

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 172
5420532

BETWEEN RUSSELL McCASKILL
 Applicant

A N D INFRAMAX
 CONSTRUCTION LIMITED
 Respondent

Member of Authority: K J Anderson

Representatives: S McKenna, Counsel for Applicant
 R Drake, Advocate for Respondent

Investigation Meeting: 19 December 2013 at Hamilton

Submissions Received: 24 January 2014 for the Applicant
 28 February 2014 for the Respondent

Date of Determination: 6 May 2014

DETERMINATION OF THE AUTHORITY

Introduction

[1] The applicant, Mr Russell McCaskill, claims that he was unjustifiably dismissed on 26 October 2012. Mr McCaskill asks the Authority to find that he has a personal grievance and award him various remedies.

[2] The respondent, Inframax Construction Limited (Inframax) denies that Mr McCaskill was unjustifiably dismissed. The company says that while the position held by Mr McCaskill was made redundant, he was offered suitable alternative employment which he rejected. The outcome being that his employment was terminated on the ground of redundancy.

Background

[3] Mr McCaskill was employed by Inframax on or about 4 October 2004. At that time, he resided at New Plymouth and his place of employment was there.

[4] Sometime in 2010, Inframax restructured its operations. As a result, the position held by Mr McCaskill was made redundant. However, he was offered a new position based in Te Kuiti. There was a requirement that Mr McCaskill would have to relocate from New Plymouth to Te Kuiti. He had some reservations about moving to the smaller town as he considered that if he was again made redundant, it would be difficult to obtain new employment.

[5] The evidence of Mr McCaskill is that in order to address his concerns pertaining to relocating to Te Kuiti, Inframax “promised” him that if he moved to Te Kuiti to work in the new position, his employment would not be terminated for “at least two years”. Mr McCaskill says that on the basis of this promise, he accepted the Te Kuiti position and went to live there; commencing the new role on 13 March 2011.

Redundancy

[6] Albeit Mr McCaskill was employed by Inframax, he was seconded to work within a separate company owned by Inframax: Independent Road Markers Taranaki Limited (IRM).

[7] The evidence of Mr Chris Haywood, the Chief Executive Officer of Inframax, is that the company had suffered significant losses and since his appointment to Inframax on 1 December 2011, he has had to implement a number of significant restructuring decisions in order to reduce the annual loss being incurred by the company.

[8] Mr Haywood attests that a restructure within IRM was necessary as the result of the loss of a major contract. IRM employed four staff; three in Taranaki and Mr McCaskill in Te Kuiti. The restructure involved the loss of two positions.

[9] Via a letter from Mr Haywood dated 10 August 2012, Mr McCaskill was informed that following a due process, that Mr McCaskill had been involved with, and under the rating criteria that had been applied, Mr McCaskill was one of the two

employees that would lose their employment. He was informed of his redundancy compensation entitlement and the notice arrangements.

[10] Upon receiving the notification of the redundancy of his position, Mr McCaskill informed Inframax that he had been guaranteed at least two years of employment when he relocated from New Plymouth to Te Kuiti. Mr McCaskill told Inframax that he was given this guarantee by the previous Chief Executive Officer, Mr Colin Dixon. It was (and is) Mr McCaskill's view that he had a guarantee of employment with Inframax until 13 March 2013.

An offer of alternative employment

[11] The evidence of Mr Haywood is that upon being informed by Mr McCaskill that he had been guaranteed employment with Inframax for two years (until 13 March 2013) by the previous CEO, and despite there being no confirmed record of any such guarantee, it was decided, in good faith, to recognise the possibility that an undertaking had previously been given to Mr McCaskill.

[12] The result was that Mr McCaskill was offered an alternative position as Site Traffic Management Supervisor/Traffic Control; commencing on 1 October 2012. The job offer was recorded in a letter dated 21 September 2012, attached to a new employment agreement.

[13] The evidence of Mr McCaskill is that he required some time to respond to the offer, including an opportunity to discuss it with his lawyer. Unfortunately, Mr McCaskill's lawyer (Mr McKenna) was out of the country from 23 September until 12 October 2012.

[14] The evidence of Mr Haywood is that because Mr McCaskill had not responded to the offer of alternative employment, the Operations Manager for Inframax, Mr Paul Newbound, enquired from Mr McCaskill as to whether he intended to accept the alternative position being offered. The evidence of Mr Haywood is that this approach to Mr McCaskill was made on 1 October 2012, the date of the expiry of the offer of alternative employment. But it seems more likely that it was 28 September 2012 as an email of that date, from Mr Newbound to Mr Drake, (the advocate for Inframax) records that:

Russell M [McCaskill] has just rang me and said that he cannot sign that agreement as he feels this will interfere with his outstanding issues with Imax. I told him that this agreement relates to the role of STMS and nothing more and that if he is to accept the role it needs to be signed and returned by the 1st October.

[15] The evidence of Mr Haywood is that Mr McCaskill was reminded that his representative had confirmed that acceptance of the offer of alternative employment would appear to resolve the situation. This is an apparent reference to the content of a letter from Mr McKenna dated 20 September 2012 (said by Inframax to have been received on 24 September 2012), raising a personal grievance on behalf of Mr McCaskill. The letter records (in part) that it was understood that an alternative position may be available for Mr McCaskill and: "...if so then Russell is happy to consider a transfer to a new position as a resolution of this claim". The letter informs further that: "...this would be on the expectation that the new position would be on the same or similar terms to his current position. If this is the case then it would appear that we may be able to easily resolve this situation". Mr McKenna also informed that he would be overseas from 23 September until 12 October 2012 and would respond to any communication from Inframax after the latter date.

[16] As an apparent response to Mr McKenna's letter, on 1 October Inframax extended the time for Mr McCaskill to accept the new job offered until 3 October 2012. The evidence of Mr Haywood is that despite this extension of time, Mr McCaskill never confirmed his acceptance (or rejection) of the new role and the only communication from him was to inform Mr Newbound, on 10 October 2012, that Mr Haywood should look at the final date of employment as apparently, in the view of Mr McCaskill, it was incorrect.

[17] Mr McCaskill says that he needed more time to discuss the offer of alternative employment with his lawyer. It is accepted that Mr McKenna was unavailable until after 12 October 2012 but there is no evidence that Mr McCaskill made any attempt to consult further with Mr McKenna before receiving a letter from Mr Newbound dated 24 October confirming the termination of his employment on 26 October 2012.

[18] And as revealed by the content of the statement of problem (para.2.9), it seems that Mr McCaskill had no intention of accepting the offer of alternative employment, as it was his view that it was not substantially similar to his current position.

[19] As Mr McCaskill never accepted the alternative position that was offered by 3 October, the offer was withdrawn and the position went to another employee.

Analysis and conclusions

[20] Mr McCaskill accepts that the redundancy of his position was genuine and the substance of this dispute is not really about the redundancy of his position at all. Rather, Mr McCaskill says that when he relocated from New Plymouth to Te Kuiti in 2011, he was given an assurance that he would have continued employment for a period of two years, i.e. until 13 March 2013.

[21] However, there is nothing in writing to confirm this nor has Mr McCaskill produced any corroborative evidence to support his assertion. At best, all Mr McCaskill relies upon is an oral assurance that he says he received from the previous CEO of Inframax, that he would have two years of employment from when he commenced his role at Te Kuiti. The submissions for Mr McCaskill posit that Inframax had accepted that he was promised guaranteed employment for a period of two years when he relocated to Te Kuiti in 2011. But Inframax says that it has never accepted that a verbal agreement existed between Mr McCaskill and the previous CEO. Nonetheless, Inframax seems to have allowed Mr McCaskill the benefit of the doubt, as it were, and acted in good faith towards him by offering him an alternative role when his position was made redundant.

[22] But given the redundancy of Mr McCaskill's position, Inframax was bound to explore the possibility of redeployment to another position with Mr McCaskill in any event.

[23] Much has been made by Mr McCaskill in regard to the alternative position being not substantially similar, largely because at the time that it was offered, he was of the view that if he had accepted the new role, he would incur a considerable loss of income; notwithstanding that as of 19 December 2013, some 14 months after Mr McCaskill lost his employment, he had not obtained new employment.

[24] In response to the argument about the purported loss of income, Inframax have presented wages information pertaining to the earnings of the person that was subsequently appointed to the position offered to Mr McCaskill. And while this employee appears to have worked a considerable amount of overtime for the year 7

October 2012 to 22 September 2013, this employee earned \$58,716.00 as compared with the \$48,000 that Mr McCaskill earned in his last year of employment.

[25] But apart from the fact that it seems to be reasonably established that if Mr McCaskill had accepted the position offered to him he would have been as well off, if not better off, in regard to his income, there is no probative evidence of any binding contractual undertaking by Inframax, written, oral, or implied, that Mr McCaskill would have his terms and conditions guaranteed or protected for a period of two years. At best, all Mr McCaskill had (supposedly) was some assurance from the previous CEO of Inframax that he would continue to be employed for two years from when he relocated to Te Kuiti in 2011. And it has to be said that even that is not really sustained by any tangible evidence.

Determination

[26] I find that Mr McCaskill was not unjustifiably dismissed. Rather, given that it is accepted that the redundancy of Mr McCaskill's position was genuine, Inframax acted fairly and reasonably by offering him a reasonably suitable position which regrettably, Mr McCaskill rejected. Of course this was his prerogative but I find that he does not have any grounds for a personal grievance and his claims are dismissed accordingly.

Costs

[27] The respondent has informed that it understands that Mr McCaskill is in receipt of legal aid but there has been no formal notification of this to the respondent (or the Authority), as required by s.24(1) of the Legal Services Act 2011 (the Act). Nonetheless, the principles applying to an unsuccessful applicant in receipt of legal aid are well established and under s.45 of the Act, in the absence of exceptional circumstances, no order for costs may be made against an aided person in a civil proceeding.

[28] The Authority is unaware of any exceptional circumstances that may exist in this matter in a costs setting, and it would seem that the consideration of any liability for costs would be a fruitless exercise. This appears to be accepted by the respondent.

However, in the event that it believes otherwise, the respondent has 28 days from the date of this determination to present any relevant submissions and in such event, the applicant has a further 14 days to respond.

K J Anderson
Member of the Employment Relations Authority