

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**Attention is drawn to the order
prohibiting publication of
certain information**

[2015] NZERA Auckland 33
5518971

BETWEEN DAVID JOHN CRISAFULLI
Applicant

A N D PRISTINE AIR LIMITED
Respondent

Member of Authority: T G Tetitaha

Representatives: Applicant in person
R Narayan, Representative for the Respondent

Investigation Meeting: 30 January 2015 at Whangarei

Submissions Received: 30 January 2015 from the Applicant
30 January 2015 from the Respondent

Date of Determination: 4 February 2015

DETERMINATION OF THE AUTHORITY

- A. There is a non-publication order in respect of the respondent's profit and loss statement for June 2014 and its accounts for the year ended 31 March 2014. No party or person shall have access to these documents except by further order of a member of the Authority pursuant to clause 10 Schedule 2 of the Employment Authority Relations Act 2000.**
- B. The application for personal grievance is dismissed.**
- C. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.**

Employment relationship problem

[1] David John Crisafulli (the applicant) was employed until he was made redundant on or about 30 June 2014. The applicant alleges he was unjustifiably dismissed because there were no genuine reasons for redundancy and the process leading to the dismissal for redundancy was defective.

Facts leading to dispute

[2] On 18 November 2013 the applicant was employed by Pristine Air Limited (the respondent) as a direct marketer of HRV Systems. At the time it was owed by a third party.

[3] The respondent company is a small business operating from Northland. At the time of the dismissal it comprised up to 8 part time and full time employees.

[4] On or about 23 April 2014 the respondent company was purchased by Brendon Fox. Prior to the purchase he had been the respondent's general manager.

[5] Around 25 June 2014 there were meetings and correspondence between Mr Fox and the applicant about dismissal for redundancy.

[6] On 30 June 2014 the parties met to discuss the applicant's redundancy. At the end of the meeting the applicant was dismissed.

[7] On 8 July 2014 the applicant raised a grievance with the respondent alleging unfair treatment in the process leading to redundancy, disputing the reasons for redundancy and questioning why another direct marketer was retained.

[8] On 16 September 2014 the applicant filed a statement of problem with the Authority. The matter is now before me for determination.

Issues

[9] At the start of the hearing the parties agreed there were two issues for determination namely:

- (a) Were the reasons for redundancy genuine? and

- (b) Was the process leading to dismissal for redundancy what a fair and reasonable employer could have done in all the circumstances?

Were the reasons for redundancy genuine?

[10] The applicant submits the reasons were not genuine as evidenced by the retention of another Direct Marketer and his redundancy. He alleged he had no idea of the respondent's financial situation.

[11] There is a substantial conflict of evidence between the parties. This requires me to make express findings of credibility¹ about the evidence. Credibility can be assessed on two bases – the witness personally² and the story the witness tells. Some factors relevant to personal credibility are inconsistencies and contradictions of all kinds³ and prevarication⁴.

[12] Credibility of the story is an assessment of it within the context of other evidence, such as undisputed facts or facts unknown to the witness. Is this evidence absurd or is there other evidence making the conclusion inevitable?⁵

[13] I may draw inferences and fill gaps in evidence by the application of common sense, knowledge of human affairs and the state of the industry and any matter that seems capable of being taken into account as indicating the probabilities of the situation.⁶

[14] The primary reasons for the redundancy are set out in the respondent company's letter to the applicant dated 27 June 2014 headed "*consultation on possible retrenchment*" namely:

"... the restructuring of the Direct Marketer functions for the reasons of insufficient work, efficiency cost savings, continuing losses and the downturn in the business."

¹ *RNZAF Museum Trust Board v Hunter* Employment Court Wellington WC11/00, 1 March 2000 at p6

² *Kelly v Accident Rehabilitation & Compensation Insurance Corporation* EMC Wellington WC 13/99, 24 March 1999 at p69

³ *Taiapa v Te Runanga O Turanganui A Kiwa t/a Turanga Ararau Private Training Establishment* [2012] NZERA Auckland 252

⁴ *Griffith v Sunbeam Corporation Ltd* EMC Wellington WC13/06, 28 July 2006 at [108]

⁵ See above at [111]; *Corbett v National Mutual Finance Ltd* (CA 172/91, 10 February 1992, p10

⁶ *New Zealand Merchant Service Guild IUOW Inc v New Zealand Rail Ltd* [1991] 2 ERNZ 587 (LC), at 603

[15] I directed the respondent to produce a copy of its profit and loss statement for June 2014 and its accounts for the year ended 31 March 2014. There is a non-publication order in respect of the respondent's profit and loss statement for June 2014 and its accounts for the year ended 31 March 2014. No party or person shall have access to these documents except by further order of a member of the Authority pursuant to clause 10 Schedule 2 of the Employment Authority Relations Act 2000.

[16] The evidence showed there were difficulties managing the direct marketing team. It is common ground the direct marketing manager left to work in the Auckland national call centre shortly after Mr Fox purchased the respondent company. The respondent contracted her to remotely manage the team through the Auckland national call centre.

[17] Brendon Fox, the respondent owner and managing director, gave evidence he was unable to replace the manager and the monthly costs of remote management were significant - half of his DM fees and data costs (\$2,150 approximately) and travel costs of a manager from Auckland to Northland (\$1,130.87). The two direct marketing employees' wages were also considerable. The applicant's certificate of earnings and the other employee's payslip produced showed their combined gross annual wages were \$30,151.14 or \$2,512.59 per month excluding overheads.

[18] There were also performance problems which were not being resolved by remote management. At hearing the applicant accepted he was not consistently meeting the KPI's set out in his employment contract. Mr Fox gave evidence he had trouble recruiting direct marketing managers and did not possess those skills within his existing staff. The evidence showed the Northland direct marketing team were generating insufficient sales and the costs of running the direct marketing through the Auckland national call centre appeared considerably cheaper.

[19] I accept Mr Fox's evidence the respondent was in financial strife. Profits continued to drop despite the use of remote management. The accounts for the year ended 31 March 2014 showed a significant net loss. Mr Fox attested to further losses in April and June 2014 of \$13,500 and \$19,000 respectively. Although a small \$900 profit was made in May 2014, losses were a continuing trend in 2014.

[20] I also accept Mr Fox's evidence that he intended making both direct marketing staff redundant. When the applicant raised his grievance following dismissal on 8

July 2014 he halted the redundancy process. The remaining staff member then left of his own accord. This does not mean the reasons for making the applicant redundant were not genuine at the time of his dismissal. The respondent has now outsourced its direct marketing to the Auckland national call centre.

[21] Having regard to the above evidence I find the respondent had genuine reasons for the applicant's proposed dismissal for redundancy.

Was the process leading to dismissal for redundancy what a fair and reasonable employer could have done in all the circumstances?

[22] The applicant submitted the process was defective because he was not consulted about the redundancy prior to its implementation. He denied meeting with Mr Fox on 27 June or receiving the letter headed "*consultation on possible retrenchment*" the same day. He alleges he had no transport and it was handed to him with the termination letter also dated 27 June 2014 on 30 June 2014. He states Mr Fox told him on 25 June he should quit or he would fire him. He submits he was fired on 25 June and denies being offered any alternative employment.

[23] A decision to make staff redundant is part of management's prerogative. The Authority should not substitute its business judgment for that of an employer⁷.

[24] The Authority may review the business decision to determine whether the decision, and how it was reached, were what a fair and reasonable employer could have done in all the relevant circumstances.⁸

[25] An unjustified dismissal claim can arise where termination of employment has occurred summarily by reason of redundancy.⁹ The procedural fairness standard will determine the period of notice or payment in lieu of notice which recognises that commercial circumstances may dictate that redundancies take immediate effect.¹⁰

[26] It was common ground the parties met on 25 June 2014 to discuss redundancy. The applicant accepted Mr Fox offered him help. Mr Fox submitted he also spoke about positions available in Auckland and told the applicant the business was losing

⁷ *G N Hale & Son Limited v. Wellington etc. Caretakers etc. IUOW* [1991] 1 NZLR 151; (1990) ERNZ Sel CAS 843 (CA)

⁸ *Rittson-Thomas T/A Totara Hills Farm v. Davidson* [2013] NZEmpC 39 at [53] – [54]

⁹ *Atwill v Tanners Timberworld Ltd* [1994] 1 ERNZ 321

¹⁰ *Aoraki Corporation Ltd v Colin Keith McGavin* [1998] 1 ERNZ 601

money. He also recalled a discussion that if he quit there would have no access to WINZ benefits which was confirmed by the applicant.

[27] A secretary employed by the respondent, Sharlene Cullen, gave evidence she drafted the letter handed to the applicant on Friday 27 June 2014 seeking consultation about his redundancy proposal. She was then asked to subsequently draft a letter headed "*redundancy*" on 30 June 2014 which she mistakenly dated 27 June 2014. Although the applicant made a point about this correspondence not being upon business letterhead, it does not affect the fact he received both letters.

[28] The applicant admitted he was not good with dates. His evidence at times prevaricated and was inconsistent with written statements he had made at or around the time of the dismissal. His evidence at hearing was inconsistent and prevaricated from earlier written signed statements he had made. His letter of grievance dated 8 July 2014 stated that on 25 June 2014 Mr Fox "*gave me the choice of quitting or being made redundant.*" This letter does not allege he was told to quit or be fired. He said at hearing he believed redundancy was the same as being fired.

[29] The offer of him being able to quit without giving notice is reasonable if he had been looking for work and had another job to go to. The applicant gave evidence of a job offer he received one week prior to the redundancy and his awareness in March 2014 of a proposed reduction of the direct marketing team. I infer from his evidence that he was aware of future redundancies prior to 25 June 2014 because he was actively seeking alternative work.

[30] Although the applicant submitted he was fired on 25 June 2014, his letter of grievance dated 8 July 2014 refers to him calling Mr Fox on 27 June to tell him he chose redundancy. If he had been fired as alleged, there would be no need to call Mr Fox about redundancy at all. He may be using this term loosely to refer to his actual termination date but it still raises inconsistencies in his evidence. This does not assist his credibility.

