

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 9A/10
5288502

BETWEEN GERT VISSER
 Applicant

 AND WAIOTAHU CONTRACTORS
 LIMITED
 Respondent

Member of Authority: R A Monaghan

Representatives: S Austin, advocate for applicant
 K Stretton, advocate for respondent

Investigation meeting 19 February 2010

Submissions received: 22 February and 4 March 2010 from applicant
 1 March 2010 from respondent

Determination: 19 March 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Waiotahi Contractors Limited (WCL) employed Gert Visser as a project manager in its civil engineering business. It terminated his employment by reason of redundancy in November 2009.

[2] Mr Visser says he was dismissed unjustifiably and seeks reinstatement.

Background

[3] Mr Visser's position was created at the end of 2008. It was intended to incorporate some of the activities then being carried out by WCL's directors, and assist with what was expected to be a growing workload. This, together with the

general economic and trading conditions facing the company in 2009 in particular, was addressed in the Authority's determination of Mr Visser's application for an order for interim reinstatement.¹

[4] These matters were discussed in more detail during the investigation meeting in the substantive matter, and additional documentary information was provided. As a result I accept statements of the managing director, Richard Claydon, that in early-mid 2009 the company needed to and did consider ways of protecting its position in the light of existing and anticipated adverse trading conditions. Of particular concern was a trend towards lower profits coupled with relatively higher overheads and increased competition for available work.

[5] Although it was also apparent that the company faced a seasonal downturn in winter every year, this was not in itself sufficient to base a conclusion that the company was facing normal trading conditions and had no genuine reason to move to protect its position. Mr Visser's argument to contrary effect, and associated disagreement with Mr Claydon's account of the general economic and trading conditions facing WCL at the time, were not well-founded.

[6] While I confirm the conclusions reached on a preliminary basis in the above respects, the more detailed evidence produced for the substantive investigation placed a focus on the following issues:

- a. whether the redundancy was imposed for genuine reasons, or whether Mr Visser was 'targeted'; and
- b. whether, with particular reference to the adequacy of the consultation process, a fair procedure was followed in implementing it.

The genuineness of the redundancy

[7] As mentioned, I accept Mr Claydon's account of the economic and trading circumstances facing WCL at the relevant time, but matters do not end there with

¹ **Visser v Waiotahi Contractors Limited**, AA9/10, 14 January 2010

reference to the genuineness of the redundancy. Evidence produced during the substantive investigation cast a different light on Mr Claydon's account of how and why WCL reacted to those circumstances.

[8] By memorandum dated 6 November 2009, and circulated to the board and WCL's CEO, another of the WCL directors, Robbie Petersen, said:

"I have real concern about the direction this company is heading towards. At the last three board meetings Stephen has supplied us with his reports which are self explanatory and stressing his concern about the continual slide in the company's profitability.

Some managers who have control over the allotted contracts have no real ideas whether they are making a profit or a loss, and after seeing some of the photographs I was shown and the amount of re-work this company is currently involved in I shake my head in horror. This is not acceptable. Richard and I have worked too hard and too long over many years to have this sort of rubbish cropping up within the company.

I would like Denise to give us a report and to give us her input as to where she thinks the company trend is going.

I believe we must act now and at the next board meeting on the 11th November 2009 I will move that a full company restructure be put on the table to be discussed and worked through to its ultimate conclusion and to the satisfaction of the Board of Directors."

[9] On the face of this document the concerns about sliding profitability and the need to address it are unremarkable in themselves in the context of the economic and trading background, but the comments on performance indicate that this was the focus of the strategy to halt the slide.

[10] The minutes of the 11 November board meeting were provided at the investigation meeting. Profitability was a theme in the agenda items in general, and in that context adverse comments were made about the performance of Mr Visser and others. When discussion turned to the proposed restructure, Mr Petersen opened by saying he had made the proposal because he believed the company was 'meandering'. In particular he expressed concern about no, or inadequate, planning and management of jobs and reporting-back afterwards. Although Mr Visser was not the only target of

these comments, there was something of a consensus among the directors that his management and oversight skills were lacking. Overall, in their linking of performance and profitability, there is a consistency in the tone of the discussion at the board meeting and the tone of Mr Petersen's memorandum.

[11] The minutes did not record the presentation of any specific restructuring proposal or alternatives, and there was no evidence of any report obtained from 'Denise'. The minutes recorded only blanket references to restructuring. Since the minutes were lengthy and unusually detailed - a characteristic of all of the minutes produced - I consider it unlikely this was the result of an omission. The 11 November minutes went on to record that after Mr Petersen's opening comment the discussion turned to performance concerns about the CEO, Kenrick Knowlson. There followed a note simply that: "There was further talk about proposed restructuring", which in its context I read as a reference to a proposed termination of Mr Knowlson's employment.

[12] After the lunch break the same day a 'proposed restructuring resolution' was tabled, with the proposal being that the position of CEO be disestablished. The reason was said to be that the directors were concerned with WCL's deteriorating financial performance and mindful of the need to improve its competitive position. Overhead cost was said to have been highlighted as a major area of concern. However there was no other record of a discussion of that kind as it related to the disestablishment of employees' positions.

[13] Further, in his affidavit filed in respect of the interim application, Mr Claydon referred to tabling at the 11 November meeting a suggestion that the directors give consideration to the future viability of the project manager's role. There was no record in the minutes of any such tabling, or of any discussion about the need for a project manager. I found Mr Claydon's putting the omission down to Mr Knowlson's note-taking to be unconvincing, particularly as minute-taker Mr Knowlson had even recorded the discussion relevant to his own position.

[14] Similarly, I found unconvincing Mr Claydon's lack of recollection of the detail of the 'further talk about proposed restructuring' noted in the minutes. The discussion was significant, the CEO and Mr Visser had their employment terminated

within days of it, and Mr Visser's termination was in turn challenged almost immediately by the raising of a personal grievance. In such circumstances it is unlikely that Mr Claydon would be unable to recall the discussion.

[15] No resolution was passed in respect of the project manager's position at the 11 November meeting. Further to what he called the directors' decision to proceed with a restructuring, Mr Claydon said three of the 5 directors were together on 16 November. He had a 'quick word' with Mr Petersen and the third director, Graham Mills. There was a consensus that unless Mr Visser could come up with 'some ideas' his employment could not continue. This was the only evidence bearing on the directors having considered any response of Mr Visser's to the proposed restructuring and the disestablishment of his position, and the directors' decision to proceed.

[16] I have set these matters out in some detail because, to the extent that there is a paper trail in respect of the restructuring, the trail is vague about the proposal other than in respect of the performance concerns. Moreover, it is silent on the project manager's position.

[17] I now turn to the performance concerns involving Mr Visser. In a letter dated 29 July 2009, which he said was presented to him in October 2009, Mr Visser received a first and final written warning over his performance in a number of matters arising during a bund raising contract at 'The Hub' and detailed in the letter. There had been several discussions about problems on the site in June and July 2009, culminating in a meeting on 29 July. Mr Claydon had conducted the discussions and the meeting, and was the author of the letter. Mr Visser alleged that Mr Claydon blamed him unfairly for the problems.

[18] Mr Claydon denied the warning had any bearing on the decision to disestablish Mr Visser's position. I regard the warning as evidence of dissatisfaction with Mr Visser's performance and take it into account in that context.

[19] Mr Visser said that after he received the warning he continued to manage successfully a range of projects, until Mr Claydon raised the prospect of redundancy on 13 November. However, he also said Mr Claydon blamed him unfairly for a

difficulty on another site at Edgecumbe, which had occurred in the interim. Mr Claydon accepted in evidence that matters such as the difficulty at Edgecumbe highlighted his concerns about Mr Visser's performance.

[20] Finally, the minutes of the meeting of 11 November suggest the board did not share Mr Visser's view of the success of his management. In discussion under the 'general business' agenda item, Mr Visser was the subject of adverse comment over 'the Edgecumbe job', with specific reference to tidiness on-site. Mr Mills was recorded as opining during the discussion on the restructuring proposal that 'Gert just doesn't understand' (with reference to the need for oversight and coaching of staff) and that 'Gert ... does not make good decisions', while Mr Claydon opined that 'Gert can not manage. He is not highly organised'.

[21] Accordingly I do not accept that concerns about Mr Visser's performance were unrelated to the termination of his employment on the ground of redundancy.

The procedure used in implementing the redundancy

[22] There is little to add to the account of the parties' exchanges on 13 and 16 November contained in the determination of the interim application, except that the references to 'the directors' and their 'decision' require modification in accordance with the further detail contained in this determination.

[23] There is one area of the evidence which was the subject of some further discussion during the substantive investigation.

