

Employment relationship problem

[1] Mr Loveday raised a personal grievance for unjustified dismissal arising from his redundancy. He alleges that his redundancy was predetermined; that his selection for redundancy was predetermined; and that CNC Machining Co Ltd (“CNC”) did not follow a proper procedure. During the investigation meeting Mr Loveday raised specific concern about the timing and provision of information during the redundancy process.

[2] Although Mr Loveday’s personal grievance letter to CNC dated 16 November 2010 stated that his redundancy “*did not appear to be a genuine redundancy*”, he accepted during the investigation meeting that CNC was facing very serious financial difficulties and that it had to reduce the number of staff it employed. Because Mr Loveday was unrepresented, I nevertheless heard evidence on the substantive justification for his redundancy.

[3] Mr Loveday had a number of complaints relating to annual leave which he says unjustifiably disadvantaged him. Firstly, he was directed to take one week’s annual leave on less than one week’s notice. Secondly, he was asked to phone his boss, Mr Houston during this period of annual leave, in case he was needed back at work earlier. Third, Mr Loveday says he was treated differently from other staff because he was directed to take more annual leave than anyone else.

[4] CNC maintains that it had genuine commercial reasons for making Mr Loveday redundant and that it followed a fair and proper process before it did so. It strongly refutes the allegations of predetermination, and says it worked very hard to avoid redundancies. It says that all relevant information, including highly sensitive commercial and financial information, was shared with Mr Loveday during the consultation process and that he was given a genuine opportunity to comment on it before a final decision was made.

[5] CNC believes that it gave Mr Loveday 14 days notice of the requirement to take additional annual leave. It says he was given the option of phoning in whilst on leave to give him a chance to return early if there was work for him to do, in order to address his dissatisfaction about being directed to take annual leave. It also says that all staff were directed to take 5 days annual leave in September 2009, and Mr Loveday was not treated differently from his colleagues.

Issues

- [6] The Authority is required to determine the following issues:
- (a) Did CNC have genuine commercial reasons for disestablishing Mr Loveday's position?
 - (b) Did CNC follow a fair and proper process before it decided to make Mr Loveday redundant?
 - (c) Was Mr Loveday's dismissal on the grounds of redundancy justified?
 - (d) If not, what (if any) remedies should be awarded?
 - (e) Was Mr Loveday disadvantaged in his employment by CNC's unjustified actions?
 - (f) If so, what (if any) remedies should be awarded?

Did CNC have genuine commercial reasons for disestablishing Mr Loveday's position?

[7] John Houston is the owner/operator of CNC Machining Co Limited (CNC). He has operated the business for over 25 years and has nine permanent employees. The parties shared a personal and professional relationship that went back 25 years. Mr Loveday was initially employed by CNC as a fitter/operator role, but over time that changed into a quality control role. Mr Loveday's was the only quality control role in the business, although other staff would help out from time to time if necessary.

[8] CNC manufactures products for local (mostly New Zealand) manufacturers. It does not manufacture any product of its own, so it is reliant on other businesses to generate business and sales for it. CNC had usually been able to predict a certain level of monthly sales due to its well established clientele, who had ongoing manufacturing requirements.

[9] However, in August of 2009 the business suffered a dramatic downturn of forward orders which was uncharacteristic compared with prior years. This created significant financial challenges, and Mr Houston had to ask his bank for additional

financial support. Ongoing banking support was conditional upon an immediate and ongoing reduction in CNC's cost structure.

[10] Mr Houston took a number of steps which included not buying back-up tools, reducing expenditure where possible, putting his own money into the business, reducing drawings, reducing salary (with agreement) of some staff, and reducing annual leave balances of staff, but these measures did not generate the necessary cost savings. The bank therefore required him to restructure the business, in order to reduce outgoings.

[11] Mr Houston therefore reluctantly embarked on a restructuring that involved disestablishing a number of positions. From August 2009 to May 2010 CNC reduced its staff by four. Three staff were made redundant as a result of separate redundancy processes. The fourth person would have been made redundant, but resigned before that occurred, and has not been replaced. Mr Loveday was the second staff member to be made redundant.

[12] Each time he made someone redundant, Mr Houston hoped that business would pick up, so further redundancies could be avoided. When that did not occur, and with CNC continuing to face ongoing and serious financial difficulty, Mr Houston remained under pressure from his bankers, so he would then look at the disestablishing the next position that he thought the business may be able to continue running without.

[13] Mr Houston impressed me as a sincere and hard working small business owner whose business had been severely affected by the economic downturn. It was obvious from his evidence that he has been struggling very hard to keep his business afloat, and that he saw redundancies as a last resort. He has taken a 'hands on' role in the business and now, in addition to managing the business, also works on the production floor. Although he was distressed at having to lay off staff, because of its reduced outgoings, CNC has managed to remain in business.

[14] Although Mr Loveday appeared to have initially challenged the genuineness of his redundancy, in his evidence during the investigation meeting he accepted that CNC was in financial difficulty and that redundancies were necessary.

[15] I find that CNC had genuine commercial reasons for disestablishing Mr Loveday's position.

Did CNC follow a fair and proper process before it decided to make Mr Loveday redundant?

[16] Mr Loveday had the following complaints about the process:

- (a) He should have been spoken to informally instead of being put through a formal process;
- (b) He was not given the selection criteria used by CNC;
- (c) He should not have been selected for redundancy;
- (d) He was not given the information he needed to enable him to consult in a timely manner; and
- (e) His redundancy was predetermined.

Informal discussion

[17] Mr Loveday said that, because of their 25 year relationship, Mr Houston should have just talked to him about the problems facing the business instead of embarking on a formal process.

[18] I find this criticism very hard to understand because Mr Loveday admitted that Mr Houston did talk to him informally before starting a formal process. Mr Houston shared very sensitive and confidential financial and commercial information with Mr Loveday at an informal meeting on 3 September 2009, because of their longstanding relationship. CNC did not embark on a formal consultation process until 30 September 2009.

[19] I find that there is no merit in Mr Loveday's complaint about this. There is no legal requirement on an employer to engage in informal discussions with an employee before embarking on a formal consultation process, regardless of how long that employee may have been employed. In any event, such informal discussions did occur, so I was surprised at Mr Loveday's insistence during his evidence that this remained a live issue.

[20] I further note that an employer which proposes to make an employee redundant should usually always enter into a formal consultation process about that proposal. Dealing with a proposed redundancy by way of informal discussions only

significantly increases an employer's risk of liability if the dismissal is later challenged by the redundant employee.

Selection criteria

[21] During the consultation process Mr Loveday asked for the selection criteria CNC used and believed he was unable to participate in the consultation process without it. He was advised by letter dated 6 October 2009 that his position had been selected because its duties could be absorbed by existing staff.

[22] Mr Loveday was the only person in the Quality Control role, so this was not a situation where there were more staff wanting the role than there were roles available. Where there is only one position being disestablished, and only one person in that position, then (in the absence of redeployment opportunities) the individual in the disestablished role is the person who is made redundant.

[23] In that type of scenario, the employer does not have to apply selection criteria to determine who should be made redundant. There is no obligation on an employer to disclose selection criteria, where selection criteria is not applicable.

[24] I find that, because Mr Loveday was the only person in the Quality Control role, CNC was not required to provide him with selection criteria.

Selection for redundancy

[25] Mr Loveday says he should not have been selected for redundancy. He did not say why not or who should have been selected instead of him. Mr Houston gave evidence that Mr Loveday's position was selected because its duties could be reallocated to existing staff and because he was one of the highest paid employees, so CNC would achieve the most immediate savings by making him redundant over other staff.

[26] I find that these are reasonable and credible reasons and that Mr Houston was not improperly motivated when he identified Mr Loveday's position as one that could potentially be disestablished.

[27] Mr Loveday's claim attempts to get the Authority to substitute its own view on which position should have been disestablished. However, that is a decision that falls within CNC's exclusive management prerogative to make and it is not for the

Authority to second guess that. The Chief Judge in *Simpson Farms v Aberhart* [2006] 1 ERNZ 825 made that clear when he stated:

“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 Court, even under s103A”

[28] I find that CNC was entitled to select Mr Loveday’s position for disestablishment.

Lack of information

[29] Mr Loveday’s main complaint was that he was not provided with the “selection criteria”. I have already found that selection criteria did not apply to Mr Loveday’s situation, so CNC cannot be criticised for not providing it.

[30] Mr Loveday was also critical that he did not get all of the information about the proposal at the outset of the process, which meant he had to ask for information in the course of the consultation process. In this case, I do not consider that any criticism can attach to CNC about that. Mr Houston was doing his best, without the benefit of Human Resources or legal advice, to fully and properly explain to Mr Loveday what he was proposing to do.

[31] I agree with Mr Loveday that the first meeting between the parties on 30 September 2009 did not result in a restructuring proposal being tabled. Instead Mr Houston shared very detailed information about CNC’s financial situation, sales information, the steps it had taken up to then to address the problems it was facing, and the future options that it may have to consider, one of which included reducing staff numbers.

[32] Mr Houston said at this point he was still waiting on further information from CNC’s bankers as to what level of support would be provided, and he wanted to know that before considering future options, such as a formal restructuring process.

[33] Mr Loveday and Bridgit Wright, who acted as his support person during the process and who gave evidence during the investigation meeting, both accepted that

by 6 October 2009 they had received responses to all of their queries, and that they had sufficient information to enable them to provide feedback on the proposal.

[34] The point of a consultation process is to enable parties to engage over a range of issues which may include requests for clarification or further information. The mere fact that an employee may need to ask for further information during the consultation process does not make the process defective.

[35] Mr Houston was active and constructive and responsive and communicative in the way he dealt with Mr Loveday. He explained what was proposed and why. He set out the steps he had taken to avoid redundancies and explained why that had not been successful. He identified how the quality control work would be undertaken, and what affect it was likely to have on Mr Loveday, if the proposal was adopted, and he responded to every issue that Mr Loveday raised.

[36] Mr Houston also shared a lot more commercially sensitive and confidential information with Mr Loveday at a far earlier stage than many employers would have. I find that CNC did provide Mr Loveday with all relevant information and that he was given an opportunity to comment on it before a final decision was made to disestablish his position. CNC fully complied with the s4(1A) duty of good faith under the Act.

Predetermination

[37] Mr Loveday pointed to three factors which caused him to believe that his redundancy was predetermined, namely:

- (a) The suggestion in July 2009 that his work mobile phone account be transferred into his own name;
- (b) The instruction on 01 September 2009 to take five days' annual leave;
- (c) The failure on 27 September 2009 to provide him with training on the CMM machine.

(a) Mobile phone

[38] Mr Houston and the Office Administrator, Jayne Bevan, both gave evidence about this issue. Mr Loveday was provided with a business phone, on a Vodafone contract, which CNC paid for. In July 2009, Ms Bevan Telecom offered CNC a competitive deal if it transferred its five company mobile phones from Vodafone to Telecom.

[39] At the time of this discussion, the production manager did not have a mobile phone, because it had been lost. This meant that when other staff needed to use a mobile phone, they had to ask to use Mr Loveday's. However, Mr Loveday was reluctant to provide his phone to other staff because he would be expecting calls or if he did lend it, then he would stipulate that he needed it back by a certain time. This situation was not working well for anyone, but Mr Houston did not want to raise it with Mr Loveday, because he foresaw that would be likely to create difficulties.

[40] Ms Bevan suggested that a practical way of dealing with this problem would be to give Mr Loveday his CNC work mobile phone by transferring it in to his own name, so it would become his own personal phone. CNC would continue to pay for the remainder of the Vodafone contract, but other staff would not be able to ask to use Mr Loveday's mobile because it would be his own personal phone. CNC would then take out a contract with Telecom for five other solely business mobile phones, which would be available to staff who needed to use a mobile phone for work purposes.

[41] The suggestion that the mobile be transferred to Mr Loveday's own name, at no cost to him, occurred so it was clear to everyone that it had therefore become his own personal mobile. This was seen as the outcome which would in the least amount of inconvenience to Mr Loveday. As it turned out Mr Loveday declined this offer, so the transfer did not occur.

[42] Mr Houston's evidence was that he made this suggestion to remove the problems which had been occurring. He said that he was trying to do the right thing by ensuring that a work mobile phone was readily available from time to time for staff who needed it, without turning the problems which had been occurring into an issue, which he thought would have upset Mr Loveday.

[43] I am satisfied with CNC's explanation and do not agree with Mr Loveday's view that CNC's actions indicate predetermination of his redundancy.

(b) Annual leave

[44] The instruction to all staff that they had to take 5 days annual holidays in September in order to reduce CNC's annual leave liability was a measure which was adopted to address a falling workload and increasing financial pressures. I am satisfied that CNC took steps to reduce the accrued annual leave balance of all staff in as part of its cost cutting measures. I find that this did not indicate that any future redundancies had been predetermined.

(c) Training

[45] Mr Loveday says his training on the CMM machine was cancelled, with no explanation.

[46] Mr Houston's evidence was that he had initially arranged for three staff to be trained on the CMM machine. However, when the training day arrived, because of work commitments, he could not spare three staff from the shop floor. He therefore told the production manager to undertake the training, and then the other staff himself, which is what had occurred a number of times previously. Mr Houston did not tell the other two staff members that personally, because he assumed that his production manager would do so.

[47] Mr Loveday's evidence was that he was walking past the area where the CMM machine was, saw the production manager receiving training, so decided to join in. Mr Houston said he was unhappy when he found out that had occurred because that meant he lost a resource from the shop floor, which was exactly what he had been trying to avoid. He was disappointed that his production manager had allowed Mr Loveday to join in, contrary to his instructions that the two other staff were needed on the shop floor.

