

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

2013 NZERA Auckland 128
5389538

BETWEEN GLENN EDE
 Applicant

A N D WILCO PRECAST LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Ray Roussell, Advocate for Applicant
 Gary Taylor, Advocate for Respondent

Investigation Meeting: 19 March 2013 at Auckland

Submissions Received: 22 March 2013 from Applicant
 27 March 2013 from Respondent
 2 April 2013 from Applicant

Date of Determination: 15 April 2013

DETERMINATION OF THE AUTHORITY

- A. Wilco Precast Limited's (Wilco's) dismissal of Mr Glenn Ede on the grounds of redundancy was justified.**
- B. Wilco breached its duty of good faith by offering Mr Ede tax free payment when he was not legally entitled to it.**

Employment relationship problem

[1] Mr Ede started work as a Concrete Lead Hand with Wilco on 29 August 2011. His employment ended on 18 May 2012 when he was made redundant as a result of his position being disestablished.

[2] Mr Ede claims his dismissal was procedurally and substantively unjustified. Mr Ede believes his redundancy is a sham to mask that his supervisor Mr Ajmer

(Sonny) Singh wanted him gone. Mr Ede claims Mr Singh and the Human Resources Manager Mr Bill Pretorius conspired to end his employment because he did not have a good relationship with Mr Singh. Mr Ede also claims the process Wilco used to make him redundant was unfair.

[3] Mr Ede claims Wilco breached its duty of good faith by:

- a. breaching its obligation under s.4(1A) of the Employment Relations Act 2000 (the Act) to provide him with access to relevant information and an opportunity to comment on it; and
- b. offering him a tax free payment provided he entered into a record of settlement under s.149 of the Act when he was not legally entitled to it because he had not raised a grievance with his employer.

[4] Mr Ede asks that penalties be imposed on Wilco for these alleged breaches of good faith and that some or all of the penalties be paid to him personally.

[5] Wilco says Mr Ede's dismissal was justified because the disestablishment of his position was a genuine commercial decision made following a fair and proper process. It denies it breached its duty of good faith and opposes the penalties claim.

Issues

[6] The following issues need to be determined:

- a. Credibility and factual findings;
- b. Did Wilco breach its duty of good faith?
- c. If so, should a penalty be imposed?
- d. Was Mr Ede's dismissal justified?
- e. If not, what if any remedies should be awarded?

Credibility findings

[7] There were a number of conflicts in the evidence which have to be resolved on the balance of probabilities. After carefully considering the material conflicts I have preferred the evidence of Wilco's witnesses over Mr Ede's evidence. I reach that

conclusion because in a number of respects Mr Ede's evidence was demonstratively incorrect which undermined his credibility overall.

[8] Examples of Mr Ede's evidence which I consider were incorrect include:

- a. He made extremely serious and ultimately unsubstantiated allegations that Wilco employed "*illegal Indians*". This allegation was strongly denied by Wilco who offered Mr Ede and the Authority full access to all of its employment records and documentation. Immigration New Zealand (INZ) investigated Mr Ede's allegations and concluded they are without merit. Wilco employs a number of different nationalities and INZ commended it for the "*great systems*" it had in place around ensuring its employees were eligible to work in New Zealand. INZ concluded Wilco's operations and employment of overseas staff was "*all above board*".
- b. Mr Ede claims when he told Mr Paul Sinclair (a director and shareholder) he had been made redundant Mr Sinclair informed him that his redundancy was "*bullshit*" because "*the company had a job involving 400-500 panels coming up*". Mr Paul Sinclair denied such comments and review of Wilco's order books established it had no such order.
- c. Mr Ede insists a discussion he had with Mr Pretorius on 9 March 2012 was a "*performance review*" when it is very clear that it was not. Wilco has in place processes and documentation relevant to performance reviews and it is obvious the discussion on 9 March was not part of a performance review process.
- d. Mr Ede says he observed "*26 Indians*" working in the factory before he was made redundant when Wilco's records establish it did not have that many Indian employees.
- e. Mr Ede claims his "*contemporaneous diary notes*" established he had been subjected to on-going harassment by Mr Sonny Singh. An examination of his notes does not support that allegation.

- f. Mr Ede claims that when he was made redundant Wilco was the busiest it had ever been since he started work. Wilco's records show that was not the case and it suffered a significant drop in monthly turnover in early 2012. It had the lowest forward orders ever.

