IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2018] NZERA Christchurch 135
3022331

	BETWEEN	GLENN LOCKERBIE Applicant
	AND	PAECH CONSTRUCTION LIMITED Respondent

Member of Authority:	Christine Hickey
Representatives:	Chrissy Gordon, Advocate for the Applicant Gareth Abdinor, Counsel for the Respondent
Investigation meeting:	29 May 2018
Submissions received:	At the investigation meeting
Determination:	17 September 2018

DETERMINATION OF THE AUTHORITY

A. Paech Construction Limited unjustifiably dismissed Glenn Lockerbie.

B. Paech Construction Limited must pay Glenn Lockerbie:

(i) $1620 gross lost wages, 8% holiday pay of $129.60 gross and the employer contribution of Kiwisaver on those amounts; and

(ii) $6,000.00 compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.

C. I have reserved the issue of costs and set a timetable for submissions.

[1] I have issued this reserved determination outside of the three-month period after receiving the last of the submissions. Under s 174C(4) of the Employment Relations Act (the Act) the Chief of the Authority has decided that special circumstances exist and has allowed me to provide the determination outside of the usual three-month period.

Employment relationship problem

[2] Glenn Lockerbie claims that he was unjustifiably dismissed from his role of Leading Hand painter by way of a restructuring of Paech Construction Limited's (Paech) workforce. He claims lost wages of $3,240, employer Kiwisaver contributions and holiday pay on the lost wages, and compensation of $15,000 for humiliation, loss of dignity and injury to his feelings.

[3] Mr Lockerbie claims the restructuring was not genuine, that the process followed was not fair, and, in particular, that the decision was pre-determined.

[4] Paech says that it disestablished Mr Lockerbie's position after following a fair process and his employment came to an end as the result of a genuine redundancy.

[5] At the investigation meeting I heard affirmed evidence from Mr Lockerbie, his wife, Collette Blitvich, and sworn evidence from David Peach, the director of Paech. Each of them answered my questions and those of the representatives.

Background facts

[6] Mr Lockerbie was employed as Leading Hand painter by Paech on 12 September 2016.

[7] The painting arm of the business consisted of an Operations Manager, who was Mr Lockerbie's supervisor, and a varying number of painters. Mr Lockerbie was paid more than the other painters were paid, although less than the Operations Manager.

[8] Mr Lockerbie says, in July 2017, the Operations Manager started saying things to him that he found unsettling, such as, "we can't make money using you on new builds". The Operations Manager also told him on two separate occasions that he was likely to get a written warning. Although he did not tell Mr Lockerbie what one of the warnings would be about, he told him the other would be for poor workmanship.

[9] Paech did not start any performance management process or any disciplinary process against Mr Lockerbie, and he did not receive any written warnings.

[10] In June, July and August 2017, Mr Lockerbie's hours reduced. He was told on several days that there was no work for him. During August in particular, Mr Lockerbie used sick leave and annual leave days to ensure he had an income stream.

[11] On 21 August 2017, Mr Lockerbie had been booked to do a Site Safe course in the afternoon. However, Mr Peach's requested another employee to tell Mr Lockerbie that he was not to attend. On the same day, the work van that Mr Lockerbie usually used was given to another employee to use for the afternoon. That employee went to the site Mr Lockerbie had been working on to finish the job Mr Lockerbie had begun in the morning. Mr Lockerbie was told there was no work for him in the afternoon.

[12] When Mr Lockerbie went home for the afternoon he called the Site Safe course provider to enquire whether the course had been cancelled. He was told it had not been cancelled. That made him feel uneasy and he tried calling Mr Peach a number of times.

[13] At 4.38 pm that day, Mr Peach sent Mr Lockerbie a letter by email entitled "Restructure Proposal":

> Workload and the pipeline of work for our painting team has started to slow and this has prompted me to consider the current structure of the business and whether changes could be made to increase efficiencies and reduce costs.
>
> I believe that your role – Leading Hand Painter – could be disestablished with the work carried out by that role being absorbed by other existing roles. This would result in a cost and overhead savings for the business.

> I emphasise that at this stage no decisions have been made and the restructure is only a proposal. I would like to provide you with an opportunity to provide me with your comments and feedback on the proposal before I decide whether … the proposal will go ahead or not.
>
> As there do not appear to be any opportunities for redeployment, if the decisions is made to go ahead with the proposal it seems likely that you will be given 2 weeks' notice of the termination of your employment as a result of the redundancy.
>
> I would like to meet with you to receive your feedback on **23 August 2017** at **0730**. The meeting will be held in my office. Given that one possible outcome from this process is the disestablishment of your position, you are entitled to bring a support person or representative with you to the meeting if you wish.

[14] At 5.01 pm, Mr Lockerbie emailed Mr Peach asking to see:

> …a copy of all information that you are relying on in consideration of these changes.

[15] On 22 August at 5.22 pm, Mr Lockerbie replied that he would meet with Mr Peach the next day and "clarified" that at the meeting he:

> would like to see all the information in support of the proposal for change. As I understand there is plenty of work coming up.

[16] Paech did not supply any further information to Mr Lockerbie before the meeting beyond the letter.

[17] Mr Lockerbie and Mr Peach met at 7.30 am on 23 August 2017. Mr Lockerbie covertly recorded the meeting. The recording shows that he asked Mr Peach why the company was restructuring. Mr Peach said:

> I just wanted changes, whether or not changes can be done based upon the workflow and everything like that.

[18] He confirmed that there were new houses coming up, but that "they keep on getting delayed."

[19] Later the conversation was:

> Mr P: Well the [reasons for] the restructure was in the letter. Workload in the pipeline and basically, I've decided to just change how I do it, that's all. It's just a different way of doing it. That's all. So, what you're saying is why restructuring? I've sort of explained that. [The Operations Manager] said workflows were going to increase and that they were trying to make you redundant. The information that you want is that to do with the upcoming work is it?
>
> Mr L: Yup
>
> Mr P: So, you want to know any information about upcoming work. That would be fair would it?
>
> Mr L: Yup. I mean you must have some more reason behind it?
>
> Mr P: No, no that's it.
>
> Mr L: So, it's not financial?
>
> Mr P: Well if we keep going the way we're going eventually it will be financial [won't] it? It's part of what the issue is. I know that for the next two weeks there's almost no work for anybody. We've got no work for anybody. Anybody at all. Very little. And it could be 3 or it could be 4.
>
> …
>
> Mr P: And trust me, I've been busting my gut trying to get work. You know I don't want to say or look, the point is I'm doing an incredible amount of hours to try and get work on both sides, okay. … It's ridiculous. You know I thought it was reasonably bad, but I thought, you know it would come right.

[20] Mr Peach also revealed that competitors were undercutting the quotes Paech were making by large amounts, and consequently were being awarded them over and above Paech. Paech would have made a loss on those jobs had they quoted in line with their competitors.

[21] On 25 August 2017, Mr Peach sent Mr Lockerbie the following letter:

> I have carefully considered your feedback.
>
> I acknowledge that the company is due to be getting some more work in 3 to 4 weeks. As you know this work has already been delayed several times and there is no guarantee that it will go ahead. Even if it does, there is no guarantee that there will be more work after that.

> Having considered all of the information, I have concluded that your role of Leading Hand painter is surplus to requirements and accordingly I have decided to proceed with the proposal to disestablish that position.
>
> At the meeting we discussed the potential for redeployment. There are not currently any vacancies and the company does not require another painter at this time. I am however prepared to consider you for future painting roles if and when they arise if you want me to do so …
>
> Given all of the above, your employment will come to an end as a result of redundancy. I will not require you to work out your notice and it will be paid to you in lieu of notice.

Law on redundancy

[22] A redundancy is a "no fault" dismissal; that is, an employee loses their job usually through no fault of their own when they are made redundant. However, an employee whose role is made redundant may still suffer the same disadvantageous consequences from the dismissal as if he had been dismissed for breach of his employment agreement.[1]

[23] Because a redundancy is a dismissal, an employer needs to comply with the tests set out in s 103 and 103A(3) of the Employment Relations Act (the Act), insofar as the procedural tests can be applied to a redundancy process.

[24] Essentially, the employer must prove that the dismissal by way of redundancy was a decision a fair and reasonable employer could have made in all the circumstances at the time, having used a process that a fair and reasonable employer could have used.

[25] An employer is entitled to have a working plan in mind for its business when it puts a proposal to the employee for consultation. However, such a plan must be based on more than a "gut feeling" that a role needs to be disestablished.[2]

[26] In the Court of Appeal decision in *Grace Team Accounting Limited v Brake*[3] the Court decided:

> If the decision to make an employee redundant is shown not to be genuine (where genuine means the decision is based on business requirements and not

[1] *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825, at[37]-[38].
[2] *Stormont v Peddle Thorp Aitken Limited* [2017] NZEmpC 71.
[3] [2014] ERNZ 129, Court of Appeal.

> used as a pretext for dismissing a disliked employee), it is hard to see how it could be found to be what a fair and reasonable employer … could do.
>
> …
>
> In the end the focus of the Employment Court has to be on the objective standard of fair and reasonable employer, so the subjective findings about what the particular employer has done in any case still have to be measured against the Employment Court's assessment of what a fair and reasonable employer [could] have done in the circumstances.[4]

[27] So, a genuine reason for restructuring leading to the redundancy must have been the predominant motive. The Authority is justified in assessing the evidence the employer relied on to propose redundancy and to proceed with it. However, once the genuineness of the redundancy is established, the Authority must not substitute its business judgement for that of the respondent.

[28] An employer must carry out consultation with an affected employee about the proposal with an open mind. It must be true consultation where the employer listens to the employee's feedback, considers it fairly and is open to changing its view on the proposal.

Was there a substantively justified reason for Mr Lockerbie's redundancy at the time he was made redundant?

[29] Mr Lockerbie alleges that the redundancy decision was based, at least in part, on a desire to get rid of him for other reasons and the redundancy was thought to be the best way to do so.

[30] Submissions for Paech are that there was a genuine drop-off in work on the painting side of the business. Mr Peach's evidence was that there was insufficient work "in the pipeline" for all the employed painters. The painting business was losing money. It needed to save $300-$400 per week.

[31] Mr Peach says that in the light of reducing work he considered the best structure for the business was to disestablish the role of Leading Hand, to save the wages and overheads associated with Mr Lockerbie's role. Mr Lockerbie's supervisory work could then be

[4] At [85].

absorbed by the foreman, and his "on the tools work" by other employed painters who were paid less than him.

[32] Mr Peach's evidence at the investigation meeting was that he proposed to make the leading hand's position redundant not only to save money but because, in all the circumstances, the new flatter structure was a better structure for the business.

[33] I accept Mr Peach's evidence that there was a significant slowing down of work coming in and that had been the case for some weeks already when he proposed making the leading hand's position redundant. Indeed, Mr Lockerbie was aware of that as he and other painters had not had many hours over the preceding weeks and Mr Lockerbie had asked to be paid for some annual leave days instead of working days. He needed a full week's pay because his wife had breast cancer and had recently had surgery, after giving up her job due to her health. Mr Lockerbie was the sole breadwinner in his family that had, until recently, had two incomes to rely on.

[34] Mr Peach did not provide Mr Lockerbie or the Authority any objective written evidence that gave weight to any of the reasons Mr Lockerbie's position was chosen, rather, for example, than a less well paid employee painter. That is, apart from his witness statement and sworn testimony in the investigation meeting.

[35] In the words of Chief Judge Inglis of the Employment Court in *Stormont v Peddle Thorp Aitken Limited*, the problem with such an approach is:

> … that it makes the task of demonstrating substantive justification harder, due to a paucity of documentation and supporting analysis for disestablishing [Mr Lockerbie's] position. [5]

[5] Note 2, at paragraph [67].

