

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 393/09
5152646

BETWEEN

KEVIN RILEY
Applicant

AND

INTERNATIONAL PRODUCT
SOURCING LIMITED
Respondent

Member of Authority: R A Monaghan

Representatives: K Riley in person for applicant
LR Li, advocate for respondent

Investigation Meeting: 2 November 2009

Determination: 06 November 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Kevin Riley says his former employer, International Product Sourcing Limited (“IPS”) dismissed him unjustifiably on the ground of redundancy.

[2] IPS says the redundancy was genuine and the associated dismissal was justified.

Preliminary matters

1. The identity of the employer

[3] Mr Riley cited Liang Ren Li as the employer party to this matter in his statement of problem. However nothing in any of the material filed in association with the problem indicated that Mr Li was the employer party in his personal capacity.

He is the director of and shareholder in IPS. After discussion with Mr Riley the identity of the employer party to the relationship was confirmed as IPS and the entitling was amended accordingly.

2. Remedies in respect of a personal guarantee

[4] Mr Riley sought reimbursement of payments he made to a creditor under a personal guarantee he provided during his association with another company, Mad Plumbing Merchants Limited (in liq), and what amounted to a release from further obligations under the guarantee. The claim was directed at Mr Li in his personal capacity.

[5] There were several difficulties with that application. The most relevant for present purposes is that it cannot proceed in the Employment Relations Authority against IPS or Mr Li as neither was the relevant employer party.

Whether the dismissal was justified

1. Background

[6] Mr Riley began his employment as general manager of IPS in or about February 2008. The parties' written employment agreement provided:

“10. Restructuring and redundancy

...

Redundancy is a situation where the position of employment of an employee is or will become surplus to the requirements of the Employer's business. If the employee's position is redundant there will be no redundancy payment made to the Employee. ...

11. Termination of employment

The Employer may terminate this agreement for cause, by providing 2 weeks notice in writing to the Employee. Likewise the Employee is required to give 2 weeks notice of resignation. The Employer may, at its discretion, pay remuneration in lieu of some or all of this notice period.”

[7] Both Mr Li and Mr Riley recognised at the commencement of Mr Riley's employment that IPS could not maintain the number of staff currently employed. One

employee left employment and was not replaced, then in or about July 2008 some four people were made redundant. Two staff members remained, of which Mr Riley was one.

[8] According to the company's monthly accounts, a significant loss was recorded at the end of July 2008, but the reduction in staff numbers meant the loss was far less the following month. There was again a significant loss for the month ending 30 September 2008. Some of the loss was explained by the way in which rents were treated, but this did not affect the overall pattern of continuing losses.

[9] As general manager Mr Riley had access to the accounts, although he said he could not access them immediately. Nevertheless he must have had a good appreciation of the company's financial status, being hindered as far as detail is concerned only by the time lag between the end of a month and the completion of the accounts for that month.

[10] Mr Li said that in or about mid-September 2008 he was concerned the company was still running at a loss and said so to Mr Riley. He told Mr Riley things would have to change or the company would have to shut.

[11] Mr Riley denied having a discussion of that kind. He said that on Tuesday 22 September 2008 Mr Li asked him to attend a meeting to discuss a customer. The meeting went ahead on 23 September. To Mr Riley's surprise the conversation was not about the customer but rather about the possibility of Mr Riley becoming involved in another enterprise with which Mr Li had a connection, Usave Depots.

[12] Mr Li denied asking Mr Riley to a meeting to discuss a customer, but otherwise agreed there was a conversation about Mr Riley's involvement in Usave Depots. He believed Mr Riley had the skills necessary to run the business. It was common ground that Mr Riley told Mr Li he would consider the possibility.

[13] There was a further meeting the next day, 24 September 2008. It was again common ground that Mr Li indicated that, if he became involved in the business, Mr Riley would need to invest some \$50,000 initially and more later. Mr Riley replied

that he did not have that kind of money. Mr Li then informed Mr Riley that IPS was not making money and would have to close. Mr Riley would be made redundant.

