

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 190/09
5141001

BETWEEN GARY JOHN McAUSLIN
 Applicant

AND HIREQUIP LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Stephen McAuslin, Counsel for Applicant
 Ralph Webster, Advocate for Respondent

Investigation Meeting: 24 July 2009

Submissions received: On the day

Determination: 4 November 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Gary McAuslin started working for HireQuip Limited (HireQuip) on a casual basis in a customer service role in February 2008. For about a month after commencement of his employment the hours Mr McAuslin worked were irregular. After this period Mr McAuslin was working nearly every Saturday and Sunday and his employment took on features of regularity.

[2] On 25 September 2008 it was confirmed to Mr McAuslin following a telephone conversation with the Manager of the branch he worked at, Stuart McLean, that his position was redundant. Mr McAuslin was given one months notice.

[3] Mr McAuslin said in his statement of problem that his dismissal was unjustified because the redundancy was not genuine and the process adopted by

HireQuip Limited was unfair. Mr McAuslin seeks compensation, reimbursement of lost wages and costs.

[4] HireQuip say that Mr McAuslin's position was genuinely redundant and that it carried out the redundancy in a procedurally fair manner. On that basis it says that Mr McAuslin does not have a personal grievance and is not entitled therefore to remedies. HireQuip do accept that Mr McAuslin's employment did after a period of time take on features of regularity.

[5] The parties attended mediation but were not able to resolve the employment relationship problem.

Issues

[6] The issues in this case are:

- Was the decision to make Mr McAuslin redundant and the implementation of the decision justifiable in that objectively considered it was what a fair and reasonable employer would have done in all the circumstances at the time – s.103A Employment Relations Act 2000;
- If Mr McAuslin was unjustifiably dismissed, then what remedies is he entitled to, and are there issues of mitigation or contribution.

Was the decision to make Mr McAuslin redundant and the implementation of the decision justifiable?

[7] I find that Mr McAuslin's employment status whilst employed by HireQuip was permanent part time rather than casual because he worked virtually every Saturday and Sunday after the first month he commenced employment.

[8] Mr McAuslin had a written employment agreement with HireQuip and clause 23 was headed redundancy and applied in the event that Mr McAuslin's services became surplus to the requirements of the business.

[9] On Saturdays Mr McAuslin usually worked from 8am until 5pm with two other employees and on Sundays he worked with one other employee from 8am to 1pm.

[10] Mr McLean received advice in August or September 2008 from HireQuip Head Office that branch managers were required to cut costs due to poor financial performance and that they were to consider making redundant any positions that were not absolutely essential.

[11] Mr McLean said that he considered his own workforce and felt that the business could do with fewer employees on a Saturday. Mr McLean concluded that the business could only afford to lose one position and it came down to Mr McAuslin and one other employee. He said that he could not really choose between them as it was finely balanced but decided that the fairest selection criteria would be *last on first off*. Mr McLean did accept under questioning at the Authority investigation meeting that the fact Mr McAuslin was deemed to be a casual employee did have a bearing on the decision about redundancy which is reinforced by the letter of termination received by Mr McAuslin.

[12] I am not satisfied that Mr McAuslin knew anything of this restructuring until 22 September 2008. On that date Mr McAuslin telephoned the branch to talk to Mr McLean as he had missed a call from HireQuip. Mr McAuslin talked to Darren an employee second in charge to Mr McLean. Darren advised Mr McAuslin to ring Mr McLean as HireQuip was restructuring. Mr McAuslin said that he asked Darren whether they were restructuring him [Mr McAuslin]. Darren did not reply except to tell him to ring Mr McLean.

[13] Mr McAuslin telephoned Mr McLean that same day. There is some conflict in the evidence as to what was said during that telephone conversation. I am satisfied that Mr McAuslin was advised in response to his questioning of Mr McLean as to whether he was being restructured out of HireQuip that his position would be made redundant and that there was to be a meeting that week to talk about the termination of his employment.

[14] Mr McLean gave evidence which I accept that he did not want to advise Mr McAuslin of his termination over the telephone but felt that he was pressured into it. It is clear though from the evidence that the decision to make Mr McAuslin redundant had already been made at the time of that telephone call.

[15] There was a dispute as to whether Mr McAuslin advised Mr McLean that he had another job and was looking at leaving anyway. Mr McAuslin adamantly denies

that he said that. I have regard to the evidence and also to Mr McLean's notes that he says he took shortly after the meeting on 25 September 2008.

[16] Considering the evidence I do not find it likely on the balance of probabilities that this was what was said by Mr McAuslin. I note in that regard the evidence of Mr McAuslin's partner, Jennifer Shedden that Mr McAuslin had never spoken to her about leaving HireQuip and that it was their main source of income as they were both students. I have also had regard to what occurred after Mr McAuslin was made redundant and the evidence does not support that there was another position for him to go to. Mr McAuslin was working whilst employed by HireQuip for four and a half hours with another employer. He was able to do this work to fit around his weekend work at HireQuip but had been undertaking this additional work for some three months before his termination.

Meeting 25 September 2008

[17] Mr McAuslin was represented at this meeting by his brother, Stephen McAuslin, a solicitor. It was the only meeting held to discuss the redundancy.

[18] I find that at the meeting Mr McLean advised the reasons for Mr McAuslin's redundancy and made statements along the lines that the Dunedin office was over budget and that Mr McAuslin's position would be covered by another employee, Dean. There was some questioning during the meeting by Stephen McAuslin of Mr McLean. I am satisfied Mr McLean did his best to answer the questions. There was discussion about a notice period of four weeks.

[19] On 2 October 2008 Mr McLean wrote to Mr McAuslin and said in his letter amongst other matter:

As discussed previously in our meeting at Hirequip Dunedin on the 25th September 2008 that we regrettably will no longer be able to offer you further employment at our Dunedin branch with effect the 27th October 2008.

As discussed at our meeting there are a number of industry changes which have resulted in a down-turn in the financial performance of this branch, which as a result has meant that the branch is not reaching its targets in control of branch expenses. In particular the branch staff wages which are considerably over spent in just the first couple of months of this financial year. This poor result has necessitated a reduction in staff hours and will mean that the current staffing of the branch is unsustainable in its current form.

What this means is that those casual staff employed will be required to change when and how long they work. This has left me in the difficult position of deciding who goes and who stays Gary. In this instance we have decided that it will be on a "last on – first off" basis and as you were the last person employed here Gary unfortunately it means that your role is to become redundant. I did note that you had expressed to me in our telephone conversation on the 22nd September that you had intended to resign in early October anyway to focus more on your other employment position.

I regret that we are unable to continue to offer you employment with us and wish you all the best in your future endeavours. If you require references for future employment then I would be happy to act as such to any prospective employers.

Effect on Mr McAuslin

[20] Mr McAuslin said that he became quite sick and stressed after finding out that he had been made redundant and he obtained a medical certificate on 30 September 2008 that he was unfit for work from 27 September until 27 October 2008 and did not work during his notice period. Mr McAuslin said that the advice received in terms of his redundancy came at a difficult time for him as he had not long returned from Starship Hospital with his son, and there were other issues of family illness. Mr McAuslin said that he was also entering into the exam period at the University of Otago.

[21] Mr McAuslin set out in his written evidence details of encounters that he had with Darren after his dismissal during which he felt threatened. One of these occasions Mr McAuslin set out was while he was bread merchandising in a supermarket in his other role. He said that he was approached by Darren who told him in a heated conversation that if he won the case he would get him and that he was a bludger for living in a state house and he had been a bludger for his entire life. He gave evidence that after this occasion he asked the Police to issue a trespass notice against Darren because he felt threatened and was worried for the safety of his partner and son.

[22] Mr McLean said that he was unaware of these matters and that if they occurred they were not as a result of any actions on his part.

Conclusion

[23] Mr McLean had received advice from Head Office of HireQuip about the need to cut costs because of poor financial performance. I am satisfied that in the Dunedin Branch of HireQuip because staff wages were over budget, revenue was down and there was talk of closing on a Sunday in the future. Eventually Sunday trading did end at the Dunedin branch of HireQuip.

[24] I am satisfied that the disestablishment of Mr McAuslin's position was for reason of genuine redundancy.

[25] In terms of the process undertaken, Mr McLean reviewed the HireQuip business in Dunedin to see where any costs could be saved. A decision was made by him to restructure and reduce one position at that time, which was that of Mr McAuslin.

[26] Section 4(1A)(c) requires in terms of the duty of good faith that:

... an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected –

- (i) access to information, relevant to the continuation of the employees' employment, about the decision; and*
- (ii) an opportunity to comment on the information to their employer before the decision is made.*

[27] In this case Mr McAuslin had no opportunity to comment and insufficient information to comment on before the decision to make his position redundant was made. Did that matter?

[28] If there had been proper consultation and Mr McAuslin had known about the restructuring proposal and had a genuine opportunity to offer his views then the outcome may still have been the same but the way Mr McAuslin felt about it would have been different. Mr McAuslin did not, before the decision was made, have an opportunity to put his view that he was considered a permanent part-timer. Had he been able to do that it may well have meant that the focus in terms of the restructuring and decision making was different and more or equal emphasis may have been placed on other positions.

[29] Mr McLean accepted that although he advised Mr McAuslin Dean would take over his role he had not at that stage spoken to Dean about whether he was agreeable to doing that, because Dean would have to change his usual working days.

[30] In this case a fair and reasonable employer would have consulted with all of the affected employees before proceeding to implement a decision.

[31] Because there was no proper consultation Mr McAuslin felt it was very unfair that an employee, Darren's son, employed to perform a few hours work after school in the yard at HireQuip position was not considered as part of the restructuring even though he commenced employment after Mr McAuslin so Mr McAuslin was not the *last on*. Mr McLean said that this young man's role was only for a few hours and consisted of yard work and that he was considering the customer service roles. The selection of Mr McAuslin is clearly set out in the 2 October 2008 letter to be because he was the last person employed and makes no mention of the restructuring being restricted to customer services roles. That was unfair because Mr McAuslin was not the last person employed.

[32] Mr McLean said that he considered whether there were any alternative roles for Mr McAuslin and concluded there were not. HireQuip was required under clause 23.3 of Mr McAuslin's employment agreement to investigate whether re-training or re-deployment was possible to avoid termination. Mr McLean said that he considered that these options were not available. Without proper consultation it is difficult to see how consideration could have been given under clause 23.3, particularly when some other staff had not been consulted at the time that Mr McAuslin was advised his position was redundant.

[33] I find that HireQuip was in breach of its good faith obligations to consult with Mr McAuslin. I do not find the process adopted by HireQuip was that which a fair and reasonable employer would have undertaken in all the circumstances at the time the decision was made to terminate Mr McAuslin's employment.

[34] I find that Mr McAuslin's dismissal whilst justified in that his position was genuinely redundant, was unjustified as a result of the procedural deficiencies set out above which were serious and not simply of a technical nature.

[35] Mr McAuslin has a personal grievance that he was unjustifiably dismissed from his employment with HireQuip Limited and he is entitled to remedies.

Remedies

[36] Mr McAuslin was given one months notice of his termination and he was not entitled in terms of his employment agreement to any other redundancy compensation. I have found that Mr McAuslin's redundancy was genuine. In some cases the absence of consultation and issues about selection may well support an award for some reimbursement of wages on the basis that a proper process would have taken additional time or indeed may not have resulted in the loss of a position. I am not satisfied that in this case it is appropriate to make an award for lost wages because it seemed to me that regardless of the procedural deficiencies it was very likely that Mr McAuslin's position would have been redundant. In those circumstances I find that the remedy due to Mr McAuslin is limited to compensation under s.123(1)(c)(i) and I make no award for loss of wages. This is not a case where I find any contribution on the part of Mr McAuslin.

[37] Mr McAuslin was upset at the way that his employment ended and how he came to know about the decision that his position was redundant without the ability to have any input into that decision. The redundancy came at a difficult time for him and was Mr McAuslin's main source of income leaving him in a financially difficult position but I cannot compensate Mr McAuslin for the loss of his position and am limited to compensating him for the unfair process adopted by HireQuip. Although I accept that the actions of another employee after termination caused Mr McAuslin distress I am not satisfied that the responsibility for those actions can be levelled at HireQuip and Mr McLean.

[38] In all the circumstances I am of the view that a fair and reasonable award be the sum of \$4,000 without deduction under s.123(1)(c)(i).

[39] I order HireQuip Limited to pay to Gary John McAuslin the sum of \$4,000 without deduction under s.123(1)(c)(i) of the Employment Relations Act 2000.

Costs

[40] I reserve the issue of costs. Mr Stephen McAuslin has until Wednesday

25 November 2009 to lodge and serve submissions as to costs and Mr Webster has until Wednesday 16 December 2009 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority