

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 274
5281690

BETWEEN DEAN GOTOBY

AND ALLIED EXTERIORS
 LIMITED

Member of Authority: Yvonne Oldfield

Representatives: Michael McFadden for applicant
 Steve Jameson, director, for respondent

Investigation Meeting 20 September 2010, 1 November 2010

Determination: 27 June 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This employment relationship problem, which concerns allegations of unjustified disadvantage and unjustified dismissal, arose out of the downturn in the construction industry in 2008-2009.

[2] Mr Gotoby, a plasterer, was employed by the respondent in 2006 when Aztech Coatings Limited (his employer at the time) and Design Management Limited merged their operations under a new company: Allied Coatings Limited. (The new company later changed its name to Allied Exteriors Limited.) Mr Gotoby did not sign a new employment agreement. He and Mr Jameson (Director of Allied Exteriors Limited) both told the Authority that his terms and conditions of employment remained unchanged however just what they were was not clear. I was provided with a prior written agreement dated 2003 but this was for a job at Ruakaka in Northland and was with Aztech Coatings (Northland) Limited, a separate entity from the one that

amalgamated in 2006. It would appear that Mr Gotoby moved to Auckland to work some time before the amalgamation occurred.

[3] I was able to establish that Mr Gotoby did not work set hours each week. His hours fluctuated depending on the weather and on how much work was available. For the first couple of years after he started with Allied Exteriors this flexibility presented no problems. The respondent had plenty of business and any winter reduction in hours was either covered by annual leave or made up in the summer months. Mr Gotoby's hours over the year averaged full time.

[4] All this changed when the recession hit in late 2008. Mr Jameson told the Authority that from September of that year his business, in common with the rest of the construction industry, was struggling. During this period, he said, he gave his employees regular briefings about the situation as it developed, explaining the likely impact on staffing, and his plans to restructure. He claims to have sought and considered input from his staff as this process unfolded.

[5] By February 2009 the available work had dropped to the point that two staff members who left that month were not replaced. During March Mr Gotoby and many of his co-workers had fewer than forty hours per week. After 6 April he was offered no work at all.

[6] Mr Jameson said that by May the proposed restructure was in place. He told the Authority that a letter was sent to Mr Gotoby confirming that he would not be part of a permanent plastering team in the new structure. Instead his role was to be that of a "float" who would be called in to work when needed. The letter requested formal notification of acceptance of the new terms and conditions of employment. Mr Gotoby did not respond - he denies receiving such a letter. On 11 May, having heard nothing from him, the respondent wrote again to tell him that his employment was now terminated. Mr Gotoby does not recall this letter either.

[7] By June 2009 he considered his employment to be at an end and raised a personal grievance.

Issues

[8] It is argued for Mr Gotoby that between February and April he was being treated as a casual. His position is that this was a unilateral variation of his terms and conditions as a full time permanent member of staff, and amounted to a disadvantage grievance.

[9] Thereafter, he says, the respondent failed to give proper notice of termination and left him “hanging in limbo.” This he says amounted to an unjustified dismissal conducted in a way which increased his stress and humiliation.

[10] Allied Exteriors takes the position that it simply had less and less work available and had no choice, as the situation worsened, but to restructure. It says it kept staff fully informed of what was happening and followed a fair process. In the circumstances, Mr Jameson said, the actions he took were justified.

[11] In all Mr Gotoby was out of work for over 14 months. He claims lost earnings of \$43,490.72 and compensation of \$15,000.00 for humiliation, loss of dignity and injury to feelings. He does not claim separate remedies for the disadvantage grievance.

[12] The issues for determination are therefore whether there was an unjustified disadvantage and/or an unjustified dismissal and, if either grievance is made out, what remedies are in order.

(i) February – April: unjustified disadvantage?

[13] Mr Jameson told me that in September 2008 he called a meeting of all his staff to discuss the state of the business and strategies proposed for survival. He told them that it was inevitable that changes would need to be made if the business was going to carry on. As things turned out, one big contract kept things afloat over the summer period but by February 2009 Mr Jameson had decided he could postpone change no longer.

[14] Mr Jameson met with staff again on 2 February and presented a document setting out a proposed restructure. His main idea was to move to a fixed pricing system which he hoped would control cost overruns and make the respondent more competitive in bidding for work. In order to make this feasible, he planned for the workers to be in set teams which would receive a fixed amount for each job. Previously work teams had been loosely constituted, being assembled from amongst staff who lived locally when a project was about to start in a particular area.

