

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 110 /08  
5093909

BETWEEN                      STEPHEN GEARRY  
   Applicant  
  
AND                              ARMOURGUARD SECURITY  
   LIMITED  
   Respondent

Member of Authority:      James Crichton  
  
Representatives:            Francis Wall, Advocate for Applicant  
   Paul Johnson, Counsel for Respondent  
  
Investigation Meeting:      13 May 2008 at Christchurch  
  
Submissions received:      1 July 2008 from Applicant  
   21 July 2008 from Respondent  
  
Determination:              30 July 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant (Mr Gearry) claims that he is entitled to be paid redundancy compensation while the respondent (Armourguard) says that Mr Gearry is not entitled to redundancy compensation because he resigned his employment and his position was not redundant.

[2]     Mr Gearry commenced employment with Armourguard in 1987 working initially as a general security guard with no fixed place of work. In 1998, he was assigned a permanent position as a supervisor security guard working at the Christchurch branch of the Reserve Bank of New Zealand.

[3]     When the Reserve Bank of New Zealand closed its Christchurch branch in May 2000, Mr Gearry was offered the option of taking redundancy compensation or being redeployed elsewhere by Armourguard. He chose the latter option and was

redeployed to the Christchurch Polytechnic Institute of Technology site (CPIT) where he continued until his resignation on 3 April 2007.

[4] From about 2003, CPIT had been looking at whether it would be beneficial for it to take over the daytime security guards from Armourguard and have those guards on their own staff instead. Mr Gearry was then employed by Armourguard as one of its daytime complement at CPIT.

[5] On 14 February 2007, a delegation of senior managers from Armourguard met with senior managers from the management department of CPIT to discuss this development. The essence of the discussion was that CPIT conveyed to Armourguard that it had made the decision to terminate the contractual arrangement with Armourguard in relation to the daytime guards and to provide that service from its own staff resources.

[6] CPIT indicated to Armourguard that it would be advertising to fill two vacancies that would be created by this change and that it would welcome applications from the two Armourguard staff who were then on site (one of whom was Mr Gearry) because CPIT had a high regard for those Armourguard staff members.

[7] CPIT agreed that Armourguard management could convey the general thrust of the meeting to the affected Armourguard staff (including Mr Gearry) and that was done immediately after the meeting between Armourguard and CPIT.

[8] There is dispute about whether Armourguard told Mr Gearry that there were no options within its ranks, or not. Armourguard maintains that it made it plain to Mr Gearry that he could remain with it, albeit not on the exact same work as he had done at CPIT, but Mr Gearry disputes that.

[9] Mr Gearry applied for one of the CPIT vacancies and was offered a position with CPIT doing essentially the same job that he had done on the same site but being paid more money than he had been paid by Armourguard.

[10] Concurrently with this development, Mr Gearry telephoned Armourguard to inquire about his redundancy compensation and was told that he was not entitled to any redundancy compensation.

[11] Mr Gearry formally resigned his employment with Armourguard on 3 April 2007 and his personal grievance was conveyed to Armourguard by letter dated 16 May 2007.

### **Issues**

[12] To determine whether Mr Gearry has been wronged by the failure of Armourguard to pay him redundancy compensation, it will be useful to examine the following matters:

- (a) The employment agreement between the parties;
- (b) Armourguard's obligation to redeploy.

### **The employment agreement**

[13] The relevant provisions in the employment agreement pertaining to redundancy are in clause 22. Subclause 22.3 provides that in the event the employee's employment is terminated because of redundancy, one month's notice will be paid together with compensation of four weeks' base pay for the first year of service and two years' base pay for each continuous year of service thereafter. In Mr Gearry's case, the amount that he would be entitled to under this formula because of his long service would of course be significant.

[14] The subclause then goes on to define redundancy and it is appropriate to set out the two definitions that are provided:

*22.3.1 For the purpose of this contract, redundancy is a condition in which the company has employees surplus to its requirements because of the closing down of the whole or any part of the company's operations, or to a change in methods, materials, products, reorganisation, reduction in business activity or like cause requiring a permanent reduction in the number of its employees.*

*22.3.2 Technical redundancy: If the company is sold and any affected employees offered employment by the purchaser on the same or similar terms or conditions, then he or she is deemed not to be redundant and has no entitlement to redundancy compensation.*

[15] Interestingly, when Mr Gearry contacted Armourguard and sought his redundancy payment, he spoke with Mr Mann who was then the South Island regional

manager. Mr Mann said that Mr Gearry was not entitled to redundancy compensation because he was effectively technically redundant. Mr Mann agreed with me during the course of the investigation meeting that he was speaking loosely when he used this phrase. What he meant was that Mr Gearry was in a situation *similar to* technical redundancy. By this he meant that although there was no sale of Armourguard, Mr Gearry was offered replacement employment in circumstances where Armourguard's contract to provide services had been withdrawn.

[16] Mr Mann argued that although he understood it was not strictly speaking a technical redundancy (because Armourguard had not been sold), it was analogous to technical redundancy and because of that analogous situation, Mr Gearry was not entitled to redundancy compensation.

