IN THE EMPLOYMENT COURT
CHRISTCHURCH

CC 22/09
CRC 25/08

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	STEPHEN GEARRY Plaintiff
AND	ARMOURGUARD SECURITY LIMITED Defendant

Hearing: 9 and 10 March 2009
(Heard at Christchurch)

Appearances: F J Wall, Advocate for the Plaintiff
Paul Johnson, Counsel for the Defendant

Judgment: 15 December 2009

JUDGMENT OF JUDGE A A COUCH

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[1] Stephen Gearry was employed by Armourguard Security Limited ("Armourguard") as a security officer. During the last several years of that employment he worked at the Christchurch Polytechnic Institute of Technology ("CPIT") with another employee of Armourguard, Mathew Wilkinson. In 2007, CPIT decided to employ its own staff to do the work then being done by Mr Gearry and Mr Wilkinson. They applied for the new positions created by CPIT and were appointed. Mr Gearry then gave notice to Armourguard of his resignation and left to take up the position at CPIT. He asked Armourguard to pay him redundancy compensation. Armourguard refused.

[2] Mr Gearry lodged a claim for redundancy compensation in the Employment Relations Authority. In its determination dated 30 July 2008 (CA 110/08), the

Authority dismissed that claim. Mr Gearry challenged the whole of the Authority's determination and the matter proceeded before the Court by way of a hearing *de novo*.

[3] As originally filed in the Court, Mr Gearry's claim was expanded to include an allegation of unjustifiable dismissal but this was withdrawn in the course of Mr Wall's final submissions. The claim for redundancy compensation was presented as a personal grievance alleging that Armourguard's refusal to pay compensation was unjustifiable and affected Mr Gearry's employment to his disadvantage.

Events

[4] Mr Gearry began work for Armourguard in September 1987. After working in many different locations for short periods of time, Mr Gearry was asked to work at the Reserve Bank in Christchurch. This allowed him to work regular hours, Monday to Friday. He began that assignment in 1990 and stayed there until the Reserve Bank closed its Christchurch premises in 2000. While Mr Gearry was working at the Reserve Bank, the parties entered into an employment contract which came into effect on 1 June 1998. Provisions of that contract relevant to the matters at issue in this case include:

> *2.3 You are expected to respond flexibly and quickly to any changes required by the Company, its clients and the requirements of the industry. You may be required to undertake any duties within the Company's operation as required, subject to the extent of your skills and training.*
>
> …
>
> *5.1 Hours of work will be the hours required by the employer, as per the employer's roster, to meet the needs of the employer, which runs a 24 hours a day, seven days a week business.*
>
> *5.2 The work roster will be set in advance by the employer and the employee understands that the roster may need to be varied at short notice or the employee may need to be flexible / work extra hours, to meet the needs of the employer's business.*
>
> …
>
> *22.1 Termination of employment shall be by one week's notice by either party in writing to the other except in the case of serious misconduct in which case summary termination may apply (as outlined in the Company's Employee Booklet).*
>
> …
>
> *22.3 In the event that your employment is terminated due to redundancy you will be given one month's notice or pay in lieu of notice. You will also*

be entitled to compensation of four weeks base pay for the first year of service and two weeks base pay for each continuous year of service thereafter.

> *22.3.1 For the purpose of this contract, redundancy is a condition in which the Company has employee(s) surplus to its requirements because of the closing down of the whole or any part of the Company operations, or to a change in methods, materials, products, reorganisation, reduction in business activity or like cause requiring a permanent reduction in the number of its employees.*

[5] When the Reserve Bank role came to an end, Mr Gearry was assigned to work at CPIT. Armourguard supplied staff to CPIT to perform several functions. From Monday to Friday, there were two staff on site during the day from 7.30 am to 5 pm. They were Mr Gearry and Mr Wilkinson, who was designated as a supervisor. Other staff provided services during the evening and early morning and at weekends.

[6] As well as engaging Armourguard to provide services, CPIT also employed its own staff known as "custodians". The work of the security staff and the custodians was largely complementary but did overlap from time to time. On occasions, the security staff also helped the custodians with their work. Although the security staff were employed by Armourguard and took their directions primarily from a manager of that company, they also took directions from the supervisor of security and custodial services at CPIT, Tony Burling-Claridge.

[7] The arrangements at CPIT were congenial and apparently effective but, in or about 2004, CPIT commissioned a review of services including those of the security staff and the custodians. This apparently led to a recommendation that CPIT employ its own security staff or merge their functions with those of the custodians. For reasons which were not explained, this recommendation was not acted on for 2 years or so.

[8] In the third quarter of 2006, CPIT expressed interest in implementing the recommendation. Mr Burling-Claridge mentioned this to Mr Gearry and Mr Wilkinson and to Damon Barnett, the Armourguard manager responsible for the CPIT contract. Nothing further happened immediately but, towards the end of 2006, two of the custodians left and that appears to have precipitated a decision by CPIT to change how security and custodial services were carried out. That change was to

dispense with the services of Armourguard during the day, Monday to Friday, and to have custodians perform all required tasks. Two new custodians were to be employed as part of this change.

[9] The evidence of when Mr Gearry and Mr Wilkinson became aware of this plan was unclear. Initially, they both gave the impression in their evidence that it was in January 2007. Later, they said it was early in the week beginning 11 February 2007. In any event, they were both clear that they knew about CPIT's intentions prior to 14 February 2007.

[10] The significance of that date is that it was when CPIT formally communicated its decision to Armourguard. That day, the company's South Island regional manager, Gregory Mann, had a meeting with Mr Burling-Claridge on site at CPIT. Mr Mann was accompanied by Mr Barnett and by Karl Wyatt, another employee of Armourguard. Mr Burling-Claridge told them that CPIT intended to terminate its contract with Armourguard for the work being done by Mr Gearry and Mr Wilkinson. From some time in April 2007, that work was to be done by two new staff to be employed by CPIT. Mr Burling-Claridge said that the positions would be advertised but, if Mr Gearry and Mr Wilkinson applied, it was a *"foregone conclusion"* they would be appointed. It was also said that the wages they would get working for CPIT would be more than they were receiving from Armourguard. It was clear to Mr Mann and Mr Barnett from what was said in this meeting that Mr Burling-Claridge was keen to employ Mr Gearry and Mr Wilkinson in these new positions and had already approached them about doing so.

[11] Immediately after their meeting with Mr Burling-Claridge, Mr Mann, Mr Barnett and Mr Wyatt met with Mr Gearry and Mr Wilkinson. Mr Barnett relayed to Mr Gearry and Mr Wilkinson what had been said in the earlier meeting. Mr Barnett encouraged Mr Gearry and Mr Wilkinson to apply for the new positions with CPIT and they confirmed they were interested in doing so.

[12] There was then a discussion about alternative work with Armourguard for Mr Gearry and Mr Wilkinson when the CPIT contract came to an end. Mr Gearry and Mr Wilkinson said in evidence that they were told that no alternative work of any

kind would be available. Mr Barnett said that he asked what sort of work they would like, that Mr Wilkinson replied that he would like a supervisory role similar to the one he had at CPIT, and that Mr Barnett replied that there was no work like that available.

[13] Mr Barnett also said in evidence that he had another discussion with Mr Gearry and Mr Wilkinson about alternative roles with Armourguard after the CPIT contract ended and that this second discussion occurred about 2 weeks after the 14 February 2007 meeting. Mr Barnett said that, in this latter discussion, he specifically mentioned the availability of work at the Ministry of Social Development. Mr Gearry denied that such a discussion ever took place.

[14] Mr Mann said that he also made proposals to Mr Gearry of specific alternative work with Armourguard. He said one such proposal was made in a telephone call and the other in an email. One of the options mentioned was night shift work at CPIT. Mr Gearry denied receiving such approaches from Mr Mann.

[15] Mr Gearry and Mr Wilkinson successfully applied for the new positions at CPIT. Mr Gearry said he received notice of his appointment at the end of March or the beginning of April 2007 and that he was given a starting date of 11 April 2007.

[16] On 3 April 2007, Mr Gearry telephoned Mr Mann. There was general agreement about what was said in this conversation. Mr Gearry had an expectation that, once the CPIT daytime contract came to an end, Armourguard would dismiss him as redundant and pay him redundancy compensation. The purpose of his call to Mr Mann was to confirm that this was so and to get a finishing date. Mr Gearry began by asking Mr Mann when the work at CPIT would finish and if he was going to receive redundancy compensation. Mr Mann replied that he did not have a final date, that this was a *"technical redundancy"* and that Armourguard would not be paying Mr Gearry redundancy compensation. Mr Mann told Mr Gearry that, if he wanted to stay with Armourguard, there was alternative work available for him. Mr Gearry then disclosed that he had already taken the job with CPIT and had agreed to start on 11 April 2007. Mr Gearry said that he wanted his final pay. Mr Mann replied that, if he wanted to finish work with Armourguard on 10 April 2007 and

receive his final pay, he would need to give his resignation. That was the end of the conversation.

[17] Later that day, Mr Gearry gave written notice of his resignation to be effective on 10 April 2007.

[18] Mr Barnett and Mr Mann both gave evidence that there was alternative work available for Mr Gearry following the end of the CPIT contract. This included long term positions such as that at the Ministry of Social Development and another at a supermarket. The company also had a constant demand for staff to do short term assignments. Mr Gearry had skills and experience which were highly valued and in short supply. The loss of the CPIT contract did not create a surplus of staff for Armourguard. Had Mr Gearry not resigned, he would have been assigned to alternative work on the same conditions of employment.

Discussion and decision

[19] On behalf of Mr Gearry, Mr Wall made extensive submissions. These included 30 close-typed pages of written submissions and oral submissions lasting several hours.

[20] In his submissions, Mr Wall put forward numerous propositions based very largely on what he described as "rules of law" and the provisions of repealed statutes, including the Industrial Relations Act 1973, the Labour Relations Act 1987 and the Employment Contracts Act 1991. Much of this argument was directed to the claim of unjustifiable dismissal which Mr Wall then abandoned at the very end of his submissions.

[21] To the extent that his submissions related to the claim for redundancy compensation, he relied on the proposition that a failure by an employer to provide an employee with the type of work agreed upon constitutes a fundamental breach of the employment contract between them. He submitted that, once this has occurred, the employer must either offer the employee "*suitable alternative employment*" or pay redundancy compensation. According to Mr Wall, the doctrine of fundamental

breach overrides the provisions of an employment contract, preventing the employer from relying on any provision of it to escape liability.

[22] Mr Wall submitted that an appropriate definition of *"suitable alternative employment"* is that contained in s184A of the Labour Relations Act 1987.

[23] Applying these principles to the facts of this case, Mr Wall's argument was as follows. The type of work Mr Gearry was employed to do was daytime work at CPIT, Monday to Friday. Once Armourguard told Mr Gearry that it would no longer employ him on day work at CPIT, it was in fundamental breach of the employment contract between them and that this occurred on 14 February 2007. As Armourguard did not provide Mr Gearry with suitable alternative employment, it was obliged to pay him redundancy compensation. The existence of a fundamental breach of the employment contract by Armourguard prevented it from relying on clause 2.3.

[24] This argument is essentially flawed in at least five respects. Firstly, the so called "doctrine" of fundamental breach has no application. This theory had its origins in certain English decisions in the 1950s as a means of avoiding the effect of very wide exclusion clauses. It had a short life in the United Kingdom where it was rejected by the House of Lords in 1967[1] and again in 1980[2]. In this country, it has never been an accepted part of the law.[3] In both jurisdictions, the courts have now long taken the approach that whether an exclusion clause applies is a matter of construction and issues of consumer protection have been addressed in legislation.

[25] Secondly, when Armourguard told Mr Gearry on 14 February 2007 that he would no longer be assigned to CPIT after the contract came to an end in April 2007, that was not a breach of contract, either immediate or anticipatory. There was no agreement between the parties that Mr Gearry be assigned to the CPIT site permanently. At all times, Mr Gearry's place of work was subject to the provisions of clause 2.3 of the employment contract which required him to be flexible in his response to changes required by Armourguard. That was supported by clauses 5.1

[1] *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361
[2] *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827.

and 5.2 of the contract which emphasise the requirement for change in times and places at which Mr Gearry was to work.

[26] Thirdly, even when the theory of fundamental breach was in vogue, it applied only in relation to exclusion clauses. Clause 2.3 of the employment contract cannot sensibly be construed as an exclusion clause. It is constructive in nature and does not purport to exclude liability.

