

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2014] NZERA Auckland 152
5420056**

BETWEEN JAISON BROOME
 Applicant

AND KEN STOUT MOTORS LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Mark Nutsford, Advocate for Applicant
 Ken Stout, Advocate for Respondent

Investigation Meeting: 15 April 2014 at Auckland

Submissions received: from Applicant
 from Respondent

Determination: 22 April 2014

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Jaison Broome, was employed as an Automotive Service Technician by the Respondent, Ken Stout Motors Limited (KSML) from 6 July 2011 until his employment was terminated by reason of redundancy on 1 February 2013. Mr Broome claims that he was unjustifiably dismissed.

[2] KSML denies that Mr Broome was unjustifiably dismissed and claims that he was justifiably dismissed on the basis that his position was redundant.

Issue

[3] The issue for determination is whether or not Mr Broome was unjustifiably dismissed by KSML.

Background Facts

[4] KSML specialises in pre-owned car sales, servicing and mechanical repairs for Jaguar, Rover and British cars. At the time Mr Broome was employed, there were 6

employees comprising 3 service technicians, a service advisor, a part-time office administrator and Mr Ken Stout, director and sole shareholder.

[5] Mr Broome commenced employment as an Automotive Service Technician on 6 July 2011 and was provided with an individual employment agreement (the Employment Agreement) which was signed by the parties on 12 July 2011.

[6] The Employment Agreement stated that it was for a fixed term of employment from 6 July 2011 until 6 July 2012; however Mr Broome's employment did not terminate on that date such that I find the fixed term nature of the employment ceased and Mr Broome's employment became permanent in nature.

[7] Mr Broome worked a 40 hour week at an hourly rate of \$22.00, and the contractual notice period was two weeks.

[8] Mr Broome explained that when he had commenced employment at KSML business had been quiet and he had worked one day a week, gradually increasing to a full-time, 40 hour week, basis as the business increased.

[9] Mr Broome said that just prior to February 2013 business had been very quiet and on occasion he had taken time off without pay following authorisation from the service adviser.

[10] On 1 February 2013 Mr Broome attended for work as usual and Mr Stout approached him as he was working on a vehicle repair, and asked him into his office.

[11] Mr Broome said he had been given no prior notice of the meeting, and he had no idea what it was concerning. He was therefore unprepared to be informed by Mr Stout that he was redundant with immediate effect.

[12] Mr Stout said that KSML had been facing a difficult trading position financially, and as a result there had been a reduced work demand during January 2013 resulting in an urgent need to reduce the number of employees.

[13] Mr Stout said he had believed that, as the redundancy could not be avoided, the delay likely to be involved in following a process incorporating a further meeting and consideration of any feedback Mr Broome may have submitted, would have only occasioned Mr Broome further hurt and upset.

[14] Mr Broome said that after the meeting, he had been asked by Mr Stout if he had anything to say and he had asked why his position had been the one selected for redundancy.

Mr Stout had told him that the other employees were paid less than he was, and that he had been the last person to be employed.

[15] Mr Stout said he had decided to select Mr Broome's position for redundancy as although he (Mr Broome) had knowledge of recent model Jaguar cars which was an asset to the business, KSML had not been able to fully charge out the time Mr Broome had spent on the work he had undertaken in servicing the vehicles allocated to him.

[16] Mr Stout said that there had been meetings in respect of performance issues with the standard of Mr Broome's work, and the time taken on tasks, however there had been no formal disciplinary action recorded or taken.

[17] Just prior to Christmas 2012 there had been an issue regarding a cylinder head repair to a customer's vehicle which had resulted in the customer complaining that the repair work had been carried out on the vehicle without his prior authorisation. This had resulted in a prolonged dispute with the customer who was the Treasurer of the Auckland Jaguar Club about payment.

[18] Mr Broome agreed that whilst he had taken the cylinder head to the repairers, he had understood that the service advisor had authorised the work to be carried out on it.

[19] Mr Stout said that he had regarded this as a serious incident, and he had held a meeting with the employees. However several employees had been involved and he had not selected Mr Broome's position for redundancy based on this incident, but rather on the fact that Mr Broome was not meeting the expectation of value to the business which he had expected of someone with his level of experience.

[20] Mr Broome said that Mr Stout had told him to leave immediately and that he could return to collect his tools the following day. When he returned the following day to collect his tools, Mr Broome said Mr Stout had stood over him whilst he packed the tools which had made him feel that he was not trusted.

[21] Mr Broome said that he did not receive his contractual two weeks' notice payment until he had raised this issue with Mr Stout, who had then made payment and apologised.

Determination

Genuine reason for the redundancy

[22] Mr Stout stated that he reached the decision that he needed to take the action that resulted in the redundancy situation upon realisation that the business downturn resulted in an inability to pay creditors and provide the employees with on-going work.

[23] Mr Broome confirmed that he was aware that KSML had been experiencing a business downturn at the time of the termination of his employment, and that he and/or the other technicians had taken time off work without pay as a result.

[24] In this situation, despite the failure of KSML to provide detailed supporting financial documentation, I accept that there was a genuine redundancy situation. However the employer facing a difficult financial position necessitating a redundancy decision must still act in good faith and follow a fair procedure.

Fair Procedure

[25] The Test of Justification as set out in s 103A of the Employment Relations Act 2000 (the Act) addresses the question of whether or not an action was justifiable or is unjustifiable and states:

S103A Test of Justification

- i. 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 applying the test in subsection (2).*
- ii. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[26] 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).

[27] 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*¹ noted that this compliance with good faith dealing includes consultation *“as the fair and reasonable employer will comply with the law”*²

[28] The Employment Court further made clear in *Vice-Chancellor of Massey University v Wrigley*³ that consultation is essential to any fair process, stating that:⁴

The purpose of s4(1A)(c) ... requires the employer to give the employees an opportunity to comment before a decision is made. The opportunity must be real and not limited by the extent of the information available to the employer.

[29] Mr Stout does not dispute that he failed to follow a fair procedure in relation to the termination of Mr Broome's employment. Rather he states that allowance should be made for the fact that as a small business, KSML did not have access to the resources available to a larger employer.

[30] I acknowledge that KSML is a small business without access to a Human Resources department and that it states in s 103A (5) of the Act that:

The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were-

(a) Minor; and

¹ [2006] ERNZ 825,842

² Ibid at para [40]

³ [2011] NZEmpC 37

⁴ Ibid at para [55]

(b) Did not result in the employee being treated unfairly.

[31] However in this case the defects in the process were not minor and they resulted in Mr Broome being treated unfairly in that he was deprived of any opportunity to comment on the process prior to a final decision in the matter being taken.

[32] Moreover I find that performance concerns which had not been the subject of a formal disciplinary investigation and process had influenced the selection of Mr Broome's position for redundancy as evidenced by Mr Stout's statement at the Investigation Meeting that Mr Broome had been selected for redundancy because he had not been meeting the expectation of value to the business which had been expected of someone with his level of experience. I find that in this regard, KSML were not acting in good faith.

[33] I find that KSML failed to follow a fair and proper process.

[34] I determine that Mr Broome has been unjustifiably dismissed by KSML

Remedies

[35] Mr Broome has been unfairly dismissed and he is entitled to remedies.

Lost Wages

[36] Mr Broome provided evidence to the Authority of his efforts to mitigate his loss following the termination of his employment with KSML, and he in fact obtained alternative employment on 16 April 2013.

[37] I order that KSML pay Mr Broome the sum of \$7,664.80 gross in respect of lost wages (calculated as 10.71 weeks at \$880.00 gross per week minus 2 weeks' notice period payment) pursuant to s 128(2) of the Act.

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

[38] Mr Broome is also entitled to compensation for humiliation and distress. I find that in respect of the unjustifiable dismissal, Mr Broome suffered significant hurt and humiliation in addition to financial difficulties which impacted on him and his family.

[39] I order KSML pay Mr Broome the sum of \$6,000.00 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1) (c) (i) of the Act.

Contribution

[40] I have considered the matter of contribution as I am required to do under s124 of the Act. There is no evidence that Mr Broome contributed to the situation which gave rise to the grievances. There is to be no reduction in remedies.

Costs

[41] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave of the Authority.

Eleanor Robinson
Member of the Employment Relations Authority