

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Jacob Rex Muollo (Applicant)
AND Punt Painting and Waterblasting Limited (Respondent)
REPRESENTATIVES Alastair Webber, Counsel for Applicant
Rosalind Webby, Advocate for Respondent
MEMBER OF AUTHORITY Helen Doyle
INVESTIGATION MEETING 18 April 2006
APPLICANT'S SUBMISSIONS 9 May 2006 and 31 May 2006
RESPONDENT'S SUBMISSIONS 12 May 2006 and 6 June 2006
AFFIDAVIT of Joseph Szentpeteri dated 2 May 2006
AFFIDAVIT of Bevan Muollo dated 4 May 2006
DATE OF DETERMINATION 13 June 2006

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

- [1] The applicant, Jacob Muollo, commenced employment with Punt Painting and Waterblasting Limited on 13 April 2004 as a general hand. He was 17 years of age.
- [2] The respondent, Punt Painting and Waterblasting Limited ("Punt Painting") is a duly incorporated company involved in water and abrasive blasting, providing a range of different protective coatings and asbestos removal.
- [3] Mr Muollo signed a written employment agreement with Punt Painting on 22 June 2004 at which time he was confirmed as a permanent employee.
- [4] On Friday 2 July 2004 Mr Muollo was dismissed from his employment with two weeks notice.
- [5] At the heart of the employment relationship problem is the reason for that dismissal.

[6] Mr Muollo attended a meeting on 2 July 2004 with his older brother Bevan who was also an employee at Punt Painting. The managing director of Punt Painting, Joseph Szentpeteri attended the meeting with one of the directors, Evelyn Punt.

[7] Mr Muollo says that he was told at the meeting, before being advised he would be given two weeks notice, that he was too young although he would be an asset when he was older. Bevan agreed with Mr Muollo's recollection of the events at the meeting and says that Mr Szentpeteri also said that Mr Muollo needed to be more mature to cope with a bit of flak.

[8] Mr Szentpeteri says that the meeting was held to discuss with Mr Muollo the future of his job in view of the lack of work available at that time. Mr Szentpeteri says that he gave Mr Muollo an opportunity during the meeting to take time to think about alternatives to redundancy. He says that Bevan on behalf of his brother said that they wanted a decision there and then. Mr Szentpeteri then took a brief adjournment with Mrs Punt and advised Mr Muollo that his position was redundant and gave him two weeks notice. Mr Szentpeteri's evidence as to the purpose of the meeting and what was said was confirmed by Mrs Punt.

[9] Mr Muollo says that he was unjustifiably dismissed and seeks recovery of three months wages and \$15,000.00 compensation.

[10] Punt Painting say the dismissal was justified on the basis of redundancy and that the company did not employ anyone in Mr Muollo's position.

[11] The issues for determination are the following:

- What was the reason for the termination of Mr Muollo's employment?
- In terms of the reason for termination of Mr Muollo's employment, was the decision to dismiss Mr Muollo justified? The law to be applied to justification for the decision to dismiss is that prior to the 2004 amendment to the Employment Relations Act 2000 which introduced a statutory test of justification for personal grievances.

Credibility

[12] This is a case where it will be necessary to determine whose evidence about the meeting on 2 July 2004 is more credible. This means I have to assess on the balance of probabilities whether and to what extent the evidence of those present at the meeting on 2 July 2004 is more likely to be true.

[13] I am assisted in this not only from the evidence I heard but from the sequence of events prior to the meeting and relevant documentation proximate to the meeting on 2 July 2004.

What was the reason for the termination of Mr Muollo's employment?

[14] Mr Muollo said that his employment was terminated on the basis of his age. Mr Szentpeteri says that Mr Muollo's employment was terminated for redundancy.

[15] The position at Punt Painting was Mr Muollo's first real job. He gave evidence that he was subjected to, on occasion, harassment and bullying from the older and more experienced workers. He also said that he had difficulty with the yard manager, Graham Perry, who would tell him that he was too young and inexperienced and that he did not have the time to train and supervise Mr Muollo. Mr Muollo said that Mr Perry would make it obvious that he was irritated by Mr Muollo.