[36] This case is finely balanced. By a thin margin, I accept that Mr Peach based the decision to disestablish the leading hand role on what saw as a sensible restructuring of the business and because of a lack of current and upcoming work, and not for any ulterior motive to get rid of Mr Lockerbie for other reasons. However, there are aspects of the process used that were not fair.

Was there predetermination?

[37] Although Mr Peach says that he did not instruct anyone to tell Mr Lockerbie the Site Safe course was cancelled that is the message that Mr Lockerbie was given. He was suspicious that was not the case, and indeed it was not. When he discovered that only his participation in the course, and not the course itself, had been cancelled it caused anxiety for him and caused him to consider when he received the letter proposing to disestablish his position that there had been predetermination of the issue. That was confirmed for him when his position was made redundant.

[38] A fair and reasonable employer could have communicated more clearly and in a timelier manner with Mr Lockerbie about the Site Safe course and the redundancy proposal. Mr Paech could have started the process earlier or spoken to Mr Lockerbie in person earlier.

[39] In addition, the cancellation of Mr Lockerbie going on the course coincided with the van being removed from his use that day and no painting work being provided to him. He had expected to be attending the course and receiving pay for the day. I accept Mr Peach's evidence that there was a genuine work requirement for the van that day. However, again better communication was necessary to stop Mr Lockerbie understandably considering that a decision to take work away from him on a more permanent basis had already been reached.

[40] Mr Peach reached a premature decision that the leading hand position and, along with it, Mr Lockerbie would be made redundant. Therefore, Paech did not want to pay for Mr Lockerbie's Site Safe certification.

Provision of relevant information to Mr Lockerbie

[41] A fair and reasonable employer will act in good faith. There are specific additional duties of good faith on an employer who proposes to disestablish a position by way of redundancy. Section 4(1A)(c) of the Act requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of an employee to provide:

- the affected employee with access to information relating to the continuation of the employee's employment, and
- an opportunity to comment on that information before the employer makes its decision.

[42] Submissions for Paech are that there was no other information to be provided and if Mr Lockerbie wanted specific information, he had to specifically request it. Mr Abdinor submitted that in failing to do so, Mr Lockerbie was in breach of his duty of good faith to be communicative. I do not accept that. How is an employee supposed to know what kind of information an employer may have that has led it to propose a redundancy?

[43] Mr Peach had such information, even if some of it was in his head. He could have shared that information with Mr Lockerbie before the meeting, including financial information showing that the painting business had not been profitable in recent times. Indeed, the Act requires him to have done that.

[44] For example, Mr Peach knew there was not enough work coming up and said at the investigation meeting that in the room next to where he and Mr Lockerbie met there was a workflow schedule on the wall. He did not provide a copy of that to Mr Lockerbie to consider before the meeting, or go through it with him at the meeting.

[45] Mr Peach also said that at that stage he needed to save between $300 and $400 per week. He did not tell Mr Lockerbie that, instead he said the reasons were not financial but that they would soon become financial.

[46] Mr Peach had already considered and dismissed the options of making the Operations Manager redundant, because he was needed to help attract work, or making another painter or painters redundant. He could have told Mr Lockerbie that and told him why he considered those options were not viable.

[47] In reality, there was very little feedback Mr Lockerbie could give or alternative suggestions he could make to stave off the redundancy when he had no specific information to consider to formulate options for preventing it. For example, he did not know how much money the business needed to save per week. If he had known, he may have been able to make alternative suggestions that could have achieved the same or similar savings. For example, he may have been prepared to reduce his hourly rate or go down to a guaranteed 20 hours per week or both.

[48] While Paech may not have been under an obligation to carry out a formal review prior to restructuring the business, it was under an obligation to adequately explain the rationale for the proposal and provide Mr Lockerbie with relevant information about the proposal.

Consultation timeframe

[49] Paech was also required to give Mr Lockerbie a reasonable opportunity to comment on the proposal.

[50] Mr Lockerbie was expected to absorb the news that his job may be made redundant and come up with feedback within an extremely short timeframe, about 36 hours. Mr Peach says the timing was adequate and that Mr Lockerbie was entitled to bring a support person or a representative with him. In reality, he was unlikely to be able to get representation at such short notice and unlikely to be able to come up with useful alternative proposals, even if he had the relevant information, in such a short time.

[51] I do not consider Paech gave Mr Lockerbie a reasonable opportunity to have his say on the redundancy proposal.

Conclusion on redundancy

[52] The process used by Paech was not a process a fair and reasonable employer could have used. Therefore, Paech unjustifiably dismissed Mr Lockerbie. I will go on to consider remedies. Paech could have undertaken a fair process if it had entered into the consultation process earlier, provided more information and handled the issue of the Site Safe course more clearly and fairly. I estimate that to do so would have taken two further weeks.

Remedies

Lost wages

[53] Mr Lockerbie has claimed $3,240 gross in lost wages. He got new work, although lower paid and not within his trade, within three weeks of his dismissal. The calculation is based on 40 hours of work a week x $27 per hour. However, Mr Lockerbie's individual employment agreement guaranteed him a minimum of 30 hours a week work at $27 per hour.

[54] Given the lack of work there would have been in those weeks I consider payment of two further weeks of work at the contractual minimum of 30 hours a week is reasonable. That is $1,620 gross. Paech must pay Mr Lockerbie $1,620 gross in lost wages, 8% ($129.60 gross) as holiday pay and the employer portion of Kiwisaver on those amounts.

Compensation

[55] Mr Lockerbie originally claimed $30,000 in compensation for humiliation, loss of dignity and injury to his feelings. In submissions, he reduced that claim to $15,000.

[56] Mr Lockerbie and his wife's evidence was that as soon as the Site Safe course was cancelled he became very unsettled about the future of his job. He was already anxious about being the sole income earner for the family after his wife had to step down from her job.

[57] He says he was shocked when he got the letter from Mr Peach, and although he had a meeting with him he felt that the meeting was a waste of time as he felt the decision had already been made. He says he was really upset to find that it was his job that had been chosen to be disestablished.

[58] He was also upset that before Mr Peach communicated the decision that he was to be made redundant his co-workers seemed to know that he was going to be dismissed and that their jobs were safe.

[59] Paech had to take Mr Lockerbie as it found him. In other words, the personality of the employee and their circumstances are relevant to how they are affected in terms of compensation, but the most important factor is how the employer treated the employee leading up to the dismissal.

[60] Since I have decided the dismissal was substantively justified I cannot consider the effect on Mr Lockerbie of the dismissal itself. However, I consider that even for the short few days between the unexpected cancellation of his attendance on the Site Safe course, to another employee finishing a job he worked on the day before, to when he got the news his role had been disestablished Mr Lockerbie suffered extreme distress.

[61] In all the circumstances, and considering other like cases, I consider that Paech must pay Mr Lockerbie $6,000 in compensation for the humiliation, loss of dignity and injury to his feelings from the unjustified process used to dismiss him.

Contribution

[62] I need to consider the extent to which Mr Lockerbie's actions contributed to the situation giving rise to his personal grievance. If there was a causal connection between those actions and the situation that gave rise to the dismissal and if those actions so require, I must reduce the remedy that would otherwise be awarded.

[63] Mr Lockerbie did not contribute to his dismissal in any way, let alone a blameworthy

way.

Costs

[64] Costs are reserved. The unsuccessful party can usually expect to pay a reasonable contribution towards the successful party's costs.

[65] I invite the parties to agree on costs. I am likely to adopt the Authority's notional daily tariff-based approach to costs. The daily tariff is $4,500.

[66] If the parties cannot reach an agreement the party seeking costs has 28 days from the date of this determination to file and serve its submissions on costs. The other party has 14 days from the date they receive those submissions to file submissions in reply. The parties should identify any factors they say should result in any adjustment to the notional daily tariff.

Christine Hickey
Member of the Employment Relations Authority