[15] It was planned that once the new pricing system was in place, smaller permanent teams would be working together on a regular basis, with “floats” used as necessary to boost numbers. Mr Jameson proposed to let the workforce decide amongst themselves who would work with which team leader and team members.

[16] Although he could not initially recall being present at the September and February meetings, once Mr Gotoby had heard Mr Jameson’s evidence he agreed that he was in fact at both of those meetings.

[17] Each staff member was asked to give feedback on the proposal and to notify the respondent about desired team placement and roles within teams. A timeline was set for the whole process with a view to its completion by the end of February, when major projects currently underway were expected to be complete. By the end of February Mr Gotoby had not provided any feedback or made any suggestions about where he wished to be placed. Mr Jameson therefore called him to an individual meeting on or about 25 February.

[18] Mr Gotoby had always tended to move around more than most staff. Mr Jameson now told him that no team leader had requested to have him. Because of this, and because he had not put forward any suggestions about where he would like to work, Mr Jameson told him that it was unlikely that he would be offered a place on a team under the new structure. Instead it was proposed that he be a “float.”

[19] Mr Jameson’s evidence was that because he wanted Mr Gotoby to be able to make informed decisions about his future he was candid about the fact that when there was insufficient work available for everyone the floating employees would be the last to get what there was. He also said that because the company was hoping to move into

doing more remedial work on leaky buildings “floats” with the widest range of skills would be used the most. Mr Gotoby was not one of these. However Mr Jameson told me that he was still hopeful that there would be enough work for Mr Gotoby. For this reason, he said, he refrained from telling Mr Gotoby that he was fired or redundant at that stage.

[20] Although the intention had originally been for all the changes to be in place by the end of February, the new pricing system was not ready to be implemented then. The months of March and April became something of a transition period. During March, as work ran out, Mr Gotoby was increasingly being treated as a float. He did some work in Coatesville (rather than his usual South Auckland) and in an effort to keep him engaged he was deployed to work on a project at Mr Jameson’s home. To maintain his income during this period he took annual leave, by agreement, as he was accustomed to doing in the wet winter months when work slowed down.

[21] At my request Mr Jameson provided wage and time records showing the hours worked by all staff in the seven weeks from 25 February to 6 April. Mr Gotoby worked 23 hours per week on average. The average for the South Auckland group with whom Mr Gotoby had often worked in the past was 28 per week. Other teams across town had more work – because of projects in those areas- but few staff had consistent full time work. Two people had left during February and were not replaced although at the beginning of March Mr Jameson re-hired a former team leader.

Determination

[22] There is no dispute that Mr Gotoby’s hours of work dropped significantly over the period 25 February 2009 to 6 April 2009. Mr Jameson justifies this by saying that during this time he did what he had always done: he gave Mr Gotoby as much work as he could and approved annual leave to make up any shortfall.

[23] It is common ground that Mr Gotoby had only ever worked, and been paid, as work was available, and that he was accustomed to taking annual leave when it was not. It has also been established that Mr Gotoby was not singled out for unfair treatment during the period in question. Most others also had reduced hours of work and many used annual leave to cover this.

[24] I am satisfied that what occurred between 25 February and 6 April was essentially no different to what had occurred previously. Just as the respondent had been justified in asking staff to take some of their annual leave over the winter months, now it was justified in asking them to do so during a downturn. What happened between 25 February and 6 April was consistent with prior agreed arrangements between the parties.

[25] The respondent was therefore justified in its actions in all the circumstances. I am not persuaded that a disadvantage grievance arises out of the period 25 February to 6 April.

April- May: Unjustified dismissal?

[26] On 6 April Mr Gotoby rang the respondent's office to advise that he was unwell and unable to work. He was told that there was no work available that day anyway. Over the next month he rang or texted the office several times but was not given work again.

[27] On or about 5 May the respondent held a further employee meeting. Mr Gotoby did not attend and told the Authority that he did not know it was on. Mr Jameson did not have first hand knowledge of how and when Mr Gotoby was advised of this meeting but believed that he was. He also said he must have been aware of it anyway because he and his father (who was also employed by the respondent and did go to the meeting) lived in the same house.

[28] Those who attended the meeting received written notice that their employment would be terminated as of 11 May and a new agreement offered, on fresh terms, in the new structure. Mr Jameson says that anyone who was not at the meeting (including Mr Gotoby) had the information posted out to them and was asked to respond. He said the offer to Mr Gotoby was, as previously indicated, to be a "float." Mr Gotoby did not respond and denies receiving an offer of employment under the new structure.

[29] Mr Jameson's evidence was that Mr Gotoby was "on the books" until 11 May and was regarded as employed until that date. Mr Jameson said that as things turned out, by 11 May it was clear that there was not enough work for all the floats anyway. He said even if Mr Gotoby had accepted the new offer of employment he would have been put off ahead of other floats because he was not preferred by other team members and because he did not have any dependents to support. (Mr Jameson also told the Authority that Mr Gotoby's father, one of the other floats, continued to be given a good level of work.)

[30] Mr Gotoby never called the office again after 4 May. He told the Authority that there was no connection between that fact and the fact that the staff meeting took place on 5 May. He started receiving the unemployment benefit in late May, having applied shortly beforehand. His application was therefore made soon after 11 May, the date Mr Jameson says the respondent advised Mr Gotoby that his employment was over. Mr Gotoby says that this was also a coincidence.

[31] Mr Gotoby's recall was not reliable. He could not initially remember the September and February meetings but later changed his mind and confirmed that he was present. I therefore consider it unlikely that the timing was a coincidence in either case. I conclude that it is more likely than not that the respondent did, as it claims, give him notice of termination on 11 May.

[32] In his evidence to the Authority Mr Jameson acknowledged that Mr Gotoby was dismissed but argued that this was justified on grounds of redundancy. His view was simply that the business did not have enough work for the entire workforce. Two more staff (besides Mr Gotoby) left in May and were not replaced. In June Mr Jameson and all his office staff took a 20% pay cut in order to avoid further layoffs, and in the second half of 2009 Mr Jameson made a substantial personal loan to the company to keep it afloat.

Determination

[33] Although, as recorded above, Mr Gotoby's terms of employment could and did accommodate an arrangement where annual leave could be taken to cover a period where insufficient work was available, there was no evidence of any precedent for the

taking of what amounted to unpaid leave. I do not accept that the employment agreement remained on foot during a period when no work at all was offered and no further consultation took place with Mr Gotoby about his future with the company. Mr Gotoby was entitled to consider himself effectively dismissed from 6 April, rather than (as Mr Jameson maintained) 11 May.

[34] As to whether that dismissal was justified, the respondent clearly did not have enough work for all the staff. It was reasonable, in these circumstances, for it to proceed with redundancies. I also accept that Mr Jameson has justified the approach by which it was determined who would come back to work under the new structure. He effectively asked the workforce to self-select into work teams which were rehired to operate on a fixed price basis, with the rest of the staff occupying “float” positions. This approach was not arbitrary and was adopted for genuine operational reasons. Everyone had an opportunity for input and no more jobs were lost than necessary. I conclude that the end result (including the fact that Mr Gotoby was one of those selected for redundancy) was fair and reasonable. The dismissal was substantively justified.

[35] However the respondent did not adequately consult with Mr Gotoby, failed to explain exactly why he personally was let go and failed to give notice of termination. Although Mr Jameson did give Mr Gotoby an outline of the proposal and forewarned him that ongoing full time work was not guaranteed (on 25 February) he did not tell Mr Gotoby that his employment was ending then or on any particular date. The proposal was still, at that stage, a work in progress. Mr Gotoby was entitled to further consultation as the situation continued to develop between 25 February and 6 April, as well as formal notification of the outcome before work ceased completely for him, as it did on 6 April.

[36] Mr Gotoby was, as he asserted left “in limbo” in a wholly unacceptable way. There can be no question that this dismissal was procedurally unfair.

Remedies

[37] I accept that it is in order to award sum equivalent to what would have been a reasonable period of notice, which in this case I consider to be a period of one month.

Given my conclusion that the dismissal was genuinely for reasons of redundancy I am not satisfied that subsequent loss of earnings after 11 May can be attributed to the personal grievance.

[38] I was not given precise details of Mr Gotoby's earnings but from the evidence I do have I am satisfied that one month's pay in lieu of notice can be rounded to \$3,000.00 gross.

[39] As for the claim for hurt and humiliation I received evidence from a health professional and from Mr Gotoby's mother indicating that his emotional well being and self confidence suffered a serious set back as a result of the uncertainty he experienced in the period after 6 April. I am satisfied that a modest award is in order to compensate for the poor handling of the termination. In all the circumstances I set this at \$5,000.00.

Summary of Orders

[40] The respondent, Allied Exteriors Limited, is ordered to pay the following sums to Mr Gotoby:

- i. \$3,000.00 gross lost earnings, and
- ii. \$5,000.00 compensation for hurt and humiliation.

Costs

[41] Costs are reserved. Any application for costs must be made, with reasons, within 28 days of the date of this determination.

Yvonne Oldfield

Member of the Employment Relations Authority