IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 414
5299243

	BETWEEN	ALAN ROSS Applicant
	AND	TYRELINE DISTRIBUTORS LTD Respondent

Member of Authority:	Yvonne Oldfield
Representatives:	Andrew Swan for Applicant Andrea Twaddle for Respondent
Investigation meeting	21 February 2011
Further evidence by affidavit	25 March 2011
Submissions:	25 March 2011 for Applicant, 11 April for Respondent
Determination:	21 September 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The respondent (Tyreline) is in the wholesale tyre industry. Mr Ross was employed by Tyreline in January 2006 in the role of Territory Account Manager, based in Auckland. In early 2009 Tyreline implemented changes which meant that its operations would be run from Hamilton and its account managers would become van-based. At that time Mr Ross was approaching 65. Although he was not yet ready to retire he wished to reduce his hours and the amount of travelling in his job and he was not keen to become van-based or work out of Hamilton.

[2] After talking the situation over, the parties decided that Mr Ross would move to a new role looking after the "*Earthmoving and Agricultural Project"* the purpose of which was:

> *"to gather information on Earthmover and Agricultural Agents/dealers in the North Island…This information will be used by Tyreline Management for Strategic Planning."*

[3] There is no dispute that despite the title the job was narrowed in scope, from the very outset, to just the earthmoving industry. The role suited Mr Ross in that it carried greater flexibility, reduced hours and less travel than the Territory Account Manager role. The respondent says that it was in fact the only way, at that time, to accommodate what Mr Ross wanted. If he had declined both this and the Hamilton van-based account manager role the alternative would have been redundancy. Consistent with this, Mr Ross has not pursued a claim relating to his move to the new project.

[4] The role was expressed to be for a fixed term to the end of August 2009. Both parties envisaged that if earthmoving turned out to have sufficient potential the position could become a permanent sales role. By the end of August there had been no new sales or indications of prospective sales. Managing Director Grant Rushbrooke decided the area lacked the potential to justify a permanent job. On or about 31 August 2009 he told Mr Ross that his contract would be rolled over for another month (by which he says he meant 'for one more month only.') Mr Ross construed this differently - as a positive sign that his employment might be ongoing. When, subsequently he was told to leave on 30 September he believed it was an unjustified dismissal.

[5] The respondent denies that there was a dismissal at all let alone an unjustified dismissal. Tyreline concedes that in failing to state the reasons for ending the employment at the conclusion of the term the purported fixed term agreement fails to meet the requirements of s. 66 of the Employment Relations Act. Nonetheless Tyreline says the ending of Mr Ross's employment was essentially a matter of agreement. It says the fixed term role was offered in order to accommodate Mr Ross's wish to wind down in anticipation of retirement, and he accepted it knowing that there was no guarantee that it would lead to on going work.

[6] In the alternative the respondent says the situation amounted to a genuine redundancy. It says the scoping work which was the main focus of the role was finished by August and there was no sales work to go on to. In this way, the respondent says, the role became unsustainable.

Issues

[7] A major part of the applicant's case was that the requirements of s.66 had not been met. Having conceded this point Counsel for the respondent has argued that the remaining issues for determination are as follows:

i. whether Mr Ross was dismissed by the respondent;

ii. if so, whether the dismissal was justified under section 103A of the Employment Relations Act 2000, and

iii. if a personal grievance has been established, what remedies should follow.

[8] The applicant's submission having also traversed these points, I accept that they are the issues for determination.

Was there a dismissal?

[9] There was no formal meeting between the parties as 31 August approached. Instead the news of the one month extension to the employment was conveyed in a passing conversation between Mr Rushbrooke and Mr Ross. Mr Ross says that he was initially just told that the contract had been rolled over for one month with no specific leaving date mentioned. He says he construed this in a positive light, thinking that his job might quite likely be extended beyond one month.

[10] Mr Rushbrooke says he confirmed the details in a letter of 31 August which read, in its entirety, as follows:

> *"Further to our meeting today I regretfully confirm that your employment with us is terminated with effect from 30 September, 2009. This is due to your position having to be made redundant and in no way reflects on your performance in your job.*
> *The reality is we are facing a down turn in the Earthmover business and are not seeing the possibilities of an upturn for some time ahead.*
> *We had discussed that the fixed term agreement was for the purpose of giving you a less demanding position as you were looking to reduce hours of work.*
> *Ideally if we had achieved the results over the time of the fixed term agreement we could of [*sic] *carried on but this has not been the case of a depressed market.*
> *In is* [sic] *proposed that future sales representation will be carried out from the Hamilton office with van sales representation. The two Holden cars will be sold.*
> *I will be away in September so Graeme will work with you to organise the return of the car and all the other documentation."*

[11] Mr Ross said he never received the letter of 31 August. In early September Mr Rushbrooke went overseas leaving Sales and Marketing Manager Graeme Mead in charge in his absence. Mr Ross says that shortly before he left Mr Rushbrooke telephoned and confirmed Mr Ross's leaving date as the end of September.

[12] Submissions for the applicant go so far as to assert that the letter of 31 August has been fabricated after the event. While the evidence does not establish that Mr Ross received the letter (it was said to have been left on his desk rather than being handed or delivered directly to him) there is no basis for the assertion that it was a subsequent fabrication. I am satisfied that Mr Rushbrooke wrote the letter before he went overseas and that it represents his intentions at that time. Unfortunately those intentions were not conveyed as clearly or in as much detail in the brief conversations he had with Mr Ross in person.

[13] The respondent's position now is that Mr Ross effectively agreed to leave at the end of September and that this amounted simply to his retirement. It was noted in submissions for the respondent that:

> *"at no time during the Applicant's employment did he express any intention other than to retire by progressively reducing his workload with the company"*

[14] Mr Ross denies that he agreed to his employment ending on 30 September or that he retired then.

[15] I think the issue here is essentially about timing. Mr Ross agreed that he wished to reduce his workload in anticipation of his eventual retirement. He was winding down, but not yet ready to retire completely. He understood, when he entered into it, that the contract was expressed to be fixed term but he hoped it would be extended and he could keep working for a while longer.

[16] The respondent knew this was his view having discussed the possibility of the role becoming permanent. That knowledge is demonstrated even in the letter of 31 August. It says nothing about an agreement to leave on 30 September. In these circumstances, it cannot be said that there was an agreement that the employment would end on September 30. As clearly expressed in that letter, it was to end on that day at the initiative of the employer.

[17] Mr Ross was therefore dismissed.

Was the dismissal justified by reason of redundancy?

Genuineness

[18] The purpose of the purported fixed term role was to assess the market and determine if it was worth developing. Mr Ross acknowledged to the Authority that he knew from the outset that Tyreline would reconsider the position at the end of August and end it if it was not sustainable.

[19] Mr Ross fed information back to Mr Rushbrooke throughout the project. It became clear from this that the earthmoving industry (unlike other segments of the wholesale tyre industry) tended to source its tyres from China. Tyreline found it could not compete on price. By August Mr Rushbrooke had concluded that an ongoing role was unsustainable because there was little or no potential business beyond a few clients the respondent already had.

[20] When it was put to Mr Ross (during the Authority investigation) that this must have been clear to him also from his own reports, he agreed. He noted however that at the end of August he still had had as much as a third of the earthmoving market to

evaluate. He also suggested that it would have been helpful to have longer to explore the potential of the agricultural markets. Mr Rushbrooke responded (and I accept) that it had been decided before Mr Ross even started in the role that the agricultural business needed to be Hamilton based and was best covered by the van based Territory managers.

[21] Mr Ross had originally raised concerns that someone had been recruited to replace him. It was established that the very small handful of existing clients in the earthmoving area were passed on to another staff member to look after but it was not established that this amounted to anything like enough work to make up a job.

[22] Even though the market had not been quite fully scoped, enough had been covered for it to be clear that there was not enough work to create an ongoing job. The *Earthmoving and Agricultural Project* job became superfluous to requirements. The position was ended on genuine business grounds.

Consultation and consideration of redeployment

[23] Mr Rushbrooke acknowledged that there was "*not a lot of dialogue*" in his brief exchange about the one month roll over. He says that he had already consulted "*at the front end*" (before the new employment agreement was signed) and there was very little left to consult about. He also says that the one month extension of Mr Ross's employment amounted to an additional month's notice.

[24] Section 4 (1A) of the Employment Relations Act 2000 provides that the duty of good faith:

> *"(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, amongst other things, responsive and communicative…*
>
> *(c) …requires an employer who is proposing to make a decision that will…have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected –*
>
> *(i) access to information, relevant to the continuation of the employees' employment, about the decision, and*
>
> *(ii) an opportunity to comment on the information to their employer before the decision is made."*

[25] It is fair to say in this case that Mr Ross probably had all the relevant information, because the key material was what he had gathered himself. It cannot be said however that he got an opportunity to comment on it. There was no meeting to discuss what had come out of the project, whether it should run on and if so, for how long. The respondent has not met its obligations in respect of s. 4 of the Employment Relations Act. Although it is now clear that further consultation would not have changed the outcome, I nonetheless consider what there was to have been inadequate.

[26] I am however satisfied that Mr Ross's preferences regarding the type and location of his work precluded redeployment.

[27] The dismissal has been justified on the grounds of redundancy however Mr Ross has established a disadvantage grievance arising out of the inadequacy of the consultation.

Remedies

[28] Since there can be no loss of earnings where there is a genuine redundancy the question of reimbursement does not arise. I am however satisfied that Mr Ross has suffered hurt and humiliation arising out of the disadvantage grievance. The events described here may turn out to be the end of his working life. He has found that very distressing along with the fact that his leaving was not marked in any way by a farewell.

[29] In these circumstances I consider a small award of compensation to be in order. The respondent is ordered to pay to Mr Ross the sum of $5,000.00 pursuant to s.123 (c) (i).

Costs

[30] 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