

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 250/10
5273182

BETWEEN DRAGOS RADU
 Applicant

AND DUCT WORK SPECIALITIES
 LIMITED
 Respondent

Member of Authority: Marija Urlich

Representatives: Mark Nutsford, Advocate for Applicant
 James Duckworth, Counsel for Respondent

Investigation Meeting: 26 February 2010

Information and
Submissions Received: 12 and 22 March 2010

Determination: 24 May 2010

DETERMINATION OF THE AUTHORITY

[1] Mr Radu was employed by Duct Work as an autocad designer for seven weeks. He says he was unjustifiably dismissed and seeks remedies to address alleged consequent losses. He also makes a claim under section 69 of the Act for unfair bargaining. Duct Work says Mr Radu was employed on a valid fixed term employment agreement which expired on 31 January 2009 or in the alternative that the business suffered a downturn and Mr Radu's employment ended by way of redundancy.

[2] To determine this employment relationship problem the Authority must determine:

- (i) whether the parties entered a valid fixed term agreement?

- (ii) if not, whether Mr Radu's redundancy was genuine and fair and reasonable in all the circumstances? and
- (iii) whether Duct Work engaged in unfair bargaining with Mr Radu to procure an employment agreement.

A valid fixed term agreement?

[3] Section 66 of the Act expressly provides for fixed term agreements in the following situations – at the close of a specified date or period, the occurrence of a specified event or the conclusion of a specified project. However, before such an agreement can be entered the employer must have a genuine reason for the fixed term agreement, advise the employee when and how their employment will end and why¹, advice which must be recorded in writing². A genuine reason does not include one to exclude or limit an employee's rights under the Act (or the Holidays Act) or establish the employee's suitability for permanent employment³.

[4] On Mr Radu's first day of employment with Duct Work he was presented with two employment agreements. The first was a fixed term agreement, its term being 10 December 2008 to 31 January 2009 and the second identical but for blank spaces where the aforementioned dates had been entered.

[5] Peter Taylor is a director of Duct Work. He presented the agreements to Mr Radu on 10 December.

[6] In his evidence to the Authority Mr Taylor said the fixed term agreement was offered because upon commencement of his duties, Mr Radu would need to undertake training and depending on how that training went the terms of the second employment agreement could be negotiated.

[7] I find the reason for the fixed term agreement was to establish Mr Radu's suitability for permanent employment. As set out above this is not a genuine reason to enter a fixed term agreement. The fixed term agreement is not valid. Duct Work

¹ Section 66(2) Employment Relations Act 2000

² Section 66(4) Employment Relations Act 2000

³ Section 66(3) Employment Relations Act 2000

cannot now and could not at date of termination rely on the expiry term of the agreement to end Mr Radu's employment⁴.

A genuine redundancy?

[8] I accept that subsequent to Mr Radu's employment Duct Work suffered a downturn in business. However, I do not accept that it was inevitable that Mr Radu's position should have been made redundant.

[9] Mr Radu was one of two autocad designers employed by Duct Work. There is no dispute that Duct Work did not consult with Mr Radu over the proposed redundancy including selection criteria. He was simply advised (verbally and later that day in writing) that his employment was to terminate due to the business downturn.

[10] Duct Work had an obligation to consult with Mr Radu. Section 4(1A) of the Act provides that the duty of good faith, applicable to all employment relationships, requires an employer proposing to make a decision which will, or is likely to have an adverse effect on an employee's continued employment, to provide relevant information to that employee and afford them an opportunity to comment on that information. Section 4(4)(c) of the Act provides that good faith applies to consultation regarding changes to an employer's business.

[11] The failure to consult, in the circumstance of this case, renders Mr Radu's dismissal unjustified. If Duct Work had conducted a proper redundancy process with Mr Radu the outcome could have been very different. If Duct Work had conducted a proper redundancy process with Mr Radu it would be able to demonstrate to the Authority that it had a genuine basis for dismissing Mr Radu. In the absence of such it cannot.

Unfair bargaining?

[12] Section 68 of the Act provides that bargaining for an employment agreement will be considered unfair if at the time of bargaining for or entering an agreement the

⁴ Section 66(6) Employment Relations Act 2000

employer knew, or ought to have known, that the employee suffered diminished capacity, relied on the skill, care or advice of the employer, was induced to enter the agreement by oppressive means, undue influence or duress or did not have the information or opportunity to seek advice. The threshold is high.

[13] Mr Nutsford submits Mr Radu was induced to enter the employment agreement by oppressive means, undue influence or duress⁵ on the following grounds:

- the 10 December agreement was presented on a ‘take or leave it’ basis – if not signed there would be no employment;
- the agreement differed significantly to the terms earlier agreed between the parties – it was not permanent and the salary was \$5000 less than earlier agreed;
- inadequate advice as to the entitlement to seek independent advice before entering the agreement; and
- Mr Radu is a recent immigrant to New Zealand without knowledge of his legal rights and obligations, this was known to Mr Taylor and Mr Glover’s and he relied on their assurances the agreement represented nothing of concern.

[14] The evidence before the Authority was that on presentation of the proposed employment agreement Mr Radu was told by representatives of Duct Work to consider the document and that he could get some advice, that Mr Radu took the proposed documents away, discussed the situation with his wife and the recruitment consultation with whom he was dealing and returned the executed employment agreement to Mr Taylor and Mr Glover later that day. There was no evidence before the Authority that Mr Radu relied on assurances given by Mr Taylor and Mr Glover because of a lack of knowledge of New Zealand law.

[15] There is no evidential basis for a finding that the employment agreement was procured through oppressive means, undue influence or duress.

⁵ Section 68(2)(c) Employment Relations Act 2000

Remedies

[16] Mr Radu has established his dismissal was unjustified. He is entitled to a consideration of remedies sought.

[17] Mr Radu seeks a large award to compensate humiliation, loss of dignity and injury to feelings arising from his dismissal. He said his dismissal occurred at a vulnerable time in his personal circumstances – that he and his wife had a new baby and he had moved his family to Auckland to take up what he understood was a permanent position with Duct Work. He said it was very stressful to be unemployed with a young family to support. He said he felt his reputation had been damaged as a consequence of his dismissal – that it was difficult to explain to friends and family that through no fault of his own his employment had ended after such short duration.

[18] I accept this was a very distressing situation for Mr Radu. In assessing the appropriate level of compensation this is a relevant consideration. Also relevant is the short duration of Mr Radu's employment with Duct Work and that a degree of Mr Radu's distress arises from the pre-agreement discussions between the parties. Mr Radu is entitled to an award pursuant to section 123(1)(c)(i) of the Act which I assess at \$3000.

[19] Mr Radu commenced alternative employment on 9 March 2009 at a salary lower than that at Duct Work. He seeks reimbursement of all lost wages including those beyond the statutory 3 month limit⁶.

[20] I am satisfied Mr Radu made reasonable efforts to find alternative employment and that he has mitigated his losses. He is entitled to an award to reimburse lost wages pursuant to section 123(1)(b) to the sum of \$9550 (gross) being the equivalent of three months wages less earnings in his new position.

[21] I decline to exercise the Authority's discretion and make an award beyond three months. There is no evidence to support the claim Mr Radu's employment would have lasted at least 12 months.

⁶ Section 128(3)

[22] Mr Radu did not contribute to the circumstances which gave rise to his dismissal. I record he proved himself to be a skilled and hardworking employee during his employment with Duct Work.

Costs

[23] Costs are reserved. The parties are invited to attempt to resolve this issue themselves. If they are unable to then costs memoranda should be filed within 14 days of the date of this determination with a further 7 days for any reply.

Marija Urlich

Member of the Employment Relations Authority