

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	John Harris (applicant)
AND	Tony Galbraith Limited (respondent)
REPRESENTATIVES	Mike Andrews for the applicant Tony Galbraith for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Palmerston North, 19 January 2005
DATE OF DETERMINATION	21 January 2005

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. The applicant, John Harris, says the respondent (the Company) acted in breach of his contract and/or unjustifiably dismissed him – statement of problem received on 27 September 2004. He sought payment of compensation for humiliation, etc of \$10,000, lost wages, costs and any other order the Authority deemed just.

2. The Company said Mr Harris' position was made redundant for genuine commercial reasons and a joint agreement was reached with the applicant on the implementation of that redundancy – statement in reply received 30 September.
3. The parties underwent mediation but their employment relationship problem remained.

Investigation

4. During a telephone conference held on 20 October 2004 the parties agreed to a one-day investigation in Palmerston North commencing at 9.30 a.m. on Wednesday 19 January 2005. The parties usefully provided written statements in advance of the investigation. Counsel for the applicant, Mike Andrews, also usefully submitted a summary of his client's legal position.
5. Efforts by the parties during the investigation to settle this matter on their own terms were unsuccessful.

Background

6. Key background details can be summarised as follows.
7. The respondent is a Hamilton-based transport company.
8. John Harris was appointed as its operations supervisor, Palmerston North, on 6 October 2003.
9. Clause 15.2 of Mr Harris' employment agreement provides that:

The employer shall use best endeavours to consult with, notify or warn you in the early stages where your position is likely to be made redundant.

10. On Friday 25 June 2004 Mr Harris was asked to meet with the Company's general manager, Chris McKenzie, and its operations manager, Ron Ford. It is agreed that Mr Harris was not advised in advance of the meeting as to its purpose, nor was he provided with the opportunity to be represented at that meeting.

11. What was said at the meeting is in dispute: Messrs McKenzie and Ford say – consistent with clause 15.2 – that they consulted with Mr Harris as to the likely redundancy of his position. The Company says that, at the time of the meeting, nothing had been finalised in respect of whether, how and when the redundancy would take place, and that it was only after discussions with Mr Harris was it jointly agreed he would go that day while being paid up to 30 July (refer to par 3 of document A attached to the respondent’s statement in reply and the written statements from Messrs McKenzie and Ford).
12. The applicant’s recollection is entirely different: his description of what was said during the interview is that of a *fait accompli*, that he was told his position was being made redundant and, because of the level of his upset he only wanted to get out of the workplace (written statement and oral evidence to the investigation).

Discussion and Findings

Breach of Contract

13. For the following reasons I am satisfied that the Company acted in breach of the applicant’s employment agreement, in particular the “*best endeavours*” requirement of clause 15.2.
14. The respondent accepts that its approach was defective. This is acknowledged by the Company in its statement in reply, at par 6 where it says:

In hindsight, it may have been better for TGL to have advised John to think about the situation for a day or two, and to get any advice he wanted, before they came to a final decision about anything. TGL would do this in a similar situation in the future.

15. With these words, the Company is properly acknowledging the importance of the advice of the potential loss of employment, that redundancy can be a very significant event. The Company is also conceding that such advice requires a significant measure of careful treatment, so as to ensure amongst other things that communications are reasonably clear of error and confusion and to give those

affected a real opportunity to consider their situation before being called on to respond with meaningful decisions.

16. That is the purpose of clause 15.2 of Mr Harris' employment agreement, to ensure the applicant had a fair and reasonable opportunity to participate in a genuine consultation process before any decision was reached to make his position redundant.
17. Acting as it did, the Company failed to meet its contracted obligations. It explained it elected not to inform Mr Harris in advance as to the purpose of the meeting because it had no firm conclusions and significant commercial sensitivity lay behind what was a Company-wide restructure. I have no reason to challenge the legitimacy of the Company's understanding of its commercial considerations. However, the very real risk in adopting a 'cold-calling' approach to Mr Harris was – without prior notification – that he could be deeply shocked by the news his position was under review and he faced the real prospect of being terminated.
18. To proceed, as the respondent did, to enter into an agreement in that context was to compound the error. This was a situation where Mr Harris might not – and did not – understand that an opportunity existed to explore options and provide his input. I am satisfied that, as a result of the approach adopted by the Company and, in particular, its willingness to move to an almost immediate agreement in respect of the applicant's termination, Mr Harris took from what he was being told that the decision to make his position redundant had already been reached and all that remained to be agreed was the detail as to his departure.
19. Evidence in support of this conclusion is found not only in Mr Harris' statement to the effect that he was agreeing only to a *fait accompli*, but also that he was upset by what had happened and wanted to get out of the workplace (par 8). That Mr Harris was distressed is confirmed in Messrs McKenzie and Ford's evidence: they both noted the applicant's visible distress (refer to their statements and oral evidence). A distressed employee is in no condition to enter into agreements, particularly one terminating that worker's employment. I am satisfied that the approach adopted by the Company caused Mr Harris to be in no fit condition to enter into an agreement as to the future of his employment with the Company. I am satisfied the process adopted by the

Company – as it has conceded – was too hasty: I find it was abrupt and therefore unfair, that it provided no real opportunity for genuine consultation and was therefore in breach of clause 15.2. A measured approach was required, particularly as there is no evidence of, or suggestion that, operational imperatives required a decision to be reached that day.

20. I am therefore satisfied that the Company acted in breach of its “*best endeavours*” obligations.
21. I am satisfied that support for my interpretation of clause 15.2 is found in relevant case law including the 12 propositions about consultation taken from the Court of Appeal’s decision *Wellington International Airport Ltd v Air NZ Ltd* [1993] 1 NZLR 671 by the Employment Court in *Communication & Energy Workers Inc v Telecom Ltd* [1993] 2 ERNZ 429 at 455, 456, including,
- (4) *... but there must be sufficiently precise information given to enable the person to be consulted to state a view together with a reasonable opportunity to do so. ...*
- (5) *The requirement for consultation is never to be treated perfunctorily or as a mere formality. The person ... to be consulted must be given a reasonably ample and sufficient opportunity to express views or to point to problems or difficulties: “they must be free to say what they think”.*
- (6) *Consultation must be allowed sufficient time.*
22. The process adopted by the respondent denied the applicant sufficient time to consider the potential loss of his employment and denied him reasonably ample and sufficient opportunity to express his view.

Redundancy Dismissal

23. Mr Harris argues that he was also, or in the alternative, unjustifiably dismissed and accordingly claims lost wages. The claim remains unquantified. I do not accept it for the following reasons.
24. Sufficient evidence was advanced by the Company to satisfy me that Mr Harris’ redundancy occurred in the context of a Company-wide restructure. Mr McKenzie

explained that he had been employed by the respondent to review and reduce its structure and operating costs; he testified that, as a result of his being engaged for that purpose, the respondent had been “boned”, i.e. staff numbers had been substantially reduced.

25. Mr Harris accepted the tasks he previously performed were distributed to others; he had no reasons to challenge the respondent’s claim they had subsequently been centralised in Hamilton. Mr Harris could not point with any conviction to alternative positions within the Company that he could have been redeployed to, or alternatives to the redistribution of his tasks to other workers. I therefore do not accept his implied argument that, had an adequate process been followed, he had the possibility of persuading the Company to retain him in employment. In reaching this conclusion I note also that Mr Harris’ employment agreement provided for two weeks’ notice or pay in lieu of if his position was terminated by reason of redundancy. The applicant received more than two weeks’ pay in compensation for redundancy as he was paid from 25 June to 30 July and that sum was, in turn, rounded up.
26. As I am satisfied that the position occupied by Mr Harris was genuinely redundant and there was no realistic prospect of the applicant being kept on in another capacity, there is no basis to support his claim for lost wages and it is declined.

Remedies

27. Mr Harris says he was unjustifiably disadvantaged by the respondent’s breach of his employment agreement (of clause 15.2) and he therefore seeks compensation of \$10,000 for the resulting humiliation, etc. The applicant gave compelling evidence of the impact and effects on him of the process adopted by the Company on 25 June. As is made clear above, Messrs McKenzie and Ford agreed Mr Harris was visibly upset during the 25 June meeting.
28. Having regard to the above I am satisfied that an award of \$5,000 is an appropriate level of compensation for the humiliation and distress occasioned Mr Harris by the disadvantageous process – in breach of the employment agreement - employed by the respondent, in terminating the applicant’s employment.

Contributing Behaviour

29. The investigation disclosed no evidence of any action by Mr Harris that contributed towards the situation that gave rise to his personal grievance: s. 124 of the Act applied.

Determination

30. For the reasons set out above I find in favour of John Harris' claim that the respondent, Tony Galbraith Limited, acted in breach of his contract. I therefore direct the respondent to pay to the applicant \$5,000.00 (five thousand dollars) compensation for humiliation, etc.

31. Costs are reserved.

Denis Asher

Member of Employment Relations Authority