

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 184
5450868

BETWEEN DAVID LEE
 Applicant

A N D SYSTEM CONTROLS LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Helen White, Counsel for Applicant
 Phil Bates, Advocate for Respondent

Investigation Meeting: 14 April 2014 at Auckland

Date of Determination: 13 May 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Lee) alleges first that he has been unjustifiably dismissed from his employment and second has suffered a further personal grievance because of the unjustified actions of the respondent employer (System Controls) causing him disadvantage. Those claims are both resisted by System Controls.

[2] Mr Lee was a long serving employee of System Controls. He commenced employment initially in March 2001 as a junior automation engineer responsible for software applications for computers used in industrial sites. He was subsequently promoted to a senior automation engineer, then to an interim engineering manager role and finally to a contracts management role in 2009. Subsequently, that last mentioned role was renamed as projects manager and it was in that role that Mr Lee's employment with System Controls was terminated for redundancy.

[3] Mr Lee told me that System Controls was effectively his first employer, and until very recently, his only employer since completing his education.

[4] Mr Lee acknowledged in his evidence that he knew System Controls was experiencing financial difficulty prior to his termination for redundancy. But he put that into context by indicating that his experience with System Controls over the eleven years of his employment was that that was always the position. He referred to a particular occasion eight years ago when he was aware that the owners were not taking salary and were re-mortgaging their homes in order to keep the company going.

[5] Mr Lee explained that the financial difficulties of the employer were a function of the nature of the industry. It made bids for work and whether those bids were successful or not determined the subsequent cash flow.

[6] Mr Bates, who gave evidence for System Controls, agreed with Mr Lee's analysis of the business. He described it as a project based business and said there were spells where they were busy and other spells where they were quiet.

[7] Mr Bates told me that "famine" had started towards the end of 2012 when two projects that System Controls was working on "went sour" and legal proceedings issued. Neither of those matters have been brought to any closure yet.

[8] Mr Bates told me that in July 2013, he wrote the first of what he called a "state of the nation" email to staff. He said that things "kept going downhill" from that point and the second "state of the nation" email indicated that there would be redundancies and that anyone who had ideas amongst the staff should "step forward".

[9] Mr Bates said that he cancelled the 2013 Christmas party, closed the business absolutely for three weeks over the holiday period and had to address other ways of "taking costs out of the business".

[10] After the elongated holiday break, that is in late January 2014, Mr Bates says that he met with the departmental managers one by one, including Mr Lee, to discuss the financial predicament of the company. Given those discussions, Mr Bates remained puzzled as to why Mr Lee was disgruntled about his termination for redundancy. Mr Bates said that Mr Lee had all the information that everybody else had, to the effect that the company was in dire straits and that all positions were up for

redundancy. He indicated that the company was still in the process of what he described as a “controlled wind down” but that liquidation was not in prospect at present.

[11] Mr Lee, while acknowledging that he had first been aware of the general vicissitudes of the business, and subsequently read and digested the so-called “state of the nation” emails from Mr Bates, nevertheless did not understand that his position was being considered for disestablishment. His understanding of the engagements between himself and Mr Bates was that they were talking about possible redundancies of staff that reported to Mr Lee rather than the disestablishment of Mr Lee’s own position.

[12] In any event, whatever Mr Lee’s expectations, there was a meeting between the parties on 28 January 2014 at which Mr Lee was told that his position has been disestablished for redundancy and there were to be further discussions between the parties as to how that decision was to be communicated to other staff, and in particular Mr Lee’s direct reports.

[13] In the result, because of an apparent misunderstanding, Mr Bates told Mr Lee’s direct reports that Mr Lee’s position had been disestablished and that same evening Mr Lee had a call from one of his direct reports commiserating with him about his losing his job.

[14] Subsequently, Mr Lee claims that Mr Bates was reluctant to give him a written reference and Mr Lee maintained that Mr Bates was linking the provisions of that written reference to an agreement from Mr Lee that he would not pursue legal proceedings challenging the redundancy.

[15] In the result, the written reference was provided within two weeks of the declaration of Mr Lee’s redundancy and Mr Lee raised a personal grievance on 17 February 2014.

Issues

[16] It will be convenient if I consider the following questions:

- (a) Was this a genuine redundancy?
- (b) Did System Controls undertake a proper consultation with Mr Lee?

- (c) Does Mr Lee have a personal grievance for unjustified dismissal?
- (d) Does Mr Lee have a personal grievance for unjustified disadvantage?

Is this a genuine redundancy?

[17] I have no hesitation in concluding that this was a genuine redundancy. I am satisfied that both Mr Lee and Mr Bates were clear that the redundancy was genuine. There is ample evidence before me to confirm that System Controls was in serious commercial difficulty as a consequence of its failure to win bids for new work and I am persuaded that Mr Lee was as aware of that circumstance as anyone.

[18] For the sake of completeness, I observe that Mr Lee did not contend that the redundancy was anything other than genuine; his claim in respect to the dismissal is based on the employer's failure to consult him appropriately.

Did System Controls adequately consult with Mr Lee?

[19] I am satisfied on the evidence I heard that System Controls did not fulfil its obligations to consult appropriately with Mr Lee in relation to his possible redundancy. I made this clear to the parties at the investigation meeting.

[20] It is apparent to me that the only consultation that took place was general rather than specific, that is there were broadcast emails indicating the commercial situation that System Controls was in and I accept that in the most recent of those broadcast emails, there was a reference to redundancies being inevitable.

[21] It is also clear that there were meetings between the management of System Controls and department heads (including Mr Lee) but in the evidence I heard, Mr Bates was unable to satisfy me that either he or any other senior manager of System Controls had sat down with Mr Lee, indicated to him that his position was in jeopardy and sought from him any alternative strategies he might be able to suggest to obviate the need for the disestablishment of his role.

[22] Indeed, what Mr Bates told me was that he had met with Mr Lee as a department head and talked generally about the dire position the firm was in but he acknowledged that the only direct discussion he had with Mr Lee about the disestablishment of Mr Lee's position was the meeting held between System Controls

and Mr Lee on 28 January 2014 when Mr Lee was told by System Controls that his position had gone.

[23] As I explained to Mr Bates at the investigation meeting, that is simply not enough to meet the obligations of a good and fair employer in a redundancy situation. The fact that Mr Lee knew that the firm was in difficulty is one thing, but he must also have been told in the clearest terms that his own position was at risk and be given the opportunity to offer alternatives for the employer to consider which might have saved the position.

[24] So while it is apparent from the evidence of both parties that there was a general understanding that the firm was in difficulty, it is equally apparent to me that Mr Lee was never aware that his position was at risk. He always thought that the discussions that he and Mr Bates were having revolved around the possibility of disestablishing one of his subordinate's positions and it was never clear to him that his own position might be at risk. I did not understand Mr Bates to concede that point; his evidence rather tended to doubt Mr Lee's conviction that he (Mr Lee) did not understand his own position was at risk. But Mr Bates was absolutely straightforward in confirming that Mr Lee was never given an opportunity to comment on the proposal that his position might be disestablished; rather what happened was that Mr Lee was called into a meeting and told that his position had gone.

[25] The requirements of the law in relation to consultation in a redundancy situation are quite simple. First, the effected employees must be given relevant information about the circumstance the business is in sufficient for them to have a reasoned understanding of the basis for the employer's concerns.

[26] Second, where the employer forms the view that particular positions may need to be disestablished in order to address the wider environment that has already been disclosed to affected staff, the employer is under an obligation to meet with the affected staff in an appropriate confidential environment and give the affected individuals the intelligence that there is a prospect their position may be disestablished and to seek from those affected individuals any observations they may wish to make for the employer to consider as an alternative to the disestablishment of the position.

[27] Next, the employer must genuinely consider what it has received from the affected staff, but if it is satisfied that the only way of addressing the wider business imperatives is to confirm the disestablishment of certain roles, it may then go ahead and do that once it has considered and reflected upon the input from affected employees.

[28] The purpose of this process is not to make things difficult for employers in challenging commercial environments, but rather to ensure that affected staff have a proper opportunity to be heard and can actually engage with the employer on as near as possible to a level playing field.

[29] In the particular circumstances of this case, Mr Lee's evidence is that if he had been given the opportunity of having input into the prospect that his position might be disestablished he would have urged on System Controls the proposal that certain other positions (subordinate to Mr Lee's position) might appropriately be considered for disestablishing before Mr Lee's. Whether that would have had any impact in terms of System Controls' ultimate determination of the matter is beside the point; the fact that they did not give Mr Lee the opportunity of having input into the matter meant that they failed absolutely to meet their legal obligations in the matter.

Has Mr Lee been unjustifiably dismissed?

[30] Having reached the conclusion that, although the redundancy itself was a genuine one, the process by which the redundancy was effected failed to meet the requirements of New Zealand law, it follows inexorably that Mr Lee has a personal grievance.

[31] But because I concluded that the redundancy itself was a genuine one, I am satisfied that the proper way to categorise Mr Lee's personal grievance is not as an unjustified dismissal, which would have been the case if the redundancy had not been found to be genuine, but rather as a disadvantage as a consequence of the unjustifiable actions of System Controls in failing to adequately consult with Mr Lee about the disestablishment of his position.

[32] Put another way, the Authority cannot consider compensation for an unjustified dismissal if the dismissal was itself justified by reason of a genuine redundancy, even if the process by which the redundancy was effected is not in conformity with the law.

Has Mr Lee suffered any other disadvantage?

[33] Mr Lee's evidence is that during the notice period which following the declaration of redundancy in respect of his position, Mr Bates sought to link the provision of a good written reference with a commitment from Mr Lee that he would not challenge the dismissal for redundancy in the employment institutions. For his part, Mr Bates denied absolutely that that was System Controls' position and he pointed out that the written reference sought by Mr Lee was in fact provided within two weeks of the declaration of redundancy.

[34] That might have been where the argument rested were it not for the fact that at the investigation meeting, Mr Lee appeared with a transcript of a taped conversation between himself and Mr Bates which had happened in mid February 2014. Mr Bates was unaware that the meeting was being taped and was naturally upset that this step had been taken without his knowledge or consent.

[35] Mr Lee maintained that he would not have felt any need to tape the discussion were it not for his distress at the way in which the redundancy matter had been handled by System Controls.

[36] Because of the way in which the transcript of the meeting had been presented without notice at the investigation meeting, I invited Mr Bates to take it away and consider it and let me have any comments he might want to make by way of submission after the event. I then gave Mr Lee an opportunity to respond to Mr Bates' submissions.

[37] Mr Bates described the fact of the secret recording as "devious" in his submissions, and said that the provision of the transcript at the investigation meeting constituted an "ambush".

[38] That said, Mr Bates argued that a proper construction of the whole transcript disclosed that System Controls had dealt with the matter *in an open and fair manner and at no time was David (Mr Lee) treated unreasonably ... (the transcript) portrays a balanced discussion and was not in any way weighted towards being threatening against David (Mr Lee).*

[39] Of course, those contentions were resisted by Mr Lee. In particular, in respect to the contention that Mr Lee ought to have either not taped the meeting or if he did,

told Mr Bates about the tape, Mr Lee maintained in his submissions that if Mr Bates had known about the existence of a taped record of the meeting, he might well have used his influence negatively because the written reference eventually provided by Mr Bates proposed that prospective employers could contact him personally for further and better particulars.

[40] Whatever the propriety of a secret tape of a meeting is, the fact remains that the evidence is now before the Authority and I am duty bound to consider it. I note that Mr Bates considers that, looked at in its totality, the transcript evidence is a balanced discussion and that may well be a reasonable assessment.

[41] However, on the particular question of whether Mr Bates had tried to link the provision of a positive written reference with a commitment from Mr Lee not to take legal proceedings to challenge the dismissal, I am bound to conclude the transcript suggests that such a nexus did exist.

[42] I am satisfied that Mr Bates did try to link his provision of a good written reference for Mr Lee with a commitment from Mr Lee not to take legal proceedings against System Controls because of the redundancy. I reach that conclusion because of two exchanges between Mr Lee and Mr Bates, the first of which is on p.12 of the transcript. At the top half of that page, Mr Bates is recorded as saying

I would like you to be truthful with me as far as, you know, whether you're going to make life difficult as far as this ...

Dave (Mr Lee) look, you're not that naive, you can go, I'm sure you've gone on Google and put "employment tribunal" or whatever. I'm sure there are plenty of lawyers that are out there that will offer you their services for free, and I'm not trying to put ideas into your head here ...

... So I am cutting to the chase that's what I'm saying, I would hope that you'd be truthful, particularly when we're talking about references and moving forward, I would hope that you'd be truthful enough to say whether you are or you're not ...

Well Dave (Mr Lee) I'm not going to help, I'm not going to be inclined to want to do my best to help you move forward, if on the other hand you're going to be trying to make life difficult ... surely you can see that?

[43] I quoted above from four separate observations made by Mr Bates in an exchange with Mr Lee in the first half of p.12 of the transcript of the meeting between

Mr Bates and Mr Lee which took place in mid February 2014. I am satisfied that a reasonable observer looking at the words just quoted in a dispassionate fashion would conclude that Mr Bates was endeavouring to marry the provision of a good written reference with a commitment from Mr Lee not to take proceedings. I note that there is a second exchange between the parties later on in the transcript, to the same effect.

[44] Of course the linking of a good written reference to a commitment not to sue is completely improper, an absolute abuse of process, and not the action of a good and fair employer acting in accordance with the good faith principle.

[45] Mr Bates pleads that he was not under a legal obligation to provide a written reference (something that I confirmed at the investigation meeting) and that having been asked for one by Mr Lee, he provided one within two weeks of the termination of the employment and that the reference itself was a good reference if only because Mr Lee himself drafted much of it.

[46] So Mr Lee's position is clear that he feels the tape has demonstrated that unreasonable pressure was put on him by Mr Bates to avoid legal proceedings in return for a reference and on the face of it the transcript confirms that that is precisely what happened.

[47] However, Mr Bates relies on the fact that a written reference is not a legal requirement and more especially, having had a request for a reference, he provided one within a reasonable time.

[48] I am satisfied that it is grossly improper to seek to pressurise an employee not to bring proceedings in return for the provision of a written reference. But that said, Mr Bates' point that he provided the reference without ultimately getting the assurance he sought in return, would seem to go some way to putting matters right.

[49] In order for Mr Lee to satisfy me that this reference aspect is a basis for a personal grievance for unjustified disadvantage, he has to show first of all unjustified actions by the employer (and that is as clear as can be in the present case) but he must also show disadvantage to him and the only disadvantage I can discern is his distress at the time at the possibility that he was not going to get a reference because he would not commit to withdrawing the threat of legal proceedings. Given that he subsequently got the reference and did not withdraw his legal proceedings, it is difficult to see what permanent disadvantage he has suffered except for the transitory

distress at the time the discussion took place which must have been remedied within a matter of days by the provision of the reference.

Determination

[50] I am satisfied that Mr Lee has satisfactorily demonstrated that he has suffered a personal grievance by reason of having been disadvantaged by unjustifiable actions of System Controls in its failure to adequately consult with him in relation to his redundancy. However, I am satisfied the redundancy itself was genuine and therefore I consider the proper course is to treat the grievance as a disadvantage grievance rather than unjustified dismissal grievance.

[51] In respect to the second purported grievance, the claim that by attempting to link the provision of a good written reference with a commitment from Mr Lee not to bring legal proceedings concerning the dismissal, I am not satisfied that a personal grievance is made out. While it is undoubtedly true that System Controls behaviour in trying to link the two aspects was completely unjustified behaviour and thoroughly improper, it is nonetheless a fact that System Controls within a short time of making those thoroughly improper threats then proceeded to issue a good written reference without obtaining the indemnity from suit they sought. That being the position, any disadvantage suffered by Mr Lee must have been only transitory and I am not satisfied is compensatable.

[52] The position is otherwise though in relation to the failure to consult concerning the redundancy where I consider a compensatable wrong has been done to Mr Lee for which he is entitled to remedies.

[53] Because that is my conclusion, I am required by law to consider whether Mr Lee has contributed in any way to the circumstances giving rise to the personal grievance and I am satisfied he has not: s.124 of the Employment Relations Act 2000 applied.

[54] I direct that System Controls is to pay to Mr Lee the sum of \$5,000 as compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 in respect to the personal grievance I have found proved. That sum represents the Authority's assessment of the compensation that Mr Lee is entitled to as a consequence of the wrong done to him in failing to adequately consult with him in respect to the redundancy proposal. Mr Lee is not entitled to the larger sums that he has claimed

because those sums are only accessible where redundancy is found to not be genuine and thus the personal grievance can be for unjustified dismissal rather than simply for disadvantage.

[55] It follows from the foregoing analysis that Mr Lee also cannot enjoy reimbursement of lost wages because I am satisfied on the basis of the genuineness of the disestablishment of his position that there has been no unjustified dismissal and without an unjustified dismissal there cannot be any entitlement to reimbursement of lost wages.

Costs

[56] Mr Lee also claims costs and identifies these as \$2,244.80 plus work in progress. The Authority's invariable practice is to reserve costs to enable the parties to seek to resolve matters first on their own terms.

[57] If that should prove impossible, one of the parties may file and serve a submission in the Authority seeking costs to be fixed and the responding party will have 14 days from the date of receipt of the initiating party's submissions, to file their submissions in response. The Authority will then deal with the application to fix costs, on the papers.

James Crichton
Member of the Employment Relations Authority