

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN	ABB Limited
AND	Chris Dohrman
REPRESENTATIVES	Gillian Service, counsel for ABB Limited Kim Stretton, counsel for Chris Dohrman
MEMBER OF AUTHORITY	R A Monaghan
INVESTIGATION MEETING	9 August 2006
SUBMISSIONS RECEIVED	11, 18 and 25 August 2006
DATE OF DETERMINATION	4 September 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] ABB Limited ("ABB") provides engineering and maintenance services to the pulp and paper industry in the central North Island. It contracts with Norske Skog Tasman ("NST"), SCA Tissue ("SCA") and Carter Holt Harvey Kinleith ("CHH"). It employs Chris Dohrman as a senior field service engineer.

[2] Mr Dohrman has worked for ABB for some 26 years. For the last three of these he has carried out work at the SCA site. In May 2006 ABB instructed him to carry out work on paper machine 3 ("PM3") at the NST site. Mr Dohrman refused, citing health and safety concerns as a main reason. After further discussions led to further refusals, ABB issued a final written warning in respect of the refusal. The parties have attempted mediation in an attempt to resolve the problem of where Mr Dohrman will work. The problem has not been resolved, and ABB is concerned that Mr Dohrman will continue to refuse to work at NST, jeopardising his job.

[3] ABB now seeks from the Authority:

- (a) a declaration that ABB's instruction to Mr Dohrman to perform duties under his employment agreement at NST PM3 is a lawful and reasonable instruction; and
- (b) an order that Mr Dohrman comply with this instruction and perform his duties under his employment agreement at NST PM3.

The reason for the instruction

[4] Since January 2006 ABB has been experiencing equipment and control problems at NST. The majority of the problems have occurred on PM3, and some have required the assistance of overseas specialists. NST has also had other

unrelated problems, meaning that for a variety of reasons both it and ABB have been under pressure to improve their performance.

[5] At the same time ABB's contract with NST for the work on PM3 has lapsed. The companies have continued to operate under expired terms and conditions, but ABB is seeking to complete a new agreement. Of more immediate concern is its belief that NST is exploring the possibility of engaging a competitor of ABB's to assist in resolving the problems on PM3. If NST chose to engage the competitor, Honeywell, the door would be opened for the loss of the entire NST contract.

[6] Stuart Owen, ABB's Industrial Automation Group ("IAG") manager, is responsible for the management and business development of quality control systems for the three sites. He is also Mr Dohrman's manager. When looking at ways of addressing the concerns about NST PM3 he noted that the existing IAG site engineer, Theo Hansen, was a relative newcomer to the IAG control systems. In or about April 2006 he asked Mr Dohrman, who is IAG's most experienced engineer, to assist Mr Jansen for a period which became three weeks. The short term arrangement was to enable Mr Dohrman to assist Mr Jansen with control problems, pending the arrival of a control systems expert from the United States.

[7] Mr Owen also believed some employees were not getting an opportunity to expand their skills and develop new capabilities. He decided to make some changes, in part in reliance on provisions such as this one in Mr Dohrman's individual employment contract:

"1.1 The employee is engaged in a full time position The employee may be required to undertake other work from time to time as directed by the Company. Any duties, responsibilities or other matters which are specified in Attachment 2 – 'Position Description' may from time to time be altered by the Company to suit the dynamic needs of business.

2.1 The employee will in all respects work in pursuit of the Company's objectives and image, in accordance with the Position Description, and will comply with all reasonable instructions, ..."

[8] Mr Dohrman's employment contract provided further as follows:

"Position Description

Primary Purpose of Position

- . the service and maintenance of ABB ... pulp and paper quality control systems, distributed control systems and other systems and products.
- . the execution of pulp and paper service contracts, particularly those with Tasman Pulp and Paper, CHH Pulp and Paper and CHH tissue [NST, CHH and SCA]

Nature and scope

- . Responsible for total arena of service, maintenance and optimisation of ABB Quality Control Systems, Distributed Control Systems and their success at customer sites.
- ..."

[9] Accordingly, in May 2006 Mr Owen sought to move Mr Dohrman to a sole charge position at NST PM3 for 6 months, move Mr Jansen into a 'floating' role across all sites, and move another engineer to the SCA site. As well as offering opportunities for other engineers to improve their skills, Mr Dohrman's placement was important because Mr Owen wanted NST to see ABB was taking seriously the need to resolve the problems on PM3. Not only is Mr Dohrman a senior and experienced engineer, known to NST, but NST welcomed the proposed placement.

[10] Mr Dohrman, however, did not welcome it. On 16 May 2006 Mr Owen advised of the proposed move and the reason for it, with Mr Dohrman responding that he was not happy and would not move. His reasons were:

- (a) the stress on the NST site;
- (b) his belief that the move was a backward step for him; and
- (c) his belief that other options were available.

Mr Dohrman's reasons for refusing to move

1. Stress

[11] Mr Dohrman has asserted on several occasions that the NST site, and the PM3 work, was generally recognised as being very stressful. However discussion of the stressful aspects of the work made it clear that the significant stressor for Mr Dohrman concerned his view of his interaction with NST staff. Thus he alleged that the staff had an 'antagonistic' approach to problem solving, the daily work schedule was 'dictated by problems on the site' and 'there is little trust and respect given to engineers by the NST staff'.

[12] When I asked Mr Dohrman to be more specific about the behaviour causing him stress, he referred in particular to interactions during the three-week period of his temporary placement in April-May 2006. He believed the placement did not go well – a view apparently not shared by NST.

[13] To the extent that both NST and ABB were under pressure to lift their performance I would accept there was some tension in the workplace although there was little detailed evidence about that. Efforts to address the problems on PM3 included daily meetings between NST's representatives and Messrs Dohrman and (usually) Mr Owen. No doubt ABB was tested during those meetings, and Mr Owen said in evidence that NST perceived a problem with ABB's control systems. Even so, NST acknowledged not all of the problems were the fault of ABB.

[14] Mr Dohrman's examples of the kinds of interactions he found stressful, both in the daily meetings and in other interactions, were:

- (a) Mr Dohrman would be asked a technical question, and sometimes would draw a diagram to illustrate his answer. He would be asked if his diagram was accurate. Mr Dohrman did not expect his accuracy to be questioned in that way;
- (b) Mr Dohrman would be asked to describe ABB's mapping and modelling techniques. Mr Dohrman did not see why he should be asked that, since one of the NST managers concerned was a former ABB employee and 'had our manuals'. Moreover, he expected NST to accept he knew how the system worked, but when he explained it in detail NST would say they would await confirmation from the overseas expert.
- (c) Mr Dohrman would be asked about matters with which he was not familiar – for example about certain software. He would try to answer, or say he did not know the answer, but the questioning would continue.
- (d) Mr Dohrman would make a suggestion and NST would disagree and make a different suggestion, which Mr Dohrman took as questioning his knowledge.

[15] Mr Dohrman also indicated he had a broader concern about the former ABB employee who was now an NST manager. The concern was stated as one of feeling that manager had 'a problem' with him, did not support his efforts and was not helpful. Mr Dohrman would have preferred a more collaborative approach.

[16] Evidence of that kind does not persuade me it is reasonable from an objective point of view to accuse NST staff of having an antagonistic approach to problem solving, or of having little trust and respect for engineers. As for the daily work schedule being dictated by problems on the site, that may have been the case during the three weeks of Mr Dohrman's temporary placement. That was precisely because there were problems on the site and Mr Dohrman had been asked to work there in order to assist in their resolution. However he was not being expected to bear the burden alone, and the arrival of expert assistance was imminent. It was not even the thrust of Mr Dohrman's evidence that he found the problems burdensome – rather it was that he did not like the way he was questioned when he was trying to resolve them.

[17] The other aspect of Mr Dohrman's experience of the NST workplace as stressful was his view that he needed more training in certain areas. That aspect was dwarfed by the concerns I have just set out, but I address it anyway. In 2003 ABB had changed the interface between the user and PM3. Mr Dohrman had not received training on the new interface, but had managed adequately when working on callout on another machine with the same interface. Mr Dohrman said he was uncomfortable about learning on the job and he struggled, but Mr Owen said Mr Dohrman was using the system at a reasonably high level and 'got by'. Mr Owen would assess training needs, and would provide training if necessary.

[18] Evidence of this kind suggests Mr Dohrman is a perfectionist. It also suggests that while it was desirable that he receive training, it was not immediately imperative that he receive it. Moreover, there is nothing to suggest Mr Dohrman will not receive any training he needs, because as at the date of the investigation meeting Mr Owen had not had an opportunity to implement any training that may be necessary.

2. Backward step

[19] I do not accept it is reasonable to regard the move as a backward step in Mr Dohrman's career. Moreover, during the investigation meeting Mr Dohrman said his career was a minor issue and the thrust of his concern was with his health.

3. Other options

[20] Mr Dohrman believes that, if his input into NST PM3 is required, he can provide it by acting as supporter and mentor to Mr Jansen. The obvious difficulty with that option when he raised it in May was that it would require an additional staff member, and it cut across the plan to have Mr Jansen work as a floater.

[21] However it transpired during the investigation meeting that ABB has recruited another engineer, although the person's start date is still some weeks away. The person is to work on PM3 once he has been trained. That information led to a lengthy adjournment of the investigation meeting while the parties had further settlement discussions. Unfortunately no settlement resulted, and the investigation meeting continued.

ABB's response to Mr Dohrman's refusal

[22] Mr Dohrman explained to Mr Owen on 16 May the nature of his discomfort about the NST approach. In essence the explanation concerned his view of NST's questioning of what he did. He felt the approach at SCA was more collaborative.

Later the same day he advised Mr Owen he had a medical condition that could be aggravated by stress, and explained the condition.

[23] Mr Owen gave Mr Dohrman until 22 May to come back with any other reasons why he should not be moved to NST PM3. Mr Dohrman said he had nothing to add.

[24] Meanwhile Mr Owen took Mr Dohrman's concerns up with several of the managers at NST PM3. He explained Mr Dohrman's concern about their adversarial style, and reached an arrangement under which they would speak to Mr Dohrman about operational matters, but any concern about ABB's performance or equipment would be raised with Mr Owen. In that way Mr Owen would act as a 'buffer'.

[25] On 23 May Mr Owen advised Mr Dohrman of his decision to go ahead with the plan to move Mr Dohrman to NST PM3. Mr Dohrman responded by asking to speak to the human resources staff about the matter. Accordingly a meeting was arranged for 26 May. Messrs Owen and Dohrman attended, as did Ronda Saunders, the HR Manager with responsibility for the relevant area.

[26] The meeting began with Messrs Dohrman and Owen summarising the chronology of the problem to date. Mr Owen and Ms Saunders gave evidence that Mr Owen discussed his efforts to address Mr Dohrman's concerns with NST, although Mr Dohrman had no recollection of that part of the discussion. I consider it likely Mr Owen did discuss the matter. Mr Dohrman's response to Mr Owen was that the efforts were not good enough, and that Mr Owen had not taken his concerns seriously enough.

[27] Discussion moved on to address Mr Dohrman's concerns in detail. Mr Dohrman raised his dislike of being questioned, and Mr Owen suggested that the managers concerned might simply be seeking to understand what Mr Dohrman was doing. Mr Dohrman did not disagree – instead he asserted that those concerned did not like him and the relationship was not good.

[28] Mr Dohrman's concern about his career was also discussed. His position then was, in essence, that he had been on the NST site before and worked on PM3, and he did not see why he should have to go back and sort out any problems on it again.

[29] Thirdly, Mr Dohrman addressed his suggestion that he act as a supporter and mentor for Mr Jansen. Mr Owen explained his reasons for not agreeing to that, as well as his reasons for not requiring one of two other engineers to work on NST PM3.

[30] Mr Owen said in evidence he considered Mr Dohrman to have been obstinate in his refusal to work at NST, and said Mr Dohrman did not appear to have taken on board or acknowledged his efforts to address Mr Dohrman's concerns. I agree with that assessment. Mr Owen also said Mr Dohrman had not presented any information to persuade him that the decision to move Mr Dohrman was wrong. For those reasons he instructed Mr Dohrman to report for work at NST PM3 on 29 May. Mr Dohrman refused to go. Mr Owen warned that, if Mr Dohrman did not report for work he would be suspended and an investigation would begin.

[31] After the end of the meeting, Ms Saunders had a further discussion with Mr Dohrman. She sought to explain that ABB was seeking his assistance in getting the team through a difficult spot. Mr Dohrman's response was to say that he had

offered a solution, and to suggest that ABB look at the 'real problems' before taking the action it was.

[32] Then on 28 May Mr Dohrman advised the company he had a personal grievance, challenging the requirement that he move to NST essentially on the ground that the move would be detrimental to his health. The relevant provision in his employment agreement incorporated a set of internal procedures under which a grievance was first to be discussed, then referred to the manager of the relevant division, then referred in writing to the ABB personal grievance and disputes committee.

[33] When Mr Dohrman did not report to the NST site on 29 May – reporting to the SCA site instead - Mr Owen suspended him pending an investigation.

[34] The parties attended mediation on 28 June. They were unable to resolve the problem.

[35] ABB then convened an investigation meeting on 7 July. This time Mr Dohrman was represented by Ms Stretton. Mr Dohrman presented a document in which he set out in detail his concerns, particularly his health concern. Again he accused ABB of not taking the concern seriously, and explained the importance of avoiding stress.

[36] He also raised his view that Mr Owen considered him a trouble maker, and said he felt Mr Owen was trying to squeeze him out of the company. There were no reasonable grounds for that allegation and it is unfortunate that Mr Dohrman made it. It was not supported by the evidence, or by the company's extensive efforts to resolve this matter. Allegations of that kind, and of the kind I am about to set out, did not facilitate the resolution of the matter.

[37] Mr Dohrman then alleged the company was trying to get out of paying him redundancy compensation in respect of the 'restructuring' of his position. There were no reasonable grounds for that allegation, and Mr Dohrman's position was not being restructured in terms of the applicable redundancy agreement. Very properly, that line of argument was not pursued in submissions.

[38] Finally, Mr Dohrman expressed concerns about the length of his suspension, and that he had not received a response to his internal grievance. Both of those matters are concerned with the timing of and other matters associated with the mediation. I do not address them any further.

[39] The 7 July meeting was a long one. At the end, Mr Owen told Mr Dohrman he would consider his responses, and the next step would be to decide whether disciplinary action would be taken. Meanwhile the suspension was lifted and Mr Dohrman was instructed to report to the NST site on Monday 10 July.

[40] Mr Dohrman did not report to the NST site on 10 July. Mr Owen wrote to him by letter of that date, requesting his attendance at a disciplinary meeting. The meeting did not go ahead because of Ms Stretton's unavailability, and because Mr Dohrman then went on four weeks' sick leave.

[41] By letter dated 13 July Mr Dohrman forwarded a letter from his doctor, advising that Mr Dohrman was suffering from an anxiety disorder attributed to the dispute about ABB's 'restructuring' plan. The doctor also confirmed that he had advised Mr Dohrman he should not be in a work environment that was likely to put him under stress, such as the NST site. Mr Dohrman would be unable to attend work until 13 August when his condition would be reviewed.

[42] By letter dated 19 July Mr Owen again explained the company's position, and said it viewed Mr Dohrman's conduct as a breach of his employment agreement. Although ABB believed it was entitled to dismiss Mr Dohrman, in the interests of providing another chance it was issuing Mr Dohrman with a final written warning.

[43] By another letter of the same date, Mr Owen's manager advised Mr Dohrman that the company considered his grievance had been addressed in the form of the meetings of 23 and 26 May, the attendance at mediation and the meeting of 7 July. Indeed Ms Saunders' evidence was that she spoke to Mr Dohrman about his grievance when ABB received it. By agreement, the grievance was addressed further in the mediation.

[44] By letter dated 21 July ABB's medical advisor asked Mr Dohrman, in the interests of his rehabilitation and to prepare a return to work plan, to see an independent doctor recommended by the medical advisor. There was no response to that request. I was told that was because the present application supervened.

Whether the instruction was lawful and reasonable

1. Lawfulness of the instruction

[45] Regarding both the lawfulness and the reasonableness of the instruction I have gained assistance from the following:

"It is basic to every contract of employment that the employee must comply with lawful and reasonable directions of the employer. The work to be carried out within the ambit of lawful and reasonable directions is the work which the employer requires to have done and not merely the work which the employee is prepared to do. .. Whether a question is lawful is a question of law and whether it is reasonable is a question of fact but at the heart of the matter is the basic proposition that ... refusal to carry out work as directed lawfully and reasonably is a ground justifying summary dismissal.¹

[46] The instruction here, as it related to the duties to be performed, was within the terms of the parties' employment agreement. There was a submission on behalf of Mr Dohrman that there was a custom and practice of consulting and agreeing with affected staff before requiring staff to undertake 'other work' under their employment agreements. The evidence was too vague to establish such a 'custom and practice', and this kind of submission is really concerned with the fairness of the procedure used in making such changes. To the extent that it seeks to persuade me the change here could not be made without Mr Dohrman's agreement, I do not accept it.

[47] The second ground on which the lawfulness of the instruction could be challenged on the present facts arises from Mr Dohrman's view that the instruction requires him to do something that places his health and safety at risk.

[48] While it is true as a general proposition that it is not lawful for an employer to instruct an employee to do something that places the employee's health or safety at risk, I do not accept that the risk to Mr Dohrman's health arises from the NST site. Mr Dohrman's stress (and the resulting health risk) comes from his own dislike of being asked to discuss and explain work he was doing, his feeling that his knowledge and experience was not suitably respected, and his preference for being left to get on with his work alone and without interference. There is nothing in the work – or even the behaviour of the NST employees - that can

¹ NZ (with exceptions) *Shipwrights etc IUOW v Honda NZ Limited* [1989] 3 NZILR 791

reasonably be described as unsafe or creating an unsafe environment, whether potentially or otherwise.

[49] Mr Dohrman is really saying he does not want to work at NST because he does not like it there, and ABB cannot make him work there. He wants to stay at SCA. He says if he has to work at NST he will suffer stress which may aggravate his medical condition. I do not accept that the workplace interactions to which Mr Dohrman objects are outside the normal range of workplace interactions, or that they can reasonably be described as workplace hazards from which Mr Dohrman must be protected.

[50] While the submissions on behalf of Mr Dohrman referred to the Health and Safety in Employment Act 1992, neither party addressed s 28A of the Act. The thrust of the section is to permit an employee to refuse to do work if the employee believes the work is likely to cause serious harm. It also addresses attempts to resolve such concerns, saying the refusal may continue if the employee continues to believe on reasonable grounds that the work is likely to cause serious harm. I note, however, that the authors of Brookers have commented on the amendment as follows:

“The majority Select Committee Report on the Bill observed that the intent of the section is to ensure safety by highlighting an employee’s right to refuse to perform work that has become ‘dangerous’. The section is intended to reflect the existing common law right.”²

2. Reasonableness of the instruction

[51] The decided cases most readily comparable with this one involve employees who refuse to follow an instruction because they apprehend a threat to their health or safety. One example is **Makeham v New Plymouth District Council**³. The employees concerned refused to wear name badges because, from time to time while carrying out their duties, they experienced threatening and hostile behaviour from members of the public. They believed that, if they were obliged to display their full names, they would face an increased risk of being found and harmed or harassed away from the workplace. The Employment Court indicated that while the instruction was lawful and reasonable in principle, the employees’ fears were rational. It also said its conclusion that the instruction was not reasonable was based principally on the employer’s inconsistent stance towards similarly placed employees. It was concerned with the implementation of the instruction.

[52] I do not believe the same concern arises here. Mr Dohrman’s challenges to the reasonableness of the instruction included the reasonableness of the decision to place him (rather than someone else) at the NST site in particular, and to move engineers around different sites in general. However the relevant decisions were made for genuine business reasons. It is not open to Mr Dohrman or the Authority to substitute ABB’s decisions with their views on the appropriate deployment of staff. The decisions were reasonable.

[53] Nevertheless - appropriately in the light of the enhanced obligations of the parties to deal with each other in good faith - ABB has not left matters there and has sought to address Mr Dohrman’s concerns and reach a solution. The evidence about the parties’ early discussions shows Mr Dohrman has been intransigent, and unreasonably dismissive of ABB’s efforts. While Mr Dohrman was entitled to raise his concerns, his continuing rejection of reasonable attempts to address them, and even apply reality tests to them, is not reasonable. In that sense his

² Brooker’s Statutes of New Zealand HS28A.04

³ [2005] 1 ERNZ 49

response is in a different category from the responses of the employees in **Makeham**.

[54] Mr Dohrman now says he was unaware of the extent of the commercial risk to ABB, as explained in detail at the Authority's investigation meeting, although elsewhere in he says he does not believe the risk exists. He says he fears ABB will seek to keep him at NST for an indefinite period, while the indication from ABB is that he will be there for as long as is necessary to complete the new recruit's training. If these stances remain stumbling blocks to a resolution, they are not well-founded and will not assist Mr Dohrman.

3. Conclusion

[55] For these reasons I declare that ABB's instruction to Mr Dohrman to perform duties under his employment agreement at NST PM3 is a lawful and reasonable instruction.

[56] However in the circumstances disclosed by this determination I do not consider it wise to go further and order Mr Dohrman to comply with the instruction. It will not be in either party's interests to attempt to force Mr Dohrman to work on a site to which he so rigidly objects.

[57] Thus I consider it likely that an order for compliance would not be a practical solution the matter. It is better for Mr Dohrman to now acknowledge that ABB is entitled to instruct him to work at NST PM3 and he risks a justifiable dismissal if he does not do so, and for the parties to continue to attempt a workable solution to the practical implementation of the instruction.

Further mediation

[58] The parties have already tried to resolve the problem in several meetings of their own, one attempt at mediation, and further settlement discussions on the day of the investigation meeting. While I am not aware of the detail of those discussions, I believe the parties have come close to resolving the matter and there may be some merit in further discussion.

[59] I am also mindful that finalising the deployment of staff on PM3 is urgent from ABB's point of view.

[60] I therefore direct that, unless they are otherwise able to resolve this matter, the parties attend further mediation within 7 days of the date of this determination.

Costs

[61] Costs are reserved. The parties are invited to agree on the matter. If they seek a determination from the Authority they are to file and serve memoranda within 28 days of the date of this determination.

R A Monaghan
Member of Employment Relations Authority