[31] Despite alleging he had no transportation on 27 June, he managed to get to a meeting on 30 June 2014. At hearing he explained he had returned the work vehicle and was reliant upon his partner's car. He alleged her car was unavailable on 27 June and he had no alternative transportation to attend any meeting. No other evidence was produced to corroborate his non-attendance. Mr Fox remained firmly of the view

there was a short meeting on 27 June with the applicant where he was handed the letter headed "*consultation on possible retrenchment*". He did not know how the applicant got there.

[32] At hearing the applicant accepted he met with Mr Fox on 30 June 2014. There would be no need to do so if he had been fired on 25 June. The applicant confirmed he told Mr Fox he would need to move to Australia to find a job and Mr Fox made an offer of assistance with travel costs. At hearing the applicant confirmed he made no suggestions or proposals at the time because "*I did not want to give any because I just lost my job.*" He also accepted he received a second letter headed "*Redundancy*". Alternative employment at the national call centre in Auckland is specifically referred to therein. The applicant's explanation that he did not read the letter does not justify his submission no alternative employment was offered. His submission he could not take the employment because he owned a house in Whangarei does not negate the offer of alternative employment. The evidence supports Mr Fox's submission he did discuss and offer alternative employment.

[33] Given the inconsistencies in the applicant's evidence and consistency and corroboration of Mr Fox's evidence by other sources, I prefer the evidence of Mr Fox. I find the possibility of redundancy and alternative employment was raised with the applicant in the week prior to 25 June 2014. I find there was a meeting on 25 June to inform the applicant about possible redundancy. I reject the suggestion the applicant was fired or told he would be fired that day. I find there was a meeting on 27 June 2014 for the purposes of consulting the applicant about redundancy where the applicant was given the letter headed "*consultation on possible retrenchment*". On 30 June 2014 the parties met again where I find the applicant told Mr Fox he wished to be made redundant for the purposes of ensuring he could obtain WINZ benefits. I also find the applicant was offered alternative employment in Auckland but declined to take it because of his financial obligations in Whangarei.

[34] I also find the applicant should have been aware of the respondent's financial circumstances. The letter headed "*consultation on possible retrenchment*" on 27 June 2014 set out the respondent's concerns including continuing losses and the downturn in business giving rise to the proposal to outsource its direct marketing. The applicant told me at hearing he did not read the letters given to him. That does not mean

consultation had not taken place. An employee cannot turn a blind eye to efforts to seek his views about a proposed redundancy.

[35] At hearing the applicant raised for the first time allegations of bullying at weekly meetings where Mr Fox was telling everyone that they needed to perform or leave. He found this “*extremely irritating.*” Mr Fox denied this occurred. He accepts he did impress upon the staff the need to meet performance targets especially given the respondent company’s financial position. The applicant further submitted Mr Fox told him about the reduction of the direct marketing team from four to two in March 2014 stating the applicant’s job was safe. Given his subsequent redundancy he alleges Mr Fox was dishonest. Mr Fox denies he spoke to the applicant about the reduction in the team. At the time he was contemplating purchasing the business and the previous owner had been telling staff if the business was not purchased it would be closed down. He admits telling the applicant at the time his job was safe as far as he was aware in March 2014. It was accepted no one was made redundant in March 2014 from the direct marketing team although staff left of their own volition possibly due to the previous owner’s comments.

[36] The above behaviour is not bullying. Mr Fox was entitled to reinforce performance requirements as set out in the KPI’s in the applicant’s employment agreement. The fact the applicant found this irritating does not make this bullying. I accept Mr Fox’s evidence he did not tell the applicant that he was going to reduce the marketing team in March. It appears strange that he would do so. This is especially when the applicant alleged at hearing the staff were not close. If they were not close, it is unlikely Mr Fox would confide in the applicant about his future plans. It appears more likely he was reassuring the applicant. His actions did not bind the company to keep the applicant employed especially given the subsequent departure of staff and downturn in performance and profits. I also find he was not dishonest. He was doing the best he could do in a situation where he did not own the respondent company and the previous owner was making inflammatory statements to the staff.

[37] I prefer Mr Fox’s evidence. The applicant was made aware about redundancy in the week prior to 25 June 2014. Consultation was attempted on 25, 27 and 30 June 2014. On 30 June 2014 the applicant agreed to take redundancy and was paid an extra week’s wages. He had no entitlement to redundancy compensation. He was paid on an hourly basis and had not worked since 25 June 2014.

[38] It was not a perfect redundancy process but having regard to this company's small size, resources and financial strife, these were not unfair or unreasonable actions prior to dismissal. Any defects were minor and did not result in unfairness to the applicant. In the circumstances I determine that the process leading to redundancy of the applicant was what a fair and reasonable employer could have done in all the circumstances.

[39] The application for personal grievance is dismissed.

[40] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

T G Tetitaha
Member of the Employment Relations Authority