 1 April.
- [6] The parties agree that, prior to the commencement of Mr Bolton's employment and after refusing an initial offer of \$40,000 p.a., it was agreed that Mr Bolton would be paid \$60,000 p.a.
- [7] The Company's director, Mr Gavin Munro says that, while no formal targets were agreed upon (statement in reply and oral evidence) the final pay level was in recognition of the applicant accepting sales targets of \$20-25,000 per month extra to existing sales; Mr Bolton says it was in recognition of his achieving monthly sales of \$20-25,000. As it happened neither set of figures was achieved.
- [8] Clause 12. a) of the employment agreement said the contract was "*... for a term of six months commencing from 1st April 2007 and ending on 30th September 2007 but may be extended indefinitely by mutual consent ...*" (attachment to statement of problem).
- [9] During the Authority's investigation Mr Munro explained that he was attempting to put in place a fixed term contract: however, he also conceded it did not meet the requirements of s. 66 of the Employment Relations Act 2000 (in that there were not reasonable grounds for

specifying when the employment was to come to an end) and it was effectively an open-ended employment relationship.

- [10] As it happened, fast moving events brought the employment relationship to an end after three months.
- [11] Clause 14 of Mr Bolton's employment agreement provided for, amongst other things, redundancy compensation of one month's notice or payment in lieu except, "*Where the Employer's economic situation is such that the payment of redundancy compensation would endanger the Employer's continuing viability*".
- [12] The parties agree that during May and/or early June 2007 Mr Munro expressed concern to the applicant about declining sales figures: the former illustrated the figures by way of a graph (not produced). Mr Munro says he made it clear to Mr Bolton that his continued employment was at risk if sales did not significantly improve. Mr Bolton agrees he knew sales were down but effectively claims he did not understand his employment to be at risk.
- [13] As is made clear in a letter written by Mr Munro and dated 25 June 2007, he met with the applicant on and/or shortly before that day and advised that, because sales figures had dropped by over 25% since March 2007 and were continuing at those low levels, the Company was in a difficult financial position and was unable to pay his salary at current levels: "*Despite your hard work and dedication I am forced to ask you to stop working at Bright Tiles Limited due to these financial considerations*" (above).
- [14] Mr Bolton did not accept Mr Munro's suggestion he take a severe pay cut. The applicant disputes Mr Munro's claim that he asked Mr Bolton to consider other ways of cost cutting. Mr Munro accepts that, while he had in mind options such as deferring payment of salary and the applicant taking a shareholding, he did not put any other specific cost cutting proposals to Mr Bolton, but instead was looking for the applicant to come up with his own. Mr Bolton did not put any alternatives to the Company.
- [15] Mr Bolton was then paid out to the end of June plus two weeks' holiday pay: redundancy compensation of one month's notice was not paid on the ground of financial hardship (clause 14. b) above).

- [16] Mr Bolton was unable to dispute Mr Munro's evidence that no one had been employed to replace him.
- [17] Documents attached to the Company's statement in reply, and signed off by a David Beck, public accountant, 91 Main Road, Tawa, set out sales figures for the period of the applicant's employment. Mr Bolton did not dispute those figures or the respondent's evidence that sales were significantly down. Mr Munro said the significance of the sales figures was that the Company, for the period of the applicant's employment, made an unsustainably low profit of \$300. The applicant did not dispute that assessment. Profit and loss figures attached to the statement in reply set a profit figure at \$100.53. Mr Munro explained that the figures also reflect the losses in the wholesale side of his Company, an area of activity that Mr Bolton was not responsible for and had no control over.
- [18] At the end of the Authority's investigation Mr Bolton said he was seeking 5-weeks' lost wages (before he found fresh employment and based on his expectation of working a minimum of 6-months), \$6,000 compensation for humiliation, etc and costs of \$2,500.

Discussion and Findings

- [19] Was Mr Bolton procedurally and substantively justifiably dismissed per s. 103A of the Act? Was the Company's decision to terminate the applicant, on an objective basis, justifiable? Were the employer's actions, and how it acted, those of what a fair and reasonable employee would have done in all the circumstances at the time? Was Mr Bolton entitled to redundancy compensation by way of one month's notice or payment in lieu?
- [20] Both Mr Munro and Mr Bolton produced considerable evidence that had little or no bearing on the issue central to their employment relationship problem. Both men evidenced considerable bitterness toward each in respect of this short-lived employment relationship. Mr Bolton said the Company's actions caused him to sell first his car and then his house. He said the respondent's actions placed his marriage under considerable pressure, particularly as he regarded himself as the principal bread-winner whereas the family was required to get by on his partner's earnings before he found alternate employment. That is not a credible claim because of Mr Bolton's view he was entitled to a minimum of 6-months' employment, i.e. his employment could end after 6 months; six months' employment is not commonly accepted as sufficient for the purposes of paying off a home and a new vehicle.
- [21] From the Company's perspective, Mr Bolton said the applicant over-represented his sales abilities and caused his Company considerable financial loss. However, Mr Bolton properly

accepted that it was his decision to appoint the applicant and he therefore had made a major error of judgement.

- [22] In *Simpsons Farms Limited v Aberhart* [2006] 1 ERNZ 825, the Employment Court reiterated the long-established principal that an employer carries the burden of justifying a dismissal, including one arising out of redundancy situations.
- [23] In this instance I am satisfied from Mr Munro's unchallenged evidence, confirmed in part as it was by a public accountant, Mr David Deck, that Mr Bolton's termination for redundancy was as a result of unsustainably low sales figures from the commencement of his employment.
- [24] Further confirmation of the genuineness of the decision to terminate Mr Bolton is found in the fact that no appointment has been made to the position he previously occupied.
- [25] As Mr Bolton made clear to the Authority during its investigation that the basis of his claim he had been unjustifiably dismissed was his (I find mistaken) belief he was entitled to a minimum of six months' employment, and that the poor sales were no reflection of his performance. Redundancy is, of course, a no-fault situation: consistent with the provisions of his employment agreement Mr Bolton's employment was terminated not because of fault on his part, but because of the Company's overall economic situation.
- [26] I therefore find that the Company's decision to terminate Mr Bolton's position was substantively justified.
- [27] I am also satisfied that the Company took minimum but sufficient steps from May/early June to put Mr Bolton on adequate notice that sales had to be significantly improved were he to enjoy ongoing employment: that is because Mr Bolton is an intelligent man who would have linked the negotiations leading to his appointment, and the increased package offered to him, to the need to pay for his employment through improved sales. Mr Bolton was aware sales had not improved but had deteriorated: he would thereby have appreciated the risk to his employment, particularly because of the redundancy provision in his employment agreement. By putting him on notice, the Company met its good faith obligations to the applicant.
- [28] I similarly accept that Mr Munro gave Mr Bolton a brief but adequate opportunity, on and around 25 June 2007, to explore alternatives to his position being made redundant and the

applicant's employment being terminated. Again, the respondent thereby, albeit barely, met its good faith obligations.

- [29] However, the respondent has failed to demonstrate why it saw fit to invoke clause 14. b) of the parties' employment agreement. I am satisfied it did not, and has not, fairly and reasonably demonstrated that its economic situation was such "*that the payment of redundancy compensation would endanger the Employer's continuing viability*" (above). That is because the sales figures endorsed by Mr Deck do not, on their face, demonstrate that payment of one month's notice of termination to Mr Bolton would endanger the Company's continuing viability. It is also because Mr Munro did not put any such explanation to the applicant on or around their meeting on 25 June. What he put to Mr Bolton was a view that the Company's continuing viability would be endangered if it paid him one month's notice, but he failed to demonstrate then – and, during the investigation, to the Authority – any objective basis for that view.
- [30] I do not accept that it is sufficient for the respondent to make such a claim without any objective basis and in the absence of some calculation or similar evidence to support such an assertion.
- [31] The Company's obligation to demonstrate why it was satisfied it could not pay one month's notice was all the greater because the figures produced by Mr Munro reflect both the retail and wholesale side of its business: Mr Bolton was responsible for its retail performance but not for its wholesale activity. A separation of the relevant figures would have been appropriate so as to not only measure Mr Bolton's contribution but also to properly account for the different aspects of the respondent's commercial activities as well as its overall economic performance.
- [32] The Company's obligation to demonstrate why it was satisfied it could not pay one month's notice was also all the greater because of the likely effect of clause 12. a) of its employment agreement with Mr Bolton: as Mr Munro's evidence confirmed, it purported to provide a fixed term contract of employment of six months. In his oral evidence to the Authority, Mr Bolton expected, because of the clause, to work at least a minimum of 6-months. Of course Mr Bolton cannot claim that he was contractually entitled to payment for that period: that is because the same employment agreement also provided for redundancy at any time. However, I am satisfied a fair and reasonable employer would anticipate the probable effect of clause 12. a) and that it would therefore take sufficient steps to demonstrate why it was not giving him a minimum of one month's notice or payment in lieu, as provided by clause

14. It did not do so and I am satisfied that it is in breach of its contractual obligations to Mr Bolton, in respect of clause 14 of the employment agreement.

Remedies

- [33] It follows from the above that Mr Bolton is entitled to one month's notice of termination: clause 14 of his employment agreement and ss. 123 (1) (b) of the Act applied. It follows he is also entitled to a recalculation of his holiday pay entitlement. Leave is reserved to the parties to return this matter to the Authority if agreement cannot be reached on the relevant monetary amount(s).
- [34] Mr Bolton gave belated oral evidence to the Authority of the humiliation, etc he said he experienced. All of that evidence was related to his conviction he had been unjustifiably dismissed: he did not link his distress to the respondent's failure to pay him one month's notice.
- [35] As is made clear above, I am satisfied the termination of Mr Bolton's position was substantively and procedurally justified and that he did not enjoy a contractual entitlement to a minimum of 6-months' employment. I do not accept that his feelings of humiliation, etc were the result of his employer's failure to make payment to him of one month's notice, or that the failure caused his termination to be in any way unjustified. That failure is a matter of compliance not unjustified disadvantage. Having regard to his evidence I am therefore satisfied Mr Bolton has no entitlement to compensation in respect of the humiliation, etc.

Determination

- [36] The Company is to pay to Mr Bolton payment in lieu for one month's notice of termination, recalculate his holiday pay entitlement.

[37] Costs are reserved. However, as indicated to the parties during the investigation, costs in the Authority typically follow the event and usually range between \$1,500 and \$3,000. This was a typical investigation that lasted half a day: while leaving open to the parties the opportunity to make submissions on this matter, I can give a preliminary indication that a contribution to Mr Bolton's fair and reasonable costs would therefore be toward the lower end of that spectrum.

Denis Asher

Member of the Employment Relations Authority