

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 379
5450103

BETWEEN	JONATHAN GLEN HAYES Applicant
A N D	THE SPRUCE UP COMPANY 2008 LIMITED Respondent

Member of Authority: Rachel Larmer

Representatives: David Hayes, Counsel for Applicant
Scott McKenna, Counsel for Respondent

Investigation Meeting: 08 September 2014 at Tauranga

Date of Determination: 12 September 2014

DETERMINATION OF THE AUTHORITY

- A. Within 28 days of the date of this determination The Spruce Up Company 2008 Limited (Spruce Up) is ordered to pay Mr Hayes:**
- (a) \$1,451.52 wage arrears;**
 - (b) \$224 lost remuneration;**
 - (c) \$2,500 distress compensation;**
 - (d) \$1,750 towards his legal costs;**
 - (e) \$71.56 to reimburse his filing fee.**

Employment relationship problem

[1] Mr Hayes started work with Spruce Up on or around 16 May 2013. He worked making planter boxes and performed other manual labour. On 20 January 2014 Mr Hayes was handed a letter which terminated his employment on 31 January 2014 as a

result of a “*restructuring*” of the business. Mr Hayes claims his dismissal was unjustified. Mr Hayes claims there was no consultation process and Spruce Up did not comply with its good faith obligations.

[2] Spruce Up concedes that Ms Hayes’ dismissal was procedurally unfair. It acknowledges that it failed to comply with its good faith obligations under s.4(1A) of the Employment Relations Act 2000 (the Act) or with any of the four procedural fairness tests in s.103A(3) of the Act. Spruce Up does not dispute that there was no consultation process and that it just presented Mr Hayes with notice of termination.

[3] However, Spruce Up claims that Mr Hayes’ dismissal was substantively justified because he was made redundant in order to save costs. It says Mr Hayes was selected for redundancy over other employees because he was a poor performer. Mr Hayes believes the restructuring was a sham device used to exit him from the business because he was seen as a poor performer.

[4] Mr Hayes was out of work for two days so he claims two days’ lost remuneration plus distress compensation.

[5] Mr Hayes is also pursuing a wage arrears claim. He seeks wage arrears arising from:

- a. Failure to pay sick two days’ sick leave (01 November 2013 and 30 January 2014);
- b. Failure to pay two weeks’ pay in lieu of his full contractual four weeks’ notice (he was required to work out two weeks’ of his notice period);
- c. Unpaid holiday pay calculated at 8% on the above amounts.

[6] Spruce Up agrees that it gave Mr Hayes two weeks’ notice of termination and that it did not pay him in lieu for the balance of his notice period as required under his employment agreement.

[7] Spruce Up also admits it did not pay Mr Hayes for the two days’ sick leave he is claiming. It says it did not believe he was genuinely sick.

[8] I record that at the Authority's investigation meeting Spruce Up agreed to reimburse Mr Hayes \$41 for the cost of a medical certificate it had required him to obtain on 01 November 2013 prior to him being given notice of redundancy.

Issues

[9] The following issues are to be determined:

- a. Is Mr Hayes' owed wage arrears?
- b. Was Mr Hayes' dismissal unjustified?
- c. If so, what if any remedies should be awarded?
- d. What if any costs should be awarded?

Is Mr Hayes owed wage arrears?

Unpaid sick leave

[10] Mr Hayes obtained a medical certificate for his sick leave on or around 01 November 2013. He also had paid sick leave entitlement available to him when he took sick leave on that date. I find that he is entitled to be paid for this day.

[11] Mr Hayes claims he was sick on the last two days of his notice period. He says he only had one day of paid sick leave remaining so he seeks payment of one day's sick leave. Although Spruce Up believe he was not genuinely sick it did not take any steps to address that (such as by requiring him to provide a medical certificate) whilst he was employed. I therefore find that Mr Hayes is entitled to be paid sick leave for that day.

[12] Spruce Up is ordered to pay Mr Hayes wages arrears \$224 (16 hours x \$14 per hour) relating to unpaid sick leave for 01 November 2013 and 30 January 2014.

Unpaid notice

[13] Mr Hayes' employment agreement provided for him to get four weeks' notice or pay in lieu. He only got two weeks' notice and no pay in lieu. Spruce Up is ordered to pay Mr Hayes \$1,120 (80 hours x \$14 per hour) wage arrears being the unpaid balance of his notice period.

Holiday pay

[14] Mr Hayes claims holiday pay on his wage arrears. If Mr Hayes had been paid what he was contractually entitled to be paid upon termination he would have received 8% holiday pay on his wage arrears. I therefore find he is owed \$107.52 (being 8% of \$1,344) unpaid holiday pay.

[15] Spruce Up is ordered to pay Mr Hayes \$1,451.52 wage arrears (consisting of \$224 unpaid sick leave, \$1120 unpaid notice pay and \$107.52 unpaid holiday pay).

Was Mr Hayes' dismissal justified?

[16] Justification is to be assessed in accordance with the justification test in s.103A of the Employment Relations Act 2000 (the Act). This requires the Authority to objectively assess whether Spruce Up's "*actions, and how it acted*" were what a fair and reasonable employer would have done in all the circumstances at the time Mr Hayes was dismissed.¹

[17] A fair and reasonable employer is expected to comply with its statutory obligations. This includes the good faith obligations in s.4(1A) of the Act which require an employer proposing to make an adverse decision about an employee's ongoing employment to provide that employee with all relevant information before making a final decision. It also includes the four procedural fairness tests set out in s.103A(3) of the Act.

[18] Spruce Up failed to comply with any of its statutory obligations which fundamentally undermines its ability to justify its dismissal of Mr Hayes. Spruce Up breached its duty of good faith because it did not provide Mr Hayes with any information before dismissing him.

[19] Spruce Up is unable to comply with any of the four procedural fairness tests in s.103A(3) of the Act because it dismissed Mr Hayes without following any process at all. That is not the actions of a fair and reasonable employer. Spruce Up did not consult with Ms Hayes over the selection criteria. Nor did it provide him with any information about why he had been selected for redundancy over other employees. Spruce Up says it selected him because he was a poor performing employee.

¹ Section 103A(2) of the Act

[20] Spruce Up did not provide the Authority with any specific financial information to back up its evidence that a restructure was needed.

[21] Mr Richard Knaggs (one of Spruce Up's two directors and shareholders) was the decision maker. He was unable to tell the Authority what financial information he had relied on. I consider that his evidence about the rationale for the redundancy and what exactly was achieved by it was vague.

[22] Mr Knaggs focused his evidence on reasons why he believed Mr Hayes was a poor performer. He accepted that had Mr Hayes been a high performing employee he may not have been made redundant. Mr Hayes was the only employee to be made redundant.

[23] I am not satisfied that the evidence supported a genuine restructure. The financial and other information that is expected to be available in such a case simply was not. Nor could any of the witnesses provide this information when questioned with the clarity or detail that is expected in a genuine redundancy scenario. I consider this failure undermines the genuineness of Mr Hayes' redundancy.

[24] I am not satisfied that it was open to a fair and reasonable employer to conclude in all the circumstances that it was appropriate for Mr Hayes to be dismissed on the grounds of redundancy.

[25] Spruce Up is therefore unable to justify its dismissal of Mr Hayes in terms of the requirements of the justification test in s.103A(2) of the Act. Accordingly, I find that Mr Hayes' dismissal was unjustified.

What if any remedies should be awarded?

[26] Mr Hayes was out of work for two days before securing alternative employment at a higher rate of pay. Spruce Up is ordered to pay him \$224 actual lost remuneration under s.128(2) of the Act.

[27] Mr Hayes claims \$15,000 distress compensation. I find the evidence did not support an award at that level as the evidence of distress was minimal. The evidence provided was scant. There was evidence that tends to suggest Mr Hayes did not like his job although I note that he did tell the Authority he wanted to keep his job because he supported his pregnant partner (who did not work) with his wages.

[28] Mr Hayes obtained higher paid employment quickly. Whilst I acknowledge he was shocked at his dismissal he seems to have recovered quickly. I consider an award of distress compensation of \$2,500 is appropriate.

[29] Spruce Up is ordered to pay Mr Hayes \$2,500 under s.123(1)(c)(i) of the Act to compensate him for the hurt, injury to feelings and distress he suffered as a result of his unjustified dismissal.

Costs

[30] Mr Hayes as the successful party is entitled to a contribution towards his actual legal costs. The parties agree that the Authority should adopt its usual notional daily tariff based approach to costs. They also acknowledge that there are no factors which should result in the current notional daily tariff of \$3,500 being adjusted.

[31] This matter involved a half day investigation meeting so on a pro rata basis I order Spruce Up to pay Mr Hayes \$1,750 towards his legal costs plus \$71.56 to reimburse his filing fee.

Rachel Larmer
Member of the Employment Relations Authority