

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Jon McCarron (Applicant)  
**AND** Reynolds Realty Limited (Respondent)  
**REPRESENTATIVES** Jon McCarron In person  
R Wood, Advocate for Respondent  
**MEMBER OF AUTHORITY** R A Monaghan  
**INVESTIGATION MEETING** 24 March 2006  
**DATE OF DETERMINATION** 5 April 2006

**DETERMINATION OF THE AUTHORITY**

**Employment relationship problem**

[1] Reynolds Realty Limited (“RRL”) employed Jon McCarron initially as a real estate salesperson, then as a rental property manager.<sup>1</sup> The business operated an LJ Hooker franchise at Waiuku. Mr McCarron says his dismissal by reason of redundancy was unjustified and seeks the reimbursement of income lost as a result, as well as compensation for injury to his feelings. He has, correctly, abandoned a claim that he did not receive his final pay, but now says he is owed \$506.25 in respect of a deduction made from his final pay, as well as payment of outstanding annual leave and statutory holidays

**The redundancy**

[2] In or about July 2005 RRL’s business was sold as a going concern to an agent who operated another LJ Hooker franchise elsewhere in South Auckland. The settlement date was 1 August 2005.

[3] Soon after the sale was finalised RRL’s managing director, Anthony Reynolds, informed the staff members of the sale. According to Mr McCarron, Mr Reynolds called him into the office on 8 July 2005 and advised the LJ Hooker franchise had been sold, effective 1 August 2005. Mr McCarron’s position would no longer be required as from 31 July 2005. Mr Reynolds told Mr McCarron the purchaser was aware that the property management arm of the RRL business was uneconomic, and such business as there was would be absorbed into the purchaser’s existing property management business.

[4] Mr McCarron said that information hit him without warning, and he walked out of the office like a possum caught in headlights. That is a not unnatural reaction, but I asked him to identify

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<sup>1</sup> As determined in **McCarron v Reynolds Realty Limited** (9 March 2006, AA 69/06)

what was unfair about what had happened with reference to the principles applicable to dismissals by reason of redundancy. He is not entitled to the compensation and reimbursement of lost earnings he seeks unless his dismissal was unjustified with reference to those principles.

[5] RRL's business was being sold and Mr McCarron's position was to disappear as a result. The redundancy was genuine and any alleged lack of justification had to focus on the fairness with which the decision was made and implemented. Thus, in response to my question, Mr McCarron referred to:

- (a) a lack of consultation;
- (b) the failure to provide any alternatives to redundancy; and
- (c) the lack of any offer of compensation.

[6] Another matter Mr McCarron considered unfair was RRL's failure to reply to a letter he wrote to it, dated 11 July 2005. The letter sought written confirmation that Mr McCarron would, in effect, receive monies owed to him, and confirmation of the information he had been given about his redundancy. Regarding the latter he said he considered it only fair that, if his position was to be terminated, he be informed of this officially and in writing. He also said the failure to provide a reply was one of the driving forces behind the present application. While Mr Reynolds should have replied, as a matter of fact and law nothing in his failure to do so amounts to unfairness rendering the dismissal unjustified.

[7] Regarding consultation, Mr McCarron believed he should have had an opportunity to discuss ways in which the property management part of RRL's business could have been run more profitably. However this was not a matter of closing the property management operation, rather the entire business was being sold. Property management was only a very small part of it, with a mere 10 properties being managed. I do not accept that, at the time the sale was being negotiated, Mr Reynolds was obliged to consult with Mr McCarron about improving the property management arm, and nor would such consultation have been of any assistance once the sale had been confirmed.

[8] As for alternatives to redundancy, Mr Reynolds said he discussed the fate of RRL's staff with the purchaser, who offered to accommodate the staff if they wished. The staff included one salaried employee, three or four salespeople, and Mr McCarron. In particular the purchaser told Mr Reynolds a job in sales would be available for Mr McCarron if he wished.

[9] Mr McCarron denied that this information was passed on to him, but said he would not have been interested in taking a real estate salesperson's position. Even so, he said Mr Reynolds should have done something about helping him to continue with the purchaser. Since the property management arm of RRL's business was so small, so obviously uneconomic, and so obviously capable of being integrated into the purchaser's business I do not accept Mr Reynolds was obliged to attempt more than he did to obtain a position for Mr McCarron in the purchaser's business.

[10] Thirdly, Mr McCarron said he should have been paid redundancy compensation in the sum of 1 – 2 months' pay. However here there was no agreement between the parties regarding redundancy compensation, and it is not for the Authority to create one. RRL was a small business which was sold, it had significant liabilities, and its employees and contractors were given as much notice of the sale as possible. I do not consider the circumstances were such that redundancy compensation was called for.

[11] For these reasons I find the dismissal was justified. Mr McCarron is not entitled to the compensation and reimbursement of lost income which he seeks.

### **The deduction from Mr McCarron's final pay**

[12] Under the Real Estate Agents Act 1976, real estate salespeople are obliged to obtain a certificate of approval as a salesperson from the Real Estate Agents Licensing Board, and undergo the required training. There is a prescribed fee associated with applications for grants of certificates of approval.<sup>2</sup> Applications are made by the licensed real estate agent on behalf of a person wishing to become a salesperson.

