

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 104/09
5143681

BETWEEN DARRYL CREEVEY
 Applicant

AND AIMEX LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Darryl Creevey in person
 Dennis Creed, Counsel for Respondent

Investigation Meeting: 27 May 2009 at Nelson

Determination: 17 July 2009

DETERMINATION OF THE AUTHORITY

Identity of respondent

[1] During the course of the investigation meeting, Mr Creevey asked if the Authority got to the point of making orders against the respondent, it could make orders against the directors of Aimex Limited and/or the general manager of Aimex Limited. Mr Creevey entered into a written employment agreement dated 10 October 2006 with Aimex Limited. There was no evidence of a variation or change to the identity of his employer throughout the period of his employment.

[2] I explained to Mr Creevey that I did not consider, on the basis of the documents lodged and the evidence in relation to the employment relationship problem, that there would be grounds to look behind Aimex Limited as employer and find the directors personally liable.

[3] I did advise Mr Creevey that I would record that he had asked me to consider this point. I am not persuaded that the respondent should be other than Aimex Limited and if orders are made then they will be against that company.

Employment relationship problem

[4] Darryl Creevey was employed by Aimex Limited (Aimex) in August 2006 as a Parts Manager. It was a permanent full time role. Mr Creevey was handed a letter dated 18 September 2008 and also attended a meeting on that date from which he knew that the new General Manager, Mr Monopoli, who had commenced with Aimex on 15 September 2008 was going to review the workplace situation and recommend a course of action to the directors as to how money could be saved. This was because the company was considered to be in an unhealthy position.

[5] After meeting with Mr Monopoli, Mr Creevey took a period of annual leave and when he returned on 6 October 2008 he was asked to attend a meeting with Mr Monopoli. He was provided with a letter at that meeting which advised that a review had been undertaken and one of Mr Monopoli's recommendations was to dispense with the Parts Department as a stand-alone entity and to make the position of Parts Manager redundant.

[6] Mr Creevey was invited to attend a meeting with Mr Monopoli at 9am on Tuesday, 7 October to put forward any ideas that he may have on where or how he could be integrated into other areas of the Aimex business.

[7] After the meeting with Mr Monopoli on 7 October 2008, Mr Creevey was advised that his position was redundant and that there were no other alternatives available. On 10 October 2008, Mr Creevey was given a letter dated 8 October 2008 which confirmed in writing that his position was redundant and he was paid in lieu of notice for a period of one month commencing 13 October 2008 as required by his employment agreement. Other than a notice period there was no process set out in Mr Creevey's employment agreement in the event his position was made redundant.

[8] Mr Creevey says that his dismissal was unjustified and he seeks reimbursement of lost wages for a three week period after the end of the notice period but before he secured other employment, together with a compensatory payment and costs. Mr Creevey also raised in his closing statement at the investigation meeting that he wanted payment of medical costs and there was earlier mention in his documents of the lost medical insurance benefit in his employment agreement.

[9] Aimex does not accept that Mr Creevey was unjustifiably dismissed. Aimex says that Mr Creevey's position was genuinely redundant and that the process followed was fair and reasonable in all the circumstances.

The issues

[10] The Authority needs to have regard to the test for justification in s.103A of the Employment Relations Act 2000 as to whether a dismissal or an action of the employer was justifiable. The Authority is required to determine justification on an objective basis by assessing 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.

In terms of that test the issues that the Authority is required to determine are as follows:

- Was Mr Creevey's dismissal for genuine reasons of redundancy?
- Was the process carried out to restructure Aimex and the implementation of Mr Creevey's dismissal fair and reasonable and in accordance with the implied obligations of trust and confidence and the statutory obligations that exist to deal with one another in an employment relationship in good faith?
- If the Authority determines that Mr Creevey's dismissal was not justifiable then what remedies is he entitled to and are there issues of contribution?

Was Mr Creevey's dismissal for genuine reason of redundancy?***Background to the restructuring***

[11] Aimex carries on business as an engine repair specialist company and has operated in Nelson for a number of years. It says that there were financial issues for it throughout 2008 and even beforehand and there was concern from the owners of the business that the costs of running the business were out of proportion to the anticipated income. Mr Monopoli was therefore appointed by the Board as General Manager of Aimex in September 2008 and asked to do what was necessary to get the company back into a profitable operation.

[12] Mr Monopoli gave evidence that, after he commenced his employment as General Manager on 15 September 2008, he looked at the operation of all parts of the

business. He said that he observed that Mr Creevey appeared to be less busy than the other two managers in sales and in the workshop and parts were being ordered independently of Mr Creevey. He said that Mr Creevey was spending about two hours a day on the parts aspect of his role.

[13] Mr Creevey said in his evidence that he spent about three or four hours on the parts aspect of his role but he spent the balance of his time doing other work in terms of sales, quotations for the marine industry and he was key accounts manager for Sealord. He questioned how Mr Monopoli could have in the very short period before he went on leave properly assessed what he was doing. There is no evidence to support that Mr Creevey had an opportunity to talk to Mr Monopoli about how he spent his time during the working day.

[14] There is a dispute in the evidence as to how many meetings were held with Mr Monopoli and the management team during the week commencing 15 September 2008 before Mr Creevey went on annual leave the following week for two weeks. Mr Monopoli and the Sales Manager, Nick Law, gave evidence that there were three meetings held on consecutive days on 17, 18 and 19 September 2008. Mr Creevey on the other hand said in his evidence that he could only recall the one meeting and referred to the meeting on 18 September 2008. To further confuse matters, the statement in reply refers to only two meetings.

[15] Mr Law gave evidence that he recalled that there was a discussion at the meeting on 18 September 2008 that, following the review, there would only be two positions at management level. Mr Creevey said that he did not have that type of understanding from the meeting.

[16] Lane Findlay is the Group Sales Manager of Challenge New Zealand Limited and helps the companies under Challenge management, of which Aimex is one, to make responsible judgements about running their businesses. Mr Findlay gave evidence that he attended one meeting with the management team on 19 September 2008 at Aimex at which he recalls Mr Creevey being present. Mr Findlay said that those present from the management team were told that the company may need to make some jobs redundant.

[17] Having considered the evidence, I find that it is more likely than not that there was more than one meeting which involved the management team leading up to the

review. These meetings involved Mr Monopoli and the managers of the Workshop and Sales Departments as well as Mr Creevey. I accept that it is more likely than not that Mr Findlay was also present at one of the meetings. I find that, consistent with the letter that Mr Creevey was given on 18 September 2008, it was discussed at the meetings that Aimex was in the process of reorganising its structure and staffing requirements and there was a need to modify the operation so that it became more efficient. The managers in all probability gave some feedback of a preliminary nature prior to the review actually commencing during the meetings.

[18] I accept Mr Creevey's evidence that he did not appreciate clearly at the time that he took annual leave that his position could be made redundant but he certainly knew that a review was to be undertaken.

6 October 2008

[19] When Mr Creevey returned from his leave on 6 October 2008, he was asked to attend a meeting with Mr Monopoli. He was given a letter dated 3 October 2008 signed by Mr Monopoli which set out, amongst other matters, that there had been a review undertaken while Mr Creevey was on annual leave and a number of suggestions, recommendations and changes had taken place in the interests of cost and efficiency. It was also set out that these changes included the change in the ordering of parts by each department and set out that now any parts required for the workshop would be ordered by a casual contractor called Raphael, parts required for the Marine Department by another employee and parts required for the Sales Department would be ordered by Mr Law.

[20] It was set out in the letter that one of Mr Monopoli's recommendations was to dispense with the Parts department as a stand alone entity and make the position of Parts Manager redundant. Mr Creevey was invited to attend a meeting to put forward ideas as to where he could be integrated into other areas of the Aimex business at 9am on Tuesday 7 October 2008. The letter set out that if there were no other options acceptable to the company, then it was possible that the position of Parts Manager may be made redundant.

[21] Mr Creevey said the letter came as a huge shock to him and that when questioned about it, Mr Monopoli responded that the company had *too many overheads* and *something had to go*. Mr Creevey said that he asked for the criteria

that Aimex had used to decide which position was redundant but that Mr Monopoli was not forthcoming with that information. Mr Monopoli said that Mr Creevey should have the day off to think about things and come up with alternative suggestions. Mr Creevey did not physically attend to work at Aimex after his annual leave.

