

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Christopher Elmsly (Applicant)
AND Armson Holdings Limited (Respondent)
REPRESENTATIVES Gary Tayler, Advocate for Applicant
Mike Jones, Advocate for Respondent
MEMBER OF AUTHORITY Leon Robinson
INVESTIGATION MEETING 28 April 2006
SUBMISSIONS RECEIVED 5 May 2006
8 May 2006
DATE OF DETERMINATION 17 May 2006

DETERMINATION OF THE AUTHORITY

The problem

[1] Mr Christopher Elmsly (“Mr Elmsly”) says that he was summarily dismissed from his employment as Technical Manager with Armson Holdings Limited (“the Company”) on 30 August 2005. The Company says Mr Elmsly’s employment was terminated for genuine redundancy and was in all respects substantively and procedurally justified.

[2] The parties were unable to resolve the differences between them by the use of mediation.

The issues

[3] The issue for determination is whether Mr Elmsly’s termination for redundancy was justified.

The facts

[4] Mr Elmsly was employed by Armson Holdings Limited at its International Petfoods site on 1 February 2005. The terms of the employment were recorded in a written individual employment agreement signed by the parties on 11 January 2005. Mr Elmsly was paid a salary of \$84,000.00 per annum to perform a minimum of 40 hours of work per week.

[5] On 30 August 2005, Mr Elmsly was asked by the Company’s Marketing Director Mr Kerry Russell (“Mr Russell”) to meet in Mr Russell’s office. According to Mr Elmsly, Mr Russell informed him that the Company’s directors had met in Wellington and had decided to terminate his

(Mr Elmsly's) position immediately. He says that Mr Russell then informed him that the managing director Mr Mike Jones would ring him the following week to explain the situation and that Mr Elmsly would be paid out one month's notice together with any holiday pay owing.

[6] Mr Elmsly further says that Mr Russell then asked him to remove his personal items and leave the premises. He says Mr Russell required him to leave his laptop computer and because of that he then volunteered to handover his mobile phone. Then Mr Elmsly says, Mr Russell escorted him from the building in full view of the office staff.

[7] Mr Russell recollects matters differently. He refers to a file note of the meeting he says he made at 7.00 pm that same evening which records that he informed Mr Elmsly that the Company directors had agreed to "review" Mr Elmsly's position. The directors viewed the role as only currently used at around 60% of capacity and that it was "proposed" that Mr Elmsly's position be made redundant. Mr Russell is adamant he specifically communicated the following matters, as recorded in his file note, to Mr Elmsly:-

- *Other projects unlikely to now go ahead, Pet Food was the 100% focus*
- *Engineering was now with Sam along with other activities i.e staff*
- *Steve was back to full capacity*
- *Discussed potential for contract/part time work*

[8] Mr Russell is further adamant that Mr Elmsly "was disappointed but understood" the position. He says he then advised Mr Elmsly to take the rest of the week off to think about options. He confirms that he informed Mr Elmsly that Mr Jones would call him the following week "to discuss various possibilities". Mr Russell says that it was Mr Elmsly who initiated discussion about final pay and that he (Mr Russell) told Mr Elmsly that if the position was confirmed redundant, Mr Elmsly would be paid one months pay plus holidays. Mr Russell's file note records that Mr Elmsly mentioned that he still had much to do and that he could finish the "week/month" but Mr Elmsly told him it was best for him to take the time to consider the position and that it was preferred that he take time out to reflect. Mr Russell denies Mr Elmsly was "shown the door" in the way Mr Elmsly gives evidence.

[9] Mr Elmsly and Mr Jones met on 6 September 2005. Mr Elmsly says Mr Jones confirmed there was no work for him. He says he was told the Company was only using 60% of his skills and that he was being paid too much. He says also that he questioned Mr Jones about the need for continuing legal compliance in production and that Mr Jones then invited him to submit a proposal.

[10] Mr Jones tells the Authority he confirmed to Mr Elmsly that Mr Russell had informed him (Mr Elmsly) of the proposal to dis-establish his role. Mr Jones presents his file note to the Authority of the discussion and notes these reasons for the proposal were communicated to Mr Elmsly:-

- *That Armson Holdings Limited did not plan to commence the edibles project at this stage. This project had been part of the rationale for establishing the group technical role.*
- *The establishment of the roles of Production Manager and Planning and Supply Manager had been made since the Technical role had been established and these had taken up some of the responsibilities that were previously part of the role.*
- *The Risk Management Plan (RMP) had now been established and as a consequence a large part of the project was now over.*
- *The relocation of the factory from the Hull Road to Maleme Street had been concluded. Chris had been Project Manager and this had taken the bulk of his time.*

[11] Mr Jones says that he asked Mr Elmsly how he felt about the proposal and that Mr Elmsly said he understood what the Company was doing and that he felt his work would have reduced to four days at the most. He says Mr Elmsly then said he was not happy that the role was to be dis-established but if that was what the Company wanted he did not intend to stand in the way.

[12] Mr Jones' file note records that Mr Elmsly said he was hurt by the way that Mr Russell had asked him to leave his laptop computer and Company documents. He felt more trust should have been shown towards him. Mr Jones says Mr Elmsly asked about working part-time. They agreed that Mr Elmsly would submit a proposal.

[13] Mr Elmsly was permitted to then farewell the staff. Mr Jones says the meeting ended amicably after he informed Mr Elmsly that he would be paid one month salary in lieu of notice from that date and would be paid his normal monthly salary on 20 September 2005.

[14] Mr Jones telephoned Mr Elmsly on 20 September 2005 and told him the Company did not require his further service in any alternative capacity.

The merits

[15] Mr Elmsly does not pursue any criticism of the substantive justification for his termination. Accordingly, I make no findings in that regard.

[16] That issue aside, the decision to terminate Mr Elmsly's employment must be carried out fairly and sensitively. That is because the *Employment Relations Act 2000* ("the Act") obliges the parties to act towards each other in good faith and additionally, the law implies in all contracts of employment a duty of fair and reasonable treatment. These are duties which both parties owe to each other.

[17] The parties are also obliged to deal with each other in good faith. Section 4 of the Act required the Company to provide to Mr Elmsly access to information relevant to the continuation of his employment as well as an opportunity to comment on the information before the decision was made.

[18] Apparently, there was no information, merely a decision by the directors that Mr Elmsly's position be reviewed, as the directors give evidence. Mr Elmsly says he was presented with a confirmed decision and no proposal. But nor was there any other documentation. There was no written confirmation of the proposal or any correspondence recording matters in discussion.

[19] I prefer Mr Elmsly's evidence and conclude that on 30 August 2005 Mr Russell presented him with a decision and not a proposal. I am not persuaded that the evidence establishes that Mr Elmsly was "shown the door" and I am more inclined to accept that Mr Elmsly's departure from the premises on 30 August 2005 was not as sinister as Mr Elmsly recounts.

[20] That however is no comment on the justification for the requirement that Mr Elmsly depart from the premises. I accept that he was required to leave. I see no justification for that requirement. It is the Company's own evidence that Mr Elmsly did not wish to take leave and he protested that he had much work to attend to. Corroborative of that fact too is the undisputed evidence that Mr Elmsly volunteered his mobile phone in a rather petulant fashion indicative of his reluctance and disagreement with the decision that he leave.

[21] I conclude then that Mr Elmsly was required to leave his employment and he did not agree to do so. I see no reason why he was required to cease his work. I conclude that this action by the employer was an action to his disadvantage which has no justification. **It constitutes an unjustifiable action by the employer and Mr Elmsly has a personal grievance because of it.**

[22] Because I have found that Mr Russell did not present Mr Elmsly with any proposal, it must follow that the meeting held with Mr Jones on 6 September 2005 cannot have constituted a real opportunity for Mr Elmsly to comment prior to the decision being taken. The decision had already been made. It follows then that I find Mr Elmsly was never invited to comment on whether his position was redundant.

[23] Nor was there any consideration or consultation of alternatives to redundancy before the decision to terminate. I find that it was Mr Elmsly who initiated discussions. It should of course have been the Company since the intention must always be to preserve continuing employment. I agree that Mr Elmsly was dismissed before there was any consideration of alternatives to redundancy. He was only redundant after no alternatives to that situation could be identified.

[24] I find that Mr Elmsly had no input as to whether he was redundant. Nor was he provided any opportunity to have input as to redeployment within the Company prior to his termination. He ought to have been involved in both of those matters but he was not.

[25] The Company did not act towards Mr Elmsly in good faith. I am satisfied that Mr Elmsly's input was never sought in relation to the justification for his dismissal and therefore, he had no opportunity to provide feedback on the decision before it was taken. I am satisfied that it was practicable for there to have been consultation with him. His dismissal for redundancy was unjustifiable because it was not effected in a fair and reasonable manner. The Company did not treat Mr Elmsly fairly and sensitively. **I find that Mr Elmsly has a personal grievance. He is entitled to remedies in settlement of that personal grievance.**

[26] Having made that finding and in considering both the nature and the extent of the remedies to be provided, I am bound by section 124 of the Act to consider the extent to which Mr Elmsly's actions contributed towards the situation that gave rise his personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[27] I find that Mr Elmsly did not contribute to the situation that gave rise to the personal grievance and there was no blameworthy conduct on his part which could constitute contributory fault which led to that situation, nor which requires a reduction. There is therefore no basis for reducing the nature and extent of the remedies to be granted to Mr Elmsly.

[28] Mr Elmsly claims two months salary on the basis that the Company employed another person to perform his duties six days after Mr Jones advised that Mr Elmsly's services would not be required in any other capacity. That other person is said to have been engaged by the Company on a fixed-term basis for two months. The rationale for this claim is that Mr Elmsly would have had work for a two further months. I do not consider these facts established in my investigation nor do I consider it proper to grant the claim since Mr Elmsly has elected not to take issue with the substantive justification for his termination.

[29] Mr Elmsly tells the Authority he was stunned by the advice Mr Russell gave him in the meeting on 30 August 2005. He says felt like a ten tonne block had been dropped on him. He says he was shocked at the sudden and unexpected termination of his employment. He says he was in a daze as he was made to leave the premises. In relation to the consideration of alternatives and his proposals, he says he felt frustrated and misled.

[30] Mr Elmsly is entitled to be compensated for the unfairness in the process by which his position was deemed to be redundant. I accept that he has suffered humiliation, loss of dignity and injury to his feelings because of that unfairness and I accept too that he was humiliated by his required departure.

[31] I award compensation to Mr Cameron to resolve the two personal grievances I have found. **I order Armson Holdings Limited to pay to Mr Christopher Elmsly \$1,000.00 as compensation for the unjustified suspension and a further \$4,500.00 for the unjustifiable dismissal.**

Costs

[32] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Tayler is to lodge and serve a memorandum making a case for costs within 14 days of the date of this Determination. Mr Jones is to lodge in the Authority and serve on Mr Tayler a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe.

Leon Robinson
Member of Employment Relations Authority