[9] I make the following factual findings:

- a. Wilco's orders significantly declined in the early part of 2012 to the lowest level it had ever experienced.
- b. I consider it unlikely that Mr Paul Sinclair informed Mr Ede that his redundancy was "*bullshit*" and that Wilco had "*a lot of work coming up*" and that he would "*sort it out*" meaning he would ensure Mr Ede kept his job.
- c. I also consider it unlikely that Mr Paul Sinclair subsequently informed Mr Ede that his approach to his brother, Andrew Sinclair to rescind the redundancy decision had been "*too late*".
- d. I accept Ms Danne Maule's evidence that she did not tell Mr Ede that he had "*lost his job because of Harnek and Sonny*".
- e. Mr Sonny Singh had nothing to do with the redundancy process.
- f. Neither Mr Sonny Singh nor Mr Pretorius conspired to remove Mr Ede from his job.
- g. The disestablishment of Mr Ede's position was initially proposed by the Operations Manager Mr Harnek Singh (no relation to Sonny Singh) and approved by the Managing Director Mr Andrew Sinclair (who was also a shareholder).
- h. Mr Ede did not have a performance review on 9 March.
- i. Mr Pretorius did not mislead Mr Ede at the consultation meeting on 13 April because I consider it unlikely Mr Pretorius indicated/implied Mr Ede was not the only employee at risk of redundancy.

Did Wilco breach its duty of good faith?

Did Wilco breach s.4(1A) of the Act?

[10] Section 4(1A) of the Act requires an employer who is proposing to make a decision that may have an adverse effect on an employee's continued employment to provide that employee with access to information relevant to the decision about their ongoing employment and an opportunity to comment on the information before a final decision is made by the employer.

[11] Mr Ede says Wilco breached s4(1A) of the Act by:

- a. Failing to provide him with precise financial information, for example the value and amount of work jobs coming up and the amount of factory costs/expenses that the company was looking to save.
- b. Failing to disclose the Minutes of the Board meeting on 27 March 2012 which record "*next month we may need to relook at factory costs [...]*".
- c. Failing to disclose that five other factory employees had either given notice or would be resigning shortly.
- d. Failing to inform him he was the only person whose position was affected by the redundancy proposal.
- e. Misleading him during the consultation meeting on 13 April when Mr Pretorius indicated or implied Mr Ede was not the only employee at risk of redundancy.
- f. Failing to inform him Mr Andrew Sinclair was the decision-maker, not Mr Pretorius.

[12] This case involved the proposed disestablishment of the sole Concrete Lead Hand position which was a new position created when Mr Ede was employed. Mr Ede was therefore the only Wilco employee who worked as a Concrete Lead Hand.

[13] Under s4(1A) of the Act Wilco was required to provide Mr Ede with access to information relevant to the proposed disestablishment of his position and an opportunity to comment on that information. However, it was not legally required to

provide additional information which was not relevant to the proposed disestablishment of the Concrete Lead hand position.

[14] Wilco's initial letter to Mr Ede dated 30 March 2012 identifies it intends to restructure to improve efficiencies and reduce costs and it proposes to disestablish his Concrete Lead Hand position.

[15] I find s.4(1A) did not require Wilco to provide the information identified at paragraph [11] (a)-(d) above because such information was not relevant to the proposed disestablishment of the Mr Ede's position. I find Mr Ede did not need the information set out in paragraph [11] (a)-(d) above in order to be able to meaningfully engage in the consultation process. I note Mr Ede did not request this (or any other) information during the consultation process. Nor did he explain how such information would have assisted him to provide feedback on the proposal.

[16] This is not a situation where Wilco needed to achieve specific savings or to retrench a specified number of employees. It had identified that Mr Ede's duties could be taken over by his supervisor at no additional cost to the business, which is what the situation was before Mr Ede was employed.

[17] I find Wilco should have informed Mr Ede that Mr Andrew Sinclair was the decision-maker in respect of the redundancy process. However I do not consider that omission breached s4(1A) of the Act.

[18] I do not consider Wilco breached s4(1A) of the Act. It communicated to Mr Ede that it was considering disestablishing his position. Because he was the only person in a Concrete Lead hand position there was no selection issue. Wilco engaged in a consultation process during which it gave Mr Ede a real and genuine opportunity to provide his views on the proposal.

Was the offer of a tax free payment a breach of good faith?

[19] Mr Ede claims Wilco's offer to pay him pay in lieu of notice as a tax free payment under s.123(1)(c)(i) of the Act¹ was a breach of good faith because he had not raised a personal grievance. Mr Ede says Wilco's offer was an attempt to defraud Inland Revenue Department of the tax he was legally required to pay tax on his notice

¹ Provided he entered into a s.149 Record of Settlement of any potential employment related claims he had against Wilco.

pay. I note that Mr Ede turned the offer down and worked out his notice period so his actions are beyond reproach.

