

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 216
5369138

BETWEEN

MICHAEL HAFNER
Applicant

A N D

CLUB MOUNT MAUNGANUI
INCORPORATED
Respondent

Member of Authority: K J Anderson
Representatives: W Hika, Counsel for Applicant
W Macphail, Counsel for Respondent
Investigation Meeting: 26 March 2013 at Tauranga
Date of Determination: 29 May 2013

DETERMINATION OF THE AUTHORITY

Introduction

[1] The applicant, Mr Michael Hafner, claims that the termination of his employment on the ground of redundancy was an unjustifiable dismissal. Mr Hafner asks the Authority to find that he has a personal grievance and award him various remedies. Conversely, Club Mount Maunganui Incorporated says that following a restructure, for genuine reasons, the position of Mr Hafner was no longer required.

Factual background

[2] Club Mount Maunganui Incorporated (“the Club”) provides a location for local people to meet and engage in a number of activities such as bowls and croquet. There is a bar and a restaurant within the Club.

[3] Around mid 2011, the Club became concerned about the financial viability of its restaurant. The evidence of Mr David Oliver, the Club Manager at the material

times, is that as a result of his concerns pertaining to the restaurant running at a financial loss, he commenced a review of the restaurant's staffing structure in order to ascertain if the restaurant could be run more efficiently, with a consequent reduction in costs.

[4] The outcome of a review carried out by Mr Oliver was that he formed a preliminary view that the restaurant could be operated with three permanent staff and a pool of "as required" employees, conditional on the demands of the restaurant patronage. As evidenced by comparable charts provided to the Authority, the staffing structure prior to the review is that the restaurant had around eight permanent employees; including Mr Hafner, who was primarily employed as a dishwasher/kitchen hand, albeit it appears that he also performed some other duties from time to time.

[5] Mr Oliver attests that when conducting the review of the operations of the restaurant, he took into consideration that there was not enough work involved to keep all of the permanent staff fully occupied; and the revenue from the restaurant was not sufficient to justify having the existing number of fulltime staff. Mr Oliver calculated that if his restructuring proposal was adopted by the Club, there would be a saving of approximately \$104,000 per annum in wages expenditure.

13 September 2011

[6] On 13 September 2011, Mr Oliver met with Mr Hafner and informed him on the restructuring proposal, as recorded in a letter of the same date that was given to him. The letter sets out with some clarity the situation:

This letter is to inform you we are looking at the way we are presently doing things for financial and operational reasons. We consider there may be a smarter way of doing things than the way we are presently operating. As part of this process, we are considering adopting a restructuring proposal.

Before we make any decisions about whether to adopt the restructuring proposal presently under consideration, we want to hear your views about the matter.

If, however, the restructuring proposal presently under consideration is adopted without change, your employment position may be surplus to our requirements. I would like to hold a formal consultative meeting to discuss this matter with you.

You are entitled to have a representative with you at this meeting if you would like to.

At the meeting you will be provided with the opportunity to put forward any initial comments and suggestions you may have regarding the restructuring proposal under consideration. As mentioned earlier, we want to hear your views about the situation before making a decision about what to do.

Meeting 15 September 2011

[7] At a meeting on 15 September 2011 the restructuring proposal, as it related to his fulltime position, was explained to Mr Hafner. It was explained by Mr Oliver that it was proposed to disestablish Mr Hafner's fulltime permanent position and if this eventually transpired, then Mr Hafner's employment would be redundant. Mr Hafner was invited to consider this and give feedback on the overall proposal. Mr Oliver attests that Mr Hafner never presented any feedback.

Meeting 21 September 2011

[8] Mr Oliver met again with Mr Hafner on 21 September 2011 and informed him that the Club had decided to adopt the restructuring proposal and as a consequence, Mr Hafner's position was going to be made redundant. Mr Hafner was also informed that while he was entitled to two weeks' notice under his employment agreement, the Club was giving four weeks' notice. Mr Hafner was given the option of working out the notice but he elected to be paid in lieu thereof and as I understand it, the last day of work at the Club for Mr Hafner was 21 September 2011.

Analysis and conclusions

[9] As with any dismissal, pursuant to section 103A of the Employment Relations Act 2000, the test that the Authority must apply is whether the decision to dismiss Mr Hafner on the ground of redundancy was what a fair and reasonable employer could have done in the circumstances.