[48] I accept that there was a legitimate explanation for the machine training issue and find that it was not evidence of predetermination of Mr Loveday's redundancy.

Fair process

[49] I find that CNC followed a fair and proper process before it decided to make Mr Loveday redundant. The process it followed enabled Mr Loveday to have genuine

input into the proposed restructure, before a final decision was made. The process used also complied with natural justice considerations and good faith requirements.

No predetermination

[50] None of the factors raised by Mr Loveday support a finding of predetermination. I accept Mr Houston's evidence that he was hoping, right up until the time he made the final decision, that something would change to make redundancy unnecessary. I also find that he took the day before he advised Mr Loveday of his redundancy off work to discuss with his wife, who was the only other director, what the outcome of the process should be. It was a decision he found to be extremely difficult, but one which he took to save the business.

Was Mr Loveday's dismissal on the grounds of redundancy justified?

[51] I find that Mr Loveday's dismissal on the grounds of redundancy was justified. CNC had genuine commercial reasons for disestablishing his position, and making him redundant, and it followed a fair and proper process before doing so. CNC not only complied with its legal obligations but also exceeded what a fair and reasonable employer was expected to do in all of the of the circumstances.

[52] It was obvious that both parties found the situation distressing. Mr Loveday was stressed by the fact his job was at risk and then by his redundancy. Mr Houston was also upset at having to make Mr Loveday redundant, to the extent that when he attempted to read Mr Loveday the outcome letter containing the notice of redundancy in the final meeting, he was unable to do so.

[53] Mr Houston went out of his way to implement the decision to make Mr Loveday redundant in a sensitive manner, and his actions in this regard went beyond the legal requirements of what is expected from an employer in a redundancy situation.

[54] Mr Houston offered Mr Loveday an extra week's pay and gave him the option of being paid in lieu of notice, which he accepted. Mr Houston offered to approach his industry contacts as well as anyone else nominated by Mr Loveday to see if they had any work available, in order to assist him with finding work. Mr Loveday was given the use of the company vehicle for four weeks after the termination of his employment. Mr Houston offered to transfer Mr Loveday's work mobile phone into

his own name, so he could retain the number and be assured of uninterrupted coverage. He also offered a positive reference and assistance with preparing and typing up a current CV. Mr Loveday was told CNC would pay up to \$200 towards counselling in recognition of the upset and stress the redundancy may have caused him.

[55] Mr Loveday's personal grievance claim for unjustified dismissal is not upheld.

If not, what (if any) remedies should be awarded?

[56] Liability has not been established, so remedies are not appropriate.

Was Mr Loveday disadvantaged in his employment by CNC's unjustifiable actions?

[57] Mr Loveday has three complaints about his annual leave, which he relies on in support of unjustifiable disadvantage claim ;

- a. He was instructed to take annual holidays on less than one week's notice;
- b. He was told to phone Mr Houston whilst on annual leave;
- c. He was treated differently, because he was told to take more annual leave than other staff.

Instruction to take annual holidays

[58] Mr Loveday says that he was instructed on 1 September 2009 to take the following week as annual leave (i.e. from 7 to 11 September). He did not want to take this leave because he had already booked annual holidays later in the month and the short notice meant he did not have time to make any holiday arrangements. He felt he was unable to use this required annual leave effectively. Upon termination he also received two days' less holiday pay.

[59] Mr Houston said he believed Mr Loveday had received two weeks' notice of the requirement to take annual leave from 7-11 September 2009, because all staff were told at a meeting on 24 August 2009 that, due to financial concerns, they were each going to be asked to reduce their annual leave balance.

[60] Section 18 of the Holidays Act 2003 (“HA03”) deals with the taking of annual holidays. Pursuant to s18(3), annual holidays are to be taken by agreement between the employer and employee. Where agreement cannot be reached, then s19 HA03 enables an employer to require an employee to take annual holiday. Subsection 19(2) HA03 requires an employer to give at least 14 days’ notice of the requirement to take annual holidays if it is invoking its right under s19(1)HA03 to require an employee to take annual holidays.

[61] Clause 11.2 of Mr Loveday’s individual employment agreement recorded that *“The Employer shall give not less than two weeks’ notice of the requirement for the Employee to take annual leave”*

[62] I find that CNC required Mr Loveday to take annual holidays without giving him the two weeks notice required by HA03. A general announcement to staff that they were going to be required to reduce their annual holiday entitlements was insufficient to comply with the notice requirements s19(2) HA03. Specific notice, in terms of the actual dates that the employee is required to take leave, is required in order to comply with s19(2) HA03 and clause 11.2 of Mr Loveday’s employment agreement.

[63] Mr Loveday was not given notice of the requirement to take annual holidays until 1 September 2009, which was less than two weeks before he was required to take annual leave.

Requirement to phone in whilst on annual holidays

[64] Mr Loveday raised his unhappiness about being directed to take annual holidays with Mr Houston. In response, Mr Houston confirmed he had to take annual leave but suggested that Mr Loveday phone him whilst on leave to see if any unexpected new work had come in for him to do, on the basis that if it had, Mr Loveday would be allowed to return to work early.

[65] Mr Houston genuinely believed that he had provided the required notice but because he knew Mr Loveday was not happy taking leave, so he gave him the option of calling him to see whether any new orders had been placed which would have required Mr Loveday’s services. The nature of CNC’s business meant that it could be taken by surprise with orders coming in that it had not been expecting, which would then require resource.

[66] Mr Loveday agreed that Mr Houston had made it clear that he would not be required to return to work to undertake unexpected new orders, but would be given the opportunity to do so, which he could accept or decline. Mr Loveday said this arrangement disrupted his holiday because he thought he may get called back in to work.

[67] I find that by giving Mr Loveday the opportunity to phone him to see if new work had come in, Mr Houston was endeavouring to accommodate Mr Loveday's reluctance to take leave. This did not disadvantage Mr Loveday. Even if it had, then I would have found that this suggestion by Mr Houston was justified.

Treated differently from other staff

[68] Mr Loveday says he was directed to take more annual holiday than other staff. When questioned by me about what he based that view on, Mr Loveday admitted that it was from his observations and assumptions, not as a result of any direct evidence.

[69] CNC produced an annual leave table, showing which staff were directed to take annual holidays and when. Mr Loveday did not accept the table was accurate based on his discussions with other staff and his observations when he had been at work.

[70] Mr Loveday said that CNC should have published an annual leave roster, as they had indicated they would during the staff meeting on 24 August 2009. I find there was no legal obligation on CNC to publish a roster to all staff recording who it had directed to take annual leave and when.

[71] Mr Houston and Jayne Bevan, who both impressed me as honest witnesses, assured me that the annual leave record was accurate. I accept that that is the case. Mr Loveday never asked anyone what leave other staff had been directed to take and his concerns about different treatment are based on his unsubstantiated impressions, rather than any direct evidence.

[72] An analysis of the annual leave record does not support Mr Loveday's claim that he was treated differently from other staff. Four staff took annual leave in September 2009, I have referred to them by their initials. Mr Loveday and "M" were both directed to take 5 days leave; "A" took 7 days; and "Z" took 12 days annual leave.

[73] Mr Houston said he directed everyone to take 5 days annual leave in addition to any leave which had already been booked, because he felt that was the fairest approach. I accept his evidence and find that Mr Loveday was not treated differently from other staff.

Disadvantage claim

[74] Section 103(1)(b) of the Act entitles an employee to raise a personal grievance on the grounds;

“that the employee’s employment, or 1 or more conditions of the employee’s employment, [...] is or are or was [...] affected to the employee’s disadvantage by some unjustified action by the employer”

[75] I accept that Mr Loveday was disadvantaged by CNC directing him to take annual leave on less than one week’s notice because he did not have sufficient time to plan a holiday or time off with other family members. I find that CNC’s direction to Mr Loveday to use his annual leave was an unjustified action, because it breached s19(2) of the HA03 and clause 11.2 of his employment agreement.

[76] I find that Mr Loveday has a personal grievance for unjustified disadvantage.

What (if any) remedies should be awarded?

[77] Mr Loveday only used two days of annual leave, because he called Mr Houston on the second day of his leave saying that CNC had breached clause 11.2 of his employment agreement. Mr Houston said if there was any question that CNC had not complied with its obligations to Mr Loveday, then he could come back to work if he wanted to. Mr Loveday returned to work the next day.

[78] Notwithstanding his early return to work, I accept that Mr Loveday was inconvenienced and suffered injury to his feelings as a result of being directed to take leave on insufficient notice. However, I am mindful that Mr Loveday’s evidence of this was minimal and that he did receive the benefit of two paid days off work. I therefore consider that a nominal award is appropriate.

[79] CNC is ordered to pay Mr Loveday \$350 pursuant to s123(1)(c)(i) of the Act.

Costs

[80] The parties were not legally represented, so no issue as to costs arises.

Rachel Larmer
Member of the Employment Relations Authority