

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 96
5349085

BETWEEN

KELVIN BOULT
First Applicant

A N D

HARVEY NORMAN (NZ)
LIMITED
Respondent

Member of Authority: Philip Cheyne

Representatives: Kevin Murray, Representative for Applicant
Blair Edwards, Counsel for Respondent

Investigation meeting: 8 February 2012 at Ashburton

Date of Determination: 21 May 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Kelvin Boulton worked for Harvey Norman (NZ) Limited as a computer service technician at its store in Ashburton until he was dismissed in September 2009. In 2011 Mr Boulton lodged with the Authority a statement of problem setting out various complaints arising from this employment.

[2] However, on 17 April 2009 Mr Boulton and Harvey Norman had entered into a record of settlement under s.149 of the Employment Relations Act 2000 which included a full and final settlement of all matters arising out of their employment relationship up to 17 April 2009. Accordingly I will not refer to the earlier matters canvassed in the present statement of problem.

[3] Mr Murray near the end of the investigation meeting confirmed that the only matter for determination by the Authority is Mr Boulton's claim of unjustified dismissal. Mr Boulton says that there was no genuine redundancy situation and that his dismissal

was improperly handled even if there was. I will focus on that problem. There are some disputes about the sequence of events which I will resolve at the same time as explaining what happened. I will then consider justification for the acknowledged dismissal in accordance with the law as it applied in September 2010.

Terms of employment

[4] Mr Boulton told me that the exhibit labelled document 4 attached to the statement of problem is the applicable employment agreement.

[5] Clause 6 of the agreement states that where the termination of employment is attributable wholly or mainly to the position being superfluous then Harvey Norman will pay compensation for the loss of the position as set in attached policies. Clause 5 permits Harvey Norman to pay in lieu of notice upon a resignation or if they terminate the agreement. The notice period is said to be set out in schedule 1. That provides the options of two weeks or a month but there is no indication of which applies. Schedule 4 includes a clause about redundancy compensation.

[6] The statement of problem referred to redundancy compensation but on 6 January 2012 Mr Murray advised the Authority and counsel that the issue was no longer live. I need not refer to it further.

Consultation

[7] Wayne McIntosh is the proprietor of the computer department in Harvey Norman's Ashburton store. Mr McIntosh's evidence, which I accept, is that around June or July 2009 he became concerned that the department was running at a loss. Trading conditions were increasingly difficult.

[8] Mr Boulton was the technical services manager which principally involved resolving software and hardware issues for Harvey Norman's customers. The service provided by Mr Boulton was called TechBay. On review, Mr McIntosh identified that TechBay labour charges to customers averaged between \$700.00 and \$900.00 per month while Mr Boulton's base salary alone was more than \$2,500.00 per month. He decided to initiate a restructure.

[9] Mr McIntosh gave Mr Boulton a letter dated 22 July 2009 inviting him and a representative to a meeting about the possibility of making his position redundant, for the company to outline its position and for Mr Boulton to put forward any comments.

[10] Mr Boulton's representative (Mr Murray) was not available for the proposed meeting date. Mr Murray wrote to Mr McIntosh asking for *the documents and proposals* as well as Mr Boulton's wages records for the year. Mr McIntosh replied on 27 July 2009 with a brief description of what he wanted to discuss at the meeting and enclosed the wage records and a copy of Mr Boulton's employment agreement and position description.

[11] Because he had not heard further Mr McIntosh spoke to Mr Boulton on 17 August 2009 and then wrote to Mr Murray on 20 August 2009. That letter says that he has provided all the documentation that he has and intends to give a full description at the initial meeting which could be between 24 and 28 August 2009.

[12] Mr McIntosh rang but had to leave a phone message for Mr Murray on 26 August 2009. It is common ground that Mr McIntosh's message referred to *phone tag* so I infer that Mr Murray must have left a phone message for Mr McIntosh at some point before Mr McIntosh tried to call Mr Murray.

[13] In the absence of any further response, Mr McIntosh sent a fax to Mr Murray on 28 August 2009. That fax rehearses the delays to date and states that Mr McIntosh will have to proceed with a meeting on 31 August 2009 at 4pm and make a decision based on the available information. The letter gives the option of a written submission if Mr Boulton is unable to attend the meeting.

[14] Having heard nothing further Mr McIntosh convened the meeting on 31 August 2009 between himself, a proprietor from Harvey Norman Timaru (Ben Jones) and a note taker. The notes reflect a discussion between Mr McIntosh and Mr Jones about the TechBay work load, turnover and profitability.

