

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012]NZERA Auckland 231
5353986

BETWEEN EARL SUBRITZKY
 Applicant

A N D MULLINS TYRES
 AUCKLAND LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Applicant in person
 Niall Dow, for Respondent

Investigation meeting: 19 June 2012 at Auckland

Date of Determination: 10 July 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Subritzky) alleges that he was unjustifiably dismissed from his employment by the respondent (Mullins Tyres). Mullins Tyres resists that claim.

[2] Mr Subritzky was visited at his home by the owner of Mullins Tyres (Mr Dow) on 15 October 2010 and told that he was redundant effective immediately.

[3] Mr Subritzky had been the manager of the Mullins Tyres truck shop, that is, the branch of Mullins Tyres which was devoted exclusively to the servicing of trucks rather than cars.

[4] The evidence before the Authority supports the conclusion that the truck shop branch made dramatic losses in the 2009 and 2010 trading years, losing nearly \$250,000 over that two year period.

[5] Mr Dow told the Authority that he had met regularly with staff at all of Mullins Tyres' branches in which Mr Dow tried to set out the financial difficulties that the firm was facing and his oral evidence to the Authority together with the notes of those meetings, which Mr Dow made available to the Authority, confirmed that there were "*numerous referrals to the real possibility of staff reductions*" in those meetings.

[6] In addition, Mr Dow's evidence was that he had met individually with Mr Subritzky as well and Mr Dow produced to the Authority the notes of one of those meetings. Mr Subritzky confirmed to the Authority on oath that he remembered having a meeting with Mr Dow but he could not remember when it was.

[7] For the avoidance of doubt, the Authority is satisfied that Mr Dow had a serious financial crisis on his hands, particularly in respect of the truck shop, and that he was advised by his accountants that he had to reduce costs or face the real prospect of the collapse of the whole business. The financial results for the truck shop were far worse than for the other branches of the business because of the effect of the recession on the purchase and servicing of truck tyres. In effect, the Authority was told (and it accepts) that truck movements were down because of the recession and therefore, with less movement, there was less wear and tear on gear and particularly perishable items such as tyres.

[8] The Authority is also satisfied that Mr Dow undertook a process of consultation with his staff, both collectively and individually, and that that process of consultation included a consultation with Mr Subritzky.

[9] Mr Subritzky protests that he was not given an opportunity to come up with different alternatives to the disestablishing of his management position but the Authority does not accept that claim. Mr Subritzky had confirmed to the Authority that he had participated in staff meetings at which the financial situation was discussed and he agreed that he had had one meeting privately with Mr Dow but he was unable to tell the Authority why he did not make use of the opportunities provided to him thereby, to raise alternative possibilities. Certainly Mr Dow made clear that had there been any such proposals raised with him (such as reducing working hours or perhaps working on a contract basis), he would readily have considered them.

[10] In the result, Mr Dow felt the only step he could take to dramatically reduce the business's costs was to remove the single largest staff overhead, namely Mr Subritzky's salary as manager. Mr Subritzky protested that he was not actually the truck shop's manager but the Authority did not accept this. Mr Dow referred to him as the manager and regarded him as having management authority and the Authority preferred Mr Dow's evidence on that point.

[11] There were no other direct redundancies but the business was able to survive, according to the evidence the Authority heard, because a number of other staff across the group had resigned their employment and were not replaced. Further, it was the truck shop that was particularly dragging down the rest of the business and the removal of the significant salary paid to Mr Subritzky would, Mr Dow thought, be enough to assist in reducing cash outgoings sufficiently to ensure the business's long term survival.

[12] It is the case that Mr Dow visited Mr Subritzky at home on 15 October 2010 to advise him that his position had been disestablished. Mr Dow told the Authority that he did that to protect Mr Subritzky's privacy and because there had been a longstanding personal relationship between them. Mr Dow told the Authority that he had attended various family occasions with Mr Subritzky and felt that there was more than simply an employment relationship there.

