IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 167
5391113

	BETWEEN	MURRAY KNAPP Applicant
	AND	LOCKTITE ALUMINIUM SPECIALTIES LIMITED Respondent

Member of Authority:	K J Anderson
Representatives:	W Reid, Advocate for Applicant P Kotze, Advocate for Respondent
Investigation Meeting:	26 February 2014 at Tauranga
Determination:	2 May 2014

DETERMINATION OF THE AUTHORITY

Introduction

[1] The applicant, Mr Murray Knapp, claims that he was unjustifiably dismissed on 26 June 2012. Mr Knapp asks the Authority to find that he has a personal grievance and award him various remedies.

[2] The respondent, Locktite Aluminium Specialties Limited (Locktite) rebuts the claims of Mr Knapp and says that the termination of his employment was justifiable on the ground of redundancy; which was an outcome of his alleged refusal to honour an agreement reached whereby he would work reduced hours in order to avoid his position being made redundant.

Background

[3] Mr Knapp was employed as an aluminium joiner (fabricator) working on windows, doors and conservatories. He commenced his employment in 2010 with a company called Aluminium Systems (2007) Limited which at that time was owned by GAC Group Limited. The latter company sold the business to Locktite Aluminium Specialties Limited; with the change of ownership being effective from 1 April 2011.

[4] The business (Locktite) is owned and operated by Mr David Sutton and his wife, Mrs Gaylene Sutton (the Suttons).

[5] Upon purchasing the business, the Suttons agreed to employ the current staff (five in total) which included three fabricators; one of whom was Mr Knapp. New employment agreements were introduced effective from 1 April 2011.

[6] The evidence of Mr Sutton is that a number of issues were revealed shortly after purchasing the business. The result was that the cost of running the business was more than had been anticipated.

[7] Mr Sutton says that a decision was subsequently made to employ another person, with more joinery experience, in the role of factory floor manager. Mr Tony Ford commenced his employment with Locktite on 22 March 2012 and the other five employees, including Mr Knapp, were informed of his appointment on 26 March 2012.

[8] The evidence of Mr Knapp is that at the meeting on 26 March 2012, Mr Sutton informed him that he: "... was standing me down as the foreman and I was being replaced by Tony [Mr Ford]".

[9] Mr Sutton does not accept that this happened and he says further, that Mr Knapp was not a foreman, albeit he had some responsibility for allocating job sheets for the particular work to be carried out. Mr Knapp also had a key to the Locktite premises and had some responsibility for opening up the building each day. It seems more likely that rather than being a foreman, Mr Knapp fulfilled the role of leading hand, as he had under the previous owner and this arrangement simply carried over upon the sale of the business. Nonetheless it is clear that Mr Knapp perceived that his role was being usurped by Mr Ford, as at the conclusion of the meeting on 26

March 2012, Mr Knapp (voluntarily) handed over the keys to the premises to Mr Ford and wished him "good luck".

[10] The further evidence of Mr Knapp is that on 29 March 2012, Mr Ford approached him and informed him that he: "... was at the top of the list to get rid of". Mr Ford did not attend the investigation meeting but I note that he does not refute Mr Knapp's evidence in his witness statement. Whether Mr Ford had any influence upon the eventual departure of Mr Knapp is inconclusive, but it does appear that the relationship between the two men was not particularly friendly and I suspect that Mr Knapp resented the appointment of Mr Ford as the factory floor manager.

Reduction of labour costs

[11] The evidence of Mr Sutton is that due to issues regarding the profitability of the business, a discussion with the staff took place on 13 June 2012. It was proposed that the cost of the pay roll for the business would have to be reduced. Mr Sutton says that he invited the employees to put forward ideas about how labour costs could be reduced. Some staff indicated that they would prefer to not come into work on days when there was only a few hours work available. Mr Knapp inquired about taking annual leave in order to retain his full pay. However, this was not an option for the Suttons as it was necessary to ensure that employees had enough leave accrued to provide for the end of year shutdown.

[12] Mr Sutton says that the outcome of the meeting on 13 June was that the Suttons agreed to wait and see if trading conditions improved.

[13] However, on 14 June, Mrs Sutton wrote to Mr Knapp (and the other staff) thus:

> Dear Murray Knapp,
>
> Amendment to your employment agreement
>
> At our meeting yesterday, Wednesday (13 June) I explained the uncertain trading situation that we are experiencing and said that we have no option but to reduce working hours as soon as possible to match incoming work. We explained we had very little work coming in and therefore had to cut costs, but did not want to make anyone redundant. The alternative was to reduce hours of work. In the course of the discussion I said that, with effect from next week, we therefore propose to send staff home if there was not enough work for them.

> During the meeting on 13th April some staff said that they would prefer not to have to come in for a few hours only. We finally agreed that we would assess the situation every afternoon, and decide who should come into work the following day. If there was not enough work for you for at least half a day, you would not be called in. David and I have subsequently decided to go ahead with the plan, but to implement it from the 20th of June (Wednesday next week) to give you more notice of the change.
>
> This amendment is permanent, but we will obviously review it again as the trading situation improves. As this arrangement means a change to your employment contract, it should be in writing and attached to your contract. Therefore, please sign the bottom of this letter and of the copy attached to show your agreement, and return it to me for filing with your contract. Because of the urgency of the matter, please do so before 1pm on Monday, 18th June. If you do not wish to accept the change, please note that we have no alternative but to terminate your employment for redundancy at 1pm on Monday, 18th June 2012. In that case you will receive the notice set out in your contract. You will be expected to work out your notice period. If you have any questions in this regard please come and see me right away.
>
> [Signed]
> Gaylene Sutton, General Manager

18 June 2012

[14] The other two fabricators signed their acceptance of the variation to the hours of work but Mr Knapp did not. On Monday, 18 June 2012 there was some discussion between him and the Suttons. The letter of 14 June was discussed. The evidence of the Suttons is that Mr Knapp had received legal advice not to sign the amendment to his employment agreement; and he said that he did not like the way the letter was worded. Mr Sutton says that it was emphasised to Mr Knapp that there was no wish to make him redundant, but the business could no longer guarantee to provide him with 40 hours of work each week.

[15] The further evidence of Mr Sutton is that Mr Knapp was referred to clause 3 of his employment agreement. It provides for the hours of work as follows:

> The hours of work shall be up to forty (40) hours per week within the normal hours of operation of the business. The employee may be required to work extended hours or in excess of five (5) days in any week without payment of overtime in order to fulfil the requirements of the business. The employee acknowledges that the employer has the right to change any days and hours of work to meet the needs of the business. Where possible, any changes will be notified five (5) days in advance. The employee may on occasion be required to work outside of their normal hours and days, on statutory holidays and/or

> weekends and the employee agrees to do so. This may include but it is not limited to stock-takes and attending staff meetings or training.

[16] The Suttons both say that upon them pointing out to Mr Knapp that the employment agreement allowed for reduction in his hours of work, his response was that he asked to be made redundant because: "... it would make it easier for the other staff".

[17] The further evidence of the Suttons is that Mr Knapp also said that he was not happy about "a few things downstairs". As the office at Locktite is upstairs, this is, apparently, a reference to the factory floor. Upon the Suttons inquiring as to what Mr Knapp meant he indicated that he did not want to talk about it and confirmed that the Suttons should go ahead with his redundancy and "fill out the paperwork".

[18] The evidence of Mrs Sutton is that at this point, she contacted the company's human resources adviser, Mr Kotze, and explained the situation to him. Mr Kotze asked to speak to Mr Knapp. A conversation then took place between the two men.

[19] The evidence of Mrs Sutton is that following the telephone conversation between him and Mr Knapp, Mr Kotze contacted her and informed that Mr Knapp had indicated that he required a minimum of 25 hours of work each week and that he would not sign anything unless that was guaranteed.

[20] The evidence of the Suttons is that they discussed the appropriateness of guaranteeing 25 hours of work each week and agreed that this could apply for Mr Knapp, and the other two employees affected. The letter of 14 June was amended accordingly with the addition of the words: "We expect that each person would work at least 25 hours each week". The change would be implemented from 20th June 2014. The other two joiners accepted and signed the changes in conditions of employment referred to in the letter.[1]

[21] The evidence of the Suttons is that when they informed Mr Knapp that they had agreed to his request to provide a minimum of 25 hours of work each week, his response was that he: "... wanted to be made redundant ...".

[1] Unfortunately the date was not changed from 14 June to 18 June 2012 and neither was the new implementation date altered to 20 June 2012, but no issue is taken with this.

[22] Mrs Sutton says that she was "flabbergasted" by this response and contacted Mr Kotze again to confirm what had been said earlier in regard to Mr Knapp requiring a guarantee of 25 hours of work each week. Upon being asked to speak to Mr Kotze again, Mr Knapp declined to do so.

He was given the amended letter and asked to give further consideration to it overnight.

