Employment Court of New Zealand

Ikundabose v McWatt Group Limited [2019] NZEmpC 193 (18 December 2019)

Last Updated: 31 December 2019

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKAURAU

[2019] NZEmpC 193
EMPC 50/2019

IN THE MATTER OF	challenges to determinations of the Employment Relations Authority
BETWEEN	ELIYA IKUNDABOSE Plaintiff
AND	MCWATT GROUP LIMITED Defendant

Hearing:	27 and 28 June 2019, written submissions filed on 18 July 2019, 1 and 8 August 2019 (Heard at Auckland)
Appearances:	E Ikundabose, plaintiff in person P M Howard-Smith, counsel for defendant
Judgment:	18 December 2019

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] Eliya Ikundabose commenced employment with McWatt Group Limited (McWatt Group) as a mechanic. A formal employment agreement was executed by the parties on 5 and 6 September 2016. The written agreement confirmed that employment had commenced on 17 August 2016. The agreement also confirmed Mr Ikundabose's position as a mechanic performing the duties in the job description attached. Clause 2.2 of the agreement further provided:

2.2 **Duties as set out in the job description which may be modified from time to time by the Employer**

The Employee shall perform the duties set out in the Job Description attached to this agreement. These duties may be modified and updated by the Employer from time to time following agreement with the Employee. The Employee also agrees to perform all other reasonable duties and comply with reasonable instructions issued by the Employer.

[2] Mr Ikundabose's employment with McWatt Group ended on 8 May 2018. The position was terminated on the grounds of redundancy. Mr Ikundabose raised a personal grievance against McWatt Group claiming that he was unjustifiably dismissed. When the grievance could not be resolved, Mr Ikundabose commenced proceedings in the Employment Relations Authority. He disputed that McWatt Group had genuine grounds for making him redundant. He claimed that the decision to terminate his employment was made for the ulterior purpose of removing him from employment because of dissatisfaction with his performance, disputes with his supervisor and disputes relating to his entitlement to parental and sick leave.

[3] The Authority issued three determinations in the matter, dated 19 February 2019, 22 February 2019 and 4 March 2019.

The first determination dismissed Mr Ikundabose's claim for unjustifiable dismissal upholding McWatt Group's grounds for making him redundant. The second determination rejected an application by Mr Ikundabose for orders prohibiting publication of some or all of the evidence referred to in the first determination or the entire determination itself, which would include the identity of the parties. The third determination related to an application by McWatt Group for costs. Costs were awarded against Mr Ikundabose in the sum of $4,500, being the usual daily tariff.

[4] In pleadings filed in Court and culminating in a second amended statement of claim, Mr Ikundabose has filed challenges to all three determinations. The election relates to the whole of the determinations and seeks a hearing de novo. The remedies now sought by Mr Ikundabose, if his claim to being unjustifiably dismissed is successful are compensation in the sum of $100,000, reimbursement for lost earnings, totalling 39 weeks for a sum of $11,700, interest, costs and holiday pay and that the determinations of the Authority be overturned, including the refusal to prohibit publication.

Factual outline

[5] Murray McWatt, who is the founder and one of the directors of what is now McWatt Group Ltd, commenced business as an earthmoving contractor in 1975. He started out with one truck and took over some clients from his father's business which was also an earthmoving business. Since then the company has grown and now employs 37 staff and has a fleet of 25 trucks, 7 truck trailers, 12 diggers, 21 utilities (utes) and 9 motor vehicles used by members of the staff. The company has its business premises and a yard depot in East Tamaki, Auckland. In August 2000 a company known as McWatt Transport Ltd was incorporated to own and operate the business and in April 2013, the company name was changed to McWatt Group Ltd. An earthmoving business owned by Mr McWatt's son was also amalgamated into the group.

[6] This history of expansion provides the background to the present dispute involving Mr Ikundabose. Mr Ikundabose was the last mechanic employed by McWatt Group as its in-house mechanic to service trucks, earthmoving equipment and some of the utes and motor vehicles. The vehicles and equipment were predominantly older plant, purchased second-hand. As the company's fortunes have improved and primarily during the period when Mr Ikundabose was employed by it, the company changed to purchasing new trucks and equipment. Even so, most of its utes and motor vehicles which had been purchased second-hand, or aged beyond warranty periods, were outsourced for mechanical servicing to service companies unconnected with McWatt Group.

[7] With the purchasing of new vehicles and equipment, the mechanical servicing requirements went through a process of change. This resulted from new vehicles being under warranty or service agreements which, apart from some minor mechanical work, required McWatt Group to have mechanical servicing carried out by the vendor of the vehicles or the provider under service agreements. While it was disputed by Mr Ikundabose, the evidence is that the work available for an in-house mechanic has reduced considerably as McWatt Group has upgraded its fleet of trucks, equipment and vehicles.

[8] Logically the effect of these business decisions on Mr Ikundabose's workload as the in-house mechanic was that it would begin to decline. Employees of McWatt Group had already noticed Mr Ikundabose having idle periods during his working day. He, however, indicated in evidence that he was fully occupied. He pointed out that he was often required to work on Saturdays. However, the company's evidence was that the requirement for Saturday work was not because of an excess of duties to be performed by Mr Ikundabose, but that Saturday was an off-peak time for the business and it was more convenient for vehicles to be serviced by him on that day.

[9] Mr Ikundabose's supervisor, noticing the idle periods, tried to get Mr Ikundabose to do other work which included jobs around the yard, washing down and cleaning vehicles and equipment and driving trucks. Some of this work Mr Ikundabose agreed to do, but he flatly refused to clean vehicles as this, along with other duties he also declined to do, he regarded as outside his contractual duties. This apparently led to some dissension between Mr Ikundabose and his supervisor which he later alleged was one of the matters which was really behind McWatt's Group decision in the end to terminate his employment.

[10] In February 2018 and before making any decision on Mr Ikundabose's employment, an assessment had been undertaken of the company's performance, profitability and ways to improve company efficiency. Resulting from this, one of the shareholders of McWatt Group, Laurel McWatt, who was also the office manager, carried out a review of the work which Mr Ikundabose was performing in his position as the in-house mechanic. Ms McWatt set out in her evidence the reasonably extensive steps she took to ascertain Mr Ikundabose's workload. It involved inquiring into the written and computerised records which Mr Ikundabose was understood to have kept of the work he performed. This in turn led to substantial dispute in the evidence, with Mr Ikundabose claiming that McWatt Group had deliberately manipulated the information for its own purposes, had not taken account of information which he had transferred into another diary – which can no longer be found – and had tampered with computerised information which he claimed to have entered in his work computer.

[11] The ambit of Mr Ikundabose's evidence was that if the other information had been available it would show that he was fully occupied and there was not a proper

business case for him to be made redundant. He also disputed, during the course of evidence, the assertion by McWatt Group that with

new vehicles, diagnostic and repair work is carried out using computers solely operated by the suppliers of the vehicles. In addition, he claimed that service and repair work carried out on the used vehicles presently outsourced could be carried out by him even though the vehicle service contracting companies also use computer diagnosing equipment. Mr Ikundabose maintained that McWatt Group could, at quite low cost, have purchased its own computer diagnostic equipment for him to use. These allegations on his part were undermined by evidence from representatives of the servicing companies to which McWatt Group outsourced mechanical repairs and service. McWatt Group also maintained that escalation of internal mechanical work in this way was unrealistic in view of the size of its then workshop, which had minimum tools and no hoist or pit.

[12] The outcome of Laurel McWatt's review was quite significant. There was no dispute in this case that Mr Ikundabose was required to attend for work at fixed times and he was paid on the basis of timesheets which he submitted based on those hours. However, the diaries she reviewed showed a decline in the actual mechanical work and truck-driving duties Mr Ikundabose undertook even with some other duties which he agreed to do. The computer supplied to Mr Ikundabose by the company showed no work recorded by him. For the period of the review, he had been paid for 3,051 hours of attendance at a gross amount of $98,446.50, whereas if he had been paid on the basis of the hours of his actual performed duties which he recorded in the diaries, the average gross salary would have been only $36,046. The income difference between the hours when he performed work and what he was paid for his hours of attendance was $62,400.50 gross. The review therefore disclosed that Mr Ikundabose's hours when he performed and recorded mechanical work had decreased significantly over time. Laurel McWatt also indicated in her review that the financial evidence was also corroborated. This was, first, by her own observations of Mr Ikundabose being idle for periods during the working day and, secondly, the fact that the company knew that the requirements for an in-house mechanic must incrementally decrease as the company renewed its fleet vehicles. The company became compelled to have mechanical and servicing work carried out in accordance with warranty and service agreement conditions.

Relevant legal principles

[13] Redundancy has been described as a situation where the worker's employment is terminated by the employer, termination being attributable, wholly or mainly, to the fact that the position filled by the worker is, or will become, superfluous to the needs of the employer.1 It is well established that it is not for the Employment Court to substitute its business judgment for that of the employer.2

[14] Under s 103A, of the Employment Relations Act 2000 (the Act) the Court is nevertheless required to determine, on an objective basis, whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred. In *Grace Team Accounting Ltd v Brake*, the Court of Appeal affirmed the Employment Court's finding that it is appropriate for the Employment Court to consider the genuineness of the redundancy. It defined "genuine" as meaning that the decision is based on business requirements and not used as a pretext for dismissing a disliked employee.3 The first step for the Court, then, is to consider on an objective basis whether there was a genuine reason for the redundancy. As this Court stated in *Scarborough v Micron Security*:4

The Court of Appeal has ... confirmed that the Court is entitled to enquire into the merits of the redundancy business decision. The genuineness of the redundancy remains a key focus. Once that is established, if an employer concludes that the employee is surplus to its needs, the Court is not to substitute its business judgment for that of the employer.

[15] Secondly, the Court must consider the steps outlined in s 103A(3) and (4) of the Act. *Grace Team Accounting* makes it clear that although the language of the section is geared towards misconduct dismissal, the requirements apply equally to redundancy situations. The Court of Appeal said:5

We agree with the Full Court that it will be necessary to interpret s 103A(3) in a way that adapts it to a situation not involving misconduct and to invoke s 103A(4) (allowing it to consider "any other factors it thinks appropriate") in redundancy cases.

1 Labour Relations Act 1987, s 184.

2 *Grace Team Accounting Ltd v Brake* [2014] NZCA 541, [2015] 2 NZLR 494 at [70], [83]-[85].

3 At [85].

4 *Scarborough v Micron Security Products Ltd* [2015] NZEmpC 39 at [37] (footnote omitted).

5 At [77].

[16] Finally, the enquiry necessarily considers the duty of good faith in s 4(1A). Subsection (1A) was inserted into the Act following the case of *Coutts Cars Ltd v Baguley*, where a car groomer was made redundant.6 The redundancy was found to be flawed not on the basis of whether the work was still there to be done; clearly it was there, but the company had made a legitimate business decision to outsource that work. The claim of the aggrieved employee was upheld, however, on the basis

of the refusal of the employer to provide selection criteria for the decision as to who would be kept on and who laid off. Section 4(1A) confirms that an employer who is proposing to make a decision that will or is likely to have an adverse effect on the continuation of employment, must provide the affected employees with both access to information relevant to the continuation of the employment, about the decision, and an opportunity to comment on the information to their employer before the decision is made.

Collateral issues raised by Mr Ikundabose

[17] The case which Mr Ikundabose presented in evidence and during his submissions implied that Laurel McWatt was part of a conspiracy with the other proprietors of McWatt Group. He alleged they fraudulently manipulated the information in the review to provide a basis for him being made redundant when the real reasons for the termination of his employment were other collateral factors. He alleged that statements were made by Mr McWatt and his supervisor that they would get rid of him. This was denied by Mr McWatt and Mr Ikundabose's supervisor.

[18] Not long after Mr Ikundabose commenced employment with McWatt Group, the company advanced to him an interest-free loan for $6,000. This was to enable him to travel back home to Africa to find a wife. Mr Ikundabose then returned to New Zealand and re-commenced work on 2 February 2017. His bride-to-be arrived in June 2017. Mr McWatt and his wife hosted the wedding at their home on 13 August 2017. The loan which was advanced to Mr Ikundabose was repaid by him by way of agreed periodic deduction from his wages. During the course of evidence both before the Authority and the Court and in his submissions, Mr Ikundabose made the comment

6 *Coutts Cars Ltd v Baguley* [2001] NZCA 382; [2002] 2 NZLR 533, [2001] ERNZ 660 (CA).

that he considered that Mr McWatt and his wife Catherine McWatt put on the wedding for Mr Ikundabose and his wife from ulterior motives. He alleges that they put on the wedding and had photos taken so that they would have evidence of their benevolence to use against him in the event that he brought a grievance. Mr Ikundabose's assertions in this regard appear to be a continuation of his belief that there was a conspiracy against him. Mr McWatt, in his evidence, indicated that he was considerably hurt by this allegation. This reaction is understandable in the circumstances. The wedding was arranged about 12 months after Mr Ikundabose commenced employment, and it seems hardly likely that the McWatts would, at that early stage, have decided that they would have been wanting to terminate Mr Ikundabose's employment. While Mr Ikundabose did make some effort in his evidence to apologise for the assertions, he then reinforced his views in his final submissions in reply.

[19] Mr Ikundabose also raised what he believes to be one of the true grounds for the termination of his employment. This was the dispute which existed between himself and his supervisor. It appears to have arisen over Mr Ikundabose's refusal to perform duties directed by the supervisor. It became an acrimonious dispute in which Mr McWatt was forced to intervene. While Mr McWatt endeavoured to mediate in the matter, it does not appear to have been finally resolved in Mr Ikundabose's thinking before he left employment. However, it seems unlikely that Mr McWatt would go to the extent he did to try and resolve the dispute if it was a matter he was intending to use to terminate Mr Ikundabose's employment.

[20] Another matter which Mr Ikundabose also alleges was one of the real reasons for termination of his employment, relates to circumstances surrounding the birth of his twin children who were born prematurely by caesarean section. There is no doubt that the situation was a very difficult and stressful one for Mr Ikundabose and his wife. However, I am of the view that some of the employment issues which arose out of it resulted from a misunderstanding. The first issue related to an application which Mr Ikundabose wished to make for paid parental leave. A form needed to be signed by the employer to support the application. Catherine McWatt was employed by the company as its payroll manager. She indicated to Mr Ikundabose that as he was not the primary caregiver for the children, he would not be entitled to parental leave. In these circumstances she was not prepared to sign the form. Eventually Mr Ikundabose

persuaded Mr McWatt to sign the form. It is unclear whether in fact Mr Ikundabose ever received approval for paid parental leave.

[21] Arising out of this incident, however, was an issue of sick leave which Mr Ikundabose wanted to take. Apparently one of the children had suffered a broken leg during birth but Mr Ikundabose had not communicated this to the McWatts. In the absence of knowledge of the injury Mr Ikundabose's original application for sick leave was refused. However, once the McWatts became aware of the true position, they sympathised with Mr Ikundabose's position and he was granted sick leave on pay to assist his wife. I have some difficulty in seeing how this incident could be linked to grounds for termination of Mr Ikundabose's employment as part of a conspiracy to get rid of him.

[22] The final collateral matter I deal with relates to a time during the employment where Mr Ikundabose was intending to leave employment with McWatt Group to take up employment with another company on a higher wage. An agreement was reached that Mr Ikundabose's hourly rate would be increased to $33 to persuade him to stay with the McWatt Group. When the increased pay was entered in the payroll system it was entered for $30 per hour rather than $33 per hour as a result of a misunderstanding on the part of Catherine McWatt. The position was rectified, but Mr Ikundabose clearly saw this as one more reason for believing there was a conspiracy against him.

Redundancy procedure

> [23] Once McWatt Group had completed its assessment of the overall position of the company, which included Ms McWatt's review of Mr Ikundabose's position, a letter was forwarded to Mr Ikundabose. That letter, dated 3 May 2018, invited Mr Ikundabose to a meeting on 8 May 2018 to discuss his position. The letter plays an important part in the process adopted by the company and reads as follows:7

7 Emphasis in original.

3 May 2018

BY HAND

Eliya Ikundabose Auckland

Dear Eliya

We invite you to meet with us on the 8th May 2018 at 9.00am, 7 Neales Road, East Tamaki, and the purpose of the meeting is to discuss whether your position is, or will be, superfluous to our company requirements.

No decision has yet been made, and we wish to consult with you as to the possibility of redundancy before any decision is made.

The relevant provisions as to redundancy are contained in clauses 12.4 – 12.7 of your Employment Contract, and no doubt you would like to refer to that before we meet.

