

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 222/09
5131825**

BETWEEN SELWYN GEORGE HUGHES-
 SPARROW
 Applicant

AND RUG DOCTOR (NEW ZEALAND)
 LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: Applicant In Person
 Sarah O'Brien, Counsel for Respondent

Investigation Meeting: 3 February 2009

Submissions Received: 16 February 2009 from Applicant
 20 February 2009 from Respondent

Determination: 06 July 2009

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Mr Selwyn George Hughes-Sparrow ("Mr Hughes-Sparrow") challenges his dismissal for redundancy from his employment with Rug Doctor (New Zealand) Limited ("Rug Doctor"). He claims his dismissal is unjustifiable. He further claims he is owed payment of a bonus and arrears of wages. Rug Doctor denies the claims.

[2] The parties were unable to resolve the problem between them by mediation.

The facts

[3] Rug Doctor hires out carpet cleaning equipment from supermarkets throughout New Zealand.

[4] Mr Hughes-Sparrow first commenced employment with Rug Doctor in March 1997. At the time of his dismissal he was employed as a Service Technician under the terms of an individual employment agreement dated 19 March 2003 ("the IEA"). His specified duties included maintenance and servicing of Rug Doctor hire equipment on location and/or at the workshop, together with customer sales and service over the whole of New Zealand.

[5] Mr Hughes-Sparrow's role involved him visiting all stores where Rug Doctor equipment was hired out, maintaining and servicing hire equipment on location or at the Auckland workshop when required, electronically testing and tagging the certification to equipment, stock rotation and store display, collecting rental docketts and dealing with all in-store issues. Mr Hughes-Sparrow travelled frequently and widely throughout New Zealand for his work.

[6] In July 2007 Rug Doctor appointed a new General Manager Mr David Hall ("Mr Hall"). Mr Hall and Rug Doctor's directors developed a new business plan which sought to develop the in-store role that had been carried out by Mr Hughes-Sparrow nationally, into a sales role to be independently contracted on a regional basis.

[7] On 3 December 2007 a meeting was held with all staff to introduce the business plan. Mr Hughes-Sparrow was provided with a letter summarising what was presented in the meeting and confirming that the detail of the proposal business plan would be presented at a further meeting to be held on 7 December 2007. The letter further advised that Mr Hughes-Sparrow could bring a representative to that further meeting.

[8] On 7 December 2007, a proposed new structure was presented to staff in the form of a Powerpoint presentation. In essence, the national role held by Mr Hughes-Sparrow was to be divided into four regional positions known as "Field Area Representative". The presentation and accompanying report stated explicitly that there would be "direct impact on the existing service technician". Employees were invited to offer feedback on the proposal.

[9] Mr Hughes-Sparrow actively participated in the feedback process. He delivered a written commentary on the proposed new structure expressing his doubts that Rug Doctor would be able to obtain the sales contractors that it had identified in place of his role.

[10] On 21 December 2007, Mr Hall advised Mr Hughes-Sparrow that the proposed new structure was confirmed un-amended.

[11] The new regional sales contractor roles were advertised in January 2008.

[12] On 18 January 2008 Mr Hall asked Mr Hughes-Sparrow if he was interested in applying for one of the regional sales contractor roles. Mr Hughes-Sparrow asked to see a job description and was provided with one.

[13] On 25 January 2008 Mr Hall asked Mr Hughes-Sparrow if he was interested. Mr Hughes-Sparrow said he had not made up his mind.

[14] Mr Hughes-Sparrow did not apply for any of the regional sales contractor roles.

[15] By letter dated 6 March 2008, Mr Hughes-Sparrow was requested to meet the following day to discuss his future. He was advised he was welcome to have a representative present with him.

[16] The next day on 7 March 2008, Mr Hughes-Sparrow attended and confirmed he did not require support or a representative. He was advised his employment was redundant. He was offered and accepted compensation for redundancy as well as notice of termination in excess of what was provided in the IEA.

[17] The termination was recorded in a letter of the same date. Rug Doctor agreed to pay four weeks notice of redundancy but did not require Mr Hughes-Sparrow to work out that notice period. It further advised it would pay six weeks pay for redundancy,

pay for two sessions with an advisor to assist Mr Hughes-Sparrow develop his CV, and it would provide him with a positive reference.

The merits

[18] Mr Hughes-Sparrow challenges his dismissal for redundancy. He explicitly pleads that he was constructively dismissed, but that is not so because he did not resign and he was actually dismissed. Howsoever he describes his challenge, I deal with it as a claim of unjustifiable dismissal.

[19] The test of justification is prescribed at Section 103A of the *Employment Relations Act 2000* ("the Act"). That section provides:-

103A. Test of justification

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 considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[20] In scrutinising Rug Doctor's decision to terminate Mr Hughes-Sparrow's employment for redundancy, I look to see whether the business decision to make Mr Hughes-Sparrow's position redundant was made genuinely and not for ulterior motives, and secondly, whether Rug Doctor acted in a fair and open way in carrying out that decision, and in particular, whether it consulted properly about the proposal to make him redundant and in good faith.

A genuine redundancy?

[21] The Court of Appeal in *GN Hale & Son Ltd v Wellington Caretakers IUOW* [1991] 1 NZLR 151 affirmed an employer's right to make its business more efficient:-

...make his business more efficient, as for example by automation, abandonment of unprofitable activities, re-organisation or other cost-saving steps, no matter whether or not the business would otherwise go to the wall. A worker does not have the right to continued employment if the business could be run more efficiently without him.

[22] I find that Rug Doctor's directors desired less involvement in the day to day management of Rug Doctor. I find that to achieve that end, they sought professional assistance and a fundamental restructure of Rug Doctor's business was devised. The restructure proposed decentralising the Auckland based management to the appointment of a General Manager and three regional businesses each with their own area/regional managers.

[23] Mr Hughes-Sparrow performed a national role. He travelled all over New Zealand servicing equipment in supermarkets that hired out Rug Doctor equipment. The proposed decentralised management structure had a direct impact on the role that he performed. I accept that it was no longer sustainable to have one representative for all of New Zealand and that a restructure was required.

[24] Rug Doctor was entitled to reorganise its operations in pursuit of better efficiencies. I find that such an impact was by reason of a genuine commercial desire directed towards improving the efficiency and profitability of Rug Doctor's operations. I am satisfied the reasons for the restructuring and therefore the disestablishment of Mr Hughes-Sparrow's role were for genuine commercial reasons.

Procedurally fair and in good faith?

[25] Section 4 of the Act requires Rug Doctor to deal with its employees in good faith. That duty is to be exercised not only generally but in specific situations including redundancy.

[26] The duty of good faith set out in the Act requires an employer who is proposing to make a decision that will have an adverse effect on the continuation of employment of an employee to provide to that employee, access to information relevant to the continuation of the employee's employment, about the decision, and an opportunity to comment on the information before the decision is made.

[27] The redundancy provision in the IEA is this:-

16. *Redundancy*

16.1 For the purposes of this Agreement, redundancy is a condition in which the Company has staff surplus to requirements because of the re-organisation, contracting out or the closing down of the whole or any part of the Company's operations due to a change in plant, methods, materials or products, economic circumstances or like cause requiring a reduction in the number of employees.

16.2 Redundancy shall also not include employees whose employment is being terminated by the Company by reason only of the sale, contracting out or transfer by the employer of the whole or part of the employer's business if:

(i) The person acquiring the business or the part being sold, contracted or transferred:

- Has offered the employee employment in the business or the part being sold, contracted or transferred, and*
- Has agreed to treat service with the employer as if it were service with that person and as if it were continuous; and*

(ii) The conditions of employment offered to the employee by the person acquiring the business or the part of the business being sold, contracted or transferred are substantially similar to the employee's service related conditions of employment.

16.3 All employees to be declared redundant shall receive not less than two weeks' notice termination of their employment. In lieu of such notice an employee shall receive two weeks' wages. No compensation for redundancy will be paid.

[28] Rug Doctor says that its proposed restructuring was developed professionally, communicated openly and transparently with all staff and provided them with an opportunity for feedback. I am satisfied that is correct. There was first a meeting where an announcement was made on 3 December 2007. Then there was a further meeting on 7 December 2007 at which a PowerPoint presentation was made. A full Structure Review document was provided to staff. Mr Hughes-Sparrow was in fact the only employee who offered feedback about the proposal and he did so in writing. Mr Hughes-Sparrow was aware that his existing position was to be restructured. On 21 December 2007 he was advised the restructure would proceed. He was informed his position would be impacted. He was invited to apply for one of the new contractor roles.

[29] I find that Mr Hughes-Sparrow was consulted about the proposed restructure and having been provided with an opportunity to provide input, he did so. I am satisfied that there was a full comprehensive open and transparent consultation process that Mr Hughes-Sparrow participated in.

The determination

[30] I find that Mr Hughes-Sparrow decided that because considered he was the only registered technician, his role could not be made redundant as long as that aspect of his role remained. He was not the sole registered technician. But any such work formed only one aspect of his role. He says he was never offered a role as registered technician at base "although [he] already held it". I accept that Mr Hughes-Sparrow was a travelling customer sales and service representative and was not an at-base maintenance/service/technician/supervisor. I find Mr Hughes-Sparrow was not the only registered technician and one Mr Williams was engaged periodically since 2006 for electrical inspections. I find that Mr Hughes-Sparrow was not entitled to take for granted that he would not be made redundant on this basis. I also find Mr Hughes-Sparrow was not employed to supervise workshop technicians.

[31] I further find that Mr Hughes-Sparrow chose not to apply for a regional contractor role. I find he did not do so because he was not satisfied with the remuneration. That was his prerogative. Nor was he interested in applying for a junior technician role based at the workshop. I find that at no stage did Mr Hughes-Sparrow indicate any interest in a workshop technician role.

[32] I conclude that Mr Hughes-Sparrow's dismissal for redundancy has met the tests that there was a genuine commercial reason for the restructuring and the process used to implement the restructuring was a procedure a fair and reasonable employer in the circumstances of this case would have followed. I am unable to make the findings or the orders Mr Hughes-Sparrow seeks. **There will be no formal orders in relation Mr Hughes-Sparrow's dismissal.**

The claims for arrears

[33] Mr Hughes-Sparrow further claims a bonus of \$400.00 and annual leave owing of some 20 days.

[34] The bonus in contention is that provided at clause 5.2 of the IEA. The final quarter was due at the end of March 2008. I find that Rug Doctor did not conduct an assessment of Mr Hughes-Sparrow's entitlement to this bonus because it says he did not work this quarter. Rug Doctor gave Mr Hughes-Sparrow four weeks notice but did not require him to work that notice period. I find that his employment therefore continued to 4 April 2008. This finding leads me to conclude Rug Doctor ought to have considered whether Mr Hughes-Sparrow was entitled to the final quarter bonus. It did not and that was not fair to Mr Hughes-Sparrow. I do not know whether Mr Hughes-Sparrow would have qualified for the payment of that bonus. I do know however, that no assessment was carried out when it should have been. I think it right that the matter be considered on a loss of chance basis and an all-or-nothing approach is warranted. I think it just and equitable in the circumstances that Mr Hughes-Sparrow be paid \$400.00 in respect of this bonus as arrears of wages. **I order Rug Doctor (New Zealand) Limited to pay to Selwyn Hughes-Sparrow the sum of \$400.00 as arrears of wages.**

[35] Rug Doctor also admits that Mr Hughes-Sparrow has been short-paid \$121.35. It must pay him that sum. **I order Rug Doctor (New Zealand) Limited to pay to Selwyn Hughes-Sparrow the sum of \$121.35 as arrears of wages.**

[36] Mr Hughes-Sparrow claims he is owed 20 days annual leave. I accept he confuses the anniversary of his employment for his annual leave anniversary date. I ordered Rug Doctor to produce its wage and time record. It duly complied and I have inspected that record. Consequently, I accept the submission, and Mr Hughes-Sparrow does not persuade me otherwise, that Mr Hughes-Sparrow has miscalculated his leave entitlement and is not entitled to any further payment. **I find accordingly and there will be no orders in relation to annual leave.**

[37] I note that Rug Doctor concedes that ordinarily it would have paid a final severance payment as termination pay. I accept however that for the notice period, it did not require Mr Hughes-Sparrow to perform his duties and it continued to pay him his usual wages. I note that it also paid him redundancy compensation of six weeks wages and it was not obliged to do so. **In these circumstances I decline to order a**

penalty against Rug Doctor (New Zealand) Limited.**The costs**

[38] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Ms O'Brien is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Hughes-Sparrow is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application or submission lodged outside that timeframe without leave.

Leon Robinson
Member of Employment Relations Authority