

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 174/09  
5160136

BETWEEN

PETER JOHN OWENS  
Applicant

AND

DANIEL SMITH  
INDUSTRIES LIMITED  
Respondent

Member of Authority: Paul Montgomery  
Representatives: Tania McKenzie, Counsel for Applicant  
Daniel Smith, Advocate for Respondent  
Investigation Meeting: 8 September 2009 at Christchurch  
Submissions received: On the day  
Determination: 12 October 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Mr Owens was employed by the respondent as a driver, at times working on projects at a distance from the company's Rangiora base. He says he was unjustifiably dismissed on 10 October 2008 by Mr Smith on the ground of redundancy and without warning or consultation. Further he says a short time after his dismissal he was informed that the respondent had employed two new people and took the view Mr Smith had acted unfairly in dismissing him and then hiring others.

[2] The applicant seeks \$10,000 for hurt and humiliation, lost wages of one week and costs.

[3] Mr Smith, for the respondent, says a downturn in heavy construction work led him to having to consider laying off staff. He says earlier in the month he advised

that staff hours were likely to drop. Mr Smith also says a number of issues were taken into account before he decided to make Mr Owens' position redundant. They included a change to use of rail to move heavy equipment items where possible rather than to truck them; the reluctance of the applicant to multi task and to drive and operate cranes and the intention to resign from his position expressed to the site supervisor on the Makara wind farm project a few weeks before. Mr Smith accepts that no resignation was tendered by Mr Owens. However, he says he took that into account in coming to his decision.

[4] Mr Smith's view is that he tried to deal with a difficult situation sensibly and says that he followed the terms as set out in the employment agreement to the letter in advising the applicant of his demise.

[5] Mr Smith told the Authority that the company is owned by himself and his wife, has been in business for 19 years and has built the company up from two employees to 45 employees. He says:

*Our staff numbers fluctuate depending on the work availability in the very volatile building and construction industry. To accommodate this, the company needs a mechanism to be able to lay off staff, this is why section 7.1 of the individual employment agreement is in place.*

[6] In summary, Mr Smith says the company terminated the employment in accordance with the employment agreement. Further, he says he treated Mr Owens fairly, reasonably and with respect and made all financial payments to him promptly. He says that in addition to his entitlement, the company paid Mr Owens one week's additional wages.

### **The essential facts**

[7] Mr Owens was employed for almost two years at the time of his dismissal. He agrees there were a number of incidents in the course of his employment but none which warranted employing any disciplinary procedures. Mr Smith agrees Mr Owens was a very competent driver who took care of the company's truck and equipment. He says it was because of these qualities that he was able to give very positive references to employers inquiring about Mr Owens' abilities and attitudes.

[8] The respondent was engaged in crane and construction work on the wind farm project at Makara. The task meant South Island staff deployed there were away from home for reasonably lengthy periods with only occasional weekends off. The

company flew staff home for some weekends to be with family and flew them back for the next work period.

[9] Mr Owens said he had become tired of the long hours and absence from home. On an occasion in September 2008 he was speaking to the site supervisor who was discussing the applicant's travel arrangements for the coming weekend. Mr Owens asked his supervisor if he had booked a return ticket and was told he had not. The applicant said he need not bother as he was going to hand his resignation in when he got home to Rangiora.

[10] The supervisor asked him, given he was going to resign, to take a truck from Makara to Rangiora rather than to fly. Mr Owens agreed. As it happened, Mr Owens did not tender his resignation but worked on until dismissed on 10 October 2008.

[11] At the time he was told his position was going, Mr Owens was engaged in labouring jobs around Mr Smith's home adjacent to the company's yards and workshop. Mr Smith approached him and told him of his decision and that there was a letter for Mr Owens in the office. That letter of termination was dated the previous day, 9 October 2008.

### **The issues**

[12] To resolve this matter, the Authority needs to make findings on the following issues:

- Was the redundancy of the applicant genuine in the circumstances; and
- Was the process adopted by the respondent consistent with a fair and reasonable process; and
- Does the applicant have a personal grievance and, if so, what if any remedies are due to him?

### **The investigation meeting**

[13] At the investigation meeting the Authority heard evidence from Mr Owens and also from Mr Smith. The meeting was relatively cordial in spite of the differences each man had of the circumstances giving rise to the meeting.

[14] I also wish to record my thanks to Ms McKenzie for her on point questioning.

### **The test**

[15] The test for justification in the case of a dismissal claim is set out in s.103A of the Employment Relations Act 2000. The section reads:

*For the purposes of s.103(1)(a) and (b), the question of whether dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.*

### **Analysis and discussion**

[16] Mr Owens says he took his dismissal as one made for genuine business reasons and was philosophical about that until he learned two people had been employed after his dismissal. This angered him and he decided to challenge the genuineness of his redundancy. He engaged Ms McKenzie who wrote to the respondent on 1 December 2008 seeking relevant information and advising that she and her client *had been discussing his potential personal grievance for unjustified dismissal.*

[17] On 22 December 2008, Ms McKenzie wrote again advising she had instructions to pursue a personal grievance and setting out the remedies sought. Further, she stated that a reply was required by 16 January 2009. Mr Smith replied by email attaching the documents Ms McKenzie required.

[18] In the course of the investigation, it became clear the two *new* employees engaged by the respondent were not direct replacements for Mr Owens, one being a mechanic/driver and the other a labourer in the pre-cast concrete plant. It also became clear the number of drivers employed had been reduced from eight to four. This evidence was not challenged by the applicant and it is clear other employees were laid off about this time. It appears the redundancy of Mr Owens was legitimate. That, however, is not the end of the matter.

[19] In a redundancy setting, the obligations of an employer are not satisfied solely by adhering to the terms set out in the employment agreement. The need for consultation, as distinct from negotiation, is necessary to ensure the employee affected has the opportunity to hear the reasons for the proposed loss of employment, to have

the opportunity to provide alternatives to redundancy and to have those alternatives seriously considered before a decision is made.

[20] The reason for the applicant's selection over others also needs to be made plain and the opportunity given to the employee to advocate for his retaining the position.

[21] The principles set out in *Coutts Cars Ltd v. Baguley* [2000] 2 NZLR 533 set out the course an employer needs to follow in a redundancy setting. They are summarised immediately above in this determination.

[22] It is clear in this matter the procedure adopted by Mr Smith, in spite of his adherence to the terms set out in the agreement, and in fact going beyond those terms, failed to engage with Mr Owens before the decision was made and executed. That falls well short of the standard set by the test referred to above.

### **Determination**

[23] Returning to the issues set out above in this determination, I find:

- The respondent was entitled to make a business decision and declare the position held by Mr Owens to be surplus to requirements.
- I find the dismissal of Mr Owens was unjustified due solely to the deficient process employed by the respondent.
- The applicant is entitled to remedies which are addressed below.

### **Remedies**

[24] The evidence before the Authority leads me to believe that even had the proper process been followed, Mr Owens' position would have been disestablished.

[25] The evidence is Mr Owens secured alternative employment one week after his dismissal. He accepts he was paid a week in lieu and an additional week at 40 hours. He complains the lack of overtime rates in his new position equates to a reduction in remuneration. While I accept this to be the case, that situation would prevail regardless of whether the dismissal was justified or otherwise. Accordingly, I decline to make any award in terms of lost remuneration.

[26] Mr Owens claims \$10,000 in hurt and humiliation yet produced no compelling evidence of this at the investigation meeting. His evidence was he was accepting of the situation until told two others had been employed. In such a setting, it is more likely he was angry. However I accept, in a community the size of Rangiora, he would have felt some sense of humiliation. The information he was given, however, was inaccurate as the new employees were deployed in different roles.

[27] That said, it is possible Mr Owens would have accepted a position in the pre-cast plant if that had been the only option open to him.

[28] Weighing the matter, I think it just to award Mr Owens the compensatory sum of \$1,500.

### **Costs**

[29] Mr Owens was represented by counsel and has incurred legal costs. I think it fair to award the applicant a contribution to those costs.

[30] The investigation meeting was relatively brief, taking a little over one hour. Using the tariff approach set out in *PBO (formerly Rush Security Ltd) Ltd v. Da Cruz* [2005] 1 ERNZ 808, I award the applicant the sum of \$600 as a contribution to his reasonably incurred costs.

Paul Montgomery  
Member of the Employment Relations Authority