[17] The real issue, though, is whether Mr Gearry was in truth redundant at all, whether technical or otherwise. That takes us back to the first definition which requires an assessment about whether the company has employees who are *surplus to its requirements* because of either a closing down of part of the operation or a change in methods or a reduction in business activity which has the effect of ... *requiring a permanent reduction in the number of its employees.*

[18] Armourguard was adamant that this was not a redundancy situation. It said it sought to retain Mr Gearry or perhaps more accurately it sought to give him the option of remaining employed by Armourguard although it acknowledged that the offer from CPIT was financially better for Mr Gearry than Armourguard itself was able to offer. Armourguard made the point clearly in its evidence that Mr Gearry was a long serving and valued employee, that security guards were difficult to obtain and that experienced security guards were particularly difficult to obtain and retain. Mr Gearry was one of those, and was valued as a consequence. Armourguard said in its evidence at my investigation meeting that it made no sense for it not to seek to retain Mr Gearry, if he wanted to be retained.

[19] Further, Armourguard indicated that by reason of the shortage of security guards and the steady demand for its services generally, there was absolutely no *permanent reduction in the number of employees.* Nor was there any change in business methods or any situation that could properly be described as a finding that Mr Gearry's position was surplus to requirements.

[20] In that latter regard, the company emphasised the point that Mr Gearry, like all its other security guards, was not employed on a site-specific basis. Indeed, Mr Gearry's whole career was an example of the usual pattern where security guards could expect to work at a number of sites. Because of changes in contractual requirements, Armourguard had the requirement to move its security guards around and none of them was guaranteed work at a particular site in perpetuity.

[21] There is some support for that oral evidence in the employment agreement. For instance, clause 2.3 reads as follows:

*You are expected to respond flexibly and quickly to any changes required by the company, its clients and the requirements of the industry. You may be required to undertake any duties within the company's operation as required, subject to the extent of your skills and training.*

[22] Mr Gearry, on the other hand, says that he considered that he was entitled to redundancy compensation *because the job I was doing was being discontinued and Armourguard had nothing to offer me.* Mr Gearry clearly did not understand or accept the company's view that it was entitled to move him from job to job and that his engagement was with it as employer fulfilling a generic task wherever he was directed to go rather than performing a particular task at a particular site.

[23] It is clear that there is dispute about whether alternative work was offered and I consider that in the next section of this determination. But the question whether Mr Gearry is entitled to think he earned redundancy compensation because his job was discontinued, needs a little more examination.

[24] On the face of it, Mr Gearry's employment agreement is clear and there can be no entitlement to redundancy compensation, not because he is technically redundant (as a matter of law he is not), but because there is in truth no labour surplus so his position has not gone at all; the site at which he works is no longer requiring daytime security guards, but given the shortage of such skilled employees as Mr Gearry, I am satisfied on the evidence I heard that there were ample other opportunities that Mr Gearry could have been directed to, had he chosen to remain with Armourguard.

[25] However, I think it likely that Mr Gearry felt he was entitled to redundancy compensation, at least in part because of his experience when the Reserve Bank job ended. His unchallenged evidence was that he had been offered redundancy

compensation then, or the opportunity of continuing in employment and he had chosen the latter course. Clearly, he expected the company to behave in a similar fashion on this occasion, that is, to give him the option of either remaining in employment or taking redundancy compensation.

[26] There is a sense in which, on this occasion, Armourguard's thinking was that Mr Gearry had two options, namely the option of remaining within its service or the option of taking a new role with CPIT which Armourguard clearly acknowledged in its evidence would have been more remunerative for Mr Gearry. In the end, whatever the explanation for what happened when the Reserve Bank contract came to an end and Mr Gearry was effectively offered the option of either continuing or taking redundancy compensation, if the terms and conditions of his employment agreement were similar then to the ones that apply now, it is difficult to see the offer of redundancy compensation when the Reserve Bank contract ended as anything other than an *ex gratia* payment, given the proper interpretation of the employment agreement.

### **Redeployment**

[27] Mr Gearry is adamant that there was no offer of redeployment; Armourguard is equally adamant that there was. For reasons I will now explain, I think both views have an element of truth to them.

[28] Mr Gearry acknowledges that Armourguard at least went so far as to *try to find me employment elsewhere within the organisation* and Armourguard was equally clear that, although it claimed to have identified the possibility of a particular role or roles, it never actually went further than talking generalities about finding continuing employment for Mr Gearry.

[29] Mr Gearry's evidence that no **specific** offer of employment was conveyed to him is supported by the evidence of Mr Wilkinson who was Mr Gearry's co-worker at CPIT and who, like Mr Gearry, applied for a vacancy at CPIT and was appointed there, thus leaving the employ of Armourguard.

[30] Against the clear evidence of Mr Wilkinson and Mr Gearry that no **specific** offer of employment was made by Armourguard, are the three Armourguard senior managers from the relevant period, two of whom say they made offers of employment

to Mr Geary and one of whom says that he overheard one of his colleagues making such offers.

[31] Although the Armourguard evidence primarily consists of assertions that a promise to maintain employment and/or to find positions was made, there were two suggestions that particular roles were talked about, one relating to work at Work and Income New Zealand (WINZ) and one relating to work at the Countdown supermarket.

[32] Both groups of evidence were given by individuals who seemed to me to be honest and credible to the extent that it is particularly difficult to make a judgment as to who is mistaken.

[33] Because even Mr Geary accepts that on one occasion anyway he was told that Armourguard would find him employment, I incline to the conclusion that it is more rather than less likely that Armourguard went so far as to promise that but without specificity and that therefore, insofar as Mr Geary claims that he was not offered continuity of employment, he is mistaken.

[34] One of the factors which encourages me to reach this conclusion is that the evidence from Armourguard very strongly suggested that the Armourguard senior managers were supportive of Mr Geary taking the CPIT role which they freely acknowledged was more remunerative for him and therefore better for him and his family than they were able to provide. They clearly regarded him highly and were happy that he was held in such high regard by CPIT that it was likely he would be appointed to one of the CPIT roles in any event.

[35] This view is supported by the evidence from CPIT's supervisor of security and custodial services who indicated that at the meeting between CPIT and Armourguard on 14 February 2007, CPIT had indicated to Armourguard that Mr Geary would be *seriously considered* for one of the CPIT roles and that Mr Geary had been told about the vacancy before Armourguard had. The Armourguard executives went further in their evidence of the 14 February meeting and indicated that CPIT executives had referred to Mr Geary's appointment to one of the two positions as *a foregone conclusion*.

[36] When Armourguard executives reported the conversation they had had with CPIT to Mr Geary and Mr Wilkinson, they told Mr Geary that the expectation was that if he wanted the appointment to CPIT, he would get it.

[37] A particularly revealing observation was made by Mr Wyatt in his evidence. Mr Wyatt was, at the relevant time, a marketing executive with Armourguard but he attended the meeting with CPIT. He said that after the meeting with CPIT when it became clear that CPIT sought to effectively recruit Armourguard staff for its own purposes, the Armourguard team had to make the decision whether to *make it easy for CPIT (to recruit Armourguard staff) or do we make it hard for them bearing in mind that we (Armourguard) have a continuing relationship with them in relation to our contract for the night work.*

[38] Mr Wyatt was affirming, in those remarks, that Armourguard was motivated in part by the commercial imperatives not to destabilise its continuing (albeit diminished) relationship with CPIT.

[39] Mr Mann, who was then the South Island regional manager of Armourguard, expressed similar sentiments when he said in his oral evidence that *I had the bigger picture in mind and that the ongoing relationship with the client had to be taken into account* in considering Mr Geary's future. Importantly, Mr Mann went on to say that until he spoke to Mr Geary by telephone (and this is the conversation that Mr Geary acknowledges an offer to find him work within Armourguard was made), Mr Mann did not understand that Mr Geary was *still considering staying with Armourguard.*

[40] Mr Mann also accepted as a *fair enough summary* of his view, that Mr Geary had been a good employee and so he could go to CPIT with Armourguard's blessing.

[41] In all the circumstances then, I am satisfied that Armourguard was naturally influenced by its continuing relationship with CPIT but genuinely happy for Mr Geary to better himself by taking the opportunity of permanent work with CPIT at a better rate of pay than Armourguard was able to offer. I am equally satisfied that Armourguard did in fact offer Mr Geary continuity of employment and that Mr Geary himself acknowledges that that was the position, albeit that Mr Geary complains that there was no specific role referred to. I accept that is correct on the evidence I heard, but I do not think that the absence of a specific role is of any moment.

[42] I am particularly drawn to Mr Mann's analysis where he makes clear that once he was aware from his telephone discussion with Mr Gearry that Mr Gearry was still thinking about his options, including staying with Armourguard, he (Mr Mann) promptly made clear that that was indeed an option.

[43] Mr Mann gave evidence as well, and I accept his evidence as truthful, that he confirmed that telephone advice in a subsequent email to Mr Gearry. That email has disappeared into the ether, but I am satisfied on Mr Mann's sworn testimony that he did in fact send it and that, as he said in his evidence, it simply reiterated the oral promise to find Mr Gearry a position, which he had made on the telephone.

### **Determination**

[44] I am satisfied that Mr Gearry has no entitlement to redundancy compensation under the terms of his employment agreement. I consider a proper interpretation of that agreement does not allow of the interpretation that Mr Gearry can have a reasonable expectation of redundancy compensation when on the facts, as in this case, he is not in truth redundant from his role with Armourguard, his role being very clearly not site-specific.

[45] I am equally satisfied that no criticism can be levelled at Armourguard in its treatment of Mr Gearry; it quite properly regarded him highly, it was pleased at his success when he so impressed the site at which he worked that he was able to be appointed to a permanent role there. Had he not wanted a permanent role at CPIT, Armourguard would have gladly used his expertise elsewhere.

### **Costs**

[46] Costs are reserved.

James Crichton  
Member of the Employment Relations Authority