

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 215
5403298

BETWEEN BRIAN RICHARD TAYLOR
 Applicant

A N D AEROMOTIVE LIMITED
 Respondent

Member of Authority: K J Anderson

Representatives: Brian Taylor, In person
 Gordon Luke, Advocate for Respondent

Investigation Meeting: 10 April 2013 at Hamilton

Date of Determination: 27 May 2013

DETERMINATION OF THE AUTHORITY

Introduction

[1] The applicant, Mr Brian Taylor, claims that he was unjustifiably dismissed on 25 November 2009. Mr Taylor asks the Authority to find that he has a personal grievance and award him various remedies. Aeromotive Limited (“Aeromotive”) denies that Mr Taylor was unjustifiably dismissed and says that the dismissal was justified due to the existence of a genuine redundancy situation, and it was also procedurally correct.

[2] While the termination of Mr Taylor’s employment was effective from late 2009, a statement of problem for this matter was not received by the Authority until 23 November 2012. It has not been clearly explained by Mr Taylor why it has taken so long for him to progress this matter. Nonetheless, it is established that a personal grievance alleging unjustified dismissal was raised on his behalf on or about 4 December 2009; and the parties have attended mediation in an (unsuccessful) attempt to resolve the dispute.

Factual Background

[3] Aeromotive Limited is a subsidiary company of the Oceania Aviation Group (“the Group”). The latter is based at Ardmore Airport, Auckland; the former is located in Hamilton.

[4] In February 2009, the Group implemented the MORE (Maintenance, Overhead and Repair Excellence) programme. The evidence of Mr Gordon Luke, the Chief Executive Officer of the Group, is that the programme was rolled out across the organisation. The plan was to improve the Group’s processes and procedures in addition to investigating and improving the use of resources.

[5] As part of implementing a sustainable process for the leadership and management of the changes associated with the MORE programme, a “Strategic Leadership Team/Steering Group” (“the team”) was established. As the Chief Financial Officer (“CFO”) for Aeromotive, Mr Taylor was part of the team which appears to have been established in late 2008. Hence he seems to have been actively involved in the process of change that was subsequently implemented, and its effects.

[6] While the evidence is somewhat unclear, the circumstances were such that in addition to his role as CFO, Mr Taylor carried out the role of Chief Operating Officer (“COO”). Due to the change in the operating systems, it appears that this created some stress for Mr Taylor and on 5 October 2009, he presented Mr Luke with a doctor’s certificate. This informed that Mr Taylor was medically unfit as of that date but should be fit to resume work again on 19 October 2009. The evidence of Mr Luke is that he told Mr Taylor that he should go on sick leave as he had been under some pressure with his work and personal life. However, and rather oddly, given the doctor’s certificate, Mr Taylor chose not go on leave until 12 October through to 23 October 2009 (inclusive). But according to the “Application for Leave” document produced to the Authority, rather than taking sick leave, Mr Taylor took annual leave.

[7] Prior to going on leave, Mr Taylor and Mr Luke met on 8 October 2009, ostensibly for the purpose of defining more clearly Mr Taylor’s roles as CFO/CCO, but the evidence about the outcome of this meeting is inconclusive.

Further leave taken by Mr Taylor

[8] On 6 November 2009, Mr Taylor requested further leave, apparently to take effect from 9 November 2009. However, due to some work issues that demanded his immediate attention, Mr Taylor was asked by Mr Luke to postpone the leave until Monday, 10 November 2009, which he did; returning to work on Monday 16 November 2009. Mr Taylor says that he did not return to work until 24 November 2009 but on the basis of the “Application for Leave” record that has been produced to the Authority; it seems that he may be mistaken about this.

Staff review

[9] The relevance of the timing of Mr Taylor’s leave is that on 18 November 2009, Mr Luke called a meeting of the administrative staff to advise them that a review of all administration positions within the Group was being undertaken in order to align systems and processes, now that all of the Group was using the same maintenance and accounting software packages.

[10] The evidence of Mr Taylor is rather confusing in that firstly, he says that he was on stress/sick leave from 17-20 November 2009 (inclusive). But Mr Taylor also says that he returned to work on Monday, 24 November 2009¹ and hence did not attend the meeting on 18 November. But the minutes of the meeting held on 18 November 2009 record that Mr Taylor was present. Also recorded is:

Over the next week the plan is to review all administration tasks and establish the appropriate company structure for Aeromotive Limited. It was advised that this review could lead to a reduction in staff resources.

[11] The minute also records that Ms Tracey Bell, the Group Financial Officer, would liaise with the Aeromotive administration staff with the intention that each person would complete a “consolidated list of tasks” or in other words, a list of the work that they carry out, by Friday 20 November 2009. The evidence of Ms Bell is that Mr Taylor was not required to complete such a list as he had already worked with Mr Luke on such beforehand. A monthly duty sheet for Mr Taylor for the position of CFO was signed off by him on 13 October 2009.

¹ But 24 November 2009 was a Tuesday.

Potential redundancy – 25 November 2009

[12] On 25 November 2009, Mr Taylor became aware of and duly attended a meeting of Aeromotive administration staff that was addressed by Mr Luke. The evidence of Mr Taylor is that other people seemed surprised to see him there but he was not required to leave and so he stayed on. Mr Taylor says that it “*became apparent*” that there had been another meeting the week before (18 November) but it seems probable that Mr Taylor attended that meeting; as previously indicated. In regard to the meeting on 25 November 2009, Mr Taylor says that Mr Luke informed those in attendance that there would be staff redundancies as a result of the full implementation of the new software packages that had been introduced throughout the Group.

[13] At 1:30p.m. on 25 November 2009, Mr Taylor met with Ms Bell and Mr Luke. There is some conflict in the evidence about the context of the meeting. Mr Taylor says that he was: “... *told by Mr Luke that the roles of Chief Financial Officer and Chief Operations Officer had been made redundant*”. Mr Taylor attests that he asked Mr Luke for confirmation of this in writing and he was informed that this would be available at a meeting proposed for the following morning “*at about 9.30am*”. Mr Taylor says that he left the meeting, cleared some items from his desk and placed them in his briefcase and then went to see his lawyers; whom he had, apparently, previously consulted.

[14] The evidence of Mr Luke is that he advised Mr Taylor that the position of CFO/COO “... *may not be required in the future and that if so, the position could possibly be made redundant. I asked Brian to think over the afternoon and that night, of anything we needed to consider or options we could discuss before any final decisions were made.*” Mr Luke attests that it was agreed that Mr Taylor would consider the points of the discussion and meet with him and Ms Bell again the following day, for the purpose of considering any “other points” that Mr Taylor wished to have considered. Mr Luke says that the meeting finished at 1:45p.m. and Mr Taylor went back to his office, closed the door for a couple of minutes and then left the premises without a word to anyone.

[15] The evidence of Ms Bell is similar to that of Mr Luke. She says that Mr Luke explained to Mr Taylor that it appeared that the role of Aeromotive CFO/COO was no longer required, as it was believed that efficiencies could be gained across the Group

by centralising the finances. Ms Bell attests that Mr Luke explained that: "... *if it was decided to centralise, the Aeromotive CFO/COO position could possibly be made redundant*". Ms Bell confirms that a request was made for Mr Taylor to meet again the next morning and it was agreed that this would be at 8:30a.m.

[16] A document was prepared by Ms Bell following the meeting on 25 November 2009. It purports to be *Minutes of the Administration Review Meeting* but really it is a very brief (three sentences) record of what was discussed at the meeting. Nonetheless, and apart from the mixed context, it can be seen as a contemporaneous written record and is reproduced below:

After reviewing all administration tasks at a group level, it has become evident that the CFO/COO position has diminished to the point where this position may become redundant under the new company structure.

However, we would like to give you some time to review the position and come back to us tomorrow with any further considerations that you may feel are relevant or other options that we may not have considered.

Brian Taylor and Gordon Luke agreed to meet again tomorrow at 8.30am to discuss the situation further and consider any options put forward for the CFO/COO position.

[17] It is also recorded that the meeting began at 1.30pm and finished at 1.45pm and:

Next Meeting: Thursday 26 November 2009 (8.30am)

[18] To summarise, in regard to the conflict in the evidence regarding the context of the meeting on 25 November 2009, I find the evidence of Mr Luke and Ms Bell to be more probable. That is, Mr Taylor was notified that the redundancy of his roles with Aeromotive was likely, that he should give some thought to that possibility, and be prepared to discuss his views at a meeting the next day.

The absence of Mr Taylor

[19] While it was expected that Mr Taylor would meet again with Mr Luke and Ms Bell at 8:30a.m. on 26 November 2009, this did not occur. The evidence of Mr Taylor is that when he met with his lawyers on the afternoon of 25 November, he

says he was advised not to meet again with Mr Luke and Ms Bell until he had received written confirmation from Mr Luke about his “redundancy”.

[20] Mr Luke was expecting to meet with Mr Taylor again at 8:30a.m. but instead he received an email from him at 8:28a.m:

Good morning Gordon,

I'd appreciate it if you would commit to paper what transpired at yesterday's meeting with yourself, myself, and Tracey Bell. Please either scan the letter and send it to me by email or leave it at reception for me to collect.

Furthermore, please ensure that all monies due to me are credited to my account overnight tonight and a breakdown of this also to be scanned and emailed to me.

Yours sincerely
Brian Taylor

[21] Mr Luke responded promptly informing that:

The purpose of yesterday's meeting was to outline our views on the administration review at Aeromotive, and the potential impact of this on the CFO/COO position at Aeromotive. The next step in this process was for you to consider what has been discussed and come back to us with any additional comments or views that we need to consider prior to making any final decision. You are still currently employed by Aeromotive Limited and I am dismayed that you left early yesterday with no notice to myself. I also expected you to be at work this morning and to meet as we agreed at 8.30am. Can I take it from your email below that you do not have any further comments or views around yesterday's discussion that we need to consider prior to making any final decision. Can you please advise if you intend returning to work or not and do you still wish to meet with me as agreed?

[22] On Friday 27 November 2009, Mr Luke sent another email to Mr Taylor:

Can you please respond to my email below. If I do not hear back from you by Monday morning, 30th Nov, I will have no choice but to assume you have nothing further you want to have us consider and we will move forward to make our final decision regards the CFO/COO position at Aeromotive Limited. At this point your current absenteeism will be treated as annual leave.

[23] There was no response received from Mr Taylor and on Monday 30 November 2009, Mr Luke sent a further email to Mr Taylor:

I would hope to have had some response from you today. If not we will continue with our process on the basis that you do not wish to comment further and have no intention of returning to work.

[24] Unfortunately, and without any explanation, Mr Taylor chose not to respond to any of Mr Luke's email messages and on Tuesday, 1 December 2009, Mr Luke emailed again:

As I have still not received any communication from you regards the meetings and emails outlined below, we have moved forward with our final review and decision regards the CFO/COO position at Aeromotive. Please find letter attached outlining our decision. I have sent the original by post today. Can you please advise when you would be able to return company property in your possession? We can then discuss how we handle your notice period and arrange payments due to you. As you have not been at work since early afternoon on 25 October we continue to treat this absenteeism as annual leave.

[25] The letter referred to in the email is also dated 1 December 2009. The germane content is:

Having reviewed all the job tasks and suggestions put forward from all staff who attended the meeting on the 18th November and matching them against current resources, it has become evident to us that the CFO/COO position within Aeromotive has diminished to the point where we felt that this position was unlikely to be required in the structure going forward. This was discussed with you at our meeting on 25th November with the opportunity for you to come back to us with any further comments/ideas we needed to consider. As you did not show up to the meet [sic] on 26th November as we both agreed, we must assume that you have no further comments you wish us to consider prior to us making our final decision. I have sent several emails (since your email sent on the 26th November) requesting your comments with no response from you at all.

We have now fully considered all the points/views made by everyone during the administration review process.

To that end it is with regret that I have to inform you that your position of CFO/COO Aeromotive Limited will become redundant.

This letter serves as formal notice under your employment agreement that your position will become redundant as at 1st December 2009. Under your employment agreement we are required to give you one month's notice of redundancy and as such your employment with Aeromotive Limited will cease on 31st December 2009. Your current absenteeism is being treated as annual leave.

[26] Mr Taylor was also informed that Mr Luke was happy to discuss with him how Mr Taylor would like to handle his notice period and it was suggested that it may be helpful for payment to be made in lieu of notice; enabling Mr Taylor to pursue other employment opportunities over the December period. Finally, Mr Luke indicated that he was happy to provide a reference, either written or verbal. Mr Taylor was invited to discuss further any aspect of the letter if he wished to do so. A response was received from Mr Taylor via his lawyers on 1 December 2009, raising a personal grievance on his behalf. The nature of the grievance was that of unjustified disadvantage. However, on 4 December 2009, a further grievance was raised on behalf of Mr Taylor, alleging that the process of the redundancy was substantively and procedurally unjustified. The letter then went on to request that the absences of Mr Taylor should be treated as sick leave and reference is made to a medical certificate dated 27 November 2009 which placed Mr Taylor on sick leave until 11 December 2009. A response to the raising of this grievance was made by a lawyer acting for Aeromotive and among other things, Mr Taylor was invited to return to work, when and if health allowed, to work out his notice period. But of course, given the content of the grievance letter of 4 December 2009, there was never going to be any possibility of this happening.

Analysis and conclusions

[27] Mr Taylor does not appear to challenge the genuineness of the redundancy of his position. Indeed, he acknowledges the logic of the changes that occurred. Rather Mr Taylor challenges the procedure that was adopted. But there are two significant problems with Mr Taylor's position. Firstly, there is a failure on his part to provide any substantive evidence or argument about why the process adopted by the employer was flawed. Secondly, and most significantly (and regrettably), Mr Taylor disengaged from the consultation process on 25 November 2009. It appears that it was his perception that he had been told then that his employment was finished. But that perception was incorrect as revealed by the evidence available to the Authority. But even then, Mr Taylor had the opportunity to re-engage with his employer and discuss the situation and have some input into it. But despite the urgings of Mr Luke that Mr Taylor make contact and indicate his views on the proposed loss of his position, Mr Taylor chose not to respond or engage at all; and he has given no tangible reason to his employer, or the Authority, as to why. And in the absence of any engagement, Mr Taylor's employer concluded that he did not wish to have any input into the

consultation process that had clearly just begun, and in due course Mr Taylor's employment was terminated on the ground of a genuine redundancy.

[28] Mr Taylor never gave any real reason for his decision not to partake in the consultation process relating to the disestablishment of his position(s), apart from his (mistaken) belief that his employment had been terminated on 25 November 2009. Regrettably, it seems probable that Mr Taylor was not functioning as coherently as he might have, due to the personal circumstances that had befallen him at the time, particularly the health of his wife whom he had the responsibility of caring for. Nonetheless, Mr Taylor had obtained legal assistance and ostensibly, he acted upon the advice received and presumably, gave his instructions accordingly.

[29] It seems to me that if Mr Taylor had chosen to engage with his employer from 25 November 2009, a process may have occurred whereby possible alternative options could have been explored and failing such, at least Mr Taylor could have exited his employment with appropriate dignity. However, Aeromotive cannot be held responsible for the unfortunate refusal of Mr Taylor to engage in appropriate discussions.

[30] Therefore, I am left to conclude that the loss of Mr Taylor's employment was the result of a business decision that the employer was entitled to make in the circumstances. It follows that I find that the dismissal of Mr Taylor on the grounds of redundancy was what a fair and reasonable employer would² do in the circumstances and his claims to the contrary are unsuccessful.

Costs

[31] As the respondent was represented by Mr Luke as the Chief Executive Officer of the Group, the consideration of costs is not required.

K J Anderson
Member of the Employment Relations Authority

² Section 103A as it was then.