

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Stephen John Hutchinson (Applicant)

AND Signature Security Systems Limited (First Respondent)
AND Char Webb (Second Respondent)

REPRESENTATIVES F J Wall, Advocate for Applicant
Ian Davidson, Advocate for Respondents

MEMBER OF AUTHORITY Paul Montgomery

INVESTIGATION MEETING 26 October 2005
20 June 2006

DATE OF DETERMINATION 30 January 2007

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] The applicant, Mr Hutchinson, claims he was unjustifiably dismissed from his employment with the respondent on 4 June 2003 on the ground of redundancy. He seeks reimbursement of wages lost due to the alleged grievance, compensation for hurt and humiliation, compensation for benefits lost and costs. He also sought penalties from the first and second respondents alleging under s.134 of the Employment Contracts Act that both had aided and abetted the breaching of an employment relationship agreement. These were later withdrawn at the investigation meeting. Finally the applicant alleges a lock-out under s.82(1)(a)(3) of the Act.

[2] The respondent denies the dismissal was unjustified saying the redundancy was genuine and the applicant's position was disestablished as a result of restructuring of its Christchurch operations.

What caused the problem

[3] The respondent, Signature Security Systems, was formed following the merging of Link Security and Securitas. Mr Hutchinson had been initially employed in late 1997 by Link Security and transferred to the respondent. His role was that of Security Controller and his duties to monitor customers' alarms alerting the appropriate registered key holder of the activation of the alarm. This section of the business was known as the Operations Department.

[4] The respondent also had a Communications Department which offered an after hours telephone answering service to customers. Both departments were staffed by shift workers.

[5] In 1999 the Operations Department was reorganised and the applicant was prompted to the position of Service Manager. In association with the Installation Manager, Mr Hutchinson was responsible for liaison with customers and sub-contractors. The Installation Manager had specified duties linked to sales whereas the applicant focused his attention on installation, maintenance, extensions and breakdowns. Essentially he was engaged in post-sales service.

[6] In June 1999 the Installation Manager resigned and Mr Hutchinson was approached to take on those responsibilities in addition to those he carried already. The applicant accepted and became responsible for both sales and post-sales activities. Over the next year sales of new systems dropped while the post-sales activity increased substantially and the respondent hired two further staff to support the development of the maintenance aspect of the business.

[7] In January 2002, the General Manager resigned and set up his own security company in competition with the respondent. In the middle of that year, Ms Char Webb was appointed to take control of the total Christchurch operation, that is both the alarm and telephone services. She reviewed the alarm operation and in particular the decrease in system sales.

[8] On 26 May 2002, Mr Hutchinson met with Ms Webb who advised him that in consultation with the Auckland based General Manager, a reorganisation of the Christchurch management was planned and that it was possible for the position the applicant held would be dispensed with. Mr Hutchinson was told Mr Ross wanted to discuss the proposed changes with him the following day and advised the applicant to have a representative or support person with him during that discussion.

[9] The applicant, accompanied by a colleague, met with Ms Webb on 27 May 2002. Mr Ross was not present but attended by conference call from Auckland.

[10] Mr Hutchinson says he was advised that while no final decision had been made, it was proposed that his position would go, that a new position of Project Manager would be created to focus the sales efforts and that a position of Technical Support Officer would also be established. Neither was to be a supervisory role and the salaries would likely be lower than that paid by his present position. Beyond this basic information, the applicant says no details of the positions were available. Mr Ross asked that the applicant consider what he wished to do about these positions before they met on 4 June 2002. The meeting was shifted to 6 June 2002.

[11] At that meeting Mr Hutchinson says it was confirmed that the management of the post sales operations in the alarm area was to pass to Ms Webb. Mr Hutchinson then asked Mr Ross about the content of the new positions. Mr Ross said that details had still to be decided and job descriptions prepared. Further, in relation to the role of Project Manager, Mr Ross told the applicant that he could fill the position, however he intended to advertise it and select the best candidate available.

[12] Mr Wall inquired whether the applicant's severance pay was open to negotiation in the event of his being made redundant. Mr Ross said that it was not. Mr Wall then requested that the whole matter be dealt with using the Mediation Service of the Department of Labour. Mr Ross declined.

[13] Mr Hutchinson says Mr Ross undertook to provide him with the job descriptions of the two positions. He also advised the applicant that he was to finish work that day but would be given some days to consider the positions on offer and to make his decision. The notice provisions of the employment agreement would, if required, come into play after that decision was made.

[14] Mr Hutchinson says he never received the job descriptions and although he diligently searched the newspapers, neither position was ever advertised.

[15] Mr Roland Ipenburg had previously been employed by Signature Security Alarms for about 12 months as a service technician dealing with faults that arose following the installation of an alarm system. He resigned his position with the company and went to work for another company in Christchurch who sell electronic alarm systems. In that role, in addition to a sales function he was employed in technical support giving advice and support to those installers who purchased the alarms as required. He says that while he cannot recall the exact date he believed that around May 2003 Mr Lowe, the Sales Manager for Signature who purchased equipment from Mr Ipenburg's then employer, visited their premises.

[16] Mr Ipenburg said he is not entirely sure how the matter arose but during the conversation with Mr Lowe the Signature Sales Manager inquired whether he would consider returning to Signature. Mr Ipenburg said he would consider the matter and said that Mr Lowe returned to see him on two or three separate occasions over a period of 2-3 weeks to encourage him to return to his previous employment. Mr Ipenburg said it would have been *towards the end of May 2003 when Mr Lowe again visited me*. This time he was accompanied by Mr Paul Ross who was at that time the New Zealand General Manager of Signature. Mr Ipenburg's evidence was *when Paul Ross came to see me we had a long discussion as to what my role would be if I returned to Signature. I do not recall it being described as a project manager role. Nevertheless we discussed the conditions of my employment, that was to include a wage package, company vehicle and cell phone. Basically I was to take over the position previously held by Mr Stephen Hutchinson by becoming responsible for overseeing the work of sub-contractors*.

[17] In his evidence, Mr Ipenburg said that *I cannot recall precisely when I was informed, whether it was at this meeting or an earlier meeting, but during one of our meetings it was made known to me that Mr Steven Hutchinson was no longer with Signature Security. I was informed that he had 'left the place' without being informed of the circumstances of his departure*.

[18] Mr Ipenburg discussed the possibility of returning to Signature with his wife and after mulling the matters over for a few days came to the conclusion that the offer should be accepted. He telephoned Mr Lowe informing him of the decision and accepting the offer and then following working out his month's notice with his then employer, he and his wife took a weeks holiday before he commenced at Signature. He says he believes he commenced around mid July 2003 and undertook some tasks previously done by Mr Hutchinson. However, he says *unlike Mr Hutchinson I did not have responsibility for the service department. That came under Ms Char Webb*.

The issues

[19] In order to determine this matter the Authority needs to decide the following issues:

- Was the respondent entitled to reorganise its structure; and
- Was the consultative process employed by the respondent prior to declaring the applicant's position surplus to requirements fair; and
- Was the respondent's declining to attend mediation assistance in the course of the consultative process a breach of the employment agreement; and
- Was there a lock out; and was the transfer of the applicant's duties to Ms Webb a contractual breach; and
- Was the refusal to go to mediation a breach of good faith.

The investigation meetings

[20] At the initial meeting the Authority heard evidence from the applicant and from Ms Webb on behalf of both respondents. In the course of the meeting Mr Wall advised he had another witness he had arranged to appear on behalf of the applicant, a Mr Ipenburg. Neither the Authority nor the respondent had previous advice of this witness and had no statement of evidence from him. To avoid any prejudice to the respondent, I adjourned the investigation meeting and directed Mr Wall as to the procedure to be followed in having this witness appear before the Authority and to give his evidence.

[21] The investigation was reconvened on 20 June 2006. As Mr Ipenburg was unable to attend due to being involved in repairing major power outages caused by heavy snow in mid Canterbury, his evidence was affirmed by cell phone and he responded to questions from the Authority and from the respective representatives.

[22] I found each of the witnesses open and straight forward and I thank them for their assistance. It was regrettable that Mr Paul Ross was unable to attend the investigation meeting since it was he who played the major role in relation to the decisions made which led up to the dismissal of Mr Hutchinson.

Discussion and analysis

[23] The respondent's position is that in the face of increased competition from the company set up by its former Christchurch manager and other companies in the market, and a decrease in systems sales in both the domestic and commercial sectors, it needed to reduce its costs and increase its sales. The branch restructure was to address both. There is no difficulty in a company adjusting its staffing to meet the needs of the business. However, where existing staff are likely to be affected or possibly displaced, the law requires a formal consultative process to be undertaken and the real opportunity for affected employees to put alternative proposals to management for its active consideration.

[24] In fact, on the evidence, Mr Hutchinson was advised that his position could disappear in the proposed restructure and was told of the two positions the proposal would generate. What appears to be lacking is the opportunity for him to put counter proposals which may have modified the final outcome. What was offered was for him to consider the new positions and whether he would be interested in securing either of them.

[25] That failure on the part of the management of the respondent may have been of little consequence had the job descriptions promised by Mr Ross been provided to the applicant. In failing to provide them the respondent effectively excluded Mr Hutchinson from applying and therefore left him no option but to accept dismissal.

[26] In this context Mr Ipenburg's evidence that about this time Mr Lowe and Mr Ross were speaking with him about returning to Signature, may be of relevance. It is unclear from the evidence when the actual offer was put to Mr Ipenburg. He told the Authority that he was told at some point that Mr Hutchinson had left the respondent's employment, but I am in no position to judge whether, at that time, the respondent's representatives were being truthful about the applicant's departure or not. The imprecision of this evidence in respect of timing is a difficulty as it does not allow me to make a finding in relation to whether or not Mr Ross was being completely up-front with Mr Hutchinson.

[27] Regardless, the failure of Mr Ross to meet his undertaking to provide the position descriptions to the applicant is reprehensible and totally unfair to Mr Hutchinson. That significant failure does not render the restructuring a sham, but it deals a serious blow to the respondent's defence of the applicant's claim.

[28] For the record, Ms Webb was not a major player in designing the respondent's restructure of the branch, and at the June 6 meeting was essentially taking notes on proceedings. The proposed transfer of some of the applicant's duties to her in her managerial prerogative and fell well short of a contractual breach.

[29] Turning to the lock out claim, Mr Wall submitted that the respondent was in breach of s.82(1)(a)(iii). The total section reads:

82. Meaning of Lock Out

(1) *In this Act, **lock out** means an act that –*

(a) Is the act of an employer –

- (i) in closing the employers place of business, or suspending or discontinuing the employer's business or any branch of that business; or*
- (ii) in discontinuing the employment of any employees; or*
- (iii) in breaking some of all of the employers employment agreement; or*
- (iv) in refusing or failing to engage employees for any work for which the employer usually employs employees; and*

(b) Is done with a view to compelling employees, or to aid another employer in compelling employees to –

- (i) accept terms of employment; or*
- (ii) comply with demands made by the employer.*

[30] As neither of the statutory requirements set out in s.82(1)(b)(i) and (ii) are not met, no lock out existed.

The determination

[31] Returning to the issues as set out earlier in this determination; I find the respondent was entitled to reorganise the structure of its Christchurch operation given the commercial setting in which it found itself.

[32] I find the consultative process employed by the respondent prior to declaring the applicant's position surplus to requirements to have been unfair in that the process lacked a true consultative element and further, because the undertaking to provide the applicant with position descriptions was not carried through.

[33] I find the respondent declining to attend mediation in the course of the consultative process was not a breach of the employment agreement as at that time no employment relationship problem existed between the parties. As indicated above I find that there was no lock out and nor was the

transfer of the applicant's duties to Ms Webb a contractual breach in respect of the employment agreement between the applicant and the respondent.

[34] I find the dismissal was unjustified and as a result of that finding must turn my mind to remedies.

Remedies

[35] In this case I have found that the redundancy was genuine but the process seriously flawed. In such a situation, a claim for lost remuneration resulting from the dismissal will fail as there was no assurance of continuing employment. Mr Wall provided the Authority with wage records from the applicant's new employer to establish his client's loss and I accept there has been a loss. Mr Davidson submitted there had been no evidence as to loss however, the applicant did not address this himself but did so through his representative late in the investigation meeting. I decline to make an award for remuneration lost as a result of the grievance. However in doing so I also commend the respondent for its offer of an assistance package and the gratuitous payment of redundancy compensation equivalent to ten weeks wages to the applicant. The gross figure was in excess of \$7,000.

[36] Significantly, Mr Davidson submitted that *there is no compelling evidence of hurt and humiliation arising from a process failure by the first respondent*. I accept that submission given that Mr Hutchinson made little mention of the effects of the dismissal on him and called no supporting evidence on this point to put before the Authority. Notwithstanding that, it was clear to me that Mr Hutchinson was hurt by the manner in which the company handled the process given he had spent over five years working in its interests.

[37] Considering all aspects of the case I think it just to award Mr Hutchinson the sum of \$6,500 in compensation under s.123(1)(c)(i) of the Act.

[38] The applications for penalties are dismissed.

Costs

[39] Costs are reserved. The parties are encouraged to attempt to resolve the matter of costs between themselves. In the event they are unable to do so leave is granted to approach the Authority to determine that issue.

Paul Montgomery
Member of Employment Relations Authority