[22] There is a dispute about whether Mr Creevey was advised he could bring a support person to the meeting which was to be held the following day. Mr Creevey said he asked for more time to obtain a representative but that was not accepted by Mr Monopoli. Mr Monopoli, however, said that he did advise Mr Creevey that he could bring a support person to the meeting the following day. On balance, I find that there was some discussion about Mr Creevey being able to bring a support person and I find it less likely that Mr Monopoli went so far as to refuse an extension of time in order for him to be able to bring someone. I do accept Mr Creevey's evidence that it was a very tight timeframe within which to realistically obtain a support person, but I do not find that an extension of time was refused.

[23] Mr Creevey did two things on 6 October 2008. First, I find that he had a meeting with Mr Findlay. There is a significant difference in the evidence about what was discussed. Mr Creevey said that Mr Findlay bluntly told him at the meeting that the redundancy was his idea, that Aimex's overheads were too high and that Mr Creevey was paid too much. Mr Findlay said in response that he did not recall discussing business with Mr Creevey, he denied that the words alleged by Mr Creevey because they were not the type of words he would use and he absolutely denied that any decisions in terms of the redundancy were his and he said that it was Mr Monopoli's decision.

[24] Having considered the evidence I prefer Mr Creevey's evidence to the extent that he was left, after the discussion with Mr Findlay, with the clear impression that his position of Parts manager was in fact redundant.

[25] Secondly, I find that, Mr Creevey visited a business called Premier Groomers Limited where he went to talk to the owner, Steve Cleverley, about the changes that were going to happen at Aimex and asked his advice. I was provided with a written statement from Steve's wife, Raewyn Cleverley, about Mr Creevey's visit on that day. Ms Cleverley was, for reasons I accept, not able to attend at the investigation meeting. What she said in her statement was corroborated to an extent by Mr Creevey's

evidence and also the evidence of Mr Law. Ms Cleverley wrote in her statement that Mr Law called in to Premier Groomers Limited prior to 6 October 2008 and told her husband in front of her that there were changes about to happen at Aimex and that one of the staff members, Mr Creevey, was going to be made redundant when he returned from holiday. Mr Law gave evidence about this matter and agreed that he had attended and talked to Steve Cleverley about the situation at Aimex. He explained that he was only giving his opinion as to who in the management team would be most likely to be made redundant. Mr Law did not accept all the matters in Ms Cleverley's statement and I am not satisfied that he was laughing when he told Steve about Mr Creevey. I formed the firm view however that given the letter of 3 October 2008 which stated changes had already been made Mr Law must have been clear before 6 October that his position was not redundant.

[26] The situation must have annoyed Ms Cleverley. She barely knew Mr Creevey but when he attended at the business premises on 6 October 2008 and asked for her husband's advice on how to deal with the situation she told him they already knew he was going to be made redundant because Mr Law had told them.

[27] Mr Creevey left Premier Gromers Limited and returned home to prepare an email which responded to the letter of 3 October 2008 and set out matters that he felt were relevant. He emailed it that night through to Mr Monopoli. In particular, I have had regard to the matters that Mr Creevey set out under the heading *the future* where he advised that he was ready and willing to take on other tasks and suggested that some form of walk-in parts and sales operation would have to continue and that his knowledge and experience put him in good stead to carry out that function. He also set out that he was willing to accept a more accounts-style function and proposed that sales and parts continue on a 50% time basis with the other 50% of time taken up with functions that an employee Kay then undertook. Mr Creevey also expressed that he was open to other opportunities that Aimex or the company's directors may offer within Aimex or one of the other companies within the Challenge group of companies.

7 October 2008

[28] On 7 October 2008 Mr Creevey met with Mr Monopoli. Mr Creevey went through his email and discussed his options. Mr Monopoli did not accept that the alternatives presented by Mr Creevey were viable and I am satisfied that at the end of

that meeting it was clear to Mr Creevey that he no longer had a position with Aimex. Mr Monopoli advised Mr Creevey that he would be given a letter outlining the redundancy as soon as possible and that Mr Creevey was not required to attend at work again.

[29] On Friday 10 October 2008, Mr Creevey met with Mr Monopoli and was handed a letter dated 8 October 2008 confirming his redundancy. Mr Creevey was told that he would receive four weeks' pay in lieu of notice, although there were some issues about that payment and they were not resolved until 15 October 2008.

[30] Mr Creevey said the dismissal was devastating for him and that he immediately applied for other positions and was successful in securing another position which he commenced on 1 December 2008.

