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THE ADVOCATE

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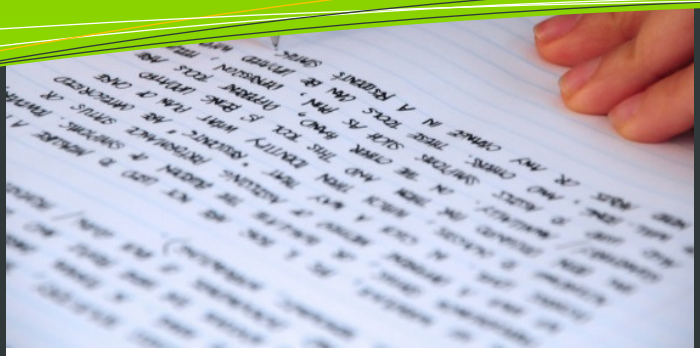

Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
- Employment Relations Strategies
- Training
- Monthly newsletter

"The Author of his own Misfortune"

A recent determination of the Employment Court, ***Knapp v. Locktite Aluminium Specialists Limited*** [2015] NZEmpC 71, has considered the law relating to contribution. The Court confirmed that despite a finding of unjustified dismissal an applicant may not be granted any remedies in circumstances where they are found to have contributed to their dismissal 100%. What is of particular note in this case is that the termination of employment was due to a redundancy situation, which traditionally are viewed as cases where the employee has no culpability and consequently cannot be held to have contributed to his/her dismissal.

The facts of this case are as follows:

1. Mr Knapp was employed by Locktite Aluminium as a fabricator.

2. Locktite Aluminium were a small company who engaged three fabricators to work in their factory, one of whom was Mr Knapp.

3. After purchasing the business in April 2011, the owners realised that the cost of running the business was more than they had anticipated and they became concerned about the company's financial position.

4. On 13 June 2012 the owners met with the staff and 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 they considered this may be achieved.

5. In response to this, some employees indicated that they would prefer not to come in to work on days when there were only a few hours of work available. Mr Knapp inquired about taking annual leave in order to retain his full pay however this was not an option because the company operated a shutdown and wanted to ensure staff retained sufficient annual leave to take during the shutdown.

6. On 14 June 2012 the employer wrote to the employees, 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.

   This amendment is permanent, … 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 … "

7. The other two fabricators signed their acceptance of the variation to the hours of work however Mr Knapp did not.

8. Mr Knapp met with the owners on 18 June 2012 and said that he did not like the way in which the letter of 14 June 2012 was written. Mr Knapp asked to be made redundant. The employer asked the company's Human Resources Advisor to speak to Mr Knapp. During this conversation Mr Knapp advised the Human Resources Advisor 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 employer agreed to Mr Knapp's proposal and decided to extend this offer to the other two fabricators as well as Mr Knapp. The 14 June 2012 letter was amended to state *"We expect that each person would work at least 25 hours each week*."

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Neil McPhail**, **Raewyn Gibson**, or **Peter Zwart**.

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10. The other two fabricators accepted this and signed changes to their employment agreement however when the employer advised Mr Knapp that they had agreed to his request to provide a minimum of 25 hours of work each week, Mr Knapp 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 employer had a further meeting during which Mr Knapp confirmed that he did wish to be made redundant. The termination of Mr Knapp's employment was confirmed by way of letter the following day.

Mr Knapp pursued a personal grievance claim of unjustified dismissal and the Employment Relations Authority determined that while the termination of Mr Knapp's employment was unjustified, any remedies awarded in his favour were to be reduced by 100% for contribution.

Mr Knapp challenged the Employment Relations Authority determination, on the basis of the Authority's determination that Mr Knapp's conduct "*disentitled him to any relief*".

It was argued on Mr Knapp's behalf that there was no basis for a reduction in the remedies which would have otherwise been awarded in Mr Knapp's favour and 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."*

The Employment Court determined that on the facts before it:

"[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)."

The Employment Court noted that some doubt had been expressed by the Employment Court in ***Harris v. The Warehouse Limited*** [2014] NZEmpC 108 as to whether a 100% reduction in remedies is permissible in accordance with s.124 of the Employment Relations Act 2000. The Court in reaching a determination that a 100% contribution was permissible assessed s.124 of the Employment Relations Act 2000:

"[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 . . .

[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. . ."

In assessing the factual situation before it the Employment Court agreed with the Authority's determination 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 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."*

The Employment Court considered that Mr Knapp's conduct was blameworthy and it had 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 was required; the Employment Court noting that *"He was directly the author of his own misfortune."*