

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Jamie Maxwell (Applicant)
AND Conferenz Limited (Respondent)
REPRESENTATIVES Ken Nicolson, for Applicant
Carl Blake, for Respondent
MEMBER OF AUTHORITY Vicki Campbell
INVESTIGATION MEETING 2 March 2006
DATE OF DETERMINATION 8 June 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Jamie Maxwell was employed by Conferenz Ltd (“Conferenz”) in June 2002 as a conference Manager until he was made redundant on 5 November 2003. Mr Maxwell claims the redundancy was a sham, lacked a fair selection process and no proper consultation was undertaken. Conferenz denies Mr Maxwell’s claims.

[2] The issues for this determination are whether:

- The redundancy was genuine; and
- The process used by the respondent was fair and reasonable?

Was the redundancy genuine?

The Law

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

...make his business more efficient, as for example by automation, abandonment or 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. [my emphasis]

[2] Genuineness is considered by the Court in relation to whether or not the redundancy was the actual reason for dismissal rather than being a sham (see *Staykov v Cap Gemini Ernst & Young NZ Ltd*, unreported, Travis J, AC 18/05, 20 April 2005), and must be the predominant reason for termination (see *Nelson Aero Club Inv v Palmer*, unreported 7 March 2000, WC 10A/00, Shaw, J).

[3] Redundancy pertains to ‘positions’ of employment and not to the individuals who are employed to occupy them. It is unlikely to be a genuine redundancy if the same duties and responsibilities are substantially retained in the same position. There is a redundancy if a significant proportion of the duties and responsibilities are transferred or reassigned to one or more other positions.

The business

[4] Conferenz produces conferences for the business market. Conference managers are responsible for developing and organising conferences and workshops. The conferences range from annual conferences to one-off conferences on a specific current issue. Conference managers undertake market research to establish viability of ideas. It takes approximately 3 months from the inception of a conference through to delivery. Conference managers could be working on several conferences at any one time including the market research to test ideas, sourcing speakers and organisation of the conference. Conference managers also spend time sourcing sponsorships. It was common ground that sponsorship activity made up about 5% of Mr Maxwell’s activity. It was also common ground that Mr Maxwell was successful in obtaining sponsorship.

[5] Mr Steve Scott is the Managing Director for Conferenz. At the time of the redundancies occurring at Conferenz, Mr Scott was also a director in a company called Bright Star Conferences and Training Ltd. This company also developed and ran conferences.

The employment relationship

[6] Mr Maxwell was subject to a written employment agreement dated 8 May 2002. The employment agreement provides for four weeks notice, or payment in lieu, in the event of redundancy and states that there is no entitlement to redundancy compensation.

[7] During his employment Mr Maxwell had 2 performance reviews. The first of these was on 26 November 2002. The document provided to the Authority shows that Mr Maxwell was working well as an employee and was meeting expectations.

[8] The second performance review occurred on 4 June 2003. This review shows that Mr Maxwell was performing at an above average level in some areas and not in others. At this same time Mr Sukumar Verma, Director of Conferences and Seminars and team manager for the conference managers, was working with the team to address performance issues.

[9] Prior to the June 2003 performance review, Mr Scott became aware of an email sent to Mr Maxwell on his work email address regarding an application Mr Maxwell had made for a position as event manager with a competitor. Mr Scott met with Mr Maxwell to seek his explanation and discussed his commitment to the job and the company. Mr Scott told me he received no convincing assurance from Mr Maxwell that he was committed to continuing employment with the Company. Mr Scott's view was that he was '...half way out the door...'.

[10] Mr Scott says that at the June review Mr Maxwell sought a 27% salary increase while the company were offering 8%. Mr Maxwell eventually accepted the 8% but Mr Scott contends that from that time on Mr Maxwell's attitude changed.

[11] Mr Maxwell says that following that June performance review, Mr Scott and Mr Verma ignored him and, in particular, Mr Verma began putting pressure on him regarding the production of conferences and became critical of his ideas for conference topics.

[12] On 22 July 2003 Mr Maxwell was issued with a verbal warning for making a statement in the customer services area in front of other staff members, that the company was trying to unilaterally alter his employment agreement.

[13] At about that same time Mr Scott and Mr Verma had decided to vest the responsibility for sponsorship sales in one position in an effort to maximise sales in this area. To achieve that, Mr Dominic Duncan was appointed to a new position which incorporated a dual role of Conference Manager and Sponsorship Manager. Until that change, all Conference Managers had responsibility for sponsorship sales and received incentive payments based on their sponsorship sales.

[14] To give proper effect to the changed role for Mr Duncan, Mr Scott and Mr Verma discussed removing the bonus payment for sponsorships from the employment agreements with staff. Mr Maxwell refused to allow the change to be made to his agreement and as a result retained his bonus. Mr Maxwell's comment made to customer services staff was made in the context of enquiring about a copy of his employment agreement to check the bonus provision. At the

investigation meeting and in answer to questions Mr Scott reluctantly accepted there was a lack of any process used in issuing the warning. Mr Maxwell has never challenged the warning.

[15] Mr Maxwell says that by the beginning of October he was feeling victimised. He pointed to two pieces of communication in particular, to support his view. The first was an email, dated 9 October, from Mr Verma, asking Mr Maxwell for an explanation as to why he had not targeted a list of potential sponsors. The second was an email dated 10 October, from Mr Verma pointing out that Mr Maxwell was not at his desk at 1.59pm and asking what time he went to lunch. Mr Maxwell's documented response at 2.04pm was that he had been back at his desk for 15-20 minutes and had been out to lunch with other members of the team.

[16] Mr Scott says that overall the performance of the whole team was being scrutinised and needed improvement. He also said the emails referred to above were part of the closer supervision of the conference managers and an effort to increase the performance of the team.

[17] Mr Verma told the Authority that Mr Maxwell's behaviour was continually challenging and that he pushed the boundaries. By way of example Mr Verma says that in relation to a Strategic Communications conference Mr Maxwell was organising, he had three case studies on corporate social responsibility which Mr Verma felt was too many. Mr Verma maintained that Mr Maxwell was losing the opportunity to communicate another topic. He says Mr Maxwell had the idea of doing an international video conference which is very expensive to administer and would not have given a return on the expense. He says he tried to explain this to Mr Maxwell, but that Mr Maxwell's responses were challenging and he [Mr Maxwell] would not accept his point of view. Mr Maxwell's view of this incident was that Mr Verma was applying pressure on him.

[18] As a further example of Mr Maxwell's challenging behaviours, Mr Verma told the Authority that Mr Maxwell was organising a Manufacturing conference which contained "Theory of constraints" as a topic. Mr Verma said Conferenz had attempted that as a topic on a previous occasion and didn't get high ratings for it. Mr Verma says he was attempting to dissuade Mr Maxwell from using the topic. Mr Verma says Mr Maxwell would not accept his point of view.

The financial position

[19] Mr Scott told the authority that from July 2003 the bookings for conferences were steadily dropping. It seems to me that this was always going to be possible given that the conference

division were two staff members short. One had resigned and left, the other, Mr Duncan, was predominantly working on sponsorship sales.

[20] In support of his assertions that the company was experiencing a significant downturn in business, Mr Scott produced a graph of the registrations achieved for conferences for 2003 with a comparison to those received for 2002. I have carefully analysed the graph which demonstrates that with the exception of two weeks in July, registrations for the year, for each week, up until week 36 (1-7 September 2003) were consistently higher than for the corresponding weeks in 2002.

[21] From week 36 onwards, with the exception of two weeks, the graph shows the registrations for conferences were significantly lower than for each corresponding week in 2002.

[22] In October, Mr Vaibhav Gangun, another conference manager, left the company. This meant that with Mr Loner coming on board (as a replacement for the conference manager who had left earlier in the year) in September and Mr Duncan concentrating on sponsorship sales instead of conferences, Mr Scott was still one employee down in the division.

[23] It was during the month of October 2003, that Mr Scott says, he, together with his department heads, reviewed the situation and concerns regarding the consistent drop in registrations from September onwards was discussed at team meetings at which Mr Maxwell was present. At the investigation meeting Mr Maxwell told me he did not recall the concerns being discussed but that it was possible they were.

[24] Mr Scott says that before any steps were taken to make staff redundant other steps were put in place including closely monitoring all costs, and reducing staff costs by not replacing leaving staff.

[25] As part of dealing with the drop off in registrations and looking at his business overall Mr Scott then determined he had to consider the product mix. That is, how many conferences and how many seminars should be organised each year by the company to ensure the correct mix and to maximise take up of registrations. Any change to the product mix would have a flow on effect relating to the number of staff required. It was a proposal to change the product mix, which led to Mr Maxwell's redundancy.

[26] At a meeting held on 30 October 2003 (and referred to more fully, later on in this determination) Mr Scott addressed employees on the measures implemented to date but did not expand on whether these measures had been successful in assisting the company to meet the reduction in conference bookings. In his address to the employees, Mr Scott commented that if the problem was a short-term problem he would be prepared to ride it out, however, he believed all indications were that the problem was going to be more long term and therefore decisions had to be made. There was no evidence to show that this was not the case, and in fact the graph produced for the Authority shows that Mr Scott's predictions on registration numbers for November and December were correct. They were significantly lower than for the same months in 2002.

I am satisfied that on the balance of probabilities, the restructuring process was entered into for genuine commercial reasons.

Was the process followed by the respondent fair and reasonable?

[27] Section 4 of the Employment Relations Act 2000 requires Conferenz to deal with Mr Maxwell, in good faith. This duty is to be exercised not only generally but in specific situations, including redundancy.

[28] 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. The requirement to consult is therefore, a statutory obligation.

[29] 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 series of 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 prior 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 view.
- (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 and even start anew.

First consultation meeting

[30] As mentioned earlier, on Thursday, 30 October 2003 at about 9.15am Mr Scott met with all employees and advised them that the business was experiencing a downturn in registrations and this would have a flow-on effect for the next couple of months. Mr Scott advised that he was considering the reduction of the overall production of conferences and seminars and that the number of seminars produced would reduce from 65 to 55. He further advised staff that employee costs were also being looked at and specifically mentioned that reductions were possible in the Conference management area.

[31] Mr Scott advised further, that departmental meetings would be held the following day to allow staff to put forward any ideas they had to assist in the decision making process. He advised that redundancies were a possibility and outlined the general criteria to be used to assess staff for the redundancies.

[32] Mr Scott told me he read from a prepared script at the meeting. Mr Maxwell could not recall Mr Scott reading from a script but he did acknowledge at the investigation meeting that he received a copy of the document Mr Scott says he used at the meeting, the following day and that he had the document in time for the departmental meeting.

Departmental meetings

[33] On Friday, 31 October, meetings were held with each department. Mr Maxwell says he was determined to display lots of positive ideas and suggestions, which he did. Mr Maxwell told me he suggested the company consider a reduction in the food and beverage provided to conference participants, a reduction in printing costs and suggested merging the positions of Conferenz with Brightstar.

[34] Mr Scott says that after the departmental meetings he and Mr Verma discussed the ideas but determined that the ideas were not of a nature that would immediately address the financial situation, although he did not expand on the reasons why the ideas would not work.

[35] Mr Scott determined that one of the conference managers positions would be made redundant.

Third consultation meeting

[36] On Monday, 3 November 2003, a further meeting was held with all staff where employees were informed of the decision to make a Conference Manager position, and a marketing position, redundant. Employees were advised that one on one interviews would be held during the rest of that day and the next day with the directly affected employees. The criteria for the selection process was outlined to staff in general terms and reiterated that which had been conveyed to them on the previous Thursday. He outlined for the employees the general areas being considered as selection criteria, however, Mr Scott did not advise employees how the criteria would be applied, nor what weighting he gave to any specific criteria.

Selection interviews

[37] Mr Maxwell's interview took place on Tuesday, 4 November 2003. To assist them with the interviews of each staff member Mr Verma and Mr Scott had prepared a list of questions. Each list of questions was developed specifically for each individual. Each interview commenced with a positive statement about the employee's performance and then went on to ask questions relating to the job and whether it was meeting the employee's expectations, long term goals, opportunities for personal growth, contributions to the company, any other comments.

[38] While the questions were worded a little differently for each employee, I am satisfied that the questions explored the same areas for each and provided an opportunity for each employee to persuade Mr Scott and Mr Verma that they were a valuable employee and should be retained. I am also satisfied that these questions were aligned to the criteria outlined to staff at the meetings on 30 October and 3 November 2003.

[39] The interview notes show that five out of the six conference managers had performance issues in relation to the conferences they were organising. The notes used for Mr Maxwell's interview shows that the main issues for the company were around his earlier expectation of a salary increase (June performance review), that he had looked for alternative employment, and the verbal warning issued to him. Mr Maxwell was told that his attitude had deteriorated.

[40] Mr Scott says he wanted to receive from Mr Maxwell an assurance that he was committed to the company but he did not receive that. Mr Maxwell says that during the meeting he attempted to explore options other than redundancy including suggestions that staff could reduce to 4 days per

week, and that the company could reduce the work space and sublease the unused space. He says neither Mr Scott, nor Mr Verma were responsive to his suggestions.

[41] Following the individual meetings Mr Scott and Mr Verma ranked each employee. In answer to questions at the investigation meeting Mr Scott and Mr Verma contradicted each other when Mr Verma told the Authority he had ranked the employees in collusion with Mr Scott and Mr Scott told me he and Mr Verma ranked the employees separately and then discussed their rankings together. In any event, the evidence of both Mr Verma and Mr Scott was that out of six candidates, Mr Maxwell ranked sixth by both Managers. It was, therefore, Mr Maxwell who was selected for redundancy.

[42] On Wednesday 5 November 2003 Mr Maxwell was advised that his position was to be made redundant. He was given one months notice. He was told that each conference manager had equal performance and what it came down to was attitude and length of tenure. I am satisfied that in making his decision Mr Scott relied on the fact that Mr Maxwell had apparently applied for another position in June and that Mr Scott had taken this as a clear indication that he was unlikely to remain in Conferenz employment. I am also satisfied that Mr Scott relied on the fact that Mr Maxwell had been given a warning in July.

[43] Mr Maxwell was made redundant on 5 November 2003 and given one month's notice in writing. On 12 November 2003, Bright Star Conferences and Training Limited advertised for a Conference Producer. Brightstar is Mr Scott's second company. At the investigation meeting and in answer to questions, Mr Scott explained that he was not aware the position had been advertised until Mr Nicholson raised it with him on 12 November 2003 at a meeting between the parties. Mr Scott told me Mr Nicholson had asked if there were any other positions available for Mr Maxwell. When he said no, Mr Nicholson produced a copy of the advertisement. It is not disputed that Mr Scott immediately offered Mr Maxwell the opportunity to be considered for the role.

[44] I have some concerns about the process used by Conferenz to implement the redundancies. My first concern relates to the lack of any consultation around how the selection criteria would be applied and the staff ranked. There was no discussion at any of the consultation meetings about these matters specifically. I am satisfied that the staff were told of the general areas being used for selection, however, the consultation process lacked the opportunity to fully discuss and get employee feedback into how the criteria would be applied and how the rankings of employees would be carried out. It seems to me that in Mr Maxwell's case the company weighted heavily in

the areas of attitude and longevity, whereas in other cases, there does not appear to be any obvious weighting given to any aspect of the criteria.

[45] Secondly I am concerned at the swiftness of the process. On day one employees were advised that redundancies may be a possibility and within four working days, notice of redundancy had been issued to Mr Maxwell. In answer to questions at the investigation meeting Mr Scott acknowledged that there was no crisis. I therefore fail to see what the need for urgency was and why the consultation process could not have been extended to allow more opportunity for discussion about the alternative solutions proposed by Mr Maxwell.

[46] In his closing submissions Mr Blake, on behalf of Conferenz referred me to *Corey Marsland v Health Innovations Holdings Limited*, unreported, WEA65/03, a decision in which the Authority had found a four day process to be within the bounds of fairness. That case must be distinguished on its facts. Health Innovations Holdings Ltd was required to put quite drastic measures in place, very quickly. Employees were in danger of not being paid if immediate and drastic steps were not taken and external pressures had been brought to bear on the company. There is no evidence of such urgency in this case.

[47] I have concluded, on the balance of probabilities, that the process implemented to affect the redundancies was unfair. The implementation of the decision to make an employee redundant did not allow Mr Maxwell sufficient time to prepare for the interview which would determine his ongoing employment. The decision to make Mr Maxwell redundant was made without any opportunity for Mr Maxwell to comment on how the selection criteria would be applied and how the ranking of employees would take place. He was never told that his attitude and longevity of employment would be the two critical areas of assessment. Neither was he given the opportunity to comment on his poor ranking in relation to other employees.

In all the circumstances I find that the process used by Conferenz was unfair and the dismissal is therefore unjustified.

Remedies

[48] Mr Maxwell has been successful in his personal grievance for unjustified dismissal. He is therefore entitled to remedies.

Reinstatement/Lost wages

[49] Compensation may only relate to the procedural unfairness and not to the loss of employment (*Aoraki Corporation Ltd v McGavin* [1998] 1 ERNZ 601). As I have found the restructuring to be based on genuine commercial reasons Mr Maxwell could not be said to have lost any wages as a result of this unjustified dismissal.

Compensation

[50] In setting an award I have been guided by the judgment of the Court of Appeal, *NCR (NZ) Corporation Limited v Blowes*, unreported, 23 September 2005, CA 186/05.

[51] Mr Maxwell was dismissed for redundancy through no fault of his own and therefore there is no issue of any contributory conduct by Mr Maxwell.

[52] Mr Maxwell's evidence as of the impact on him losing his job he had held for 7 years was scant, to say the least. Mr Maxwell provided a copy of an email dated 5 November which indicates that he was "...sounding pretty cheerful..." at that time. However, I have considered the fact that Mr Maxwell had only one days notice that his job was on the line. He was told on Monday 3 November that redundancies would occur and was expected to front up the following day to a one-on-one interview which would determine his fate. While he was given a general list of criteria to be used, he was never told that his attitude and longevity were the only two areas considered important for him.

Conferenz Limited is ordered to pay to Mr Maxwell \$5,000 without deduction pursuant to s.123(c)(i) of the Employment Relations Act 2000 within 28 days of the date of this determination.

Costs

[53] The parties are encouraged to discuss and resolve the matter of costs between them. In the event that they are unable to do so they may lodge and serve memorandum in the Authority for consideration.

Vicki Campbell
Member of Employment Relations Authority