Conclusions about the genuineness of the redundancy

[31] Mr Creevey challenged the genuineness of his redundancy for several reasons. He said his position could not be redundant when the parts operation was simply assigned to other people. He said that his department had made a good profit for the company and that the Workshop would have been the place to be looking for efficiency gains rather than the Parts Department. Mr Creevey maintained that there were other reasons for his redundancy in the nature of performance or personality issues. Another of Mr Creevey's concerns was that another employee was employed in or about December 2008 to perform, as part her duties, the parts ordering.

[32] Mr Creevey also said that the restructuring should have involved consulting with all employees in the company, including those to whom at least initially the parts ordering fell.

[33] I accept there is some basis for Mr Creevey to have misgivings about the genuineness of his redundancy. The justification put forward for Mr Creevey's dismissal was that Mr Monopoli considered all parts of the business and concluded that there was no requirement for a stand-alone Parts Department with a Parts Manager and that the various roles Mr Creevey was undertaking could be absorbed into other staff roles. A trial was undertaken while Mr Creevey was on leave and this satisfied Mr Monopoli that the redundancy of the Parts Manager position would reduce overheads and streamline the process.

[34] An employer is able to manage its own business and this includes the right to restructure for genuine business reasons. I find that the restructuring process was embarked upon for genuine business reasons as the business wished to reduce overheads in relation to income produced. I am not satisfied that Mr Creevey was dismissed for an ulterior motive to that of redundancy. He was not replaced at Aimex and there is currently no Parts Manager or stand-alone Parts Department.

[35] I find that Mr Creevey's dismissal was for reasons of genuine redundancy.

Was the process carried out to restructure Aimex and the implementation of Mr Creevey's dismissal fair and reasonable and in accordance with the implied obligations of trust and confidence and the statutory obligations that exist to deal with one another in an employment relationship in good faith?

[36] I find that there were fundamental flaws with the process used by Aimex in its restructuring as follows:

- When Mr Creevey returned from annual leave it is clear from the letter he was handed on 3 October 2008 and other evidence that his position as Parts Manager in reality had ceased to exist. The only matter that he was to discuss with Mr Monopoli on 7 October 2008 was other options for him in the Aimex business.
- Mr Creevey was not properly consulted about the redundancy of his position. The changes made were presented as a fait accompli and that is not what a fair and reasonable employer would have done. The evidence supports that the decision to make the Parts Manager position redundant had been determined before he returned from his period of annual leave.
- Mr Creevey was not provided with information about the review that had been carried out which was relevant to the continuation of his position. He had no opportunity to comment on the information before the decision was made. This was a breach of the good faith obligations set out in the Employment Relations Act 2000 under s.4 (1A)(c). I find that Mr Creevey did in all likelihood ask for the criteria used for making his position redundant and there was no satisfactory response from Mr Monopoli.

- A fair and reasonable employer will not make an employee redundant if there is an alternative position that is viable and becomes clear from the restructuring process. The process in this case was restricted to the management team and cost savings to be found in the three departments they managed. It was a fundamental flaw to a fair process not to consult with employees on a wider basis who may have been potentially affected by the restructuring rather than simply limit the consultation process to the management team. Objectively assessed this is particularly where the work from Mr Creevey's role was still going to have to be performed and would have to be undertaken by other employees.
- There may have been alternatives to Mr Creevey's redundancy or redeployment options. It was known at that time that the part-time accounts person had indicated she was looking elsewhere for another role. Mr Creevey had put forward a proposition that involved doing more accounts type work as well as the parts aspect of the role. That was not seen as a viable alternative but, considered objectively, if properly explored may have been part of the alternatives for consideration if there had been a fairer and fuller restructuring process.
- Mr Monopoli said that there was no real discussion about the accounts aspects of a role put forward by Mr Creevey in his email of 6 October because that would have meant that the accounts person would have been redundant and further that Mr Creevey could not have done the work effectively that was done by the accounts person. He could not have fairly reached that conclusion in the absence of a discussion about Mr Creevey's suitability for such a role and consideration as to whether or not the accounts person may have left the company in the near future.
- Aimex also appointed another employee in December 2008 as a workshop administrator. Part of her role involves about two hours a day doing parts ordering and the balance doing administration type work and helping the workshop run more effectively. That may have been a viable alternative for Mr Creevey to have been considered for if there had been a fairer restructuring process and wider consultation.

- In reality though, the ability of Mr Creevey being able to put forward any real alternatives to enable him to retain a position in Aimex required him to have a good understanding of the changes that had occurred during the period that he had been on annual leave. He was not provided with that information and, given that he did not return to work in his role, he had no real ability, therefore, to sensibly comment when asked about ideas within the very short timeframe between 6 and 7 October 2008. That was unfair.
- Mr Creevey was handed a letter confirming his redundancy at a meeting on 10 October 2008 but the letter itself was dated 8 October 2008 and Mr Monopoli properly conceded that it had been written on that date.

[37] It was accepted by Mr Creevey that Mr Monopoli did attempt to find Mr Creevey another position outside of Aimex but aside from that matter and mention in the redundancy letter that these attempts would be made, I am not satisfied the redundancy decision was otherwise implemented in a fair and sensitive way.

[38] I find for the reasons that I have bullet pointed above that Aimex's actions in the restructuring process and implementation of the redundancy were seriously flawed. The actions of Aimex were not what a fair and reasonable employer would have done in all the circumstances.

[39] As a result of this finding, I conclude that Mr Creevey was unjustifiably dismissed from his employment on 10 October 2008 when he was paid one month's salary in lieu of notice.

[40] Mr Creevey has a personal grievance that he was unjustifiably dismissed and he is entitled to remedies.

Remedies

[41] I have concluded that the redundancy was genuine. I have found that there was serious flaws in the process but I am not satisfied that it was not inevitable that Mr Creevey would have been dismissed for redundancy even if a proper process had been followed. In those circumstances Mr Creevey cannot be compensated for the loss of his job.

[42] I do conclude in the unusual circumstances of this case that a proper process would have taken longer than it did after Mr Creevey returned from annual leave. Had there been a proper process then Mr Creevey would not have been given notice when he was. I consider it fair in all the circumstances to compensate Mr Creevey for one additional week's pay. Mr Creevey was on a salary of \$52,000 and one weeks pay is \$1000.00

[43] I order Aimex Limited to pay to Darryl Creevey the sum of \$1000 gross being one week wages under s 123 (1)(b) of the Employment Relations Act 2000.

Compensation

[44] Mr Creevey was clearly upset and distressed by his dismissal. He spoke passionately about how much he enjoyed his position, particularly given the proximity of the workplace to the sea because he is a sailor. He had moved to Nelson with his wife to work with Aimex. I cannot, however, award compensation in the circumstances of this case for the actual loss of the position but rather I am limited to compensating Mr Creevey for the unfair process that led to his dismissal and the distress which is associated with that.

[45] I accept that Mr Creevey suffered considerable distress and shock on returning from annual leave to find that his position was redundant and that there was no proper process. I do take into account that Mr Monopoli did attempt to find Mr Creevey another position at another organisation. I conclude that an appropriate award for compensation in all the circumstances is the sum of \$5,000.

[46] I order Aimex Limited to pay to Darryl Creevey the sum of \$5,000 without deduction under s.123(1)(c)(i) of the Employment Relations Act 2000.

Medical expenses

[47] Mr Creevey claimed medical expenses on the day of the investigation meeting in the sum of \$150. There is no basis to make an award for those expenses and, in the circumstances where I consider there was a degree of inevitability about the redundancy I make no award for the loss of the benefit of medical insurance.

[48] I do not conclude that Mr Creevey contributed to his personal grievance and make no deduction to the amount awarded.

Costs

[49] Mr Creevey represented himself at the investigation meeting. He is entitled to reimbursement of the filing fee of \$70 but no other contribution towards his costs.

[50] I order Aimex Limited to pay to Darryl Creevey the sum of \$70 being his filing fee.

Summary of findings and orders made:

- a. I have found that Mr Creevey was unjustifiably dismissed.
- b. I have concluded that the redundancy was genuine but the process used by Aimex Limited was fundamentally flawed. In those circumstances I have only awarded one weeks lost wages in the sum of \$1000 gross under s 123 (1) (b) of the Employment Relations Act 2000 on the basis that a fair process would have taken a further week and delayed the giving of notice.
- c. I have ordered Aimex Limited to pay Mr Creevey \$5000 without deduction for compensation under s 123 (1)(c)(i) of the Employment Relations Act 2000.
- d. I have made no award for medical expenses or loss of the medical insurance benefit and I have not found that Mr Creevy contributed to the personal grievance.
- e. I have ordered Aimex Limited to pay Mr Creevey \$70 being the filing fee.

Helen Doyle
Member of the Employment Relations Authority