

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Graham Sperry (applicant)
AND	River City Export Beef Limited (respondent)
REPRESENTATIVES	Harry Mallalieu for the applicant No appearance by or for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Wanganui, 30 January 2007
DATE OF DETERMINATION	31 January 2007

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. In a statement of problem received on 4 August 2006 Mr Sperry claimed he had been unjustifiably dismissed. He sought compensation for lost earnings, for humiliation, etc and cost.
2. In a late statement in reply, received on 2 October, the Company denied unjustifiably dismissing Mr Sperry but said he was part of a seasonal shift lay off along with other workers.
3. The Company also forwarded advice to the effect that it had incurred significant operating losses, that its liabilities exceeded its assets by nearly \$600,000 and therefore it was unlikely to be in a position to pay its creditors, and that the plant was closed and the

Company ceased trading in October 2005 so as to mitigate any further loss. It was anticipated the Company would soon be liquidated.

4. The parties have not undertaken mediation: on two occasions the Company failed to attend mediation appointments arranged by Mr Sperry.
5. Following a telephone conference on 18 September the parties agreed to a one day investigation in Wanganui on 30 January 2007. Despite its agreement to do so, the Company failed to provide the Authority with any witness statements.
6. Despite agreeing to the 30 January investigation date, the Company did not attend. In a telephone conversation, the respondent's Director, and one of its principal shareholders, Mr Terry Lester, confirmed neither he nor any other Company representatives would be attending. Mr Lester offered no explanation for initially agreeing to the investigation date while failing to attend: Mr Lester articulated the view that, because there were no funds, there was "*no point*" in the applicant pursuing his claim. Because of Mr Lester's earlier agreement, on behalf of the respondent, to the 30 January investigation date and the absence of any request for - or grounds to grant - an adjournment I determined to proceed with the investigation: s. 173 and clause 12 of Schedule 2 of the Act ("*If, without good cause shown, any party to a matter before the Authority fails to attend or be represented, the Authority may act as fully in the matter before it as if that party had duly attended or been represented*") applied.

Background

7. Mr Sperry affirmed the contents of his statement of problem and witness statement. As is made clear above, his evidence was not contested. I was also satisfied by the answers provided by Mr Sperry to my questions that there were no grounds to doubt his evidence and claims. The applicant's position can be accurately summarised as follows.
8. Following overtures from the Company, Mr Sperry was persuaded to take on a position with the respondent from 7 February 2005. He says that, prior to giving up his then permanent employment and starting work with the respondent, he sought and received verbal confirmation from the Company that he would be engaged in a permanent capacity, that he was not a seasonal employee. The applicant says he sought this confirmation because of his knowledge of the meat processing industry, gained from his employment as a driver transporting animal by-product.

9. The applicant also sought and received a written offer of employment. It does not describe the employment offered the applicant as seasonal work, but instead says "*I would like to offer you a position at River City Export Beef Ltd starting the week etc*" (refer to the undated letter from the Company attached as document 16 to the statement of problem).
10. After commencing employment Mr Sperry received a written employment agreement from the Company which he signed and dated 13 April 2005 (document 17, above). Clause 21 of the agreement provides as follows:

TERM OF THIS AGREEMENT

The term of this agreement is:

- *temporary*
- *fixed (for a period of one year from the date of signing)*
- *casual*

(Delete whichever is not applicable).

11. No deletions were made to any of the provisions of clause 21.
12. In his statement of problem and witness statement, Mr Sperry explains how he was called – with other staff – to a meeting on 27 May 2005 to be told, amongst other things, that a restructuring was underway: he and others were then sent home. Later that day he received a telephone call from a Company representative who advised him he no longer had a position.
13. Mr Sperry says that there was no consultation in respect of the restructuring, no discussion as to the selection criteria in respect of those who would stay and those who were being laid off, nor was there any opportunity for the applicant to take on the job at a lesser rate or to take on any other position. He says that, despite his contractual entitlement (clause 5 (a), above), he received no notice and that the Company continued to operate with another employee carrying out the same work as previously performed by the applicant, while being paid at a lesser rate.
14. Advice of a personal grievance was filed by letter dated 22 August 2005.
15. Mr Sperry says the costs to him, both financial and emotional, arising out of his unjustified dismissal were significant: he says it is an "*understatement*" (oral evidence) to describe the period after losing his job as a difficult time. This is because he had to borrow over \$1,000 from family and friends so as to meet immediate rental and car-repayment

obligations. The applicant is the breadwinner and supports his wife. For re-employment purposes, but at a cost of \$600 that Mr Sperry is seeking to recover, he found it necessary to move from Wanganui to Hawera.

16. Advice from the NZ Companies Office dated 26 January 2007 records the respondent as still registered.

Findings

17. From the largely uncontested evidence before the Authority, and because I do not accept Mr Sperry was employed on a seasonal basis, I am satisfied that Mr Sperry was grievously unjustifiably dismissed. This is because, in breach of well-established case law and statutory requirements, he received no access to relevant information about the (non) continuation of his employment, nor an opportunity to comment on that information before his employer's decision was made: these shortcomings are a serious breach of the good faith obligations set out at s. 4 of the Act as well as the well-known requirements of long established employment case law.
18. Mr Sperry was also denied the opportunity to be represented at the meeting on 27 May 2005, nor did he enjoy prior advice as to the purpose of the meeting. The applicant was instead confronted by a *fait accompli* and a predetermined decision to dismiss him, that was conveyed by telephone advice later on the same day.
19. I do not accept the Company's claim that Mr Sperry "*was not dismissed (but) was (terminated instead as) part of a seasonal shift lay off along with other workers*" (statement in reply). There is no written evidence before the Authority to support the claim the applicant was a seasonal employee: his offer of appointment and employment agreement do not expressly define the applicant's employment as seasonal. They are more properly read as supporting his claim of permanent employment.
20. The uncontested evidence by the applicant, that he sought and received a verbal assurance he was being taken on permanently, and gave up permanent employment – along with the associated benefit of being able to live in Wanganui while being employed by a Taranaki-based trucking business – to take on the job, all support Mr Sperry's claim.
21. In the alternative, I find that even if it were true that Mr Sperry was a seasonal employee – which I do not accept – the procedural shortcomings accompanying his termination, and

the serious breach of the Company's obligations under s. 4 of the Act, are such that the termination remains grievously unjustifiable.

Remedies

22. Mr Sperry seeks two weeks lost income, i.e. \$1300 nett. I am satisfied from the evidence he produced of his average weekly earnings (document 18, above) and his successful effort to quickly find re-employment that this claim is properly made out: s. 123 (1) (b) of the Act applied.
23. Mr Sperry also seeks relocation costs of \$600 arising from his need to move out of the region to take up re-employment: I am satisfied from the evidence of the applicant to find fresh employment, and of the cost reasonably incurred as a result of his unjustified dismissal, that this claim is also properly made out: s. 123 (1) (b) of the Act applied.
24. Mr Sperry also seeks compensation of \$150 for costs incurred in his unsuccessful attempt to undertake mediation with the Company (i.e. time off work/lost earnings and travel costs). I am satisfied that the Company's egregious conduct, both in the context of the unjustifiably dismissal of the applicant and its subsequent conduct, warrants an order requiring the respondent to pay this sum to Mr Sperry: s. 123 (1) (b) of the Act applied.
25. Compensation of \$10,000 is sought by Mr Sperry in respect of the humiliation, etc he experienced as a consequence of his unjustified dismissal. I am similarly satisfied that the applicant has properly made out his claim: s. 123 (1) (c) (i) of the Act applied. This is because I accept that the news of the loss of his job must have come as a complete and unwelcome surprise to Mr Sperry.
26. I also accept that the absence of any consultation and the immediacy of his termination imposed great strain on the applicant, particularly because of his role as the breadwinner. The complete absence of fair process by the respondent, and its bogus claim as to his seasonal status, have worsened the distress occasioned Mr Sperry.
27. I accept the legal costs claim advanced by Mr Sperry, of \$1300: this is a modest claim and falls well within the costs awards typically provided by the Authority.

Contributory Fault

28. Other than having elected to take employment with the Company there is no way in which Mr Sperry can be said to have contributed toward the situation that gave rise to his personal grievance: s. 124 of the Act applied.

Determination

29. For the reasons set out above I find in favour of Mr Sperry's claim that he was unjustifiably dismissed by River City Export Beef Limited.
30. The Company is directed to pay to the applicant the following monies:
- a. Lost wages totalling \$1,300 (thirteen hundred dollars); and
 - b. Relocation expenses of \$600 (six hundred dollars); and
 - c. Costs incurred in respect of unsuccessful mediation totalling \$150 (one hundred and fifty dollars); and
 - d. Compensation for humiliation, etc of \$10,000 (ten thousand dollars); and
 - e. Legal costs totalling \$1,300 (thirteen hundred dollars).

Denis Asher

Member of Employment Relations Authority