

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Bruce Jack (Applicant)  
**AND** Faithfull Funeral Services Limited (Respondent)  
**REPRESENTATIVES** Perry Skilton, Advocate for Applicant  
Ferial Yasmin, Advocate for Respondent  
**MEMBER OF AUTHORITY** R A Monaghan  
**INVESTIGATION MEETING** 20 December 2005  
**SUBMISSIONS RECEIVED** 23 January 2006  
**ADDITIONAL MATERIAL RECEIVED** 10 and 17 February, 3, 9,16 and 20 March 2006  
**DATE OF DETERMINATION** 24 March 2006

**DETERMINATION OF THE AUTHORITY**

**Employment relationship problem**

[1] Faithfull Funeral Services Limited (“FFSL”) employed Bruce Jack as an embalmer/general hand commencing 5 January 2004. Mr Jack’s employment terminated by reason of redundancy on 9 February 2005.

[2] Mr Jack says he was unjustifiably dismissed and the redundancy was not genuine. He says further that he and his representative were misled and deceived about the genuineness of the reasons for the redundancy, that FSSL did not act in good faith and a penalty for breach of s 4 of the Employment Relations Act 2000 should be awarded.

[3] FFSL says not only that the redundancy was genuine and it acted in good faith, but:

- (a) the termination of Mr Jack’s employment by reason of redundancy was effected in association with an agreement between the parties; and
- (b) no personal grievance was raised until after the expiry of the 90-day period in s 114(1) of the Employment Relations Act 2000.

[4] All of these matters were heard together. The parties had already attended mediation.

**Whether the agreement was reached through misleading and deceptive conduct**

[5] Mr Jack did not dispute that on 9 February 2005 the parties reached an agreement terminating his employment by reason of redundancy. The agreement included a severance payment and the

payment of Mr Jack's costs of representation to that date. Instead Mr Jack says the agreement was reached on the understanding that Brenton Faithfull - a qualified funeral director and the director of FFSL - was telling the truth about the need for the redundancy. As a result he has sought to have the entire circumstances of his redundancy revisited, saying he was dismissed and seeking a finding that it was unjustified as if the agreement did not exist.

[6] I was not addressed on the legal basis for Mr Jack's wish to, in effect, set aside the agreement terminating his employment. Nevertheless the agreement must be set aside before I can revisit the entire circumstances of the redundancy. Accordingly I start by assuming Mr Jack no longer wishes to be bound by the agreement.

[7] Turning to the grounds on which that might be achieved, much was made of allegations that Mr Faithfull failed to deal with Mr Jack in good faith. However no argument was raised about how the alleged breach of the obligation to deal in good faith provided a legal basis for proceeding as if the agreement did not exist.

[8] Since the agreement was not one made under s 149 of the Act, and Mr Jack's concern was that he was misled and deceived, I have considered whether the agreement is capable of cancellation under the Contractual Remedies Act 1979.

[9] Section 7 of the Contractual Remedies Act provides in part as follows:

“(4) ... a party may exercise the right to cancel if, and only if,—

(a) The parties have expressly or impliedly agreed that the truth of the representation or, as the case may require, the performance of the [term] is essential to him; or

(b) The effect of the misrepresentation or breach is, or, in the case of an anticipated breach, will be,—

(i) Substantially to reduce the benefit of the contract to the cancelling party; or

(ii) Substantially to increase the burden of the cancelling party under the contract; or

(iii) In relation to the cancelling party, to make the benefit or burden of the contract substantially different from that represented or contracted for.

[10] The allegedly misleading and deceptive conduct (or misrepresentations) concerned the intended allocation of work following the restructuring cited as the reason for Mr Jack's redundancy. That in turn had a bearing on the genuineness of the redundancy. Mr Jack said he had been led to believe his position would disappear, and that Mr Faithfull himself would pick up many of the duties Mr Jack had been performing. Mr Jack said he had also been led to believe that FFSL would not be offering permanent employment to a young man named Brad Johnston, who was employed on work experience at the time of the redundancy. Nevertheless, such employment was offered to Mr Johnston. Then another person named Helen Riches was also employed after the redundancy, and she and Mr Johnston were the people who carried out Mr Jack's duties.

[11] Those duties included: embalming; trimming and maintaining a supply of trimmed caskets; vehicle maintenance and cleanliness; building and ground maintenance and cleanliness; and other general duties. Mr Faithfull's reason for disestablishing the position was that he did not believe there were enough duties to warrant retaining it. He decided, instead, that it would be better to employ a funeral director/embalmer, and that he would be able to cover some of the general maintenance as well as embalming work himself. He believed he would have more time to pick up that work because he had recently employed a personal assistant, who would take on some of the administrative work he had been carrying out. All of this was discussed during a series of meetings between the end of November 2004 and 9 February 2005, and Mr Jack relied on the truth of it.

[12] Mr Jack asked about Mr Johnston because Mr Johnston was employed after Mr Jack had been advised of his possible redundancy. In or about January 2005, Mr Faithfull advertised for the funeral director/embalmer as planned, and in order to replace a person who had recently resigned. No suitably qualified people applied. Mr Johnston's mother saw the advertisement and approached Mr Faithfull about employing Mr Johnston anyway. Mr Faithfull engaged Mr Johnston for a period of work experience. Mr Jack knew that much because it happened while he was still employed. His query was whether Mr Johnston's employment would become permanent, with the unstated question being whether Mr Johnston would be employed to do Mr Jack's job. The response, at the time, was 'no'.

[13] The role of Mr Faithfull's personal assistant, Debra Bromley, was apparently not discussed in any detail beyond the fact that her presence would give Mr Faithfull more time to carry out some of Mr Jack's duties. However by letter dated 11 February 2005 Ms Bromley gave notice that she sought a reduction in her hours of work, from 35 per week to 4 per week, and that she would 'finish up completely by the end of June'. Mr Jack does not believe Mr Faithfull could have been unaware of that prospect in the period up to and including 9 February, and believes Mr Faithfull misrepresented his availability to carry out some of Mr Jack's duties himself.

[14] Mr Faithfull said as at 9 February he did not know Ms Bromley would seek such a reduction. The effect of her request was that, if he agreed to it, he would not have available the time he had expected to pick up Mr Jack's duties. However he did agree to it, and said he addressed the resulting pressure on his time by offering Mr Johnston permanent employment as a trainee funeral director.

[15] A letter offering employment to Mr Johnston was dated 12 February 2005. The offer was stated to be of appointment to the vacancy advertised in January but still unfilled, on a trainee basis. When asked at the investigation meeting why he did not offer the position to Mr Jack, Mr Faithfull said Mr Jack had not demonstrated the empathetic skills required of a funeral director. Even if Mr Jack had applied for the position, he would not have been granted an interview. For his part, Mr Jack did not assert any real wish to be trained as a funeral director.

[16] Ms Riches was employed commencing on or about 22 February 2005. She, too, was not a trained or qualified funeral director. However Mr Faithfull believed that Ms Riches' background in childcare and nursing indicated she would have the necessary empathy, and he also believed there would be an advantage in having a woman on the staff. He said clients often asked for a female embalmer and celebrant. Accordingly Ms Riches was employed as a trainee funeral director. Unfortunately in May 2005 she, too, was dismissed on the ground of redundancy, although Mr Johnston has continued in his employment.

[17] I understand Ms Riches' employment has been raised in an attempt to impugn the genuineness of Mr Jack's redundancy with reference to the duties Ms Riches carried out. If Mr Jack also wants me to make something of the fact that a concern about misconduct on her part preceded her redundancy, I decline to do so in the present context. That is because it was open to Mr Jack to raise the same issue in connection with the genuineness of his own redundancy at any time up to and including 9 February. I do not accept that anything in that aspect of Ms Riches' employment amounts to a misrepresentation affecting the agreement under which Mr Jack's employment ended.

[18] As for Ms Riches' duties, I would accept they included some which Mr Jack had formerly carried out. However I was provided with a copy of Ms Riches' job description, and it confirmed she was employed as a trainee funeral director/embalmer to carry out duties consistent with that

position. Her position was not Mr Jack's. I do not accept that aspect of her employment, either, affects the agreement under which Mr Jack's employment ended.

[19] However the coincidence of the confirmation of the end of Mr Jack's employment, Ms Bromley's notice of her wish to reduce her hours, and the decision to offer permanent employment to Mr Johnston, warrant scrutiny.

[20] Ms Bromley gave evidence at my request. She had 'finished up completely' with FFSL several months earlier, and was a credible witness. She said she immigrated to New Zealand in August 2004 and began full time employment at FFSL at the beginning of October 2004. She was to assist Mr Faithfull with the day to day running of FFSL. That is consistent with the general evidence that Mr Faithfull first approached Mr Jack about the possibility of redundancy late in November 2004, indicating he would have the time to pick up some of Mr Jack's duties.

[21] Ms Bromley acknowledged discussing with FFSL staff her desire to start her own business. No doubt Mr Jack and his colleagues heard her do so on a number of occasions, and Ms Bromley's evidence indicated they participated in the discussions. However Ms Bromley said that, when she had the discussions, she was not aware of the opportunity which led to her letter of 11 February. She said of her workplace conversations: 'many things get talked about, but they do not necessarily happen'. Thus, even if she indicated she would leave as soon as a suitable opportunity came up (although her evidence was that she said she would start her own business 'some time in the future') that does not amount to proof that she, let alone Mr Faithfull, knew by 9 February that she was about to seek a significant reduction in her hours of work. Nor does it amount to proof that, with that knowledge, Mr Faithfull misrepresented to Mr Jack his availability to pick up Mr Jack's duties. I do not accept there was such a misrepresentation.

[22] Mr Johnston also gave evidence. In essence he confirmed the circumstances in which he came to be working at FFSL, and that the original arrangement was one of work experience. He said that, after some three weeks, Mr Faithfull was quite impressed with him and he was enjoying the work. He also said there was a discussion on a Friday (which would have been 11 February) about his becoming a permanent employee, and he received the 12 February letter of offer on Monday 14 February. He understood he was the replacement for the funeral director/embalmer who had left – or in other words he was being appointed to the vacancy advertised in January 2005.

[23] In those circumstances I find it hard to believe that by 9 February Mr Faithfull was not at least considering offering a permanent position to Mr Johnston. Ms Bromley's change in circumstances probably played a part in prompting the offer, but the success of the arrangement with Mr Johnston and the lack of suitable applicants for the vacancy mean I consider it likely the offer would have been made anyway.

[24] All of this leads me to the following conclusions. The representation that Mr Faithfull intended to pick up many of the duties that had been Mr Jack's was true. Mr Jack's position was being disestablished, Mr Faithfull would be picking up many of the duties, and in that respect the resulting redundancy was genuine.

[25] At the same time the representation that Mr Johnston would not be offered permanent employment probably did not accurately reflect Mr Faithfull's plans or intentions. On the other hand, Mr Johnston was not offered Mr Jack's job and Mr Faithfull never planned or intended to offer Mr Jack's job to Mr Johnston. Mr Johnston was offered the job held by the employee who had resigned. It is likely Ms Bromley's reduction in hours meant he picked up more of Mr Jack's duties than he would otherwise have done. Overall, however, I do not believe any of this amounts to a misrepresentation about the allocation of work or the genuineness of the redundancy.

[26] For these reasons I decline to cancel the agreement terminating Mr Jack's employment. He is bound by it, and the justification (or lack thereof) for the termination cannot be taken any further.

### **Penalty for breach of good faith**

[27] The above findings about the allocation, and intended allocation, of Mr Jack's duties mean I am not persuaded there was a breach of good faith as far as the genuineness of Mr Jack's redundancy is concerned. In that respect I note further that s 4(3) of the Employment Relations Act provides that the obligation to deal in good faith does not prevent a party to an employment relationship communicating a statement of fact or of opinion reasonably held about the employer's business. Subject to the following reservation, Mr Faithfull did no more than that.

[28] The reservation is that I believe Mr Faithfull was less than full and frank about his plans for Mr Johnston. Even if I accept those plans did not affect the genuineness of the redundancy, Mr Jack was still entitled to satisfy himself that Mr Johnston would not be employed to take his place. Mr Faithfull deprived him of a proper opportunity to do that. In doing so, Mr Faithfull was in breach of s 4(1) of the Employment Relations Act.

[29] Section 4A of the Act provides for the payment of penalties for breach of s 4(1) if, among other things, the failure to comply with the duty of good faith was deliberate, serious and sustained. The section does not say whether the Authority or the Employment Court has jurisdiction in respect of such penalties. On the assumption that it is appropriate for the present application to be dealt with by the Authority, I do not accept that Mr Faithfull's failure was of a kind proscribed by s 4(1).

[30] Therefore there will be no order for the payment of a penalty.

### **Whether personal grievance raised in time**

[31] The above findings mean it is not necessary to address whether Mr Jack's personal grievance was raised in time.

### **Costs**

[32] Costs are reserved.

[33] The parties are invited to agree on the matter. If they are unable to do so they shall have 28 days from the date of this determination in which to file and serve memoranda on the matter.

**R A Monaghan**  
**Member, Employment Relations Authority**