

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Richard Lloyd Johnston (Applicant)
AND Tru Test Limited (Respondent)
REPRESENTATIVES Richard Lloyd Johnston, In Person
Peter Mandeno, Advocate for the Respondent
MEMBER OF AUTHORITY Ken Anderson
INVESTIGATION MEETING 8 May 2003
DATE OF DETERMINATION 25 July 2003

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

Mr Johnston claims that the termination of his employment on the grounds of redundancy, occurring on or about 14 August 2002, was an unjustifiable dismissal. To remedy his problem, he seeks that the Authority finds that he has a personal grievance and award him various remedies.

However, Tru Test Limited say that the termination of Mr Johnston's employment was on the grounds of genuine redundancy and that they believe they treated Mr Johnston fairly and reasonably given all of the circumstances.

Background Facts and Evidence

Mr Johnston is an experienced Electronics Design Engineer. He commenced employment with PEL Industries in 1982. In May 2001, Tru Test Limited ("TTL") purchased PEL Industries ("PEL").

In October 2001, in conjunction with the purchase of the Cyclone Wire Company, TTL relocated the manufacturing operations to Auckland. However, the research and development division of the business remained in Hamilton. Mr Johnston was involved with research and development. It was intended that TTL would utilise computer links and video conferencing facilities to provide a continuing link between the manufacturing and research and development divisions, but Mr Johnston says that this did not fully occur. It seems that there had been some discussion about the research and development function relocating to Auckland also but the manager and his staff, that is, Mr Johnston and one other person, were unwilling to do this.

In December 2001, Mr Johnston entered into an employment agreement with TTL that he signed on 21 December 2001. Mr Johnston lost an entitlement to long service that was a condition of his employment with PEL. However, TTL did not have a long service provision in their employment agreements. Understandably, Mr Johnson was disappointed about the loss of the long service leave as he had 20 years of continuous service in February 2002.

The changes under the ownership of TTL continued with the research and development division relocating to a new venue in Hamilton, following the expiry of the lease on the ex-PEL premises.

Mr Peter Mandeno, the Human Resources Manager for the Company, told me that in June 2002, TTL implemented plans to move from an acquisition phase to a consolidation phase and that there was a need to cut costs by approximately 15% to improve the financial performance of the business.

Mr Tim Otley, is the Manager of Research and Development (“R&D”) for TTL. He told me that he had to evaluate his department with a view to reducing costs by 15%. He concluded that he would have to reduce his staff by six people and as part of that process, he decided that the R&D function would operate more efficiently from one location in Auckland.

On 4 July 2002, Mr Otley met with Mr Johnston and the two other staff in Hamilton. With the assistance of a consultancy firm, Mr Otley had prepared a “*Proposed Renewal*” outline which he used as the basis for the presentation to the Hamilton R&D staff. One of the proposals outlined was:

- “Disestablish R&D operation based in Hamilton.”

Mr Otley conveyed to the three Hamilton staff that while the disestablishment of the Hamilton R&D function was just a proposal at this stage, unless some viable alternative was forthcoming, it was likely that the positions in Hamilton would be redundant. Mr Otley asked the men in Hamilton to give him their feedback or ideas as to any possible alternatives that they may be able to suggest.

Mr Johnston says that he had a discussion with Mr Otley on 8 July 2002. Mr Otley suggested that providing Mr Johnston did not go and work for an opposition company, there might be some consulting work available from TTL on an “as required basis.” Mr Johnston said that he found that suggestion to be very uncertain in regard to whether or not he would have any consultancy work provided to him.

On 9 July, the Hamilton employees travelled to Auckland for the purpose of passing their current projects over to the Auckland staff. Mr Johnston had another discussion with Mr Otley about the possibility of consulting work being available but it appears that there was nothing definite on offer. Mr Otley also confirmed to the Hamilton staff that in the absence of any other alternative being available, the closure of the Hamilton R&D unit would take place.

By way of a letter dated 12 July 2002, Mr Otley confirmed to Mr Johnson that his position was redundant. The content of the letter states, in part:

“As we have discussed, the number of positions within the team has been reduced, and we now have completed the assessment and selection process to determine those employees who will be maintained by the Company. Unfortunately, as we discussed, the outcome of this process for you is that you have not been successful in this process and therefore your position of R&D Engineer, Electronics is to be redundant.

As outlined to you in our meeting, the first priority for us has been to determine if there are any suitable alternative positions within the business that you could be redeployed into. Unfortunately however, we have not managed to identify any other opportunities for you since our meeting.”

Mr Johnston was informed that his employment would cease on 13 September 2002. However, on 14 August 2002, Mr Mandeno accompanied by Mr Jobbitt, the Site Services Supervisor for TTL, came to the Hamilton workplace. Mr Johnston says that he had no prior knowledge of the visitor's arrival, and that he and his colleagues were escorted from the premises.

However, Mr Mandeno says that because TTL had become aware that the three Hamilton staff were pursuing opportunities with a rival business, it was felt it was in the best interests of TTL to ensure that their commercial interests were secured, including the content of computers, hence the presence of Mr Jobbitt. It was the further evidence of Mr Mandeno, that the reason for their presence was discussed amicably with the Hamilton staff and it was agreed that they would not be required to work out their notice, that they could leave in their own time, and that as professional engineers, their integrity would be respected.

I have some doubts that the attitude of TTL towards the redundant employees was as benign as Mr Mandeno projects, particularly given that they were seeking positions with the opposition, nonetheless, I do accept that Mr Mandeno's version of events regarding the departure of the Hamilton staff, on 14 August 2002, is probably more likely.

Analysis and Conclusions

(a) Was the Redundancy Genuine?

While Mr Johnston is understandably unhappy about the loss of his position with TTL in Hamilton, I do not understand that he challenges the overall ability of TTL to make the commercial decision that they arrived at. That is, to close the R&D facility in Hamilton. However, in case there is any doubt, I find that the decision of TTL can be seen as a commercial option that the business was reasonably entitled to take and that as a consequence, the position of Mr Johnston was genuinely redundant.

(b) Was the Dismissal Procedurally Unjustified?

I conclude that overall, TTL adopted a fair and reasonable process regarding the redundancy of the Hamilton employees. However, Mr Johnston takes particular issue about the process that was adopted regarding possible relocation to Auckland. I understood Mr Otley and Mr Mandeno to be saying that TTL relied upon the view of Mr Reeves, the Hamilton Manager, that none of the three Hamilton staff were interested in relocating to Auckland. I believe that it could be reasonably assumed that the three Hamilton men would have discussed their future prospects with each other, given the close nature of their work environment, therefore Mr Reeves could reasonably be taken to be expressing not only his own view about relocation, but also the view of Mr Johnston and Mr Currie. Furthermore, there is no evidence that Mr Johnston had expressed any interest in relocating to Auckland when he spoke to Mr Otley regarding the possibility of consulting work. I also observed that Mr Johnston was somewhat diffident when I enquired from him as to whether he would have relocated to Auckland had he been offered the opportunity.

While ideally, it would have been appropriate for Mr Otley and/or Mr Mandeno to have explored more closely the possibility of relocation, but given the overall circumstances and the discussions that took place prior to confirming that Mr Johnston's position was to be made redundant, I do not find that it was unfair or unreasonable that they reached a conclusion that relocation was not an option that would have been acceptable to Mr Johnston.

I also have to say that the wording used by Mr Otley was unfortunate when he conveyed to Mr Johnston that his position was redundant and that he had not been successful in the “assessment and selection process” and I can understand why Mr Johnston maintains that he never participated in such a process. However, I understand that 85 positions were made redundant in the overall restructuring that TTL had engaged upon and it would appear that a “standard form” letter was used.

Mr Johnston also raised an issue about the proceedings that took place regarding TTL attempting to enforce the restraint of trade provisions of his employment agreement, subsequent to his departure from TTL, when he obtained employment with a rival company. I understand that Mr Johnston’s argument is that, the fact that he was prevented from taking up alternative employment until the restraint of trade proceedings, including the possibility of a challenge to the determination of the Authority on that matter (AA 267A/02), were completed, points to unfair and unreasonable conduct on the part of TTL and is contemporaneous with his dismissal.

While I can understand why Mr Johnston feels aggrieved about the actions of TTL pertaining to the restraint of trade action, having viewed the terms of the employment agreement, it seems to me that the actions that TTL pursued were legitimately available to them in law and an arguable case existed. It also seems to me that any remedies that may have been available to Mr Johnston, particularly as to loss of income and any other associated damages, probably should have been advanced as a counterclaim at the time and hence are not something that can revisited now. Therefore, while one can appreciate that Mr Johnston must feel that salt was rubbed into the wound left by the loss of his employment at the time, that is not something that I am able to remedy for him.

Determination

I find that the termination of Mr Johnston’s employment on the grounds of redundancy was genuine and procedurally justifiable. Mr Johnston does not have a personal grievance, hence the remedies that he seeks are not available to him.

Costs

Tru Test Limited was represented by Mr Mandeno as the Human Resources Manager, hence no advocacy costs were incurred. I conclude that it is appropriate that costs should lie where they fall and I now so order.

Ken Anderson
Member
Employment Relations Authority