[20] I find Wilco's offer to make a tax free payment (which did not consist of genuine distress compensation because it was made up solely of contractual notice pay) to Mr Ede when he was not legally entitled to such a payment is contrary to s.4(1)(a) of the Act and therefore amounts to a breach of good faith. There was no dispute that Mr Ede had not raised a grievance with Wilco so there was no legitimate basis for Wilco to have offered him a tax free payment.

[21] A tax free payment made to an employee under s.123(1)(c)(i) of the Act is only permitted if it is a payment made to genuinely compensate the employee for the "*humiliation, loss of dignity and injury to feelings*" they have suffered as a result of a personal grievance. That requires the employee to have raised a personal grievance with their employer before the employer can settle the alleged grievance by a tax free settlement payment.

[22] An employee's normal contractual remuneration payments cannot be packaged into a tax free payment just to avoid the employee paying tax, which is what Wilco sought to do in this case.

[23] Wilco's offer if accepted would not have cost it anything because it still had to contractually pay his gross notice pay if it had elected to pay him in lieu of allowing him to work out his notice. Had the offer been accepted the benefit to Wilco was that Mr Ede would have been prevented from pursuing any employment related claims and the tax free payment would have been a deductible expense for Wilco.

Should a penalty be imposed?

[24] Section 4A of the Act limits penalties to breaches of good faith which meet the qualifying requirements of that section. Wilco's breach of good faith does not meet any of the s4A requirements so there is no jurisdiction to impose a penalty on it.

Was Mr Ede's dismissal justified?

[25] Justification is to be determined in light of the s.103A justification test in the Act. This requires the Authority to assess whether Wilco's actions, and how it acted,

were what a fair and reasonable employer could have done in all the circumstances at the time that Mr Ede was made redundant.²

[26] When assessing justification, the Authority must consider compliance or otherwise with each of the four tests set out in s103A(3) of the Act. It may also consider other appropriate factors.³ The Authority must not determine that a dismissal or an action is unjustified solely because of minor process defects which did not result in the employee being treated unfairly.⁴

Substantive justification

[27] Mr Ede relies on the following matters to support his claim that his redundancy is a sham:

- a. On 5 March 2012 Mr Sonny Singh took the phone Mr Ede usually used and from then on did all the ordering of concrete, which was Mr Ede's job.
- b. Mr Pretorius' discussion with him on 9 March⁵ about his performance.
- c. Mr Andrew Sinclair did not have authority from the Board to commence a redundancy process. He says the Board's Minute of 27 April prevented any redundancy process being considered until April. The minute says:

“Next month we may need to relook at our factory costs and staff holidays plus review our cash position [...] Also talk to [landlord] about a month's credit on the rent.”
- d. Mr Sonny Singh and Mr Pretorius conspired to remove Mr Ede from the business.

Sham allegation

[28] I find Mr Ede's redundancy is the result of a genuine commercial decision – it is not a sham. The Concrete Lead Hand position was disestablished and its duties

² Section 103A ERA.

³ Section 103A(4) ERA.

⁴ Section 103A(5) ERA.

⁵ Which Mr Ede incorrectly described as a performance review.

taken on by an existing employee at no extra cost to Wilco, so it clearly saved the cost of Mr Ede's salary.

[29] An employer has the management prerogative to make decisions about how best to run its business. Wilco decided it could run its business at less cost without retaining Mr Ede's position. Wilco has not subsequently engaged anyone else to undertake Mr Ede's former responsibilities so there was obviously a genuine cost saving which arose from the disestablishment of his position. It is not open to the Authority to look behind that decision in order to second guess Wilco's decision about how best to run its business.

[30] I do not accept Mr Ede's claim that Mr Sonny Singh "*took the phone off him*" or that Mr Singh's actions in ordering concrete indicated that he wanted Mr Ede gone from the business. First it was not Mr Ede's own phone it was a landline factory work phone. Mr Singh's phone had broken which was why he began using the other factory phone. Wilco was about to install a new phone system which was why it did not immediately replace the phone Mr Singh used.

[31] Mr Singh was subsequently asked by a supplier to undertake the concrete ordering because the supplier expressed concerns that Mr Ede was getting the orders wrong. Mr Singh did the concrete ordering because he was mostly using the one factory phone and to keep the supplier happy. I am satisfied with Wilco's explanation regarding the phone issue.

[32] The discussion that Mr Pretorius had with Mr Ede on 9 March is irrelevant to the redundancy situation. Mr Pretorius asked Mr Ede about some Non-Conformist Reject (NCR) material that he had seen the previous day and alerted him to the cost of NCRs to the business.