[13] A personal grievance was raised by letter dated 12 November 2010 and the parties ultimately proceeded to mediation on 28 April 2011. At that mediation, the parties conferred on the Labour Department mediator the power to make a recommendation pursuant to s.149A of the Employment Relations Act 2000 (the Act). The recommendation made by the mediator was not accepted and eventually Mr Subritzky filed his statement of problem in the Authority. While there has been a significant delay between the unsuccessful mediation and the filing of a statement of problem in the Authority, the delay has not been such as to breach the legal rules and the Authority is able to deal with the matter in the usual way.

Issues

[14] The two issues that the Authority needs to consider are as follows:

- (a) Was the redundancy genuine; and

(b) Did Mullins Tyres consult adequately with Mr Subritzky?

Was the redundancy genuine?

[15] The Authority has no hesitation in concluding that the redundancy was a genuine one. The financial losses already described were enormous and the only practical way of dealing with the dramatic reduction in revenues particularly in the truck shop was to reduce labour. The most expensive unit of labour sadly was Mr Subritzky. Further, as the person in charge of the truck shop, he was the least valuable to the business going forward.

[16] Of course, it is not for the Authority to put itself in the place of the employer. It is for the employer to decide, using its own skill and judgment, how its business is to best be structured so as to be able to continue to trade. While the Authority can, and must, review the evidence about the genuineness of the redundancy, it is not for the Authority to determine the particular response made to the situation by the employer.

[17] In the present case, the evidence is as plain as can be that the business was in serious financial difficulty and that the particular part of the business where the money was being lost was in the truck shop and the largest single cost in that area was Mr Subritzky's salary. It follows that the redundancy is, in the Authority's view, a genuine one and the response made by the employer in all the circumstances, hardly controversial.

Was there adequate consultation?

[18] Again, the Authority is satisfied that Mullins Tyres engaged appropriately with all staff in consultation around the difficult trading conditions during 2009 and 2010. In particular, the evidence before the Authority confirms that Mr Subritzky was both part of the wider staff group which was the recipient of various consultative sessions with the employer, but also Mr Subritzky himself was personally spoken to in a one-on-one situation. Even on Mr Subritzky's own evidence, he accepts that there was one face-to-face meeting with Mr Dow. Mr Dow's evidence is that there were a number of meetings with Mr Subritzky and lest the matter be in any doubt, the Authority prefers the evidence of Mr Dow.

Determination

[19] The Authority is not persuaded that Mr Subritzky has any personal grievance. The redundancy was, in the Authority's opinion, a genuine one. The evidence the Authority heard is unequivocal on that score. Second, the evidence is plain that Mr Subritzky received adequate consultation over an extended period while the business was in financial difficulty.

[20] It follows from the foregoing conclusions that Mr Subritzky was in the unfortunate position of occupying a position which became surplus to the employer's requirements but that having regard to all the circumstances, Mullins Tyres fulfilled its obligations to the best of its ability and in accordance with the generally accepted precepts of employment law.

[21] Mr Subritzky also protests that he did not have a written employment agreement. The evidence on this aspect from Mr Dow is that there were various attempts by Mullins Tyres to complete an employment agreement but that Mr Subritzky was as much to blame for the failure to complete the exercise as the employer was.

[22] In any event, nothing turns on the failure to provide an employment agreement. It was not a factor in any of the claims made by Mr Subritzky against Mullins Tyres and, in any event, the Authority has not found those claims made out.

[23] The loss of a valued position by reason of redundancy is always a traumatic event for an employee, particularly a long serving one. Mr Subritzky has the Authority's sympathy. However, the Authority is not persuaded that the process adopted by Mullins Tyres was inconsistent with employment law and not persuaded that the redundancy was not, in itself, absolutely genuine.

[24] Indeed, if the Authority were to comment adversely on the employer's behaviour at all it would be only to remark that the evidence the Authority heard suggested that the employer ought to have acted sooner than it did in making Mr Subritzky's position redundant and it ought to have ignored the personal relationship and dealt with the matter exclusively in the workplace. However, the Authority is not persuaded that those blemishes affect either the genuineness of the redundancy or indeed the clear evidence of adequate consultation. The fact that Mr Subritzky chose not to raise alternatives to redundancy during the many

opportunities he had to do so cannot be a criticism of Mullins Tyres. Those opportunities existed, on the evidence the Authority heard, and Mr Subritzky had the opportunity to raise alternatives had he chosen to do so.

Costs

[25] Costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority