

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 407/08  
5113599

BETWEEN COLIN SHORT  
Applicant

AND WALTON SPECIAL  
VEHICLES AND  
CONVERSIONS LIMITED  
Respondent

Member of Authority: Marija Urlich

Representatives: Graeme Norton, for Applicant  
Gerald Wagg, for Respondent

Investigation Meeting: 21 October 2008

Further information and costs memoranda: 28 October, 4 and 19 November 2008

Determination: 1 December 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Mr Short was employed by Walton Special Vehicles and Conversions Limited (“WSV”) in July 2007 when Keith and Leslie Doherty purchased the business Mr Short had been employed in since May 2003. The business proved not to be as profitable as Mr and Mrs Doherty had thought upon purchase and in late 2007 they began a review.

[2] Mr Short received written notice of dismissal for redundancy on 18 December 2007. He says his dismissal was unjustified and seeks to be reinstated to the role from which he was dismissed, payment of monies agreed with WSV, reimbursement of lost wages and a compensatory sum for hurt and humiliation consequent to his dismissal.

[3] WSV says Mr Short's position was genuinely redundant and he has been paid everything he is owed. WSV says Mr Short's conduct contributed to the circumstances in which he left the business but that in any event WSV is no longer trading.

### **The investigation meeting**

[4] Keith Doherty filed an affidavit in support of WSV. At the start of the investigation meeting Mr Wagg requested Mr Doherty be excused from attending the investigation meeting due to ongoing serious ill health. A letter from Mr Doherty's doctor supports this application. An adjournment was not sought. Mr Wagg advised Mrs Leslie Doherty, a shareholder in WSV, was in attendance and able to give evidence. Mrs Doherty readily accepted that she had no direct knowledge of the events leading up to and including Mr Short's dismissal. She has knowledge of the financial status of the business now and at the time of Mr Short's dismissal. The investigation meeting proceeded in these circumstances.

### **Mr Short's dismissal**

[5] On 17 December Mr Short was invited to meet with Mr Doherty. He did not know what the meeting was about. Mr Doherty told Mr Short WSV was in financial difficulties and the servicing and parts department was not making any money. He handed Mr Doherty a letter:

- Asking for Mr Short's urgent feedback as to how WSV could deal with its poor financial circumstances;
- That the area of particular concern for the business was the service and parts department;
- That Mr Short's position could be made redundant;
- The letter was *highly confidential and for your eyes only*.

[6] The focus on the service department did not make any sense to Mr Short. He told Mr Doherty the service department was still only a proposal and that the parts department stood apart. Mr Short left the meeting. Mr Short then left the premises

for an hour, having told Jason Docherty, Mr Docherty's son, that he needed some time out.

[7] Mr Short went to meet his representative, Mr Norton, on the evening of 17 December. A letter was then sent to Mr Docherty seeking further information about the proposed restructuring, asking for more time to give feedback given the proximity to Christmas and requesting confirmation that Mr Short was the only employee affected.

[8] Mid-morning the following day Mr Doherty attended the premises. There was an exchange as he passed Mr Short. Mr Short addressed him and Mr Docherty accused him of causing trouble. Mr Short asked what he was referring to and Mr Docherty said he (Mr Short) knew what it was about. Mr Docherty then attended a meeting with the other staff members in which Mr Short was not involved.

[9] Following the meeting Mr Docherty returned to Mr Short and told him he would not be responding to Mr Norton's letter, this was the end and handed him a letter advising:

- Due to adverse trading conditions WSV had to retrench its operations and reduce staff numbers;
- Mr Short's recommendation to build a service department would not proceed; and
- Mr Short's position could not be maintained and his employment was terminated due to redundancy.

[10] The letter concluded by setting out two options for Mr Short to consider; either work until 11 January with his final pay being made on 21 December or finish his employment on 21 December with a payment of \$4000 and satisfactory removal of Mr Short's property from WSV and return of WSV property.

[11] There was some discussion about the dismissal; Mr Docherty told Mr Short that if had come back with some ideas the issues could have been worked through but Mr Short's actions had precluded such an outcome. Mr Docherty then told Mr Short he thought he had taken a liberty (in more vibrant language) using a work vehicle to

meet with his representative. Mr Short denied this had occurred and Mr Docherty apologised. Mr Docherty then told Mr Short to take the rest of the week off. He confirmed he would pay Mr Short what he was owed and Mr Short handed over the keys he held to the business. Mr Short then left the premises. He did not return.

[12] Mr Short emailed Mr Docherty the following day advising of his election of the second option - cease work on 21 December and receive a \$4000 payment. The email also stated that this election was made without prejudice to his legal rights. WSV denies receiving this email.

### **Was Mr Short's dismissal unjustified?**

[13] Parties to employment relationships are obliged to deal with each other in good faith<sup>1</sup>. The obligation of good faith requires parties to conduct themselves in a manner which actively and constructively establishes and maintains a productive employment relationship<sup>2</sup> and extends to proposals which may impact on an employee's employment<sup>3</sup> including redundancy<sup>4</sup>.

[14] A dismissal is justified if the employer's actions can be objectively judged fair and reasonable in all the circumstances at the time<sup>5</sup>. In applying this test to a dismissal for redundancy the Authority considers two factors – the genuineness of the redundancy and the process followed.

[15] I accept that WSV was in a parlous financial situation and that a genuine business need may have motivated redundancies in the business. However, any genuine basis for Mr Short's redundancy has been overshadowed by WSV's reaction to receiving Mr Short's representative's letter. The requests made in the letter were reasonable and lawful. There is no evidence WSV gave those requests the fair consideration to which they were entitled. On Mr Short's evidence (the only evidence tested before the Authority) WSV reacted to his assertion of rights by dismissing him. I find Mr Short's dismissal for redundancy was not motivated for genuine business reasons. Mr Short's dismissal was unjustified.

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<sup>1</sup> Section 4(1)(a) Employment Relations Act 2000

<sup>2</sup> Section 4(1A)(b) Employment Relations Act 2000

<sup>3</sup> Section 4(4)(d) Employment Relations Act 2000

<sup>4</sup> Section 4(4)(e) Employment Relations Act 2000

<sup>5</sup> Section 103A Employment Relations Act 2000

## Remedies

[16] The claim for reinstatement is declined. There is no position with the employer to which Mr Short could be reinstated. I accept Mrs Docherty's evidence, supported by a draft set of accounts that WSV is no longer trading.

[17] Mr Short seeks an award of wages per the options set out in his dismissal letter and reimbursement of lost wages. WSV has provided Mr Short's final wage and time records. They show Mr Short has been paid wages up to 21 December 2007, outstanding holiday pay and public holiday entitlements for the Christmas/New Year period. The payment options set out in the dismissal letter are:

*You have the choice of either finishing on the 11<sup>th</sup> of January with final pay due 21<sup>st</sup> December which will include all holiday pay etc entitlement and all payments owed.*

*Or accepting a payment of \$4000.00 (payable on the 21<sup>st</sup> of December 2007) subject to your removal of all personal goods from Walton Special Vehicles and Conversions and the satisfactory return of all WSV property finishing employment Friday 21<sup>st</sup> (sic)*

[18] Mr Short says he elected the second option and that entitles him to a payment of \$4000 in addition to the final payment he has received. I accept Mr Short has made this election but I do not accept he is entitled to the sum claimed. Mr Short is entitled to the \$4000 payment less the \$2380.76 final pay he has received.

[19] **Walton Special Vehicles and Conversions Limited owes Mr Short \$1619.24 outstanding from the redundancy payment offer made in WSV's letter of 18 December 2007.**

[20] Mr Short seeks reimbursement of lost wages up to 28 February 2008 when he went to America for three months. Such loss must be proved and evidence of mitigation must be provided. Mr Short is entitled to the balance of his notice (11 January 2008), dealt with above. Is he entitled to the remaining six weeks lost wages of the claimed period? Mr Short said when he was dismissed he immediately started looking for alternative employment. He has provided no evidence in support. I set the award at two weeks.

[21] **Walton Special Vehicles and Conversions Limited is ordered to reimburse Mr Short two weeks wages at his ordinary rate of pay, being \$1200 (gross) per week.**

[22] Mr Short seeks an award pursuant to section 123(1)(c)(i) of the Act for hurt and humiliation consequent to his dismissal. He said his dismissal came as a complete surprise - Mr Docherty had very recently had a conversation with him about playing a bigger role in the business. He was hurt not to be invited to the work Christmas function and to be told by Mr Docherty, when he returned to pick up his belongings that he was not to speak to any staff, denying him the chance to say goodbye to his work mates. Mr Short said his dismissal caused him financial embarrassment over the Christmas period and that he was unable to meet family obligations. He said his hurt feelings have been compounded by his 20 year old son being dragged into this situation; Mr Docherty dismissed him the same day (a claim upheld Authority).

[23] **Mr Short is entitled to an award pursuant to section 123(1)(c)(i) of the Act. I set that award at \$5000.**

### **Costs**

[24] The parties have requested that costs be determined along with the substantive issues. They have filed memoranda to this effect.

[25] Mr Short's costs total \$2835.00 (including GST), plus disbursements of \$53.90 and \$70 filing fee. He seeks a contribution to those costs of \$2000 plus reimbursement of disbursements.

[26] WSV's costs exceed \$3000. The contribution sought is \$1000. The submissions do not address Mr Short's costs claim.

[27] Mr Short is the successful party. It is usual that costs follow the event. Applying the principles applicable to a determination of costs in the Authority<sup>6</sup> I set costs at \$1500 plus disbursements of \$53.90 and the filing fee of \$70.

**[28] Walton Special Vehicles and Conversions Limited is ordered to pay \$1623.90 to Colin Short in costs pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.**

Marija Urlich

Member of the Employment Relations Authority

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<sup>6</sup> *PBO v Da Cruz* [2005] 1 ERNZ 808