

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 62
5339548

BETWEEN ASHLEY O'BRIEN
Applicant

AND HOLER NEW ZEALAND
LIMITED
Respondent

Member of Authority: Philip Cheyne

Representatives: Heather Mckinnon, Counsel for Applicant
Gary Brown, Representative for Respondent

Investigation Meeting: 30 March 2012 at Nelson

Submissions: 30 March 2012 from the Applicant
10 April 2012 from the Respondent

Determination: 11 April 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ashley O'Brien worked fulltime for Holer New Zealand Limited (HNZ) as a service technician from 17 November 2004 until he was dismissed on 16 November 2010.

[2] The work performed by Mr O'Brien was subject to the Electrical Registration Act 1979 and later to amendments to the Electricity Act 1992. Unbeknownst to both Mr O'Brien and HNZ, Mr O'Brien did not have sufficient qualifications for the work required in the position he occupied. That came to the attention of HNZ and Mr O'Brien was dismissed purportedly for redundancy. Mr O'Brien says that HNZ did not adequately explore options that would have allowed him to perform the work in compliance with the Act and relevant regulations. Mr O'Brien also says that one of HNZ's directors (Simon Holer) had developed a negative attitude towards him.

Finally Mr O'Brien says that HNZ did not comply with its standard redundancy procedures and breached its obligations under s.4 of the Employment Relations Act 2000 in how it dealt with the purported redundancy situation. For these reasons Mr O'Brien says that he was unjustifiably dismissed and therefore has a personal grievance against HNZ.

[3] HNZ says that Mr O'Brien when first employed acknowledged he knew and was qualified for the requirements of the position; that it did follow its standard redundancy procedures; that there is no merit in the complaint against Mr Holer; and generally that it complied with its good faith obligations.

[4] To resolve this personal grievance claim I will need to explain more fully how HNZ's concern about compliance with the Electricity Act 1992 arose, what was done by HNZ before making its decision to dismiss Mr O'Brien and how that decision was implemented. It is helpful first to briefly describe the requirements of the position occupied by Mr O'Brien at HNZ.

The position

[5] Mr O'Brien originally applied for another position with HNZ but was encouraged to apply for the following position instead. He was interviewed and offered the position.

[6] The employment agreement dated 17 November 2004 describes the duties as follows:

Position: The employee is employed as a service technician to work in the employer's manufacturing and servicing division based in Hope, Nelson and he is required to undertake such tasks as are directed from time to time by the Directors. Normal duties will include:

- *The employee advised the employer that he is qualified and electrical wiring certified. This is a strong support for the employment!*
- *Service of electric core drills & gearbox, service of power packs.*
- *Wire switch and motor components on various machinery.*
- *Undertake normal maintenance and servicing of concrete cutting machinery.*
- *Servicing of transmissions and engines.*
- *Packaging, order dispatch and inwards goods are part of the duties.*
- *General plant maintenance and keeping the workshop in a tidy manner.*

[7] This clause was modified in an employment agreement dated 27 July 2007:

Position: The employee is employed as a service technician to work in the employer's manufacturing and servicing division based in Hope, Nelson and he is required to undertake such tasks as are directed from time to time by the Service Coordinator, Directors and Production Coordinator. However the main person to report to is the Service Coordinator (Peter Fitzgibbon). Normal duties will include:

(The employee advised the employer that he is qualified and electrical wiring certified. This is a strong support for the employment!)

- *Service of electric core drills & gearbox, service of power packs, general machinery.*
- *Wire switch and motor components on various machinery.*
- *Undertake normal maintenance and servicing of concrete cutting machinery.*
- *Servicing of transmissions and engines.*

[8] There is also an undated job description. It describes the primary purpose of the role as *Appliance service and repair*. It also lists the *Key Responsibilities, Key Tasks and Processes* and *Summary* as follows:

To service and repair customer's appliances and prepare appliances for sale or resale. Ensure that E tags are applied when required. Scope of work includes engines of various types, transmissions, and electrical.

Maintain a clean and tidy workplace.

Assist in maintain the security of the employers assets.

Work proactively with the Service Coordinator on matters of health and safety.

Other such tasks that may be required from time to time by the Service Coordinator.

Liaise every work day with the Service Coordinator on work to be done that day. Record inputs to each repair job and advise the Service Coordinator at the end of each day. Advise Service Coordinator of supplies that are required. Check new machines before sale.

This position primarily involves machine repairs and the economics of repair vs. replacement is an important factor hence the close relationship with the Service Coordinator.

[9] It is common ground that much of Mr O'Brien's day to day work involved prescribed electrical work.

The issue arises

[10] Any electrical equipment sold or serviced by HNZ is inspected and given an E-Tag to show that it is compliant with relevant standards and safe to use. E-Tags are valid for a defined period and relate to an external inspection. Some construction sites require contractors only to use such equipment on site. An E-Tag inspection must be

signed off by a properly certified person. While there was some uncertainty, HNZ thought that Mr O'Brien fell within the relevant definition so as to allow him to sign off E-Tags.

[11] In June 2010 Mr O'Brien was due to go on a one day E-Tag course. HNZ thought the course would resolve any uncertainty about Mr O'Brien's entitlement to sign off E-Tags. However, Mr O'Brien was not well and his supervisor went instead. The supervisor's report after the course suggested that Mr O'Brien might not be entitled to sign off E-Tags. That led HNZ to find the definition about *prescribed electrical work* which appeared to cover much of Mr O'Brien's work even though he did not have the appropriate qualifications to do such work. HNZ came to think that it faced a significant compliance risk.

HNZ's consultation with Mr O'Brien

[12] It seems that there might have been some mention to Mr O'Brien sometime in 2009 about the uncertainty over his entitlement to sign off E-Tags but nothing came of that.

[13] Gary Brown is HNZ's accounts and HR manager. On 8 November 2010 Mr Brown gave Mr O'Brien a letter saying that HNZ needed to meet with him to discuss a matter of importance concerning a *proposed organisation change* likely to affect his position. The letter says that while it is Mr O'Brien's decision HNZ thinks it important that he have a support person present. Mr O'Brien's evidence is that he asked *Will I lose my job* and Mr Brown told him *No*. I note that this exchange is not disputed so I accept that evidence. While Mr Brown knew that there was every prospect of Mr O'Brien losing his job his evidence is that he answered *No* as they were starting a review process with an unknown outcome. I will return to this point later. It is common ground that Mr O'Brien was not told that he risked losing his job. Mr O'Brien decided to attend the meeting without support.

[14] This meeting was on Tuesday 9 November 2010. Mr O'Brien, Mr Brown and Roger Clements (HNZ's purchasing & inventory manager) were present. HNZ had drafted the following document:

Proposal for Change

An internal review is being carried out by Management staff as an ongoing process, and this has revealed that the company needs to further develop its appliance and maintenance service.

The content of the service has moved to the considerably higher proportion of electrical work. This coupled with the enhancement of E Tagging has highlighted the need to develop the level of service, while exploring centralisation and managing compliance.

The latter issue of compliance strongly suggests that we should be engaging appropriately qualified staff in the role and research so far has revealed that someone with an appropriate qualification recognised by the Electrical Workers Registration Board is required. The current job description does not call for this and such a requirement may result in a substantial change in the role.

This matter is at the stage where it must be raised with the current incumbent in accordance with the company's standard conditions of employment – accordingly the matter is put forward for consultation.

We ask at this time for a response regarding this proposal – its rationale and the proposed change.

[15] Mr O'Brien's evidence is that he was not given this document. Both Mr Brown and Mr Clements say that the document was given to Mr O'Brien. I prefer their evidence. In particular I note that so-called minutes of the meeting dated 9 November 2010 record that the document was presented to Mr O'Brien. In all probability Mr O'Brien has forgotten about receiving the document.

[16] At the meeting there was some discussion about Mr O'Brien's willingness to do whatever training was required to allow him to be properly registered, that HNZ felt very exposed and needed assurances about its position and that Mr O'Brien wanted HNZ to engage a consultant to review HNZ's operations regarding electrical work and advise on what was needed for compliance. Mr O'Brien's evidence is that he was told at this meeting that he did not have the qualifications for the work he was doing and that his position was therefore being made redundant. It is clear that Mr O'Brien was told the first part but I do not accept that he was told he was redundant at this point. If he had been, there would have been no need for anything further.

[17] HNZ through Mr Brown sought advice from a local business. Mr Brown received the following email on 11 November 2010:

Hi Gary,

Have thrown your question among my inspectors and the general consensus seems to be that any electrical work or repairs carried out must be undertaken by a registered electrician, the equipment should be tested and tagged to ensure it is electrically safe before being released into the public arena. This would ensure you are being totally compliant within the regulatory framework.

You could seek further clarification from the EWRB (Electrical Workers Registration Board) if you wished.

The appropriate standard that should be adhered to is AS/NZS 3760:2003 In-service safety inspection and testing of electrical equipment. I suggest a copy of that standard would assist you in compliance.

Kind Regards

...

Aaron Hunter

[18] Receipt of this response led to an exchange between Mr Clements and Mr Brown to the effect that the advice confirmed their suspicions and Mr Brown's research leaving the question whether Mr O'Brien was qualified sufficiently for registration as an electrician. Mr Brown made inquiries about the steps required for a person in Mr O'Brien's position to qualify and register as an electrical appliance technician. He received a response from ETCO to the effect that it would be necessary to enrol on a course, pass an examination and complete 1500 hours work experience to qualify as an Electrical Appliance Service person with additional requirements for registration as an Electrical Appliance Technician.

[19] There was a further meeting on Friday 12 November 2010 with Mr O'Brien, Mr Brown and Mr Clements. Mr O'Brien's evidence is that he was shown but not given a copy of the email from Mr Hunter. He was told that the advice was that his qualifications were insufficient for the job he was doing. Mr Brown told him that they had known this for some time and that he should check out for himself how he might become qualified. Mr O'Brien says that he was not given any information about how he could qualify or the requirements for qualification. In particular, HNZ's communications with ETCO were not copied to Mr O'Brien. He says that he was told that the only option was for the company to hire a registered electrician but that the company considered that would be too expensive. Mr O'Brien's evidence is that no-one even checked to see if there was a position available for him in HNZ's Auckland office where there was a registered electrician.

[20] Simon Holer and Philipp Holer are directors of HNZ. There is an email from Mr Brown to Simon Holer (copied to Mr Clements and Philipp Holer) with the subject line *Ashley (for the record)* timed at 10.09am on Friday 12 November 2010. It reads:

Hi Simon

We gave Ashley a copy of the letter from Aaron Hunter that says that we need a qualified person in the role and Ashley does not accept this as fact.

We reiterated that this conclusion was not unexpected for us and that he should take some time to ask questions himself as to how he could qualify. We don't believe that this can be done quickly enough as the company is legally exposed now but Ashley should ask for himself and accordingly Ashley accepted an offer of taking time off to make enquiries. We will meet again on Monday.

Gary Brown

...

[21] It is unlikely that Mr Brown would deliberately mislead HNZ directors about the exchanges between himself and Mr O'Brien that had occurred earlier that morning. Accordingly I find that Mr O'Brien probably was given a copy of the email from Mr Hunter. It is common ground that Mr O'Brien was released from his duties so he could spend some time researching the issues about qualification and registration for himself.