[13] Mr Reynolds duly made an application on behalf of Mr McCarron, and the application was granted. Mr Reynolds said he made out a cheque for some \$506 to accompany the application, so I have taken it that he did not dispute the quantification of the amount now said to be owed. Mr Reynolds said he made the payment because Mr McCarron advised he was ‘a bit cash strapped’ at the time. However after further questioning Mr Reynolds said he was under the impression Mr McCarron could not pay, which is not the same thing. Mr Reynolds told Mr McCarron he would make the payment, on the understanding that he would be repaid. He said in evidence that salespeople normally pay their own fees.

[14] Mr McCarron acknowledged that, during the conversation, Mr Reynolds expressed the view that Mr McCarron should pay the fee. Mr McCarron’s evidence was that he had been told by the people running his real estate salesperson’s training course that agents pay the fee. That was the reason why he asked Mr Reynolds to pay. Mr Reynolds conceded that may have been the discussion, and may be why he said he would pay.

[15] When the money had not been repaid by the date of termination of Mr McCarron’s employment, it was deducted from his final pay by way of an ‘adjustment’ described as ‘RELB fee, reimbursement’. However employers are not entitled to deduct monies from an employee’s wages in that way unless there is written authority to do so. There was none here.

[16] Despite this, and in the interests of resolving the problem, it would be open to me to consider a finding that RRL was nevertheless owed the money and make an order reflecting that state of affairs. In order to decide the money was indeed owed, I needed evidence to persuade me there was an agreement between Messrs McCarron and Reynolds that RRL or Mr Reynolds would pay the fee and Mr McCarron would repay it.

[17] Information allegedly provided to Mr McCarron by his training providers is not determinative of the matter, and only marginally relevant to it. The critical area of evidence was the discussion between Messrs McCarron and Reynolds. There was nothing in that discussion amounting to evidence of an agreement to repay. Mr Reynolds’ evidence was vague, and at best indicated he did no more than assume or expect there would be repayment. There was no evidence Mr McCarron agreed to repay – on the contrary the evidence indicated no such agreement or intention on his part.

[18] Since I am not persuaded there was an agreement to repay, and the deduction was in any event unlawful, RRL is ordered to repay to Mr McCarron the sum of \$506.25.

### **Annual leave and statutory holiday pay**

#### **1. Annual leave**

[19] As an employee, Mr McCarron was entitled to paid annual leave. He says he did not receive any paid annual leave, so claims payment of 4.75 weeks’ leave in the sum of \$1,514.41. His employment began on 5 January 2004 and ended on 31 July 2005. On an entitlement to three

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<sup>2</sup> See s 46 of the Act

weeks' leave per annum, his entitlement over the 19 month period of his employment was to 4.75 weeks' leave. RRL provided figures indicating he earned \$21,143 over the 17 month period beginning 4 March 2004, at an average of \$293 per week. That comes to \$1,391.75. I adopt that figure in the absence of any other information of assistance.

[20] It was common ground that Mr McCarron had a three and a half week absence for a trip overseas. Mr Wood submitted that, as Mr McCarron continued to receive commission payments during that time, he was paid for that time. I agree. Mr McCarron was not at work, but was being paid. The amount received during that period is to be deducted from \$1,391.75.

## 2. Statutory holiday pay

[21] As an employee, Mr McCarron was also entitled to be paid for statutory holidays falling on days on which he would otherwise have worked. His claim for payment assumes he worked on all statutory holidays, but he acknowledged when giving evidence that was not the case. Instead he said he came into the office during the Easter break in his first year. That evidence is too vague to persuade me of which, if any, of the relevant statutory holidays were actually worked, or for how long. Even if both of them were worked, Mr McCarron came to work of his own volition.

[22] Anzac Day fell on a Sunday in 2004, and Mr McCarron started work after the new year holidays. Accordingly he was entitled to be paid for 8 statutory holidays in the 2004 calendar year. Waitangi Day fell on a Sunday in 2005, so Mr McCarron was entitled to be paid for 7 statutory holidays occurring up to August 2005. Thus he is entitled to payment for 14 statutory holidays.

[23] An average weekly rate of \$293 is the equivalent of an average ordinary daily rate of \$58.60. RRL is ordered to pay to Mr McCarron  $14 \times \$58.60 = \$820.40$  in respect of statutory holidays.

## Summary of orders

[24] RRL is to pay to Mr McCarron:

- (a) The sum deducted from his final pay, being \$506.25;
- (b) \$1,391.75 less monies actually paid to him while he was taking his overseas trip, as holiday pay; and
- (c) \$820.40 as statutory holiday pay.

[25] All of these figures are gross figures.

## Costs

[26] Costs are reserved.

[27] If the parties have anything they wish to say on whether they should receive a contribution to their costs incurred in respect of this investigation, and if so in what amount, they are to file and exchange written statements of their views within 14 days of the date of this determination.

**R A Monaghan**  
**Member, Employment Relations Authority**