IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 164/10
5157467

	BETWEEN	JOHN DOWLING Applicant
	AND	METLIFECARE LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Michael McFadden for Applicant Andrew Peskett for Respondent
Investigation Meeting:	16 October 2009
Determination:	9 April 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 9 December 2008 Metlifecare Limited gave John Dowling notice of the redundancy of his position as its Property and Maintenance Manager. His employment ended on 19 December.

[2] He challenges whether the decision about the redundancy of his position was made for genuine reasons and carried out in a fair way. He believes Craig Fletcher, Metlifecare's Property Services General Manager, wanted to "*get rid of*" him and this attitude was demonstrated by derogatory remarks said to have been made by Mr Fletcher to other staff about Mr Dowling's work. He also says Mr Fletcher repeatedly asked when Mr Dowling – then aged 67 years old – would retire.

[3] Metlifecare denies any ulterior motive for its decision. Mr Fletcher insists he openly praised Mr Dowling's work and regarded him as a senior and valued employee. However he was instructed by the company's board to "*reduce the head*

count" by a further one, after having already made one other position redundant in October 2008. Both Mr Dowling's role and the position of Development Manager, then held by Peter Kerrigan, were reviewed. Both men were consulted before a decision was made.

[4] Mr Dowling says the decision was "*rushed*". Mr Fletcher contends Mr Dowling had adequate opportunity and information for input with his feedback considered before deciding that Mr Kerrigan had the "*flexibility*" to pick up the single role that would remain after the restructuring was complete.

The legal framework

[5] Mr Dowling's employment agreement included the following two clauses under the heading 'Surplus Staffing':

> *21.1 The employer recognises the serious consequences that the loss of permanent employment can have on employees and proposes to minimise this by relocation and/or retraining where possible.*
>
> *21.2 However, in the event that your position becomes surplus to the needs of the employer, you shall be given one months notice of termination of your employment or at the discretion of the employer, be paid in lieu thereof …*

[6] The agreement also includes provisions for the payment of redundancy compensation except in situations of moving to an alternative position or being offered employment by a new owner in the event of the business being sold.

[7] Metlifecare also had statutory obligations in any decision on the future of Mr Dowling's position. Its decision to make the position redundant – and how it went about dealing with Mr Dowling about any proposal, decision and consequences of redundancy – would be justifiable only if its actions were what a fair and reasonable employer would have done in all the circumstances at the time of the decision and dealings around it: s103A of the Employment Relations Act 2000 ("the Act").

[8] The Employment Court has described the obligation on employers making

redundancy decisions in this way:[1]

> *[65] … The statutory obligations of good faith dealing and, in particular, those under s4(1A)(c) inform the decision under s103A about how the employer acted. A fair and reasonable employer must, if challenged, be able to establish that he or she or it has complied with the statutory obligations of good faith dealing in s4 including as to consultation because a fair and reasonable employer will comply with the law.*
> …
> *[67] … So long as an employer acts genuinely and not out of ulterior motives, a business decision to make positions or employees redundant is for the employer to make and not for the Authority or the Court, even under s103A.*

[9] This requires the Authority to be satisfied on two general points – (i) whether the business decision to make the Property and Maintenance Manager position redundant in this case was made genuinely and not for ulterior motives; and (ii) whether Metlifecare acted in a fair and open way in carrying out that decision – particularly did it consult properly with Mr Dowling about the proposal to make his position redundant and otherwise act in a way that was not likely to mislead or deceive him, that is in good faith?

[10] The Authority does not substitute its judgment for that of Metlifecare as to whether there were genuine commercial reasons for a redundancy. The scope of the inquiry, as identified by the Court of Appeal, is as follows:[2]

> *An employer is entitled to make his business more efficient, as for example by automation, abandonment of unprofitable activities, reorganisation or other cost saving steps, no matter whether or not the business would otherwise go to the wall. A worker does not have the right to continued employment if the business can be run more efficiently without him. The personal grievance provisions … should not be treated as derogating from the rights of employers to make management decisions genuinely on such grounds.*
> …
> *When a dismissal is based on redundancy, it is the good faith of that basis and the fairness of the procedure followed that may fall to be examined on a complaint of unjustifiable dismissal. … For instance, a suggestion that alleged redundancy was being used as a camouflage for getting rid of an unsatisfactory employee might warrant examination.*

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[1] *Simpsons Farms Limited v Aberhart* [2006] ERNZ 825 (EC).
[2] *GNH Hale & Sons Ltd v Wellington Caretakers and Cleaners Union* ERNZ Sel Cas 843, 849 (per Cooke P).

[11] So, in this case where Mr Dowling alleges an ulterior purpose to the selection of his position for redundancy, the Authority may investigate whether the decision was "*tainted by some inappropriate motive*".[3] Having raised the allegation of an engineered dismissal, he bears the burden of convincing the Authority that his theory has substance.

Issues

[12] The issues for determination are:

(i) whether the redundancy of Mr Dowling's position was predominantly decided for genuine commercial reasons or for an ulterior motive; and

(ii) whether the decision was made and carried out in a fair manner; and

(iii) if the decision was not made for genuine commercial reasons or was not carried out in a fair manner, are the following remedies due:

(a) lost wages (if the redundancy was not for genuine commercial reasons, and Mr Dowling has taken reasonable steps to mitigate his loss); and

(b) compensation for hurt and humiliation?

[13] For the purposes of the Authority's investigation written witness statements were lodged by Mr Dowling; Metlifecare's property services manager from August to November 2008, Noel Ward; Mr Fletcher; and Metlifecare's human resources general manager, Colleen Tang.

[14] Each witness, under oath, answered questions from the Authority member and the parties' representatives. The representatives also made oral closing submissions. I regret the demands of other Authority business have delayed the issuing of this determination. The patience of the parties is appreciated.

[15] In preparing this determination I have reviewed and taken account of the confirmed written statements of witnesses, their answers to questions during the investigation meeting, the available documents and the representatives' submissions.

[3] *Savage v Unlimited Architecture Limited* [1999] 2 ERNZ 40, 49-50 (EC).

In accordance with s174 of the Act I have not set out all evidence or submissions received but only findings on facts and legal issues and the Authority's conclusion on matters for determination.

The redundancy decision

[16] Mr Dowling's evidence of what he says points to an ulterior motive in Metlifecare's decision to end his employment can be summarised in this way:

(i) In late 2007 Mr Fletcher changed Mr Dowling's area of responsibility and had property staff reporting directly to him rather than through Mr Dowling.

(ii) Mr Fletcher had asked Mr Dowling several times in 2008 about his retirement plans.

(iii) Mr Ward told him in September 2008 to "*watch his back*" after a discussion with Mr Fletcher about Mr Dowling's future with the company.

(iv) Some other employees – whom Mr Dowling would not name and who would not give evidence – were said to have told Mr Dowling that they had heard Mr Fletcher make "*derogatory remarks*" about him. One was said to have told Mr Dowling that Mr Fletcher had referred to him as being "*under review*".

(v) Mr Dowling was selected for redundancy over two other people with property services management roles.

[17] I find this evidence fails to meet the burden of proof that the dismissal was engineered or tainted by an inappropriate motive. I do so for the following reasons.

[18] On joining the business in 2007 as a new manager Mr Fletcher did make a number of changes to how work and responsibilities were organised, including removing responsibility for the Auckland area from Mr Dowling's duties. Those decisions were ones Mr Fletcher was entitled to make in the position he held. Similarly he was entitled, as a matter of management prerogative, to introduce a 'flat reporting' structure.

[19] Mr Fletcher did make several inquiries in 2008 about Mr Dowling's plans for retirement. However Mr Dowling had already talked, informally at least, with the chief executive of Metlifecare as well as Ms Tang and Mr Fletcher about when he might retire. In early 2008 he had suggested he intended retiring within 12 to 18 months. However he says his plans changed when the economic recession affected the value of shares and investments he held. He gave Mr Fletcher no more particular indication but said he would give three months notice when he decided to retire.

[20] It was not unreasonable for Mr Fletcher as a matter of succession planning to make those inquiries of Mr Dowling. Mr Dowling had complained to Ms Tang about being asked and Ms Tang had "*coached*" Mr Fletcher to be more careful about how he discussed the matter with Mr Dowling. However that interest in itself is not sufficient to establish an ulterior motive in the eventual dismissal for redundancy.

[21] Mr Ward's evidence was that shortly after starting work for Metlifecare in August 2008 Mr Fletcher had made a critical comment about Mr Dowling "*not fully embracing*" changes that Mr Fletcher had introduced in how costs were negotiated with contractors providing services. He also said Mr Fletcher had referred to Mr Dowling not being with Metlifecare much longer and that Mr Ward could get Mr Dowling's job.

[22] However this evidence is strongly contested by Mr Fletcher. He says Mr Ward talked to him about wanting a higher salary and asked Mr Fletcher about the prospects of moving into Mr Dowling's position on his retirement. And he says it was Mr Ward who made critical comments about how Mr Dowling arranged his work. Mr Fletcher says that rather than be critical of Mr Dowling he told Mr Ward a number of times that Mr Dowling was "*extremely valuable*" to Metlifecare.

[23] Having heard from both men, I prefer Mr Fletcher's account. Mr Ward's evidence was inevitably coloured by the redundancy of his own position decided by Mr Fletcher in October 2008 and which was understandably disappointing as Mr Ward had begun the role only three months earlier.

[24] I give no weight to Mr Dowling's evidence of what he says he was told by

other staff about allegedly negative comments from Mr Fletcher. Mr Dowling acknowledged in answering questions during the Authority investigation what he called "*the hearsay nature of the whole exercise*". In some circumstances the Authority could accept hearsay statements as having been made, but not in the present situation. Not even the names of the staff from whom Mr Dowling says the reports came are known and there is no other reliable evidence which might otherwise support the fact or likelihood of the alleged comments having been made.

[25] Neither do I accept Mr Dowling's contention that another property service role should have been selected for redundancy.

[26] Two positions had already been reviewed in October 2008 with the role then held by Mr Ward disestablished. Mr Dowling says the remaining role after that review should have been assessed again in December 2008 rather than looking at just the two roles held by him and Mr Kerrigan. Part of his reason for this was the man in that role had the least service. However I prefer Mr Fletcher's evidence that the role had already been evaluated as still required by Metlifecare. It was a role at a lower level than that of Mr Dowling and its duties could include some trade work which could be carried out by its incumbent who was a qualified tradesman. There was also no service protection provision in the employment agreement and this was not a factor that Metlifecare was required to take into account.

A fairly made decision

[27] Mr Dowling criticises three aspects of how Metlifecare made its decision as being unfair:

(i) His selection for redundancy; and

(ii) The adequacy of consultation before the decision was made; and

(iii) How he was treated following the decision.

[28] Mr Fletcher's evidence was that in reviewing the positions held by Mr Dowling and Mr Kerrigan he had the following dilemma:

I had two excellent employees who were both important to the

> *company but I had been instructed to reduce the head count by one. The decision was based upon the flexibility of the persons involved to pick up the other's roles within the changed organisation."*

[29] He made that selection based on Mr Kerrigan's more recent experience with a major development project that Metlifecare had underway in Auckland and Mr Kerrigan's willingness to do additional tasks in the regions for which Mr Dowling had been responsible. While Mr Dowling had significant civil engineering and management experience, Mr Kerrigan had been an architect for many years. I find no evidence of an ulterior motive in the selection made after having sought proposals and comments from each man.

[30] The tight timeframe of the review was not inherently unfair. Mr Dowling was asked for his input on 5 December and told the review might result in the merger of some tasks and the disestablishment of his role (as was Mr Kerrigan). Two days later Mr Dowling asked for more information about "*the drivers and requirements of the organisation*" so he could meaningfully comment for the review. This was discussed with him in a meeting on 8 December. He responded with an email setting out his comments that evening. Mr Fletcher considered feedback from Mr Kerrigan and Mr Dowling the next morning and decided to select Mr Kerrigan for the remaining role. He told Mr Dowling of the decision later that day.

[31] I find the consultation was adequate in the circumstances. It included consideration of alternatives, specifically the prospect that Mr Dowling might be able to do some ongoing work for Metlifecare on a contract basis.

[32] I also find Mr Dowling was treated fairly once advised of the decision. He was offered counselling and job placement assistance which he chose not to use. He was emotionally upset by the decision and no issue was taken with him leaving earlier than a proposed shortened notice period. He was paid in lieu of notice for that period. There was also an error in calculation of his entitlement to redundancy calculation which resulted in him being paid on the basis of eight years service rather than the five years to which he was entitled. Although that error was discovered before payment was made, Metlifecare authorised payment at the higher amount.

Determination

[33] For the reasons given I find Mr Dowling has not established to the required level any ulterior motive in Metlifecare's decision to dismiss him for redundancy. I also find the decision was made and carried out in a fair manner by Metlifecare. Accordingly Mr Dowling's personal grievance application is dismissed.

Costs

[34] Costs are reserved. If there is any issue as to costs which the parties are not able to resolve between themselves, Metlifecare may lodge and serve a memorandum as to costs within 28 days of the date of this determination. Mr Dowling will then have 14 days from service to lodge and serve a memorandum in reply. No application will be considered outside this timeframe without prior leave.

Robin Arthur
Member of the Employment Relations Authority