

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012]NZERA Auckland 239
5350618

BETWEEN ALAN STANYER
 Applicant

A N D GSM HOLDINGS LIMITED t/a
 GLOVER PLUMBING
 Respondent

Member of Authority: James Crichton

Representatives: Wharetaka Hika, Counsel for Applicant
 Graeme Wallace, Advocate for Respondent

Investigation meeting: 9 July 2012 at Tauranga

Date of Determination: 17 July 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Stanyer) alleges that he was unjustifiably dismissed from his employment by the respondent (Glover Plumbing). Glover Plumbing resists that claim.

[2] Mr Stanyer was employed by Glover Plumbing for approximately a decade, initially as a plumber/gas cutter but most recently as assistant manager.

[3] On 10 April 2011, Mr Stanyer was dismissed for redundancy in a telephone discussion with Glover Plumbing's Mr Wallace.

Issues

[4] The Authority needs to determine the following questions:

- (a) What happened in the telephone discussion between Mr Stanyer and Mr Wallace;
- (b) Does Mr Stanyer have a personal grievance?

What happened in the telephone discussion between Mr Stanyer and Mr Wallace?

[5] The evidence before the Authority discloses that over the weekend of 9 and 10 April 2011, Mr Wallace and his wife, between them the owners of Glover Plumbing, were agonising about the direction of the business and the effect of the global downturn on their trading results. In particular, Mr Wallace told the Authority that while Glover Plumbing had forward work in the medium term, it had a significant dearth of work in the immediate future. Mr Wallace indicated to the Authority that he and his wife determined that, in order that they could concentrate on trying to drum up short term work, they should ask all of their staff to take the next week off on paid special leave because, first there was nothing for those staff to do, and secondly their absence would enable Mr and Mrs Wallace to concentrate on getting new work in. Mrs Wallace worked in the business as well.

[6] Mr Wallace's evidence was that he managed to speak to all of his staff during the weekend and all of them, save for Mr Stanyer, agreed to the proposal.

[7] Mr Wallace made clear in his evidence that there were some staff who were not asked to take leave immediately because they were on projects that had finish dates that the employer had committed to, but he was adamant that each and every staff member was asked to take a period of special paid leave and that all agreed save for Mr Stanyer.

[8] The telephone discussion with Mr Stanyer took place on the Sunday afternoon of that weekend. Mr Stanyer had been in Auckland visiting his son when Mr Wallace rang Mr Stanyer's home. When Mr Stanyer returned to his home on Sunday afternoon, he rang Mr Wallace. The nature of that telephone discussion is in dispute between the parties. Mr Wallace is adamant that what he proposed to Mr Stanyer was exactly what he proposed to everybody else, namely that Mr Stanyer take a period of paid special leave for the following week. What Mr Stanyer says he heard was a proposal that he take the following week as annual leave and Mr Stanyer was acutely

aware, having just come back from the United Kingdom, that he had no annual leave to take.

[9] There seems to have been some exchange of views between the two men, the gist of which was Mr Stanyer's contention that Mr Wallace could not make him take leave. Mr Stanyer says that Mr Wallace became hostile and difficult at that point and told him that he was dismissed with immediate effect, for redundancy.

[10] The principal difference between the two men on the telephone call issue is that while Mr Stanyer was adamant that what he was being asked to do was to take annual leave, Mr Wallace was equally adamant that he was proposing special paid leave not debited against Mr Stanyer's annual leave entitlement. Mr Wallace told the Authority that everyone else on the staff understood the proposal and he was at a loss to know why Mr Stanyer did not.

[11] Although nothing turns on this factor in deciding what actually happened in the telephone discussion, Mr Stanyer maintained at the Authority's investigation meeting that not all staff were treated similarly. The Authority does not accept that evidence. The Authority prefers Mr Wallace's evidence on this point. Mr Wallace said that all staff agreed to take the week off, just that it was not necessarily the same week for all staff. If staff were involved in a project that was required to be delivered in a certain timeframe, then they would continue to work until that was done.

[12] On balance, the Authority is not persuaded that Mr Stanyer heard the proposal from Mr Wallace correctly. It seems inconceivable that Mr Wallace would have had no other protests from staff if he was proposing that staff take annual leave with that little amount of notice; it follows in the Authority's view that it is more likely than not that what Mr Wallace was offering Mr Stanyer, and seeking his consent to, was a proposal that he take a week's special paid leave.

[13] It was absolutely evident at the investigation meeting that Mr Wallace was completely flummoxed by Mr Stanyer's response and simply did not know what to do when Mr Stanyer refused his request. At various times in his evidence, Mr Wallace referred to Mr Stanyer being insubordinate for failing to follow his request and to "*responding off the cuff*" when Mr Stanyer "*said he wouldn't go on special leave*".

[14] Mr Wallace told the Authority that he "*wasn't expecting to fire Mr Stanyer*" in that telephone discussion and the Authority accepts that evidence at face value. But

the reality is that Mr Stanyer was dismissed in that telephone discussion and he was dismissed for redundancy, allegedly on the footing that the business was suffering trading difficulties and the employer needed to reduce costs and had been through a period of consultation.

[15] But none of that context is credible. It is true that the business had been through a difficult period in its trading cycle and that shortage of work was set to continue. But dismissal for redundancy is a measured process and on Mr Wallace's own evidence, he had no intention of dismissing Mr Stanyer for redundancy, or indeed for any other cause. He simply was caught flat footed by Mr Stanyer's intransigence and he seems to have done the first thing that came into his head.

[16] What is even more extraordinary about Mr Wallace's actions in this telephone discussion is that the business was, at the relevant time, for sale and indeed it was just three weeks before the conditional purchaser took the business over when Mr Wallace dismissed Mr Stanyer. Furthermore, at the point at which Mr Stanyer was dismissed, Mr Wallace knew that the incoming purchasers would not be offering Mr Stanyer continuing employment. The conditional purchaser's son had worked for Glover Plumbing for a number of years, having done his apprenticeship there, and he had formed a negative view of Mr Stanyer, particularly apparently after the two of them had had words about an issue, and as a consequence, the conditional purchasers had made the decision that Mr Stanyer would not be offered continuing employment.

[17] Mr Stanyer alleged that it was that fact that caused Mr Wallace to dismiss him and not any other factor. But the Authority does not accept that contention either. The Authority thinks that Mr Wallace was absolutely honest and straightforward when he said that he simply had not expected Mr Stanyer to respond in the way that he had and that he had no backup plan, as it were, for the contingency that Mr Stanyer would not agree to the proposal and, on the spur of the moment, he dismissed him. The Authority is not persuaded that Mr Wallace was in any way influenced by the fact that the incoming purchasers would not re-employ Mr Stanyer. Surely, if Mr Wallace had had that fact in his mind when he had the telephone discussion with Mr Stanyer, he would not have contemplated dismissing Mr Stanyer because the matter would effectively have been resolved three weeks later.

[18] Indeed, the whole thing is quite extraordinary because, on Mr Wallace's own evidence, he could easily have done nothing at all in response to the conversation with

Mr Stanyer and simply let the matter run on until settlement of the sale three weeks later when it would no longer be his problem.

[19] The Authority concludes then that the decision to dismiss Mr Stanyer was a spur of the moment decision and that Mr Wallace called it a redundancy but that, in fact, it was nothing of the kind. If it had been a dismissal for redundancy, there would have been a measured process where consultation would have been undertaken and Mr Stanyer would have had the opportunity to have input into the possible approaches that could have been taken to save the firm the money that it needed to save. Further, Mr Stanyer would have been provided with sufficient information in order for him to reasonably participate in the consultation process: *Vice-Chancellor of Massey University v. Wrigley* [2011] NZEmpC 37 applied.

[20] None of that happened. There were staff meetings at which Mr Wallace spoke broadly about the financial difficulties the firm was experiencing and there were reductions in hours worked (and therefore paid) for Mr Stanyer and for others. But there was no adequate information provided to Mr Stanyer in order to enable him to participate in a consultation process. Both witnesses confirmed that although he was the assistant manager, Mr Stanyer had no better information about the financial health of the firm than ordinary wage workers. Both witnesses also confirmed that Mr Stanyer had not been provided with any financial information at all about the firm and its prospects, and Glover Plumbing had never even got to the point of saying that it needed to shed staff in order to survive or restructure. All that existed was a context in which there was financial difficulty for the business, but there was no declaration of redundancy and no consultation. It follows that the Authority must conclude that, insofar as Mr Stanyer's dismissal was labelled redundancy, the redundancy was neither genuine nor informed by a proper consultative process. This was simply a dismissal on the spur of the moment labelled a redundancy.

Was Mr Stanyer unjustifiably dismissed?

[21] Given the foregoing analysis, the Authority has no doubt that Mr Stanyer was unjustifiably dismissed from his employment. The decision may have been labelled a redundancy, but, in the Authority's opinion, it was nothing of the sort. Really, the evidence discloses that Mr Wallace did not need to take the step of dismissing Mr Stanyer and his response was simply a knee jerk reaction to Mr Stanyer's response to the proposal that he take special leave for a week.

[22] Clearly then, in principle Mr Stanyer has suffered an unjustified dismissal, but the Authority must now consider whether Mr Stanyer has contributed in any way to the circumstances giving rise to his grievance. It is difficult not to conclude that, in a very real sense, Mr Stanyer's attitude materially contributed to the grievance because had he not taken the stance of refusing Mr Wallace's request, that he take special leave, there would have been no dismissal. The only reason that Mr Stanyer was dismissed was because he had refused to consider Mr Wallace's proposal that he take a week off on pay. There was no other reason for the dismissal.

[23] In the Authority's view, neither party has distinguished themselves in this exchange. Mr Wallace ought to have had a back up plan in his mind for any of his staff who had turned down his request. Plainly he did not. He reacted precipitately when he was challenged by Mr Stanyer and made a decision which he absolutely did not need to make.

[24] Similarly, Mr Stanyer did not need to challenge his employer in the way that he did and he ought to have been more receptive to his employer's proposal in the way that all other staff were. It seems plain to the Authority that if Mr Stanyer had not immediately responded so negatively to the proposal and, on his own admission, maintained to Mr Wallace that he could not be made to take leave, then the outcome would have been quite different.

[25] But in the Authority's view, the principal error is Mr Wallace's. He ought not to have acted precipitately, particularly when, in the context of the future sale of the business, any action was absolutely unnecessary. Further, having plainly made a mistake in the telephone discussion on 10 April 2011, as a good and fair employer, Mr Wallace ought to have got Mr Stanyer back into the workplace and sought to put matters right.

Determination

[26] The Authority is satisfied that Mr Stanyer has proved his personal grievance for unjustified dismissal and is entitled to remedies as a consequence. However, the Authority is also satisfied that Mr Stanyer has contributed to the circumstances giving rise to his grievance and in the Authority's view, that contribution amounts to 50%.

[27] That being the case, the Authority directs that GSM Holdings Limited t/a Glover Plumbing, is to pay to Mr Stanyer the following sums:

- (a) Compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of \$2,000;
- (b) Lost wages in the sum of \$7,500 gross;
- (c) The Authority's filing fee in the sum of \$71.56.

[28] The compensatory sum and the contribution to lost wages both reflect the Authority's judgment that Mr Stanyer is half responsible for the personal grievance.

Costs

[29] Costs are reserved.

James Crichton
Member of the Employment Relations Authority