[16] I find that there was more probably than not some difficulties in the relationship between Mr Perry and Mr Muollo which impacted on Mr Muollo and the way he was able to do his work. I do not conclude that Mr Szentpeteri was actively aware of other instances of bullying aside from one sand kicking incident shortly before the termination of Mr Muollo's employment. I do find he was aware of Mr Perry's view of Mr Muollo as a worker and that he knew Mr Perry was on occasions frustrated about Mr Muollo, got *hot under the collar* and said that he did not have the time to train Mr Muollo.

[17] It is common ground that there was a performance meeting held on or about 10 June 2004 with Mr Perry, Mr Szentpeteri and Mr Muollo to discuss areas of concern with Mr Muollo's work. Mr Muollo understood that there would be performance monitoring on a weekly basis from that point. Although performance monitoring did not take place with any degree of formality after that meeting Mr Muollo said that he took comfort from Mr Szentpeteri's statement when he signed the employment agreement on 22 June 2004 that it confirmed his permanent status as an employee.

[18] I heard evidence from Mr Muollo, Bevan and another senior employee Nigel Tangaroa that Mr Muollo was simply replaced by another employee, C. Mr Tangaroa said that C carried out many of the duties Mr Muollo had previously carried out although probably did more sand blasting.

[19] Mr Szentpeteri said that C was experienced in sand blasting and that Mr Muollo's duties were shared between all the employees after Mr Muollo's employment was terminated.

[20] Mr Szentpeteri said C and another employee, Darryl, were taken on in late July 2004 or early August 2004 because Punt Painting had lost three skilled staff after 12 July 2004 as a result of the uncertainty of continued employment with Punt Painting. At the investigation meeting Mr Szentpeteri could only recall the name of two of those skilled staff who had resigned. Mr Szentpeteri said that there were no other redundancies because of this natural attrition.

[21] In June 2004 Mr Szentpeteri said there was a decision by the directors of the company to downsize. The aim was to retain key, skilled staff and to sacrifice positions or people who were the most expendable. He said that the most obvious position was the unskilled position held by Mr Muollo and that it appeared to the company that his duties and responsibilities could be easily absorbed by others in light of the downturn of work.

[22] Mr Szentpeteri said that he alerted staff to the possibility of redundancies and the financial situation of the company in a staff meeting in late June 2004 and met with Mr Muollo about one week later.

[23] Mr Muollo, his brother and Mr Tangaroa gave evidence that there had been no meeting in June 2004 at which these matters had been discussed.

[24] Mr Szentpeteri said he had searched for the notes from the staff meeting in late June 2004 but he was unable to find them for the investigation meeting. He was only able to find some meeting notes dated 12 July 2004.

[25] Mr Muollo was not at work on 12 July 2004 because he only worked the first three days of his notice period although was paid for the notice period. There was reference within the notes of 12 July 2004 to informing staff of the financial position and the fact that the company was considering redundancies. Bevan and Mr Tangaroa who were still employed at that date could not recall a meeting at which those matters were discussed. Mr Szentpeteri described the late June

meeting as talking about the possibility of redundancy and then on 12 July told staff that the company was definitely looking at redundancies if it could not turn the situation around.

[26] After the investigation meeting Mr Szentpeteri lodged and served an affidavit sworn on 2 May 2006 in which he deposed that he was mistaken about the names of the experienced staff who left and he gave three other employees names including Bevan.

[27] A copy of a letter Mr Szentpeteri wrote dated 24 June 2004 in support of C's application for home detention was provided after the investigation meeting. It confirmed that C commenced employment with Punt Painting whilst Mr Muollo was still employed. This was consistent with Mr Muollo and his brother's evidence. It appears that C was initially working out of the yard but was required to move into and work from the yard because of the home detention, more probably than not after Mr Muollo's employment was terminated.

[28] Annexed to Mr Szentpeteri's affidavit was a copy of staff meeting notes dated 15 June 2004 that Mr Szentpeteri said he was unable to locate at the time of the investigation meeting. Mr Szentpeteri said that it was whilst searching for the other information I had requested about C, in particular, that he came across the meeting notes.

[29] I permitted further affidavit evidence from the applicant. Bevan provided an affidavit sworn on 4 May 2006. He deposed that the meeting notes were *fake* for a variety of reasons and that he could not recall such a meeting.

[30] As well as this additional affidavit evidence I wrote at the request of the parties following the investigation meeting to six current or previous employees at Punt Painting. Three names were provided to me by the applicant and three names by the respondent. The central question I asked of the six employees was whether they could recall a meeting at which there had been mention of the company's financial position and the possibility of redundancies during 2004. The Authority only received two responses. I do not give any weight to the responses in the circumstances except to record one employee was not employed during the relevant period and the other employee did not recall any meetings where the issues were discussed.

[31] I now turn to the document annexed to Mr Szentpeteri's affidavit to support his oral and written evidence that there was a staff meeting at which discussion took place about the possibility of redundancies before the meeting with Mr Muollo on 2 July 2004.

[32] The written staff meeting notes annexed to Mr Szentpeteri's affidavit are dated 15 June 2004 and commence with a paragraph - *welcome Daryl and C*. The welcome to these two employees on 15 June 2004 is inconsistent with Mr Szentpeteri's evidence at the investigation meeting that both employees commenced employment at a later date in July or August 2004. The inconsistency in my view cannot simply be explained by the passage of time and recollection. This is evidence which is capable of verification from company records. It is in my view more likely from the wording in the letter of 24 June 2004 from Mr Szentpeteri about C that C commenced his employment before 15 June 2004. I am also of the view that it is more likely from the evidence I heard that Darryl commenced his employment after 15 June 2004 and after Mr Muollo's employment terminated.

[33] Mrs Punt's evidence was that the wages bill needed to be reduced and that the general yard hands position (Mr Muollo's) was the obvious one to look at first. If the wages bill needed to be reduced and/or there was to be downsizing as Mr Szentpeteri said then it is unlikely in my view that two additional new employees would be taken on at that point in time.

[34] Paragraph 7 of the notes provide:

As you are aware the company is having a rough year in terms of work load and financial gain or lack of. Rolling interviews will take affect as from this week for the purpose of establishing the profitability and work load of your respective positions. Among the many reasons for doing this we are looking at the possibility of redundancies.

[35] There was no written or oral evidence from Mr Szentpeteri or Mrs Punt before these notes were produced, by way of annexure to Mr Szentpeteri's affidavit after the investigation meeting, to suggest that there had been such interviews with staff about their positions following a staff meeting in June 2004. I would have expected that if there had been such interviews undertaken Mr Szentpeteri would have remembered. Mr Muollo was in any event not asked to attend a meeting shortly after 15 June 2004. He did not attend a meeting until 2 July 2004. I also take into account that there was no reference on the staff meeting notes of 12 July 2004 back to the interviews or the viability of positions.

[36] I have considered the notes annexed to the affidavit together with the evidence I heard at the investigation meeting. There are significant inconsistencies between the evidence I heard and the notes. The notes cannot be safely relied on as evidence as to what was discussed at a staff meeting and accordingly I place no weight on them. I record that I asked for the original notes of 15 June 2004 be provided on 8 May 2006 and followed that up again with another formal request on 25 May 2006. They have not been provided as at the date of this determination although Punt's representative advised Mr Szentpeteri would provide them directly.

[37] I find it more likely than not that there was no mention of the possibility of redundancies during a staff meeting in June 2004. I consider it unlikely for example Mr Muollo would have been told that he was confirmed as a permanent employee on 22 June 2004 when he signed his employment agreement if there was a possibility his position would be redundant. There was no evidence that there was any other discussion when he returned the signed agreement about his position except that he was permanent.

[38] Both Mr Muollo and his brother would also have been quite clear about the purpose of the meeting on 2 July 2004 if there was some issue about possible redundancies. I prefer the evidence of Mr Muollo to Mr Szentpeteri that he did not know about the purpose of the meeting he was asked by Mr Szentpeteri to attend on 2 July 2004. I prefer that evidence for the reason there was agreement that Bevan asked Mr Szentpeteri on 1 July 2004 what the meeting the following day with his brother was about. Mr Szentpeteri told Bevan that he did not want to discuss it without Mr Muollo present. Had Mr Muollo known the purpose of the meeting then there would have been no need for Bevan to ask Mr Szentpeteri.

[39] I conclude therefore that there was no mention of a possibility of redundancies prior to 2 July 2004.

2 July 2004

[40] There is significant dispute about what was said at the 2 July meeting.

[41] The Muollos' say that Mr Szentpeteri got straight to the point and said Mr Muollo was too young for the industry and needed to be more mature to cop a bit of flak. He was then given two weeks notice. Mr Muollo agreed that he shook Mr Szentpeteri's hand at the end of the meeting. He didn't agree that he shook Mrs Punt's hand. Mr Muollo said that he was simply being polite. He

agreed that he was told he would get a reference and that Mr Szentpeteri offered to assist him in finding something else in the spray painting area although he said that when he followed that up with Mr Szentpeteri he was too busy to talk to him. Mr Muollo said that he told his father when he got home that he was very disappointed that he had been dismissed because of his age. Mr Muollo and Bevan recalled the meeting took about five minutes and there was no adjournment.

[42] Bevan said that he was so upset by how his brother had been treated that he asked Mrs Punt at the end of the meeting with his brother to leave the room so he could speak to Mr Szentpeteri. He says that he told Mr Szentpeteri that he was resigning because of the unjust way his brother had been treated and gave two weeks written notice. Mr Szentpeteri disagreed that Bevan gave the treatment of his brother as a reason for the dismissal and said that Bevan told him he was sick and tired of the industry and his dermatitis was reoccurring. Bevan did not accept that and said the next job he had was also in the painting industry and that he did not have an issue with dermatitis at Punt Painting.

[43] Mr Szentpeteri and Mrs Punt say that there was an initial explanation given to Mr Muollo at the meeting about the company's financial difficulties and why Mr Muollo's position had been chosen in terms of possible redundancy. Mr Szentpeteri said that he offered Mr Muollo time to consider the matter but said that he was pressed for a decision and that neither Mr Muollo nor Bevan had any comment to make. Mrs Punt said that Mr Szentpeteri asked Mr Muollo if he could think of any other areas he could work in the company but that Mr Muollo could not. He says that he took a brief adjournment to talk to Mrs Punt and they then returned and confirmed that Mr Muollo's employment would be terminated on two weeks notice for redundancy. Mrs Punt said that *she had never seen Mr Muollo so happy or animated and that he seemed like a kid let out of school.*

[44] Mrs Punt said that Mr Muollo shook hands with her and Mr Szentpeteri and made a point of going to thank her husband Bill for the opportunity in the business. Mrs Punt said that Mr Muollo's position no longer exists.

[45] Following the meeting Mr Muollo received a letter which confirmed the termination of his employment but said nothing further. Mr Szentpeteri also provided a good reference to Mr Muollo although there was no mention of the reason for his leaving Punt Painting. I agree with Ms Webby's submission that nothing particularly can be read into that. The same cannot be said in my view of the failure to provide reasons for the dismissal following a written request from Mr Muollo's father on 30 July 2004.

[46] Mr Szentpeteri explained to me that he felt that the letter confirming termination was adequate but that gave no reasons for the termination. He also said that Mr Muollo's father had been abusive toward him on the telephone. In my view they are less than satisfactory explanations for failing to provide the reason for Mr Muollo's dismissal.

Conclusion about the reason for the dismissal

[47] It was open to Punt Painting to make a decision for valid commercial reasons that Mr Muollo's position was surplus to the company's needs and therefore a genuine commercial reason for his redundancy. If that had been the situation then there was a procedure in Mr Muollo's employment agreement to be followed.

[48] I need to be satisfied from the evidence that there was a genuine redundancy or restructuring that justified Mr Muollo's dismissal. The evidence in my view falls well short of establishing that

the dismissal of Mr Muollo was for the reason that there was a genuine restructuring or redundancy. I am not satisfied that it was.

[49] I accept that the witnesses did not recall exactly what was said at the meeting on 2 July 2004 and there were unfortunately no notes taken. I do however prefer the evidence of the Muollos' that they did not understand from the discussion at the meeting that the dismissal was for the reason of redundancy and was more about Mr Muollo's maturity. I have not found there to have been any earlier discussion of the possibility of redundancies at staff meetings.

[50] There is also the fact that as from 24 June 2004, when Mr Szentpeteri wrote in support of C's home detention application, he knew that C would have to work in the yard. The letter Mr Szentpeteri wrote on 24 June does not in my view suggest that C was particularly experienced or skilled and refers to C *gaining essential skills relevant to the industry* and his *enthusiastic attitude toward learning*. I prefer Mr Tangaroa's evidence that when C came into the yard after the termination of Mr Muollo's employment he carried out many of the duties Mr Muollo used to do. Had Mr Muollo remained then there would have been an additional person in the yard. I also think it was likely that Mr Szentpeteri was under some pressure from Mr Perry in terms of Mr Muollo's continued employment. I think it highly unlikely that Mr Muollo if he was asked if he could see himself working elsewhere in the company as was put forward by Mr Szentpeteri would have responded that he could not.

[51] I find that the reason for Mr Muollo's termination was not as the result of a genuine restructuring or redundancy but because, for whatever reason, Punt Painting no longer wanted Mr Muollo working there.

Was the decision to dismiss Mr Muollo justified?

[52] The only justification put forward for the decision to dismiss Mr Muollo was that of redundancy. I have not found that Mr Muollo's employment was terminated for reason of redundancy and I am not satisfied that this was a genuine redundancy situation. I find therefore that the dismissal is unjustified.

[53] Mr Muollo has a personal grievance that he was unjustifiably dismissed and is entitled to remedies.

Remedies

Contribution

[54] Mr Muollo did not contribute to his dismissal.

Lost Wages

[55] Mr Muollo seeks three months lost wages from 16 July 2004. He said that during that time he tried to get an apprenticeship and other unskilled work using his reference from Punt Painting but was unable to. He did get some part-time work at Subway and I have been provided with an IRD certificate for those earnings.

[56] I find that Mr Muollo is entitled to reimbursement of three months lost wages from 16 July 2004 to 15 October 2004 less earning received during that period. Mr Muollo was paid \$9.00 per hour and worked on average 40 hours per week at \$360.00 per week gross. I have calculated the

three months lost wages on the following basis; $\$360 \times 13 \text{ weeks} = \4680.00 gross less earnings of $\$762.00$ over the three month period leaves a balance of $\$3918.00$ gross.

[57] Punt Painting and Waterblasting Limited is to pay to Jacob Muollo the sum of $\$3918.00$ being the reimbursement of lost wages for three months under section 123 (1)(b) of the Employment Relations Act 2000.

Compensation for humiliation and loss of dignity

[58] I accept that as a young worker Mr Muollo felt significant humiliation and loss of dignity when he was dismissed. Whilst the meeting itself may have been conducted in a relatively friendly manner the end result was that Mr Muollo was dismissed. He was made to feel that it was his youth and immaturity that was the cause for his dismissal. I do not accept that he was pleased by the decision to terminate his employment.

[59] Mr Muollo had previously thought he was good at some of the jobs particularly spray painting and wanted it to be a long term job for him. There was no warning that Mr Muollo would be dismissed and there was no real understanding at that time why he was being dismissed. Mr Muollo failed to obtain other employment for some months. I am of the view that even though Mr Muollo only worked a short period any award should recognise the absence of any genuine substantive reason for Mr Muollo's dismissal and the absence of any fair process.

[60] In all the circumstances I am of the view that a fair and reasonable award would be $\$9000.00$.

[61] Punt Painting and Waterblasting Limited is to pay to Jacob Muollo the sum of $\$9000.00$ as compensation for humiliation and loss of dignity under section 123 (1) (c)(i) of the Employment Relations Act 2000.

Costs

[62] I reserve the issue of costs.

Helen Doyle
Member of Employment Relations Authority