IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2015] NZERA Auckland 25
5461076

	BETWEEN	STEVE McEWING Applicant
	A N D	GEOVERT LIMITED Respondent

Member of Authority:	T G Tetitaha
Representatives:	M Smyth, Counsel for the Applicant A Parish, Advocate for the Respondent
Investigation meeting:	11 and 12 November 2014 at Auckland
Submissions Received:	13 November 2014 from Applicant 13 November 2014 from Respondent
Date of Determination:	29 January 2015

DETERMINATION OF THE AUTHORITY

A. Steve McEwing was unjustifiably dismissed by Geovert Limited.

B. An order that Geovert Limited pay compensation of $5,000 to Steve McEwing pursuant to s.123(c)(i) of the Employment Relations Act 2000.

C. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served by 30 January 2015. The other party shall have until 13 February 2015 to file and serve a reply.

Employment relationship problem

[1] Steve McEwing was employed by Geovert Limited (the respondent) until he was dismissed for redundancy on 6 November 2013. He submits there were no

genuine reasons for the redundancy and the process leading to his dismissal was defective.

The facts leading to the dismissal

[2] The respondent is part of a group of companies known as Geovert Group owned by Anthony Teen and his family. The other companies which were part of the Geovert Group were Geobrugg NZ Limited and Geovert Australia.

[3] On 13 February 2013 Mr McEwing started work as Project Development Manager. His terms of employment were governed by a written employment agreement dated 10 February 2013.[1]

[4] On 6 November 2013 Mr McEwing was called into a meeting with Anthony Teen, the respondent's director, and Matthew Whiteley, chief financial officer. The applicant was unaware of the purpose of the meeting he was attending.

[5] During the meeting Mr McEwing was told that his job was redundant. He was handed a letter which stated:

> *Geovert Limited is currently suffering negative financial impact as a result of a long term downturn in workload in New Zealand and, therefore, must facilitate a necessary restructure of its New Zealand operation.*
>
> *This restructure will involve reducing the number of staff employed by the company and, unfortunately, the decision has been taken to make your position of Business Development redundant at the earliest opportunity. The Geovert Board have discussed other options for your skill set and currently have no alternative employment opportunities available to you with Geovert Limited or any of its associated entities.*
>
> *Geovert are committed to helping your transition into new employment and will endeavour to provide you with any reasonable assistance we can during this period.*
>
> *After receiving this letter, management would like to discuss with you any suggestions or comments you may have as to the restructure in your employment together with agreeing any compensation terms of your redundancy.*
>
> *We apologise for any distress this may cause you and look forward to your assistance and understanding in working through this process.*

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1 Bundle of Documents doc.4

[6] There was a discussion concerning a non-competition covenant in Mr McEwing's employment agreement and his notice. He was told the restraint would not be enforced. It was agreed he would be paid in lieu of notice and he could retain his non-salary employment benefits for the duration of the notice period.

[7] On 12 November 2013 Mr McEwing received a letter confirming his non-compete covenant would not be enforced but that he was required not to solicit the respondent's customers for a period of six months following the end of his notice period.

[8] On 13 January 2014 Mr McEwing secured a role with Hydrock Limited. Hydrock Limited is a company owned by Justin Wilson. Mr McEwing has proceedings before the Authority for unjustified dismissal by the respondent (file 5461073).

[9] On 22 January 2014 Mr McEwing raised a personal grievance.

[10] The matter was unable to be resolved and is now before the Authority for determination.

Issues

[11] At a teleconference on 17 July 2014 the following issues were identified for determination:

(a) Were the reasons for redundancy genuine;

(b) Was the process followed by the respondent leading to dismissal for redundancy what a fair and reasonable employer could have done in all the circumstances?

Were the reasons for redundancy genuine?

[12] Mr McEwing and another applicant, Justin Wilson were both made redundant by the respondent at the same time for similar reasons. Mr McEwing relied upon the same submissions filed in that matter here with the difference that the position occupied by another employee Matt Avery was redundant and he should have been offered or had it available to him.

[13] The decision whether to make redundancies is part of management's prerogative. As such, it is not for the Authority to substitute their business judgment for that of the employers.[2]

[14] The Court of Appeal has recently confirmed that a redundancy arises where the employee was superfluous to the needs of the business. This could arise where the employer sought to make the business more efficient.[3]

[15] In the end the focus of the Employment Relations Authority has to be on the objective standard of a fair and reasonable employer, so the subjective findings about what the particular employer has done in any case still have to be measured against the Authority's assessment of what a fair and reasonable employer would (or, now, could) have done in the circumstances.[4]

[16] The financial information supporting the decision made at the time is not the spreadsheet produced in the bundle of documents.[5] This was a redacted version of a spreadsheet produced at hearing by the respondent. The spreadsheet produced at hearing contained more detail. It essentially confirmed no income was generated by the respondent from October 2013 to January 2014.

[17] The parties accepted the respondent had peaks and troughs. It was accepted there was usually no income or work in November to December 2013 but October 2013 was unusual. The applicant's witness, Matthew Whiteley, former respondent Chief Financial Officer confirmed the respondent was propped up by Geovert Australia Limited during the lean periods.

[18] Mr Whiteley confirmed the accounts were in disarray in mid-2013 and following revision the accounts showed a small loss. His evidence was the respondent could have continued trading if 'emergency' work had been available. The work was not. In October 2013 the respondent was running at a loss and had no future work to cover the lean period. The loss of work in Indonesia and financial situation of Geovert Australia meant there was no cash available to continue propping the respondent up. In short redundancies were required to keep the company trading

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2 *Rittson-Thomas t/a Totara Hills Farm v Davidson* [2013] NZEmpC 39, [2013] ERNZ 55 at [51] referring to dicta in *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825 (EmpC) and confirming *GN Hale & Son Ltd v Wellington etc Caretakers etc IUOW* [1991] 1 NZLR 151, (1990) ERNZ Sel Cas 843 (CA)

3 *Grace Team Accounting v Brake* [2014] NZCA 541at [47]

4 *Grace Team Accounting v Brake* [2014] NZCA 541at [85]

5 Bundle of Documents Document 6

in the interim. Mr Whiteley had advised that the respondent needed to be reduced to a 'shell' with one administrator and one salesperson. He confirmed to his knowledge there was no personal motivation to get rid of any employee which I accept.

[19] I accept Anthony Teen's evidence that the work was either the subject of contracts or not. He relied upon the profit and loss statements for the respondent. The respondent produced the statement of financial position for year ended 31 March 2014 which included the 2013 figures. This showed a deficit of $11,217 for the year ended 2013 and a deficit of $70,838 for the year ended 2014.[6] In short the respondent's financial position was worsening over time.

[20] Justin Wilson gave evidence confirming there were no 'locked' contracts in October 2013 or for the months after. At the date of Mr Ewing's dismissal, the company was struggling to find work. The respondent appeared unable to meet its financial obligations in October 2013 and its position steadily worsened.

[21] Counsel for Mr Wilson cross-examined Anthony Teen about why there was no selection process between Mr McEwing and Mr Avery for redundancy. The decision maker regarding redundancy was Anthony Teen. At hearing Anthony Teen gave evidence that Matt Avery had a different skill set to Mr McEwing. He was an engineer and capable of project management. Mr McEwing was not. Mr Avery's job was not superfluous to the respondent's business needs. Mr McEwing's was. The respondent was not required to offer Mr McEwing Mr Avery's job because it was not superfluous to the needs of the business.

[22] The redundancy arose because the applicant's position as Project Development Manager had become surplus at the time the decision was made. There was no evidence of any personal motivation by the respondent to get rid of Mr McEwing. The reasons for redundancy were genuine.

Was the process followed by Geovert leading to dismissal for redundancy what a fair and reasonable employer could have done in all the circumstances?

[23] The respondent acknowledges the redundancy process for the applicant was not perfect, but submits their intention was to be 'as helpful as possible'. Anthony Teens' evidence was he did not hold the applicant responsible for the respondent's

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6 Respondent Exhibit 1 produced P Teen 11/10/14

issues and intended the process to be as amicable and open as possible. If the applicant had raised comment during their meeting in regard to having time to provide solutions or alternatives, the respondent would have been open to amending the process accordingly. Anthony Teen was not an expert on the process and did not know what was required. He genuinely did not want to lose employees he had spent time training and was open to any real solutions provided by Mr McEwing.

[24] Employment agreements contain an implied obligation on parties to deal with each other in good faith. The acts of an employer must meet the standards required of a reasonable employer acting fairly[7].

[25] Section 4 requires parties to deal with each other in good faith. Section 4(4)(e), which provides that the duty of good faith applies to *"making employees redundant"*.

[26] Section 4(1A)(c) of the Act requires an employer proposing to make a decision that will have an adverse effect on the continuation of employment to provide the affected employed with:

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

[27] These sections impose a requirement of notice and an opportunity to comment upon redundancy prior to the redundancy decision being made. This did not occur here.

[28] I do not accept Anthony Teen's evidence that he reasonably relied upon Justin Wilson to relay the purpose of the meeting to Mr McEwing and to provide him with any required information. Mr Wilson was not privy to the discussions about redundancy at the time because one of them was his own. I have already found that Mr Wilson's redundancy was not explicitly raised with him to enable him to prepare and be able to comment about it at the meeting on 6 November 2013. I find it improbable Anthony Teen would ask Mr Wilson to prepare Mr McEwing for a discussion about redundancy in the circumstances. Nor do I accept the respondent's

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7 *Coutts Cars Ltd v. Bagley* [2002] 2 NZLR 533, [2001] ERNZ 660 (CA)

submission redundancy decision had not been made at 6 November 2013. The letter Mr McEwing received clearly showed he had been made redundant. There was no real opportunity for him to comment thereafter.

[29] He received no notice or information in advance of the meeting. I accept he was even more shocked then Mr Wilson to learn he had been made redundant because he was unaware of the company's current financial position.

[30] The process leading to the dismissal was not what a fair and reasonable employer could have done in all the circumstances. Concerns were not raised at all with Mr McEwing prior to the meeting. He was not given a reasonable opportunity to respond to the decision to dismiss him for redundancy prior to it being enacted at the meeting.

[31] I do not accept there was a reasonable opportunity for Mr McEwing to return after that meeting to offer counter-proposals to the redundancy given the contents of the letter he was handed. Mr McEwing's dismissal was extremely abrupt.

[32] These defects were not minor and did result in Mr McEwing being treated unfairly. Steve McEwing was unjustifiably dismissed by Geovert Limited.

Remedies

[33] Mr McEwing seeks reimbursement of lost wages of $9,615.38 being his salary up to the date he secured new employment. He referred to checking the papers for jobs then waiting to the New Year hoping for things to pick up. He was approached prior to Christmas 2013 by Mr Wilson to work for his company Hydrock Limited. He started in January 2014.

[34] He submits he was in shock because this was the third time it had happened to him in 2 years. At hearing he referred to requiring anti-depressents and the effect of stress upon a skin condition. He felt embarrassed dealing with the same client's through Hydrock Limited. He *"had no problem being made redundant as long as they followed the correct process."*

Lost remuneration

[35] Where the Authority determines an employee as a personal grievance and lost remuneration as a result of that grievance, the Authority must order the employer to

pay to the employee the lesser of a sum equal to that lost remuneration or to three months' ordinary time remuneration pursuant to s.128 of the Employment Relations Act 2000 (the Act).

[36] In considering an order for remuneration under s.128, the employee has an obligation to mitigate loss by seeking alternative paid employment irrespective of whether he seeks reinstatement.[8]. An employee who has not acted reasonably to mitigate loss of wages has not lost remuneration as a result of the grievance. If remuneration has been lost because of a failure to mitigate, there is no statutory requirement to order reimbursement.[9] In practice, this requires evidence of a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like.[10]

[37] There is little evidence of Mr McEwing looking for alternative work in the period immediately following dismissal. It appears from the evidence he looked for a period of time immediately following dismissal but gave up before Christmas.

[38] In the circumstances, I decline to order payment under s123(b) and 128 of the Employment Relations Act 2000 because Mr McEwing has failed to mitigate his lost remuneration.

Compensation for hurt and humiliation

[39] Compensation should not be used as a penalty to indicate disapproval of an employer's conduct. Rather, it is to compensate the employee for the effect of the grievance.[11]

[40] My impression of Mr McEwing was that any distress was temporary and he was coping well with the dismissal and had in fact gone on to secure employment.

[41] My view of the dismissal was it was handled insensitively. Where an employee was not humiliated or "brutally dismissed" but dismissed "insensitively" the Court of Appeal has awarded compensation of $7,000.[12] Based upon the evidence before me an amount of $5,000 for damages under s.123(c)(i) is appropriate. There is

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8 *Carter Holt Harvey Ltd v. Yukich* (CA04/05/05)
9 *Finau v. Carter Holt Building Supplies* [1993] 2 ERNZ 971 (EmpC) at 977
10 *Alan v. Trans Pacific Industries Group Ltd (t./a Media Smart Ltd)* [2009] 6 NZELR 530 para.[78]
11 *Paykel Ltd v Ahlfeld* [1993] 1 ERNZ 334 (EmpC)
12 *NCR (NC) Corp Ltd v. Blowes* [2005] ERNZ 922 (CA) at [44]

no evidence of contributory behaviour requiring me to reduce the remedies awarded under s.124.

[42] There is an order that Geovert Limited pay to Steve McEwing compensation of $5,000 for hurt and humiliation pursuant to s.123(c)(i) of the Act.

[43] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served by 30 January 2015. The other party shall have until 13 February 2015 to file and serve a reply.

T G Tetitaha
Member of the Employment Relations Authority