

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Digby Green (Applicant)
AND Marexim Export-Import Limited (Respondent)
REPRESENTATIVES Hamish Russ, Advocate for Applicant
Kim Stretton, Advocate for Respondent
MEMBER OF AUTHORITY R A Monaghan
INVESTIGATION MEETING 22 August 2005
SUBMISSIONS RECEIVED 6, 9 and 16 September 2005
DATE OF DETERMINATION 10 October 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Digby Green says he was unjustifiably dismissed by his former employer Marexim Export-Import Limited ("MEIL"). The dismissal was imposed by reason of redundancy. Mr Green says:

- (a) the redundancy could have been avoided by allowing one employee to 'go on the road';
- (b) his selection for redundancy was unfair; and
- (c) a vacancy advertised a short time after he was notified of his redundancy was for a position not significantly different from his own, and was an alternative that should have been made available to him.

[2] Mr Green also says he has a personal grievance on the ground that his terms and conditions of employment were affected to his disadvantage by an unjustifiable action of MEIL's. The grievance is concerned with the fact that Mr Green's employment agreement incorporated a termination provision obliging an employee to give four weeks' notice of the termination of employment, while the employer was obliged to give only two weeks' notice.

The disadvantage grievance

[3] There was no express mention of a disadvantage grievance in the statement of problem or any of the documents filed in support. It was raised during the investigation meeting. If the grievance was being raised for the first time during the meeting, then it was well outside the 90 day time limit on the raising of personal grievances, as set out in s 114 of the Employment Relations Act 2000. Mr Green's advocate said the grievance had been raised before. When I asked when and how, a letter to MEIL dated 9 June 2004 was produced.

[4] The letter opens by saying it is a formal notification of Mr Green's personal grievance for unjustified dismissal. It then sets out a number of paragraphs expressed to be 'by way of background', and which describe the circumstances of the redundancy. One of those paragraphs reads:

"Mr Green was asked to sign an employment contract a few weeks before he was made redundant and although he signed the contract he did have an issue with section 19.1 – the discrepancy of notice periods between employee and employer."

[5] I was asked to find that paragraph amounted to the raising of the disadvantage grievance Mr Green was seeking to pursue. Nothing more was said in the letter about the employment agreement and there was no express reference in the letter to any disadvantage grievance. Nothing in the surrounding evidence was relied on in support of the proposition that a grievance was raised in respect of the employment agreement or its notice provision. While the threshold for the raising of a personal grievance is not high, this paragraph does not meet it. It cannot be read as anything other than a statement forming part of the background to Mr Green's personal grievance in respect of his redundancy.

[6] Therefore the grievance has been raised well outside the 90-day period. There was no application for leave to proceed with it. No such leave is given.

[7] Mr Green's advocate submitted that the grievance can be considered on the ground that s 122 of the Act allows the Authority to do so. Section 122 reads:

"Nothing in this Part or in any employment agreement prevents a finding that a personal grievance is of a type other than that alleged."

[8] Section 122 is not intended to allow parties to ignore the provisions regarding the raising of personal grievances within 90 days, as contained in ss 114 and 115. If I were to accept it, which I do not, the submission would have that effect.

[9] Further, s 122 can apply when the factual matrix advanced in support of an alleged grievance such as a dismissal, for example, does not support the existence of a dismissal although it may support the existence of another kind of grievance, such as a disadvantage (see **New Zealand Van Lines Limited v Gray** [1999] 1 ERNZ 85 (CA)). That is not the same thing as picking one element out of the factual matrix, as has happened here, and relying on s 122 to create a new grievance out of that one element. That is not the purpose of s 122.

[10] I will, however, say this about the employment agreement. In early February 2004 Mr Green asked for a copy of his written employment agreement. It seems he and the previous owner of the MEIL business had not entered into a written agreement when their relationship began in 1998, and the matter was not addressed when the business was purchased by the current owners in July 2002. When Mr Green asked for a written agreement, he was promptly given a standard agreement to consider and sign if he wished. Both parties signed it on or about 27 February 2005.

[11] Mr Green asserted that he was pressured into signing, but the evidence did not support that to any degree. On the contrary, Mr Green was even given time to obtain advice on the agreement. At best, Mr Green queried the differing notice provisions at the time of signing. Still, he signed.

[12] Aside from this it seemed from discussions at the investigation meeting that Mr Green's concern, in reality, was with the fact that he offered his resignation three days before he was advised of his redundancy and during the course of the redundancy consultation process. He did so because he was stressed by the process and anticipated being selected for redundancy anyway. Had his

resignation been put into effect he would have had a notional four weeks from the date of the resignation until his employment ended. Since he did not proceed with it, but his employment ended anyway, he lost the equivalent of one week and two days' pay in lieu of notice.

[13] While that is an understandably galling outcome for Mr Green, he did allow himself to be persuaded not to proceed with the resignation. In so persuading Mr Green I do not believe Dean Coleman, MEIL's managing director, was engaging in misleading or deceptive conduct in respect of the termination of Mr Green's employment. On the contrary he had taken considerable care to obtain and act on advice about the correct process for deciding on and implementing a redundancy, and was adhering closely to that advice. He did not wish to convey to Mr Green that Mr Green's redundancy was inevitable or predetermined, rather he conveyed his view that the process needed to be completed before any conclusions were reached about Mr Green's future.

[14] Mr Coleman also expressed to Mr Green a concern at the possibility that Mr Green would be subjected to a stand down period in respect of any income support he sought following a resignation, and the belief that this would not be the case if Mr Green was dismissed for redundancy. He may have been wrong, but if that was the case the error was genuine. It was open to Mr Green to make his own enquiries and pursue the matter if he wished. He did not do so.

The redundancy

1. The consultation process

[15] By letter dated 1 March 2004, Mr Coleman advised the MEIL staff he was considering a restructure of the sales and operations side of the company's business. He proposed that the number of front line sales positions be reduced from three to two, and sought responses to this. There was no dispute that, on the face of the matter, MEIL's sales performance justified a reduction in the number of sales positions. Even Mr Green said the staff did not have enough to do once a catalogue project had been completed. His was one of the affected positions.

[16] Mr Green's response took the form of a 19-page written report in which he argued against reducing the number of sales staff from three to two, and made a number of suggestions about ways of cutting costs and increasing sales. One of the suggestions included having a representative go 'out on the road' – a suggestion he had been making for some time in any event. As matters stood, the sales representatives were effectively telesales representatives and no travelling or personal calling on clients was required of them.

[17] I do not accept the submission that Mr Green's redundancy was not genuine as it could have been avoided by having one representative go out on the road. Mr Coleman was entitled to make a management decision about how to address the company's poor sales performance. The submission amounts to saying Mr Green's proposal should have been accepted as an alternative. While Mr Coleman was obliged to consider the proposal, and he did, he was not obliged to accept it. One of his main concerns was that extra revenue that might be generated by Mr Green's proposal would be more than outweighed by the costs associated with implementing that and other suggestions. That Mr Coleman did not accept the suggestion does not render less than genuine a decision which was based on a genuine and well-founded concern about the company's performance.

2. The selection process

[18] By letter dated 9 March 2004 Mr Coleman advised of his decision to proceed with the reduction in the number of sales staff, and sought to consult about the method of selection. The letter included advice that MEIL favoured making an assessment based on the 20 characteristics

outlined in an attached table. The characteristics amounted to a suggested list of the attributes of a good salesperson, and included references to sales skills, reliability, attitude, product knowledge and presentation. Each characteristic was to be given a rating of 1 to 5, with 1 being very poor and 5 being excellent.

[19] Mr Green saw himself as the person most likely to be made redundant, so approached Mr Coleman on 12 March 2004 to offer the resignation to which I have already referred. As already described, the resignation did not proceed. However Mr Green had read the signs correctly, and was ranked lowest on Mr Coleman's list of characteristics. On 15 March Mr Coleman met with Mr Green to advise of this outcome. He gave Mr Green a letter of that date, which confirmed that Mr Green was not selected for one of the two remaining positions and sought a meeting to discuss alternatives to redundancy.

3. A suitable alternative position

[20] A meeting went ahead on 16 March, this time attended by the parties and their representatives. The existence (or not) of an alternative position was raised but no position was identified. A follow up letter dated 17 March confirmed the date of termination of employment as 30 March 2004, and set out arrangements relating to the termination. Mr Green was not required to work through his notice period.

[21] In April 2004 one of the other sales representatives, who had not in any event worked full time in that role, also left his employment. He was not replaced.

[22] On or about 27 March 2004 a recruitment consultant placed an advertisement for a customer services representative for 'one of New Zealand's specialist lighting and electrical importers.' The person was to develop relationships following from a product launch, and was to call on electrical wholesalers in the Bay of Plenty, Waikato and Auckland areas.

[23] According to the advertisement, the position was an 'on the road' position. Mr Green says his redundancy was not genuine because he had suggested it could be avoided by the creation of an 'on the road' position, the suggestion was rejected, and yet within less than a fortnight an 'on the road' position was being advertised. It was eminently predictable that Mr Green would see the advertisement and take the view he has of it. Although I was told that the decision to create and recruit for the position was made on or about 22 or 23 March, it seems to me the decision was made and acted on unusually quickly. If the creation of the position was receiving serious consideration any earlier than that, it would have been sensible for Mr Coleman to at least warn Mr Green of what was coming.

[24] The background to the position is this. Mr Coleman's family trust owns the shares in another company, Marexim Lighting and Electrical Technologies Limited ("MLETL"). The company was registered on 16 July 2004. Mr Coleman is the sole director. I accept that, although the company had not been registered in March 2004, the position was created for the purposes of that company's business. It specialises in selling high quality electrical products to electrical wholesalers in the New Zealand market, while MEIL now specialises in importing and exporting the products, distributing them to customers such as super yacht builders and focussing on the international market.

[25] Although MLETL was not registered until July 2004, the marketing material for its business was being prepared while Mr Green was still employed. Mr Green saw at least some of it and was aware of the use of a model named Amber Peebles as the face of the marketing campaign. For example an industry magazine of February-April 2004 featured Ms Peebles and 'Marexim' on its

cover. The magazine contained a cover story extolling the virtues of high quality products and identifying Marexim as a supplier of those products.

[26] It was submitted on behalf of Mr Green that, since MLETL had not by then been registered, the argument that the position was a new position for a second company is not available. It was further submitted that the position could and should have been offered to Mr Green.

[27] However the position was not the same as or substantially similar to the position Mr Green already held. He was a telesales person who wanted to go on the road in the role of travelling salesperson but, for good reason at the time, this was not agreed to. Despite what was said in the advertisement, the new position was created primarily to conduct product launches and train customers in the use of the company's products. After that there was no need for ongoing customer visits. Indeed the person appointed worked for only a few months and was not replaced. The position was not essentially that of a travelling salesperson, let alone a telesales person, and if anything it had a strong marketing element.

[28] A second factor which must materially have influenced Mr Coleman's approach to any possibility of offering Mr Green the job was that a clear theme was being promoted in support of the launch and marketing of the new company. It involved youth and glamour, and without intending any disrespect Mr Green does not have either of those attributes. Neither do many of us. I was not addressed on the extent of an employer's ability to rely on attributes of that kind in recruiting for a position like the one in question here.

[29] Suffice to say I am not persuaded that the position associated with MLETL was one that could and should have been offered to Mr Green.

[30] I therefore conclude his dismissal was justified.

Costs

[31] Costs are reserved. The parties are invited to reach agreement on the matter. If they seek a determination from the Authority they are to file and serve memoranda setting out their positions.

R A Monaghan
Member, Employment Relations Authority