IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 377
5394778

	BETWEEN	KEVIN HARPER Applicant
	AND	FORMAT SIGNS LIMITED Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Applicant in Person Jacques de Lange, Advocate for Respondent
Investigation Meeting:	7 August 2013 at Auckland
Determination:	22 August 2013

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Kevin Harper, claims that he was unjustifiably dismissed by the Respondent, Format Signs Limited (FSL), on 11 July 2012 when his employment was terminated on the grounds that his position had become redundant.

[2] In particular Mr Harper claims that he had not been consulted about the decision to terminate his employment, and that his position had been unfairly selected for redundancy.

[3] FSL denies that Mr Harper had been unjustifiably dismissed and claims that the redundancy had been motivated by genuine commercial reasons and that it had carried out a proper process. FSL also claims that Mr Harper's position had not been unfairly selected for redundancy.

Issues

a. The issues for determination are whether Mr Harper was unjustifiably dismissed by FSL by way of redundancy, specifically did FSL:

- have genuine commercial reasons for the redundancy exercise

- follow a fair and proper process, specifically did FSL unfairly select Mr Harper for redundancy

Background Facts

[4] Mr Jacques de Lange, Managing Director of Format Limited and director of a number of other companies, said he had been approached by Mr Jared Percival, the son of a long-serving employee of Format Limited, to assist Mr Percival in setting up FSL, a business specialising in the creation and installation of signage for other businesses..

[5] Mr de Lange said his role had been to guide and advise Mr Percival, and he had assisted Mr Percival to draw up a business plan. Funding for the new venture had been provided by Format Limited

[6] Mr Harper said he had met Mr Percival through a mutual contact and had been offered a position with FSL as a Sign Writer on an hourly rate of $16.00, although this had subsequently been increased to $18.00 per hour.

[7] Mr Harper had been employed subject to an individual employment agreement (the Employment Agreement) which stated that he was employed as a Sign Writer and that the commencement date of his employment was 1 August 2011. Clause 6.12 of the Employment Agreement stated: "*No compensation is payable in the event of redundancy",* and it is noted that in the event of redundancy 2 weeks' notice would be provided.

[8] Mr Harper explained that during the job interview discussion with Mr Percival it had been agreed that although he would commence employment as a Sign Writer, he would assume the role of Production Manager as the business became larger and more profitable. It had also been agreed that his salary would increase at that time.

[9] Mr de Lange confirmed that Mr Percival had told him that Mr Harper's position would evolve into that of Production Manager.

[10] Mr Harper also said that Mr Percival had been aware that he had been applying for residency in New Zealand, and had offered to support his application to Immigration New Zealand. Mr de Lange stated that he had no personal knowledge of Mr Percival signing Mr Harper's application to Immigration New Zealand.

[11] Mr Harper said that his relationship with Mr Percival had become very difficult and strained and he had disagreed with the way in which Mr Percival had been managing FSL which had resulted in constant arguments between them.

[12] Mr de Lange said he had received several emails from Mr Harper which outlined his concerns regarding Mr Percival and his operation of FSL. Mr de Lange said he had been concerned at the content of the emails and had investigated the issues raised, as a result of which he had held discussions with Mr Harper and Mr Percival.

[13] Mr de Lange said he had informed Mr Harper and Mr Percival that unless FSL operated profitability, there was no guarantee of on-going funding being provided. Mr Harper confirmed that in March 2012 Mr de Lange had told him that FSL was operating at a loss and that on many occasions Mr Percival had also informed him of this.

[14] In April 2012 Mr Shane Williams was employed by FSL as Production Manager. Mr Harper said he had become aware of this following his return from a holiday in Australia at the beginning of April 2012, and he had been concerned about the appointment and the fact that he believed Mr Williams to have been paid at a greater hourly rate than himself.

[15] Mr de Lange said that Mr Percival had explained to him that FSL had a number of prospective projects and that he wished to employ Mr Williams who had additional skills to those of Mr Harper in the area of IT and design.

[16] Although it represented a risk in terms of the finances of FSL, Mr de Lange said he had agreed to the appointment of Mr Williams because it would release Mr Percival to promote the business and bring in more work to FSL.

[17] Mr de Lange confirmed that Mr Williams had been remunerated at a higher level than that of Mr Harper and explained this as being attributable to his larger skill set and his being able to operate the design software.

[18] Mr Harper said that prior to Mr Williams joining FSL; he had been responsible for operating the design software and had received no complaints from FSL in relation to this.

[19] Mr de Lange explained that at the time of employing Mr Williams FSL had acquired a large signage contract involved in changing the naming rights on the AXA building to AIG, and as a result there had been ample work for both Mr Harper and Mr Williams. However approximately two months later the project had been put on hold, and FSL had been unable to operate profitably.

[20] Mr Harper said he had not been involved in the AXA naming rights contract, however he confirmed that it had been the largest contract FSL had undertaken.

[21] Mr de Lange said he and Mr Percival had discussed various options available to FSL in the circumstances and it had been agreed that Mr Percival would engage in a consultation process with Mr Williams and Mr Harper about the future of FSL.

Meeting held on 25 June 2012

[22] Meeting notes provided in evidence by FSL stated that on 25 June 2012 Mr Percival had spoken to both Mr Harper and Mr Williams about the fact that (i) error rates were costing FSL money, (ii) FSL was overstaffed, (iii) work had slowed down considerably, and (iv) action would need to be taken to increase business efficiencies..

[23] Mr Harper said that the meeting on 25 June 2012 had consisted of Mr Percival addressing himself and Mr Williams about the business running at a loss, and asking them for suggestions on how to improve profitability.

[24] Mr Harper said he had subsequently provided suggestions on improving the business.

Meeting held on 2 July 2012

[25] The meeting notes provided in evidence by FSL stated that on 2 July 2012 Mr Percival met with Mr Harper and Mr Williams, confirmed that FSL was still unprofitable, that future work might not support having two people in the business and that redundancies might occur. Further that he (Mr Percival) was open to receiving suggestions from Mr Harper and Mr Williams, however this needed to be done quickly as: "… *the company is basically trading insolvent."*

[26] Mr Harper said he recalled Mr Percival speaking to him on 2 July 2012, but that Mr Williams had not been present, and Mr Percival had not mentioned the possibility of redundancies occurring.

Meeting held on 6 July 2012

[27] The meeting notes provided state that on 6 July 2012 Mr Percival had met with Mr Harper and Mr Williams separately, and that in respect of Mr Harper, had informed him that his position might be redundant.

[28] The notes record Mr Percival asking Mr Harper if he had any suggestions that might obviate the need for the redundancy of his position to occur; and it is recorded that Mr Harper did not have any suggestions.

[29] Mr Harper said that on 6 July 2012 Mr Percival had informed him that FSL was facing liquidation and that unless there was an improvement; FSL would need to make someone redundant. However although no names had been mentioned, Mr Harper said he had concluded that it would be Mr Williams' position which would be made redundant on the basis that Mr Williams had been the most recently recruited and had the least experience in FSL.

[30] Mr Harper said that on 9 July 2012 Mr Percival had handed him a letter. The letter stated:

> *This letter is to confirm that your position of Sign Writer is being made redundant as of Wednesday 11 July 29013.*
>
> *This decision is made due to decreased workload in this area of business and in no way reflects your ability or job performance.*
>
> *As per the terms of your contract, no redundancy is payable, however, we are happy to pay you 2 weeks in lieu of notice so that you may use this time to look for suitable employment.*

[31] Mr Harper said he had asked Mr Percival why his position had been made redundant to which Mr Percival had replied that FSL no longer had any work for him.

[32] The parties had attended mediation but this had failed to resolve matters, and on 11 September 2012 Mr Harper had filed a Statement of Problem with the Authority.

[33] Mr de Lange explained that Mr Percival had left FSL by mutual agreement in December 2012, and that it had been necessary to keep FSL active until March 2013, when it had ceased trading. Mr Williams had subsequently been offered a position and was currently employed with Format Limited.

Determination

Was Mr Harper unjustifiably dismissed by FSL by way of redundancy?

1. Did FSL have a genuine commercial reason for the redundancy of Mr Harper's position?

[34] Mr Harper confirmed that he had been informed by Mr de Lange in March 2012 that FSL had been operating at a loss, and further that Mr Percival had informed him of this on many occasions.

[35] Mr de Lange stated that the loss of the AXA naming contract had meant that FSL had been operating at a loss Although Mr Harper said that he had not been involved in that contract; he had been made aware by Mr Percival that FSL had been running at a loss following that contract being put on hold.

[36] I note that Mr Harper had not raised any objection to the genuine nature of the restructuring proposal.

[37] I determine that FSL had genuine commercial reasons for undertaking a restructuring exercise.

2. Did FSL follow a fair and proper process; specifically did FSL unfairly select Mr Harper for redundancy?

(i) Process

[38] The Test of Justification as set out in s 103A of the Employment Relations Act 2000 (the Act) addresses the question of whether or not an action was justifiable or is unjustifiable and states:

> ***S103A Test of Justification***
>
> *i. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
>
> *ii. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[39] Other provisions of the Act govern questions of justification for dismissal and, in particular, by reason of redundancy. Section 4 of the Act addresses the requirement for parties to the employment relationship to deal with each other in good faith. Section 4(1A)(c)

in particular is relevant to a redundancy situation and 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 to the employee affected:

> "(i) *access to information, relevant to the continuation of the employees' employment, about the decision; and*
>
> *(ii) an opportunity to comment on the information to their employer before a decision is made."* s4 (1A)(i) and (ii).

[40] Although Mr Harper disagreed with some of the content of the meetings as recorded in the meeting notes provided by FSL in evidence, I find enough points of concurrence to conclude that Mr Harper was provided with relevant information prior to the decision being made about his continued employment, including the opportunity to comment on the information and provide suggestions to assist with averting the redundancy situation.

(ii) Selection

[41] Mr Harper said that Mr Williams, who had been appointed as the Production Manager at a higher salary than him, had been retained in employment despite having shorter service that Mr Harper, and having the least experience with FSL.

[42] The process of selection for redundancy which may be used by FSL is set out at clause 6.11 of the Employment Agreement:

> *If any redundancy or redundancies are required, we reserve the right to select staff for redundancy on criteria determined by us and that may include selection on the basis that staff are retained who we consider by reason of their skills and attributes are important to our continuing operation.*

[43] Mr de Lange stated that Mr William's position had not been selected for redundancy on the basis that whilst he had less service than Mr Harper, he had a superior skill set to that of Mr Harper, and explained that Mr William's salary level had been set commensurate to his experience..

[44] Mr Harper refuted the claim that Mr Williams had a superior skill set to himself, and stated that prior to Mr Williams being appointed, he had operated the design software, printers and the computers without any indication from FSL that he had not been competent to do so.

[45] Mr de Lange stated that he had received complaints from customers about the quality of Mr Harper's work, and had agreed to provide these in evidence to the Authority in support of this claim, however he has failed to so.

[46] In light of the provisions of clause 6.11 of the Employment Agreement, I consider that a fair and reasonable employer would have detailed and advised both Mr Harper and Mr Williams of the criteria to be used for selection and considered the merits of each employee against the criteria. To ensure a transparent process, the results of the selection process would then be made available to each employee. However there is no evidence that FSL followed the process for selection as set out in the Employment Agreement.

[47] There is no evidence of any warnings or disciplinary process taking place in connection with the alleged short-comings of Mr Harper in respect of his operation of the FSL computer software, and I note that the termination letter to Mr Harper dated 9 July 2012 stated that the decision to make Mr Harper's position redundant: "*in no way reflects your ability or job performance".*

[48] I find that this statement does not correlate with the intent of clause 6.11 of the Employment Agreement and further there is no mention in the letter of the process used by FSL in selecting Mr Harper's position for redundancy.

[49] I determine that Mr Harper was unfairly selected for redundancy, and determine that he has been unjustifiably dismissed.

Remedies

[50] Mr Harper has been unjustifiably dismissed and is entitled to remedies.

Lost Wages

[51] Mr Harper supplied satisfactory evidence to the Authority that he had made an effort to mitigate his loss following the termination of his employment with FSL. Mr Harper has since obtained part-time employment.

[52] FSL is to reimburse Mr Harper for lost wages from the date of his dismissal on 9 July 2012 for a period of 13 weeks pursuant to s 128 (2) of the Act.

[53] FSL is to pay Mr Harper the sum of $8,415.00, being 13 weeks x $765.00 per week, less 2 weeks' salary paid in lieu.

Compensation pursuant to s 123(1) (c) (i) of the Act

[54] I accept that Mr Harper suffered hurt, humiliation, and injury to feelings as a result of the unfair selection for employment.

[55] FSL is to pay Mr Harper the sum of $3,000.00 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1) (c) (i) of the Act**.**

Other monies lost: costs associated with an Immigration application.

[56] Mr Harper is claiming costs in relation to his application for residency. Although Mr Harper claimed that Mr Percival supported his application to Immigration New Zealand, he had not provided evidence in support.

[57] On this basis I am unable to determine that Mr Harper is entitled to monies in respect of his application to Immigration New Zealand.

[58] Mr Harper is to be reimbursed the filing fee of $71.56.

Costs

[59] Costs are reserved. I note that Mr Harper had been not been legally represented at the Investigation Meeting, however Mr Harper had obtained legal advice during the investigation process. Accordingly the parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority