

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Jack Crimmins (Applicant)  
**AND** McVicar Timber Group Ltd (Respondent)  
**REPRESENTATIVES** Gregory Lloyd, Advocate for Applicant  
Peter D Zwart, Advocate for Respondent  
**MEMBER OF AUTHORITY** James Crichton  
**INVESTIGATION MEETING** 15 September 2005  
**DATE OF DETERMINATION** 12 December 2005

DETERMINATION OF THE AUTHORITY

*Employment relationship problem*

- [1] The applicant (Mr Crimmins) was employed as a general labourer by the respondent company McVicar Timber Group Limited (McVicars) for approximately 38 years.
- [2] Mr Crimmins says that he suffered an unjustifiable action by his employer to his disadvantage in that McVicar failed to pay him redundancy compensation to which he considers he is entitled. Additionally, Mr Crimmins seeks compensation.
- [3] McVicars say there was no unjustifiable action causing disadvantage and that there was no redundancy declared in respect of Mr Crimmins.
- [4] The parties have attended mediation but have not been successful in solving the employment relationship problem.
- [5] McVicars operated a retail timber business and employed Mr Crimmins at their facility at Halswell Junction Road in Christchurch where Mr Crimmins was principally employed making wooden stakes.
- [6] The Halswell Junction Road site was sold by McVicars effective 28 February 2005 to an entity called Hillside Building Supplies Limited (Hillside).
- [7] On and from that date, the six employees on that site would be affected by the change in the employer's circumstances and the ownership of the work site. One employee was offered work by McVicars at another site and the bulk of the workers were likely to transfer to the employment of Hillside.

[8] At first, it seemed that there was no suggestion that Mr Crimmins could continue to be employed by McVicars. The prospect of Mr Crimmins working for Hillside also seemed remote. Hillside did not make wooden stakes and Mr Crimmins evidence was that the only work that he was offered by Hillside was casual or contract work. This did not meet Mr Crimmins needs and he declined that opportunity.

[9] Mr Kevin Rae, who did not given evidence at the investigation meeting, apparently asked Mr Crimmins what his intentions were and Mr Crimmins said he did not want to be employed by Hillside.

[10] Then it seems that McVicars operations manager Mr Ockenden spoke directly to Mr Crimmins' union official Mr Paul Watson about Mr Crimmins' situation.

[11] From this point on, there was no contact between Mr Crimmins and McVicars and all of the discussions on Mr Crimmins situation were between his employer and his union.

[12] Mr Crimmins evidence was that once Mr Ockenden had spoken to Mr Watson about the situation for the first time, Mr Watson had indicated to Mr Crimmins that "they (referring to McVicars) have put you in a redundant situation".

[13] On 23 February there was a further discussion between Mr Ockenden and Mr Watson of the union at which there were more discussions about Mr Crimmins and another indication from McVicars that Mr Crimmins was redundant. Critically, Mr Ockenden invited Mr Watson to submit a redundancy proposal for Mr Crimmins.

[14] That proposal was forwarded the following day and a meeting was scheduled on February 25th at which the matter was discussed again between McVicars and the union on behalf of Mr Crimmins. At this meeting, McVicars said that they now had a job for Mr Crimmins. It is common ground that this was the first occasion on which the employer indicated that redeployment was an option and of course Mr Crimmins' union contended that the only reason McVicars changed its position in relation to redundancy was because of the redundancy calculation which the union had prepared on Mr Crimmins' behalf.

[15] The consequence of the sudden change in position by McVicars was that Mr Crimmins suffered a stress related health collapse and he was off work from this point down to 19 May when his union advised McVicars that Mr Crimmins would not return to work because his employment had been terminated by reason of redundancy.

### *Issues*

[16] The first and most significant issue for determination by the Authority is whether or not Mr Crimmins' position was made redundant so as to engage the redundancy provisions of the relevant employment agreement.

[17] The second question is whether McVicars' treatment of Mr Crimmins constitutes a personal grievance in terms of an unjustified action by McVicars to Mr Crimmins' disadvantage.

[18] The final issue for determination is, assuming that the Authority was to find that Mr Crimmins is indeed redundant, what redundancy compensation entitlement does he have.

***The redundancy issue***

[19] Mr Crimmins' employment was covered by a collective employment agreement (the agreement).

[20] The agreement contains two relevant sets of provisions concerning redundancy. It is useful to set out in full the provisions of schedule A of the agreement which state:

*Where the employer sells the timber yard(s) and existing staff are not offered the same wages and conditions by the new owner it is agreed by the parties this is a staff surplus situation.*

*In the staff surplus situation the employer will give the affected employees and the union a month's notice of the sale.*

*In this notice period the parties will review all relocation options in the company.*

*Where relocation is not an agreed option between the parties then redundancy compensation will be paid to the affected employee.*

*The calculation of the redundancy compensation will take into consideration the impartial statistics recorded by Victoria University for the timber industry.*

*The above redundancy provisions will not apply where there is simultaneously a mill closure. If the mill is closed in conjunction with the timber yard the parties will meet and agree on a redundancy payment for affected staff.*

[21] The other relevant provision is s17 of the agreement entitled Termination of Employment.

[22] Clause 17.5 is in these terms: "*All employees to be declared redundant will receive not less than four week (sic) written notice of the termination of their employment and the union will be advised before such notice is given. The terms and conditions of such redundancy shall be negotiated by the employer and the union (refer to the schedule re yard closures)*".

[23] The last clause in parenthesis appears to refer to schedule A which I quoted in full at paragraph [20] above. Nowhere in the agreement is there a definition of redundancy.

[24] The definition provided in the old Labour Relations Act indicated that redundancy was a situation where workers' employment was terminated by the employer because the position that worker held was superfluous to the employer's needs.

[25] Clearly, redundancy connotes a termination of employment for a particular reason and the central question between the instant parties is whether in fact Mr Crimmins' employment was ever actually terminated by McVicars.

[26] There is no question that the circumstances in which the parties found themselves constituted a superfluity of labour but that will not automatically translate into a termination of employment for a particular employee on the grounds of redundancy.

[27] Mr Crimmins says through his union that the actions of McVicars effectively demonstrated substantial compliance with the redundancy provisions in the agreement such as to create in his mind and in the mind of his union the conviction that he had in fact been made redundant.

[28] When McVicars then resiled from that position and sought to redeploy Mr Crimmins, Mr Crimmins says that such a unilateral change was not available to McVicars to make and so they must be held to their original position of declaring him redundant and paying him redundancy compensation in consequence.

[29] For its part, McVicars acknowledges that there was a surplus of staff but denies that Mr Crimmins was ever declared redundant. It agrees that it negotiated in good faith with Mr Crimmins' union with a view to exploring whether redundancy might be agreed but it says that it never actually terminated Mr Crimmins' employment and so while he was part of the superfluity of employees caused by the sale of the timber yard at which he worked, he was never dismissed for redundancy and therefore his argument that McVicars cannot resile from their obligation to pay redundancy compensation is not made out.

[30] An analysis of the first four paragraphs of schedule A of the agreement is instructive. The first paragraph refers to the sale of the timber yard as the tipping point for activating a staff surplus situation with the proviso that the staff member was not offered *the same wages and conditions and position by the new owner*.

[31] Mr Crimmins says this first paragraph does apply because the timber yard was sold and that is conceded by McVicars. However, the next point is disputed when Mr Crimmins through his union says that he was not offered the same wages and conditions and position by the new owner.

[32] Mr Crimmins made pegs and had done for many years. His job title was yard worker which in McVicars' view, carries a job description wider in scope than might be contemplated simply by the title of peg maker.

[33] It is common ground that Hillside had no intention of continuing the manufacture of pegs but McVicars say that because Hillside made an offer to Mr Crimmins which would be in the nature of work that could be done by a yard worker, that brought McVicars within the terms of the proviso to the first paragraph of schedule A. It followed that Mr Crimmins had been offered work on the same wages and conditions and position by Hillside and therefore schedule A did not apply.

[34] I do not accept that submission. Mr Crimmins gave clear evidence that he had been offered casual or contract work by Hillside and even if the work offered would be the kind of work that could be done by a yard worker I find that such work would not be on "the same wages and conditions and position"

[35] Accordingly, I think schedule A does apply.

[36] It follows that we have "a staff surplus situation". Paragraph 2 tells us that the employer is supposed to give affected staff and the union a month's notice of the sale. It is common ground that that notice was never given. On the face of it, that is a breach of the terms of the agreement. The month's notice effectively repeats the central feature of clause 17.5.

[37] Paragraph 3 requires that during that notice period the parties are to review relocation options within the company. Because McVicars effectively only gave the union two and half weeks notice of the sale, that period was artificially truncated.

[38] There is precious little evidence of any genuine effort being put in by McVicars to consider relocation until after McVicars received the union's redundancy proposal.

[39] There was discussion about Mr Crimmins working in a kiln at another timber yard owned by McVicars although both parties seem to accept that that would not be a realistic option for Mr Crimmins.

[40] It was not until the union presented its redundancy calculation to McVicars that McVicars very suddenly rethought its enthusiasm for Mr Crimmins' redundancy and, it seems within 24 hours of receiving the union's redundancy calculation, it was meeting with the union and saying that relocation was a genuine possibility with Mr Crimmins doing exactly the work that he was previously engaged to do but on a different McVicars site.

[41] It is difficult to escape the conclusion that McVicars have not acted in good faith in relation to the relocation issue. Mr Ockenden the representative of McVicars who was primarily involved in these discussions clearly said to Mr Watson the union official looking after Mr Crimmins that Mr Crimmins was in a redundancy situation and it was Mr Ockenden who invited Mr Watson to produce the redundancy calculation.

[42] Mr Ockenden, Mr Watson, Mr Crimmins all seemed to have agreed and they all gave evidence before me that the kiln job was simply not an option. Until McVicars saw the union's redundancy calculation, that was the only relocation option that was in any way canvassed. It was only when McVicars saw the redundancy calculation that they came up with a brand new option of having Mr Crimmins continue to make pegs on another site.

[43] The fourth paragraph of the schedule simply provides that if relocation is not an agreed option (and plainly it was not) then redundancy compensation will be paid.

[44] It is difficult to escape the force of these words. There has been no agreement on relocation. Maybe the position could have been different if McVicars had offered the peg making option at first blush rather than at the 11th hour. In the result the only option on relocation that was discussed in a reasonable way between the parties was the kiln option and everybody agreed that was unsuitable. It seems to me the force and effect of the fourth paragraph of the relevant schedule of the agreement is to require that the parties negotiate redundancy compensation so that the "affected employee" can be paid that compensation.

[45] McVicars argue that because no formal written notice terminating Mr Crimmins' employment was ever given Mr Crimmins is not entitled to assume that he is redundant simply by interpreting the actions of others. But one observes that Mr Crimmins' job has clearly gone.

[46] They further say that the provisions of schedule A need to be read in conjunction with the provisions of clause 17 which is the clause relating to termination of employment and they support their argument by drawing the Authority's attention to the usual meaning of redundancy as including the concept of termination. But clause 17 says nothing inconsistent with schedule A and indeed seems to refer us back to schedule A

[47] McVicars also say that the fact of a superfluity of workers as a consequence of a change in business conditions does not of itself necessarily result in termination of employment of individual employees. Indeed not, but the fact of superfluity brings the parties within the terms of schedule A, which must be applied in its entirety.

[48] Schedule A clearly applies to the instant case. It starts from a position where if certain conditions exist, a staff surplus situation is created.

[49] Having established the existence of a staff surplus situation, schedule A's second and third paragraphs then establish the process for considering options other than redundancy and once those provisos have been met there is a mandatory requirement that redundancy compensation is to be paid to an affected employee.

***The disadvantage claim***

[50] The evidence before me was that on and from the 25 February when McVicars announced that they found a job for Mr Crimmins making pegs at another site operated by them, Mr Crimmins health collapsed from the stress occasioned by the sudden change in the employers' previous position. He never attended at work again, his employment being brought to an end by his union advising McVicars on 19 May that Mr Crimmins would not be returning to work because his employment had been terminated by reason of redundancy.

[51] McVicars argue that Mr Crimmins did not keep good health and that his medical records disclose regular bouts of anxiety and/or depression not all of which was work related.

[52] Mr Crimmins general practitioner Dr Mark Cohen gave useful evidence to the effect that he could not be sure that Mr Crimmins' depression and anxiety was all attributable to his employment difficulties.

[53] In the result, I am satisfied there is ample evidence that Mr Crimmins was seriously hurt by his employer of 37 odd years treating him in the manner which it did. I am not persuaded that it is the action of a good employer to lead a long serving employee to believe that he would be made redundant and, at the 11th hour and what is for apparently their own convenience to unilaterally change that position and advise such an employee that indeed he will continue working but on a different site. Such behaviour is not an example of the good faith principle in action.

[54] I find that Mr Crimmins has suffered as a consequence of an unjustified action by McVicars and that he has been disadvantaged by that action.

***Determination***

[55] I direct that the parties are to engage with each other with a view to completing the negotiations which started on 23 February 2005 on the matter of Mr Crimmins redundancy compensation. I note that Mr Crimmins' union has indicated its opening position to McVicars and I specifically decline to order that McVicars pay that sum to Mr Crimmins.

[56] Clearly, the agreement contemplates negotiation and that is what should happen between these parties.

[57] Leave is reserved for the parties to come back to the Authority should the matter not be resolved within a reasonable period of time.

[58] I find that Mr Crimmins has a personal grievance by way of disadvantage in respect to the way in which McVicars managed the labour superfluity issue as it related to Mr Crimmins and I direct that McVicars pay to Mr Crimmins the sum of \$5,000 under s.123(1)(c)(1) of the Employment Relations Act 2000. I am satisfied Mr Crimmins has not contributed, in any way, to the situation which gave rise to the grievance

*Costs*

[59] Costs are reserved.

James Crichton  
Member of Employment Relations Authority