

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 169/10  
5154669

BETWEEN                      STEVE TREE  
   Applicant

AND                                JANSEN LIMITED  
   Respondent

Member of Authority:      Robin Arthur

Representatives:            Shelley Lomas for Applicant  
   Andrew Swan for Respondent

Investigation Meeting:      9 December 2009

Determination:                13 April 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]      Jansen Limited (JL) operates a business retailing sound equipment, lighting and instruments to the entertainment industry. It employed Steve Tree as a sales representative from January 2008 until February 2009.

[2]      On returning to work on 2 February 2009, after a 40-day holiday break, Mr Tree was told his position was to be disestablished.

[3]      Arrangements were made for Mr Tree to serve a two week notice period. During that time Mr Tree was provided with some details about the possibility of continuing to work for JL as an independent contractor working on a commission-only basis. He sent some of the customers he had dealt with an email saying he would continue to be involved with JL on that basis.

[4]      However by 16 February arrangements for work as an independent contractor

were not yet finalised. JL says Mr Tree was notified of a meeting scheduled for 17 February where the details of that arrangement would be confirmed but he did not attend the meeting.

[5] Instead Mr Tree raised a personal grievance on that day through his representative at the time, Dylan Marriott (since deceased). It is that personal grievance application which has now been investigated by the Authority, along with a counterclaim by JL.

[6] Mr Tree's case is that he was unjustifiably dismissed because the redundancy was for ulterior motives rather than a genuine commercial reason, the redundancy decision was made without properly consulting him, and the redundancy was notified and carried out in abrupt and distressing manner without properly addressing the alternative of his continued employment as an independent contractor. He also says JL wrongly withheld a final commission payment from him.

[7] JL did not provide Mr Tree with a written employment agreement although it had indicated it would do so and he had asked for one. He seeks a penalty for that omission along with remedies of lost wages and benefits, compensation for hurt and humiliation and his costs.

[8] JL denies Mr Tree's claims. It asserts pressing business reasons for the redundancy of Mr Tree's position. In the period from May 2008 to August 2009, Mr Tree's position was one of 13 staff positions made redundant or not replaced following resignations.

[9] JL says Mr Tree was aware following a staff meeting on 31 October 2008 of the prospect of redundancy and that on either 2 or 3 February 2009 he had accepted the alternative prospect of continuing to work for JL on a commission-only basis. However JL says Mr Tree then resiled from that agreement. JL says it was entitled to keep a final commission payment owed to Mr Tree because he had received more holiday pay than he was due.

[10] JL also lodged a counterclaim for losses it says resulted from a breach of Mr Tree's duties of good faith, fidelity and confidentiality over attempts to sell an agency

held by JL – for the sale in New Zealand of a brand of cymbals.

[11] JL asserts Mr Tree did not disclose he had a business connection with Murray Cullen, a potential purchaser of the agency whom he introduced to JL, and that Mr Tree also provided Mr Cullen with JL's confidential information about the prospective sale of that agency. JL says Mr Cullen then used that information in a way that resulted in JL being unable to sell the agency to another purchaser. It seeks damages for the loss of the value of that sale, a penalty for breach of good faith obligations and its costs.

[12] Mr Tree denies failing to disclose his business connection with Mr Cullen or that he provided him with confidential information.

### **Issues**

[13] The issues for determination by the Authority are:

- (i) whether the decision to make Mr Tree's position redundant from 16 February 2009 was made for genuine commercial reasons or for an ulterior motive; and
- (ii) whether how the redundancy was decided and carried out was what a fair and reasonable employer would have done in all the circumstances at the time; and
- (iii) if the redundancy of Mr Tree's position or how it was carried out is found to be unjustified, what remedies should be awarded; and
- (iv) whether either party owes the other party any amount relating to payment of holiday pay and commission; and
- (v) whether JL should pay a penalty for not providing Mr Tree with a written employment agreement; and
- (vi) whether Mr Tree breached duties to JL by not disclosing a business connection with Mr Cullen, both at the time of his employment and when he introduced Mr Cullen as a potential purchaser of an agency held by JL?

### **The investigation**

[14] For the purposes of the investigation written witness statements were provided

by Mr Tree, Mr Cullen, JL director Brent Eady, and JL general manager Wayne Singleton. Simon Adams, also a director of JL, gave oral evidence. Each witness attended the investigation meeting and, under oath or affirmation, answered questions from the Authority member and the parties' representatives. The representatives also provided oral closing submissions.

[15] A witness summons had been issued, on Mr Tree's application, for JL's former marketing manager Kim Hughes but she did not attend. I did not pursue that matter as I was satisfied potential information from her was adequately covered by the evidence of Mr Singleton and Mr Tree and I was not satisfied that the summons had been properly served on her. I also did not consider a witness statement from Kerry Adams as the point on which he could have given evidence was adequately dealt with by the evidence of Simon Adams and Mr Tree.

[16] Before preparing this determination I have closely reviewed all the written and oral evidence given and the representatives' closing arguments about that evidence and the relevant legal principles. In accordance with s174 of the Act, I have not needed to set out all evidence and submissions received but only those findings of fact and law necessary to the conclusions expressed on the issues for determination.

### **The legal framework**

[17] JL's decision to disestablish the salaried position held by Mr Tree and how it went about dealing with him over that decision and the consequences of redundancy are justifiable if its actions were what a fair and reasonable employer would have done in all the circumstances at the time of the decision and dealings around it: s103A of the Employment Relations Act 2000 (the Act).

[18] The application of s103A of the Act to the personal grievances involving redundancy was described in this way in *Simpsons Farms Limited v Aberhart*:<sup>1</sup>

*[65] ... The statutory obligations of good faith dealing and, in particular, those under s4(1A)(c) inform the decision under s103A about how the employer acted. A fair and reasonable employer must, if challenged, be able to establish that he or she or it has complied*

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<sup>1</sup> [2006] ERNZ 825.

*with the statutory obligations of good faith dealing in s4 including as to consultation because a fair and reasonable employer will comply with the law.*

...

*[67] ... So long as an employer acts genuinely and not out of ulterior motives, a business decision to make positions or employees redundant is for the employer to make and not for the Authority or the Court, even under s103A.*

[19] On that basis the Authority must be satisfied on two points in the present matter:

- a. was the business decision to make the position redundant made genuinely and not for ulterior motives; and
- b. did JL act in a fair and open way in carrying out that decision – particularly did it consult properly about the proposal to make Mr Tree’s position redundant and otherwise act in a way that was not likely to mislead or deceive him, that is in good faith?

### **Was the redundancy for genuine business reasons or ulterior motives?**

[20] The Authority does not substitute its judgment for that of JL as to whether there are good business reasons for a redundancy. As stated by the Court of Appeal in the *Hale* case:<sup>2</sup>

*An employer is entitled to make his business more efficient, as for example by automation, abandonment of unprofitable activities, reorganisation or other cost saving steps, no matter whether or not the business would otherwise go to the wall. A worker does not have the right to continued employment if the business can be run more efficiently without him. The personal grievance provisions ... should not be treated as derogating from the rights of employers to make management decisions genuinely on such grounds.*

[21] Rather, as held by the Court of Appeal in the *Aoraki* case:<sup>3</sup>

*Where it is decided as a matter of commercial judgement that there are too many employees in the particular area or overall, it is for the employer as a matter of business judgement to decide on the strategy to be adopted in the restructuring exercise and what position or positions should be dispensed with in the implementation of that strategy. ...*

[22] However the integrity of a restructuring scheme, even where motivated by

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<sup>2</sup> *GNH Hale & Sons Ltd v Wellington Caretakers and Cleaners Union* [1990] 2 NZILR 1079

<sup>3</sup> *Aoraki Corporation Ltd v McGavin* [1998] 1 ERNZ 601

genuine operational requirements, may be compromised by its application to particular individuals. Where the selection of an employee for redundancy is “*tainted by some inappropriate motive*” and the redundancy is “*masking another and different reason*”, the employee will have a valid grievance.<sup>4</sup>

[23] The grievant raising an allegation of an engineered dismissal has the burden of convincing the Authority that the theory has substance.

[24] Where the Authority finds “*mixed motives*” – such as genuine business reasons but with underlying personality or performance concerns<sup>5</sup> – the employer bears the burden in justifying the dismissal of persuading the Authority that the redundancy was both genuine and the predominant motive for ending the employment. If the predominant motive was a genuine commercial decision, the dismissal will be justified if carried out in a fair manner. If the predominant motive was for some other illegitimate reason, the dismissal will be unjustified.<sup>6</sup>

[25] In the present case Mr Tree’s argument about the genuineness of JL’s decision has two limbs.

[26] Firstly, he argues JL’s immediate offer to him of a position as an independent contractor on a commission-only basis, canvassing largely the same customer base, shows the work remained and he was not – to use the usual description of redundancy – ‘superfluous’ to JL’s requirements.

[27] Secondly, he alleges its choice of him for redundancy was motivated by ulterior motives. Mr Tree identifies those motives as unwarranted concerns by Mr Adams and Mr Eady about his work ethic and performance and misplaced doubts that he was responsible for the events that led to the cymbals agency sale falling through.

[28] I find neither limb established sufficiently to impugn the genuineness of JL’s business decision to do away with one salaried sales representative role in Auckland.

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<sup>4</sup> *Savage v Unlimited Architecture Ltd* [1999] 2 ERNZ 40, 49-50 (EC)

<sup>5</sup> The example given in *Nelson Aero Club Inc v Palmer* (unreported, EC Wellington, 7 March 2000, WC10A/00, Judge Shaw)

<sup>6</sup> *Forest Park (NZ) Ltd v Adams* [2000] 2 ERNZ 310, 322 (EC)

[29] The reduction of JL staff levels by around one half from May 2008 to August 2009, largely by way of redundancy, demonstrates genuine commercial imperatives which were not peculiar to Mr Tree's position.

[30] The prospect of continuing to work on commission as an independent contractor does not negate the genuineness of the decision to disestablish the salaried sales role Mr Tree held. The two positions were different – one had a base salary of \$42,000 and related employment costs such as annual leave; the other did not. JL was entitled to make the business decision that it could not continue to meet those costs.

[31] Neither has Mr Tree met the evidential requirement to establish the contention of an ulterior motive for JL's decisions. While Mr Adams and Mr Singleton admit they had concerns about Mr Tree's level of commitment to his work for JL – which was never squarely put to him as a performance issue – there is nothing but Mr Tree's speculation to suggest this influenced the decision about the viability of the position.

[32] Similarly, while the accusation about whether he caused the loss of the cymbals agency sale re-surfaced after Mr Tree raised his personal grievance, there is nothing to confirm on the balance of probabilities that this was a factor in Mr Eady's mind at the time of making the decision about the redundancy. By early December 2008 Mr Eady appeared to have accepted an explanation given by Mr Tree about his business connection with Mr Cullen.

[33] However if that assessment of the two alleged ulterior motives were wrong, and JL did have 'mixed motives' in the redundancy decision, I accept the context of the other staff redundancies – both before and after Mr Tree's position was disestablished – confirms that the business needs of JL were its predominant motive.

#### **Was the redundancy fairly carried out?**

[34] The good faith obligations of the Act required JL to be active and constructive, responsive and communicative in consulting Mr Tree about changes to the business and proposals which might impact on him, including redundancy: s4, s4(1A) and s4(4). This included providing access to relevant information and an opportunity to comment of the information before the redundancy decision was made: s4(1A)(c).

[35] A just employer – observing its obligations of confidence, trust and fair dealing and the statutory duty of good faith – will consult on a redundancy proposal and implement any redundancy decision in a fair and sensitive way. Fair treatment may call for counselling, career and financial advice, retraining and related financial support.<sup>7</sup> This requires more than “*going through the motions*” and will not justify a course of conduct carried out in a way that bruises rather than reasonably minimises the impact on the employee.<sup>8</sup>

[36] JL contends Mr Tree was aware of the prospect of redundancy from at least 31 October 2009. Mr Eady says the perilous state of the business was made clear in a staff meeting on that day and on the same day he talked one-to-one to Mr Tree about the prospect of redundancy. He says Mr Tree was not surprised when told of the redundancy on 2 February, readily agreed to a proposed two weeks’ notice, and was happy with the prospect of an alternative role on a commission-only basis.

[37] I accept Mr Tree must have been generally aware that his position on a base salary and commission could not be immune from redundancy. While an email from Mr Eady to all JL staff on 31 October 2008 said that he doubted further staff reductions were viable, he also referred to the “*remaining alternatives*” of wage reductions and “*perhaps contract only sales reps*”.

[38] Mr Eady’s evidence was that he talked directly with Mr Tree on 31 October about the prospect of redundancy – a claim Mr Tree denies. However, even accepting Mr Tree’s evidence on this point, he himself referred to Mr Eady talking at “*every single sales meeting*” on “*every single week*” about the effect of the recession. He was also aware of the prospects for change referred to in the 31 October email.

[39] However that general awareness does not meet the express statutory requirement for consultation with Mr Tree about the prospect of the redundancy of his particular position. The required consultation did not happen. The reason is starkly put in JL’s statement in reply:

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<sup>7</sup> *Aoraki Corporation Ltd v McGavin* [1998] 1 ERNZ 601, at 619 and 631 (CA).

<sup>8</sup> *Coutts Cars Ltd v Baguley* [2001] 1 ERNZ 660, 673 (CA).

*The decision to make Mr Tree's position redundant was taken in his absence as any discussion would not have changed the outcome.*

[40] Instead he was confronted with the news of this decision on the day of return from his holidays. He was understandably shocked by the abrupt delivery of the news. While Mr Eady claims "*negotiations*" followed about how the redundancy would be implemented, the reality was that Mr Tree had a two week notice period imposed on him.

[41] With no other alternative immediately apparent he did agree to consider working under an independent contractor arrangement proposed by Mr Eady and Mr Adams. However there was no final or formal confirmation of that arrangement despite questions Mr Tree asked over the coming days. Mr Eady conceded in his oral evidence that if Mr Tree had spoken separately to him, Mr Singleton or Mr Adams about arrangements for a contractor's role, Mr Tree would have got "*a different story*" from each one and it was important everyone sat down together to agree the details.

[42] There is conflicting evidence from Mr Adams and Mr Tree on whether Mr Tree was told on 9 February that a meeting would be held on 17 February to discuss arrangements for an alternative role. However I consider the conflict over what was or was not said about those arrangements to be irrelevant. Even accepting Mr Adams' account, JL simply failed to hold a meeting before the expiry of the notice period it imposed on Mr Tree. By that time his employment had ended and he reasonably doubted the prospects of fairly concluding arrangements for it to begin again on an alternative basis.

[43] I reject JL's submission that any flaws in its redundancy procedure were "*superseded*" by the offer of a commission-only position as an agreed suitable alternative. While Mr Tree was prepared to act in the hope of confirming arrangements for such a role – by sending an email to that effect to potential customers – he was also entitled to expect those arrangements would be finalised and confirmed before his notice and his employment ended on 16 February. A fair and reasonable employer acting in good faith would, I find, have acted more promptly. JL's failure in that regard compounded the abrupt and bruising nature of its redundancy announcement.

[44] Mr Tree has a personal grievance because of JL's unjustified failure to properly consult him prior to deciding the redundancy of his position and to discuss arrangements for an alternative role before his employment ended.

### **Remedies for unfair redundancy process**

[45] As explained by the Court in *Russell Harris v Charter Trucks Limited*:<sup>9</sup>

*In many cases, an unfair process leading to a dismissal for redundancy will result in an award of compensation for the distress caused by the process but not to remedies for loss of the job. This is because it can properly be said that the redundancy was genuine and that the employee would inevitably have been dismissed for redundancy even if an appropriate process had been followed.*

[46] For that reason Mr Tree's claims for remedies of lost wages and lost benefits – use of a car and a mobile phone – are declined as the genuine reason for the redundancy of his position means he would not have continued to receive those wages and benefits. However he is entitled to compensation for the distress and injury to his feelings caused by how JL made and carried out its decision. This takes account of four elements – the shock on the day of the announcement, the aggravation of that shock by JL's procrastination in confirming details of the potential alternative role, negative comments made about Mr Tree by Mr Adams to other people in the music industry following his dismissal for redundancy, and the ongoing effects on Mr Tree of how he was treated at the end of his employment with JL.

[47] Mr Adams had provided Mr Tree with a letter dated 2 February confirming the redundancy and stating it “*in no way reflects your performance in your job*” and that he would “*gladly re-employ you should circumstances allow*”. However in the days following Mr Tree raising a personal grievance Mr Adams contacted a former employer of Mr Tree in the music industry. In that conversation negative comments were made about Mr Tree's work ethic and were soon relayed to Mr Tree. Mr Adams also referred indirectly to Mr Tree on an internet discussion forum – or ‘blog’ – for guitarists. Mr Adams did not name Mr Tree in his ‘blog’ comment but identified himself as a director of JL and referred to staff having been made redundant and “*the laziest one*” suing JL. Another reader of the blog was readily able to identify that this

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<sup>9</sup> (unreported EC, CC16/07, 11 September 2007, Judge Couch) at [105]

– as Mr Adams accepts he intended – was a reference to Mr Tree, who played in a band called “*The Lazyboyz*”.

[48] There was also, possibly, a third instance involving another potential employer of Mr Tree to whom Mr Adams may also have made negative comments but evidence of it was not confirmed in the Authority’s investigation. The two established instances however are factors which aggravate the hurt and humiliation suffered by Mr Tree in how JL carried out the redundancy of his position.

[49] Mr Tree gave evidence of his upset, at the time of the announcement and subsequently. His general practitioner provided a medical certificate in March 2009 describing Mr Tree as presenting with anxiety symptoms and mild insomnia.

[50] Taking account of the general range of awards in cases of this type, and the particular circumstances of how JL treated Mr Tree, an appropriate award of compensation under s123(1)(c)(i) of the Act is \$8000. In setting the amount at that level I emphasise that such an award is not for the loss of the job itself. It is for the shortcomings of JL in how it made the decision, failing to consult Mr Tree, abrupt notice of the decision, and the subsequent conduct (specifically by Mr Adams) aggravating the distress.

[51] JL submitted any such award should be reduced for contribution by Mr Tree to the situation giving rise to his grievance under s124 of the Act. His blameworthy conduct is said to comprise failing to do more himself to finalise the arrangements for commission-only work for JL. I do not accept that. The obligation to consult and explore alternatives to redundancy lay primarily with JL. Mr Tree had done what he could by repeatedly asking for more information before his employment ended. No reduction of his compensation remedy is required.

### **Commission and holiday pay**

[52] A letter given to Mr Tree dated 2 February 2009 and headed “*redundancy notice*” included a statement that “*final commission will be paid separately when due*”. When Mr Tree inquired in March 2009 when his February commission would be paid, an email reply from Mr Singleton implied it would only be paid if Mr Tree

withdrew his personal grievance claim.

[53] A commission report for February 2009 shows Mr Tree was due commission payments of \$333.82. However JL did not pay him that amount because Mr Tree was paid \$602.74 for holidays taken in excess of his leave entitlement. Deducting the value of the commission due JL contended Mr Tree owed it a 'refund' of \$268.92.

[54] No provision of the Holidays Act 2003 or the Wages Protection Act 1983 entitled JL to withhold or offset commission due to Mr Tree against holiday pay it considered was overpaid. There was no written employment agreement authorising JL to offset commission entitlements against holiday entitlements taken in advance. No such term was agreed at the time of Mr Singleton granting leave taken in advance of entitlement. When Mr Tree asked for the leave he did not know he would shortly be made redundant.

[55] Under s131 of the Act JL is ordered to pay the \$333.82 due to Mr Tree as commission.

#### **Penalty for not providing a written employment agreement**

[56] Mr Singleton's evidence was that arrangements were made with JL's marketing manager at the time to provide a written employment agreement to Mr Tree when he started work for JL. While I accept Mr Singleton was unaware until December 2008 that the responsible manager had failed to do so, JL did not meet its obligation under s63A(2) to provide Mr Tree with a copy of the intended employment agreement. Mr Tree had repeatedly asked about the agreement and was told by his manager that it would be "*sorted*". It was never provided to him.

[57] JL is liable for a penalty for its breach of that obligation. I order JL to pay a penalty of \$500 to the Authority for transfer to the Crown account: s133(2), s135 and s136 of the Act applied.

#### **Is Mr Tree culpable for loss of agency sale?**

[58] I decline JL's application for an order for damages against Mr Tree for its loss

of a sale of an agency said to have resulted from him providing Mr Cullen with confidential information.

[59] The oral evidence of Mr Eady and Mr Cullen established it was Mr Eady and Mr Adams who provided Mr Cullen with all or some of the information which JL later criticised Mr Tree for providing. While JL may have suffered the loss of a chance to sell the agency to another interested party because of how Mr Cullen went about inquiring into the prospect of purchasing an agency, I find JL has failed to establish to the necessary evidential level that the loss was caused by any breaches of duty by Mr Tree.

[60] Neither do I accept JL has established any breach of good faith by Mr Tree in respect of telling his managers of a prior business connection with Mr Cullen. Rather I accept, as more likely than not, that Mr Tree had told the marketing manager who interviewed him for the job with JL but that manager did not communicate all the details to Mr Eady or Mr Singleton.

[61] It is also clear Mr Tree only contacted Mr Cullen about the possibility of buying an agency because he was encouraged by Mr Adams to identify prospective purchasers and arrange for them to talk to JL. Mr Tree did what he was asked to do.

[62] I note too that this was an issue that arose in November 2008 and appeared to have been resolved by early December. By email of 3 December Mr Eady appeared to have accepted an explanation from Mr Tree about the chain of events. The email began with the words: "*OK understood*". It was not identified as a problem again until early March 2009, around three weeks after Mr Tree had raised his personal grievance.

### **Summary of determination**

[63] Mr Tree's dismissal was unjustified because of JL's failure to properly consult him prior to deciding the redundancy of his position and to discuss arrangements for an alternative role before his employment ended.

[64] As a remedy for this personal grievance, JL is ordered to pay Mr Tree \$8000

under s123(1)(c)(i) of the Act as compensation for humiliation, loss of dignity and injury to his feelings.

[65] JL is ordered to pay Mr Tree the commission of \$333.82 wrongfully withheld from him.

[66] JL is ordered to pay a penalty of \$500 to the Crown for failing to provide Mr Tree with an intended employment agreement.

[67] JL's claim for damages is dismissed.

### **Costs**

[68] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so, Mr Tree may lodge and serve a memorandum as to costs within 28 days of the date of this determination. From the date of service JL will have 14 days to lodge a memorandum in reply before the Authority determines costs. No application will be considered outside this timetable without prior leave.

Robin Arthur  
Member of the Employment Relations Authority