



New Zealand Employment Relations Authority Decisions

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Christoforou v Resene Paints Limited [2011] NZERA 50; [2011] NZERA Wellington 7 (26 January 2011)

Last Updated: 21 February 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2011] NZERA Wellington 7 5281397

BETWEEN

DEMETRIOUS
CHRISTOFOROU
Applicant

AND

RESENE PAINTS LTD Respondent

Member of Authority:

P R Stapp

Representatives:

Paul May, Counsel for the Applicant

Murray French, Advocate for the Respondent

Investigation Meeting: 19 October 2010 at Wellington

Submissions Received by: 9 November 2010

Determination:

26 January 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Christoforou was employed by Resene Paints Ltd (Resene) as a research and development chemist. He commenced his employment on 6 March 1995. He was employed under the terms of a Resene Paints Weekly Individual Employment Agreement.

[2] A downturn in sales and the economic climate in 2008 resulted in a review of costs and staff numbers at Resene. The decision was made to implement changes that had an impact on employment in the company.

[3] The decision was made by Danusia Wypych, Technical Manager, to rank Mr Christoforou third in order of ranking with other R and D Chemists that meant his employment would end with Resene due to redundancy. He was given four weeks' notice under his employment agreement and he decided to work out his notice. He challenged Ms Wypych's decision and claimed that his performance was unfairly taken into account and because he was covered by the weekly employment agreement he was chosen as the cheapest option to save costs.

[4] Resene denied Mr Christoforou's claims. It does not dispute that he was dismissed, but his dismissal was due to a genuine redundancy and undertaken following a proper and fair selection process.

Issues

[5] The issues in this matter are:

- (a) Was Resene influenced by any irrelevant factors such as any performance issues and reduced period of notice and any other savings under the weekly employment agreement to save costs? In other words, were there any ulterior motives for Resene making the applicant redundant because it was cheaper and he was a target?
- (b) Was Resene fair in its approach to Mr Christoforou's redundancy by applying the weekly employment agreement in regard to a notice provisions for redundancy;

The Facts

[6] It is common ground that Mr Christoforou was employed under the Weekly Resene Individual Employment Agreement rather than the Monthly Resene Individual Employment Agreement. This was Mr Christoforou's choice at the time. It is common ground that over the years the employment terms of the two employment agreements have been reviewed with changes occurring as a result.

[7] It is common ground that Mr Christoforou's level of productivity largely associated with time management, resulted in a wage increase being deferred in August 2005. Satisfactory progress had been made later with better productivity being achieved and the deferred salary increased was applied in February 2006.

[8] Resene was affected by a contracting market and a significant reduction in sales volumes from April 2008. It was forced to review staff numbers during the 2008/09 year. Measures were put in place that included reductions in overtime, standard working hours and cutting expenditure wherever possible, with steps taken to streamline the business and contain costs.

[9] In June 2009 Ms Wypych was instructed to review resources in the technical department in the context of current and anticipated business activity. This was to ensure resources were matched with expected needs. A review of the Research and Development (R and D) team followed.

[10] On 9 July 2009 Mr Christoforou was personally advised by Ms Wypych, that she was required to review costs and staff levels. She announced the possibility of redundancies. She announced a proposal that could involve the disestablishment of positions and result in redundancy if no other options could be identified for ongoing employment.

[11] A general advice notice was sent to all technical staff outlining the proposal to reduce the number of R and D chemists. The R and D chemists were advised of the situation the company faced and the basis for the proposed changes to the R and D team and invited any comment. She specified the details about the process involving the selection of the number required by Resene within the R and D team. In other words the persons affected were invited to comment on the proposal and whether they thought it was workable.

[12] Ms Wypych advised the R and D chemists that there would need to be a selection process for the positions available. She advised them that the format would involve a job interview with affected staff where they would be able to put forward any information they believed would assist their case.

[13] She advised them that consideration would be given and discussion on past achievements and performance in the role. They were advised she would then make a decision on who would be most suitable. She invited comments on this approach from the affected employees.

[14] Individual interviews were then held. At the same time the R and D chemists put forward a proposal to avoid redundancies. They indicated that they would like to develop and present an alternative method for achieving the reduction of one permanent staff members.

[15] Also, Ms Wypych advised Mr Christoforou by email personally that at his interview some of the things to talk about would include:

- *How you effectively progress projects*
 - *Project initiations completions in the last 12 months and their implementation or closure*
- *How you are continuing to develop your expertise*
 - *The general areas expertise you are currently applying in your work*
- *Other areas of expertise you have*
 - *How you document and communicate project progress within the team.*

[16] This was not an exhaustive list and it was left open to Mr Christoforou if he had any other insights to offer.

[17] On 13 July 2009 Ms Wypych met with Mr Christoforou where he had the opportunity to raise aspects he felt were important in regard to obtaining one of the remaining positions. As an outcome of that meeting, and meetings held with other affected staff, Ms Wypych decided that Mr Christoforou ranked third on the basis of experience, project initiative,

project progress and productivity. She emphatically denied that Mr Christoforou was being set up in regard to any previous performance related issues.

[18] At the same time as she made her decision about the ranking of the affected R and D chemists she also put up to Mr Nick Nightingale, the managing director, a confidential redundancy scenario that included a comment on the value of a redundancy. She also commented on the scenarios offered by the R and D team. Mr Nightingale instructed her to implement the changes and make her decision in regard to redundancy for commercial reasons.

[19] On 21 July 2009 Ms Wypych informed Mr Christoforou that she was confirming the decision that Resene had decided to disestablish one of the permanent R and D chemists' positions, and the fixed term position. She regretfully informed Mr Christoforou that he had been selected as the person to lose his permanent position. She advised him that her decision was reached following an evaluation of each person's skill set "... with particular focus on applied technical knowledge, project progress and completion, areas of expertise and the expected project needs for the next 12-24 months.

[20] Ms Wypych also advised him of four weeks notice of redundancy. Mr Christoforou decided to work out that notice. He has challenged the decision to make him redundant. He claims that the decision to terminate his employment was unfair and that the consideration was given to his prior performance rather than any objective selection criteria.

[21] Mr Christoforou was informed that he was to be made redundant. His last day at Resene was 18 August 2009 after he decided to work out his notice. In the meantime there were a series of discussions that occurred between the parties regarding claims made by Mr Christoforou that the application of the terms of his actual individual employment agreement was unfair.

[22] However, as a gesture of goodwill Resene did make an offer to pay him an extra four weeks pay over his contractual entitlement as an ex gratia payment, but this offer was rejected by him and consequently was later withdrawn by Resene on 7 August 2009.

[23] In his comments and claims regarding why he believed his redundancy was not justified he made the assertion that Resene selected him for redundancy in an effort to address work performance issues. Resene denied this claim.

[24] He also alleged that his selection for redundancy was influenced by the lesser period of notice Resene was required to give him, compared to a person on a monthly individual employment agreement. In other words he would cost less. Resene claimed that this was not a factor in the redundancy/selection process and that it was entitled to rely on his employment agreement as regards the notice terms.

[25] Resene claimed that Mr Christoforou failed to understand the context of the reference to performance in the various documents relating to the selection criteria used by Ms Wypych. Resene has considered its group of employees in regard to demonstrated performance of technical knowledge and project progress and completion and had regard to those who did a satisfactory job and others who were inherently more productive. It had the right, it claims, to select and elect to chose staff who in relative terms offer less performance than others, notwithstanding that the lower rated employees were not regarded as poor performers who warranted corrective performance management.

[26] Resene has denied Mr Christoforou's claim for 15 weeks lost pay and his claim for compensation for stress, humiliation and injury to feelings. It claims that its process was fair and it took care to treat the situation all staff faced, with *compassion*. It does not accept that in choosing other staff members that he has been humiliated because it was entitled to maintain a balance of skills across its R and D team and that any feelings of humiliation by Mr Christoforou are misplaced.

Determination

[27] I hold that there were commercial reasons for Resene to consider saving costs and reducing staff numbers. The commercial situation has not been challenged. I accept the redundancy was genuine for commercial reasons.

[28] There were no ulterior motives for Resene making the applicant redundant. There were no irrelevant factors taken into account by Resene such as any performance issues and the reduced period of notice and any other savings under the weekly employment agreement to save costs. In other words Resene did not make the decision because it was cheaper and did not target the applicant. There was a review in regard to costs and staff levels. Mr Christoforou was not singled out as the review applied to his department and indeed applied company wide.

[29] There was announcement of the possibility of redundancies involving the consideration of the disestablishment of positions and resulting in redundancy if no other options could be identified for ongoing employment. Input was invited on the proposal and the selection.

[30] The format involved a job interview with affected staff where they were able to put forward any information they believed would assist their case. Also, the affected employees were advised that consideration would be given to and discussion would include past achievements and performance in the role. They were advised that a decision would be made on who would be most suitable for the remaining roles. Ms Wypych invited comments on this approach from the affected

employees.

[31] Individual interviews were then held. At the same time the R and D chemists put forward a proposal to avoid redundancies. They indicated that they would like to develop and present an alternative method for achieving the reduction of one permanent staff members. Also, Ms Wypych advised Mr Christoforou by email personally that at his interview some of the things to talk about. This was not an exhaustive list and it was left open to Mr Christoforou if he had any other insights to offer.

[32] On 13 July 2009 Ms Wypych met with Mr Christoforou where he had the opportunity to raise aspects he felt were important in regard to obtaining one of the remaining positions. He knew what was involved including that Ms Wypych would be making a selection.

[33] Overall Resene consulted and provided the opportunity for employees to have input into what was happening including the selection procedure.

[34] Mr Christoforou was ranked third on the basis of experience, project initiative, project progress and productivity. Ms Wypych emphatically denied that Mr Christoforou was being set up in regard to any previous performance related issues. I have accepted her evidence on that point because there is no evidence that supports Mr Christoforou being set up.

[35] Mr Nightingale was involved in the process and made a commercial decision to proceed notwithstanding that he was given the scenarios offered by the R and D team, and then made a decision on commercial grounds.

[36] Ms Wypych informed Mr Christoforou of the decision to disestablish one of the permanent R and D chemists' positions, and the fixed term position. Ms Wypych's selection was based on criteria applying to the affected R and D chemists.

[37] I accept that the above was the action of a fair and reasonable employer.

[38] Ms Wypych also advised Mr Christoforou of his entitlement to four weeks notice of redundancy. Mr Christoforou decided to work out that notice.

[39] I hold that Mr Christoforou's terms and conditions of employment were under the Weekly Resene Individual Employment Agreement. As such Resene's obligations existed under that agreement. It was not obliged to apply the Monthly agreement even if that agreement included more advantageous provisions relating to a redundancy payment. It follows that Resene acted fairly in its approach to Mr Christoforou's redundancy by applying the weekly employment agreement in regard to a notice provision for redundancy.

[40] I dismiss the applicant's claims.

[41] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority