IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 189/09
5128155

	BETWEEN	PATRICK LAPWORTH Applicant
	AND	FONTERRA COOPERATIVE GROUP Respondent

Member of Authority:	Vicki Campbell
Representatives:	John Peebles for Applicant Steven Palmer for Respondent
Investigation Meeting:	9 March and 1 April 2009 at Hamilton
Submissions Received:	14 April from Applicant 15 April from Respondent
Determination:	17 June 2009

DETERMINATION OF THE AUTHORITY

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[1] Mr Patrick Lapworth had been employed by Fonterra Cooperative Group ("Fonterra") for 16 years when, in July 2006 he was made redundant. Mr Lapworth claims his dismissal by reason of redundancy was unjustified and he claims remedies including reinstatement, reimbursement of lost wages and compensation.

[2] Fonterra denies that Mr Lapworth's dismissal was unjustified and says it worked through a thorough consultation process before identifying approximately 26 roles which were no longer required in the organisation.

[3] I am required to scrutinise Fonterra's actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The section states:

> 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* [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 Mr Lapworth redundant and otherwise act in a way that was not likely to mislead or deceive him, that is, in good faith?

Was the redundancy genuine?

[6] 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.

[7] 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.

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

[9] In January 2006 Fonterra initiated consultation with regard to a project referred to as Lights Out Packing Project (LOPP). This project would see a major change in the technology and the skills and competencies required for operating the Te Rapa Milk Powder Packing Operation. The numbers of staff were to reduce from 36 to 12.

[10] As explained to the Authority by Mr Roger Usmar the Te Rapa Hub Manager:

> The reduced staffing per shift in itself changed the dynamics of the operation in as much as each Operator had to have ability to fully complete each task/activity within the area. This differed from previous operation where in fact with 9 [employees] per shift staff tended to specialise with some performing higher skills/more complex tasks whilst others performed more of the routine tasks.

[11] I am satisfied the reasons for the restructuring and therefore the disestablishment of Mr Lapworth's role were for genuine commercial reasons.

Was the redundancy handled in a procedurally fair manner?

[12] Section 4 of the Employment Relations Act 2000 requires Fonterra to deal with its employees in good faith. This duty is to be exercised not only generally but in specific situations including redundancy.

[13] 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.

[14] 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.

[15] The applicable employment agreement is the Fonterra Dairy Workers Collective Agreement 2004-2006. The collective agreement was entered into between the New Zealand Dairy Workers Union Inc (DWU) and Fonterra. Mr Lapworth was at all times a member of the DWU and was covered by the terms of the collective agreement. The agreement contains provisions for dealing with redundancies in the workplace. In particular the relevant provisions state:

> **Clause 10.1.3**
> …whenever such changes occur that displace the jobs or substantially affect the terms and conditions of employment of any workers to the worker's detriment, then every endeavour must be made to redeploy the workers to an alternative position in accordance with the redeployment clause set out below.
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> **10.2.1**
> Providing the worker's terms and conditions of employment are not substantially changed to the worker's detriment and providing, where necessary, sufficient training is provided by the Company to enable the worker to upgrade his/her skills to safely perform any new duties, and further providing any alternative position is on the same site or factory complex, then the company at its discretion may:
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> 10.2.1.2 redeploy a worker to a position in keeping with the workers level of skill;
> 10.2.1.3 redeploy a worker to an upgraded position, while providing sufficient training to enable the worker to upgrade his/her skills to safely perform the new duties as required.
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> **10.2.3**
> Where the Company is unable to place any redundant workers in an alternative position by use of the redeployment provisions as set out above, then the Company shall offer them a choice of:
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> 10.2.3.1 any alternative employment that may be available in the same factory or on the same site complex which the worker is competent to perform (or could perform after suitable training) but the terms and conditions of employment of which are substantially different to the worker's original terms and conditions of employment; or
> 10.2.3.2 any alternative employment that the Company may have available on a different site complex and which the worker is competent to perform (or could perform after suitable training); or
> 10.2.3.3 redundancy compensation as set out in the redundancy clause below.
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> **10.2.4**
> The alternative employment procedures referred to above shall require the Company to advertise any job vacancies they have available, or are aware of becoming available, on all the notice boards of the factories where the workers to be displaced are employed.
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> 10.2.3.4 Redundant workers are to be given first opportunities at any vacancies that arise, if no suitable applicants apply then the Company may open the vacancy up to extermal candidates. The Company shall set the criteria for such positions and where practical assist applicants to meet that criteria.

