IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 392
5342922

	BETWEEN	ANDREW MILNE Applicant
	AND	STEVE CLARK ENGINEERING LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Applicant in person Garry Pollak for Respondent
Investigation Meeting:	8 September 2011
Determination:	12 September 2011

DETERMINATION OF THE AUTHORITY

A. Andrew Milne was not prevented from pursing his personal grievance because of the agreement he signed on the day of being informed of the redundancy of his position.

B. The redundancy of Mr Milne's position was decided for a genuine business reason but how Mr Milne was told of the decision and then dismissed for redundancy was not fairly done.

C. To settle the personal grievance Steve Clark Engineering Limited (SECL) must pay Mr Milne $2500 compensation under s123(1)(c)(i) of the Employment Relations Act 2000.

D. SECL must also reimburse Mr Milne $71.56 for the fee to lodge his application in the Authority.

Employment relationship problem

[1] Andrew Milne worked as a welder for Steve Clark Engineering Limited (SCEL) for seven years. SCEL ended Mr Milne's employment on 3 February 2011. The company's director, Steve Clark, told Mr Milne there was no work for him and he was redundant.

[2] Mr Milne claimed he was unjustifiably dismissed because he had no warning of impending redundancy or Mr Clark's decision, he was selected for redundancy rather than SCEL's other employee, and he was pressured into signing a settlement agreement in order to get his final pay.

[3] SCEL denied the decision or how it was carried out was unfair. It said Mr Milne could not now bring a personal grievance because he had freely signed an agreement on 3 February fully and finally settling all employment matters with the company.

Investigation and issues

[4] For the purposes of the Authority's investigation written witness statements were lodged by Mr Milne, Mr Clarke, Mr Clark's partner and SECL office administrator Anne Smith, and SECL employee Ian Johnson. Each witness, under oath, confirmed their written statement and answered questions from the Authority member. Each party had an opportunity to ask additional questions and make oral closing submissions.

[5] As permitted by s174 of the Employment Relations Act 2000 (the Act) this determination does not record all evidence received but states findings of fact and law and conclusions on the issues. In preparing it I reviewed the written and oral evidence and the parties' submissions.

[6] The issues for determination were:

(i) whether the agreement signed by Mr Milne on 3 February 2011 prevented him pursing a personal grievance; and

(ii) if not, was the redundancy of his position (a) decided for genuine commercial reasons and (b) decided and carried out in a fair way (including his selection and how he was told); and

(iii) if SCEL's actions were less than what a fair and reasonable employer would have done in the circumstances at the time, what remedies should be awarded to Mr Milne, considering lost wages and distress compensation; and

(iv) costs.

Did the agreement prevent Mr Milne pursing his grievance?

[7] Before Mr Clark talked with Mr Milne on 3 February Ms Smith had drafted an agreement setting out terms on which the employment would end.

[8] Mr Clark gave the agreement to Mr Milne after telling him there was no more work. The evidence of the two men differed over whether Mr Clark had said Mr Milne was welcome to take the agreement away and get some advice. Mr Milne said he signed the agreement "under duress" however he accepted – in answer to a question from the Authority – that Mr Clark did not say he would not get paid if he did not sign and Mr Clark did not say he had to sign it by any set time. He said Mr Clark told him that if he signed it, the money would be in his bank account that night.

[9] On the basis of that evidence I find Mr Milne was not forced or compelled to sign the agreement and leave that day as he did. However I also find there was no accord and satisfaction by virtue of the terms agreed that day such that Mr Milne was not free to later pursue a personal grievance. That is because the terms to which he – I find – did agree on 3 February were nothing more than what he was contractually entitled, so SECL did nothing more than perform its obligations.[1]

[10] The agreement Ms Smith had drafted – using wording she found in an internet search – and which Mr Clark presented to Mr Milne provided for three payments: $1600 for two week's notice, $140.80 for one day of annual leave owed to him, and $160 for a public holiday in the previous week.

[1] *Graham v Crestline Pty Ltd* [2006] ERNZ 848 at [47].

[11] A fourth term referred to a sum of $1980, with a handwritten alteration to $1900, "less PAYE in terms of section 123(c)(I) *(sic)* of the Employment Relations Act" which would be paid within three days of 2 February 2011. On an objective, plain reading of the document this appeared to be a fourth item of payment (in addition to the three notice and leave items). However Mr Clark and Ms Smith explained this sum was really just the total of the three other items and, despite its confusing reference to what would normally be a tax-free payment under s123(1)(c)(i) of the Act, this was the sum from which PAYE was deducted. The result was Mr Milne received a net payment of around $1600 as his final pay, which only comprised wages for two weeks and two days of annual and public leave.

[12] Mr Milne had no written employment agreement. Accordingly his entitlement to notice of the termination of his employment, at common law, was for 'reasonable notice' which I find would be two weeks in the circumstances of his employment, considering his role and length of service.

[13] On that basis, what Mr Milne received under the agreement was no more than the notice and leave payments to which he was contractually entitled. I do not accept being paid in lieu of that notice – in a situation where he was being laid off at short notice because there was no work for him in the business – could fairly be said to be an additional benefit provided to him in settlement. Rather it was the reality of SCEL's business situation and obligations at the time.

[14] With nothing of any real value additional to his contractual entitlements, SCEL cannot fairly be said to have purchased a release from its obligations to Mr Milne such that there was accord and satisfaction. The effect of this conclusion is that – although he signed an agreement including a term referring to "full and final settlement of all matters between the parties arising out of their employment relationship" – he was not prevented from pursuing his personal grievance.

[15] In reaching that conclusion I also took account of the fact that the agreement and its drafting was really an amateur affair with inconsistent and ambiguous wording

in some of the terms such that it cannot fairly be said to have the wide reaching legal effect SCEL has since sought to give it.

Was the position made redundant for genuine commercial reasons?

[16] SCEL's business involved fabrication and welding work on projects for which it tendered and then contracted. There was no real dispute that business was bad in the later part of 2010 and continued to be limited through 2011. Its accounts to March 2011 were said to show a loss of more than $40,000. Mr Milne accepted, in answer to questions in the investigation, that there was no welding work for him to do in February after he returned from the 2010-11 summer holidays. Mr Clark's evidence was that the situation had not changed since and no other welders have been employed since Mr Milne was laid off. The business continued to have some work that required the skills of a fabricator but not enough work to justify retaining a full-time welder. Mr Johnson was a fabricator, a role for which Mr Milne did not have the necessary skills, and Mr Johnson was also able to do whatever limited amount of welding work was needed.

[17] Although there was no documentary evidence to support Mr Clark's oral and written evidence on SCEL's commercial position, neither was there any real doubt as to the reality of the situation. Accordingly I find the redundancy of the position held by Mr Milne was decided for genuine commercial reasons.

Was the redundancy decision made and carried out in a fair way?

[18] I find Mr Milne was not unfairly selected for redundancy. SECL chose to continue to employ Mr Johnson because of his skills as a fabricator, work that Mr Milne could not do. In a situation where he had only two employees and only one of those two could do the work that the business still needed, Mr Clark was entitled to select the other worker – Mr Milne – as the one who had to go.

[19] However there was a failure in the way Mr Clark went about informing Mr Milne of the prospect of redundancy and then carrying out his dismissal for that reason.

[20] Mr Clark's written evidence was to the effect that Mr Milne should have known about the precarious state of the business because Mr Clark frequently talked about the business while taking smoko and lunch breaks with Mr Johnson and Mr Milne. He said he specifically told them both before the Christmas break that work was unpredictable and would continue to be so in 2011. However Mr Milne's evidence was that he was not spoken to directly by Mr Clark about the future of his job, either in the smoko room or on the shop floor, at any time before 3 February. Asked during the Authority investigation whether he said specifically at any time to Mr Milne that his job may go Mr Clark gave this answer: "I didn't specifically say that. It was discussed in the smoko room but if he sat at the other end of the table and chose not to listen, it's not my fault".

[21] That answer, I find, shows SCEL failed to meet even the minimal good faith requirements for a small business of its type in deciding and implementing a redundancy. Mr Milne was entitled to be told directly of the real prospect that his job would not continue in the following year and, once the decision was made, to be consulted about how it should be implemented.

[22] While Mr Milne had made inquiries before Christmas about the prospect of work with at least one other employer, I do not accept that demonstrated he had anything more than an inkling of the actual likelihood of losing his job with SECL.

[23] That contrasts with the knowledge that Mr Clark had before Christmas. According to Ms Smith's evidence, Mr Clark twice visited SCEL's accountants for advice on the company's financial situation and this advice resulted in a decision not to renew the lease on the business premises and to reduce staff levels.

[24] If Mr Clark had shared that information directly with Mr Milne before the Christmas break, Mr Milne would have had a greater opportunity to search for another job and would not have got such abrupt news when he returned to work in early February.

Remedies

[25] Because of the finding about the genuine commercial reasons for the redundancy of Mr Milne's position, he cannot be awarded the remedy of three months lost wages that he sought.

[26] For the same reason he cannot be awarded compensation under s123(1)(c)(i) of the Act for the distress caused to him by the actual loss of the job. However he is entitled to compensation for the loss of dignity and injury to his feelings caused by the abrupt announcement and rapid termination of his employment. Having regard to the general range of awards and the particular circumstances of this case, the amount of $2500 is awarded in compensation for that reason.

[27] Mr Milne's conduct did not contribute to how SCEL carried out the redundancy and no reduction of remedies is required under s124 of the Act for that reason. The end of his employment was without fault on Mr Milne's part and Mr Clark, despite this dispute, emphasised throughout that Mr Milne was a good welder he would recommend to other employers.

Costs

[28] Mr Milne sought no order for costs. None is made. SECL must reimburse his fee of $71.56 for lodging the application.

Robin Arthur
Member of the Employment Relations Authority