[33] I accept Mr Pretorius' evidence that Mr Ede asked him if there were any other quality issues or performance issues and that Mr Pretorius confirmed he was happy with Mr Ede's work. Mr Pretorius also made a comment asking Mr Ede to refrain from speaking about staff to other staff as it made staff uncomfortable and two complaints had been made about it. I find this discussion does not indicate there was a conspiracy to exit Mr Ede from the business.

[34] I do not accept Mr Andrew Sinclair did not have authority to commence a redundancy process. It was clear that Wilco's work had significantly decreased at the

beginning of 2012. As Managing Director Mr Sinclair was required (and no doubt expected by the Board) to address that.

[35] The Board Minute relied on by Mr Ede did not prevent Mr Sinclair from identifying cost savings, it merely indicates that if the costs savings measures Mr Sinclair had already put in place⁶ were insufficient then Wilco would have to look at other measures in April. That comment did not prevent Mr Sinclair from taking steps to reduce Wilco's outgoings, it merely records that if the savings achieved in March were insufficient then additional savings would be considered in April.

[36] I reject Mr Ede's allegations that Mr Sonny Singh and Mr Pretorius conspired to remove him from the business. Mr Singh had no involvement in the redundancy process. Mr Pretorius was happy with Mr Ede's work and had no reason to want to remove him. The proposal that Mr Ede's position be disestablished was first raised by Mr Harnek Singh on the basis that the company could operate efficiently without it, as it had done prior to Mr Ede beginning employment.

Procedural fairness

[37] Mr Ede's procedural unfairness claim relies on:

- a. the same matters that he claims gave rise to a breach of s.4(1A);⁷
- b. the failure of the decision maker, Mr Andrew Sinclair to consult with him personally;
- c. Wilco's instruction to keep the restructuring proposal confidential.

[38] I found against Mr Ede on the alleged breach of s4(1A) issues so I do not intend to revisit them here, suffice to say I do not consider the matters he relies on are examples of procedural unfairness.

[39] In terms of being heard in person by the decision maker, I agree it would have been preferable for Mr Andrew Sinclair to have conducted the consultation meetings instead of Mr Pretorius. However, I consider that the particular facts of this case mean that omission amounts to a minor process error which did not result in any unfairness to Mr Ede. Because Mr Ede did not provide any feedback during the

⁶ Attrition by not replacing 5 staff who had or were about to resign, reducing the in-house accountant's role from a fulltime to a part-time one and disestablishing Mr Ede's position.

⁷ See paragraphs [10] – [16].

consultation process the decision-maker was not required to assess credibility or engage with the employee about the feedback provided.

[40] Mr Ede claims it was unfair of Wilco to advise him to keep the restructuring proposal confidential. I do not consider that the instruction regarding confidentiality was a process defect as it did not prejudice Mr Ede in any way. He did not identify any individual who he had wanted to talk to during the consultation process and I find the confidentiality instruction did not adversely affect his ability to engage in the consultation process.

Section 103A(3) tests

[41] I consider that Wilco complied with the four procedural fairness tests identified in s.103A(3) of the Act, notwithstanding that each of these four tests are not couched in language which fits comfortably with a restructuring process. Notwithstanding that observation, I am satisfied Wilco did properly raise the proposed disestablishment of Mr Ede's position with him, he was given an opportunity to respond to that proposal but did not provide any feedback.

Section 103A(5) process defects

[42] Under s.103A(5) of the Act the Authority cannot find a dismissal is unjustified solely due to minor process defects which have not resulted in the employee being treated unfairly. I consider Mr Sinclair's failure to personally meet with Mr Ede personally during the consultation process was a minor process defect which did not result in any unfairness due to Mr Ede's failure to provide any feedback on the restructuring proposal.

Outcome

[43] Wilco has satisfied me on the balance of probabilities that Mr Ede's redundancy dismissal was procedurally and substantively justified. I find that Wilco's actions in making Mr Ede redundant, and how it acted in terms of the process it adopted before reaching that decision, were what a fair and reasonable employer could have done in all the circumstances at the time that Mr Ede was dismissed.⁸

[44] Mr Ede's unjustified dismissal claim is dismissed.

⁸ Section 103A(2) ERA.

Costs

[45] Wilco as the successful party is entitled to a contribution towards its actual legal costs. The parties are encouraged to resolve costs by agreement. If that is not possible then Wilco has 14 days from the date of this determination within which to file its costs memorandum, Mr Ede has 14 days within which to respond, with Wilco having a further 7 days to file its reply memorandum.

[46] In order to assist the parties, the Authority's usual notional daily tariff based approach to costs will be adopted, with the notional tariff being adjusted if necessary in order to reflect the particular circumstances of this case.

Rachel Larmer
Member of the Employment Relations Authority