[27] The fourth point to be noted is that s184A of the Labour Relations Act was repealed in 1991 and was not replaced by any provision of the succeeding legislation, the Employment Contracts Act. Legislation has very limited significance after it is repealed and the Labour Relations Act has no significance at all in the context of this case.

[28] Finally, there is no support for the proposition that redundancy gives rise to a general right to compensation unless *"suitable alternative employment"* is provided. To the contrary, the Court of Appeal has made it clear that redundancy compensation will only be payable by agreement and then in accordance with the terms of the agreement[4].

[29] Mr Wall's argument that Mr Gearry's claim for redundancy compensation could be pursued as a disadvantage personal grievance was equally ill-founded. What Mr Gearry claimed was compensation calculated in accordance with the formula in clause 22.3 of the employment contract. It follows that his claim was for money alleged to be owing under an employment agreement. It was properly, therefore, a claim under s131 of the Act and not a personal grievance under s123.

[30] However the claim is formulated, it falls to be decided by reference to the terms of the employment contract between the parties. As noted above, there is no general right to redundancy compensation. Such compensation will be payable only by agreement. The agreement relied on in this case is the employment contract between the parties concluded in 1998.

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[3] See *DHL International (NZ) Ltd v Richmond Ltd* [1993] 3 NZLR 10 (CA).
[4] *Aoraki Corp Ltd v McGavin* [1998] 1 ERNZ 601, [1998] 3 NZLR 276

[31] Clause 22.3.1 defines the term "redundancy" for the purposes of the contract. The essential component of that definition is that *"the Company has employee(s) surplus to its requirements"*. The evidence was clear and uncontested that the conclusion of the CPIT contract in April 2007 did not result in Armourguard having a surplus of staff. Both Mr Mann and Mr Barnett said that there was ample work available for all staff, including Mr Gearry. It may not have been work as congenial or attractive to Mr Gearry as that he was doing at CPIT but it was work that Armourguard had available for him to do.

[32] I also reject Mr Wall's submission that it was open to Mr Gearry to resign and claim he was entitled to compensation under clause 22.3 of the employment contract. That is for two reasons. First, it is implicit in clause 22.3 that redundancy compensation is only to be paid when the employee is dismissed by reason of redundancy. This is clear from the use of the words *"you will be given one month's notice"*. Those words are inconsistent with the idea that the preceding expression *"In the event that your employment is terminated due to redundancy"* was intended to include termination by resignation.

[33] Secondly, I reject the proposition that Mr Gearry was constructively dismissed. What prompted his resignation on 3 April 2007 was the fact that he had agreed to start work for CPIT the following week. He wanted to receive his final pay from Armourguard, presumably including some holiday pay. Mr Gearry was also conscious that he could not have two overlapping employment agreements. When Mr Mann made it clear that Armourguard would not be dismissing Mr Gearry, it was simply a matter of logic that the only way Mr Gearry could be paid his final pay before 11 April 2007 was if he resigned. What Mr Mann said to Mr Gearry involved no breach of duty which might give rise a constructive dismissal.

[34] For these reasons, I find that Mr Gearry's employment was not *"terminated due to redundancy"*. Accordingly, he had no right to payment of redundancy compensation.

Conclusion

[35] Mr Gearry's challenge is dismissed. He had no entitlement to redundancy compensation and no foundation for a personal grievance.

[36] Although I have reached the same conclusions as the Authority, the effect of s183(2) of the Act is that the determination of the Authority is set aside and this judgment now stands in its place.

Comments

[37] The witnesses gave differing accounts of some events. In light of the reasons for my decision, there is no need for me to resolve those differences and I do not do so. Equally, I have not discussed what Mr Mann meant by the expression "technical redundancy" in his telephone conversation with Mr Gearry on 3 April 2007 as nothing turns on it.

[38] There has been a lengthy delay between the hearing of this matter and the issue of this judgment. The inconvenience to the parties is acknowledged and regretted.

Costs

[39] Armourguard has been entirely successful in resisting Mr Gearry's challenge and, subject to any unusual circumstances, is entitled to a reasonable contribution to its costs. The parties are encouraged to agree on costs but, if that is not possible, Mr Johnson is to file and serve a memorandum by 31 January 2010. Mr Wall is then to have 21 days in which to file and serve a memorandum on behalf of Mr Gearry.

A A Couch
Judge

Signed at 12.40pm on 15 December 2009.