

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 397
5365616

BETWEEN KEITH ANDERSEN
 Applicant

A N D FULLERS GROUP LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Susan Hornsby-Geluk, Counsel for Applicant
 Andrew Caisley, Counsel for Respondent

Investigation Meeting: 28 August 2012 at Auckland

Date of Determination: 14 November 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Andersen) alleges that he was unjustifiably dismissed from his employment by the respondent (Fullers Group). Fullers Group resists that contention and says that Mr Andersen's dismissal for redundancy followed a fair process and was implemented after a genuine restructure.

[2] Mr Andersen also claims to have been discriminated against in his employment because of his age and this claim is also resisted by Fullers Group which says that while his age was a factor in its consideration, he was not discriminated against because of it.

[3] Mr Andersen had been employed by Fullers Group for over 33 years. At the time of his dismissal for redundancy, he was employed as a shipwright and it was that position which was disestablished by Fullers Group with effect from 9 September 2011.

[4] There was a major review of the whole Fullers Group organisation that commenced in 2009. In October 2010, the Maintenance Department, in which Mr Andersen worked, became part of that review.

[5] That review progressed such that in June 2011, all of the staff in the Maintenance Department were advised that each position (including the one occupied by Mr Andersen) would be reviewed. Then on 23 August 2011, Mr Andersen was advised that there was a proposal to disestablish his role as part of the overall review of the structure of the organisation.

[6] Consultation took place between Fullers Group and Mr Andersen and his union, the Maritime Union of New Zealand (MUNZ).

[7] After Mr Andersen's position had been declared surplus to requirements and he had been made redundant from that position, with the payment of the requisite period of notice, redundancy compensation and outstanding leave, the parties continued to engage with each other about possible redeployment within Fullers Group, for Mr Andersen.

[8] An offer of fixed term employment as a freight assistant was posted to Mr Andersen on 23 September 2011 and Mr Andersen accepted that position for a fixed term on and from 3 November 2011.

Issues

[9] The following questions for the Authority arise:

- (a) Was the redundancy a genuine one; and
- (b) Was the procedure adopted fair; and
- (c) Was there an option to redeploy Mr Andersen; and
- (d) Was Mr Andersen discriminated against because of his age?

Was the redundancy genuine?

[10] Mr Andersen says that the redundancy was not a genuine one and he relies particularly on a document styled "Maintenance Review" which he was given at a meeting with Fullers Group on 23 August 2011. The document in question was given

to him together with a copy of Fullers Group's letter of even date which referred in a general way to the redundancy process.

[11] But the document attached, according to Mr Andersen, makes no real sense because the two reasons advanced were not a basis for disestablishing his role.

[12] The two reasons advanced were first that there had been an increase in workload in the Maintenance Department because of Fullers Group acquiring another company with a separate fleet of vessels. The second reason advanced for the redundancy was that the fleet had changed to aluminium hull vessels.

[13] Certainly, in the Authority's opinion, the document in question is not the most elegantly written and, on the face of it, does not advance any particular case for the restructuring.

[14] However, the document cannot be looked at in isolation; the whole process undertaken by Fullers Group must be considered in its totality and looked at in that way, the proposal starts to develop a logic.

[15] What Fullers Group did was undertake a complete review of the whole organisation. It had commenced that process two years before the events in question and, prior to contacting Mr Andersen, had reached a preliminary view that the position of shipwright could be disestablished with consequent savings in cost and without operational inefficiency following.

[16] It became clear at the investigation meeting that one of the bases on which Fullers Group was minded to remove the shipwright position from its organisation chart was that it had been finding it increasingly difficult to produce sufficient volumes of work for that position. Evidence was given by Mr Makin for Fullers Group that increasingly, vessels were having repair work done on a contractual basis by outside firms.

[17] But Mr Andersen protests that the claim there was insufficient work for his position was never put to him during the redundancy consultation process and had it been, he would have been able to respond.

[18] However, it is absolutely apparent on the evidence the Authority heard that neither Mr Andersen nor his extremely experienced Union made any claim that the

redundancy was anything other than completely genuine, during the process of consultation. So, despite the evident communication failures by Fullers Group (and in this regard the Authority refers particularly to the Maintenance Review document dated 23 August 2011), no complaint was raised by Mr Andersen or on his behalf as to the genuineness of the redundancy.

[19] It was only when the present proceedings before the Authority were on foot that the allegation was made that the redundancy was not a genuine one.

[20] The legal position is clear that the burden of satisfying the Authority that the redundancy is a genuine one rests with Fullers Group. The Authority is satisfied that Fullers Group has demonstrated that the redundancy was genuine but the Authority's reasoning for that conclusion is certainly not based on the communication from Fullers Group which is inadequate to say the least. Submissions made for Mr Andersen make the claim that the two reasons for the disestablishment of the role in the 23 August 2011 document are nonsensical; that may put it a little strongly but certainly, as a *raison d'être* for the removal of a whole position, the document could be described as, at best, inadequate and at worst, misleading.

[21] The Authority is inclined to agree with submissions made by Mr Andersen's counsel that neither of the reasons advanced in that document made any sense at all and that the real reason was advanced during the course of the investigation meeting and that Mr Andersen had had no opportunity whatever to make any submissions in that regard.

[22] However, as the Authority has already noted, the difficulty for Mr Andersen in relation to this particular aspect is that the argument about genuineness was never raised during the process. Had it been, Fullers Group would have been put on notice and might have been minded to provide further and better particulars on the justification.

[23] But the real issue it seems to the Authority is that, looked at in the round, Fullers Group is entitled to remove the position from its strength if it considers that that will assist the operation of the business.

[24] The Authority has been persuaded by the extensive evidence given by Mr Makin, the Asset Manager for Fullers Group. Mr Makin described to the Authority at considerable length the extensive process of reviewing the whole

structure of the organisation following on from the purchase, in 2009, of another company with its own fleet.

[25] Mr Makin describes the process by which he concluded that the shipwright position was surplus to requirements and told the Authority that a contractor is now performing the work previously performed by the position Mr Andersen had formerly occupied and that that contractor was doing the work in about one day a fortnight.

[26] On that basis, it is difficult to conclude that the redundancy was not anything other than absolutely genuine. As the Authority has made clear, the way in which Fullers Group explained its provisional conclusions leaves a great deal to be desired, but there is no evidence of an improper motive from Fullers Group, no evidence of malice against Mr Andersen or of a desire to remove him from Fullers Group's service, only evidence of a review across the whole organisation which, amongst other things, resulted in the disestablishment of Mr Andersen's role in the Maintenance Department.

[27] A particular reason for the Authority concluding that Fullers Group was engaged in a measured and reflective process rather than some improper attempt to create a basis to remove Mr Andersen from the employment was that the restructuring and review process had been going on for some significant period of time, commencing with the purchase of another company in 2009. The paper trail discloses that Mr Andersen was first advised of the review as early as October 2010, almost a year before the redundancy was actually effected. There was then an update in June 2011 followed by the advices of a provisional view that the position be disestablished on 23 August 2011.

[28] The Authority's considered view then is that this was a genuine redundancy created for proper commercial reasons.

Was the procedure fair?

[29] The Authority has already noted that the initial advice to Mr Andersen that his position might be disestablished was conveyed to him in a short meeting on 23 August 2011 when he was given the letter confirming that provisional conclusion together with the Maintenance Review document of even date, about which the Authority has said all it wishes to.

[30] The second meeting between the parties took place on 25 August 2011. Mr Andersen was represented by a senior official from his Union and while Mr Andersen's evidence is that the meeting seemed to conclude, without discussion, that the redundancy was "*a fait accompli*", it is clear from the company's letter of 23 August 2011 that Mr Andersen was invited to attend the subsequent meeting "*so that we can jointly explore alternatives to redundancy and termination*". Despite that clear invitation, Mr Andersen's evidence is that the parties did not discuss the need for the redundancy and concentrated exclusively on whether there were any other roles available for him to fulfil.

[31] However, the evidence from Fullers Group about that meeting is different. Mr Kotze, a human resources adviser on contract to Fullers Group, told the Authority that the meeting began with a background to the restructure presented by Mr Makin. Conversely, Mr Makin says that Mr Kotze provided the background. On balance, the Authority thinks it more likely than not that Mr Kotze's evidence on this point is to be preferred and it was Mr Makin and not Mr Kotze himself who provided the detail of how Fullers Group had reached its provisional conclusion that the shipwright position should be disestablished.

[32] In any event, both Mr Makin and Mr Kotze told the Authority that the thrust of the discussion was around the opportunities for redeployment for Mr Andersen and that the lead for those discussions came not from Mr Andersen himself but from Dave Phillips who was the Union official representing Mr Andersen at the meeting. There was then a discussion about the opportunities that might be available and two particular opportunities, one as a marine maintenance engineer and the other as a storeperson were discussed. Mr Andersen maintained that he could do both jobs. A list of all vacancies within the company was agreed to be provided by Fullers Group to Mr Andersen in anticipation of the next meeting 31 August 2011.

[33] Again, it seems that the focus of the discussion was on redeployment for Mr Andersen. Mr Gary Parsloe, who is currently the President of MUNZ, attended the 31 August meeting on behalf of Mr Andersen. Mr Russell Mayn, the Secretary/Treasurer of MUNZ, also attended that same meeting. Both men gave evidence to the Authority that, while their focus was on getting redeployment for Mr Andersen, Fullers Group was obstructive and refused to contemplate any of the suggestions made by MUNZ on Mr Andersen's behalf.

[34] In particular, Mr Parsloe referred to a suggestion that Mr Andersen could undertake an adult apprenticeship in marine engineering and that this might allow him to aspire to one of the vacancies in that area. The MUNZ officials both say that Fullers Group dismissed that possibility. The evidence from the Fullers Group witnesses who attended that meeting was that the reservations they had about Mr Andersen completing an adult apprenticeship was simply that such a course of action would take a significant period of time and it simply would not be cost-effective for the company to contemplate such an arrangement.

[35] Moreover, and perhaps more importantly from an operational standpoint, Mr Makin made the point very clearly in his evidence that what Fullers Group required was an immediate human resource, not a prospective future one.

[36] In relation to the suggestion that Mr Andersen could be deployed as a Master, the parties noted that Mr Andersen had previously served as a Master on one of the older style vessels, *The Kestrel*, but that while in command of that vessel, the vessel had come into collision with the Devonport wharf causing significant damage. Fullers Group took the view that, in relation to Mr Andersen taking a fresh position as a master, first there was the unsatisfactory experience with *The Kestrel*, and second, Mr Andersen's experience in the role was many years ago, in a vessel quite unlike the modern ferries run by Fullers Group and in a harbour that was significantly less congested than it is now.

[37] There were also discussions about a role as a Maintenance Storeperson, but from the company's perspective, that role was discounted because of the extensive parts knowledge that would be required. As the previous incumbent had sadly died, there was no prospect of internal training being available.

[38] The final role discussed was the role of Onboard Services Crew. This role was available during the busy summer period and was a fixed term engagement. Mr Andersen's evidence is that he would literally take any position available to remain in work (including this role).

[39] Mr Andersen also alleges in his evidence to the Authority that he had what amounted to a "side discussion" with Mr Makin during this meeting at which he alleges that Mr Makin said that "... *I would not fit in with all the young people texting on board the ferries*".

[40] Mr Makin has no recollection of the so-called “side discussion” and denies the observation attributed to him. However, Mr Makin did tell the Authority that he thought Mr Andersen “*would have huge difficulty in fitting into the Customer Services role*”.

[41] More importantly, Mr Makin maintained that the Union, and Mr Andersen himself:

... were adamant that it [the Onboard Services Crew role] was not acceptable and that the role was of no interest to Mr Andersen. This possibility was firmly ruled out by both the Union and Mr Andersen due to it being only a fixed term role for the summer season.

[42] The evidence of Mr Kotze on this point confirms the views expressed by Mr Makin. He says that the Union representatives made it absolutely clear:

... that a fixed term role was simply unacceptable to the Union and Mr Andersen. The Union explained that after 35 years of service it was impossible to say that a fixed term role as an Onboard Services Crew member was a suitable alternative vacancy. The Union advised that Mr Andersen was not willing to consider it further.

[43] Mr Kotze emphasises the point by adding that Mr Andersen heard those observations made on his behalf and took no exception to them and he refers to a particular passage from notes of the meeting recorded by Mr Mayn in the following terms:

Our concern on the other offers is that a fixed term after 35 years is not an option for us.

[44] The Union representatives complain that Fullers Group was in effect simply going through the motions of looking at various roles that Mr Andersen might be able to fulfil and then finding a basis on which that role was not suitable. Mr Kotze in particular deals with this aspect in his evidence to the Authority and indicates his view that the Union’s criticism is an unfair one. What he says is that:

... we needed to carefully consider each of the vacancies that was available and then make an assessment of whether it was suitable or not. In fact, for various reasons, none of the vacancies were suitable. ... Rather than doing anything inappropriate in this regard, we were in fact following a proper process making sure that we had properly and fully considered each of the vacancies.

[45] In fact, during this meeting, the Fullers Group representatives adjourned to have a private discussion in which they went through each of the vacancies that had

been discussed and then tried to marry Mr Andersen's skill base to those vacancies. In the result, the Fullers Group representatives reached the same conclusion as they had during the open meeting, namely that Mr Andersen did not have the requisite skills base to be suitable for consideration in respect of any of the positions that the parties had been discussing.

[46] Before this meeting concluded, there was then a further exchange between the parties in respect of the prospect of Mr Andersen returning to the role of Master of one of Fullers Group's vessels. Despite the enthusiasm of Mr Andersen himself and the Union representatives, Fullers Group was adamant that Mr Andersen did not have the necessary skill set for the role of Master, notwithstanding the fact that he held the appropriate ticket.

[47] After a return to discussing again the prospects of Mr Andersen fulfilling one of the engineering roles, the meeting concluded after almost two hours' discussion.

[48] The final meeting between the parties took place on 9 September 2011 at which the issues of possible redeployment of Mr Andersen again assumed centre stage. A summary of the position to date was offered by Mr Makin at the beginning of the meeting, at the end of which it appears that the Union raised again the prospects that Mr Andersen could aspire to the Onboard Services role. The parties discussed that issue again at length but in the result the fixed term nature of the position appears to have been the factor which discouraged the Union from persevering with that proposal. After that meeting concluded, Fullers Group made the decision to disestablish the position of shipwright and to confirm that decision in writing to Mr Andersen.

[49] The Authority has devoted some time to outlining the exchanges between the parties during the consultation phase and it will be apparent from that analysis that Fullers Group went to considerable trouble to provide an opportunity for Mr Andersen and his representatives to have significant input into the restructuring process.

[50] The Authority is satisfied that the extent of the consultation offered meets the requirements of the law. As to the content of the discussions between the parties, the Authority is satisfied that the matters traversed by the parties focused on the issues that the parties themselves wished to discuss. It is apparent from the meetings that were held that both parties wanted to focus the discussion on the question of whether

there was an option to redeploy Mr Andersen (about which more later) rather than to discuss whether the redundancy proposal, involving as it did the disestablishment of the shipwright role, was necessary or not.

[51] The Authority is not persuaded that the apparent failure of the parties to spend any real meeting time talking about whether there might be other options to the disestablishment of the shipwright position, is a criticism of the consultation process that can be sheeted home to the employer. Indeed, what the Authority thinks the consultation process discloses is that Fullers Group was itself happy to concentrate its focus on the possibilities of redeployment for Mr Andersen. Had Mr Andersen and his advisers wanted to advance views about why the shipwright position ought not to be disestablished, they had ample opportunity to do that, but apparently chose to concentrate the available time on discussing the prospect of redeployment.

[52] On that basis then, the Authority is satisfied that the consultation offered by Fullers Group was sufficient to meet the requirements of the law.

Was there a redeployment option?

[53] As the Authority has already noted, there was extensive discussion about redeployment during the consultation phase. Indeed, that seems to have been the principal focus of both parties in their discussions, as the analysis in the previous section discloses. The short point is that Mr Andersen was a long serving employee of Fullers Group and, as a man of mature years, his natural inclination was to remain with his longstanding employer in whatever role could be found, rather than losing his position through restructuring and having to find alternative employment elsewhere.

[54] The course of conduct between the parties discloses that Fullers Group was as prepared to explore the options of redeployment as Mr Andersen and his Union were to raise them, and the Authority specifically rejects the contention made on Mr Andersen's behalf that Fullers Group was just going through the motions in looking at the redeployment options.

[55] Fullers Group is entitled, as employer, to assess the qualification, skills and experience of Mr Andersen for each of the roles that are in contemplation and the fact that in each of the discussions about the individual roles, Fullers Group concluded that Mr Andersen did not have the requisite skills or experience, does not of itself demonstrate an unwillingness to contemplate the possibility of a redeployment.

[56] The employer does have the right to determine that the person seeking redeployment has the requisite skills and experience to fulfil the role to which it is suggested they be redeployed.

[57] Indeed, even although it is plain from the previous section of the determination that no redeployment option was identified, and that in consequence Mr Andersen lost his shipwright position through redundancy and was paid out, Fullers Group still engaged with Mr Andersen's Union to try to keep him on the strength.

[58] Mr Parsloe told the Authority that after the redundancy was declared and Mr Andersen was dismissed from the employment, he (Mr Parsloe) made a personal approach to Fullers Group's Managing Director, Mr Douglas Hudson, and as a consequence of that approach, a position as a freight assistant on a fixed term of six months was identified, offered to Mr Andersen and accepted by him.

[59] There is dispute between the parties as to whether Mr Hudson was concerned about the failure of Fullers Group to redeploy Mr Andersen during the redundancy consultation process, but whatever his views about the history of the matter, it is plain that after the personal approach made by Mr Parsloe to him, a role was found and accepted by Mr Andersen. It is difficult not to see this aspect as evidence of Fullers Group's good faith in the engagement with Mr Andersen. Notwithstanding the dismissal for redundancy, the employer was still prepared to enter into discussion with Mr Andersen's advisers to find a position for him to assist him further, and this having already paid out his redundancy compensation and his other entitlements as a consequence of the employment having come to an end.

[60] A further aspect of the matter which the Authority desires to comment on is the suggestion made by the Union that there might be circumstances in which the redundancy compensation package could be, as it were, parked, if redeployment of Mr Andersen to another role had been found prior to the redundancy being declared. This aspect was floated by MUNZ during the redundancy consultation process as a way of endeavouring to keep Mr Andersen in the employment, perhaps until he reached a natural retiring age.

[61] The difficulties with this concept revolve around what was supposed to happen with Mr Andersen's redundancy compensation. Mr Kotze in his evidence to the Authority was very clear that he thought the best option for Mr Andersen, in the

circumstances, was redundancy. This has been characterised, rather unfairly, by Mr Andersen as being cold hearted. In context, the Authority is satisfied that what Mr Kotze was endeavouring to convey was that Mr Andersen was best served by picking up his not insignificant redundancy compensation and moving on with his life rather than endeavouring to continue some form of short term employment with Fullers Group.

[62] Conversely, what the Union advanced on Mr Andersen's behalf was the suggestion that the redundancy compensation and associated elements of the redundancy package could be quantified and recorded for Mr Andersen's benefit in what the Union called a "letter of comfort". Fullers Group would undertake to hold onto the moneys so quantified plus interest, while Mr Andersen continued to be employed by Fullers Group.

[63] But there are obvious difficulties with this concept, like the issue of when, or if at all, Mr Andersen became entitled to the redundancy compensation. Was it suggested that the redundancy compensation would never be available to Mr Andersen if, as a consequence of the disestablishment of the shipwright role he was then redeployed to a new position within Fullers Group and continued in that or other positions with the employer until he reached an age at which he wished to cease employment altogether? Conversely, was it the case that the redundancy compensation would always be due and owing to Mr Andersen at the point at which he left the service of Fullers Group because the shipwright position had been disestablished and he was entitled to the payments as of right?

[64] It is not for the Authority to seek to answer these questions. These were clearly matters which influenced the parties during the discussions they had, and the lack of clarity about precisely what was supposed to happen, especially in relation to the payment of redundancy compensation, clearly discouraged Fullers Group from entertaining that particular Union proposal.

[65] The summary position though is that, although Fullers Group had been unable to agree a redeployment of Mr Andersen during the redundancy consultation process, it had found a position for him after he had been dismissed for redundancy and received his redundancy compensation entitlement and it willingly provided that employment for a further six month period. In the Authority's opinion, Fullers Group fulfilled its obligations in respect of redeployment. It was plain from the engagement

between the parties that Mr Andersen sought redeployment rather than an exit from the employment. The Authority is satisfied Fullers Group did everything it reasonably could to find a suitable position for redeployment but was unsuccessful.

[66] Notwithstanding that, when the matter continued to be pressed on Mr Andersen's behalf after the redundancy was effected, Fullers Group was able to find another position which Mr Andersen was capable of fulfilling and he was offered that and accepted it. In those circumstances, the Authority is satisfied that Fullers Group has met all of the obligations in respect of the redundancy process proper.

Was Mr Andersen discriminated against?

[67] Mr Andersen claims that he was discriminated against on the grounds of age but in the Authority's opinion the evidence for that is slight indeed. It is suggested on Mr Andersen's behalf that:

... the underlying theme throughout all discussions about this role [from Fullers Group] is that Mr Andersen was too old for the role and would not fit in with the much younger staff [this in relation to the Onboard Services role].

[68] Then there is the allegation (which Mr Makin denies) that, in a side discussion with Mr Andersen at the meeting on 31 August 2011, Mr Makin said that Mr Andersen would not fit in with the young people texting on the ferries.

[69] Third, at the final meeting on 9 September 2011, Mr Kotze indicated that Mr Andersen could not perform the Onboard Services role because it would "cause friction" and when Fullers Group was pressed, Mr Andersen says that Mr Makin confirmed that that was because he was too old.

[70] Further, there is a letter from Mr Hudson to Mr Andersen's lawyers dated 26 October 2011 which suggests that Mr Andersen's age was a factor in Fullers Group's consideration of him for various positions.

[71] The legal position is clear. Age is a prohibited ground of discrimination in terms of s.105(1)(i) of the Employment Relations Act 2000 (the Act) and also of s.21(1)(i) of the Human Rights Act 1993. Further, whether age discrimination has occurred or not is a factual matter with the burden of proof lying with the claimant.

[72] The Act requires that age be directly or indirectly causative of the employer's actions. It follows that it is not enough to show that age was taken into account; age must have either directly or indirectly caused Fullers Group's actions.

[73] The evidence before the Authority is plain that Mr Andersen's age was a factor that was taken into account in respect of his suitability for the Onboard Services role. But the question must be whether his age was causative of the decision made by Fullers Group to exclude that position from consideration.

[74] The Authority is not persuaded on the evidence it heard that that case is made out at all. It seems to the Authority that Fullers Group considered a number of factors in terms of Mr Andersen's suitability for that particular role, including the fact that it was fixed term, the fact that the hourly rate bore little relationship to the hourly rate he had previously enjoyed, the fact that it involved cash handling skills in an onboard environment with relatively short voyage times and the fact that Mr Andersen would have been working with staff who were a generation younger than he was.

[75] In the Authority's opinion, the dominant causation for the view which Fullers Group advanced was not Mr Andersen's age but the unsuitability of the position by reason of the combination of the much lower wage rate and the fixed term nature of the engagement. In the Authority's judgment, the assessment of the position in question must be made against the background of an attempt by both parties to redeploy Mr Andersen so that he could continue in the service of Fullers Group. Fullers Group concluded that the Onboard Services role was not suitable because it was short term (seasonal only) and because the wage rate was so much lower than the wage rate that Mr Andersen had previously enjoyed. Those were the dominant causative factors in the decision that Fullers Group made to reject Mr Andersen as a possible candidate for that role.

[76] But the Authority goes further and points out that, by common consent, Mr Andersen and the Union both appeared to hold similar views to Fullers Group until the final meeting when it seemed that Mr Andersen's side concluded that the Onboard Services role might be better than no role at all. But until that point, the evidence seems to suggest that both parties thought the role was unsuitable for Mr Andersen, and that, not because of his age, but because it was short term and poorly paid.

[77] In summary then, the Authority does not accept the contention Mr Andersen makes that he has been discriminated against on the basis of his age.

Determination

[78] For the reasons advanced in the foregoing narrative, the Authority is not persuaded that Mr Andersen's two claims of unjustified dismissal and discrimination on the grounds of age, have been made out.

Costs

[79] Costs are reserved.

James Crichton
Member of the Employment Relations Authority