[22] The three men met again on Monday 15 November 2010. Mr O'Brien's evidence is that he had not found out anything more and asked for more time to research the issue. He was told that he could take the rest of the day to do so. This evidence is consistent with HNZ's evidence. There is an email from Mr Brown to Philipp Holer and Simon Holer (copied to Mr Clements) timed at 9.59am on Monday 15 November 2010. It reflects Mr O'Brien's evidence and adds two extra points, both which I accept reflect what had been said during the meeting. It reads:

We met with Ashley this morning and he has not been able to produce any information that changes what we have concluded to date – that is, that the company needs a qualified person in the role. He feels that we have not given him enough time to research any alternatives, so he will do this today and we will meet tomorrow at 9am.

He did suggest reading what information was on the Energy Safety Service website, but this did not suggest anything different.

I went through the clause on s14 of Standard Conditions regarding the process that we are following and suggested again that he should have a support person with him.

Dismissal

[23] The final meeting was on Tuesday 16 November 2010 at 9.00am. This meeting was attended by Mr O'Brien, Mr Brown, Mr Clements and Simon Holer. Mr O'Brien's evidence is that he was told that he would have to be *Let go* and given a payslip. There was no discussion about any other options or steps taken by HNZ. He was asked to pack up his things and leave. Mr Brown and Mr Clements followed Mr O'Brien to his work area. Mr Clements asked for Mr O'Brien to return his work

issued safety footwear. Mr O'Brien appeared shocked, insulted and embarrassed. Mr Brown stepped in and said *Oh no, I think we can let that one go.*

[24] HNZ's evidence is that the request was for the return of the recently issued safety shoes, not the older pair of safety shoes that Mr O'Brien was wearing on that day. Mr O'Brien's evidence is that he was wearing the new safety shoes not the old ones so he was being asked to take off and return the pair of shoes that he had worn to work that day. In evidence Mr Brown acknowledged that there might have been a misunderstanding in that Mr O'Brien thought he was being asked to take off and return the shoes that he had on. That impresses me as the most probable scenario. I doubt that Mr Clements meant to upset and embarrass Mr O'Brien but that was certainly the effect of the way the requirement for the footwear to be returned was communicated.

[25] Mr O'Brien then left.

[26] In the materials there is the payslip that Mr O'Brien says that he was presented with during the final meeting. HNZ gets its payroll done by a firm of accountants. The payslip in the materials includes the footer *Prepared by: WHK Nelson – Page 1 10:26:41 16 November 10.* However, Mr O'Brien left HNZ shortly after 9.00am on 16 November 2010. Mr Brown's evidence is that he gave Mr O'Brien a draft payslip at the time of the dismissal. After the investigation meeting I was provided with a copy of a excel document called *provisional final pay* that was created on 16 November 2010 at 8.30 am. This must be what Mr O'Brien was given or told about at the time he was told of his dismissal.

[27] Some days after the dismissal an HNZ employee returned the remainder of Mr O'Brien's possessions to him. The box included a framed certificate which had been given to Mr O'Brien for a maintenance course and which he had hung on the wall in his work area. It was returned to him in a damaged condition.

Justification

[28] The dismissal occurred in 2010 prior to the statutory amendment to the test for justification which came into effect on 1 April 2011. With reference to the former

statutory provision, whether the decision to dismiss Mr O'Brien was justifiable must be determined on an objective basis by considering whether HNZ's actions and how HNZ acted were what a fair and reasonable employer would have done in all the circumstances at the time.

[29] Although not advanced as a reason for the dismissal, there is a suggestion that Mr O'Brien misrepresented his qualifications at the time of his appointment. The point is based on the following extract which appears in both written employment agreements:

The employee advised the employer that he is qualified and electrical wiring certified. This is a strong support for the employment!

[30] Philipp Holer interviewed Mr O'Brien. Mr Holer conceded that he has no specific memory of the interview given the passage of time other than them discussing *the electrical side of it*. Mr O'Brien's evidence is that he accurately described his qualifications which included a certificate from the Electrical Registration Board and Nelson Polytechnic entitling him to do specified electrical work and gave HNZ a copy of his CV including this certificate. Mr O'Brien's evidence is that he accurately described the work he was entitled to do. I accept Mr O'Brien's evidence. It seems that HNZ read more into what was said by Mr O'Brien and what was written on his certificate than it should have.

[31] HNZ says that the decision to dismiss Mr O'Brien was justifiable as a redundancy. The company says that it complied with its *Standard Terms and Conditions of Employment* document which was applicable to Mr O'Brien. Mr O'Brien accepted in evidence that he had agreed to be bound by these terms. There is no contractually binding definition of redundancy. In that situation redundancy is taken to mean where an employee's employment is terminated by the employer, the termination being attributable wholly or mainly to the fact that the position filled by the worker is or will become superfluous to the needs of the employer: see *GN Hale & Sons Ltd v Wellington etc Caretakers etc IUOW* [1990] 2 NZILR 1079. Superfluity is determined in relation to the position, not the incumbent: see *NZ Fasteners Stainless Ltd v Thwaites* [2000] 1 ERNZ 739 at 747. I note that the *Standard Terms and Conditions of Employment* document has been drafted on the premise that the focus of redundancy is on the position, not the person. For example,

clauses 14.1 and 14.1.2 refer to the *position of the employee* and the *employee's position*.

[32] I find that no fair and reasonable employer could have concluded that the position occupied by Mr O'Brien was surplus to HNZ's requirements. The only change was that HNZ realised that the regulatory regime that applied to the work done by the incumbent required a person with formal qualifications that Mr O'Brien did not possess and could not easily obtain. Shortly after dismissing Mr O'Brien for redundancy HNZ advertised for a qualified person to fill the position that Mr O'Brien had previously held. Naturally enough Mr O'Brien saw this ad. It took some while for the company to find an appointee. However, HNZ's requirement for the work to be performed remained and the company made some temporary arrangements to cover the work until they could employ a replacement.

[33] Given the finding that there was no genuine redundancy situation, it is unnecessary to consider the extent to which HNZ complied with the provisions in the *Standard Terms and Conditions of Employment* document about consultation over a redundancy situation. However, it is still necessary to consider the extent to which HNZ complied with its duty of good faith, particularly as expressed in s.4(1A) of the Employment Relations Act 2000. This required HNZ (and Mr O'Brien) to be active and constructive in maintaining a productive employment relationship in which they were, amongst other things, responsive and communicative. It also required HNZ to give Mr O'Brien access to information relevant to the continuation of his employment and an opportunity to comment on that information before making any decision to dismiss him.

[34] I endeavoured to find out why it had taken HNZ from June 2010 (the E-Tag course date) to November 2010 before the company sought to meet with Mr O'Brien and what if anything galvanised HNZ into action. I was not given any satisfactory answer. Mr Brown told me that they were not *100% concerned until we got the consultants in, the professionals. It was appropriate to start including Ashley at that level. Aaron's [Hunter] reply to us was the turning point.* However, Mr Hunter was approached after the 9 November 2010 meeting at Mr O'Brien's suggestion. It is also clear from the email dated 12 November 2010 that Mr Hunter's *conclusion was not unexpected for [HNZ]*. For some unexplained reason HNZ did little about its concern

that Mr O'Brien's lack of qualifications exposed the company to risk; but then thought it was necessary to present a proposal on 9 November 2010 and to dismiss Mr O'Brien just a week later.

[35] On 16 November 2010, shortly after doing the calculations to estimate Mr O'Brien's final pay, Mr Brown sent an email to Philipp Holer and Simon Holer saying that he would like HNZ to *conclude matters today as so far no information is coming from Ashley that will change the outcome, and it would seem pointless to drag it on*. Mr Brown suggested that Mr O'Brien be paid four weeks pay in lieu of notice, not be required to work out the notice period and be required to return uniforms and recently issued safety shoes. Simon Holer responded saying *Hi Gary. I will come up. Let's go with the below!* The final meeting at which Mr O'Brien was *Let go* commenced a couple of minutes after Simon Holer's email. Two points emerge from this exchange. The first is that the decision maker was Simon Holer and/or Philipp Holer rather than Mr Brown and Mr Clements. A fair and reasonable employer would ensure that an employee who faced dismissal would have an opportunity to speak directly with the decision maker prior to any decision being made. The second and related point is that HNZ had made its decision to dismiss Mr O'Brien before this final meeting which was no more than the opportunity for HNZ to announce its decision to Mr O'Brien. It follows that whether HNZ complied with its obligations under s.4(1A)(c) of the Employment Relations Act 2000 must be assessed on the exchanges that preceded the 16 November 2010 meeting.

[36] A fair and reasonable employer would have done more to investigate the situation and present the relevant information in an orderly and understandable manner prior to the final meeting. HNZ should have provided Mr O'Brien with the relevant statutory extracts, including the information about what was needed for him to obtain the necessary qualifications. Obtaining the necessary qualification would have involved Mr O'Brien in a period of supervised work experience. HNZ should have provided Mr O'Brien with its assessment of the costs of arranging that supervision.

[37] HNZ must accept responsibility for the misunderstanding that occurred and the offence caused over the request for Mr O'Brien to return the safety shoes. The decision that Mr O'Brien would be paid in lieu of notice rather than be permitted to

work out a notice period, made without any discussion or reference to Mr O'Brien, meant that Mr O'Brien's employment effectively came to an abrupt end without him having any time to deal with issues such as the return uniforms and the collection of personal items such as his certificate and the like.

[38] Overall, HNZ's approach to its good faith obligations was fundamentally flawed because of its view that it was a redundancy situation. HNZ's application of a redundancy consultation approach resulted in the exchanges with Mr O'Brien effectively being a sham. That is why Mr Brown had to answer *No* to Mr O'Brien's question before the first meeting when in reality the answer should have been *Yes*.

[39] I conclude that HNZ has failed to establish justification for its decision to dismiss Mr O'Brien.

[40] For Mr O'Brien there is an argument that he was dismissed for reasons other than his lack of proper qualification for the work he had always done. However, there is simply no credible evidence to establish that the dismissal was for some ulterior purpose. Again, HNZ must accept some responsibility for Mr O'Brien genuinely but wrongly thinking that there was an ulterior purpose for the dismissal because it conveyed the situation as a redundancy when plainly it was not.

Remedies

[41] There is a claim reimbursement for lost remuneration and compensation for distress.

[42] Mr O'Brien did not contribute in a blameworthy way to the situation giving rise to his grievance.

[43] It is common ground that the regulatory framework applicable to the work HNZ required Mr O'Brien to perform made it illegal for both parties to continue. HNZ could have lawfully and justifiably terminated the employment for that reason at the time that it did if it had handled the situation better. There is an analogy with a genuine but badly implemented redundancy situation where there can be no recovery

for lost wages. For similar reasons there can be no award for lost remuneration in the present case.

[44] For similar reasons Mr O'Brien is not entitled to any compensation for distress caused by the loss of his position but he is entitled to compensation for distress caused by HNZ's wrong characterisation of the situation and poor handling of the dismissal. These different aspects cannot be teased out with precision. Mr O'Brien's evidence is that after he got over the shock of losing his position, what upset him the most was the way so little care had been taken with his employment. He feels that losing his job as he did shows how little regard HNZ had for his feelings, it made him feel worthless and damaged his self esteem considerably. The medical evidence indicates that the manner of the dismissal has contributed to but not caused several long standing health issues. There is no reason to doubt any of this evidence. I consider that an award of \$7,500.00 compensation will properly compensate Mr O'Brien for these effects.

Summary and orders

[45] Holer New Zealand Limited unjustifiably dismissed Mr O'Brien and he has a personal grievance as a result.

[46] To remedy this grievance Holer New Zealand Limited must pay Mr O'Brien compensation of \$7,500.00 pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000.

[47] Costs are reserved. Any claim for costs should be made by lodging and serving a memorandum within 28 days and the other party may have a further 14 days to lodge and serve any reply.

Philip Cheyne
Member of the Employment Relations Authority