[24] On 17 November Mr Claydon informed Mr Visser of the decision to make him redundant. Mr Claydon said he first confirmed whether Mr Visser had any ideas that would help keep his role. Mr Visser had a suggestion, although it is not clear precisely when he offered it. He suggested that there be emphasis on the company's attributes - referring to that part of a tender document which records items such as the tenderer's experience, expertise, methodology and resources. If anything turned on the matter I would accept that such an idea was insufficient to address the directors'

concerns about profitability, and unlikely to be enough to change a genuinely reached conclusion about the future of the project manager's position.

[25] Mr Visser was given 14 days' notice of the termination of his employment.

Determination

[26] In the interim application I set out the applicable law as follows:

“[34] The applicable law is set out in the decision of the Employment Court in **Simpsons Farms Limited v Aberhart**². There the court summarised earlier case law regarding an employer's obligation to consult with an employee who may be affected by a redundancy, as well as discussing the effect on redundancy dismissals of s 103A of the Employment Relations Act 2000. It pointed out that s 4(1A) of the Act – which detailed aspects of the statutory obligation to deal in good faith – included requirements that an employer proposing to implement redundancies provide to the affected employees access to information about the proposal, and an opportunity to comment on it, before the decision is made. The court concluded:

‘[65] Following the new s 103A, the Authority or the Court must consider on an objective basis whether the decisions made by the employer, and the employer's manner of making those decisions, were what a fair and reasonable employer would have done in all the circumstances at the relevant time. The statutory obligations of good faith dealing and, in particular, those of s 4(1A)(c) inform the decision under s 103A about how the employer acted. A fair and reasonable employer must, if challenged, be able to establish that he or she has complied with the statutory obligations of good faith dealing in s 4 including as to consultation because a fair and reasonable employer will comply with the law.’³

[27] I refer to the following additional comment in **Aberhart**:

“[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 s 103A.”

[28] I understood the emphasis in the submissions on behalf of Mr Visser to be on the extent to which the company's financial and trading circumstances comprised the

² [2006] ERNZ 825

³ P 842

real reason for the dismissal. I accept there was a genuine need to address overheads and profitability, particularly in the light of the prevailing economic circumstances. Considerations of this kind are in general capable of justifying a decision to restructure the company's staffing arrangements, extending to the disestablishment of positions. They were taken into account here and were part of the reason for the disestablishment of the position. However I also find that WCL considered Mr Visser's performance to be unsatisfactory, and this was also a reason for the decision to disestablish the project manager's position.

[29] WCL had mixed motives in disestablishing the position. The Employment Court considered redundancy dismissals involving mixed motives in **Forest Park (NZ) Limited v Adams**⁴, formulating the following test:

“[49] So I find Mr Crotty's original position (a predominant or sole motive test) the correct one. It is not a 'material factor' test. Where, as here, an employer asserts redundancy as justification for dismissal and the Tribunal finds there are mixed motives, it bears the burden of persuading the Tribunal redundancy was both genuine and the predominant motive or reason for dismissal. Put another way, where there are mixed motives for dismissal, the Tribunal must ascertain the predominant motive. If this is a genuine commercial decision to make the position superfluous, dismissal will be justified if fairly undertaken. If the predominant motive for dismissal is other than a genuine commercial decision to make the position superfluous, dismissal will be unjustified.”

[30] Certain further information and explanations were provided in the submissions for WCL. They should have been included in the evidence, but in one respect they confirmed a view I had reached in any event.

[31] It was said that the project manager's position did not meet all anticipated objectives. The point being made was that the directors' hopes of devolving some of their activities into the new position of project manager were not borne out in that their own skills were called on more than had been anticipated. To them the project manager's skills had fallen short of expectations and their continued involvement meant the objectives regarding the freeing up of their time were not met. Indeed if records reflecting Mr Claydon's activities in particular are an indication, the directors

⁴ [2000] 2 ERNZ 310

maintained a high degree of involvement in day to day matters. However such a failure to meet the directors' objectives is a performance matter to be managed, not in itself a reason to disestablish a position.

[32] Overall, on the facts I find the restructuring involved a culling of what were seen to be poorly performing senior managers in the interests of addressing concerns about profitability. The predominant motive in the decision to disestablish the project manager's position was dissatisfaction with Mr Visser's performance.

2. Fairness of procedure

[33] Mr Visser says an unfair procedure was followed in respect of his redundancy, citing in particular the lack of consultation.

[34] I consider perfunctory the attempt to consult with Mr Visser about the future of his employment. The perfunctory nature of the attempt is aggravated in that the company's circumstances were not so pressing as to require the matter to be finalised as quickly as it was.

[35] Mr Visser was not given any meaningful information about the proposal to disestablish his position beyond the fact the proposal had been made. He was not given any meaningful information explaining the reason for the decision to restructure, or anything meaningful to indicate the factual basis for the decision. This made it impossible for him to respond in a meaningful way. The result is that I find WCL failed to consult adequately, and failed to meet its obligations of good faith and fairness in that respect.

[36] For all of the above reasons I find Mr Visser's dismissal was unjustified.

Remedies

1. Reinstatement

[37] Section 123 (1)(a) of the Employment Relations Act provides for:

“reinstatement of the employee in the employee’s former position or the placement of the employee in a position no less advantageous to the employee.”

[38] Section 125 of the Act provides:

“(1) This section applies where –

- a. the remedies sought ... in respect of a personal grievance include reinstatement ...; and
- b. it is determined that the employee did have a personal grievance.

(2) If this section applies the Authority must, ... provide wherever practicable for reinstatement as described in s 123(1)(a).”

[39] Mr Claydon was asked in evidence about WCL’s workload as it stands, now some 3.5 months after Mr Visser’s dismissal. I am satisfied that the trend anticipated in 2009 has come to pass. I consider it likely that, were I to order reinstatement, the order would return Mr Visser to an immediate and genuine redundancy situation. In those circumstances reinstatement is not practicable.

2. Reimbursement of remuneration lost as a result of the grievance.

[40] Mr Visser seeks the reimbursement of remuneration lost as a result of his personal grievance. His salary at WCL was \$75,000 pa. After his dismissal he obtained casual contract work as an asphalt worker at the rate of \$22.50 per hour, commencing on 18 January 2010. WCL is ordered to reimburse Mr Visser for lost remuneration calculated from the date of termination of employment to the date of this determination, less earnings received in the interim.

[41] There was no contributory fault, and accordingly I impose no reduction in the amount I would otherwise have awarded.

3. Compensation for benefits lost as a result of the personal grievance

[42] WCL lent Mr Visser some \$5,000 to pay consultants’ fees incurred over his immigration matters. Repayments were to be made by deductions from his wages commencing, according to the written and signed authority to that effect, on 21 July

2009. The arrangement was confirmed in a letter dated 2 June 2009. Some \$3,000 was outstanding as at the date of termination of employment.

[43] It was submitted that the entire amount of the loan was gifted to Mr Visser through a directors' resolution in May 2009, but the gift was later retracted and Mr Visser was required to repay the outstanding balance to WCL when his employment ended. He now seeks an order that the amount of the original loan be repaid to him in full.

[44] The claim was put differently in the statement of problem. It was said that a waiver was sought on the outstanding balance of the loan on the ground that Mr Visser did not instigate the termination of his employment. It is not appropriate to reformulate a claim in submissions and without notice in that way. While it was probably prompted by the receipt of the minutes of the May meeting, as essentially a new claim it should have been put to the Authority and WCL as a matter arising for further discussion prior to filing submissions.

[45] I would not in any event make the order sought. No legal basis was cited for it, but in the context of this employment relationship problem I have assumed it was intended to be based on s 123(1)(c)(ii). I would not have found that what was arguably intended to be a gift as at May 2009, with the intention appearing not to have been acted on, fell within that section. Otherwise there was no evidence that the directors' resolution in May was brought to Mr Visser's attention while he was still employed by WCL, no evidence that it ever became binding as between Mr Visser and WCL, and no account of why, if it did become binding, the parties proceeded to enter into and act upon the arrangement regarding repayment set out above.

4. Compensation for injury to feelings as a result of the personal grievance

[46] Mr Visser sought \$35,000 as compensation for the injury to his feelings caused by his personal grievance. This is at the top end of the range of such awards. While I accept Mr Visser suffered significant humiliation, loss of dignity and injury to his feelings there was no evidence capable of justifying an award at that level.

[47] I therefore order WCL to compensate Mr Visser for injury to his feelings in the sum of \$10,000.

Summary of orders

[48] WCL is ordered to pay to Mr Visser:

- a. Reimbursement of remuneration lost as a result of his personal grievance calculated as his lost salary less earnings since then;
- b. Compensation for injury to feelings in the sum of \$10,000.

Costs

[49] Costs are reserved.

[50] The parties are invited to reach agreement on the matter. .

R A Monaghan

Member of the Employment Relations Authority