

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Colin Gauld (Applicant)

AND Bay of Plenty District Health Board (Respondent)

REPRESENTATIVES Matthew Ward-Johnson, Counsel for Applicant
Mark Beech, Counsel for Respondent

MEMBER OF AUTHORITY Ken Anderson

INVESTIGATION MEETING 1 February 2006

SUBMISSIONS RECEIVED 16 February 2006
6 March 2006
15 March 2006
21 March 2006

DATE OF DETERMINATION 26 April 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Gauld claims that he was unjustifiably dismissed, effective from 28 October 2005. Mr Gauld says that the termination of his employment on the grounds of redundancy was not genuine and asks that the Authority find that he has a personal grievance and award him various remedies, including reinstatement.

The Bay of Plenty District Health Board ("the Board") says that the termination of Mr Gauld's employment was justified on the grounds that the position held by him was genuinely redundant.

[2] For completeness, I record that Mr Gauld was pursuing a further personal grievance (or grievances) alleging that he had been unjustifiably disadvantaged by his employer in regard to the issuing of two warnings, however that alleged grievance was formally abandoned via Counsel's correspondence dated 9 January 2006.

Background Facts and Evidence

[3] Mr Gauld was employed as the Estate and Engineering Manager at the Tauranga Hospital from late 2002. He is a professional engineer and has been involved with hospital engineering for approximately 17 years. He reported directly to the General Manager of the Tauranga Hospital, Mr Alan Wilson. The overall evidence suggests that the working relationship between Mr Gauld and Mr Wilson was fraught at times and much of Mr Gauld's evidence goes to the difficulties that he perceives were brought about by Mr Wilson.

- [4] The beginning of these difficulties appears to have been in February 2003 when Mr Gauld says the “first relationship incident” occurred. The details of this alleged incident, that appear to have involved a union delegate, Mr Paul Smith, and two other staff, approaching Mr Wilson regarding Mr Gauld’s management, are not particularly relevant to the matters that the Authority has to determine, however it appears that this incident may have become the catalyst of a deteriorating relationship between Mr Wilson and Mr Gauld.
- [5] Indeed, it was at least the perception of Mr Gauld, that the relationship between the two men was so fraught, that he raised his concerns with the Chief Executive at the time, Mr Ron Dunham. In a letter to Mr Gauld dated 2 April 2003, Mr Dunham records that: “The relationship problem between you and your manager is exposing the organisation to risk in not following a fair and correct procedure with Paul.” Mr Dunham instructed that Mr Wilson and Mr Gauld meet with Mr Smith to deal with “his issue” as quickly as possible.
- [6] Just exactly what occurred regarding various interpersonal relationships in the work place is unclear, but on 29 April 2003, Mr Gauld received a formal written warning from Mr Dunham pertaining to what Mr Dunham referred to as “a poor level of judgement” relating to Mr Gauld’s involvement with Mr Smith and his role as a union delegate.
- [7] The evidence of Mr Gauld, pertaining to matters that occurred involving his relationship with Mr Wilson, alludes to a continuity of the tension in that relationship. An issue arose regarding the responsibility of Mr Gauld to develop and complete certain accreditation policies that were required for Tauranga Hospital. The outcome being that Mr Gauld received a verbal warning related to his failure to complete the policies. The warning was recorded in a letter from Mr Wilson dated 22 March 2004.
- [8] The evidence of Mr Gauld in regard to what was happening to him in carrying out his role, depicts a continuation of ongoing conflict and negativity pertaining to his relationship with Mr Wilson and matters associated, leading to Mr Gauld making use of the Employee Assistance Programme and the process of mediation.

Events in 2005

Functions Review

- [9] Mr Gauld went on an overseas holiday in early December 2004 – returning to work on 17 January 2005. Mr Gauld says that he had a large quantity of paperwork to process and he did not discover a document entitled; *Estate and Engineering Departments – Proposed Review of Department Functions and Independence*, until 22 February 2005. While this document is undated, and there is no reference to its author, it has been established that the author of the document is Mr Graham Dyer, the Chief Operations Officer for the Board. The document was distributed with a covering letter on 9 February 2005, to seven relevant recipients, seeking their; [“input into the considerations that had been raised prior to any decisions being made about changes in structure, resources, or function that may be implemented” by 25 February 2005.
- [10] The document outlines some background in regard to it being timely to review the operation of the Estate and Engineering Departments at Whakatane and Tauranga hospitals. The existing structures at the two hospitals is discussed and a “Case for Change,” related to capital development projects is briefly set out. The substance of the document outlines three options for consideration. Option 1 being to do nothing. Option 2 proposes a “Single Engineering Manager” at both the Whakatane and Tauranga sites, and the third option is a; “Single

Engineering Manager with line accountability through to the relevant General Manager at Whakatane and Tauranga sites.” The latter being the preferred option espoused by Mr Dyer.

- [11] Mr Gauld responded to Mr Dyer in a letter dated 24 February 2005. He recommended that: [“a proper review of Estate and Engineering at Tauranga and Whakatane takes place by an independent and qualified person and with agreed terms of reference.” It subsequently transpired that Option 3 was favoured as the most acceptable option, the result being that a new position of District Estate and Engineering Services Manager (“DEESM”) was created and advertised.

Notification of redundancy

- [12] Mr Gauld attended a meeting with Mr Dyer and Mr Wilson on 13 April 2005. His evidence is that the meeting was brief and he was given a letter written by Mr Dyer notifying him of the decision that had been made following feedback on the review document, and informing him that his position will become redundant. Mr Gauld was invited to apply for the new position, and referring to Mr Gauld’s employment agreement, the other options and considerations in a redundancy setting were set out.
- [13] The further evidence of Mr Gauld is that upon receiving this news, he formed the conclusion that Mr Dyer and Mr Wilson; [“would use this so-called review to get rid of me and appoint another engineering manager.” Mr Gauld says that the review took place without any involvement or consultation with him and that no consideration had been given to his recommendation of 24 February 2005.
- [14] Consequently, Mr Gauld engaged a lawyer. She wrote a comprehensive letter to Mr Dyer on 28 April 2005 critical of the review process adopted by the Board, and seeking a postponement of the Board’s decision in favour of an independent review. Mr Dyer responded on 10 May 2005, setting out the position of the Board and the fact that their decision remained.

The new position

- [15] Mr Gauld says that he did not apply for the new position of DEESM as he was feeling “depressed and frustrated” and believed that it would be “futile” to apply. The applications closed on 27 May 2005 - without a successful applicant as it transpired. The position was re-advertised and applications closed on 12 August 2005. Mr Gauld applied and was interviewed on 5 September 2005. On 14 October 2005, Mr Gauld was notified that he was unsuccessful with his application.
- [16] A meeting was held on 18 October 2005, to discuss possible options regarding Mr Gauld’s future employment with the Board in accordance with the provisions of Mr Gauld’s employment agreement. Mr Gauld was legally represented. Following some discussions and exchanges of correspondence, on 21 October 2005, Mr Wilson wrote to Mr Gauld. The letter confirmed the redundancy of Mr Gauld’s employment with four weeks notice effective from that day. It was proposed that Mr Gauld would not be required to work out the notice period and that he would cease his employment with the Board on 28 October 2005. This is what duly occurred.

Analysis and Conclusions

- [17] Mr Gauld challenges both the procedural fairness and genuineness of the redundancy of his position.

(a) **Procedural Fairness**

- [18] In regard to the alleged procedural unfairness, Mr Gauld says that there was a lack of proper consultation with him and a failure by the Board to carry out a full, fair and proper review of the Estate and Engineering Department and its functions and his role with the Board. At first glance, it does appear to be somewhat odd that Mr Gauld was not more closely involved in the review of the Estate and Engineering Department. However, when one takes into account the difficulties in the relationship between Mr Gauld and Mr Wilson, and the general dissatisfaction of Mr Gauld regarding available resources, and his generally negative attitude, it is hardly surprising that Mr Dyer chose to proceed in the manner that he did. Indeed, given the continuing conflict that surrounded the role of Mr Gauld, regardless of where the responsibility for the respective faults is laid, it is most unlikely that Mr Gauld would have contributed in a constructive manner.
- [19] The review document was available from 9 February 2005 and it was not released until approximately three weeks after Mr Gauld returned from his holiday. I have to say that given the importance of the review document, I view with some incredulity that Mr Gauld did not get around to discovering it until some two weeks after he received it. I also find it odd that Mr Gauld did not provide a more constructive response rather than just solely seeking an independent review. In summary, I cannot help but conclude that given the generally pessimistic approach taken by Mr Gauld, little would have been gained by allowing him to have taken a more inclusive role in the review, and I find nothing unfair or unreasonable in the decision of the Board to conduct the review in the manner that was adopted.
- [20] The submissions for Mr Gauld also allude to a failure on the part of the Board to properly consider alternative employment options for Mr Gauld. Upon the evidence available to the Authority, and given the seniority and qualifications of Mr Gauld, it is obvious that there were no realistic options available and it is fanciful to suggest otherwise.
- [21] It is also suggested that there was an excessive delay in concluding the redundancy process. While it is often desirable to have this type of process concluded promptly in order to ensure that people affected can obtain some certainty in their lives, it appears that the appointment process was delayed largely because of some difficulty incurred in contacting all of the referees of the new appointee. Having examined the overall evidence, I can find nothing out of the ordinary or excessive about the process that applied to Mr Gauld.
- [22] In summary, I find that there was nothing unfair or unreasonable about the procedure that was adopted by the Board when the position of Mr Gauld was made redundant.

(b) **The genuineness of the redundancy**

- [23] Effectively Mr Gauld says that the new position of DEESM was not significantly different to his position of Estate and Engineering Manager, and that the redundancy process was created in order to remove him due to the working relationship between him and Mr Wilson becoming untenable.
- [24] While it appears that the working relationship between the two men was fraught with difficulty, almost from the time that Mr Gauld was appointed, and clearly created some difficulties for the Board, upon the overall evidence I am satisfied that the two positions are significantly different and that the focus of the Board was to create a position of greater responsibility and accountability for both the Tauranga and Whakatane sites.

- [25] In arriving at that conclusion I have taken particular cognisance of the evidence of Ms Karen Smith, the General Manager of the Whakatane Hospital. The evidence of Ms Smith is that the Whakatane Hospital is an aging campus and has to undergo extensive capital improvements to its infrastructure, particularly involving plumbing and electrical services. There are also seismic considerations that have to be taken into account in regard to structural requirements.
- [26] It is the evidence of Ms Smith that the existing service structure simply did not have the expertise to provide a strategic presence at the planning and implementation stages of future capital development, and there was a requirement to appoint a person that would have the technical knowledge to advise both the Board and the General Manager.
- [27] The evidence of Mr Dyer also refers to significant capital redevelopments at Tauranga and Whakatane Hospitals and the demands associated with such being outside the scope of the existing Estate and Engineering Departments.
- [28] I have also considered the job descriptions for the two positions and while there are some similarities, I also note that there is a focus on “Campus Development” and “Capital Management” that does not appear in Mr Gauld’s job description. While I can understand why Mr Gauld might have some suspicions that he had been manipulated out of his position, given the totality of the evidence, I conclude that there were more substantial strategic reasons for the Board to create the new position of DEESM than simply the conflict that was occurring between Mr Gauld and Mr Wilson.
- [29] Furthermore, having reached that conclusion, I am bound to say that my observations of Mr Gauld’s attitude and the evidence of his overall behaviour, also brings me to the evitable conclusion that it was highly unlikely that Mr Gauld had the necessary attributes to have fulfilled the enlarged role that the Board found necessary, and probably essential, to establish.

Determination

- [30] Having given close consideration to the substantial evidence presented by the parties I find that there is no substantial validity in the arguments advanced by Mr Gauld that the redundancy of his position was not genuine. Furthermore, I find that there was nothing unfair or unreasonable about the procedure that was adopted by the Board when the position of Mr Gauld was made redundant, or in the exercise of the termination of his employment.
- [31] It follows that I must find that the dismissal of Mr Gauld on the grounds of redundancy was justified and that Mr Gauld does not have a personal grievance and hence the remedies that he seeks are declined.

Costs

- [32] Costs are reserved. The parties are invited to reach a resolution of this matter. In the event that a resolution is not achieved, submissions may be made to the Authority for an order, within 21 days of the date of this determination.

Ken Anderson
Member
Employment Relations Authority