IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 180
5280211

	BETWEEN	RICHARD CRISP Applicant
	A N D	PMP PRINT LIMITED Respondent

Member of Authority:	M B Loftus
Representatives:	Anne-Marie McInally, Counsel for Applicant Tim McGinn, Counsel for Respondent
Investigation meeting:	22 February 2011 at Christchurch
Submissions Received	27 October 2011 from Applicant 8 December 2011 from Respondent
Date of Determination:	24 August 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Richard Crisp, claims to have been unjustifiably dismissed by the respondent, PMP Print Limited (PMP), on 17 June 2009.

[2] PMP accepts it dismissed Mr Crisp, but contends the dismissal was a substantively justified redundancy and its process fair.

Acknowledgement

[3] Unfortunately a considerable period of time has passed since the investigation meeting, which was interrupted by the Christchurch earthquake. As a result the parties chose to proceed to submissions without completing the evidence as the bulk had been heard. The earthquake did, however, lead to significant delays with files being inaccessible. I appreciate the parties patience.

Background

[4] PMP operates from multiple sites around New Zealand. Mr Crisp was a bindery assistant who worked in Christchurch. He had been in PMP's employ for some 19 years.

[5] At the time of cessation, he was on a day shift which works 6am to 2pm Monday to Friday. He was engaged on a machine (an OMG) which performs one of the final tasks in the process. He is the only operator on his shift though he has trained another in the machine's use so she can operate the OMG when he is absent. There are two others capable of operating the machine on the afternoon shift and it is not used by the night shift (which had seven staff).

[6] Prior to his current appointment, Mr Crisp spent 13 years as a reel hand in the web room. That work attracted an allowance of $74 a week which Mr Crisp retained.

[7] Mr Crisp's terms and conditions of employment were contained in a collective employment agreement negotiated by the NZ Engineering, Printing and Manufacturing Union (EPMU). The agreement contains a redundancy provision which includes the following definition:

> *Redundancy exists when for economic reasons, or as a result of the closure of all or any part of the employer's operation, a merger, takeover or change in plant, methods, material or products, or re-organisation, an employee is dismissed because there is no longer a position available for him/her.*

[8] In early 2009, PMP announced it needed significant cost savings and on 19 April issued a change proposal. This asked EPMU to consider three changes to the collective agreement for the Christchurch site. They were to forego an already agreed pay increase, half the penal rate for overtime and reduce the sick leave entitlement.

[9] On 28 April PMP managers met with EPMU delegates and an organiser, Ms Jo McLean, to discuss their proposals. EPMU did not reject the idea and other ways of saving money were discussed. EPMU also asked that they be allowed to question the *financials* before decisions were made. PMP's Christchurch manager, Mr Steve Thompson, agreed provided the queries were detailed and the information used *in camera at the next meeting.* The query was provided on 30 April and contains 12 items.

[10] A second meeting occurred on 7 May and PMP now canvassed two options. Option A repeated the three changes to the collective and added a fourth item – closing the night shift and redeploying its seven workers to the other two shifts so as to reduce reliance on casual employees who covered peak production and absences. Option B was to make seven staff redundant. Mr Thompson says he offered a profit and loss statement which Ms McLean pushed away.

[11] The meeting led to some changes to the proposals and on 12 May a further memo was sent to staff. It reiterated a need to cut costs due to low work volumes and resulting financial pressures attributable to the then poor world economic situation. The same day Mr Thompson e-mailed Ms McLean and advised he would have to act soon as he needed resolution of the bindery situation by mid June.

[12] Further clarification of the proposals was provided on 19 May and EPMU subsequently held a ballot. Members were asked whether or not they would consider a diminution in their terms of employment. Sixty two said no; two yes.

[13] On 29 May Mr Thompson again wrote to all staff. He advises he had received feedback about the proposals and EPMU had advised it favoured neither. The letter goes on to advise as option A requires EPMU's agreement, it was no longer viable. PMP would therefore consider option B. The letter states stage 1 of option B would see the bindery night shift cease and the loss of seven bindery positions through redundancy. It goes on to advise each affected staff member would be contacted individually and given full details of the proposal, and asked that staff offer suggestions or new options for PMP's consideration.

[14] Further information was provided in a letter dated 2 June. It advises no other viable option had emerged and option B was now being considered. It also states:

> *All bindery staff could potentially be affected as it does not necessarily follow that the staff being disestablished will be confined to the night shift due to the application of selection criteria that will be applied to all staff in the bindery as follows:*
>
> - *Level of skills and qualification*
> - *Cost versus benefit of the individual to the business*
> - *Attendance record*
> - *Flexibility of the individual to meet the needs of the business*
> - *Length of service*
>
> *All permanent bindery staff would be asked to indicate their first and second preference for the morning or afternoon shift positions no*

> *later than Friday, 12th June. It is possible that as a result of selection criteria night shift staff could move to either of these shifts.*

[15] The letter goes on to advise applications for voluntary redundancy would be considered and gives a timeline which would see a final decision being made on 15 June if the required reduction could not be achieved through voluntary redundancy.

[16] On 5 June, Ms McLean wrote. She asked that PMP cease discussing restructuring proposals until the request for financial information had been answered and discussed. The letter also asked PMP to consider a full consultative process as discussion and feedback to date had been limited to options A and B.

[17] It is PMP's position EPMU was choosing not to consult on the substance of the proposal, including the selection criteria. It was attempting to halt the process on the grounds it wanted financial information *when the basis for needing to cut costs had been well thrashed out already*. Notwithstanding that, Mr Thompson emailed on 8 June advising he would provide sufficient financial information to help explain why it was necessary for PMP to restructure the business so as to significantly reduce costs.

[18] Later that day, Mr Thompson wrote to staff advising PMP had decided to proceed with option B and disestablish seven positions in the bindery. The letter repeated the proposed selection criteria and asked staff to indicate their preferences. A copy was forwarded to the union.

[19] Mr Crisp's response was he would only work the morning shift.

[20] In the interim, the dispute about the provision of information continued. By letter dated 12 June Mr Thompson advised PriceWaterhouseCooper was preparing a detailed financial report before going on to give an outline of the situation. The letter also advised PMP was concerned about delaying the restructuring as divisions were emerging between staff and, in any event, work volumes had decreased to a point where staff could no longer be gainfully occupied. The letter closed by advising work on the restructure would continue and this focused on employee selection.

[21] Mr Thompson accepts responsibility for the selection process, though he consulted with the operations manager and obtained feedback from shift supervisors. He says:

> *As part of the over all mix of skills required in the bindery I determined that one of the seven positions that needed to go should come from the group of employees who were bindery assistants with the ability to operate the OMG finishing gear. There were four employees fitting within this category which I determined could be reduced to three. …*
>
> *Applying the selection criteria to this group Jack became the obvious candidate as he scored poorly against the rest of this group on cost versus benefit as his pay rate was significantly higher. Jack also scored poorly by comparison on the issue of flexibility. It was noted that Jack had in the past demonstrated a lack of flexibility of hours of work when temporary changes were requested to meet short term operational needs. He was the only person in this group that did so. Unlike the other OMG operators he had shown little interest in acquiring other skills in the bindery by helping out other staff. In addition when asked to indicate first and second preferences for morning or afternoon shifts Jack had stated both first and second preferences as the morning shift. Jack scored the same as the others on skills and attendance and was the second longest serving employee in the group. His total score was one point less than the other members of the group in the final analysis.*

[22] On 15 June, Mr Thompson wrote to Mr Crisp advising him of his redundancy. The letter proposed the two meet on Wednesday, 17 June at which time they would discuss Mr Crisp's entitlements and other assistance the company might offer.

[23] EPMU also wrote to PMP that day. The letter expresses concern about the process before advising:

> *… the night shift is the shift that has been removed and therefore unless there are voluntary redundancies, it is those employed on this shift that are redundant. We do not accept that you can then choose to redeploy redundant workers onto other shifts and make those on the other shifts redundant. This does not either fall into the category of redundancy or restructuring as the shifts nor tasks within those shifts have changed.*

[24] Mr Thompson responded by stating he had raised selection criteria as an issue for consultation on 2 June and had sought comment by 8 June. EPMU had remained silent at that time. He also pointed out that option B had always proposed the cessation of the night shift but never limited selection to those staff.

[25] Mr Thompson and Mr Crisp met on 17 June. The meeting was also attended by Ms McLean and the operations manager. Mr Thompson states he again described the selection process and Ms McLean requested a copy of the *score card*. He says he said he would provide it but at that point it was not in a presentable form. They

continued to discuss the selection process with Mr Crisp challenging various decisions and, according to Mr Thompson, the meeting degenerated with both Mr Crisp and Ms McLean becoming emotional and loud. The meeting ended and Mr Crisp ceased employment that day. He was paid in lieu of his notice period.

Determination

[26] As has already been said, PMP accepts it dismissed Mr Crisp. In doing so, it accepts it is required to justify the dismissal.

[27] Section 103A of the Employment Relations Act 2000 (the Act) states, or at least did state, that the question of whether a dismissal is justifiable

> *... must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal ... occurred.*

[28] That test is used as Mr Crisp was dismissed before the current test came into force on 1 April 2011. Section 7 of the Interpretation Act 1999 provides *An enactment does not have retrospective effect*. Section 4 makes it clear all enactments are subject to the Interpretation Act 1999 unless the enactment provides otherwise. There is no suggestion in the Act the revised s.103A has retrospective effect so the earlier test applies.

[29] It is well established that:

> *When reviewing an employer's decision to make employees redundant, the Authority or Court will generally look at two initial factors: the genuineness of the redundancy; and whether the dismissal was carried out in a procedurally fair manner.*
> *In Coutts Cars Ltd v Baguley [2001] 1 ERNZ 660; [2002] 2 NZLR 533 (CA), the Court of Appeal in reviewing the approach of the Employment Court decision (Baguley v Coutts Cars Ltd [2000] 2 ERNZ 409) emphasised the need to consider the two factors (genuineness and process) separately ...*
> Kevin Leary (ed) *Employment Law* (looseleaf ed, Brookers) at ER103.17

[30] It is also well established that a fair and reasonable employer will comply with its statutory obligations. In *Jinkinson v Oceana Gold (NZ) Ltd* [2010] NZEmpC 102 the Employment Court held:

> *The relationship between s.4(1A)(c) and s.103A is clear. A fair and reasonable employer will comply with its statutory obligations. It follows that a dismissal which results from a procedure that does not comply with s.4(1A)(c) will not be justifiable.*

[31] I conclude PMP has failed to justify its actions. There are two significant reasons for this conclusion.

[32] The parties appear agreed that the fiscal situation in which PMP found itself warranted action and there were going to be redundancies. The issue is who and from where. In this respect I conclude there is merit in Mr Crisp's argument his position remained and there was not, therefore, a situation where a position was no longer available as is required by the definition in his employment agreement.

[33] Notwithstanding Mr Crisp's oral agreement he knew PMP considered him to be a bindery assistant as opposed to an OMG operator, I accept his argument he occupied a day shift OMG position. That is all he had done for some years and terms of employment can both change and become express by virtue of practice (see for example *Barnes v Whangarei RSA* [1997] ERNZ 626 and *Jinkinson*).

[34] In any event there is a more significant issue which, in my view, removes any doubt. EPMU asserts the night shift positions are separate and the occupants thereof should have been made redundant as opposed to the pool approach. I agree.

[35] The employment agreement contains an hours of work clause which states actual hours are set individually. Variation requires mutual agreement. In the case of both Mr Crisp and those occupying positions on the night shift night, the hours were set. Those set hours form part of each individual's terms and, to me, separate the positions. A night position is a night position and a day position a day one. This approach is reinforced by the fact the function performed by Mr Crisp is not carried out by the night shift. As submitted on his behalf, Mr Crisp was engaged on the day shift as an OMG operator. The new structure required an OMG operator on the day shift. The position remained and it was one Mr Crisp had had sole occupancy of for some time.

[36] To me, this conclusion undermines the substantive justification for the redundancy, especially given the following conclusions about the adequacy of consultation which, I hold, deprived PMP of the right to simply proceed as proposed.

At the least it needed to know the EPMU's position on the issue so as to make a fully informed decision. That was not received. The facts above also raise doubts about the selection criteria. It would appear from the evidence of Mr Thompson (21 above) that Mr Crisp has been negatively rated for exercising a right granted by his employment agreement – namely the right to retain his hours of work. That said, the issue need not be canvassed further given what follows.

[37] The duty of good faith requires an employer who is proposing to make a decision that will, or is likely to have, an adverse effect on the continuation of employment of one or more of its employees to give such employees access to relevant information and an opportunity to comment on the information before the decision is made (s.4(1A)(c)).

[38] There are two significant failures in this respect. EPMU asked, on behalf of its members for detailed information. While summaries were provided, there is no evidence of the requested detailed being provided. There is no argument the details were irrelevant and if there had been it would have been undermined to some extent by the willing provision of summaries.

[39] There is then the issue of consultation over the selection criteria. In effect PMP's argument is 'you had your chance and failed to take it'. Indeed, they go further and claim the information request was simply a stalling tactic (17 above). I can not agree. EPMU did respond but in a holistic way that did not mention, and was far wider than, a detailed analysis of the selection criteria. The response was hold the process till you reply to an information request we are entitled to make given s.4(1A)(c). PMP did not do so and forged ahead in contravention of their obligations.

[40] Similarly there are issues with commencing the individual consultation with Mr Crisp after the decision he was surplus had been made. The letter inviting Mr Crisp to the meeting says your *position **is** to be made redundant* (emphasis is mine) and there are no alternates. It says the meeting is to discuss your *entitlements regarding redundancy and any other assistance the company could offer*. In other words you are going and here is how we can assist you. That termination was, by this time, a given was confirmed by Mr Thompson when answering questions. He said Mr Crisp had been selected. He added a proviso that may have changed had Mr Crisp raised something new and significant but then conceded he never advised Mr Crisp (or Ms McLean) of that.

[41] Finally I comment on an argument raised by PMP that the information requested was only relevant to option A and proposed changes to the collective. Once option A had been rejected it ceased to be a valid request. I can not agree. Option A was a proposal to address the wider, and principle, issue of the situation in which PMP found itself. It and option B were both part and parcel of the same overriding issue and an investigation into how it could be addressed. In any event I note the request was reaffirmed well after option A had ceased to be a consideration.

[42] For these reasons I also conclude PMP can not provide a procedural justification for its actions.

[43] The conclusion PMP can not justify its actions, either substantively or procedurally, means the dismissal is unjustified. That raises the issues of remedies.

[44] Mr Crisp seeks lost wages and compensation for hurt and humiliation (s.123(1)(c)(i)).

[45] Section 128(2) of the Act provides that the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. Mr Crisp seeks a greater sum as he did not find work for approximately six months, though he concedes he initially took a holiday of some twelve weeks during which time he did not attempt to mitigate his loss.

[46] Mr McGinn also points out that Ms Crisp received 30 weeks pay as redundancy compensation which more than covers the period until Mr Crisp found a new job, especially if the failure to mitigate nullifies the claim for the first twelve weeks. In other words Mr McGinn argues there is no loss. I agree.

[47] Mr Crisp seeks $10,000 as compensation pursuant to s.123(1)(c)(i). He supported the claim with evidence though relatively brief. Having considered the evidence, I conclude an award of $5,000 to be appropriate.

Conclusion and Orders

[48] For the above reasons I conclude Mr Crisp has a personal grievance in that he was unjustifiably dismissed.

[49] As a result the respondent, PMP Print Limited, is ordered to pay Mr Crisp the sum of $5,000.00 (five thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[50] Costs are reserved.

Mike Loftus
Member of the Employment Relations Authority