



[2] The issues to be determined are: was Mr Grove justifiably or unjustifiably dismissed? If he was unjustifiably dismissed, what if any remedies are available to Mr Grove?

[3] And, did the Company breach any of the terms of his employment? If it did, what if any remedies are available to him?

### **The Investigation**

[4] During a telephone conference on 18 September 2009 the parties agreed to an investigation in Wellington on 21 January 2010. The parties usefully provided the Authority with witness statements and an agreed bundle of documents in advance of the investigation. Efforts to resolve the problem on their own terms during the half-day investigation were not successful.

### **Background**

[5] Mr Grove is a registered electrician with experience in programming, automation and data acquisition.

[6] Mr Grove commenced employment with the Company on 19 November 2007, moving from Auckland to Wellington to do so.

[7] Since being made redundant Mr Grove has been unsuccessful in repeated attempts to find employment.

### **Applicant's Position Summarised**

[8] Mr Grove says that during a webcam interview for the position, and because accepting employment with the Company required him to move from Auckland to Wellington, he asked for and received from the Company's technical manager an assurance that it would not employ him for less than five years.

[9] Mr Grove says that in the latter half of 2008 the nature of the work allocated him started to change, and that he was not receiving the work he had been employed

to undertake, in particular automation projects. He says he ended up doing more electrical work and troubleshooting, and that he found himself being blamed for problems caused by other electricians that he was sent in to fix.

[10] Mr Grove believes two new employees, one an electrician, the other a salesman, were increasingly allocated him tasks, including quoting of power monitoring and thermal imaging.

[11] Mr Grove raised his concerns with the Company's general manager who told him to get the technical manager to give him some of his work: the latter declined on the grounds it was too involved and he could not take time to explain.

[12] Because he believed he was being discriminated against, and that his relationship with the technical manager was deteriorating, Mr Grove raised a grievance in February 2009: the problem he identified was his work being diverted to others.

[13] Mr Grove says that, in a meeting with the Company's general manager on 18 February, the latter said, "*You have a target on your back*" (par 32, applicant's statement). The applicant also says he was reassured there was plenty of work and there would be no redundancies

[14] Mr Grove did not believe he got any real help as a result of raising his grievance but, while he felt it had been addressed, he did not know "*where to take it*" (par 32, above) and did not pursue his grievance any further. He says it was never resolved and remains alive. Mr Grove believes that, as a result of raising a grievance, his relationship with the technical manager deteriorated further.

[15] Mr Grove's first performance review took place on 25 March 2009: it was undertaken by the technical manager. The applicant believes it was very unfair as a list of problems were identified dating back to March the previous year. He did not sign the assessment as he believed it was inaccurate. The technical manager continued to allocate work Mr Grove believed should have been his to other technicians.

[16] On 21 April the Company convened a meeting and advised staff it was 25% down on sales, in trouble and needed to economise. Job losses were foreshadowed.

[17] On 23 April Mr Grove received a letter dated the previous day headed "*Possible Redundancy*"(pg 62 in the agreed bundle): a meeting with him on 24 April was requested.

[18] At the 24 April meeting Mr Grove questioned the timing of the decision and whether his problems with the technical manager and recent negative performance review were related to the Company's decision. Mr Grove advanced alternatives to him being made redundant.

[19] By way of a letter dated 27 April Mr Grove was advised he was redundant. Of 11 employees, Mr Grove and an adult electrical apprentice were selected for redundancy.

[20] On 13 July Mr Grove found two advertisements by the Company for full-time electricians: the job descriptions were, he says, very similar to the work he was originally engaged to undertake.

### **Respondent's Position Summarised**

[21] The Company says that at no time did it offer Mr Grove any form of guarantee that he would be employed for five years. It would be unrealistic to do because the Company cannot forecast its workload for such a long period.

[22] Mr Grove failed to show a reasonable understanding of how to work the thermal imaging equipment and software in a reasonable time and, so as to get the most efficient use of it, the machine was allocated to another staff member.

[23] The Company does not accept it withheld information or work from the applicant at any time as he alleges. Mr Grove was slow to pick up and understand how things worked or how they hung together.

[24] Work was allocated to staff, including Mr Grove, on the basis of what was most efficient for the Company.

[25] The Company's technical manager denies Mr Grove's claims he made negative comments about the applicant, or that he was antagonistic to him. Time frames allocated Mr Grove were realistic. The technical manager denies the applicant's claim that he 'grinned' when told of Mr Grove's redundancy.

[26] There were issues with some of the work done by Mr Grove which the technical manager had to correct: this was reflected in the performance review of March 2009. It was a genuine exercise.

[27] In April 2009 the Company's employees comprised two apprentices, eight electricians and other general administrative staff. It now employees one apprentice and six electricians, three of whom are currently subcontracted to other electrical companies. At the time of Mr Grove's redundancy, another employee was laid off and two others took early retirement.

[28] The reduction of work available to the Company was notable during the period December 2008 and January 2009. During January and February 2009 it became noticeable to the respondent's sole shareholder and director that its workload remained quiet. The director took the step, at an Electrical Contractors Association of NZ (ECANZ) meeting, of offering other electrical contractors, on an unofficial basis, his staff on a sub-contractual basis.

[29] The director denies Mr Grove's claim he assured him there would be no redundancies.

[30] Profit and loss figures up to March 2009, available in April, showed that the Company had made a loss in each of the preceding six months: advice from the director's business coach was to think clearly about options available to the respondent and to make a decision quickly before further damage was done to the Company.

[31] The director convened a staff meeting on 21 April. Notes attached to the respondent's statement in reply make clear what he spoke to staff about. Staff cuts were foreshadowed: ideas on costs savings were sought.

[32] The basis of the director's decision to make Mr Grove's position redundant was:

- a. The Company had three electricians who had similar skills, but the technical work of the type for which Mr Groves was experienced and qualified were particularly quiet.
- b. Other staff had more flexible skills and could be more adaptable in their work;
- c. Mr Grove was one of the highest paid electricians;
- d. Mr Grove could not be subcontracted to other companies with whom the respondent had such arrangements in place;
- e. Mr Grove's efficiency was low and the Company struggled to keep him busy with chargeable work; and
- f. The Company received the most complaints about Mr Grove's workmanship and tidiness. A subsequent complaint about his driving played no part in the decision to terminate his employment as it arose after the event. The other issues had all been raised with him previously.

[33] Mr Grove was not singled out or discriminated against. One other electrician was made redundant at the same time as the applicant.

[34] Mr Grove's suggestions about costs savings and greater profitability were considered. While some had merit they were either already being implemented or would not be viable soon enough.

[35] Mr Grove verbally withdrew his grievance raised by letter dated 17 February 2009. The director's comment, that the applicant had a target on his back, was made: its purpose was to let Mr Grove know that comments had been made about his efficiency and untidiness by customers. It was not a criticism but was to let him know what others had been saying about him.

[36] Following his termination, and in an effort to find Mr Grove fresh employment, the director emailed other ECANZ members and spoke to a member of that organisation about a possible job.

[37] The Company did place advertisements as stated by Mr Grove: the skills sought were in an area different to those of the applicant's. No suitable applicants responded and no appointment was made.

[38] The general manager position was to help the Company effect growth and rebuild after the recession was over: it had nothing to do with the applicant's work or his position.

### **Discussion and Findings**

[39] From the evidence arising out of my investigation, including the redundancy of another employee and early retirement of two others (none of whom have been replaced), I have no reason to doubt the genuine nature of the employer's decision to make Mr Grove's position redundant.

[40] The evidence of the Company's work declining is credible, as is its claim of reduced staff numbers and of sub-contracting arrangements for some of the surviving staff.

[41] Looking at all matters, including the process adopted by the Company, 'in the round' as I am urged to do by Ms Hubble, counsel for the applicant, I remain satisfied there is no evidence to indicate her client was singled out and/or that his termination arising out of redundancy was a disguised performance matter or based on animus by anyone in the Company to Mr Grove, and therefore a sham.

[42] I find it more credible that Mr Grove elected to withdraw his earlier grievance and it was therefore not extant – as he claims – at the time of his termination. I reach this conclusion as a result of the applicant's own evidence in his supplementary statement ( par S6) where he talks of being fobbed off by his employer and consulting his contract and the Web as to how he might raise a personal grievance. Mr Grove would therefore clearly have known from his research what his next steps were if, as he claimed, the Company was not acting on his grievance advice.

[43] I find no evidence of that grievance being a factor in the respondent's decision making resulting in Mr Grove being made redundant.

[44] From the evidence I do not accept that the parties made an explicit, oral reciprocal and binding agreement to Mr Grove having at least 5-years employment. The parties are in dispute in respect of this matter. What is clear is that no such term is provided for in the applicant's letter of appointment (pg 9 in the bundle) or employment agreement (from pg 13). The notion of a minimum 5-year employment provision is contradicted by the restructuring and redundancy provisions expressly set out in the applicant's employment agreement.

[45] I do not doubt that Mr Grove is much distressed by the circumstances of the termination of his employment. He understandably interpreted that event in light of his growing unhappiness arising out of frustrated expectations about the work he believed he was employed to undertake, what he saw as a deteriorating relationship between himself and the Company, unfair performance issues and – from his perspective – an angry reaction to an earlier grievance.

[46] I also accept that the applicant was disadvantaged by the turn of events, in particular by issues including work allocation and performance. He was particularly disadvantaged as a result of being made redundant, and was deeply distressed as a result.

[47] However, those disadvantages cannot be said to be unjustified. As is made clear above, Mr Grove's expectations – particularly his expectation of a minimum 5 years employment, and the work he was to undertake – were not based on contracted terms. While the redundancy process was a quick affair, it drew no protests from Mr

Grove at the time: he did not seek additional time to respond nor did he challenge – at that point – the basis of the decision to select his position for redundancy.

[48] On a balance of probabilities basis there is insufficient evidence (if any at all) supporting the applicant's claims of unjustified disadvantage.

[49] Put another way, the respondent's actions, objectively measured, were in the circumstances at the time those of a fair and reasonable employer: s. 103A of the Employment Relations Act applied.

### **Determination**

[50] Mr Grove's application is dismissed.

[51] Costs are reserved.

**Denis Asher**

**Member of the Employment Relations Authority**