[10] And then, as was held by the Employment Court in *Simpson's Farm Limited v Aberhart*¹:

So long as an employer acts genuinely and not out of ulterior motives, a business decision to make positions or employees redundant is for

¹ [2006] ERNZ 825

the employer to make and not for the Authority or the Court, even under section 103A.

[11] The statutory concept of unjustified dismissal is concerned with both the reason for the dismissal and the manner in which it was handled; with the substantive justification and with procedural fairness.²

Was the redundancy of Mr Hafner's position genuine?

[12] The Club is largely funded by fees paid by its members. It is quite a small scale operation, as found in the many clubs that exist in towns and cities throughout New Zealand. The evidence also shows that the restaurant operation was not (and still is not) a financially viable proposition. Mr Hafner claims that his fulltime position continued to exist at the time that he was informed of it being made redundant. While it is probably correct that the work he used to do still remains to be done, the Club has chosen to use the three permanent staff and as required casual staff, to carry out the work that Mr Hafner used to do. This is an option that was open to the Club and I conclude that for financial reasons it was entitled to do so. Therefore, the decision to disestablish Mr Hafner's permanent fulltime position was a decision that a fair and reasonable employer could make in all the circumstances.

[13] Indeed, when it comes down to it, I understand that Mr Hafner is not really arguing about the decision of the Club to disestablish his permanent fulltime position. Rather, he argues that he should have been offered an opportunity to be re-employed on a casual or as required basis: but he was not. Mr Hafner alludes to other people being offered casual employment; but he never was. In particular, Mr Hafner gives the example of Ms A³ whom he alleges was employed on a casual basis and took over the work that he carried out. The Club refutes this allegation and says that Ms A was employed to perform predominantly food preparation or food serving tasks. Mr Hafner explained to the Authority the duties that he carried out (in addition to dishwashing) whilst employed by the Club, but there is little evidence of him being involved with food preparation and serving.

² *G N Hale & Son Limited v Wellington etc Caretakers etc IUOW* [1990] 2 NZILR 1079

³ As this person was not involved in the proceedings of the Authority, it is not appropriate for her name to be published.

[14] Further, the evidence about the work that what Mr Hafner says he performed is disputed by the Club and while it is acknowledged that he carried out some other duties, the Club says that Mr Hafner's primary employment was as a dishwasher.

[15] Unfortunately the evidence about exactly what Mr Hafner did, as compared with what Ms A was doing (but only until 20 November 2011), is inconclusive and hence I am unable to find that the allegation made by Mr Hafner is valid. But even if it were otherwise, the evidence of Mr Oliver is that he discussed with Mr Hafner the possibility of casual work being available to him and Mr Hafner was not interested. I put this point to Mr Hafner for his response at the investigation meeting and he said that he couldn't recall the possible availability of casual work being discussed. But I did not find Mr Hafner's evidence about this to be particularly convincing, as compared with the very credible evidence of Mr Oliver.

Are there any procedural defects or other factors that made the termination of Mr Hafner's employment unfair or unreasonable?

[16] There is nothing in the statement of problem or the submissions made on behalf of Mr Hafner to suggest that he challenges the procedural aspects pertaining to the loss of his employment with the Club. In any event, on the evidence before the Authority, I accept that the process adopted by the Club was fair and reasonable in the circumstances.

Determination

[17] It seems to me that the Club could have communicated better with Mr Hafner in regard to how and when as required casual work may be available to him. Equally though, Mr Hafner never left any impression that he could be contacted if appropriate casual work became available from time to time. But apart from some reservations about this aspect of the overall circumstances, I am satisfied that the termination of Mr Hafner's employment on the ground of redundancy was something that a fair and reasonable employer could do in the circumstances. It follows that I find that the dismissal was justifiable and that Mr Hafner's claims to the contrary are unsuccessful.

Costs

[18] Costs are reserved. The parties are invited to resolve this matter if they can. In the event that a resolution is not achieved, the respondent has 28 days from the date of

this determination to file and serve submissions. The applicant has a further 14 days to respond.

K J Anderson
Member of the Employment Relations Authority