[15] After this discussion Mr McIntosh saw a fax dated 31 August 2009 from Mr Murray. I will mention only those aspects presently relevant. The letter explains

that Mr Murray is not available for a meeting on 31 August 2009. There is a complaint about the lack of information provided regarding the restructure and a request for relevant documents, an assertion that Ashburton is the only Harvey Norman store presently restructuring the TechBay position and Mr Boulton's the only position in Ashburton being restructured, and a claim that these (and other) actions amount to harassment of Mr Boulton. Harvey Norman's HR manager (Bronwyn Hall) replied on 3 September 2009. Relevantly, the letter refers to other restructuring both at the Ashburton store and elsewhere in Harvey Norman stores. The letter proposes a further meeting on 10 September 2009. Accompanying the letter were the minutes of the 31 August 2009 meeting.

[16] Mr Boulton checked Ms Hall's comments by communicating with other Harvey Norman TechBay staff.

[17] The proposed meeting was held on 9 September 2009 to accommodate Mr Murray's availability. There are minutes of this meeting which Mr Boulton in evidence accepts as an accurate account. I will simply summarise the relevant part of the discussion. Mr Murray was critical about the absence of further information but Harvey Norman stated that data was accessible to Mr Boulton through the TechBay computer system. Mr Murray and Mr Boulton stated that the data was incomplete. There was discussion about what jobs were recorded through TechBay. Harvey Norman explained that some jobs done by sales staff (and not put through TechBay) did not void manufacturers' warranties. Harvey Norman repeated that TechBay averaged 30-40 jobs of 1-2 hours per month. Mr Murray stated that the figures did not include various aspects of Mr Boulton's work. He suggested measuring Mr Boulton's workload over three months to obtain a better understanding of Mr Boulton's role. There was discussion about whether the store could sustain a dedicated position in technical services and about the model adopted in the Timaru store. Mr Murray suggested that Mr McIntosh look at his business plan and consider opportunities to expand.

[18] Mr McIntosh's evidence is that he considered these points after the meeting. There is no reason to doubt this evidence. Mr McIntosh concluded that none of the suggestions would resolve the issue about profitability. It is not the Authority's role to question the wisdom of that business judgement.

Termination of employment

[19] Arrangements were made for a further meeting on 17 September 2009. Again there are minutes of this meeting which are accepted as accurate. Mr McIntosh responded to the points raised by Mr Murray and Mr Boulton during the previous meeting. Harvey Norman confirmed that it had decided to disestablish Mr Boulton's position. Mr Boulton was told that there were no alternative positions currently but he was welcome to apply when any positions came up. Mr Boulton was told that he could ring around other stores if he wished. In response to a question he was told that he would get notice as per his contract. Mr Boulton and Mr Murray adjourned for a short while. On their return Mr Murray suggested that Harvey Norman pay Mr Boulton for the notice period and not require him to work. That was agreed. Mr Boulton was asked to ensure the return of all Harvey Norman property. The meeting ended with Mr Murray saying that Mr Boulton would take a personal grievance for unfair dismissal.

[20] Mr Boulton left the premises in circumstances which are disputed. I will return to the point shortly.

[21] Mr McIntosh wrote to Mr Boulton the following day confirming the dismissal and arrangements for final pay. In addition the letter mentions the lack of vacancies in Christchurch and Timaru Harvey Norman stores and offers assistance with a CV.

Justification

[22] Whether the decision to dismiss Mr Boulton was justifiable must be determined on an objective basis by considering whether Harvey Norman's actions and how Harvey Norman acted were what a fair and reasonable employer would have done in all the circumstances at the time.

[23] There is a challenge to the genuineness of the redundancy. The submission is that Harvey Norman targeted the person rather than the position and that there remained duties for Mr Boulton to perform. I do not accept this submission. Harvey Norman reorganised that part of its business in Ashburton as it had elsewhere. As a matter of business judgement the dedicated TechBay position was genuinely surplus

to Harvey Norman's requirements in September 2009 and that state of affairs continued to the date of the Authority's investigation meeting. There is no evidence that anyone else was engaged in Mr Boulton's position after his dismissal.

[24] Connected to the claimed lack of genuineness is Mr Boulton's claim that Mr McIntosh was trialling an alternative system of getting repair work done by an external contractor. There are two incidents in particular where Mr Boulton believes this was done before his employment was terminated. Mr McIntosh denies running any such trial. Even if I did not accept Mr McIntosh's evidence it would make no difference to the outcome. Harvey Norman was entitled to organise its business in the manner it judged as commercially appropriate. However, the evidence of these incidents amounting to a trial by Mr McIntosh is merely supposition on Mr Boulton's part and is not such as to cause me to doubt Mr McIntosh's denial.

[25] Part of Mr Boulton's argument is based on not being approached by Mr McIntosh about a vacancy that arose during Mr Boulton's notice period. Mr McIntosh's evidence is that a salesperson gave two weeks notice and finished on 31 October 2009. He did not anticipate replacing the salesperson. Mr Boulton was paid up to 17 October 2009 although he did not work after the 17 September 2009 meeting. On 10 October 2009 Mr Boulton advertised his services as a computer technician in the local newspaper and Mr McIntosh became aware of the ad. In these circumstances there is nothing improper about Mr McIntosh not alerting Mr Boulton to the potential vacancy.

[26] Another sales person left in February 2010. Mr McIntosh's father was appointed to cover that vacancy. Mr Boulton complains that he was not approached about that vacancy. In November 2009 Mr Boulton started a series of ads for his own business including the line *Hardly Normal* mocking Harvey Norman. There was no legal obligation on Harvey Norman to offer Mr Boulton a vacancy that arose after the termination of his employment and it is hardly surprising that Mr McIntosh did not in any event.

[27] Mr Boulton says that several people have reported back to him that Mr McIntosh has said that he was dismissed for downloading pornography on the TechBay computer. Mr Waaka provided a statement referring to rumours but did not give

evidence during the Authority's investigation meeting. Mr Clark gave evidence that others told him that Mr McIntosh had said this but Mr Clark had not personally heard it said by Mr McIntosh. There is a statement from Mr Anderson that he was told by a staff member that Mr McIntosh found porn on Mr Boulton's computer. Against these unsworn statements and hearsay evidence there is Mr McIntosh's denial of having said this to anyone. In addition, Mr McIntosh knew from 17 September 2009 that Harvey Norman might have to defend a personal grievance claim. On balance I accept Mr McIntosh's denial. The rumours reported to Mr Boulton cannot be attributed to his former employer. I should record that Mr Boulton denied using Harvey Norman's computer to access pornography; nor is there any suggestion by Harvey Norman that Mr Boulton did so.

[28] There is some complaint that Harvey Norman did not provide information to Mr Boulton prior to the decision to dismiss him as redundant. The obligation under s.4(1A)(c) of the Employment Relations Act 2000 was to provide Mr Boulton with access to relevant information and an opportunity to comment prior to any decision affecting the continuation of his employment. Mr Boulton had access to source data because of his access to the TechBay computer information. He also was given the summary data which led Mr McIntosh to think that the position was uneconomic. The absence of Mr Boulton from the 31 August 2009 meeting in the end was immaterial because he was provided with the notes of the meeting and had a later opportunity to canvass those matters. Nothing more was presented to the Authority in an effort to justify Harvey Norman's decision. From this I conclude that there has been no breach of the statutory duty of good faith.

[29] The final point relied on is the claim that Mr McIntosh escorted Mr Boulton back to the TechBay to collect his belongings and was then escorted from the premises without being allowed to talk to other staff who were watching. Mr Boulton says that it was humiliating and conveyed the impression that he was being dismissed for serious misconduct. Mr McIntosh on the other hand says that he assisted Mr Boulton in the TechBay area to gather his belongings but did not escort him through the shop. Mr Boulton was accompanied by Mr Murray. It had been their suggestion that Mr Boulton depart there and then without working out the notice period. Mr Boulton did not proffer any other witnesses to support his contentions. Mr Boulton developed a strong antipathy

towards Harvey Norman perhaps from before the dismissal. On balance I do not accept his evidence that there was anything improper about how he left the premises.

[30] Overall, this was a commercial decision to disestablish a position following a reasonable process of consultation with Mr Boulton. The decision was implemented in a fair and reasonable manner. There was some delay attributable to Mr Boulton's representative but Harvey Norman managed that in a fair manner. I find that Mr Boulton was justifiably dismissed. He does not have a sustainable personal grievance.

Conclusion

[31] Mr Boulton does not have a sustainable personal grievance.

[32] Costs are reserved. Any claim for costs must be made by lodging and serving a memorandum within 28 days. The other party may have 14 days in which to lodge and serve any reply.

Philip Cheyne
Member of the Employment Relations Authority