

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 5A/10
5287706

BETWEEN DEREK WAYNE GILBERT
 Applicant

A N D TRANSFIELD SERVICES
 (NEW ZEALAND) LIMITED
 Respondent

Member of Authority: Paul Montgomery

Representatives: Lou Yukich, Advocate for Applicant
 Gillian Service and Andrew Campbell, Counsel for
 Respondent

Investigation Meeting: 11 and 12 February 2010 at Christchurch

Submissions Received: 19 February and 26 March 2010 from Applicant
 22 February and 29 March 2010 from Respondent

Determination: 14 May 2010

DETERMINATION OF THE AUTHORITY

[1] Mr Gilbert raises two primary issues in his application to the Authority. First, he raises the personal grievances of unjustified dismissal and unjustified disadvantage by the respondent. Secondly, he raises a dispute in respect of the interpretation and application of clause 46 of the employment agreement.

[2] Mr Gilbert seeks the remedies of reinstatement to his position or to one similar; an order for compliance with s.4 of the Employment Relations Act 2000 and its amendments and an order requiring the respondent to disclose how it arrived at the view that his position was surplus to the needs of the business.

[3] Curiously, the applicant made no claim in respect of lost wages nor of compensation in the event his personal grievance claims are made out.

[4] The respondent, by its counsel, says the applicant was not unjustifiably disadvantaged by its restructuring process nor was his dismissal on the ground of redundancy unjustified. Further, it denies it was in breach of its good faith obligations under s.4 of the Act or of the terms set out in clause 46 of the employment agreement. It also says Mr Gilbert's involvement in union affairs had no influence in the decision to select him for redundancy. Accordingly, it opposes reinstatement and declines to offer any remedies to the applicant.

Brief history

[5] Mr Gilbert was employed by the respondent on 19 July 2004 as a Telecommunications Technician undertaking a range of jobs, Network Maintenance Reviews (NMRs) being one of the tasks technicians undertake in the business. At the relevant time, Mr Gilbert was a member of the New Zealand Amalgamated Engineering, Printing & Manufacturing Union (EPMU) and was employed by the respondent on the terms and conditions of the 2008-2009 collective agreement.

[6] On 30 June 2009, the respondent secured a new 10 year contract with Chorus beginning on 1 July 2009. The new contract operates on a business model which is different from previous contracts. In the process of securing this contract, the respondent lost two areas in which it previously provided services to Chorus and that loss and a decrease in overall revenue lead to Transfield Service's view that restructuring was necessary.

[7] By mid-July, the company became aware that cost reductions were required if it was to successfully meet the new contractual arrangements with Chorus. It also held the view that an increase in productivity and efficiency was required. In the light of this situation, Mr Webb and the company's management, prepared a proposal for restructure recommending some organisational changes, including a proposal that a number of positions would be declared redundant. The proposal was endorsed by Mr Lockwood, Executive General Manager Telecommunications, and following this the consultation process with staff began.

[8] An automated text message was sent to all employees of the company on 17 August inviting them to attend a consultation meeting. Mr Gilbert was among those in the Canterbury region invited to attend the presentation.

[9] The following day, Mr Evans delivered a presentation to around 120 staff, including Mr Gilbert. That presentation set out the proposal to make some positions redundant and also set out the process and timetable for consultation. The Canterbury proposal involved the disestablishment of some 10 field staff positions in the region. The meeting was also advised that the proposal affected 124 positions across New Zealand. All staff, including Mr Gilbert, were handed an information sheet and a feedback form at the end of the meeting. The date set for feedback from staff was 26 August.

[10] Between 18 and 26 August, feedback was received in relation to the proposal. All forms were sent to the company's human resource department which reviewed the feedback and collated the responses to be provided to the employees. A frequently asked questions document was prepared and discussed at a second presentation to all staff on 4 December and handed to the employees during that presentation.

[11] On 1 September 2009, Ms Leon was approached by Mr Joe Gallagher, an EPMU representative, who asked her to address the EPMU delegates he was meeting with, on the proposed process and how the selection criteria would be established. Ms Leon attended this meeting of some six or seven delegates and, in the course of the meeting, answered questions regarding the process. Ms Leon says she explained to the delegates the reasons that technical skills had not been included in the proposed selection criteria that were being developed for consultation. She also explained the process was to be progressed in three phases and that no decisions would be made until all three steps had been completed. Further, Ms Leon explained that at the interview stage of the process, interviews would be conducted by company managers who had been trained in interview techniques, and the focus of the interviews was to be on adaptability, planning and organising, establishing relationships with others and company service values. Ms Leon received feedback following the meeting that the delegates had been happy with the meeting and the information provided.

[12] On 4 September, Mr Gilbert and Mr Johnston, who was at the time an EPMU delegate, approached Mr Webb in his office to discuss a list of 16 points concerning the restructure. Mr Webb explained Mr Evans was to present the structure the company had decided on and the responses to feedback which would address the issues raised by the two at this meeting.

[13] Mr Gilbert gave a copy of the questions to Mr Webb to pass these to Mr Evans prior to his giving the presentation. Having reviewed the questions presented by Mr Gilbert, Mr Evans says they were covered in the previous presentation and were also covered in the frequently asked questions document. In order to keep human resources informed, Mr Evans forwarded the questions to it.

[14] At his meeting on 4 September, Mr Evans went through two presentations. The first related to the responses to the feedback in detail and also advised that the company had decided to go ahead with the restructure plan. Mr Evans also detailed changes made to the proposal for the Canterbury region following consideration of the feedback which included the creation of two Team Leader positions. In the course of the second presentation, Mr Evans outlined the proposed selection criteria to be used to determine who would be made redundant. The process was identical for all staff across the country.

[15] The proposal was that a selection process would be used to place a proportion of employees into a review pool based on a business view of all area field staff. In the Canterbury area, this involved a review of 108 Field Staff/Technicians. Also, those employees would complete an independent online assessment and would attend an interview. A letter was given to employees on 4 September confirming the new structure and setting out the timeframe for consultation on the proposed selection criteria and the three step process outlined above. Mr Gilbert attended both of these presentations and was sent the letter confirming the arrangements.

[16] A further presentation took place on 11 September 2009 in which Mr Evans confirmed the selection criteria and process for the restructure, including the timeframes to be maintained. Mr Gilbert collected a copy of that presentation.

[17] On 22 September, letters were given to employees informing them as to whether they had been selected as part of the review pool. It also outlined the timetable for the selection process providing dates for online assessments and interviews and the date on which a final outcome would be available. The letter also gave affected employees an opportunity to comment on their selection and allocation to the review pool to their area manager by 23 September. Mr Gilbert was given a letter stating he was in the review pool and it also covered answers to the questions he had given to Mr Evans on 4 September 2009.

[18] Mr Gilbert took the opportunity to meet with Mr Evans on 24 September to discuss his selection into the review pool. Mr Evans gave Mr Gilbert a copy of the criteria which Mr Gardiner had worked from to select employees into the pool and Mr Gilbert's scores were explained to him for each of the criteria set out. The respondent says Mr Gilbert was one of 17 employees rated and selected into the review pool and that in the course of the meeting Mr Evans reminded him that this was the first step in a three part process. The online assessment and interview stages of the process were yet to be conducted.

[19] Mr Gilbert completed his online assessment on 25 September and was interviewed by Mr Beech, the Training Coordinator and Mr Langley, the National Manager Service Delivery Centre on 28 September. Both men were independent managers chosen to ensure an unbiased interview environment and both agreed on the scores given to Mr Gilbert for each of the criteria that the interviewers were assessing.

[20] The outcome of the three step selection process was communicated to all employees affected on 1 October by Mr Evans who personally handed letters to each employee who was being made redundant, including the applicant.

[21] Mr Gilbert said in his evidence he requested a review of his selection into the redundancy pool and also says he complained about the unfairness of the process. Mr Evans said he did not recall either of these incidents but told the Authority as all staff had been consulted and the EPMU was in dialogue directly with senior management, any concern being expressed would be handled at a higher level than him.

[22] Mr Gilbert promptly lodged his application with the Authority on 19 October 2009 and the application for interim reinstatement was investigated by the Authority on 11 January 2010.

Issues

[23] To resolve this matter, the Authority needs to make findings on the following issues:

- Was the position held by Mr Gilbert surplus to the respondent's future requirements; and

- Was the selection process adopted by the respondent in accordance with the employment agreement and the good faith obligations of s.4 of the Act; and
- Was the applicant discriminated against in the selection process by reason of his Union activities; and
- In the event Mr Gilbert has a personal grievance, to what remedies is he entitled?

The test

[24] The test of justification is set out in s.103A of the Employment Relations Act 2000 and requires the Authority or Court to consider, on an objective basis, what the employer did and how it acted and whether those actions were what a fair and reasonable employer would have done in all the circumstances at the time.

The investigation meeting

[25] The Authority heard evidence from Mr Gilbert and Mr Robert Johnston on behalf of the applicant. Evidence for the respondent was presented by Mr Glyn Evans, Canterbury Area Manager, Mr Ian Webb, National Operations Manager, Miss Monica Leon, Manager Workforce Planning and also Mr Kerry Gardiner, Mr Christopher Beech and Mr Chris Langley who were included in the implementation of the respondent's process as it affected the applicant. The Authority records its thanks to those who assisted the investigation by giving evidence. I also acknowledge the efforts of counsel and advocate at the meeting and their detailed submissions which I have considered in preparing this determination.

Discussion and analysis

[26] As set out above, there are several strands to Mr Gilbert's claims. Yet, in essence, they are concentrated on the respondent's process which led to him being made redundant. Of necessity, the Authority needs to evaluate the company's compliance with the statutory requirements and the case law applicable to the matter at hand.

[27] Mr Gilbert genuinely presents as a man of committed views. His approach to the Authority is based on his earnest challenge to actions he views as unjust. The Authority has no issue with his right to challenge his former employer's decision and acknowledges Mr Gilbert's extensive efforts to present his case with courteous candour at every step.

[28] This matter produced a welter of documents and extensive submissions. Given the expanse of the respondent's process and the issues raised by the applicant, I have focused primarily on Mr Gilbert's complaints.

[29] In summary, Mr Gilbert alleges his position was not superfluous; the consultation was a sham; the selection process was inconsistently applied; he was discriminated against because of his union work; the New Ventures Group was isolated from the process unfairly and casual and fixed term employees were given preference over him when made permanent employees.

(a) **The process**

[30] The Authority routinely deals with dismissals based on redundancy. The design of this particular process outstripped many I have studied. It is remarkable because it was assembled under major timing and financial constraints and was applied across the country simultaneously.

[31] The evidence of the respondent's witnesses, in particular of Ms Leon, was particularly helpful. Ms Leon spoke of her objective of minimising the pain and anxiety among the employees as the process was implemented while achieving the objective of selecting the multi-faceted employees demanded by the new Chorus pricing regime. The use of senior staff to undertake interviews with those in the review pool was clearly designed to remove any element of bias in the selection process and the PowerPoint presentations and the printed material handed to employees meant all those likely to be affected were informed at all times.

[32] I am satisfied the process was thorough, well designed and evenly applied in this case.

(b) **Position superfluous**

[33] Mr Gilbert's redundancy has to be seen in the context of a major, country-wide restructure. Initially, 12 Canterbury positions were likely to go. In fact, 10 field officer roles were disestablished in the region.

[34] Mr Webb's evidence was detailed and clear as to what needed to be achieved if the business was to operate under a new business model which the Chorus pricing schedules set out. Of 109 field technician positions, 10 needed to go. That is, they were seen as surplus to the realigned business. Of necessity, that left 10 people without a position with the respondent, and regrettably the applicant was one of them.

