

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

**[2019] NZERA 105
3032851**

BETWEEN

JAMES LEAHY
Applicant

A N D

FAIRFIT TOOLING LIMITED
Respondent

Member of Authority: T G Tetitaha

Representatives: D Organ, Advocate for the Applicant
D J Clark/J Matheson, Counsel for the Respondent

Investigation Meeting: 29 January 2019 at Auckland

Submissions Received: 29 January 2019 from both parties

Date of Determination: 27 February 2019

DETERMINATION OF THE AUTHORITY

- A. Mr Leahy was constructively and unjustifiably dismissed by Fairfit Tooling Limited.**
- B. I order Fairfit Tooling Limited to pay James Leahy \$10,000 compensation for the personal grievance within 28 days of the decision.**
- C. I order Fairfit Tooling Limited to pay a penalty of \$2,250. Half to be paid into the Authority's Bank Account within 28 days of the decision. The remaining \$1,125 of the penalty is to be paid to James Leahy within 28 days of the decision.**
- D. I order Fairfit Tooling Limited to pay James Leahy \$1,687.50 towards his legal costs within 28 days of the decision.**

Employment Relationship Problem

[1] James Leahy claims he was constructively and unjustifiably dismissed following the relocation of the respondent's premises to Warkworth from Otahuhu. Fairfit Tooling Limited (FTL) submits he resigned.

Relevant Facts

[2] FTL manufactures and fabricates metal parts, equipment and machinery. The operations were based in Otahuhu. It employed 5 people including Mr Leahy. The business was managed by the owner and director Rick Walters.

[3] James Leahy had worked for FTL for 25 years initially for Mr Walter's father when he owned the business. At all material times he was the Tool Room Manager. Mr Leahy had specialised skills in the manufacture of tools and dyes. Only Mr Walters possessed the same level of skill as Mr Leahy. However he had been externally managing the business for 10 years. He could not operate the same machinery as Mr Leahy. In short Mr Leahy's continued employment was a critical part of FTL's business.

[4] Mr Leahy signed an individual employment agreement on 13 October 2000 (IEA). The IEA contained a redundancy clause that defined redundancy, gave 20 working days' notice of redundancy and payment of redundancy compensation "at the rate of 2 weeks ordinary pay for the first year and 2 weeks for each year thereafter."

Relocation of FTL business

[5] FTL's operations were based in a factory in Otahuhu. The landlord advised in November 2017 the factory was to be sold with vacant possession. FTL was served with notice to vacate the premises by 29 June 2018.

[6] FTL advised its employees on 14 February 2018 about the sale of the Otahuhu premises and the need to relocate. Mr Walters consulted his employees including Mr Leahy about possible locations. Mr Leahy recommended he look south including Huntly and Hamilton. Mr Walters made efforts to secure new premises within

Auckland and the greater Auckland area. The cost of premises and the noisy nature of his business proved to be difficulties in securing new premises.

Kerikeri

[7] Mr Walters then decided to consider moving part of the business to Kerikeri. This was because he and his wife wished to eventually retire there. He purchased a home and found new premises in Waipapa Kerikeri in May 2018. He then sought his employees' views on shifting the entire business to Kerikeri.

[8] Mr Walters sent a letter to all employees on 10 May 2018 advising of the financial difficulties for the business, loss of the current premises due to sale, introduction of his own personal funds into the business and the relocation of the business to Kerikeri. He offered to pay \$3,300 towards employee relocation costs.

[9] On 14 May 2018 Mr Leahy arranged a staff meeting regarding the proposed relocation to Kerikeri. Two days later (16 May) Mr Leahy with other staff present, handed Mr Walters a letter dated 14 May advising he wished to resign because he understood "his job will become redundant as it will no longer be here at the end of June, and so have decided to take the compensation as set out in my employees agreement." Mr Walters advised Mr Leahy there was no redundancy and that he was continuing to look for factory space in the greater Auckland area.

Warkworth

[10] Later the same day he met with Mr Leahy. Several options were discussed including Mr Leahy purchasing all or part of the business and/or contracting and/or flexible working hours including working from home. Mr Leahy declined to buy the business. The discussions about the other options did not progress any further.

[11] Towards the end of May 2018 Mr Walters through personal contacts secured space in a factory in Warkworth. He advised Mr Leahy and offered to take him north to view the factory. Mr Leahy rejected this idea.

[12] Mr Leahy then sent a letter to Mr Walters on 30 May 2018 seeking "a written offer setting out the terms of the relocation and what changes would occur if the

relocation was accepted, and if not accepted, what my choices are, or I cannot respond to it and I am not required to until it is in writing.”

Resignation

[13] Mr Walters sent the below letter to all employees dated 31 May 2018 about the proposed relocations to Warkworth and Kerikeri. It is this letter that Mr Leahy submits led to his resignation:

All jobs for toolroom and press shop employees remain the same at the Warkworth plant as they are at Otahuhu. Work at Warkworth will start from Tuesday 26th along with some work at Otahuhu thru to 28th June.

After discussions I respect that for some employees the traffic conditions are of concern and although it is less than an hours drive from Otahuhu to Warkworth, traffic conditions can significantly affect the commute, this I am prepared to help ease the situation by making operating hours more flexible. The standard 40 hours per week will remain but employees will be able to work hours to suit so travelling during peak traffic can be avoided if desired.

Some employees have asked what happens if they do not want to work in Waipapa or Warkworth.

In this case you will need to resign by providing me 3 weeks written notice of resignation to ensure your rights as per employment agreement of receiving your last pay for hours worked plus accumulated holiday pay.

Then you will remain working at Otahuhu thru to 28th June (the day we must vacate 6 Beach Road)

If you chose to do nothing and do not turn up for work in Warkworth as required without justiciable written notice supplied to me i.e. Doctors note etc. it will be deemed that you have abandoned your job and you could lose rights per employment agreement.

I do realise this situation is a change and some have indicated you do not want to travel to Warkworth for work. I do respect your decisions and want to do what I can to help find alternative employment and provide references if you require.

If you have any questions or wish to discuss further, please ... email or txt me to make a time to talk.

[14] On 4 June 2018 Mr Leahy sent a letter advising he had no choice but to resign “in light of recent experiences regarding the way in which I feel the relocation to Waipapa and then again Warkworth was handled in an unfair and unreasonable process, and that I had no choice in the matter and so was setup as a [done] deal.” He then identified the unfairness of travelling long distances to Warkworth (150 km round trip), public transport not being an option, increased work hours and his family needs. He also complained about not being given an opportunity to provide feedback on options. His employment ended on 27 June 2018.

Further events

[15] Following the factory closure on 28 June, Mr Walters moved all of the machinery into storage in Kerikeri. He retained two employees including one whom relocated to Kerikeri to continue working. Another employee, the receptionist, continued working from home. The two other employees had resigned and accepted work elsewhere. Mr Walters continued to operate the business from Kerikeri only. He decided not to open the business in Warkworth or continue searching for Auckland premises.

[16] FTL did not pay Mr Leahy's holiday pay upon termination. Mr Walters emailed advising FTL had "\$50,000 of final pays" and it did not have cash available to pay Mr Leahy in full. It was spreading payment of his final pay including primarily holiday pay of \$20,446.39 over three consecutive months. Mr Leahy was unhappy with this and emailed FTL. His final pay was not received until three months after termination.

[17] Mr Leahy raised a personal grievance and the parties attended mediation in or about October 2018. Following mediation FTL wrote to Mr Leahy on 28 October 2018 offering him employment at a standalone factory in Auckland. FTL received no reply to this offer.

[18] At hearing Mr Leahy advised after a four week break he found new employment for the same money and less hours in August 2018.

Issues

[19] By consent the issues for hearing are:

- (a) Was Mr Leahy constructively and unjustifiably dismissed?
- (b) Was there a breach of s27 of the Holiday Act 2003?
- (c) If so, what remedies should be awarded?

[20] Mr Leahy has also pleaded breaches of the duty of good faith that rely upon the same events as those pleaded in support of the unjustifiable dismissal. I have elected to deal with these matters as part of the unjustifiable dismissal only.

Law

[21] Constructive dismissal may arise where an employer adopts a deliberate course of conduct intended to coerce an employee's resignation.¹ The Authority must examine all the circumstances of the resignation not merely the terms of the notice or other communication whereby an employee has tendered the resignation. If there was a breach, the question is "whether a substantial risk of resignation is reasonably foreseeable, having regard to the seriousness of the breach."²

[22] The nature of a claim for constructive dismissal is dependent on the events that preceded it; the focus of such claims is on the employee's motivation for the decision to leave, and whether the motivation arises from a breach of the employer's duty or other actions by the employer; and whether the leaving was reasonably foreseeable to the employer.³

[23] The onus is upon the employee to prove the conduct of the employer towards him was of such a repudiatory nature that he was entitled to elect to cancel the employment agreement and did so.⁴

Was Mr Leahy constructively and unjustifiably dismissed?

[24] Mr Leahy submits the letter of 31 May was an instruction to resign because FTL was trying to avoid paying his redundancy entitlements. He further submits the same events give rise to a disadvantage and a breach of good faith.

[25] There was an issue raised about whether Mr Leahy had in fact resigned by letter dated 14 May 2018 because he sought to take redundancy. I do not accept this to be the case because the FTL did not accept his resignation at that time and he continued working beyond his notice period.

¹ *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA).

² *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168 (CA).

³ *Hawkins v Commissioner of Police* [2007] ERNZ 762 (EmpC) at [30].

⁴ See above n 1.

[26] There was evidence Mr Leahy was not redundant at the time he resigned due to the business being relocated. Mr Leahy confirmed he had suggested Hamilton or Huntly as possible business locations. These are similar if not further distances to travel from Otahuhu than to Warkworth. He accepted that when he suggested these to Mr Walter, he was not intending FTL to be relocate there.

[27] At hearing Mr Leahy admitted that he could have continued his employment if the business relocated to Warkworth. He accepted flexible work hours would have reduced his travel concerns. Other options such as payment for his travel, working from home and a standalone Auckland premises for his use were also possible options to avoid redundancy.

[28] There was evidence FTL could have and did find Auckland premises for Mr Leahy to continue his employment post-resignation. Unfortunately he was employed elsewhere at the time of the offer.

[29] Mr Leahy's representative submitted this matter was similar to *Waikato District Health Board v Archibald*.⁵ I do not agree because this case is factually distinguishable. Mr Leahy's role was not being disestablished at the time he resigned nor was the issue about reasonable redeployment. Further redundancy was not a foregone conclusion here as it was in *Archibald*.

[30] There was little doubt that Mr Leahy's employment with FTL remained available to him up to and beyond his resignation. The relocation to Warkworth was not, at the time of resignation, an unreasonable option to explore. Even if it became unreasonable, an alternative option of a standalone work space in Auckland became available as well. His job was not surplus to FTL's requirements. FTL was further motivated to retain Mr Leahy because of his redundancy compensation payment. This was not, at the time of his resignation, a redundancy situation.

[31] However, FTL's letter of 31 May 2018 on its face invites Mr Leahy (and other employees) to resign if they wish to receive their final pay and holiday pay. When Mr Walters was asked whether he believed that the employees' resignation was

⁵ [2017] NZEmpC 132.

required for them to receive their final pay or holiday pay, he replied “yes because it was in the employment agreement”.

[32] Resignation is not required for employees to receive their statutory minimum entitlements of wages and holiday pay. Holiday pay is required to be paid before annual leave is taken or when an employee’s employment comes to an end. This is not limited to resignation. There is a statutory duty of good faith for employers not to directly or indirectly do anything to mislead or deceive their employees.⁶ This view evidenced in the letter was legally incorrect and misleading. This action is not one of a reasonable employer.

[33] This also made Mr Leahy’s resignation as a result of the letter reasonably foreseeable. I accept he did resign in order to obtain his final and holiday pay that amounted to \$20,446.39. This was unfair and unreasonable behaviour by the employer in the circumstances.

[34] James Leahy was constructively and unjustifiably dismissed by Fairfit Tooling Limited.

Remedies

[35] Mr Leahy has a personal grievance of constructive and unjustified dismissal. He seeks payment of his redundancy compensation and compensation for hurt and humiliation. He does not seek any lost wages.

[36] As noted above he was not redundant at the time or even following his resignation. I decline to award redundancy compensation in the circumstances.

[37] His evidence of the effects of the personal grievance was sparse. He found it emotionally upsetting primarily due to the number of years he had worked for FTL. He felt cheated and did not believe Warkworth was a “true offer”. He did not require any medical assistance. Recent cases in the Authority and Court have awarded \$20,000 for constructive and unjustified dismissal.⁷

⁶ Section 4(1)(b) Employment Relations Act 2000.

⁷ See *Andrew v Armourguard Security* [2018] NZERA Christchurch 154 and note 5 above.

[38] Although the letter inadequately expressed FTL's intentions about Mr Leahy, there was substantial evidence to show FTL was motivated to retain his services which Mr Leahy was aware of. He knew the value of his services and the consequences for FTL if he was dismissed or resigned.

[39] Although the 31 May 2018 letter is badly worded, it did invite staff to meet with Mr Walters to discuss its content. Given his length of service and relationship with Mr Walters, Mr Leahy should have spoken to Mr Walters before resignation or at the very least during the notice period. This is especially when Mr Leahy admitted at hearing that he could have considered the Warkworth option. Employees also have a duty of good faith to maintain the employment relationship by being responsive and communicative.

[40] It is not difficult to conclude when Mr Leahy realised redundancy was not going to be paid that he felt "cheated" and wished to resign. The primary intent of his current application is to recover redundancy compensation that he felt was owed. In my view his resignation contained a mixed motive based upon both the 31 May letter and his general disgruntlement at the refusal to pay redundancy.

[41] This was causative and blameworthy. It does require a reduction in compensation by 50%.

[42] I order Fairfit Tooling Limited to pay James Leahy \$10,000 compensation for the personal grievance within 28 days of the decision.

Breaches of Holiday Act 2003?

[43] During hearing it became clear there were breaches of s 27 Holidays Act 2003 by non-payment of holiday pay upon termination of employment. Mr Leahy was entitled to receive his holiday pay "in the pay that relates to the employee's final period of employment" (s27(2)). Breaches of s27 are liable to a penalty for non-compliance under s75 of the Holidays Act 2003.

[44] It is accepted he did not receive his pay until months after his final pay in breach of s27 Holidays Act 2003.

[45] This was a single ongoing breach. Section 133A of the Act and other judicial guidance indicates a penalty is warranted. The breaches occurred due to FTL utilising Mr Leahy's holiday pay to service its cashflow problems. This was a deliberate decision. As noted to the parties, employees cannot be used as unsecured creditors.

[46] A recent Authority case involving a breach of s27 Holidays Act 2003 and an employment agreement awarded a global penalty of \$5,500.⁸ Given this matter involves a single breach, a penalty of \$2,250 is justified. Mr Leahy has suffered from the breach. Therefore half of the penalty is to be paid to him.

[47] I order Fairfit Tooling Limited to pay a penalty of \$2,250. \$1,125 of the penalty is to be paid into the Authority's Bank Account within 28 days of the decision. The remaining \$1,125 of the penalty is to be paid to James Leahy within 28 days of the decision.

Costs

[48] The usual daily tariff approach to costs is an appropriate starting point. For a one day hearing \$4,500 would usually be payable. The hearing took $\frac{3}{4}$ of a hearing day. Therefore the starting point for costs is \$3,375.

[49] Mr Leahy was successful in proving his grievance but unsuccessful on the recovery of his redundancy compensation. This took a significant part of the hearing time. I intend reducing the costs by 50% to reflect this issue. The penalty awarded was not pleaded so no costs were incurred in respect of that matter.

[50] I order Fairfit Tooling Limited to pay James Leahy \$1,687.50 towards his legal costs within 28 days of the decision.

T G Tetitaha
Member of the Employment Relations Authority

⁸ See *Green v BSC Solar (New Zealand) Ltd* [2018] NZERA Christchurch 109.