IN THE EMPLOYMENT COURT
AUCKLAND

[2015] NZEmpC 71
ARC 53/14

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	MURRAY KNAPP Plaintiff
AND	LOCKTITE ALUMINIUM SPECIALTIES LIMITED Defendant

Hearing: 18 March 2015
(Heard at Tauranga)

Appearances: W Reid and R Rolston, advocates for plaintiff
P Kotze, advocate for defendant

Judgment: 20 May 2015

JUDGMENT OF JUDGE CHRISTINA INGLIS

Introduction

[1] Mr Knapp was employed by the defendant company (Locktite Aluminium Specialties Ltd) as a fabricator. His employment was terminated in June 2012. Mr Knapp pursued a grievance in the Employment Relations Authority (the Authority) for unjustified dismissal.[1] The Authority found that while he had been unjustifiably dismissed, any remedies awarded in his favour were to be reduced by 100 per cent for contribution.

[2] Mr Knapp has challenged the Authority's determination on a non de novo basis. The key point at issue is the Authority's finding that Mr Knapp's conduct disentitled him to any relief. There was, as Mr Reid pointed out, very little

[1] *Knapp v Locktite Aluminium Specialties Ltd* [2014] NZERA Auckland 167.

disagreement between the parties as to the facts. The challenge proceeded on the basis of the facts as found by the Authority.

The facts

[3] The company is a relatively small one, owned and operated by Mr and Mrs Sutton. At the relevant time there were three fabricators working in the factory, one of whom was Mr Knapp. A factory floor manager was employed, commencing work on 22 March 2012. The relationship between Mr Knapp and the factory floor manager was not particularly friendly.

[4] Shortly after purchasing the business in April 2011 Mr and Mrs Sutton realised that the cost of running the business was more than they had anticipated and they became concerned about the company's financial position. Mr and Mrs Sutton met with staff on 13 June 2012. They discussed the company's difficulties and proposed that the cost of the payroll for the business would need to be reduced. The employees were invited to put forward any ideas as to how this might be achieved. Some indicated that they would prefer not to come in to work on days where there was only a few hours work available. Mr Knapp inquired about taking annual leave in order to retain his full pay. This was not an option for the Suttons as they wished to ensure that staff had enough annual leave accrued for the end of year shutdown.

[5] On 14 June 2012 Mrs Sutton wrote to staff, including Mr Knapp, advising that:

> Amendment to your employment agreement
>
> At our meeting yesterday, … I explained the uncertain trading situation that we are experiencing and said that we have no option but to reduce working hours as soon as possible to match incoming work. We explained we had very little work coming in and therefore had to cut costs, but did not want to make anyone redundant. The alternative was to reduce hours of work. In the course of the discussion I said that, with effect from next week, we therefore propose to send staff home if there was not enough work for them.
>
> … We finally agreed that we would assess the situation every afternoon, and decide who should come into work the following day. If there was not enough work for you for at least half a day, you would not be called in. [Mr Sutton] and I have subsequently decided to go ahead with the plan, but to implement it from the 20th of June … to give you more notice of the change.

> This amendment is permanent, but we will obviously review it again as the trading situation improves. … please sign the bottom of this letter and of the copy attached to show your agreement. .. If you do not wish to accept the change, please note that we have no alternative but to terminate your employment for redundancy…

[6] The other two fabricators signed their acceptance of the variation to hours of work. Mr Knapp did not. He met with the Suttons on 18 June 2012 and discussed matters, including the 14 June letter. Mr Knapp said that he did not like the way in which the letter was worded. It appears that he had received legal advice by this stage. The Suttons emphasised to Mr Knapp that there was no wish to make him redundant but that the company could no longer guarantee to provide him with 40 hours of work each week. The discussion turned to cl 3 of Mr Knapp's employment agreement, which provided that:

> The hours of work shall be up to forty (40) hours per week within the normal hours of operation of the business. … The employee acknowledges that **the employer has the right to change any days and hours of work to meet the needs of the business**. …

[7] Mr Knapp then asked to be made redundant because "it would make it easier for the other staff." He said that he was not happy about "a few things downstairs [the factory floor]" but declined to explain why and confirmed that the Suttons should go ahead with the termination of his employment and "fill out the paperwork."

[8] The Suttons did not immediately "fill in the paperwork" as Mr Knapp had requested. Rather Mrs Sutton asked the company's human resources adviser to speak to Mr Knapp. Mr Knapp advised the human resources adviser that he required a minimum of 25 hours of work each week and that he would not sign anything unless that was guaranteed.

[9] The Suttons agreed to that proposal, and decided that such an approach should extend not just to Mr Knapp but also to the other two fabricators. The 14 June letter was amended to state: "We expect that each person would work at least 25 hours each week". The other two fabricators accepted this and signed changes to their employment agreements.

[10] The Suttons then informed Mr Knapp that they had agreed to his request to provide a minimum of 25 hours of work each week. However he responded by advising that he wanted to be made redundant. Mrs Sutton was flabbergasted by his response. She did not immediately accede to his request. Rather she asked the human resources adviser to confirm what Mr Knapp had earlier asked for, namely that he required a guarantee of 25 hours work each week. Mr Knapp declined a further request to speak to the human resources adviser. He was asked to give further consideration to the amended letter.

[11] The next day the Suttons had a further meeting with Mr Knapp. The purpose of this meeting was to ascertain whether he had reconsidered his position from the previous day, namely his expressed wish to be made redundant. Mr Knapp confirmed that he did wish to be made redundant and once again requested that they "fill out the paperwork". He then left the company's premises.

[12] The termination of Mr Knapp's employment was confirmed by way of letter the following day. That letter set out the background to the discussions that had occurred. The letter made it clear that the Suttons had agreed to change the original proposal in relation to the hours of work, having been advised that Mr Knapp required a minimum of 25 hours of work each week. Reference was made to the meeting on 19 June, during which Mr Knapp had stated that he did not agree to the offer and that he wanted to be made redundant; Mrs Sutton's advice to him that the company did not want to make him redundant; and Mr Knapp's confirmation that he did want to be made redundant. The letter concluded that "In the circumstances we have no option but to make your position redundant".

Authority's determination

[13] The Authority concluded that while the company said that it did not have an option other than to make Mr Knapp redundant, in fact it did, as the employment agreement allowed for a variation of hours and the company could have:[2]

> …quite simply refrained from making Mr Knapp's position redundant and continued to offer him employment on the basis of a minimum of 25 hours

[2] At [41].

> each week, consistent with his indication that this is what he required. Mr Knapp would then have been left with a decision to make as to whether he wished to continue to work on the basis of his own proposal.

[14] The Authority found that the termination of Mr Knapp's employment was unjustified on this basis. Mr Knapp had sought an award of three months lost wages and an award of $12,000 compensation for hurt and humiliation. In declining any orders in the plaintiff's favour the Authority observed that:[3]

> However, I conclude that taking into account all of the circumstances that apply to this matter, and pursuant to s.124 of the Act, the actions of Mr Knapp were of such blameworthy nature that any remedies that may have been applicable should be reduced by 100%.
>
> This is because while I have found that while the Suttons should not have terminated the employment of Mr Knapp, I am satisfied that in substance, they acted in good faith towards him. Regrettably, Mr Knapp did not see fit to respond in kind. By this I mean that having apparently accepted that the business needed to reduce its wages costs, Mr Knapp informed his employer (via Mr Kotze) that he required a minimum of 25 paid hours of work each week, and if the Suttons would agree to this, he would agree to a variation to his employment agreement. Relying on this indication from Mr Knapp, the Suttons acted accordingly and agreed (in writing) to provide him with a minimum of 25 hours of work each week.
>
> Acting in good faith towards the other two affected employees, the Suttons then altered their position further, possibly with some financial consequences, by also offering the other two employees a minimum of 25 hours of work each week.
>
> I find that by resiling from his earlier undertaking, Mr Knapp substantially failed to act in good faith towards the Suttons in that he misled them by indicating that he required a minimum of 25 hours of work each week and then when this was agreed to, he then rejected his own proposal. Indeed, it could be said that by failing to adhere to his earlier position, Mr Knapp is effectively estopped from now asserting that his employer acted unjustifiably. But this has not been argued and this is probably not an appropriate case to explore the complexities of the law of estoppel.
>
> In summary, pursuant to s.124 of the Act, and applying the equity and good conscience jurisdiction of the Authority, and for the reasons set out above, I conclude that while Mr Knapp was unjustifiably dismissed, he is not entitled to any remedies.

Parties' submissions

[15] Mr Reid submitted that there was no basis for a reduction in the remedies that would otherwise have been awarded in Mr Knapp's favour following the Authority's

---

[3] At [44]-[47].

finding that the termination of employment was unjustified. He submitted that the decision to terminate Mr Knapp's employment for redundancy was fundamentally flawed. The letter of 14 June, as amended, was said to be unenforceable as a matter of law and Mr Knapp was effectively placed in a position of being required either to sign the variation to his employment agreement or be made redundant. It was submitted that any reduction for contributory conduct in such circumstances would be inappropriate, as Mr Knapp's conduct was not culpable and it had not contributed to the situation giving rise to the grievance.

[16] Mr Kotze submitted that credibility was a key factor underlying the Authority's determination and it was clear (and I accept) that the Authority was not drawn to Mr Knapp's evidence. Rather, the Authority preferred the Suttons' evidence on all matters in contention. Mr Kotze made the point that the challenge was being pursued on the basis of the facts as found by the Authority. He submitted that the Authority's factual findings supported the conclusion that the plaintiff's actions disentitled him to any relief, and that a 100 per cent reduction in remedies under s 124 was appropriate.

Analysis

[17] There is no challenge to the finding that the termination of Mr Knapp's employment was unjustified. The central issue relates to the Authority's finding that Mr Knapp's actions disentitled him to any relief.

[18] As I understood the plaintiff's argument, Mr Knapp was presented with the stark option of either accepting a cut in hours of work or to be made redundant, and felt that he had no choice but to accept the latter course. The factual findings of the Authority do not do not go this far. The reasons why Mr Knapp insisted on being made redundant remained unclear. As the Authority member observed, Mr Knapp's insistence that he be made redundant was:[4]

> …most peculiar …, particularly as he told the Authority that he did not obtain new employment until October 2012; and there was no provision in his employment agreement for redundancy compensation. It seems that Mr

[4] At [40].

> Knapp decided that he would rather take his chances on the job market than have at least 25 hours work each week while he considered his options.

[19] The employment agreement allowed for flexibility in relation to work hours. The employer sought to discuss concerns relating to its operating position with its employees and sought feedback from them as to how these concerns might best be addressed. A reduction in work hours was considered and formed the basis of the proposal that was put to employees, including Mr Knapp, and there was an agreement as to a way forward.

[20] Mr Knapp advised his employer that he would accept reduced hours provided he was given a minimum of 25 hours of work per week and once that was agreed to (and made clear to him that it had been agreed), he advised that he wished to be made redundant. The company then took the step of allowing Mr Knapp the opportunity to consider his position further. It is apparent that he had access to legal advice at this time. He again confirmed that he wished to be made redundant and left the workplace. All of this took place against the backdrop of ongoing discussions between Mr Knapp and his employer as to how the company's concerns relating to its financial position might best be addressed. In advising Mr Knapp of the termination of his employment, the company was simply doing what he had asked it to do, on not one but two occasions.

[21] Mr Knapp's actions in insisting that he be made redundant were both causative of the outcome (termination) and were, as the Authority found, blameworthy (misleading his employer as to his position in breach of good faith, and to the company's likely detriment).

[22] There are a number of cases in which an employee has succeeded in establishing that their dismissal was unjustified but no remedy has been awarded. The focus has tended to be on s 124 of the Act, which relates to employee contribution. This has given rise to issues as to whether a 100 per cent reduction in remedies is permissible under that provision. Some doubt has been expressed on this point – most recently in *Harris v The Warehouse Ltd*.[5] In particular it has been

---

5 *Harris v The Warehouse Ltd* [2014] NZEmpC 188.

queried how a dismissal can simultaneously be unjustified but also 100 per cent the fault of the employee:[6]

> Put another way, if an employee is entirely responsible, by his or her conduct, for his or her dismissal, can this be said logically to have nevertheless been an unjustified dismissal?

[23] In the event, no concluded view was expressed in *Harris* on the issue, although it was noted that there was a respectable argument that a nil award under s 124 was unavailable. In the present case both of the parties' representatives were invited to address the scope of s 124 in argument and the observations in *Harris*. Neither wished to do so. Accordingly I have not had the benefit of considered argument on the point.

[24] It seems to me that there are two possible routes via which the Court may decline to award any of the remedies listed in s 123(1), even though a personal grievance has been made out. The first is s 123 itself. The second is s 124 (contribution). Section 123 is the gateway through which any claim for relief must pass. Section 124 is directed at quantification, once the gateway has been navigated.

[25] The logical starting point is accordingly s 123. It provides that where the Court determines that an employee has a personal grievance it may in settling the grievance provide for any one or more of a number of remedies (including compensation and reimbursement of lost wages). The Court is not required to order any of the remedies listed in s 123 even where a personal grievance has been made out. That is reflected in use of the word "may", not "must", and is reinforced by the requirement that any remedy ordered (including reimbursement for lost wages) relate to the loss suffered as a result of the personal grievance. Section 123 was not the subject of detailed submission, and nor was it the basis on which the Authority determined issues relating to remedies. However, it is strongly arguable that the requisite connection between the plaintiff's unjustified dismissal and any loss he sustained is fatally absent.

---

6 At [183].

[26] I return to the issue of whether there can be a 100 per cent reduction under s 124, which was the focus of the present case. Section 124 is expressed in mandatory terms. It requires the Court to consider "the extent" to which the employee contributed to his or her dismissal and to "reduce" the remedies that would otherwise have been awarded accordingly. No qualification has been placed on either "extent" or "reduce". I agree with Judge Palmer's observation in *Kendal v A Mark Publishing Ltd* that this enables a reduction to nil:[7]

> Such an approach impresses me as being within the broadly enabling legislative intent, given the plain ordinary meaning of "reduce" which means to "make … smaller or less" (The Concise Oxford Dictionary – The New Zealand Edition for the 1990s, p 1006). In my view reduction to the point of extinction is not, upon a plain words/plain meaning approach, a contradiction in terms.

[27] I consider that it would strain the plain wording of s 124 to read in an artificial ceiling of (presumably) 99 per cent and virtually nothing would be achieved, from a practical perspective, in doing so. Nor do I perceive a logical inconsistency in holding that a dismissal is unjustified but awarding no relief on the basis of contribution. Employer fault will be marked out by the finding of unjustified dismissal. It seems to me that while that is likely to be of relatively cold comfort to many litigants, there will be circumstances in which such an outcome is entirely consistent with the remedial scheme of the Act, including the Court's jurisdiction to make such decisions or orders as in equity and good conscience it thinks fit.[8] And as the Court of Appeal observed in *Ark Aviation Ltd*:[9]

> The purpose of the direction to assess the nature and extent of remedies, including sums which in general must be awarded to reimburse lost wages according to what is thought just and equitable, is to enable the Tribunal and the Employment Court to do justice to the overall situation that is proved at the hearing of the grievance. That is ultimately done when determining remedies. The statutory provisions should be interpreted to give them full effect, consistent with this statutory purpose.

[28] The emphasis on the need to do justice having regard to the overall situation proved at hearing could lead, the Court suggested, to a nil award.[10]

---

7 *Kendal v A Mark Publishing Ltd* CEC19/97, 18 July 1997 (EmpC) at 55-56.
8 Employment Relations Act 2000, s 189.
9 *Ark Aviation Ltd v Newton* [2001] ERNZ 133 (CA).at [41].
10 At [44].

[29] In *Harris* the point was made that a number of the cases in which the scope of s 124 has been considered pre-date recent amendments to the Act. Particular reference was made to s 103A(5).[11] That provision now makes it clear that a dismissal or action will not be unjustified where the procedural infelicity was minor and did not disadvantage the grievant. However, as the full Court observed in *Angus v Ports of Auckland Ltd*, the enactment of s 103A(5) simply reflected a codification of the existing practices of the Court.[12] If this is so, it is difficult to see how it materially alters the analysis in relation to the scope of s 124.

[30] It was also said in *Harris* that:[13]

> As with many aspects of statutory employment law, there is analogous common law precedent. Nominal, even absurdly nominal, awards of damages have sometimes been made to illustrate a judge's or a jury's view that whilst a plaintiff suffered a legal wrong, such was the inconsequential nature of that wrong and/or the plaintiff's contributory conduct, that only a derisory award of damages is warranted. Such an approach was usually a minimal award but not the absence of an award. There may well have been implications for costs in the event of a nil award, so that judges and juries may have intended, by such awards, that plaintiffs would only have their costs met. Under a regime where costs must follow the event, it may be crucial to determine "the event" to ensure how costs will fall. Under the Act's discretionary costs' regimes, that may be less crucial.

[31] While nominal damages may be awarded in cases which are actionable without proof of damage, I agree that the relevance of such damages (as a "mere peg on which to hang costs"[14]) applies with significantly diluted force having regard to the costs regime in this Court and (in the present case) the finding in the plaintiff's favour that he had been unjustifiably dismissed.

[32] Some assistance may be drawn from equivalent legislative provisions in the United Kingdom which, while not identically worded, provide that the Employment Tribunal "shall reduce" its assessment of a grievant's loss "to any extent" that the Tribunal considers just and equitable.[15] In *W Devis & Sons Ltd v Atkins,* Viscount Dilhorne held that the effect of this provision was to enable the Employment

---

11 See *Harris v The Warehouse Ltd,* above n 5 at [200].

12 *Angus v Ports of Auckland* [2011] NZEmpC 160, [2011] ERNZ 466 at [53].

13 At [195].

14 *Beaumont v Greathead* (1846) 2 CB 494 at 499; 135 ER 1039 at 1041, cited in *Laws of New Zealand* Damages at [54].

15 Employment Rights Act 1996 (UK), s 122(2).

Tribunal to reduce remedies to a "nil or to a nominal amount if they consider it just and equitable".[16] An argument that there was an inconsistency between a finding of unfair dismissal and a nil award of compensation was rejected. It was observed that:[17]

> A man may bring about his dismissal wholly by his own misconduct and yet … that dismissal may be unfair through a failure to warn him that his employment was in jeopardy. In such a case, and there may be others, there is no inconsistency and … the just and equitable award might be one of nil compensation.

[33] More recently (and drawing on the House of Lords decision in *Devis*) in *Lemonious v Church Commissioners* the UK Employment Appeal Tribunal observed that while it would not be just and equitable for a 100 per cent reduction to be made where the grievant's dismissal was effected by matters outside of their control, there may be situations, albeit rare, in which such a reduction was warranted.[18] The Tribunal was not drawn to a submission that a finding of unfair dismissal required, at a minimum, recognition via a nominal award. Any perceived injustice in such a result was remedied by the Tribunal giving adequate reasons for no award being made in the circumstances.[19] Finally, the Tribunal recorded that the fact that ss 122(2) and 123(6) of the Employment Rights Act 1996 expressly referred to reducing the amount of the basic award "to any extent", allows the possibility of a nil award being made.[20]

[34] I conclude that the Court may find that a 100 per cent reduction under s 124 is appropriate, depending on the circumstances, although such a result is likely to be rare. I do not see a disjuncture between a finding of liability and an order of no relief, particularly given the remedial scheme of the Act and the statutory exhortation to the Court to exercise its jurisdiction "as in equity and conscience it thinks fit".[21]

[35] The Authority found that while the company had acted in good faith towards Mr Knapp, he had failed to act in good faith towards the company. Mr Knapp was

---

16 *W Devis & Sons Ltd v Atkins* [1977] AC 931 (HL) at 956, [1977] ICR 662 at 679.
17 At 958, 681.
18 *Lemonious v Church Commissioners* [2013] UKEAT 0253, 27 March 2013 at [35].
19 At [42]-[44].
20 At [45].
21 Section 189.

found to have misled the company by making it plain that he would agree to a reduction in his working hours to a minimum of 25 a week but then, when the company agreed to that proposal (and extended the same arrangement to the other two fabricators), he declined to sign the variation that he had asked for and insisted that he be made redundant. The company provided him with an opportunity to reflect on matters, and made follow-up enquiries to ensure that it understood his position. He reiterated that he wanted the company to make him redundant and promptly left the workplace. He then took the step of pursuing a grievance in relation to the very decision (termination for redundancy) that he had invited the company to make.

[36] Mr Knapp's conduct was, as the Authority found, blameworthy. It directly contributed to the situation that gave rise to the grievance and a full reduction in the remedies that he might otherwise have been entitled to is required. He was clearly the author of his own misfortune. It would be contrary to the principles of equity and good conscience and the overall justice of the case to provide for any remedy in the particular circumstances.

Conclusion

[37] The challenge is dismissed. Costs are reserved. The parties are encouraged to agree costs. If that is not possible, memoranda and supporting material can be exchanged, with the defendant filing and serving within 25 working days of the date of this judgment, the plaintiff within a further 15 working days and anything strictly in reply within a further 5 working days.

Christina Inglis
Judge

Judgment signed at 2pm on 20 May 2015