IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND **[2013] NZERA Auckland 176**
5410038

	BETWEEN	JOSEPH MIKA Applicant
	A N D	SIMPLE RENTALS LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Gregory Bennett, Advocate for Applicant Geoffrey Jones, Advocate for Respondent
Investigation Meeting:	8 April 2013 at Auckland
Date of Determination:	9 May 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Mika) alleges that he was unjustifiably dismissed from his employment, suffered unjustifiable disadvantages in that employment and is owed wages and holiday pay as well.

[2] Although no statement in reply was ever filed, there was email traffic between the respondent (Simple Rentals) and the Authority Support Officer indicating that they regarded the matter as having been settled. On enquiry, that proved not to be the case and the dispute was still on foot. Accordingly, the Authority feels entitled to treat Mr Mika's claims as being resisted by Simple Rentals.

[3] For the sake of completeness, the Authority should note that Simple Rentals, while failing to file a statement in reply, did attend the investigation meeting and subsequently provided some of the information which the Authority sought.

[4] Mr Mika was employed in about August 2010 as a debt collector and repossession agent.

[5] The Authority heard that when Mr Mika started his employment, fully 100% of Simple Rental contracts were funded from their own resources but that that arrangement changed during Mr Mika's employment such that by the time his employment came to an end, virtually all of the financing was being provided by a finance company and Simple Rentals were their agent.

[6] The evidence is that partly as a consequence of the funding change just referred to, and partly because of the general downturn, Simple Rentals concluded that they needed to take some cost out of the business. There were a succession of reductions in Mr Mika's hours. The executed employment agreement between the parties contemplates a 40 hour week and that is the basis on which Mr Mika commenced the employment.

[7] His evidence, which the Authority accepts, is that after about eight months of working 40 hours, his working hours were reduced to 30 hours per week. There is a provision in the executed employment agreement which allows Simple Rentals to do precisely that, but the provision does not allow for a reduction in hours below 30 per week.

[8] In fact, as the economic conditions for the business continued to deteriorate, Simple Rentals made a further reduction in Mr Mika's hours to 15 hours per week. Although neither party was able to tell the Authority exactly when this happened, by common consent it seems to have been around the end of October or beginning of November 2012. This further arbitrary reduction was, according to Simple Rentals, accompanied by a discussion with Mr Mika, the thrust of which was that the business needed to reduce cost because of falling revenue.

[9] Then on 22 November 2012 there was a further discussion between Mr Mika and Michel Thomas, a director of Simple Rentals. Michel Thomas told the Authority that he indicated to Mr Mika that Simple Rentals was simply not able to continue paying his wages and he was made redundant with immediate effect. Mr Thomas explained to the Authority that Mr Mika had *a lot of spare time going forward and that the business simply could not afford to continue to employ him*. The Authority notes, for the sake of completeness, that Mr Mika told the Authority that he accepted

that the redundancy was a genuine one and his complaint was about the process the employer had used and his belief that he was still owed wages.

[10] After the advice that the employment relationship was over, there was a discussion between Simple Rentals and Mr Mika about how much Mr Mika was owed by way of wages and holiday pay.

[11] That amount was never agreed between the parties and there was disputation between them as to Mr Mika's entitlement. One of the difficulties was Simple Rentals' failure to produce wage and time records which Mr Mika's advocate, quite properly, requested.

[12] Subsequently, Simple Rentals claim that they have paid Mr Mika's holiday pay entitlement, although Mr Mika does not accept that the amount tendered is in full settlement of his holiday pay claim.

[13] Simple Rentals complain that whenever they tried to engage with Mr Mika, his representative effectively got in the way. The Authority observed at the investigation meeting, that parties are entitled to engage professional advisers and do so regularly. The other party in an employment dispute has an obligation (as of course does the representative) to engage in good faith with either the party on the other side or that party's representative. In the particular circumstances of this case, those engagements became problematical and matters were not able to be resolved by agreement.

[14] However, the Authority does observe that Simple Rentals did themselves no service by refusing to provide Mr Mika, or his representative, with a written statement explaining the dismissal, the wage, time and holiday record, the copy of the employment agreement signed by Mr Mika, or indeed any other information they held on Mr Mika by way of a personal file. All of those documents are documents which an employer has a legal obligation not only to keep but also to provide to the employee or that employee's representative when asked for them.

[15] What is more, when a matter such as this one comes before the Authority, the Authority is entitled to take judicial notice of the failure of a party (in this case the employer) to behave in good faith towards the other and to fulfil specific statutory duties such as the keeping and provision of certain key documents like the wage, time and holiday record and the explanation for the dismissal.

Issues

[16] The Authority will need to consider the following questions:

(a) Could Simple Rentals reduce Mr Mika's hours of work;

(b) Was Mr Mika unjustifiably dismissed;

(c) Is Mr Mika owed wages post dismissal?

Could Simple Rentals reduce Mr Mika's hours?

[17] There are two separate issues here. The first is the reduction in hours from 40 hours a week to 30 hours a week, and the second is the subsequent reduction in hours from 30 per week to 15 hours per week.

[18] Dealing with the first reduction in hours from 40 hours to 30 hours per week, the Authority is persuaded that Simple Rentals could make that reduction without Mr Mika's consent. To reach that conclusion, the Authority relies on the executed employment agreement which has finally been provided to the Authority by Simple Rentals and which has a clear provision in it which is in the following terms:

> *6.2 Variation to hours of work*
>
> *The Employee's hours of work may be varied as follows:*
>
> *(i) By mutual agreement between the employee and the employer; or*
>
> *(ii) If agreement cannot be reached, by the Employer, following consultation with the Employee, provided that the Employee's minimum hours of work are not reduced below 30 hours and that any increase in hours of work is reasonable.*
>
> *When seeking to reduce the Employee's hours, the Employer shall act reasonably and shall take into account the Employee's personal circumstances and commitments.*

[19] It seems to the Authority plain that Simple Rentals can rely on the clear terms of that provision in the executed employment agreement to reduce Mr Mika's hours from 40 to 30 per week whether or not he agrees. The provision is specific that following consultation, the employer may mandate a change reducing hours of work to 30 hours per week. There is a subsequent provision in the second paragraph which requires the employer to act reasonably. In the Authority's opinion, it is difficult to

see how, by a strict application of the actual provision, a determination by Simple Rentals to reduce Mr Mika's hours from 40 to 30 per week could be seen as unreasonable. The very purpose of the provision seems to be to provide Simple Rentals with that right and the Authority is satisfied that, whatever Mr Mika's difficulties with that reduction might be, Simple Rentals had a right to do what they did.

[20] However, the position is otherwise in relation to the subsequent reduction from 30 hours per week to 15 hours per week. There is no contractual basis for such a dramatic reduction in hours and that action of Simple Rentals is plainly outside the terms of the individual employment agreement and therefore without any force or effect. Mr Mika is entitled to recover the wages lost for the short period in question relating to the second reduction in hours only.

Was Mr Mika unjustifiably dismissed?

[21] It is common ground that this was a dismissal for redundancy. While Mr Mika's advocate argues that the redundancy was not a genuine one, that argument, with the greatest respect, is against the run of evidence. Not only did Mr Mika himself accept that the redundancy was genuine (in answer to a direct question from the Authority) but the evidence provided by Simple Rentals was that they simply had to take cost out of the business and the only way to do that was to reduce staff. It was apparent from what they said that other staff members were made redundant as well and while Mr Mika complains that other staff have subsequently been re-employed after the business' fortunes turned up again, Simple Rentals satisfied the Authority that those other staff members were not doing the work that Mr Mika was doing. In other words, the disestablishment of his position by Simple Rentals has not had to be revisited by the employer since Mr Mika left the role.

[22] It follows from the foregoing analysis that the Authority has not been persuaded that this was a redundancy that lacked genuineness. In reaching that conclusion, the Authority has used its discretion and in particular considered the relevant portions of the test for justification contained in s.103A of the Employment Relations Act 2000 (the Act).

[23] In that particular regard, the Authority feels obliged to emphasise that this was a small employer operating with limited resources and while no doubt a more fulsome

analysis of the financial predicament of Simple Rentals would have been appropriate in all the circumstances, the fact that Mr Mika accepted that the redundancy was genuine and, presumably by implication, accepted that he had a great deal of spare time where he was not productively employed, leads the Authority to the conclusion that the genuineness of the redundancy cannot be challenged.

[24] However, the process that the employer used can be challenged and ought to be because it did not, in the Authority's view, meet the legal minima.

[25] First, the Authority has already made clear that the meeting at which Mr Mika's hourly rate was reduced from 30 hours per week to 15 hours per week, while relied upon by Simple Rentals as being the first of two meetings about possible restructuring, already has a question mark around it because of the employer's arbitrary and improper reduction in Mr Mika's weekly hours at that same meeting. Further, as Mr Mika does not remember the meeting, it is a little difficult for Simple Rentals to rely on it as a basis for the beginning of a proper redundancy consultation.

[26] What should have happened was that Simple Rentals ought to have first indicated to Mr Mika the seriousness of the financial predicament of the business and indicated its provisional view that the only way that it could take costs out of the business effectively was by reducing staff including disestablishing Mr Mika's own role. Mr Mika should then have had an opportunity to respond to that suggestion and come up with any alternative strategies that he might have been able to offer, those alternatives needed to have been considered by the employer and then, after that period of reflection, the employer needed to establish a final decision based, as it would be then, on an assessment of all the available factors and evidence, including, in particular, any input from Mr Mika.

[27] Of course, none of that happened. Mr Mika does not remember the earlier meeting at which his hourly rate was reduced, or at least does not remember it as being relevant to the redundancy consultation process, and at the second meeting on 22 November 2012, he was simply told that Simple Rentals could not afford to pay him anymore. The Authority has no hesitation in concluding that such a truncated process does not comply with the law and fails absolutely to meet the requirements of consultation as Mr Mika's advocate quite properly points out in his closing submissions.

[28] It follows from that conclusion that while Mr Mika has been unsuccessful in his claim for an unjustified dismissal, the effect of the Authority's decision is to substitute that claim with a finding that Mr Mika has suffered an unjustified disadvantage because of the unjustified actions of Simple Rentals in failing to properly consult with Mr Mika around his genuine redundancy.

Are there wages owed post dismissal?

[29] The Authority must begin this section of the determination by referring to the legal requirements contained in the Holidays Act 2003 (the 2003 Act) concerning the maintenance of holiday leave records.

[30] The employer has not produced holiday leave records, either to the Authority or to Mr Mika. The only evidence offered for their view that Mr Mika's entitlement is so much less than he claims is first the provision in the executed employment agreement for a shutdown period. Clause 8.8 refers to an annual closedown and the provision effectively provides that this enables Simple Rentals to *require the employee to take leave during the period of the closedown, even where this requires the employee to take leave for which they are not fully reimbursed*.

[31] Mr Jones told the Authority that the shutdown over the Christmas period was for *three to four weeks* and that needed to be *factored into the leave situation*.

[32] The second piece of evidence offered to mitigate the entitlement to holiday leave for Mr Mika is a contention that he took time off for a relationship breakdown.

[33] But Mr Mika's evidence is that he took no leave at all. He said on oath that he had not taken leave at any stage during the employment.

[34] Clearly, the Authority could resolve that conflict in the evidence easily if a holiday leave record was made available to it. But despite the requests for that information both from Mr Mika's advocate and from the Authority itself, that information has simply not been provided. If it exists, it is a mystery as to why it was not provided because it would assist in demonstrating the correct position.

[35] The Authority's remit in this sort of matter is clear. By s.83 of the 2003 Act, the Authority is entitled to make a finding that because the employer failed to either keep a holiday leave record or provide a copy of the holiday leave record to the

employee, the employee has been unable to file an accurate claim. The Authority now makes just such a finding in the present case.

[36] Further, having made that finding, the Authority is able to accept as proved statements made by the employee in respect to that employee's entitlement to annual holiday leave and the associated payment for it.

[37] Relying on those statutory provisions in the 2003 Act, the Authority is satisfied that it is appropriate to accept Mr Mika's claim for holiday pay at face value subject to two qualifications that the Authority will now refer to. Mr Mika's claim is in the sum of $2,295. To make some allowance for the annual shutdown which the employer has referred to, the Authority makes the arbitrary deduction of $295. Further, the email traffic on the Authority's file suggests a part payment of holiday pay may have been made. If that is the position, that amount needs to be deducted from the amount awarded also.

Determination

[38] The Authority has not been persuaded that the first reduction in Mr Mika's hours of work as an improper one, but certainly the second reduction from 30 hours per week to 15 hours per week was and Mr Mika is entitled to be reimbursed for wages that he lost as a consequence of that improper reduction in his hours of work. The parties seem to agree that the 15 hours per week regime was implemented about three weeks before the termination of the employment relationship entirely. On that footing Mr Mika has lost 15 hours per week for each of three weeks and he is entitled to be reimbursed the gross sum lost. The sum that Mr Mika is entitled to under this head is $810 gross.

[39] Mr Mika is also entitled to receive his holiday pay entitlement which the Authority determines is $2000 but less any amount already paid by Simple Rentals on account. The Authority is entitled to prefer the evidence of Mr Mika to that offered by Simple Rentals in reliance on the application of the Holidays Act 2003. If the parties cannot agree the net holiday pay entitlement after the deduction of any amount already paid, leave is reserved for the parties to have the amount fixed by the Authority.

[40] The Authority has not been persuaded that Mr Mika has a personal grievance for unjustified dismissal because the Authority's conclusion is that, despite deficits in

the way in which the matter was dealt with, on the balance of probabilities, the redundancy was a genuine one and so the dismissal is not, of itself, unjustified.

[41] However, by reason of the complete absence of proper consultation, the process by which Simple Rentals entered into the redundancy dismissal was completely substandard and Mr Mika is entitled to be compensated for that failure. That represents an unjustified action causing Mr Mika disadvantage, the unjustified action being the complete absence of consultation in a restructuring environment. Mr Mika's evidence was plain to the Authority that he had suffered injury to his feelings as a consequence of the sudden shock of losing his position entirely. The law requires that he be compensated for that loss.

[42] Having concluded that a personal grievance on those terms has been found, the Authority must consider questions of contribution. There is nothing in the evidence that would Mr Mika contributed in any way to the failure of the employer to consult adequately with him in respect to his redundancy.

[43] Accordingly, the Authority directs that Mr Mika is to be paid the sum of $5,000 as compensation under s.123(a)(c)(i) of the Act.

[44] Mr Mika is also to be paid the filing fee of $71.56 and is to have the gross sum of $2,000 paid to him as a contribution to lost holiday pay.

[45] Simple Rentals Limited is to pay to Mr Mika the following sums:

(a) Unpaid wages of $810 gross;

(b) Compensation of $5,000 net;

(c) Reimbursement of the Authority's filing fee of $71.56 net;

(d) Unpaid holiday pay of $2,000 gross less any amount already paid.

Costs

[46] Costs are reserved.

James Crichton
Member of the Employment Relations Authority