

The employment agreement

[3] Mr Talbot had a written employment agreement. Clause 30 of that document contains the following relevant provisions:

30 Redundancy

30.1 In this clause 'redundancy' means a situation where the Employee's employment is liable to be terminated for the following reasons:

- It is no longer economically viable to sustain the position that the Employee is currently employed for
- The position is no longer necessary for the Employer's business to operate

30.2 The Employer will endeavour to place an Employee whose position has become redundant into another position within the Company, provided;

- There is a suitable position available;
- The Employee has the right skill-set and experience to fulfil the role

30.3 The Employer will provide access to counselling services and give Employees reasonable assistance with securing a position with another organisation.

30.4 If the Employee is made redundant they will be paid one month's salary and one week for each year of service. The maximum payable under this clause is three months salary.

30.5 The Employee will be given at least one month's notice of any redundancy;

30.6 Where the Company is sold or transferred the Employer will not pay redundancy compensation to the Employee.

30.7 The Employer will discuss with the Employee, the likelihood of their position becoming redundant as soon as practically possible.

[4] Schedule A to the employment agreement is entitled 'Job Scope'. Mr Talbot's role is summarised as 'Engagement delivery, management and client development'.

[5] The document goes on to describe the key accountabilities and skills for the role as:

- Carry out engagements on behalf of Gemtech Solutions: providing quality assurance, project management, business analysis and consulting services for Gemtech's clients.
- Ensure Gemtech customer service delivery and relationship expectations are being met
- Look for new opportunities with new and existing clients.

...

- Development, implementation and support skills with respect business systems
- Project Management and consulting experience in systems and business change

- *Business Analyst skills*
- *Customer relationship skills*
- *Financial and accounting skills*

Fair Trading Act claim

[6] Mr Talbot says he was induced to enter an employment agreement with Gemtech as a result of assurances made to him during the interview process by Gemtech representatives. This claim is denied by Gemtech. To make out such a claim Mr Talbot must establish Gemtech engaged in conduct which was misleading and deceptive or likely to mislead or deceive – that he was told a term of his employment agreement meant something it did not or was misled as to the nature of his duties¹.

[7] The factual basis for this claim is an assurance given at interview that Gemtech would fund the Auckland office for two years. Gemtech disputes such an assurance was given. If, for the purposes of argument, I accept such a statement was made, I do not accept the later disestablishment of Mr Talbot's position amounts to a breach of such an assurance. I cannot see that such a broad assurance could translate into a specific assurance that Mr Talbot's role would be safe for two years; that may be what Mr Talbot hoped the assurance meant but the evidence is that the matter was not clarified any further. My view is reinforced by the fact this assurance was not recorded in writing between the parties notwithstanding their careful recording of all other terms of employment².

The redundancy process

[8] On 4 October 2007 Mr Talbot received an email from Gerry Hughes, Gemtech's Auckland practice manager, inviting him to a *review meeting*. No detail of the subject of the review was provided prior to the meeting.

[9] At the meeting Mr Hughes advised Mr Talbot a restructuring of the Auckland practice would be conducted and his position might be made redundant as a consequence. Mr Hughes said the reason was the loss of the key client. Mr Talbot

¹ *Sinclair v Webb and McCormick Ltd* (1990) 3 NZELC 97, 405, Barker J

² Refer parties' written employment agreement and position description

says this was the first he had heard of this, which Gemtech disputes. Mr Talbot says Mr Hughes also said there was no opportunity to relocate to Wellington because that business had also been lost. Mr Hughes says he told Mr Talbot there might be an opportunity to move to Wellington if that was an option for Mr Talbot.

[10] Mr Talbot said the news of the restructuring and possible redundancy was a shock. He said he reminded Mr Hughes of Mr Johnson's promise to fund the Auckland office for two years which Mr Hughes confirmed. Mr Hughes disputes this.

[11] The matter was next raised with Mr Talbot the following week when he was handed a letter dated 5 October, on 8 October, asking him to a meeting either later that day or the following day. The letter summarises the discussion of 4 October.

[12] Mr Talbot said this was a difficult day. He had sat beside Mr Hughes on a flight to Wellington that morning and there had been no dialogue between them about the pending restructuring. He had seen the directors of the business during the course of the day and again there had been no discussion about the pending redundancy.

[13] At 2pm that day Mr Talbot was invited to a meeting with Mr Hughes and Jo Jones, the Wellington practise manager. The meeting went ahead then and there. Mr Talbot said he felt pressured to attend the meeting because he was in Wellington that day and Ms Jones was based there. He also said he agreed to go ahead with the meeting because, based on the 8 October letter, he understood he would receive more information about the proposal. Though he was asked, Mr Talbot declined to have a representative present because he said there was no time to organise one.

[14] Mr Talbot said his request for the strategy and business case for the restructure was denied because, he was told by Mr Hughes, it was in draft form and had not yet been signed off by the directors. Mr Talbot said he never declined to give feedback and asked Mr Hughes how he could when he had not yet seen the restructuring strategy document. Mr Talbot said he had not received any feedback on market development in the past six months. He said he was in touch with the market and that it is feasible he could have influenced Gemtech's thinking about the restructuring if he had been given a fair opportunity to do so.

[15] Mr Hughes told Mr Talbot the restructuring was a response to the loss of the key account. Mr Talbot said he reminded Mr Hughes of the 2-year undertaking he had received in relation to the Auckland office. Mr Talbot repeated an earlier expressed concern that his physical isolation within the Auckland office meant he did not hear everything that was going on. For example Mr Talbot says Mr Hughes did not communicate with him about revenue generating activities.

[16] Mr Hughes asked Mr Talbot if moving to Wellington was an option. Mr Talbot referred to their 4 October discussion and the letter of the same date which stated Wellington was not an option. Mr Hughes then said no position existed in the Wellington office.

[17] Mr Hughes then confirmed Mr Talbot's redundancy.

[18] Mr Talbot denies Gemtech's claim that he agreed there was insufficient work for a senior consultant in Auckland. Mr Talbot also denies this claim in substance; he contends there was sufficient work for a senior consultant, and denies this issue being raised with him.

[19] The following day Mr Talbot received a meeting invitation by email. The meeting was to be held that day. Mr Talbot attended as requested and was given a letter of that date. Mr Hughes summarised the letter at Mr Talbot's request.

[20] For the next fortnight Mr Talbot continued to work on the key client.

[21] Mr Talbot met with Mr Hughes on 15 October and gave him a letter dated 12 October. This letter raises a number of concerns about the process to date. The content of the letter was not discussed.

[22] The following day Mr Talbot asked Mr Hughes when he would receive a response. Mr Hughes said a response had been drafted which required the directors' approval. The response was provided the following day.

[23] Mr Hughes and Mr Talbot met later that day. Mr Talbot confirmed he had received the letter and advised he had engaged a lawyer who was drafting a letter to Gemtech.

[24] In the mean time a new senior consultant had commenced employment with the Wellington office. This was announced staff on 19 October.

[25] From 23 October Mr Talbot asked to work from home for the remainder of his notice period. A week later Gemtech offered payment in lieu for the balance of the notice period. Mr Talbot accepted this offer and sent an email message to his colleagues advising his departure that same day. He also wrote to Mr Hughes refuting the claim he (Mr Talbot) had accepted the loss of the key account meant insufficient work for the senior consultant in Auckland.

[26] I record Gemtech has complied with its obligations to provide Mr Talbot with reasonable assistance post redundancy per clause 30.3 of the employment agreement.

Was Mr Talbot's dismissal unjustified?

[27] Parties to employment relationships are obliged to deal with each other in good faith³. The obligation of good faith requires parties to conduct themselves in a manner which actively and constructively establishes and maintains a productive employment relationship⁴ and extends to proposals which may impact on an employee's employment⁵ including redundancy⁶.

[28] A dismissal is justified if the employer's actions can be objectively judged fair and reasonable in all the circumstances at the time⁷. In applying this test to a dismissal for redundancy the Authority considers two factors – the genuineness of the redundancy and the process followed.

³ Section 4(1)(a) Employment Relations Act 2000

⁴ Section 4(1A)(b) Employment Relations Act 2000

⁵ Section 4(4)(d) Employment Relations Act 2000

⁶ Section 4(4)(e) Employment Relations Act 2000

⁷ Section 103A Employment Relations Act 2000

(i) genuineness

[29] In this case the issue of genuineness turns on an analysis of the quality of Gemtech's communications with Mr Talbot about the proposal to make his role redundant and what Gemtech was able to demonstrate to the Authority in support of the proposal which it ultimately implemented. It is in this way that Gemtech can establish it had a genuine basis for making Mr Talbot's position redundant.

[30] Gemtech's sole response to this inquiry is the loss of the key client. I accept this was a significant event which required an examination of Gemtech's Auckland business. What I am unable to accept is that the inevitable outcome was Mr Talbot's dismissal for redundancy.

[31] I am unable to accept this because Gemtech has failed to fill the gap between the loss of the key client and its decision to make Mr Talbot redundant. Gemtech declined Mr Talbot's request for further information⁸ and failed to provide any information to the Authority to support the position it adopted in relation to the position Mr Talbot held. In response to the Authority's inquiries as to the provision of relevant information in the consultation phase Gemtech's witnesses responded that the material was either before the directors for sign off at the time, and therefore not available, or readily available to Mr Talbot on the business' database. I take from this response firstly, that Gemtech had not settled a business plan in relation to the impact of the loss of the key client on the Auckland business at the time Mr Talbot was made redundant and secondly, that Mr Talbot was himself capable of researching the basis of the proposal to make his role redundant and formulate a response in the consultation phase.

[32] I accept Mr Ropati's submission that consultation requires both parties to participate proactively. Employee's cannot refuse to engage in a consultation process where reasonable information has been provided and then protest that the process was unfair. However, that is not the case in this matter. The evidence clearly establishes that Mr Talbot asked for the basis for the redundancy proposal, that request was declined and he was made redundant.

⁸ Undisputed evidence meeting 8 October

[33] It was unreasonable to decline to provide further information to allow Mr Talbot to comment on the proposal:

- (i) if the business plan had not yet been signed off by the directors why would steps be taking to implement it without input from the affected employee? and
- (i) putting aside whether or not Mr Talbot had access to the material on the database, which is disputed, it was not Mr Talbot's responsibility to ferret out the basis for Gemtech's proposal to make his position redundant.

[34] It was unreasonable to declare Mr Talbot redundant when he had not had a fair opportunity to comment on the proposal. The failure to provide any cogent basis for the redundancy decision at the material time or before the Authority undermines Gemtech's claim that this was a genuine redundancy and provides the Authority with no reasonable basis to find the redundancy was motivated by genuine business need.

[35] I do not accept Gemtech's repeated assertion that Mr Talbot readily accepted the inevitability of his redundancy and his communications concerned wrangling over compensatory sums. This is not borne out by the written evidence or evidence received by the Authority.

(ii) process

[36] The weakest element of this redundancy concerns the consultation process over the proposal to disestablish Mr Talbot's position. This weakness dovetails into the issues concerning genuineness discussed above. Additional weaknesses concern the apparent undue speed with which Mr Talbot's redundancy was implemented (unsupported in the context). This undue speed has led, on my view of the evidence, to the mangled communications between Mr Hughes and Mr Talbot around a possible relocation to Wellington and the perfunctory manner in which the redundancy meetings were convened. These issues impact on the fairness of the process and have left Gemtech vulnerable to allegations that the process was flawed.

Remedies

[37] Mr Talbot has established he has a personal grievance. He is now entitled to a consideration of the remedies he seeks.

(i) lost wages

[38] I have found the grounds for Mr Talbot's dismissal for redundancy were not genuine. It is appropriate to consider Mr Talbot's claim for lost wages flowing from his unjustified dismissal.

[39] Mr Talbot received his final pay from Gemtech on 1 November. He was paid the balance of his notice period plus one month's compensatory payment. It is appropriate that that payment be taken into consideration in the assessment of his loss. I set the period of claim as 10 December 2007 to 31 January 2008.

[40] **Gemtech Limited is ordered to reimburse Bruce Talbot lost wages from 10 December 2007 until 31 January 2008 pursuant to section 123(1)(b) of the Act.**

[41] There is no basis for the holiday pay entitlement claim given the Fair Trading Act claim did not succeed.

[42] I decline to order interest on the reimbursed lost wages.

(ii) hurt and humiliation

[43] Mr Talbot seeks a compensatory sum of \$15,000 to address the humiliation, loss of dignity and injury to feelings he experienced consequent to his dismissal. In support of this claim Mr Talbot says he was hurt and humiliated by the manner in which Gemtech treated him:

- Gemtech did not formally farewell or acknowledge his departure to other staff;
- he felt misled into agreeing to take the position with Gemtech and now feels distrustful towards employers;

- the directors of Gemtech did not speak with him during or after the redundancy process the opposite of their conduct towards him prior to the commencement of the redundancy process;
- he felt the redundancy process was contrived and gave as an example the contradictory messages he received from Mr Hughes about redeployment to Wellington;
- he said the proximity to Christmas at the time of his redundancy caused considerable stress to his family;
- the short duration of his employment with Gemtech has adversely impacted on his CV and his confidence applying for positions,
- his doctor advises a cause of his arthritis flare up in mid October was stress consequent to his dismissal; and
- it was humiliating to hear of the appointment of a senior consultant in Wellington and that Gemtech has continued to perform work for the key client, the loss of which was the apparent basis for his redundancy.

[44] I accept Mr Talbot has been detrimentally affected by his dismissal. He expected, and was entitled, to receive fair and reasonable treatment during the redundancy process. I have found he did not. I also accept that Mr Talbot feels acutely that the short term of his employment with Gemtech has had a negative impact on his career and future prospects and that these concerns are a direct consequence of his dismissal.

[45] **Gemtech Limited is ordered to pay Bruce Talbot the compensatory sum of \$6000 pursuant to section 123(1)(c)(i) of the Act.**

(iii) contribution

[46] Mr Talbot was made redundant from his role with Gemtech. He did not contribute to the circumstances which resulted in this personal grievance. There will be no reduction of remedies pursuant to section 124 of the Act.

Costs

[47] Costs are reserved. The parties are invited to attempt to resolve this issue themselves. If they are unable to then Mr Poole should file and serve a memorandum as to costs within 14 days of the date of determination and Mr Ropati may file any reply within a further 14 days.

Marija Urlich

Member of the Employment Relations Authority