

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 15  
5434901

BETWEEN                      ALAN JOHNSON  
   Applicant  
  
AND                                KEVIN MCDONALD &  
   ASSOCIATES  
   Respondent

Member of Authority:        Vicki Campbell  
  
Representatives:              Paul Wicks for Applicant  
   Kevin McDonald for Respondent  
  
Investigation Meeting:        20 November 2014  
  
Submissions Received:        28 November and 5 December 2014  
  
Determination:                22 January 2015

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**DETERMINATION OF THE AUTHORITY**

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- A.     Mr Johnson was unjustifiably dismissed by reason of redundancy.**
  
- B.     Pursuant to section 123(1)(b) of the Employment Relations Act 2000 Kevin McDonald & Associates is ordered to pay to Mr Johnson lost wages of \$36,615 gross within 28 days of this determination.**
  
- C.     Pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000 Kevin McDonald & Associates is ordered to pay to Mr Johnson compensation of \$10,000 without deduction.**
  
- D.     Costs are reserved.**

### **Employment relationship problem**

[1] Mr Alan Johnson claims he was unjustifiably dismissed by reason of redundancy from his position as a Commercial lawyer with Kevin McDonald & Associates (Kevin McDonald). In the alternative, Mr Johnson claims the process used by Kevin McDonald resulted in him being disadvantaged in his employment.

[2] Kevin McDonald denies the claims and says the redundancy was genuine and carried out in a procedurally fair manner.

[3] As permitted by s 174 of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Mr Johnson and Kevin McDonald but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

### **Background**

[4] Mr Kevin McDonald is the Principal of Kevin McDonald & Associates a small law firm based in Takapuna. Mr McDonald established two teams in his practice, a litigation team and a property team. The litigation team was made up of Mr McDonald and an Associate together with the support of a secretary. The property team consisted of a solicitor and a Legal Executive, Ms Christine Wood.

[5] The property team dealt with estates, conveyancing and other matters related to property matters. In addition to her legal executive duties and client support the Legal Executive undertook other tasks such as managing the trust account, preparing accounts, managing the office, and paying accounts and wages.

[6] In addition to the employees employed in each team the practice employed a part time employee working for a few hours each day, except during school holidays, undertaking tasks such as closing files, ordering stationery and other administrative tasks.

[7] Mr Johnson commenced employment with Kevin McDonald on 14 February 2011 after the Property solicitor resigned. Mr McDonald considered the Property portfolio had room for growth and employed Mr Johnson on the belief that he would

grow the commercial aspect of the Property work. The terms and conditions of Mr Johnson's employment were set out in a written employment agreement.

[8] Mr Johnson experienced difficulties with the secretarial staff during his employment. After he had complained about his secretary, she left. A new secretary was hired in December 2012 and started working with Mr Johnson in January 2013. In December 2012 Mr Johnson and Mr McDonald met and discussed the "*bad feelings*" in the office.

[9] Mr Johnson quickly became dissatisfied with his new secretary and formally complained about her to Mr McDonald on 19 February 2013. Despite a meeting that same day with the secretary, Mr McDonald, Mr Johnson and Ms Wood, the difficulties Mr Johnson had complained of were not resolved.

[10] On 20 February 2013 Mr McDonald met with Mr Johnson and advised him that he needed to restructure the office. Mr Johnson says Mr McDonald seemed angry and agitated in the meeting and pressed the point that Mr Johnson was possibly going to be made redundant. Mr McDonald denies being angry or agitated.

[11] Mr Johnson says that at this meeting Mr McDonald told him they would meet on 22 February 2013 to discuss the proposal and that he wanted it all finished on that day. Mr Johnson asked if reducing his salary was an option. This was rejected by Mr McDonald.

[12] Mr McDonald denies he wanted a meeting on 22 February 2013 or that he wanted the restructuring process to be completed on 22 February 2013. Mr McDonald says he did not set any time frames at the meeting on 20 February 2013 and that it was premature to consider any alternatives until after the consultation process had commenced.

[13] Following the meeting, on 21 February 2013, Mr Johnson wrote to Mr McDonald requesting Mr McDonald to provide in writing the concerns and suggestions raised the previous day regarding his employment to enable him to get advice.

[14] On 25 February 2013 Mr McDonald wrote to Mr Johnson setting out in more detail the proposal to restructure. In that letter Mr McDonald says the litigation side of the practice was subsidizing the commercial/property side of the practice. He advised Mr Johnson that he wished to reduce overheads by engaging an intermediate lawyer as the practice could not support a senior commercial lawyer.

[15] Mr McDonald did not express to Mr Johnson at that time what the savings were that he wished to achieve. However in later correspondence he indicated that the salary for an Intermediate Solicitor would be in the region of \$60,000 - \$75,000. By my calculation this would provide a cost saving on wages of between \$55,000 and \$70,000.

[16] Mr McDonald sets out Mr Johnson's fees for the year to date as being \$215,000.00 with two months remaining in the financial year. In his letter Mr McDonald reminds Mr Johnson that when he was engaged he was told he was expected to produce a budget of 3 times his salary. He provided a printout showing how the year to date figure had been calculated.

[17] Mr McDonald says he had considered whether costs could be reduced to fixed expenses but had not been able to identify any areas where savings could be made. Mr McDonald invited Mr Johnson to meet with him on Wednesday, 27 February 2013 at 3.30pm to discuss his views.

[18] Mr Johnson did not consider the information provided by Mr McDonald in his letter sufficient for him to make any meaningful response to the proposal to disestablish his position and requested further specific information regarding the costs associated with his role as well as all economic and financial analysis undertaken setting out comparative costs and cost savings together with a response to Mr Johnson's proposal to reduce his salary. With regards the proposal to engage an intermediate lawyer Mr Johnson requested information on the likely salary of the new lawyer.

[19] The requested documentation was not provided to Mr Johnson, instead Mr McDonald met with Mr Johnson on 28 February 2013 and responded verbally.

[20] By letter dated 1 March 2013 Mr McDonald set out a summary of the discussion he and Mr Johnson had had on 28 February 2013. Mr McDonald set out his main concern that having a senior solicitor doing residential conveyancing which did not produce fees of any significance made it uneconomic. Mr McDonald reminded Mr Johnson that while it was envisaged that Mr Johnson would do some residential conveyancing, he was employed to grow the commercial property side of the business where fees would be commensurate with the salary of a senior solicitor.

[21] Mr McDonald advised Mr Johnson that he had not done a detailed analysis of costs for each fee-earning employee. Mr McDonald advised Mr Johnson that his expectation was, Mr Johnson would earn three times his salary in fees to ensure his position was economically viable. For the year ending 31 March 2013 Mr Johnson was not achieving that ratio.

[22] Mr McDonald assured Mr Johnson that he had closely considered whether fixed costs could be reduced and explained to Mr Johnson by way of example that he had altered his professional indemnity insurance to obtain a small reduction in those costs.

[23] In response, Mr Johnson raised a personal grievance for unjustified disadvantage on 7 March 2013. Mr Johnson continued to raise concerns that the underlying reasons for the restructuring was based on performance concerns and not the economic reasons set out in Mr McDonald's correspondence. Mr Johnson raised concerns about the lack of financial information being provided to him which would allow him a proper opportunity to respond to Mr McDonald's desire to reduce costs.

[24] Mr Johnson then wrote again on 8 March 2013 reiterating his view that he had not received sufficient information on which to engage in the consultation process about the proposal to disestablish his role.

[25] On that same day Mr McDonald provided a handwritten note to Mr Johnson. Rather than provide a formal breakdown of costs associated with Mr Johnson's employment Mr McDonald advised Mr Johnson of the salary he paid Mr Johnson's secretary and told him to add that to his own to get the total costs.

[26] Mr Johnson met with Mr McDonald again on 11 March 2013. At this meeting Mr Johnson provided Mr McDonald with a document setting out his ongoing concerns including the lack of actual financial information, the fact that a secretary had been employed less than three months earlier on a significant salary and a temporary employee had been engaged to undertake work Mr Johnson could complete.

[27] Mr Johnson also outlined his concerns that he had received no new instructions for the past two weeks and that Mr McDonald's assertions about having to reduce staff numbers was inconsistent with statements he had earlier made (including on 1 February 2013) that he was looking to increase staff numbers and that work would pick up during 2013.

[28] Mr Johnson offered alternative suggestions to the proposal that his position be disestablished. Mr McDonald says they discussed the proposal for restructuring and the suggestions made by Mr Johnson.

[29] Mr Johnson also raised suggestions and recommendations he had made to Mr McDonald during his tenure which would have seen an increase in the fees earned by the firm. Mr Johnson pointed out that these recommendations had never been acted on by Mr McDonald.

[30] Mr McDonald says that following the meeting he considered the suggestions made by Mr Johnson.

[31] On 13 March 2013 Mr Johnson was given notice of redundancy. Mr Johnson was not required to work out his notice period and his employment ended on 12 April 2013.

### **Relevant clauses from the employment agreement**

Redundancy is provided for in the employment agreement in the following terms:

- a. In the event the Employer considers that the Employee's employment could be affected by redundancy or could be made redundant, the Employer shall, except in exceptional circumstances, consult with the Employee regarding the possibility of redundancy and, before a decision to proceed with the redundancy is made, discuss with the employee whether there are any alternatives to dismissal. In the course of this consultation, the Employer will consider the views of the Employee with an open mind before making a decision as to whether the Employee's employment is redundant.

- b. In the event the Employee's employment is terminated on the basis of redundancy, the Employee shall be entitled to notice of termination of employment as specified in the termination of employment clause, but shall not be entitled to any additional payment, whether by redundancy compensation or otherwise.

## **Issues**

[32] The issues for determination are:

- a) Was the restructuring for genuine commercial requirements?
- b) Was the process used to implement the restructuring fair and reasonable and undertaken in good faith?
- c) Was Mr Johnson disadvantaged in his employment?
- d) If the dismissal by reason of redundancy is unjustified, what, if any remedies should be awarded?

### **Was the restructuring for genuine commercial requirements?**

[33] The test of justification for dismissal is stated in section 103A of the Act. The test requires the Authority to assess whether Kevin McDonald's actions and the way it acted was what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[34] The most recent authority on the application of section 103A in a redundancy setting is [\*Grace Team Accounting Limited v Brake\*](#)<sup>1</sup>. That decision upheld the earlier Employment Court<sup>2</sup> decision where the Court confirmed that employers must show that a decision to make an employee redundant is genuine and based on business requirements. This requires the Authority to scrutinise the reasons relied on by the employer in making its decision to dismiss.

[35] Section 4 of the Act requires parties to an employment relationship to deal with each other in good faith. Parties are to be active and constructive in establishing and maintaining a productive employment relationship in which they are responsive and communicative. The statutory obligations of good faith require employers to provide affected employees with access to information relevant to the continuation of

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<sup>1</sup>[2014] NZCA 541.

<sup>2</sup>[2013] NZEmpC 81.

the employee's employment and an opportunity to comment on the information before the decision is made.

[36] It was common ground that in 2011 Mr McDonald advised Mr Johnson that his expectation was that Mr Johnson would achieve billings equivalent to 3 times his salary (3:1). Mr Johnson, in his letter of 7 March 2013 confirms that in February 2012 the ratio discussed was 2.6:1.

[37] Mr McDonald had an expectation that solicitors working for the firm would achieve a ratio of 3:1. Mr Johnson does not dispute that in February 2013 his billings to date were \$215,000 and that by year end he would probably achieve about \$238,000. This equates to less than a 2:1 ratio.

[38] It was common ground that the commercial work undertaken by Mr Johnson had decreased during 2012. Mr Johnson told the Authority that a large commercial client had stopped instructing the firm which contributed to his results.

[39] Mr McDonald was seeking to reduce the costs to the business of between \$55,000 and \$70,000. On 11 March 2013 Mr Johnson's secretary resigned. Mr McDonald did not disclose this fact to Mr Johnson during the restructuring process and so he was unaware of this at the time the decision to disestablish his role was made. Mr Johnson's secretary was not replaced.

[40] I find the resignation of Mr Johnson's secretary was material to the consultation process. The salary savings achieved by not replacing Mr Johnson's secretary was an immediate saving of about \$55,000. The evidence shows Mr Johnson had offered to reduce his salary by \$20,000. Combined with the savings attributable to the loss of the secretary the savings available to Mr McDonald were approximately \$75,000.

[41] Mr McDonald's evidence was that if Mr Johnson had continued to be employed he would require the services of a secretary so his secretary would have to be replaced. The question about whether Mr Johnson would be able to do all his own typing or how much secretarial support he might need, was never discussed with him as Mr McDonald never disclosed to him during the restructuring process that his secretary had resigned.

[42] Mr McDonald gave uncontested evidence that between April 2012 and March 2013 he advanced \$137,000 to the firm in order for the firm to meet its expenses. This information was not provided to Mr Johnson during the consultation process.

[43] I accept the submissions of Counsel for Mr Johnson that the financial information about the practice and which was disclosed to the Authority prior to the investigation meeting should and could have been provided to Mr Johnson when he requested it in February and March 2013. Further the material information about Mr Johnson's secretary's resignation was relevant to the reasons for the restructuring and ought to have been provided to Mr Johnson.

[44] I find Kevin McDonald has failed to establish that the restructuring and redundancy of Mr Johnson was based on genuine commercial reasons. It is too late after a decision has been made to attempt to justify it by providing financial and other analysis after the event. By the time Mr Johnson saw the financial and other information pertinent to the restructuring proposal, Mr Johnson was no longer an employee and was no longer in a position to respond to the information with a view to offering further alternatives to Kevin McDonald's proposal.

**Was the process used to implement the restructuring fair and reasonable and undertaken in good faith?**

[45] I have accepted the evidence of Mr Johnson that at the meeting on 20 February 2013 it is more likely than not that Mr McDonald conveyed to him that he wished to have the process completed on Friday, 22 February 2013. Consistent with that approach, when Mr McDonald wrote to Mr Johnson on 25 February 2013 he indicated a two day time frame was being allowed to continue the process and allow Mr Johnson to provide alternatives to his proposal to disestablish the Senior Solicitor role and terminate Mr Johnson's employment by reason of redundancy.

[46] Mr Johnson continued to make requests for information to assist him during the consultation process, however, Mr McDonald would not provide that information and then deliberately withheld material information when Mr Johnson's secretary resigned on 11 March 2013.

[47] Mr McDonald had the benefit of having full financial information on which to base his decision making. Mr McDonald had a good faith duty to provide all information on which he was relying to Mr Johnson during the consultation process. I find the failure to provide full information was a breach of Mr McDonald's duty of good faith and were not the actions of an employer acting fairly and reasonably.

[48] While it cannot be said with any certainty that Mr Johnson's employment would have continued if, having achieved the savings from the departure of his secretary and the reduction in Mr Johnson's salary, it was a possibility that an employer acting fairly and reasonably could have explored.

[49] Further, Mr McDonald had advised Mr Johnson that he intended to establish a new Solicitor role to work in commercial and residential conveyancing at a lower salary. The top end of that lower salary is the salary Mr Johnson was paid at the commencement of his employment. The role was to be full time and encompassed all the duties Mr Johnson was currently undertaking. Redeployment of Mr Johnson into that position was never discussed.

### **Disadvantage**

[50] The claim for disadvantage was raised as an alternative claim in the event that the dismissal of Mr Johnson was justified. I have found Mr Johnson's dismissal by reason of redundancy to be unjustified and therefore do not need to take the claim for disadvantage any further.

### **Determination**

[51] Kevin McDonald has failed to establish that the restructuring was a genuine business requirement. Kevin McDonald did not act fairly and reasonably when Mr McDonald failed to provide the full information to Mr Johnson during the restructuring process. Most of the information was available as it was provided to the Authority for its use during its investigation process.

[52] I find Mr Johnson's dismissal by reason of redundancy was unjustified. Dismissing Mr Johnson by reason of redundancy is not what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[53] A fair and reasonable employer could have provided Mr Johnson and his legal representative with the complete information and explanations it has since provided to

the Authority. It is possible, but not certain, that Mr Johnson may have retained his employment albeit at a reduced rate of pay.

[54] Mr Johnson is entitled to a consideration of remedies.

### **Remedies**

[55] Mr Johnson seeks remedies pursuant to section 123 of the Employment Relations Act (the Act) of reimbursement of lost wages, compensation for distress and humiliation and costs.

### ***Reimbursement of lost wages***

[56] Mr Johnson seeks reimbursement of lost wages from the date of his dismissal to 23 October 2014. An employee who has been dismissed must take steps to mitigate their losses. Mr Johnson gave evidence that initially he went through a recruitment agency but did not get any interviews. He then changed to another recruitment agency who arranged 1 interview for him. Apart for calling a couple of solicitor friends, which was unsuccessful, he was unable to secure any employment.

[57] After being in receipt of a benefit for a period of time Mr Johnson set up in business on his own account and opened a Laundromat business on 23 October 2014.

[58] I am not satisfied the evidence Mr Johnson has provided regarding his attempts to mitigate his loss warrant a departure from an award of three months lost wages.

[59] Mr Johnson's unchallenged evidence is that he has lost \$12,205 (including KiwiSaver contributions plus an allowance for Holiday Pay) per month.

[60] Pursuant to section 123(1)(b) of the Act Kevin McDonald & Associates is ordered to pay to Mr Johnson lost wages of \$36,615 gross within 28 days of the date of this determination.

### ***Compensation***

[61] Mr Johnson seeks the payment of \$15,000 pursuant to section 123(1)(c)(i) of the Act. In support of his claim Mr Johnson gave compelling evidence to the Authority of the distress his dismissal has caused.

[62] Mr Johnson was not allowed the opportunity to work out his one month's notice period and was instead asked to leave that day. Mr McDonald did not thank him for all his work and all those present on that day watched him as he left the office.

[63] Mr Johnson became extremely anxious and distressed about being able to support his 73 year old mother and terminally ill sister who were moving to New Zealand from Australia. He had previously promised to support them in their move by providing the funds to secure accommodation for them. Mr Johnson's evidence is that Mr McDonald was aware of the circumstances of his mother and sister moving to New Zealand.

[64] Mr Johnson's distress and anxiety led to him having to consult with his doctor who determined Mr Johnson was suffering from depression. Mr Johnson was prescribed antidepressant medication to control his symptoms and this continues.

[65] I am satisfied Mr Johnson has suffered humiliation, loss of dignity and hurt feelings and that this was severe. In all the circumstances I am of the view that an appropriate award for compensation is \$10,000.

[66] Pursuant to section 123(1)(c)(i) of the Act Kevin McDonald & Associates is ordered to pay to Mr Johnson the sum of \$10,000 without deduction within 28 days of the date of this determination.

### ***Contribution***

[67] Having determined that Mr Johnson has a personal grievance I am required to assess the extent to which he contributed to the situation which gave rise to his grievance and reduce any remedies accordingly. Contribution denotes blameworthy conduct. In this case I find no such conduct established and therefore the remedies will not be reduced to reflect any contribution.

*Costs*

[68] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr Johnson shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Kevin McDonald shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Vicki Campbell  
Member of the Employment Relations Authority