

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was 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 or action occurred.

[4] The test of justification does not change the longstanding principles about justification for redundancy (see *Simpson Farms v Aberhart*, unreported, Employment Court, Colgan CJ, [2006] 1 ERNZ 825).

[5] The Authority must be satisfied on two general points – that the business decision to make a position redundant in this case was made genuinely and not for ulterior motives; and that the respondent acted in a fair and open way in carrying out that decision – particularly, did it consult properly about the proposal to make Messrs Jopson and Moorehead redundant and otherwise act in a way that was not likely to mislead or deceive them, that is in good faith?

Relevant Terms and Conditions of Employment

[6] Both Mr Jopson and Mr Moorhead were subject to written individual employment agreements. Both documents contain identical redundancy provisions which state:

Employee protection provision

In this clause:

- a. "Restructuring" includes, but is not limited to, the following situations:
 - i. where the Employer has contracted or arranged for the Employer's business or part of it to be undertaken by another person or the Employer's business; or
 - ii. the Employer is selling or transferring the Employer's business or part of it to another person or company; or
 - iii. that a contract or arrangement for the Employer to carry out work has been terminated but the work is to be carried out by another person.
- b. "Redundancy" includes, but is not limited to, the following situations:
 - i. the position held by the Employee becomes surplus to the requirements of the Employer;
 - ii. the position held by the Employee is otherwise disestablished as a result of closing down all or part of the Employer's business, or a reduction in work available or as a result of a decision of the Employer that the business can be operated more efficiently by disestablishing the position; or
 - iii. redundancy arising out of a "Restructuring" within the meaning of Part 6A subpart 2 of the Employment Relations Act 2000.

Restructuring

In the case of restructuring, the Employee is not a "specified category of Employee" under Part 6A, Subpart 1 of the Employment Relations Act 2000 but is an "affected Employee" under Part 6A, subpart 2 of the Employment Relations Act 2000.

Subject to clause 20.4, if the Employer is proposing to make a decision that will, or is likely to, be affected by any restructuring proposal, or leads to the Employee becoming redundant, the Employer will consult with the Employee a reasonable time in advance of any final decision and, in particular, will:

- a. provide the Employee with information, relevant to the continuation of the Employee's employment, about the decision;
- b. give the Employee a reasonable amount of time to consider the information provided and an opportunity to comment on the information;
- c. discuss, investigate, and consider any alternatives the Employee suggests, although the Employer is not required to accept them; and
- d. discuss possible redeployment (if any possibility of redeployment exists).

Under clause 20.3, the Employer does not have to provide the Employee with information if the information is confidential and there is good reason to maintain the confidentiality of the information. Good reason includes:

- a. Complying with statutory requirements to maintain confidentiality;
- b. Protecting the privacy of natural persons;
- c. Protecting the commercial position of the Employer from being unreasonably prejudiced.

If suitable alternative or continuing employment cannot be arranged, the Employee shall be given written notice not less than two weeks prior to the date of termination. The Employer may, at its discretion, give two week's pay in lieu of notice.

In the event of a restructuring, no payment by way of damages or compensation will be payable.

Redundancy

If the Employee's position is made redundant, the Employer will:

- a. discuss possible redeployment (if any exist);
- b. assist the Employee, if requested, in registering with The Department for Work and Income New Zealand and/or an employment service and will allow the Employee reasonable time to attend employment interviews during the notice period.
- c. provide counselling if necessary to assist the Employee.

No redundancy entitlements will be payable by way of damages or compensation.

Was the redundancy genuine?

[7] The Court of Appeal in *GN Hale & Son Ltd v Wellington Caretakers IUOW* [1991] 1 NZLR 151, cemented an employers right to:

...make his business more efficient, as for example by automation, abandonment of unprofitable activities, re-organisation 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 could be run more efficiently without him.

[8] Further, the Employment Court in *Simpsons Farms* reiterated the right of an employer to make genuine commercial decisions relating to how its business operations will function including decisions to make positions or employees redundant.

[9] A genuine redundancy is determined in relation to the position, not the incumbent (*NZ Fasteners Stainless Ltd v Thwaites* [2000] 1 ERNZ 739).

[10] BMDL is a small company that operates within the Tauranga area on various milk runs. The company distributes mainly fresh milk products and some other beverages. It operates as a franchise of Fonterra Brands (NZ) Ltd and has exclusive rights to distribute Anchor brand milk products within the defined area South Tauranga to the outskirts of Te Puke and back to Mount Maunganui.

[11] The accountant for BMDL, Ms Dianne Wood, told me she had completed the 2006/2007 annual accounts for Mr Bourgeois and an annual review meeting was held to review the business and to plan for the following year.

[12] The annual accounts for BMDL were benchmarked against the industry standard which showed the wages costs were higher than the industry. After completing further analysis Ms Wood recommended that the wages bill needed to be reduced by \$35,000 in order to bring the business into line with the better performing companies within the milk distribution industry.

[13] At the same time the costs associated with the purchase of his fuel and milk was increasing the costs associated with running the business. Mr Bourgeois also experienced a reduction in his customer base.

[14] Given all the factors affecting the viability of his business, Mr Bourgeois acted on his accountant's advice and reviewed his truck roster and manning system and came up with a proposal to utilise his trucks, and staffing more efficiently. If the proposal was implemented it would mean the loss of two permanent jobs.

[15] I am satisfied the restructuring of BMDL was for genuine commercial reasons as a direct result of the need to reduce escalating milk and fuel costs combined with a reducing customer base. This falls squarely within the ambit of the employer's right to make the business more efficient as held by the Court of Appeal in *Hale*.

Was the redundancy handled in a procedurally fair manner?

[16] Section 4 of the Employment Relations Act 2000 requires BMDL to deal with Messrs Jopson and Moorehead in good faith. This duty is to be exercised not only generally but in specific situations including redundancy.

[17] The duty of good faith set out in the Act requires an employer who is proposing to make a decision that will have an adverse affect on the continuation of employment of an employee to provide to that employee, access to information relevant to the continuation of the employee's employment, about the decision, and an opportunity to comment on the information before the decision is made.

[18] In *Communication & Energy Workers Union Inc v Telecom NZ Ltd* [1993] 2 ERNZ 429, the Court discussed the meaning of consultation in the context of redundancy and listed a serious or propositions extracted from the Court of Appeal's decision in *Wellington International Airport Ltd v Air NZ* [1993] 1 NZLR 671 (CA). In particular, the Court noted:

- (a) Consultation requires more than mere notification and must be allowed sufficient time. It is to be a reality, not a charade. Consultation is never to be treated perfunctorily or as a mere formality.
- (b) If consultation must precede change, a proposal must not be acted on until after consultation. Employees must know what is proposed before they can be expected to give their views.
- (c) Sufficiently precise information must be given to enable the employees to state a view, together with a reasonable opportunity to do so. This may include an opportunity to state views in writing or orally.
- (d) Genuine efforts must be made to accommodate the views of the employees. It follows from consultation that there should be a tendency to at least seek consensus. Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses and then deciding what will be done.
- (e) The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change or even start anew.

[19] The integrity of a restructuring scheme, even where motivated by genuine operational requirements, may be compromised by its application to particular individuals for reasons other than that their jobs have gone. Where the selection of an employee for redundancy is "...tainted by some inappropriate motive..." and the redundancy is "...masking another and different reason...", the worker will have a valid grievance (*Savage v Unlimited Architecture Ltd* [1999] 2 ERNZ 40).

[20] Mr Bourgeois operated a vehicle roster system running three vehicles on seven days per week. BMDL employed six fulltime and two part-time operational staff. Those employees delivered from two trucks which operated seven days per week each and one truck which operated five days per week. Employees either worked as runners or truck drivers. Runners work on a truck to help with the delivery of the milk. Drivers are responsible for driving the truck, delivering the milk and supervising the work of the runners.

[21] Prior to the restructuring the three rosters required the following manning levels:

- **Greerton**
One fulltime driver five days per week
One part time driver two days per week
One runner three days per week
- **Downtown** – operated seven days per week with one driver and one runner
- **Commercial**
One driver five days per week
One driver and one runner three days per week

[22] Following his review of the truck roster and manning levels, Mr Bourgeois developed a proposal which would impact on the number of vehicles by running one vehicle three days per week and two vehicles for seven days per week. To achieve this Mr Bourgeois would reorganise the customers that each run delivered to and reduce the number of visits to customers each week.

[23] The proposed changes impacted on staffing levels in the following ways:

- **Greerton**
One fulltime driver five days per week
One part time driver two days per week

The part-time runner position would be disestablished
- **Downtown** – operated seven days per week with one driver and one runner

No change
- **Commercial**
One driver three days per week

The part-time driver and part-time runner positions would be disestablished

[24] On 1 August 2007 Mr Bourgeois met briefly with Mr Jopson, Mr Moorhead and one other employee, Mr Marshall Petley to advise them that he needed them to attend a meeting to discuss the need for a change including the need to make urgent savings in wages. Each employee was handed a letter advising them that a recent review had identified that the roster system could be more efficient and seeking feedback on the possible disestablishment of the positions. All employees were invited to bring a support person with them to the meeting.

[25] On 2 August 2007 Mr Bourgeois met formally with Mr Jopson, Mr Moorehead and Mr Petley. Notes from that meeting were taken by Ms Cherie Farrington, a registered Legal Executive. At the Authority investigation meeting Mr Jopson and Mr Moorehead confirmed that the notes produced by Ms Farrington were a reasonable reflection of the meeting.

[26] The meeting opened with Mr Bourgeois explaining about the price of milk increasing, and the impact this was having on his financial profitability. Mr Bourgeois handed out copies of the truck rosters and schedules applicable at that time together with a proposed new roster. These documents were discussed during the meeting.

[27] I am satisfied that the meeting on 2 August 2007 provided opportunity for all three employees to provide suggestions and feedback on the proposal tabled at the meeting by Mr Bourgeois. Individual follow-up meetings were arranged for the following week and the employees were encouraged to talk among themselves in the meantime.

[28] It was common ground that from the outset of the meeting Mr Bourgeois identified that the way he would select staff to be made redundant was by using the last on, first off system.

[29] However, Mr Bourgeois says he then told Mr Jopson and Mr Moorehead that he would also be taking into account other factors such as ability to work the new rosters, employee's skill levels, drivers' licenses, customer relationships and distribution skills. Mr Jopson and Mr Moorehead denies Mr Bourgeois raised these factors with them.

[30] This new criteria is not recorded in the notes from the 2 August 2007 meeting as being raised by Mr Bourgeois, and there are no notes to show that there were any discussions about how these factors would be taken into account.

[31] The notes from the meeting show that suggestions were forthcoming about other ways Mr Bourgeois could determine who would be redundant, for example taking into account the actual quantities of product being delivered by each driver was one suggestion.

[32] During the investigation meeting it became clear that in coming to his conclusions as to which of the three employees would be made redundant, Mr Bourgeois took into account the ability or otherwise of Mr Jopson and Mr Moorehead to be able to work weekends. Again, there is no record that this criterion was ever discussed with either of the applicants, who both say they could have made arrangements to work on weekends if they had known it was a criterion against which they were being assessed.

[33] I find that on the balance of probabilities Mr Bourgeois did not make it clear to Mr Jopson and Mr Moorehead all of the factors he would be taking into account when making his decisions as to who would be made redundant. His omission means that neither Mr Jopson nor Mr Moorehead were given a proper opportunity to demonstrate that they could meet all the criteria.

[34] An employer acting fairly and reasonably in all the circumstances of this matter, would have raised the second tier criteria and sought the applicant's input and discussed the issues around weekend work with each of the affected employees.

[35] This failure by Mr Bourgeois renders the dismissals of Mr Jopson and Mr Moorhead unjustified.

Remedies

[36] This was a genuine redundancy. The business was experiencing significant cost increases and a downturn in customers. It follows that ongoing lost wages can not be claimed, nor can Mr Jopson or Mr Moorehead be compensated for the loss of their jobs. However both applicants can be compensated for the failure of Mr Bourgeois to properly consult over the criteria against which the applicants were assessed for redundancy.

[37] In their statement of problem the applicants claim \$10,000 each for compensation for hurt and humiliation. However, the evidence does not support such an award. Indeed the evidence as to hurt and distress was remarkable for its paucity. The only evidence as to the impact the redundancy had on either

applicant, was from Mr Moorehead when, in answer to questions at the investigation meeting he told me his confidence had taken a huge hit.

[38] Taking all relevant factors into consideration I set the level of compensation at \$2,500 for each applicant.

Bay Milk Distributors Limited is ordered to pay to Mr Moorehead and Mr Jopson \$2,500 each as compensation pursuant to s123(1)(c) within 28 days of the date of this determination.

Costs

[39] Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined.

Vicki Campbell
Member of Employment Relations Authority