[14] Mr Riley's employment ended that day. He received one week's pay in lieu of notice, holiday pay and an additional payment of four weeks' pay.

2. Determination

[15] This was a genuine redundancy, but Mr Riley says the associated dismissal was unjustified because Mr Li did not follow a fair process in implementing it. In particular Mr Riley says he was not consulted about it in advance, rather the decision was communicated to him as a *fait accompli*.

[16] The law applicable to those circumstances is set out in the decision of the Employment Court in **Simpsons Farms Limited v Aberhart**¹. There the court summarised earlier case law regarding an employer's obligation to consult with an employee who may be affected by a redundancy, as well as discussing the effect on redundancy dismissals of s 103A of the Employment Relations Act 2000. It pointed out that s 4(1A) of the Act – which detailed aspects of the statutory obligation to deal in good faith – included requirements that an employer proposing to implement redundancies provide to the affected employees access to information about the proposal, and an opportunity to comment on it, before the decision is made. The court concluded:

“[65] Following the new s 103A, the Authority or the Court must consider on an objective basis whether the decisions made by the employer, and the employer's manner of making those decisions, were what a fair and reasonable employer would have done in all the circumstances at the relevant time. The statutory obligations of good faith dealing and, in particular, those of s 4(1A)(c) inform the decision under s 103A about how the employer acted. A fair and reasonable employer must, if challenged, be able to establish that he or she has complied with the statutory obligations of good faith dealing in s 4 including as to consultation because a fair and reasonable employer will comply with the law.”²

[17] Regarding the process used here I accept that Mr Li commented to Mr Riley before the 23 and 24 September meetings on the possibility that the company would

¹ [2006] ERNZ 825

² P 842

be closed, and have found that Mr Riley both was aware of the company's financial position in general and had access to the accounts if he wished. However I am not persuaded that Mr Li raised the possibility of closure of the company clearly enough to indicate to Mr Riley that he would no longer allow the company to run at a loss, and that Mr Riley's redundancy was imminent. Nor am I persuaded that he made it clear to Mr Riley that the possibility of involvement in Usave Depots was being offered as a replacement activity for his employment with IPS, and as part of a process of consultation.

[18] As a result Mr Riley did not have a proper opportunity to comment on the prospect of redundancy or to make his own proposals. He expressed in evidence a belief that he would be able to turn around the company's fortunes so that it made a profit, hence avoiding redundancy. However in the light of the company's performance Mr Li was entitled to decide to cut the company's losses and cease to trade, as he did.

[19] Overall, on the limited ground of the failure to consult adequately, I find the dismissal was unjustified.

3. Remedies

[20] Mr Riley seeks the reimbursement of remuneration lost as a result of his personal grievance.

[21] Since the redundancy was genuine, he would have lost his position despite the lack of adequate consultation. As a result there will be no order for the reimbursement of lost remuneration, except that the parties' employment agreement required the provision of two weeks' notice of termination of employment. Mr Riley was given only one week's notice. The additional payment was *ex gratia*, and cannot be used to notionally offset the notice requirement.

[22] IPS is therefore ordered to pay to Mr Riley one further week's pay in lieu of notice.

[23] Mr Riley also seeks compensation for injury to his feelings. Again, since Mr Riley would have lost his employment anyway, only a modest award is called for. Further, I take into account that the blow was cushioned by the additional payment of four weeks' pay.

[24] IPS is therefore ordered to pay to Mr Riley the sum of \$1,000 as compensation for injury to his feelings.

Summary of orders

[25] IPS is ordered to pay to Mr Riley:

- a. a further one week's pay in lieu of notice; and
- b. \$1,000 as compensation for injury to his feelings.

Costs

[26] Costs are reserved. If a determination is sought from the Authority any party seeking an order for costs shall have 28 days from the date of this determination in which to file and serve a written statement setting out what is sought and why. The other party shall have a further 14 days in which to file and serve a written reply.

R A Monaghan

Member of the Employment Relations Authority