

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 389/07
5075822

BETWEEN STEPHEN RIPPON
 Applicant

AND NORSAND LTD
 Respondent

Member of Authority: Yvonne Oldfield

Representatives: Bryce Quarrie for Applicant
 George Swanepoel for Respondent

Investigation Meeting: 12 September 2007

Determination: 11 December 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Rippon first started with Norsand Ltd, in late 2005, as a painting contractor. He says he left other employment to work there after Norsand director Murray Wilkinson told him he would be in charge of the painting shop and of quality control in the yard. He says he understood that once the painting operation was properly underway he would receive a profit share of 10%, and that he would be reimbursed for any petrol and cell phone costs incurred on behalf of the respondent. Neither the profit share nor the reimbursement ever eventuated.

[2] Mr Wilkinson denies promising these things to Mr Rippon. By the beginning of February 2006 it had been agreed that Mr Rippon would become an employee but the employment agreement (signed on 1 February 2006) contained no references to profit share or expenses. On 25 October 2006 Mr Rippon was made redundant. Mr Wilkinson explained this by saying most other firms in town were on contract labour and employing a painter directly was not competitive. It was decided to return to contracting in painting services as needed.

[3] Another worker was taken on shortly before Mr Rippon was made redundant. Despite assertions from the respondent that this person was a general hand and not a painter, Mr Rippon believed that he was his replacement. He told me that he suspected that Mr Wilkinson regretted offering the 10% arrangement and wanted to get rid of him as a result. In his statement of problem he claimed that his redundancy was neither genuine nor procedurally fair. Then, at the investigation meeting, Mr Quarrie advised that his client was withdrawing his claim that the redundancy was not genuine. Earnings lost as a result of the dismissal were not enough to make it worth his while pursuing that aspect of his claim. (Mr Rippon received three weeks pay upon termination and then got his own painting business up and running within about a month.) Mr Rippon continues to pursue his claim that his dismissal was procedurally unfair.

[4] Mr Rippon also claimed that that when he left the company he was unable to take certain personal items with him. He sought their return. By the end of the investigation meeting good progress had been made on resolving this issue and Mr Quarrie and Mr Swanepoel assured me that they would complete arrangements for the return of personal items without the need for orders from the Authority.

[5] Mr Rippon's outstanding claims are therefore for compensation for the alleged breach of undertakings regarding profit share, and for hurt and humiliation arising out of the way the dismissal was handled. He also seeks reimbursement of fuel costs and cell phone charges in the sum of \$1,500.00.

Issues

[6] The issues for determination are therefore:

- i. Whether the respondent was bound by an undertaking to share profits with Mr Rippon;
- ii. Whether Mr Rippon is entitled to reimbursement of fuel and cell phone costs;
- iii. Whether his employment was terminated in a procedurally fair manner, and
- iv. What if any remedies he is entitled to.

Was the respondent bound by an undertaking to share profits with Mr Rippon?

[7] Mr Rippon told me that before and during his employment Mr Wilkinson spoke of Mr Rippon eventually taking over the spray painting operation and leasing a shed on site for that purpose. Meanwhile, he said, he was to supervise the painting team and to receive a profit share.

[8] Mr Wilkinson told me that originally his company had held a sand licence and operated a barge. Then, about the end of 2004, it moved into boat haulage. It was also leasing space in its yard, and by early 2006 was developing a boat maintenance business in order to better utilise that asset. He said that when Mr Rippon was first employed the boat maintenance business was still in its early stages and there were no fixed plans as to how it might operate in the future. Nor was there a fully equipped and operational paint shop for Mr Rippon to supervise. Mr Wilkinson did agree though that whenever the other yard staff did some painting Mr Rippon (the only qualified spray painter) oversaw their work. As for the profit share, Mr Wilkinson strenuously denies committing to anything of this sort.

[9] Mr Rippon could not tell me anything specific about when the profit share was discussed or agreed to, when it was to start, what exactly it would apply to or how it would work. He had no explanation for the fact that it was not recorded in the employment agreement.

[10] The evidence falls well short of establishing that the parties came to any sort of concluded agreement regarding a profit share. At most, it appears it may have been floated as one idea for the future among many. I conclude that the respondent was not bound by an undertaking to share profits with Mr Rippon.

Is Mr Rippon is entitled to reimbursement of fuel and cell phone costs?

[11] Of the \$1,500.00 total claimed under this head, Mr Rippon told me \$350.00 related to phone costs (estimated at 25% of his monthly usage.) The balance related to fuel. This included petrol for one van, diesel for another and petrol for a compressor used in the yard. In relation to the transport he said he estimated that it cost him

\$10.00 per day as he spent about an hour on the road each day picking up requirements for the yard.

[12] Mr Wilkinson told me that a phone was available in the yard for Mr Rippon's use at work. He agreed that Mr Rippon had occasionally used his own vehicle to do "pick ups." However Mr Wilkinson said that he instructed Mr Rippon to stop. Mr Wilkinson said most requirements could be delivered and if not, company vehicles were available for Mr Rippon or other workers to collect what was needed. Indeed he told me that he preferred Mr Wilkinson not to leave the yard for this purpose as he was often away longer than necessary. (The principal supplier was only about 4.5 km from the yard.)

[13] This claim also fails. I find Mr Wilkinson's evidence more credible and conclude that Mr Rippon's use of his own vehicle for work purposes was not authorised and was minimal in any event.

Was Mr Rippon's employment terminated in a procedurally fair manner?

[14] Mr Wilkinson told me that during 2006 Mr Rippon was responsible for the bulk of the painting work in the yard, with some assistance from general hands as required. However the painting work was intermittent and by September Mr Wilkinson began to wonder whether it was worth developing the paint shop any further. After taking advice from consultant Neil Dobbs he concluded it would be more efficient to use subcontractors, as and when needed, to complete painting work on maintenance projects undertaken by the company.

[15] Getting rid of specialised painting operations meant that the company no longer needed a full time spray painter. It was decided that Mr Rippon's position was redundant. At that time there were at least 12 other staff but because the rest of the staff had skills in areas such as boatbuilding, welding, rigging and engineering none of them were affected. Redeploying Mr Rippon to another position was not considered, in part because there staff numbers met requirements and in part because Mr Wilkinson did not think Mr Rippon would be prepared or equipped to do anything other than painting work.

[16] Mr Wilkinson told me that he would have been very happy to have Mr Rippon back as a contract spray painter however he acknowledged that he never told Mr Rippon that.

[17] Mr Rippon knew nothing of these deliberations until 19 October when he received a letter calling him to a meeting on 24 October. Because Mr Wilkinson was overseas on holiday the meeting was conducted by Neil Dobbs and Victor Coda (the office manager.)

[18] Mr Coda opened the meeting by introducing Mr Dobbs whom Mr Rippon had not met before. He explained that Mr Dobbs had been engaged to manage employment matters and to review the staff organisation and requirements for Norsand Ltd. Mr Rippon was asked if he wanted to obtain representation and he confirmed that he did not. Mr Dobb's meeting notes from this point record:

"He was told this review had recommended his position to be made redundant and was given formal notice of this fact. I stated that contractors were now to be used and holding of staff overheads for painting was not logical given the stop start nature of the service. He appeared to accept this.

I offered him the rest of the week off to find work on full pay and that 2 weeks notice wound [sic] be paid out as per his agreement starting next Monday."

[19] Mr Coda's notes for the same part of the meeting record:

"Neil took over and explained to Steve that after he reviewed the Company's staff organisation he recommended that Norsand's 'Painter' position be made redundant and move to a contractor system due to the erratic nature of the painting jobs.

Steve said he not only understood that, but he expected that was the reason for the meeting.

Neil told Steve the company will help him with his C.V. and a letter confirming he was leaving because of redundancy. Also that the company will pay him the full week on top of the two week's notice that apply [sic] by contract."

[20] Both sets of notes go on to record that Mr Rippon was then asked if he had anything to say, at which he raised the issues of new staff having recently been employed on site, as well as Mr Wilkinson having broken a “gentleman’s agreement” regarding profit share and reimbursement of fuel costs. Mr Dobbs responded that the new staff would not be painting. He also undertook to raise the other issues with Mr Wilkinson when he got back. He then asked Mr Rippon to collect his gear and prepare to leave work that day. Mr Rippon duly did so, and was provided with written confirmation of his redundancy as he left the site.

[21] There is no reference in the meeting notes to Mr Rippon being offered any opportunity to take up contract work.

[22] Mr Rippon told me:

“there was absolutely no discussion of alternatives to redundancy. I was simply told that was it. I had to finish up that day...”

...

I was absolutely gutted by the whole business. I had left a well paid business to come to Norsand and promises had been made to me right from the start that I was going to be an important part of the business as it grew.”

[23] After seeing the meeting notes Mr Rippon commented that he probably “*appeared to accept*” what he was told because he “*had to take it*” and was trying to “*take it on the chin.*”

[24] Mr Coda and Mr Dobbs told me that they believed the meeting amounted to proper consultation with Mr Rippon about the redundancy proposal. However I prefer Mr Rippon’s assessment. The meeting notes show that the proposal was not put to him in a way which indicated that he could influence the decision. His perception was no doubt reinforced by Mr Wilkinson’s absence. Also, as Mr Wilkinson’s evidence indicated, consideration of whether Mr Rippon could be redeployed had already taken place, without involving him.

[25] In short, he was not given a reasonable chance to have any input into his fate. The respondent failed to meet its obligations to consult with Mr Rippon in good faith. The dismissal was procedurally unfair.

What remedies is Mr Rippon entitled to?

[26] Mr Rippon is entitled to compensation for the hurt and humiliation arising out of a badly handled redundancy process. Although as we have seen, he did not suffer significant financial loss as a result of the dismissal, he demonstrated during my meeting with him that he was deeply aggrieved by it. I have found that there was no concluded agreement between him and Mr Wilkinson about a profit share but I do accept that he was encouraged by Mr Wilkinson to think that he had a bright future in his business. The abrupt end to the employment relationship shattered his expectations in that regard. The breach of trust was further compounded by Mr Wilkinson's failure to attend the 24 October meeting in person. Mr Rippon told me he had put his heart and soul into the job yet Mr Wilkinson "*could not face him in person*" and "*put a stranger in front of me.*"

[27] I am satisfied that a substantial award of compensation is called for. **I order the respondent to pay to the applicant the sum of \$6,000.00 pursuant to s.123 of the Employment Relations Act.**

Costs

[28] This issue is reserved. Any application for costs should be made within 28 days of the date of this determination.

Yvonne Oldfield

Member of the Employment Relations Authority