We have recently been conducting a review of our fleet of vehicles and machinery (**fleet**) which, in terms of your contract, you are responsible to repair and maintain, and have noted that in respect of the fleet:

- It has been, and will continue to be, upgraded and new vehicles and machinery are under warranty and repairs, maintenance and service are undertaken by the dealers and/or their agents or other dealer approved businesses.
- All repairs, servicing and records of the new fleet are completed after computer diagnostics have been undertaken, and our workshop does not have the equipment needed to complete that work, nor is it in our best interest to since the new fleet of vehicles and machinery are under warranty.
- It is intended that most of the fleet which is not under warranty will be replaced in the foreseeable future so that as far as possible all fleet will be under warranty and all repairs, maintenance servicing and lubrication of that fleet will be undertaken in terms of the warranties.
- Our company cars and utes are mostly serviced by an Outsourced Service Provider and there are only a very small number of utes which you service.
- You will be aware that your work load, as it relates to repair and maintenance of the fleet has significantly reduced, and you now carry out some driving duties for the company. These tasks could easily be undertaken by other company employees, and sometimes have been given to you Eliya, to give you something to do.
- Your maintenance records since October of last year demonstrate how little repair and maintenance work on the fleet is actually undertaken by you.
- Because of workload, our fleet will increase, we will need space for storage, parking of vehicles and the like. We are considering reconfiguring the workshop into a storage area, and the area taken for maintenance and repairs of vehicles and the space taken by the workshop can be better utilised for the increase in fleet.

We are now considering whether the company requires a mechanic, and if the position is surplus to our requirements.

I want to make it perfectly clear that no decision has been made, and that I want to discuss the matter with you, and hear what you have to say and consider whether there are other alternatives.

Eliya, I am conscious that this letter will cause you distress, and if you would like time off ahead of the meeting to prepare and to arrange for a support person, please feel free to do this. I would be grateful however if you would confirm your attendance at the meeting by return.

At the meeting I will listen and consider your views about these matters, and any other matters that may be raised before any decision is made.

Depending however on the outcome of the meeting, and any final decision that I may make, it is fair to tell you that your continued employment may be at risk.

Yours Sincerely [signed]

Murray McWatt Director

> [24] Mr Ikundabose was granted time off work to prepare for the meeting. While he was also notified that he could bring a support person with him, he chose not to do that. At the meeting, Mr Ikundabose agreed that the mechanical-related work

was decreasing. He did not request any further information and had no suggestions of other work that he could undertake. In evidence at the hearing of the challenges he maintained that he was not convinced by the information he received that his position was indeed redundant. However, he did not raise this in evidence before the Authority at its investigation meeting and I consider it unlikely that he stated that at the meeting at 8 May 2018. At the meeting Mr Ikundabose would not engage with Mr and Mrs McWatt in such a way as to traverse all of the information which was available following the company's assessment.

[25] It appears that the meeting then turned to the basis upon which Mr Ikundabose could leave his employment. There was a discussion as to the final pay he would receive. A figure of approximately $11,000 was proposed. Mr and Mrs McWatt regarded this as payment of final wages owing to Mr Ikundabose before deduction of tax and traffic fines owing was made. The figure also incorporated payment in lieu of notice. Mr Ikundabose indicated that his view of the figure was that it was a compensation payment to be made to him over and above final wages owing. The company was not prepared to settle the position with Mr Ikundabose on that basis.

[26] There was a discussion as to employment elsewhere which might be available to Mr Ikundabose and it appears that Mr McWatt contacted a company known as Truck City. With assistance from Mr McWatt, Mr Ikundabose was able to obtain immediate employment with Truck City. However, it appears that the dispute as to final payment continued and Mr Ikundabose would not sign a letter which had been prepared recording the acceptance of the redundancy position, payment in lieu of notice and date of termination. On 10 May 2018, Mr McWatt sent a letter to Mr Ikundabose setting out the company's position and to record what had transpired at the meeting on 8 May 2018. As that letter is also important as to the procedure adopted by McWatt Group, the letter is set out as follows:

10 May 2018

Eliya Ikundabose Eliya,

Further to our meeting on Monday:

1. I note that at the meeting you agreed that there was not enough work for you, and with the company's plans to modernise its fleet, there would be less and less work available.
2. That there was no other position available within the company which you could fill.
3. As a result you accepted that your position was surplus to the company requirements, and that it was appropriate that your employment with the company terminate.
4. We then discussed the four week notice period. We agreed that employment should terminate immediately and that the company would pay you the four weeks salary plus all other entitlements due to you.
5. This gesture made on behalf of the company was, in part, to free up your time so that you could seek other suitable employment.
6. Before you left I suggested you see people at Truck City who may have had a position available to you as a mechanic. I understand you went straight there from our meeting and you were given a job which you started today.
7. The following day (Tuesday) you texted and said you wanted more money ($11,000.00).
8. When you were advised there would be nothing more paid, you then indicated that you would return to work.
9. Eliya, unfortunately, and for the circumstances that have been outlined to you in detail, your position as a mechanic within the company is surplus to company requirements.
10. I have considered overnight, once again, your position and whether there were any other alternatives to terminating your employment, but unfortunately there are none, and your employment is terminated accordingly.

Once again may I reiterate our best wishes in the future and we will advise all staff members that through no fault of your own, your employment has been terminated, and if you wish to have any input into what I should say to the staff, I would be happy to consider that. Obviously I need to tell them as soon as possible so if you want to add anything which is suitable, please let me know immediately.

We will forward you shortly any moneys due to you. Yours Sincerely

Murray McWatt Director

[27] Upon termination of employment Mr Ikundabose received four weeks wages in lieu of working out notice. During that period of notice, he also received wages in his new job with Truck City. Upon termination he was also paid out his previous week's wages which included holiday pay.

[28] Following the termination of Mr Ikundabose's employment on the ground of redundancy, McWatt Group have not employed a mechanic to replace him and Mr McWatt has indicated in evidence that it is not his intention to do so. He indicated that the workshop area has now been absorbed into the depot and is used for parking trucks and machinery. When certain specialised work such as auto-electrical work is

required, the auto-electricians complete that work on-site, using the former workshop area to provide shelter from weather. The company is continuing its policy of purchasing new or nearly-new vehicles which are maintained and serviced under warranty or

service contracts without the need for the company to have an in-house mechanic.

Conclusions

[29] In summary, therefore, the process adopted by McWatt Group in the termination of Mr Ikundabose's employment was carried out in a procedurally fair manner. The company collated information before considering the matter. Mr Ikundabose was given ample notice of the meeting and the opportunity to consider the information and have a representative present. He was given the opportunity of considering the information that was available and provide input but chose not to engage on that. Mr Ikundabose clearly indicated his acceptance of the position and while he disputed this at the hearing, he had indicated a different view before the Authority in its investigation. Once it was apparent that his employment would be terminated, he was paid out appropriately and Mr McWatt used his contacts to assist Mr Ikundabose to obtain alternative employment almost immediately. While there was an argument over the final payment, there was no reason why Mr Ikundabose could expect a payment of $11,000 over and above his entitlement for final wages, payment in lieu of notice and holiday pay. He was able to mitigate any loss by taking up employment immediately upon leaving McWatt Group and there would appear to be no basis for any claim for reimbursement.

[30] Having regard to the principles applying in a redundancy situation, as discussed earlier in this judgment, I find that McWatt Group have established that there were genuine reasons for terminating Mr Ikundabose's employment. Mr Ikundabose spent a considerable part of his evidence attacking the review carried out by Ms McWatt and the conclusions which she reached. This was mainly based on his assertion that Ms McWatt had manipulated the information available from the work diaries and had not taken account of information which he had entered into another diary which can now no longer be located. He also maintained that information which he had entered into his work computer had been inappropriately deleted so that

information which he alleged showed a substantially greater workload, was not available. I do not accept his evidence in this regard. He also criticised the information which was taken from the work diaries actually available and maintained there had been some misrepresentation of the information which was contained in the volumes of documents produced for the hearing. This could have been easily resolved by Mr Ikundabose accepting the invitation from Mr Howard-Smith, counsel for McWatt Group, to view the actual diaries at his office. Mr Ikundabose's excuse for not taking up this invitation was unpersuasive. Having gone through the bundles produced for the hearing, I am of the view that Ms McWatt has collated the information from the diaries in an acceptable manner by relating the entries by Mr Ikundabose in the diaries to his time and attendance sheets. The manner in which the information has been provided to the Court is a logical way of setting the information out and I found it a helpful format.

[31] It is clear that the work available for Mr Ikundabose was reduced substantially and would continue to reduce in view of the company's decision to upgrade its vehicles and plant so that it could take advantage of warranties and, where appropriate, service agreements. This is a business decision which it was entitled to make and as indicated in the legal authorities referred to earlier, in such circumstances the Court is not to substitute its judgment for that of the employer.

[32] I do not accept Mr Ikundabose's evidence that he was fully occupied. I do not accept his inference that there was a conspiracy to get rid of him. The evidence of other employees who observed him being idle during the day is consistent with the company's decision. Of necessity, that decision would lead to a reduction in his workload to such an extent that his position of employment with McWatt Group would no longer be tenable and result in him being made redundant. However, even if Mr Ikundabose was fully occupied, as he suggests he was, this would not preclude McWatt Group from outsourcing its mechanical work as a legitimate business decision.

[33] McWatt Group went through an appropriate procedure with Mr Ikundabose setting out the reasons why his position was to be made redundant and giving him an opportunity to review the information which had been collated and provide input. He chose not to take up that opportunity. He was also given the opportunity of having a

support person, but again, chose not to adopt this course. I accept the evidence that Mr Ikundabose did not dispute that his position was redundant at the meeting with Mr McWatt. This is corroborated by what he stated in his witness statement to the Authority. His assertion that he did not accept the basis for his redundancy, and stated this, appears to have been raised belatedly in the challenge.

[34] I agree with the Authority's first determination that McWatt Group acted in the way a fair and reasonable employer could have done in all the circumstances at the time of the termination of employment. Mr Ikundabose has failed to establish a personal grievance for unjustifiable dismissal and his challenge on this ground is dismissed.

[35] Insofar as the second determination is concerned, I consider that the Authority has set out proper reasons for not granting Mr Ikundabose's request for a prohibition on publication of part or all of the first determination. Mr Ikundabose's application for prohibition on publication appears to be aimed at two areas. The first is that the publication of the determination will have an adverse effect on his reputation. I presume that he means by this that it would have an effect on

the way he might be regarded by a future prospective employer. The second area appears to relate to the publication of what might be regarded as personal information concerning the birth of his children and the medical factors which arose.

[36] Insofar as the first area is concerned, there is the potential that publication of proceedings before the Authority and Court may have an effect on future employment. However, this is not a sufficient ground for departing from the starting point of the principle of open justice. The analysis of and reliance upon authority set out in the Authority's second determination, in my view, is correct.

[37] Insofar as the second area is concerned, such matters might provide a basis for prohibiting publication. However, in this case the circumstances are so intricately connected to the areas of parental and sick leave, as discussed in the determination and this judgment, that it is not possible to have them redacted in a way that the determination and the judgment would then make sense, and it would be artificial to try to do so. They are an essential part of the narrative. The determination dealt with

them in a sensitive manner and this judgment also attempts to do the same. Certainly, this area would not be a reason for acceding to Mr Ikundabose's application to place a blanket prohibition on the whole of the determination and the judgment. Accordingly, the challenge to the second determination is dismissed.

[38] Insofar as the challenge to the third determination on costs is concerned, in view of the fact that Mr Ikundabose has been unsuccessful in his other challenges to the Court, there would be no basis for setting aside the costs award of the Authority. Mr Ikundabose did not deal with this challenge in his evidence and the challenge is dismissed.

[39] Costs should follow the event, so far as the challenges are concerned, which would mean that McWatt Group is entitled to an award of costs in respect of the proceedings before the Court. It may well be that the parties can now reach agreement on costs, but if that is not possible, then McWatt Group will have until 31 January 2020 to file a memorandum of submissions on costs. This lengthy period is to take account of the pending holiday break. Mr Ikundabose will then have 14 days from receipt of the submissions of McWatt Group on costs to file a memorandum containing his own submissions on costs. The Court will then consider the matter of costs further. To confirm the position on the costs in the Authority, Mr Ikundabose's challenge is dismissed and the order for costs made by the Authority stands and becomes part of the judgment of this Court.

M E Perkins Judge

Judgment signed at 12.15 pm on 18 December 2019