19 June 2012

[23] The evidence of the Suttons is that along with Mr Ford, they met again with Mr Knapp on the morning of 19 June to ascertain if he had reconsidered the view that he had held the day before. The evidence of the Suttons is that Mr Knapp simply said: "Fill out the paperwork*;"* indicating that he wished to be made redundant. Mr Knapp left the premises of Locktite that day. His evidence is that he was "escorted" off the premises by Mr Sutton and Mr Ford but I conclude that this is an exaggeration of what actually happened

[24] The termination of Mr Knapp's employment was confirmed in a letter to him, from Mrs Sutton, the following day:

> Dear Murray,
>
> As per our discussions on Monday 18th & Tuesday 19th June regarding working hours in the factory.
>
> In the course of our discussions with you and the other two fabricators going back as far as April, we have explained that the proposed change is an alternative to redundancy.
>
> In your discussion with our HR adviser on Monday 18th June you said that you needed a minimum number of hours of work. Following that discussion David and I decided to change our proposal to indicate that we foresaw [sic] at least 25 hours of work per week.
>
> On Tuesday morning 19th June you told me that you did not accept our offer and that you wanted to be made redundant. I explained to you that we did not want to make you redundant, but you said I should just 'complete the papers'.
>
> In the circumstances we have no option but to make your position redundant. Your last day of work will be Tuesday 26th June 2012, but you do not need to work out your notice period and may finish up right away. In terms of your employment contract there is no redundancy compensation. Your final pay and holiday pay will be paid on your last day.
>
> Please let me know if you require a certificate of service.

The evidence of Mr Knapp

[25] The evidence of Mr Knapp is somewhat at odds with that of the Suttons. He makes no mention of the meeting with the Suttons on 19 June 2012. Nor does he make any mention of the matter of 25 hours of work for each week being discussed in his brief of evidence; albeit he acknowledged at the investigation meeting that he did inform Mr Kotze that 25 hours of work each week was the minimum that he would accept. However, I have to say that I found the evidence of Mr Knapp to be lacking in substance on the key issues. In particular, I find it most odd that Mr Knapp made no mention at all of meeting with the Suttons on 19 June 2012. His evidence is that he left the employment of Locktite on 18 June, following his discussion with Mr Kotze.

[26] Mr Knapp says that he was dismissed on 18 June. Overall, where there is a conflict in the respective version of events, I found the evidence of Mr and Mrs Sutton to be more credible and I conclude that generally, their recollection of events is more probable than that of Mr Knapp.

Analysis and conclusions

[27] Mr Knapp says that he was dismissed on 18 June 2012. However, I find that this is not so as I have accepted the evidence from the Suttons that the last day of work was 19 June 2012.

[28] Mr Knapp also claims that he was simply informed on 18 June 2012 that because he would not sign a variation to his employment agreement pertaining to working less hours each week, he was dismissed. The weight of the evidence reveals that this is not correct either.

[29] The evidence of the Suttons is accepted in that the outcome of a discussion with the human resources adviser for Locktite, Mr Kotze, was that Mr Knapp accepted he would sign a variation of his employment agreement if the Suttons were prepared to give him an assurance that he would be able to work a minimum of 25 hours each week. This appears to have been an acknowledgement by Mr Knapp that the business was facing difficult financial circumstances at the time.

[30] The evidence of Mrs Sutton is that Mr Knapp “reneged” on his proposal, subsequently accepted by the Suttons, to a guarantee of 25 hours of work each week.

Perhaps that may be a rather colourful way of putting it, but one can understand why the Suttons would feel that way.

[31] The primary issue for the Authority to determine is whether the termination of Mr Knapp's employment on 19 June 2012 was something that a fair and reasonable employer could do in all the circumstances that existed at the time. (Section 103A(2) Employment Relations Act 2000.)

[32] In determining this issue, the Authority is required to assess all of the background circumstances related to this rather unusual problem.

[33] The submissions for Mr Knapp concede that there were genuine economic reasons for Locktite taking action to reduce the company's labour costs. It is accepted that: "… there were too many people and not enough work".

[34] However, the submissions for Mr Knapp take issue with the company strategy regarding its proposal to have the affected employees work less hours each week. It is said that this policy was effectively a "casualisation" of the workforce. But I find that this is a far too simplistic interpretation of events. It is not uncommon for a business faced with harsh economic circumstances to reach an agreement with employees to work reduced hours rather than have people lose their jobs. This is particularly so in situations where it is envisaged that the economic circumstances will improve in the foreseeable future.

[35] In the circumstances facing Locktite, the employment agreement, at clause 3, expressly provides that: "... the employer has the right to change any days and hours to meet the needs of the business". Nonetheless, it must be implied that reasonable parameters would be necessary in regard to reducing (or increasing) the days and/or hours of work under this provision.

[36] And while there was some discussion with the affected employees on 13 June 2012, the letter of 14 June effectively presented people with "Hobson's choice". That is, the affected employees were asked to accept that they would only be called into work if there was "at least half a day" of work available. But if this was not acceptable, there would be: "... no alternative but to terminate your employment for redundancy at 1pm on Monday, 18 June". While it subsequently transpired that two of the three affected employees accepted that working reduced hours, with a reduced

income as a consequence, was preferable to losing their employment, one wonders what would have happened if all three of the employees had refused to accept a reduction in their hours of work; as it appears that there was no thought given by the Suttons to an appropriate process, including an appropriate selection criteria, assuming that it would have been necessary to retain one or more joiners.

[37] But in any event, it subsequently transpired that on 18 June, following the discussion between Mr Knapp and Mr Kotze, the Suttons modified their previous position to provide that: *"*... each person would work at least 25 hours per week*"*. But it is unfortunate that in addition to the oversight in regard to changing the dates in the second letter to Mr Knapp, the letter still informed him that if he did not accept the reduction in his hours of work, his employment would be terminated on the ground of redundancy.

[38] Given that the employment agreement provides for a variation in the hours of work, and that Mr Knapp had informed on 18 June 2012 that he required a minimum of 25 hours of work each week, the continuing threat of the termination of his employment was not the action of a fair and reasonable employer and it seems that Mr Knapp may have taken offence to this.

[39] But having said that, the next question that arises is: Was Mr Knapp dismissed in the true sense of the word, or could his indication that he wished to be made redundant be taken as an acceptance by him that this was his preferable option?

[40] On the one hand, Mr Knapp had indicated that he (understandably) required a minimum of 25 hours paid work each week in order to meet his essential commitments. But when this was agreed to by the Suttons, he then did what can colloquially be termed as "an about face" and told his employer that he preferred to have his employment terminated on the ground of redundancy. A most peculiar stance, particularly as he told the Authority that he did not obtain new employment until October 2012; and there was no provision in his employment agreement for redundancy compensation. It seems that Mr Knapp decided that he would rather take his chances on the job market than have at least 25 hours work each week while he considered his options.

[41] Nonetheless, I must conclude that Mr Knapp was dismissed from his employment because the Suttons did have an option. Under the terms of the

employment agreement that allows for the employer to vary the hours/days of work, and given that Mr Knapp had indicated that he required a minimum of 25 hours of work each week and this was agreed to by his employer; the Suttons could have quite simply refrained from making Mr Knapp's position redundant and continued to offer him employment on the basis of a minimum of 25 hours work each week, consistent with his indication that this is what he required. Mr Knapp would then have been left with a decision to make as to whether he wished to continue to work on the basis of his own proposal.

Was the dismissal of Mr Knapp unjustified?

[42] As I have concluded (above) that the Suttons did not have to dismiss Mr Knapp, and could have continued to offer him employment on the same basis as the other two affected employees, it follows that his dismissal was unjustified.

Remedies

[43] Having found that the dismissal of Mr Knapp was unjustified, he has a personal grievance. Section 123(1) of the Employment Relations Act 2000 (the Act) provides that where the Authority determines that an employee has a personal grievance, it "may" in settling the grievance provide one or more of the remedies set out there.

[44] Mr Knapp asks the Authority to award him reimbursement of wages for 3 months under ss.123 and 128 of the Act and compensation of $12,000 pursuant to s.123(1)(c)(i). However, I conclude that taking into account all of the circumstances that apply to this matter, and pursuant to s.124 of the Act, the actions of Mr Knapp were of such a blameworthy nature that any remedies that may have been applicable should be reduced by 100%.

[45] This is because while I have found that while the Suttons should not have terminated the employment of Mr Knapp, I am satisfied that in substance, they acted in good faith towards him. Regrettably, Mr Knapp did not see fit to respond in kind. By this I mean that having apparently accepted that the business needed to reduce its wages costs, Mr Knapp informed his employer (via Mr Kotze) that he required a minimum of 25 paid hours of work each week, and if the Suttons would agree to this,

he would agree to a variation to his employment agreement.[2] Relying on this indication from Mr Knapp, the Suttons acted accordingly and agreed (in writing) to provide him with a minimum of 25 hours of work each week.

[46] Acting in good faith towards the other two affected employees, the Suttons then altered their position further, possibly with some financial consequences, by also offering the other two employees a minimum of 25 hours of work each week.

[47] I find that by resiling from his earlier undertaking, Mr Knapp substantially failed to act in good faith towards the Suttons in that he misled them[3] by indicating that he required a minimum of 25 hours of work each week and then when this was agreed to, he then rejected his own proposal. Indeed, it could be said that by failing to adhere to his earlier position, Mr Knapp is effectively estopped from now asserting that his employer acted unjustifiably. But this has not been argued and this is probably not an appropriate case to explore the complexities of the law of estoppel.

Determination

[48] In summary, pursuant to s.124 of the Act, and applying the equity and good conscience jurisdiction of the Authority, and for the reasons set out above, I conclude that while Mr Knapp was unjustifiably dismissed, he is not entitled to any remedies.

Costs

[49] Given the outcome of this matter, it is appropriate that costs should lie where they fall.

K J Anderson
Member of the Employment Relations Authority

[2] Albeit clause 3 of the employment agreement most probably allowed for such variation following consultation in any event; as now acknowledged by Mr Knapp.
[3] Section 4(1)(b) Employment Relations Act 2000