

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 413  
3034724

BETWEEN

CAMERON KERR  
Applicant

A N D

NORTHERN HYDROPONIC  
SUPPLIES 2006 LIMITED  
Respondent

Member of Authority: T G Tetitaha  
Representatives: E Monsellier/C Van Zyl for Applicant  
M Broadbelt for Respondent  
Investigation Meeting: 6 December 2018 at Auckland  
Submissions Received: 6 December 2018 from both parties  
Date of Determination: 21 December 2018

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**DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY**

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**A. The application for personal grievance is dismissed.**

**B. I order Cameron Kerr to pay Northern Hydroponic Supplies 2006 Limited the sum of \$2,250 towards his legal costs within 28 days of the date of this determination.**

**Employment Relationship Problem**

[1] Cameron Kerr was employed by Northern Hydroponic Supplies 2006 Limited (NHS) in 2016. His employment terminated on 13 July 2018. He alleges this was an unjustified dismissal.

[2] NHS accepts it terminated Mr Kerr's employment but it was on the basis of a mutual agreement he take redundancy.

### **Non-publication order**

[3] There is a non-publication in respect of NHS's financial statements. Any copies of these documents given to the parties at hearing are to be destroyed. A copy of the documents filed shall be retained on the Authority file only.

### **Relevant facts**

[4] NHS is a retail outlet selling equipment for hydroponic gardening, home brew supplies and electronic cigarettes. It has outlets in Waipapa, Silverdale and Manukau. NHS is owned by Pierre Paquay.

[5] Mr Paquay managed the business up and until 2015. He experienced several personal issues requiring him to spend more time at home. At that time Mr Kerr had been employed by one of NHS's suppliers and been made redundant. Mr Paquay approached Mr Kerr about taking on the General Manager role at NHS. Mr Kerr was employed in 2016 as NHS's General Manager based in Silverdale, Auckland.

[6] There was no written employment agreement between the parties. Mr Paquay alleges he instructed Mr Kerr on several occasions to prepare a written contract for himself and all other staff, but this never occurred. Mr Kerr was paid \$33 per hour and received \$1,346 gross wages per week at the end of his employment.

### **Events leading to dismissal**

[7] In January and February 2018, personal grievances were raised by former employees of NHS. One of the personal grievances alleged misconduct by Mr Kerr.

[8] By March 2018 Mr Paquay became aware NHS suppliers were not being paid.

[9] In April 2018 NHS had hired Tanya Franich as Mr Kerr's personal assistant. She was responsible for the wages and preparing the financial statements as well as general computer work. She began providing Mr Paquay regular profit and loss reports.

### **25 June 2018 meeting**

[10] By April 2018 NHS was showing losses. Mr Paquay was becoming increasingly concerned at the business performance. He called a meeting with Mr Kerr at Ms Franich's home on 25 June 2018. The parties agree the purpose of the meeting was to find sufficient income to meet the business expenses. At that stage outstanding debts were significantly higher than income and the business was running at a loss.

[11] Part of that discussion included the possibility of staff redundancies. Two sales assistants had been identified as redundancy prospects. The possible redundancy of Mr Kerr was not discussed at that meeting.

[12] Mr Kerr sent an email on 27 June 2018. He emphasised his discomfort with the redundancy process and raised issues about his own job security.

[13] Following the meeting Mr Paquay had been thinking about Mr Kerr's role and his ability to step back into the business. He believed he could undertake Mr Kerr's role as he had undertaken it previously and draw no salary. This would enable an immediate saving of Mr Kerr's salary each week that was equivalent to the loss the business had sustained in April 2018.

### **Redundancy**

[14] On 4 July 2018 Mr Paquay handed Mr Kerr a letter advising NHS was experiencing serious cash flow difficulties and had been incurring more costs than current revenue could service. It proposed disestablishing Mr Kerr's position of General Manager and Mr Paquay assuming his role as owner/operator within the company. This would make Mr Kerr redundant. He sought any further suggestions or ideas within the next five working days.

[15] When Mr Paquay handed the letter to Mr Kerr, he told him that he could seek legal advice and support. Mr Kerr then left in the company car and returned three hours later. Mr Paquay understood he had left to consult his wife.

[16] Upon his return, Mr Paquay approached Mr Kerr and asked if he was okay. Mr Kerr accepted under cross-examination that he told Mr Paquay that his redundancy was okay. Mr Paquay took this to mean he had accepted the termination for redundancy.

[17] Late in the evening of 6 July 2018, Mr Kerr received by email a termination letter. This letter advised his employment would terminate for redundancy on 13 July 2018. Mr Paquay referred in the letter about trying to contact Mr Kerr on several occasions over the past two days by phone but was unsuccessful.

[18] Mr Kerr did not return to work after 4 July 2018. He raised a personal grievance on 16 July 2018, three days after his dismissal.

## **Law**

[19] Redundancy arises where an employee is superfluous to business needs. This could arise where an employer seeks to make the business more efficient.<sup>1</sup>

[20] The Authority may review the business decision to determine whether the decision, and how it was reached, were what a fair and reasonable employer could have done in all the relevant circumstances.<sup>2</sup>

[21] A decision to make an employee redundant must be shown to be genuine where genuine means the decision is based on business requirements and not used as a pretext for dismissing a disliked employee. If an employer can show the redundancy is genuine and that the notice and consultation requirements of s 4 of the Act have been duly complied with that could be expected to satisfy the s 103A test. The subjective findings about what the particular employer has done in any case still have to be measured against the Authority's assessment of what a fair and reasonable employer could have done in the circumstances.<sup>3</sup>

[22] 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 Authority is not to substitute its business judgment for that of the employer.<sup>4</sup>

[23] Once it is accepted employment was terminated, the evidential burden falls upon the employer to justify whether its actions *were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred* (s103A(2)). In applying this test, the Authority must consider the matters set out in s.103A(3). These matters include whether having regard to the resources

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<sup>1</sup> *Grace v Brake Team Accounting* [2014] NZCA 541 at [47].

<sup>2</sup> *Rittson-Thomas T/A Totara Hills Farm v. Davidson* [2013] NZEmpC 39 at [53] – [54].

<sup>3</sup> *Grace v Brake Team Accounting* [2014] NZCA 541 at [85].

<sup>4</sup> *Scarborough v Micron Security Products Ltd* [2015] NZEmpC 39 at [37]

available, an employer sufficiently investigated the allegations, raised the concerns with the employee, gave the employee a reasonable opportunity to respond and genuinely considered the employees explanation prior to dismissal.

**Were there genuine reasons for Mr Kerr's redundancy?**

[24] The primary reason given for this redundancy arising was the company's financial situation and the need for cost savings. NHS profit and loss statement showed a substantial loss in April 2018. At the time the decision was made, the accounts for May and June 2018 were not available.

[25] Ms Franich's evidence was at 25 June 2018 NHS had \$170,000 outstanding creditors. The business showed a \$5,000 loss for the April 2018. Mr Kerr's evidence was also consistent with NHS having severe financial problems at the time the redundancy occurred.<sup>5</sup>

[26] The solution of Mr Paquay reassuming his previous role at no cost to the business was a reasonable response available to the employer at the time. Mr Kerr's role did not involve sales and he was not generating income. His role appeared confined to oversight of the business - work Mr Paquay had and could do.

[27] His selection for redundancy was also reasonable because the other options of making sales staff and/or Ms Franich redundant were not. NHS required experienced sales persons to generate income. NHS also required someone with Ms Franich's administrative skills.

[28] Although Mr Kerr's performance was at times raised during hearing, there was nothing to suggest NHS's selection of Mr Kerr for redundancy was motivated by performance concerns or any other reason than its finances. There is no evidence of premeditation.

[29] Mr Kerr pointed to an email dated 25 May 2018 he sent to Barry Nalder, NHS legal representative. Mr Nalder confirmed receipt but did not send it onto NHS and Mr Paquay. He stated this was sent during a period of time when Mr Kerr may have had personal health issues. Mr Kerr never raised his concerns directly with his employer. When asked why he did not do so, he initially stated he thought Mr Nalder

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<sup>5</sup> Email C Kerr to P Paquay dated 27 June 2018.

was his lawyer and wished to “document this process”. Mr Nalder was not his lawyer because he was instructed by NHS to assist it in preparing its case for the Authority only. Mr Kerr’s interaction with Mr Nalder was for the purposes of briefing him as a witness only. Mr Nalder refused to advise Mr Kerr about any issues he would have with NHS because of a conflict of interest. This should have alerted Mr Kerr to the fact he needed to take further action about any concerns he had. He never raised the same concerns during the redundancy process.

[30] There was sufficient evidence that NHS could consider making the business more financially efficient by Mr Paquay taking over Mr Kerr’s role. There were genuine reasons for Mr Kerr’s redundancy.

### **Was the process leading to redundancy fair and reasonable?**

[31] Mr Kerr was well aware of NHS’s concerns about its cash flow including incurring more costs than the current revenue could service. He was also aware that he may be selected for redundancy. The reasons for his selection for redundancy were adequately set out in the proposal letter dated 4 July. No further investigation was required.

[32] It is the shortened consultation process that raises concerns. Mr Kerr had been given five working days to provide feedback. His apparent consent within 3 hours of receiving the proposal as the basis for termination for redundancy may have given rise to issues of unfairness.

[33] When asked what options he may have put to Mr Paquay, he submitted he believed this was a cyclical drop in profits and NHS could have traded its way out back into solvency. Mr Kerr gave little explanation for why he did not provide this feedback to Mr Paquay during the consultation process and even before termination on 13 July. His correspondence gave no indication that he believed at the time there was an option of NHS trading its way out of insolvency. Instead he notes NHS was “running out of cash and not ... able to pay the bills” and redundancy was a short term fix.<sup>6</sup> There was no mention of any cyclical drop in profits or the ability of NHS to trade itself out of insolvency. His correspondence paints a grim view of the businesses ongoing solvency.

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<sup>6</sup> Email C Kerr to P Paquay dated 27 June 2018.

[34] NHS had agreed to provide 5 working days for consultation. It then reduced the consultation period down to two days before termination. There was no agreement to reduce the consultation period, even if Mr Kerr had apparently agreed with redundancy immediately after the proposal had been made. On its face this was unfair and unreasonable.

[35] However there is evidence that prior to dismissal Mr Kerr consented to redundancy. An email Mr Kerr sent to the NHS's adviser, Barry Nalder on 5 July 2018 stated:

I'm ok to be made redundant, Pierre needs to try and save his business. I feel I'll have a better chance of finding employment sooner, than some of the staff.

[36] Mr Nalder's evidence about a meeting with Mr Kerr on 6 July 2018 also indicated his acceptance of the redundancy. Mr Kerr told him he had applied for three other jobs because he did not believe his job was going to last and that Mr Paquay "couldn't afford the luxury of a general manager" and that he felt it was time to move on. When Mr Nalder asks Mr Kerr if he had responded to the redundancy proposal in writing. Mr Kerr told him he "wasn't going to bother to do that" and that he had "discussed the matter with Pierre and was fine with moving on".

[37] Even when NHS makes Mr Kerr redundant Mr Kerr does not raise any complaint. He makes no complaint during the notice period up to termination on 13 July. Mr Kerr did not adequately explain his reluctance to do anything to prevent his dismissal.

[38] Instead he consults a legal representative and raises a personal grievance of within three days of his dismissal occurring. He also starts a new job within two weeks of the dismissal.

[39] The evidence indicates he was capable of taking action to prevent dismissal if he truly judged it unfair at the time but deliberately chose not to. Employees have a duty of good faith to not mislead or deceive their employers and to be active and constructive in maintaining a productive relationship. His behaviour at the time does not meet those standards.

[40] I decline to find there was an unjustified dismissal in these circumstances. The defects in the consultation process were minor and did not result in Mr Kerr being treated unfairly. The application for personal grievance is dismissed.

### **Costs**

[41] Both parties addressed me about the issue of costs. Given this was a matter proceeded with no briefs and started at approximately 11am and finished at 4:30pm, I am only prepared to award half a day's costs. The matter was not complex and did not require any specialist skill.

[42] I order Cameron Kerr to pay Northern Hydroponic Supplies 2006 Limited the sum of \$2,250 towards its legal costs within 28 days of the date of this determination.

**T G Tetitaha**  
**Member of the Employment Relations Authority**