IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2011] NZERA Christchurch 69
5322858

BETWEEN	DENISE ANDERSEN Applicant	
A N D	SLINKSKINS LIMITED Respondent	TANNERY

Member of Authority:	Helen Doyle
Representatives:	Peter Churchman, Counsel for Applicant Don Rhodes, Advocate for Respondent
Investigation Meeting:	3 May 2011 at Invercargill
Submissions Received:	On the day
Further Information:	5 and 6 May 2011
Date of Determination:	23 May 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Denise Andersen worked at Slinkskins Tannery Limited (Slinkskins) from 3 November 1993. Slinkskins has a tannery operation in Southland. Ms Andersen undertook a wide range of roles in the production process at the tannery during her 16 years of employment including the Nappa press, Schodel operator and wheeling. At the material time in 2009, Ms Andersen worked in grading and fleshing roles in the production process.

[2] Ms Andersen says that she was unjustifiably dismissed from her employment. She was told that her dismissal was for reason of redundancy but she says that the redundancy was not genuine and the process undertaken by Slinkskins was unfair and/or in the alternative, breached the collective agreement which covered her work.

[3] Ms Andersen is a member of the Otago Southland branch of the New Zealand Meatworkers' Union (the Union). The Union was party to a collective agreement 2008-2009 with Slinkskins at the material time Ms Andersen was dismissed.

[4] Ms Andersen seeks reimbursement of lost wages from 23 October 2009 until she was able to obtain other work on 16 March 2010 and compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of $10,000. There is a claim for general damages in the alternative for breaches of the provisions of the collective agreement relating to seniority and requirements in the event of a redundancy. Ms Andersen initially wanted to be reinstated to her position with Slinkskins but has subsequently obtained employment elsewhere that she is happy with and no longer seeks that remedy. Costs are also sought.

[5] Slinkskins says that in May 2009, as a result of global economic conditions impacting on overseas markets, a decision was made to seasonally lay staff off at the end of the season in June 2009. The employees though returned again in or about August 2009 although four employees elected not to.

[6] On 23 October 2009, Slinkskins says that Ms Andersen and 10 other employees were made redundant because there was no improvement in the market at that time. In implementing that redundancy, Slinkskins says that it closely followed the provisions in the collective agreement and explained to Ms Andersen why she was selected.

[7] Another employer, Christopher McDonald, was also dismissed for reason of redundancy on 23 October 2009. By agreement with Mr Churchman and Mr Rhodes, both personal grievances were investigated on the same day. There is a separate determination for Mr McDonald.

Issues

[8] The Authority is required to determine:

- Was the dismissal for the genuine reason of redundancy;
- Was the process followed fair and reasonable?

[9] The Authority must in determining these issues objectively consider the decisions made by Slinkskins and the manner of making the decisions and whether it

was what a fair and reasonable employer would have done in all the circumstances at the relevant time – the former test for justification in s.103A under the Employment Relations Act 2000. That section has now been repealed and the new s.103A was substituted on 1 April 2011. This dismissal, however, took place before 1 April 2011 and the proceedings were lodged prior to that date – Interpretation Act 1999 (ss.17-19).

[10] The statutory obligations of good faith in s.4 of the Employment Relations Act 2000 required Slinkskins to deal with Ms Andersen in good faith throughout the process. These statutory obligations inform the decision under s.103A about how an employer acted – *Simpsons Farm Ltd v. Aberhart* [2006] ERNZ 825. There is a statutory obligation in s.4 (1A)(c) of the Employment Relations Act 2000 where an employer is proposing to make a decision where the decision will have an adverse effect on the continuation of employment to provide to the employee information relevant to the continuation of employment and an opportunity to comment on that information before a decision is made.

[11] In this case an important aspect in the decision to dismiss Ms Anderson was that the seniority list was departed from for the reason Slinkskins say that they wanted to retain employees less senior than Ms Andersen to meet its needs for skills, experience and knowledge. In the Employment Court judgment of *Jinkinson v Oceania (NZ) Ltd (No 2)* [2010] NZEMPC 102, 4 August 2010 it was stated in para. 38 that the selection process and its outcomes must form part of the employer's conduct to be reviewed in deciding whether the dismissal was justified.

Was the dismissal for the genuine reason of redundancy?

The collective agreement

[12] Clause 21 of the collective agreement is headed *SEASONAL CLOSEDOWN/ REDUNDANCY* and provides:

> *In the event of the Tannery being temporarily closed by the Employer at the conclusion of the season, then the following shall apply:*
>
> *1) All part-time workers will be laid off first after receiving one week's notice.*
>
> *2) Seasonal workers will be laid off in order of Seniority from the bottom, after receiving one week's notice.*

> *3) Workers will be offered re-employment each season in order of Seniority as long as the worker has the necessary skills required.*
>
> *4) In the event of Redundancies the Employer shall make any selection based on the need to retain the necessary skills, knowledge and experience within the remaining workers. Seniority will be used in the first instance bearing in mind the above criteria.*
>
> *5) Where the employment of the worker is terminated due to Redundancy, no compensation for redundancy shall be payable subject to the following:-*
>
> > *a) The company agrees that the terms and conditions of the agreement will apply if the business is taken over by another company or person.*
> >
> > *b) If the business is closed, the employer will make every endeavour to place workers in any other position that Slinkskins and their subsidiaries have available.*
> >
> > *c) If there are no positions available, the employer will assist in finding work for any worker that cannot get a job.*
> >
> > *d) If a worker has to leave the district to find work, the employer will assist with the cost of shifting.*

[13] As at 23 October 2009, Ms Andersen was eleventh from the top of the seniority list of employees out of 26 employees and had seniority as one of the more senior employees.

[14] Jonny Hazlett is the general manager of Slinkskins and Lincoln Dearden is the factory manager. Mr Hazlett and Mr Dearden gave evidence about the need to respond to the global economic situation and the corresponding downturn in the business of Slinkskins that they said had become evident by the end of May 2010. Mr Dearden described some of the ways that the company had started to save money. The company commenced four day work weeks from 20 April 2009 that ran through to 10 August 2009 and also turned boilers off and some of the machines.

[15] Mr Hazlett and Mr Dearden said that they then attended meetings with staff on 12 June 2009 at the end of the season and advised them of some of the difficulties the company was facing.

[16] Ms Andersen could not recall the June meeting specifically or what was said. The Union secretary of the Otago Southland branch of the New Zealand Meatworkers', Gary Davis, was present at the meeting and took notes in his diary. He

produced the corresponding diary entry at the investigation meeting and the entry reflects that the meeting took place on 11 June 2009 but nothing turns on that. It is evident there was some discussion at that meeting about some orders having finished and the downturn in business.

[17] I do not find it likely that there was a clear indication of the possibility of redundancies in the future. Mr Davis' notes do not reflect a statement to that effect that and therefore I cannot accept Mr Rhodes' submission that at that meeting staff were given four months' notice of pending redundancy.

16 October 2009

[18] It became clear for the first time at the Authority's investigation meeting that Ms Andersen was in fact on leave the day of the meeting on 16 October 2009.

[19] Ms Andersen recalled that she was separately advised by Mr Dearden, having been called to the office possibly on 17 October 2009, if that indeed was the next work day, that she was being made redundant. This was the first she knew of this I find. It did occur to me that this evidence may raise an issue of notice being short by a day or so but I am sure the parties can resolve this. I reserve leave, if required, for either party though to return to the Authority.

[20] Mr Davis was present at the meeting on 16 October 2009 and I shall refer to his evidence as to what took place because Mr Rhodes submits that the process and/or any deficiencies were in part alleviated by Mr Davis' presence at the meeting. It is important to record that the only information Mr Davis had going into the meeting was a list of the eleven employees to be made redundant. In all probability that was given to him on the day of the meeting.

[21] Mr Rhodes submits that the union through Mr Davis made no complaint about the process but the evidence does not support that. There was a meeting held at Mr Davis's initiative on 20 October 2009 to attempt to understand the selection of Ms Anderson and when the redundancy was nevertheless implemented on 23 October 2009 Mr Davis promptly raised a personal grievance seeking her re-employment on 30 October 2009. The response to these matters in my view makes Mr Rhodes submissions that the company may have been prepared if concerns about the process were raised to somehow revisit what had taken place somewhat less persuasive.

[22] Mr Davis took a note in his diary about what was said at the 16 October meeting and produced that at the Authority investigation meeting. It was the only record of the meeting provided and I accept that, although jottings, the diary entry contained the key elements of the discussion. It is recorded that Mr Hazlett advised those present at the meeting on 16 October that there were not many orders and if crusting starts then the workers would be brought back in February if possible. There is a note that if skins could be sold then fleshing etc would be started. It is also recorded that calf skins were down by 70%. Mr Davis noted in his diary entry that the company would pay Labour Day and long service. I accept that there was probably an invitation for those with questions to stay behind later and raise these with Mr Hazlett and Mr Dearden.

[23] There was a dispute as to what Ms Andersen knew about the reason her position had been selected. Mr Dearden and Mr Hazlett say it was made clear although nly at the time of announcing redundancies that selection was on the basis of the collective agreement using the seniority list in the first instance and then making sure they retained employees with the required skills, experience and knowledge.

[24] I find, to the extent that anything was said about the reason for the selection of Ms Andersen, it was more likely said during the meeting, requested by Mr Davis and held on 20 October 2009 before redundancies took effect on 23 October 2009 because of concerns raised with Mr Davis and Union delegate Bev Halder that others below Ms Andersen and Mr McDonald in the seniority list had been retained.

Meeting on 20 October 2009

[25] The meeting on 20 October 2009 involved Mr Hazlett, Mr Dearden, Mr Davis, Ms Andersen, Mr McDonald and Ms Halder. The evidence supports an exchange that became heated between Mr Dearden and Mr McDonald. I do not need to make findings about that. Nevertheless the meeting was cut short because of this and lasted about five minutes. It would be surprising if nothing was said at the meeting at all about the reasons those lower on the seniority list than Ms Andersen were to be retained. I find it likely that there was reference to that being that the company wanted to retain certain skills, experience and knowledge. All that can really be said about this meeting was that the issues outstanding between the parties as to selection and redundancy were not resolved.

Letter dated 23 October 2009

[26] Ms Andersen's employment ended on 23 October 2009. Ms Andersen received the following letter which although with her name inserted appears to have been a template letter.

> *Dear Denise,*
>
> *The Slink lamb and Calf collection season has come to an end, this will mean a lower production level in the Tannery for the moment., unfortunately this also means our company has to reduce its staff numbers accordingly.*
>
> *So further to our meeting on the 16th of October I am sorry to inform you that you will be one of the people I have to advise that will be made redundant.*
>
> *For this reason your employment with us will cease on the 23rd of October 2009 at the end of your shift on this day.*
>
> *We thank you for your efforts that have enabled us to process the raw skins for this coming season, and hope you gained some valuable experience in Tannery work whilst employed by Slinkskins Limited.*
>
> *Lincoln Dearden*
> *TANNERY MANAGER*

[27] Ms Andersen attempted to obtain other employment in the area but it took her some months before she was able to secure her current position in May 2010.

[28] Before finding employment, Ms Andersen attended mediation in February 2010 to attempt to resolve the issues. Mediation was not successful. The week before the Authority's investigation meeting, Mr Churchman was advised in an email from sent through Mr Rhodes' office, that in the period immediately after mediation, February/March 2010, eight employees were employed at Slinkskins. It was recorded in the email that most employees employed at that time had worked previously at Slinkskins but that none of those had any seniority. It was clarified during the Authority's investigation meeting that, of the eight, there were two new employees.

Conclusion

[29] The law recognises the right for Slinkskins to make its business more efficient and further recognises that an employee does not have the right to continued employment if the business could be run more efficiently without that employee – *GN Hale & Son Ltd v. Wellington Caretakers IUOW* [1991] 1 NZLR 151 (CA).

[30] The collective agreement provided that there could be at the conclusion of a season a seasonal closedown and set out a process in the event of that happening. In many ways, the process used in this case and then the re-employment of several employees made redundant a few months later by Slinkskins mirrored that of a seasonal lay off. The redundancy letters sent to Ms Andersen referred to lower production level in the tannery ***for the moment***. There was also a hope expressed that workers would be taken back in February 2010 at the meeting on 16 October 2009. The evidence and some letters to employees from other shutdown events supported that the word redundancy were also used in letters sent after a seasonal closedown for insurance or other reasons.

[31] The respondent though did not try to argue that this was a seasonal closedown and justification therefore has to be assessed on the basis of a dismissal for reason of redundancy. What was clear however was that those who were re-employed in February or March 2010 lost any seniority and started as brand new employees at the bottom of the list. That would not have occurred if there had been a seasonal lay off and employees were re-employed. Seniority in that instance would have been retained.

[32] Mr Churchman, on behalf of Ms Andersen, submits that the redundancy was not genuine and was a sham as employees, some new and some who were laid off at the same time as Ms Andersen with no seniority, were re-employed in February and March 2010. Further, Mr Churchman submits there was no compliance with the requirements in terms of seniority and/or no discussion directly with Ms Andersen as to whether she had the necessary skills and experience in terms of Slinkskins needs at that time. He further submits there was no consultation.

[33] Eleven staff were made redundant at the end of October 2009 and Slinkskins then employed eight staff in February and March 2010. The evidence supports that these eight individuals were telephoned about roles at Slinkskins. The only reason advanced as to why Ms Andersen was not telephoned was that she had not filled in an application form either provided to those present at the meeting on 16 October or indicated as being required in order to be considered for employment in the future.

[34] Mr Davis and Ms Halder could not recall any discussion about these application forms at the meeting on 16 October 2010. Mr Rhodes, at my request, provided copies of these application forms completed by the eight employees after the

investigation meeting. These forms were all dated February or March 2010 and I accept that is consistent with evidence on behalf of Ms Andersen that application forms were not required to be completed until after individuals had been telephoned in 2010 about employment opportunities at the tannery.

[35] I find the evidence about the application forms unconvincing to the extent I am not even satisfied there were any application forms either mentioned or provided during the October meeting. It follows, therefore, that I do not find an adequate reason why Ms Andersen was not contacted in February and offered a role.

[36] A failure to contact Ms Andersen and offer her employment when it is clear that other employees made redundant in October 2009 were telephoned does cast considerable doubt that the redundancy was the genuine reason for Ms Andersen's dismissal.

[37] Although Mr Dearden and Mr Hazlett said they did give consideration to the seniority list, it is not disputed that others below Ms Andersen on that list retained their position. The reason that was advanced for that was that other employees lower on the list had the necessary skills, knowledge and experience and were retained for that reason. Three individuals were retained at that stage as set out in the statement in reply for the wheeler positions although one of those left not too long after 23 October 2009. There is no dispute that Ms Andersen had considerable previous experience in wheeling. There was no discussion with Ms Andersen about whether she would be prepared to return to that area and no analysis undertaken with her about her skills, knowledge and experience in terms of Slinkskins needs. Ms Andersen said in her evidence that she would have undertaken the wheeling role if it had made the difference between retaining a role or being made redundant. The evidence supports that Ms Andersen had considerable skills, experience and knowledge in working across various roles in the production process at the Tannery during her 16 years.

[38] I accept Mr Churchman's submission that there is no real paper trail in quite a significant restructuring and redundancy situation. Alongside this going to the genuineness of the redundancy there was no compliance with the good faith or consultation requirement of s 4 (1A) (c) of the Employment Relations Act 2000. .

[39] For the reasons I have set out above, I am not satisfied that Ms Andersen's position was genuinely redundant.

Was the process followed was fair and reasonable

[40] Ms Andersen was not provided with any information about the proposed decision to make her position redundant and did not have an opportunity to comment on it. She was simply told that her position was redundant and given at most a weeks notice.

[41] Ms Andersen would have retained her position if seniority had been followed in accordance with the list. The seniority list was departed from on the basis that employees were retained with skills and experience Slinkskins needed but there was no proper analysis undertaken with Ms Andersen about her skills and experience that she had in the wheeling area.

[42] There was also no compliance with the provision in clause 21(5)(c) of the employment agreement that if employees were not able to find work, the employer would make endeavours to obtain work on their behalf. The only evidence about any steps the company took was to provide some WINZ application forms. In fact I am not even satisfied that those forms were provided to Ms Andersen.

[43] Ms Andersen had been an employee with Slinkskins for 16 years. To send a template letter that did not even reflect her individual circumstances such as a different meeting date is quite inadequate.

[44] I find, for all the reasons set out above, that the process followed by Slinkskins was not fair and reasonable.

Determination

[45] I find the decision to dismiss Ms Andersen was not what a fair and reasonable employer would have done in all the circumstances at the time of her dismissal. I find the dismissal was unjustified, both in terms of the genuineness of the redundancy and the procedure followed.

[46] Ms Andersen has a personal grievance and is entitled to remedies.

Lost wages

[47] I accept Ms Andersen made attempts to mitigate her loss by applying for what she said was about 50 positions. Helpfully, Mr Rhodes took no issue about the

adequacy of mitigation, no doubt with his local knowledge about some of the difficulties at that time with securing employment. He did not require Ms Andersen to provide documents about her job applications. The period of unemployment for which Ms Andersen received a benefit was from 23 October 2009 until 16 March 2010 (a period of 20 weeks).

[48] Ms Andersen gave evidence that her net average weekly earnings from Slinkskins were $500. No issue was taken with that averaging by Slinkskins.

[49] I order Slinkskins Tannery Limited to pay to Denise Andersen the sum of $10,000 net under s.123(1)(b) of the Employment Relations Act 2000 being lost wages.

Compensation

[50] The evidence about compensation was somewhat limited and concentrated on two main issues. The first was financial difficulties that Ms Andersen had suffered as the sole earner in her household. At that time, Ms Andersen had one dependent. Ms Andersen explained that after she paid for her outgoings there was no money and the evidence supported she had suffered financial difficulties during that period.

[51] The other matter that Ms Andersen talked about in relation to her claim for compensation was that she was upset that employees lower ranked than her in the seniority list had been retained and she had lost her job.

[52] Ms Andersen was a longstanding employee and was not treated well at the time her employment ended. The evidence, however, of distress was limited to the above matters and I am of the view that, taking into account the evidence, an award of $5,000 for compensation would be appropriate.

[53] I order Slinkskins Tannery Limited to pay to Denise Andersen the sum of $5,000 without deduction being compensation under s.123(1)(c)(i) of the Employment Relations Act 2000.

[54] There are no issues in this case with respect to contribution and no deduction is made in that regard.

General damages

[55] I make no separate award for damages in this case having found a personal grievance and awarded lost wages and compensation in relation to that.

Costs

[56] I reserve the issue of costs. I would encourage the parties to attempt to reach agreement about costs, failing which, Mr Churchman is to lodge and serve submissions as to costs by Monday 13 June 2011 and Mr Rhodes has until Monday 4 July 2011 to make submissions in reply.

Helen Doyle
Member of the Employment Relations Authority