

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN	Michael Round
AND	Just Kids Ltd
REPRESENTATIVES	Michael McFadden for Applicant Helen Thorpe for Respondent
MEMBER OF AUTHORITY	Y S Oldfield
INVESTIGATION MEETING	1 August 2006
DATE OF DETERMINATION	15 August 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This matter relates to a dismissal for redundancy. The respondent company, Just Kids Ltd employed Mr Round in June 2004 as handyman/carpenter for its 30 retail outlets around the country. 18 months later the company decided that it would be more cost effective for maintenance work to be outsourced. As a result on May 16 2006 Mr Round was made redundant. Mr Round says he was not properly consulted before being told his fate. He also believes that earlier issues related to his credit card use may have unfairly influenced the decision to dismiss him.

[2] Shortly before his notice period ended, Mr Round submitted a claim for payment of time in lieu. His final pay included payment for time in lieu but he says that it was 7 days short.¹

[3] The issues for determination are therefore whether Just Kids Ltd undertook a fair process before making Mr Round redundant, whether that decision was for genuine commercial reasons, and whether he is owed a further 7 days time in lieu.

Was the process fair?

[4] At the time of his employment Mr Round's role was to be responsible for the maintenance of JK Ltd stores nationwide. He found the stores sadly in need of care and attention and engaged on a programme to bring them up to a satisfactory standard. Where possible, he undertook maintenance work personally. When the location or urgency of the work required it, he

[1] ¹ In his statement of problem Mr Round also claimed to be owed sick leave but this claim is with his agreement dealt with as part of the claim for time in lieu.

arranged local contractors to complete repairs. Then, because he happened to possess the necessary skills, he was given responsibility for major projects involving the installation of new camera and computer systems.

- [5] In June 2005 a General Manager was appointed for the first time. This was Alex Brandon. He was charged with overseeing the company's expansion into the Australian market and with reviewing all aspects of operations to determine whether costs could be cut. He said that this was not an easy task as there was "not a lot of fat" in the organisation.
- [6] Mr Brandon began by familiarising himself with the personnel and operations of the business. He told me that once he realised that most of Mr Round's time was taken up with project work he asked him about what he would be doing when those projects were completed. These conversations were very informal and took place in November 2005 and February 2006. In summary, Mr Round's responses were that when the project work was finished he would return to what he was first employed to do: maintenance.
- [7] In February the Managing Director, Mr Sproat, confirmed to Mr Brandon that he was not planning any more project work of the type Mr Round had been occupied with. Mr Brandon decided to arrange a meeting with Mr Round and his immediate manager, Mr Ellis.
- [8] This proceeded on 9 March. Mr Brandon did not tell Mr Round in advance what the meeting would be about but it soon became clear to Mr Round, from Mr Brandon's questions about the nature and extent of his duties that his job might now be on the line. Mr Round asked directly whether he was likely to be made redundant and Mr Brandon replied that no decision had been made yet, but that all options were being considered.
- [9] Both parties agree that by the end of that meeting, Mr Round was on notice that his position was under review and that Mr Brandon was considering whether the company should keep his position open or contract out the maintenance work. Mr Brandon told Mr Round that a further meeting would be organised to follow the matter up.
- [10] On 15 March Mr Round received the following email from Mr Brandon.

"Further to our discussion last week regarding the maintenance position, I would like to hold a formal meeting to discuss the matter in greater detail.

Would you be able to come to a meeting on Friday at 10am, in my office? If this is not suitable, we can make another time and/or date. You are welcome to have a support person or representative present at this meeting.

At this meeting I will be outlining the company's position regarding the possible restructuring and possibilities of redundancies and the selection criteria that will be used in the event of the company deciding to make your position redundant. The meeting will also provide you with the opportunity of putting forward any comments or suggestions you may have regarding the possibility of making your position redundant. We will also discuss your entitlements should your position become redundant."

[11] Mr Round did arrange to have a representative present and to accommodate this the meeting was rescheduled to 27 March. It was brief, ten minutes in all. Mr Brandon reiterated that he was considering whether the maintenance work could be done more cheaply on a contract basis. Because Mr Round had previously expressed concern about whether Mr Brandon fully understood the range of work he did, Mr Brandon asked Mr Round to supply him with a comprehensive list of all his tasks. Mr Brandon told me that he recognised that he needed to have that information before he could properly compare the costs of keeping some of the work in house to the cost of outsourcing it.

[12] For his part Mr Round's representative asked to be provided with the "selection criteria" to be applied, as the email of 15 March had indicated he would be. Unfortunately the use of this term has caused some confusion. Because Mr Round's position was the only one of its type this was not a case where criteria would be applied to select for redundancy from amongst a group. The relevant information that Mr Gurney wanted (quite reasonably in my view) was the costing for the current arrangement, that is, the total cost of Mr Round's position plus additional services provided from outside the organisation.

[13] The meeting ended without a common understanding between the parties of what the next steps would be. Mr Round and Mr Gurney told me that they expected to be given the costings and that after this, (not before) Mr Round would provide a list of the work that he currently did. Mr Brandon, however, understood the reverse: that Mr Round would provide him with the list of duties which he would use to prepare figures comparing the cost of the current arrangement and of outsourcing the work.

[14] Mr Brandon confirmed this in an email immediately after the meeting, as follows:

"As discussed, we are trying to quantify what you do for JK so we can compare with external pricing. As you said today, you do a lot of things for JK that I may not be aware of. I want to be sure that I have a clear understanding of your tasks. Please write me a comprehensive list of all tasks you carry out for JK. Perhaps write a list for a typical month. We could look on Share point, but I know you don't think this is comprehensive enough. Make a list so that I have a clear understanding of all the tasks you perform.

*Try to get the list to me by Thursday"*²

[15] Mr Round did not supply the list as requested. On 30 March Mr Brandon went ahead and obtained from the financial controller a breakdown of the costs of Mr Round's position: salary, credit card, other expense claims, and vehicle costs, and of the other maintenance costs excluding Mr Round's position. Mr Brandon did not (at any stage) pass this on to Mr Round.

[16] Mr Round's job takes him all over the country and in the normal course of events he and Mr Brandon do not cross paths very often. On 7 April, having heard nothing further from Mr Round, Mr Brandon emailed

²[30th March]

him again, twice. One email had an attachment calling Mr Round to a meeting on Tuesday 11 April to "progress the matter." The attachment set out that at that meeting the parties would discuss:

- *"the current situation regarding the possibility of making some your position redundant [sic];*
- *Alternative positions/options for redeployment;*
- *Any assistance we may be able to offer you should your position become redundant;*
- *Clarification of your entitlements should your position become redundant;*
- *Any further suggestions of comments that you may have."*

[17] The other reminded him:

"Mike I asked you for a comprehensive list of your activities for the last month. This was supposed to be with me by the end of last week. Why wasn't it?"

[18] It seems that Mr Round did not look at these emails until Tuesday 11 April. It is unclear why not. He recalls being unwell that week and also experiencing IT problems. Once he did see the emails, he replied:

"My apologies, both Brett and I were of the understanding that we were to receive a letter for criteria for selection process from you first."

I was also off sick as Dean was aware of (medical certificate supplied.)"

[19] The same day, Mr Brandon replied:

"You were supposed to give me a breakdown of your duties so that I could give you criteria details. As I didn't receive anything from you I looked at sharepoint and spoke to office and store personnel instead. We looked at what it costs the company to have a centrally based maintenance person, vs. the cost of outsourcing the tasks. The cost is over \$100,000.00 per year which we are comparing to maintenance costs if they were done regionally. Per my letter on Friday we'll discuss those in person rather than by letter. You were supposed to be here this morning at 9am to discuss. When will you be able to have this meeting?"

[20] The next day (12 April) Mr Round responded that he and his support person would be available to meet on 18 April. He also noted:

"Look forward to a detailed copy of the breakdown of employee v contractor for our perusal."

[21] On 12 April the owner of the business, Ben Sproat, came to Auckland to meet with Mr Brandon. Mr Brandon told me it had been his intention to meet with Mr Round first, on 11 April, and then talk everything over with Mr Sproat. Even though it had not been possible to talk to Mr Round, he went ahead with the meeting with Mr Sproat on 12 April. He told me:

"We discussed the financials and it was so clear it was beneficial to contract out the maintenance role that we made the decision to make the position redundant."

[22] On 17 April Mr Round supplied Mr Brandon with a breakdown of his duties.

[23] A final meeting proceeded on 18 April. Once again it was no more than about ten minutes. Mr Brandon handed Mr Round a letter which read:

"The following is confirmation of what we have discussed in our meeting.

Further to our discussions over the last few weeks, we have, unfortunately, decided to make the maintenance position redundant.

Financially it will be far more cost-effective for the company to outsource the maintenance position to regional contractors.

The redundancy period is 4 weeks. You [sic] last day at the company will be May16th."

[24] Mr Round told me that after having received the email of 7 April he had attended the meeting expecting to discuss issues further. Instead, there was no opportunity for discussion and he formed the impression the decision had been made "long ago." Mr Gurney asked for the criteria for selection and the breakdown of costs which they had previously spoken about. Mr Brandon responded that this would serve no purpose now.

[25] For his part, Mr Brandon says that it must be taken into consideration that he had been talking to Mr Round about these issues since the previous November. He says he made every effort to meet with Mr Round before his meeting with Mr Sproat on 12 April. He and Mr Sproat had come to a firm view about what should happen and nothing had happened to change that so he felt it was best to go into the meeting of 18 April and be upfront.

[26] Mr Round told me that after he was notified of his redundancy there was very little support for him. He had serious problems with his vehicle and was told not to replace it, which made it very difficult to do his job. He took considerable sick leave during his notice period and found that the stress of that time affected his family and his relationships with them. Although there was mention of the possibility that he might take on the contract for maintenance of Auckland area shops, neither party pursued this.

Determination

[27] The process Mr Brandon followed got off to a good start. Unfortunately it did not finish so well. After promising further discussion in his email of 7 April it was unacceptable for Mr Brandon to go straight in to the meeting of 18 April with a notice of termination. Although I am not convinced that further discussion would have ultimately averted the termination (see below) it would have greatly assisted Mr Round in understanding how that decision came about, and alleviated the stress he experienced as a result of the termination.

Was the redundancy genuine?

[28] Although Mr Round felt that Mr Brandon recognised the quality of his work, he was very suspicious about whether the need to cut costs was

truly what lay behind the termination of his employment. He told me of the following concerns:

- i. He felt that he may have been blamed (unfairly) for things that had held up the completion of the major projects he had worked on;
- ii. He felt that things were fine "*up until the MasterCard issue.*" This was a reference to questions Mr Brandon raised, some months before the redundancy, about Mr Round's expenses. Mr Brandon told me that Mr Round incurred a high level of expenses and he queried this but soon learnt that he had a higher expense limit than other card holders, by virtue of the fact that he did so much travelling (sometimes with an assistant.) After this had been established, Mr Brandon said, the matter went no further. The expenses associated with the maintenance role were mentioned during the redundancy process only with reference to the overall cost of the position.
- iii. Mr Round felt that the project work he had been involved in had inflated the cost of his position. He told me that he felt that costs would have dropped off if he had returned strictly to a maintenance role;
- iv. Mr Round also believed that a new employee, who started about the time he left, may have been taken on to replace him. However I accept Mr Brandon's response which was that this person (who was part time anyway) had a different role altogether, in the design of store fit outs.

Determination

[29] I am satisfied that the redundancy was for genuine reasons. It has not been established that Mr Brandon had any ulterior motives for embarking on a review of the maintenance position and I accept that the routine maintenance work was not such as to amount to a full time role.

Time in lieu

[30] During his notice period Mr Round took sick leave in excess of his sick leave entitlement, including the final 7 days of his employment. He was paid for all this time.

[31] Shortly before the end of his employment, Mr Round raised the issue of time in lieu relating to after hours and weekend work he had undertaken over the course of his employment. When his claim for time in lieu was being processed, Mr Brandon decided that at least the final period of leave in excess of sick leave entitlement would be treated as time taken in lieu. Hence the 7 day discrepancy that Mr Round is concerned about.

[32] I accept that Mr Brandon was justified in doing this.

Remedies

[33] Mr Round is entitled to a modest award of compensation to remedy the hurt and humiliation he experienced as a result of the way the final meeting proceeded. Specifically, he should be compensated for Mr Brandon's failure to provide a breakdown of the costing, as he had promised, and an opportunity to respond to that. In all the circumstances I consider an award of \$4,000.00 to be appropriate.

[34] The respondent is therefore ordered to pay to the applicant the sum of \$4,000.00 compensation for hurt and humiliation.

[35] There will be no award for further time in lieu. However I note that Mr Brandon should have notified Mr Round of what he was doing. Mr Round did not receive an explanation of what had happened until my investigation meeting. He should have received a formal pay advice setting out what he had been paid and why.

Costs

[36] This issue is reserved. Should the parties require that it be determined, they should advise the Authority no later than 28 days from the date of this determination.

Y S Oldfield
Member of Employment Relations Authority