> 10.2.3.5 In cases where more than one worker applies for the position, the worker with the longest service with the Company shall, all other things being equal, be successful.
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> …
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> **10.4.8 Selection Criteria**
> All things being equal, the Company shall observe the principle of "last on, first off" in selecting workers to be made redundant. The Company reserves the right to continue the present employment of any worker who by reason of special skills is necessary for efficient operation. However where such conditions exist the parties to this agreement may negotiate an alteration of the principle of "last on, first off".

[16] Mr Lapworth's complaint is that Fonterra did not follow the requirements of the collective employment agreement. Mr Lapworth says Fonterra was required to make every endeavour to redeploy him to an alternative position in the spirit and intent of the collective agreement.

[17] Additionally he says that once every endeavour to redeploy him was exhausted, the respondent was required to provide sufficient training to enable him to upgrade his skills in order that he could be employed in an alternative position or at an alternative site. Further, he says that Fonterra should at all times, have used the "last on first off" ("LOFO") principle as required by the employment agreement.

[18] I find the redeployment provisions in the collective agreement are intended to avoid compulsory redundancies as far as practicable. The agreement provides a mechanism when issues are likely to lead to a displacement of workers arise. That is, the establishment of a Consultative Committee which is formed to oversee the implementation of all redeployment, relocation and/or redundancy issues.

[19] A consultative committee was established in January 2006 when Fonterra announced its proposal for change. That committee comprised a mix of employer and union representatives. The committee agreed on a process to deal with the restructuring which included an opportunity for affected staff to identify any preferences they had for any vacancies, and where vacant positions continued to exist after that, they would be advertised internally and would be contestable among the directly affected employees.

[20] In order to prepare the affected employees for the requirement that they apply for any vacant roles, Fonterra arranged for CV writing and interview skills workshops

to be held for all those interested. Mr Lapworth did not attend any of these workshops.

[21] Also as part of the agreed process, directly affected employees were subject to a competency check and rated accordingly. The competencies were developed by the Consultative Committee to reflect the requirements of the new roles and were taken to DWU members at the end of January or beginning of February. Mr Lapworth acknowledged at the investigation meeting that while he did not recall the meetings specifically he would have been in attendance.

[22] Mr Lapworth scored very low on this assessment. At the investigation meeting Mr Lapworth was clear that he did not like the "points system" as it did not take into account his 24 years service.

[23] Mr Lapworth was unsuccessful in any of his applications for vacancies. I am satisfied Fonterra managers met with Mr Lapworth on several occasions between March and September 2006 to provide him with constructive feedback as to why he was not being successful in securing redeployment opportunities and to assist him in his approach to future interviews.

[24] All the advertised vacancies were filled by other directly affected employees. I am satisfied that Fonterra was not in breach of its collective agreement when it advised Mr Lapworth in March 2006 that his position would be destablished on 30 April 2006 and unless he could be redeployed his employment would come to an end. The date at which Mr Lapworth's employment was to end, was extended on several occasions until September 2006.

[25] I am satisfied Mr Lapworth was provided with every opportunity for redeployment along with other directly affected employees. Indeed, Fonterra provided additional assistance to Mr Lapworth through the one-on-one coaching he received throughout the process. This one-on-one coaching was provided in order to assist Mr Lapworth improve his performance at interviews.

[26] Further Mr Lapworth's employment was extended more than once before his final termination in September 2006. These extensions were instigated by Fonterra to enable additional redeployment opportunities to be explored by Mr Lapworth.

[27] There is no evidence before the Authority to show that Fonterra did not provide its directly affected employees, including Mr Lapworth, with the first opportunity for vacancies as they arose.

[28] Mr Lapworth's focus throughout the restructuring process and at the investigation meeting was his understanding that under the LOFO principle his 24 years of employment with Fonterra should have meant that he would receive priority for redeployment ahead of employees with lesser service.

[29] While Mr Lapworth's understanding of this principle is correct, the collective agreement qualifies the application of the principle with the words "…all things being equal". In this case I am satisfied Fonterra has shown that all things were not equal between Mr Lapworth and other directly affected employees and this is why he continued to miss out on opportunities for redeployment.

[30] In his submissions Mr Peebles referred the Authority to the Employment Court decision in *Fonterra Cooperative Group Limited v Van Heerden and anor* [2007] 1 ERNZ 791. That case can be distinguished on the basis that the Court in *Van Heerden* was asked to determine the competing interests of two affected employees with regard to one vacancy in a restructuring process where all things were equal between the two. There is no evidence before the Authority that Mr Lapworth should have been redeployed ahead of another affected employee on the basis that they were equally suited to the role.

[31] I find Mr Lapworth's dismissal by reason of redundancy to have met the tests that there was a genuine commercial reason for the restructuring and the process used to implement the restructuring was a procedure a fair and reasonable employer in the circumstances of this case would have followed. I am unable to be of further assistance to Mr Lapworth.

Costs

[32] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, Fonterra may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority