

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2014] NZERA Wellington 7  
5414431

BETWEEN            KEVIN HODGSON  
                                 Applicant  
  
AND                    DOWNEY'S CITY BUTCHERY  
                                 LIMITED  
                                 Respondent

Member of Authority:     Michele Ryan  
  
Representatives:            Satchie Govender, Counsel for the Applicant  
                                 Gary Taylor, Advocate for the Respondent  
  
Investigation Meeting:     3 December 2013 at Napier  
  
Submissions received:     On the day of the investigation  
  
Determination:             22 January 2014

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     Mr Kevin Hodgson claims he was unjustifiably dismissed by Downey's City Butchery Limited (Downey's) and that Downey's breached its obligation of good faith towards him. He seeks reimbursement of wages, compensation for hurt and humiliation, and costs.

[2]     Downey's rejects Mr Hodgson's claims in their entirety. It says Mr Hodgson's position was genuinely redundant and the process undertaken was substantially justified and procedurally fair.

**Background information**

[3] Downey's is a small, specialist butchery based in Napier. The owner, Mr Robert Downey, took over the butchery from his father in 2007. The business was incorporated sometime after, with he and his wife as joint directors.

[4] Prior to his employment at Downey's, Mr Hodgson had enjoyed a long standing business association and friendship with Mr Downey (Snr) and more recently with Mr Robert Downey.

[5] In June 2012 Mr Hodgson rang Robert Downey in response to an advertisement for an experienced butcher placed on TradeMe. The pair discussed terms and conditions of employment, including that the incumbent needed to work Saturdays. Mr Hodgson says he initially turned down the offer of employment because he didn't want to work Saturdays.

[6] Approximately two weeks later, Mr Downey contacted Mr Hodgson again and they agreed that Mr Hodgson would be employed by Downey's. Mr Hodgson drafted a brief one page document which set out terms of employment he was agreeable to. Amongst other things, the document set out Mr Hodgson's hours of work, which were full time on Monday to Thursday and on Fridays were 7am to 1pm. The document recorded that one week's notice was required if Mr Hodgson wished to terminate his employment. An hourly rate was negotiated further and agreed. The parties accepted during the Authority's investigation that matters set out in the document were the terms and conditions under which Mr Hodgson was employed. No other collective or individual employment agreement was made between them.

[7] A variation to hours of work on Fridays was later agreed in September 2012 and Mr Hodgson began working from 7.30am-1.30pm on those days.

[8] There is a dispute as to whether Mr Hodgson ever consented to working weekends. However, it is accepted that he did work the occasional Saturday.

[9] On 16 January 2012, Mr Downey approached Mr Hodgson and advised that Friday afternoons and Saturdays were becoming increasingly busy. Mr Downey's father had from time to time assisted in the butchery on Saturdays, although the arrangement was voluntary and unpaid. Mr Downey indicated that his father no longer wished to work weekends and asked whether Mr Hodgson would consent to

changing his days of work to Tuesday through to Saturdays inclusive. He said he wanted to have some time off on Saturdays so that he could attend his children's sporting events.

[10] Mr Hodgson asked Mr Downey to set out his request in writing. The following day he was provided him with a letter which stated the following:

*Dear Kevin,*

*I have been considering how to best utilise staffing requirements for the efficient running of the shop and have concluded that the business would run more efficiently if you were to agree to a change in hours of work.*

*I note that regularly I could use you after 5pm on a Friday and most definitely on a Saturday.*

*What I am asking you to consider and hopefully agree to then, is that your hours of work change so that you drop your Mondays and replace that day with a Saturday.*

*It is hoped that agreement can be reached because you are a valued worker who I would not wish to have to make redundant if agreement cannot be reached.*

*I propose to discuss this letter and hear your considered response.*

*Regards,  
Robert Downey*

[11] Mr Hodgson met briefly with Mr Downey the next day and asked him to record that family matters were a reason for the request to change hours. Mr Downey proceeded to write the following at the bottom of the letter:

*One of the reasons for this change in your hours is that I would like you here more at the busy times of the week as I have two school children that both play late week/weekend sport and it would be nice to see them play and to be involved with their social activities.*

[12] The parties met at the offices of Downey's representative the following Monday, 21 January at 1pm. The meeting took almost two hours including an adjournment. Mr Hodgson was supported by a trusted friend, Mr Peter Sellars. Downey's was represented by an experienced advocate.

[13] The focus of Mr Hodgson's claim and his evidence centres on his view that the meeting was unfair. I will return to these matters later in this determination. It is not disputed that Mr Hodgson was strongly opposed to having his days of work changed during the course of that meeting.

[14] That evening and on the morning of 22 January 2013 there was an exchange of “*without prejudice*” correspondence between the parties’ representatives. Prior to the Authority’s investigation meeting, the parties waived privilege attached to those documents and they were placed into evidence.

[15] The email, sent at 5.55 pm, 21 January 2013, stated the following:

*Mr Downey needs to have the Saturdays covered and [Mr Hodgson] cannot agree to the proposal to change his hours accordingly. Redundancy talks have commenced with an indication from you about some concerns over process flaws.*

*To settle all matters noting that [Mr Hodgson] is only entitled to a week’s notice, [Mr Downey] is prepared to release Mr Hodgson from his employment immediately thereby waiving the notice period and, together with a good reference, pay him \$1500.00 as personal grievance money which is non taxable at law. This money would be paid in addition to wages and holiday pay owing as at today and would represent full and final settlement of all and any employment matters.*

...

[16] Mr Hodgson responded via Mr Sellars and advised that the process to make him redundant was flawed. He advised that he would be prepared to accept \$7,000 as full and final settlement and noted he was prepared to continue work as usual if a settlement could not be agreed.

[17] Mr Hodgson also sent an email directly to Mr Downey later that evening. He reiterated his views about the process and asked Mr Downey to reconsider “*your original “personal grievance money” offer amount so that we can put this behind us and go our separate ways.*”

[18] No agreement was reached between the parties. At 8.03 am the following morning Downey’s representative advised Mr Sellars by email that claims of procedural unfairness were denied and stated:

*The \$1500.00 offered by the employer, was intended to be an enhancement of what would have been the 1 week notice period as discussed at the two hour meeting yesterday.*

...

*Accordingly the counter offer is rejected and I am instructed to issue 1 weeks formal notice of redundancy which is hereby given. [Mr Hodgson’s] employment terminates by way of redundancy on the 29 January 2013.*

...

[19] Mr Hodgson did not return to Downey’s. On 29 January 2013 he was paid one week’s wages in lieu of notice and all other outstanding entitlements.

[20] The parties attended mediation but were unable to resolve matters. It now falls to the Authority to determine Mt Hodgson's claims.

### **The Authority's investigation**

[21] Downey's takes issue with the way Mr Hodgkin's has progressed his claims. Downey's say that Mr Hodgson has had three different advocates and "*in the face of unimpeachable evidence*" has abandoned claims only to replace those with new ones. Downey's referred to the original statement of problem and two subsequent amendment documents as a reflection of the changing nature of Mr Hodgson's claims.

[22] The Authority is an investigative body. It is required to establish the facts and make a determination according to the merits of the case, without regard to technicalities. During a directions conference on 17 October 2013 it became clear that that the employment relationship problem was predominantly about the process undertaken by Downey's when it made Mr Hodgson redundant. The parties had six weeks to prepare for an investigation meeting and I do not consider that the substance of Mr Hodgson's claims changed so materially that Downey's was disadvantaged in preparing its defence.

### **The issues**

[23] Relevant to this matter the Authority needs to consider:

- a. whether Downey's conceded, by its reference to payment of "personal grievance money", that it had acted unjustifiably;
- b. whether there were genuine business reasons sufficient for Downey's to conclude Mr Hodgson's position was redundant;
- c. whether the process Downey's undertook was fair and in particular did Downey's properly consult with Mr Hodgson;
- d. if Mr Hodgson was dismissed unjustifiably, did he contribute to the situation that led to his personal grievance;

### **Did Downey's concede it has acted unjustifiably?**

[24] Mr Hodgson drew the Authority's attention to the first email sent on Downey's behalf after the 21 January 2013 meeting, as evidence that Downey's recognised it was at fault.

[25] I am unwilling to accept that an offer using the words “*personal grievance money*” is sufficient in and of itself to conclude that Mr Hodgson has a personal grievance. Employers and employees frequently correspond under the cover of confidentiality when an employment relationship problem is alleged. In the context of this matter I consider it more likely that Downey’s was, as it referred to in its email of 22 January 2013, seeking to offer an enhancement package in which both parties could avoid a taxation liability. I am not satisfied that use of the phrase “*personal grievance money*” is sufficient to conclude that Mr Hodgson’s dismissal was unjustifiable or that Downey’s had accepted it was so.

**Was Mr Hodgson’s dismissal for reason of redundancy justifiable?**

[26] The Court recently affirmed in *Rittson–Thomas t/a Totara Hills Farm v Davidson*<sup>1</sup> that it is not for the Court (or the Authority) to substitute its own view as to whether a position should be considered redundant (or not). Rather the inquiry should be in accordance with the statutory requirements, that is: whether what was done (the dismissal and the substantive reasons for it), and how it was done (the process undertaken), was what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.<sup>2</sup>

***Did Downey’s have genuine commercial reasons to have Mr Hodgson change his hours of work?***

[27] Regarding the justifiability of a dismissal on grounds of redundancy, the starting point is to enquire whether the decision to make a position redundant was made for proper business purposes so as to ensure a purported redundancy is not an attempt to legitimize a dismissal where the predominate reason for termination of employment is for other reasons.

[28] As with any allegation of unjustified dismissal, the onus is on the employer to demonstrate that its decision to terminate an employee’s employment was justified.<sup>3</sup>

[29] In *Rittson–Thomas* the Employment Court recently stated:

*It will be insufficient under s.103A, where an employer is challenged to justify dismissal or a disadvantage in employment, for the employer to say*

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<sup>1</sup> [2013] NZEmpC 39

<sup>2</sup> Section 103A Employment Relations Act 2000

<sup>3</sup> Section 103A Employment Relations Act 2000

*that this was a genuine business decision and the Court (or Authority) is not entitled to enquire into the merits of it.*<sup>4</sup>

[30] There is no dispute that the proposal to have Mr Hodgson adjust his work pattern and commence working Saturdays was a fundamental alteration to terms and conditions of his employment.

[31] Mr Hodgson's evidence extensively focused on his concern that Mr Downey had initially characterised the reasons for the change as due to his children's activities but the letter of 17 January 2013 did not indicate those matters and instead stated that the business "*would run more efficiently if [he] were to agree to change his hours of work*". It was apparent that the two different rationales caused Mr Hodgson to view the genuineness of the redundancy as questionable.

[32] Mr Downey's evidence is that at the time of Mr Hodgson's dismissal, both of Downey's other full time employees already worked on Fridays and Saturdays. Downey's also employed two elderly gentlemen on a part time basis. Mr Downey said they each worked 4-5 hours exclusively on Mondays to assist with meat preparation and small goods production. Mr Downey advised that both men were in their seventies; one made sausages and did not engage with customers at all, and the other had significant health problems that had occurred over the previous two years. Mr Downey says neither employee is suitable to perform the customer work required on Fridays and Saturdays.

[33] Mr Downey says that from October 2011 onwards the butchery had become busier on Friday afternoons and evenings, as well as Saturdays. Opening hours were routinely extended, and with the exception of Mr Hodgson the other full time employees worked up to 10-11 hours on Fridays and 8 hours on Saturdays. Mr Downey says customers were often queuing and becoming disgruntled at the time it took to be served and were leaving. He considered that if Mr Hodgson worked on Saturdays, customers would be served more efficiently and the business would be able to close earlier, freeing him to attend to family commitments. He says service required more than just someone managing a till as customers frequented wanted particular cuts of meat prepared and sought advice about cooking methods from the butchers. He says Mr Hodgson was good with customers as well as a skilled butcher

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<sup>4</sup> [2013] NZEmpC 39 at [54]

and that his skills were better suited for Fridays and Saturdays in contrast to Mondays where the work was limited to preparing meat and there were few customers.

[34] Mr Hodgson accepted in evidence that Downey's is entitled to make its business more efficient. He agreed that Fridays and Saturdays called for skills beyond knife work and that customer service skills and till management were necessary proficiencies required on Fridays and Saturdays.

[35] I consider Downey's requirement to have Mr Hodgson working on Fridays and Saturdays to ensure customers are serviced expediently and so as to allow Mr Downey to have time with his children are not mutually exclusive reasons. It is clear from the letter of 17 January 2013 that Downey's wished to continue Mr Hodgson's employment, albeit to have his days and hours of work altered. I am satisfied on the evidence that Downey's was entitled to conclude that additional staffing was needed on Friday afternoons and Saturdays and this decision was made for sound commercial reasons.

***Did Downey's follow a fair and proper process?***

[36] Having assessed that the redundancy was based on genuine reasons, the Authority must then evaluate the process undertaken by Downey's with respect to how it made Mr Hodgson redundant.

[37] Section s.4(1A)(c) of the Employment Relations Act places an obligation on an employer proposing to make a decision that may affect an employee's ongoing employment, to provide to a potentially affected employee access to information relevant to its decision and an opportunity to comment on that information before making a final decision.

[38] Further, where an employer is contemplating dismissal on grounds of redundancy, good faith requires an employer to consult with a potentially affected employee about the possibility of redundancy<sup>5</sup>.

[39] The requirements for an employer to provide information, and to act in good faith also assists the Authority in its assessment as to whether the employer's decision was what a fair and reasonable employer could have done in all the circumstances.

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<sup>5</sup> *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825

[40] As noted, Mr Hodgson's claim predominately stems from his concern that the process undertaken by Downey's was flawed.

[41] Notes were taken during the meeting of 21 January 2013 by Downey's representative. A typed version of these was provided to the Authority. It is clear that the notes are not a verbatim record, rather, they reflect a summary of the topics discussed. Counsel for the applicant disputes the accuracy of the recorded notes but oral evidence revealed consensus about the majority of the issues discussed. I am unwilling to accept any suggestion that the notes have been embellished after the fact, I have no evidence to support that inference. I have noted the disputed topics of discussion and carefully considered the evidence furnished to the Authority on these matters.

***Did Downey's fairly consult with Mr Hodgson?***

[42] Mr Hodgson takes issue with the following matters which he says was unfair. In particular he alleges that:

- There was no discussion about the utilisation of his skills;
- the proposal to have him change his days of work was presented to him as a *fait accompli* and no real opportunity to discuss alternatives to changing his days of work was afforded to him;
- that he was unfairly selected from Downey's pool of employees for redundancy and no explanation was given to him as to why he alone was selected.

[43] Mr Sellars says the meeting focussed on a desire to reduce the butchery's hours on Saturdays so that Mr Downey "*could stop going home late and have time with his children on Saturday*".

[44] In contrast, Mr Hodgson's oral testimony is that there was only brief mention of Mr Downey wanting to go home on Saturdays.

[45] Mr Hodgson's written evidence stated that no explanation was given as to why his skills would be better utilised on Friday afternoons and Saturday's or how this the change would contribute to an efficient running of the shop. However, this evidence

conflicted with his oral testimony where he agreed there was discussion about his skills being better utilised on Fridays and Saturdays. The Authority questioned Mr Hodgson on this aspect of his oral evidence several times to ensure he was not confused by the questions put to him. Mr Hodgson was clear on each occasion that there had been discussion as to why Downey's considered his skills could be more usefully employed on Friday's and Saturdays. Mr Hodgson's oral evidence was supported by Mr Downey's evidence and by the meeting notes which recorded "*Mondays quiet and no need for someone with [Mr Hodgson's senior skill level on that day. Skill better utilised during busier periods]*". I do not accept Mr Hodgson's allegation that there was no discussion about his skills being better utilized on the days proposed by Downey's although I agree the discussion does appear to have been brief.

[46] Mr Hodgson second area of concern is more persuasive. He alleges that the sole purpose of the meeting on 21 January 2012 was to obtain his consent to change his days/hours of work. It is submitted that there was no genuine consultation and that in reality he was presented with an ultimatum; accept a change to his days of work or become redundant.

[47] Mr Hodgson further complained to the Authority that there was no opportunity to discuss any alternatives to Downey's proposal to alter his days of work and that he was unfairly selected from the pool of Downey's employee's without explanation.

[48] Mr Downey conceded in evidence that that the "*whole point of the meeting was to have [Mr Hodgson] agree to change his days of work*". He accepts that he had not raised with either of Downey's two part time employees the possibility of changing hours of work or that he had considered employing a part time person to cover the weekend work.

[49] I consider Downey's was entitled to have a working plan in mind as to how it wished to address Friday/Saturday service issues. However an employer must maintain an open mind and must give sufficient precise information to enable an employer to be able to fully respond and a reasonable opportunity to do so.

[50] From as early as 16 January 2013, when Mr Downey first asked Mr Hodgson to work Saturdays, I consider that Downey's unreasonably confined the scope of its

consultation by concluding, prior to any discussion, that the solution to the Friday/Saturday service issue was to have Mr Hodgson change his days of work.

[51] By restricting the topic of discussion to whether Mr Hodgson would accept a change to his working days, I consider Downey's effectively pre-empted any opportunity for conversation on the broader relevant issue of customer service or allow for the possibility of any other arrangement alternative to that already determined by it. I accept that such an approach left Mr Hodgson with no real choice other than to accede to Downey's proposal or be made redundant.

[52] In *Simpsons Farms Limited v Aberhart*<sup>6</sup> the Chief Judge noted

*Consultation does not require agreement between the parties however genuine efforts must be made to reasonably accommodate the views of the employees and there should be a tendency to achieve consensus*<sup>7</sup>.

[53] Downey's may contend that Mr Hodgson was not precluded from raising alternative suggestions during the meeting however I consider it was incumbent on Downey's to ensure Mr Hodgson was provided with sufficient information and opportunity to be able to so. I note the letter of 17 January invited Mr Hodgson to comment on the proposal to change his hours of work as opposed to an opportunity to comment on the issue of customer service on Fridays and Saturdays.

[54] Downey's may also argue that it is not reasonable to expect it to go through a charade of canvassing alternatives such as ostensibly consulting with part time employees who are unsuitable for the work when the most reasonable solution was to have Mr Hodgson agree to change his hours of work. I note also that there is also a suggestion that Mr Hodgson may have been unlikely to agree to work Saturday's no matter how perfect the consultation. I regard these views as speculative. As a fair and reasonable employer Downey's was obliged to provide an unfettered opportunity to discuss the broader service issue and allow Mr Hodgson to present alternative solutions or arrangements for Downey's to consider, even if those suggestions were ultimately rejected. Consultation involves a statement of a proposal not yet finally decided on<sup>8</sup>.

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<sup>6</sup> *Simpsons Farms Ltd and Aberhart* [2006] ERNZ 825

<sup>7</sup> *Ibid* at [62]

<sup>8</sup> *Ibid* at [62]

[55] I accept that Downey's is a small business with limited resources. There is no evidence that Downey's intended to cause Mr Hodgson distress or deprive him of an opportunity to engage in its consultation. However, even in these circumstances I consider the consultation process was inadequate. Downey's had an obligation as an employer to be active and responsive and to provide sufficient information about its business decision to enable Mr Hodgson to properly comment on. I am unable to conclude that Downey's actions were those of a fair and reasonable employer in all the circumstances at the time it occurred. I also do not accept that Downey's omissions with respect to its consultation process were minor and did not result in Mr Hodgson being treated unfairly.

[56] Mr Hodgson dismissal was procedurally unfair and he has a personal grievance.

## **Remedies**

### ***Contribution***

[57] Section 124 of the Act, requires that where the Authority has determined that an employee has a personal grievance, the Authority must consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and remedies are to be withheld or reduced where there has been contribution or fault on the part of the employee.

[58] Downey's asserts that at the end of the meeting on 21 January 2013 Mr Hodgson asked for one week's notice of his redundancy and wages in lieu. There is a suggestion in these circumstances that Mr Hodgson had indicated his acceptance that he was redundant and that there was no need for Downey's to continue to consult with him. The inference is that if consultation was halted unreasonably early, then Mr Hodgson initiated and/or substantially contributed to that situation.

[59] I accept on balance that Mr Hodgson did ask for one week's notice at the end of the meeting and that the parties entered into negotiations to discuss an exit package. However it is clear in the ensuing correspondence that Mr Hodgson considered the process undertaken by Downey's was unfair, that he did not accept he was redundant and remained hopeful that he might keep his job. In these circumstances I consider the possibility of further consultation between the parties was available and I do not find that Mr Hodgson prevented additional discussion such that his remedies should

be reduced. I am unable to conclude that Mr Hodgson contributed to the procedural shortcomes which led to his unjustified dismissal.

### ***Loss of remuneration***

[60] Section 123(1)(b) provides that an employee dismissed unjustifiably may be reimbursed a sum equal to the whole or any part of the wages or other money lost by the employee “*as a result of the grievance*”.

[61] Mr Hodgson was unemployed for 6 weeks following his dismissal. He seeks reimbursement of the sum equal to lost wages for this period of time.

[62] No claim or submissions were provided to the Authority as to whether the notice period and payment of one week’s wages were sufficient in the absence of any contractual obligations in redundancy circumstances. I note Mr Hodgson’s self drafted employment agreement provided that he was to give one week’s notice of termination but no reference is made to what was required of Downey’s. In *Aoraki Corporation v McGavin*<sup>9</sup> the Court of Appeal held that in the absence of a contractual stipulation, the general practice as to the period of notice does not support fixing notice in excess of one month. In that case the applicant was a very senior manager with a long history of employment with the respondent. In the circumstances of this matter Mr Hodgson had been employed for a relatively short period (5 months) and although the period of notice was short I consider it appropriate when considering the length of employment.

[63] If a redundancy is found to be genuine as I have in this matter, and a personal grievance for unjustified dismissal is upheld on grounds of procedural unfairness, remedies are confined to the distress caused by the way the redundancy was handled, rather than the loss of the job itself.<sup>10</sup> I find there has been no loss of remuneration because Mr Hodgson’s job had gone and I decline to order reimbursement of wages in these circumstances.

### ***Humiliation and distress***

[64] Mr Hodgson claims an unspecified amount of compensation for hurt and humiliation as a result of the way Downey’s dismissed him.

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<sup>9</sup> [1998] 1 ERNZ 601

<sup>10</sup> Ibid

[65] Mr Hodgson gave modest evidence about the effect the termination of his employment had on him. He says he felt humiliated as a consequence of the process taken by Downey's and reports he felt unable to attend a social event that occurred after his dismissal which included members of the Downey family. He referred also to ongoing dizziness for a few days in early February 2013 as proof of the stress the dismissal had caused him. Mr Hodgson provided evidence of a medical examination dated 4 February 2013 however there is nothing in that material to support the proposition that his symptoms were caused by his dismissal and I am unable to give weight to this aspect of his evidence. To the extent of the evidence furnished I accept Mr Hodgson felt distressed by his dismissal and order Downey's to pay the sum of \$3,000 as compensation for Mr Hodgson's distress arising from the way in which he was dismissed.

### **Costs**

[66] Costs are reserved.

### **Summary of orders**

[67] Pursuant to s.123(1)(c)(i) Downey's City Butchery Limited is to pay Mr Hodgson the total sum of \$3,000 as compensation for his personal grievance.

**Michele Ryan**  
**Member of the Employment Relations Authority**