[35] The position held by Mr Gilbert was that of Communications Technician. While I accept he was latterly largely engaged on NMRs inside the respondent's premises, the allocation of those tasks did not change his position to that of Inside Plant Technician NMR but was simply describing the tasks he had been allocated. There is no position with that official title or designation.

[36] Mr Gilbert's position is that clause 46.1 of the agreement requires the respondent to establish a redundancy situation in relation to a particular position rather than look at the overall workforce and that by failing to take the approach he suggests the company approach was in breach of the collective.

[37] Clause 46.1 of the agreement reads:

Redundancy means a situation where an employee's employment is terminated by the company, the termination being attributable, wholly or mainly to the fact that the position filled by that employee is, or will become superfluous to the requirements of the company in accordance with the Employment Relations Act 2003.

[38] Clause 46.6 reads:

The company reserves the right to select employees for redundancy on the basis that it retains employees who by reason of skills and attributes are, in the company's opinion, necessary for continuing operations.

[39] As noted above, a number of communication technician positions needed to go and by reason of others achieving higher scores in the relevant sections of the assessment process than the applicant, they were preferred for the remaining positions. The company is not in breach of its obligations under this section of the

employment agreement. In addition, the evidence of Ms Leon regarding her meeting with Mr Gallagher and the EPMU delegates strongly suggests that at the time the Union had no difficulties in respect of a potential breach of the employment agreement.

(c) **Consultation**

[40] Mr Gilbert's view is that consultation should have commenced in May 2009 if not earlier. He appears to be relying on the 20 May 2009 memorandum from Mr Lockwood as evidence that the arrangements between the respondent and Chorus had been settled in late May 2009. That however, is not the evidence the Authority heard. The memorandum does not in fact state that fixed arrangements between the two companies were in place at that time and Mr Webb told the Authority the contract with Chorus which determined the new work arrangements necessary and the workloads involved was not signed until 30 June 2009. As Ms Service submits, it was only once the contract had been secured and the subsequent workflows assessed in July 2009 that Transfield Services identified a need for a change to its structure. I accept that submission as more accurately reflecting the evidence.

[41] The employer did not attempt to avoid its obligations under s.4 of the Act but rather provided all affected staff with accurate and appropriate information at various stages as the arrangements with Chorus developed.

(d) **Inconsistency**

[42] Mr Gilbert suggests that there were different thresholds established for various regions and that it was unjust that Mr Gilbert was not assessed against other employees whom, he says, were required to meet a lower standard in order to be retained.

[43] Again, the evidence of Ms Leon is quite clear. There never was a threshold set for any employee to meet. Rather, there was simply a number of field technicians who needed to exit and it was the technicians scoring lowest in each area who were made redundant. Ms Leon's evidence was supported by Mr Evans who confirmed no threshold levels were ever set.

(e) **Selection criteria**

[44] Quoted above is clause 46.6 of the collective agreement. The respondent's position is that it aligned its proposed selection criteria to meet the needs of the new commercial arrangement it had with Chorus. Ms Leon says in her evidence:

The selection criteria used for deciding which technicians were to be placed in the technician pool was designed to match the needs of Transfield's new commercial contract with Telecom (Chorus). Whether an employee was affiliated to a union or not was not included in the criteria as this is not relevant to an assessment of business requirements.

[45] Ms Leon also told the Authority:

From the brief I had been given by management they were looking for a more flexible workforce and employees would need to be trained to do more multi faceted roles. This was the company's focus in moving forward and so technical abilities were no longer a major issue as staff would have to be retrained in any event. ... Employees can always be trained in technical skills and therefore this is no longer a differentiator between employees. On the basis of this, the business and I began looking beyond the employee's technical skills and focused on other skills and attributes such as their ability and willingness to get the work done and to accept any type of work. I also looked at the employee's motivation to learn and apply what they know in a positive manner. Transfield was looking for employees with a "role purpose" which is more than simply doing the required duties. The "role purpose" takes into account other aspects of the way an employee works such as the way they accept feedback and the way they communicate ideas and issues which they might have or other such as agility and adaptability. People with these attributes were seen as being the best fit for the new business going forward and the new Telecom (Chorus) contract and were the type of employee Transfield sought and needed to retain.

[46] As Goddard CJ noted in *Dunn v. Methanex NZ Ltd* [1996] 2 ERNZ 222:

Where a contract gives the company the right to continue the employment of selected employees who by reason of skills or attributes are necessary for efficient and effective operations, it is for the company to choose what skills and attributes are necessary as they are most able, if not uniquely able, to assess what it requires. It is the employer's opinion of its requirements for business operation that is the sole determinative of the contract.

[47] As Ms Service submitted, that simply describes the Transfield Services position and justification for its process.

Discrimination

[48] Discrimination in this context relates to conduct which has the effect of treating a person or group of persons differently in the situation where such treatment could be unlawful under the Human Rights Act 1993. Rebuttal by the person whose conduct or practice is at issue can be achieved if that person establishes a good reason for the practice of conduct then no such discrimination will be found.

[49] There is simply no evidence put before the Authority that this was the case and that Mr Gilbert's union affiliations weighed in the balance at all when it came to a decision regarding his retention.

Provision of relevant information

[50] The applicant says the company breached s.4 of the Act because it set out with a purpose not to answer questions provided to it and did not allow him the opportunity to comment prior to a decision being made. Standing back and considering the evidence of this, I am somewhat astonished in that Mr Gilbert was present at all group meetings of employees and was handed or obtained copies of the relevant handouts. Those handouts clearly establish the opportunity to comment prior to decisions being made and in particular the chance to provide feedback between 18 and 26 August.

[51] On the facts before the Authority, Mr Gilbert did not take up the opportunities offered in line with the timetable communicated on 18 August but failed to provide feedback within the timeframe. Ms Service has submitted that:

In the light of the information provided to Mr Gilbert and the opportunities afforded to Mr Gilbert to comment on the proposed restructure, the selection criteria to be applied to the technician review pool, and on his selection into the pool, Transfield Services submits that Mr Gilbert was given sufficient relevant information.

[52] The Authority accepts that submission.

New Ventures

[53] Mr Gilbert claims he was disadvantaged because he was not assessed against the employees who were assigned to New Ventures.

[54] The evidence in front of the Authority was that it was only the employees engaged in Chorus work whose numbers were affected. Those employed in New

Ventures were staff who had been employed to carry out third party work. That is, communications work for companies other than Chorus. As the pool for assessment was restricted to those involved in the Chorus contract, Mr Gilbert has suffered no disadvantage by not being assessed against New Venture employees.

Casual and fixed term employees

[55] Mr Gilbert complains that casual and fixed term employees have been afforded preference in employment in breach of clause 46.11 of the employment agreement. That clause reads:

The provisions of this clause shall not apply to employees employed on a fixed term or casual basis.

[56] In his evidence before the Authority, Mr Evans explained that the employee concerned was in fact working on a full time basis and was not a true casual employee. It was decided by the respondent that the correct approach was to place him on a full time permanent arrangement because the genuine nature of his employment was in fact permanent.

[57] Having reviewed the situation in relation to casual and fixed term employees, the respondent has assured the Authority that no preference to fixed term and casual employees has occurred throughout or since the process.

Determination

[58] Returning to the issues set out above in this determination, I find:

- The position held by Mr Gilbert as a communications technician became surplus to the respondent's future staffing requirements.
- The selection process adopted by the respondent was in accordance with the good faith obligations set out in s.4 of the Act. Further, it was in accordance with the employment agreement to which the parties are signatories.
- The applicant was not unjustifiably dismissed on the grounds of redundancy.

- The applicant did not suffer disadvantage or discrimination by reason of his union activities.

[59] In spite of the empathy I have for Mr Gilbert and those in similar situations, I find he does not have a personal grievance and the Authority is unable to help him further.

Costs

[60] Costs are reserved.

Paul Montgomery
Member of the Employment Relations Authority