

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 70
5322852

BETWEEN CHRISTOPHER MCDONALD
Applicant

A N D SLINKSKINS TANNERY
LIMITED
Respondent

Member of Authority: Helen Doyle
Representatives: Peter Churchman, Counsel for Applicant
Don Rhodes, Advocate for Respondent
Investigation Meeting: 3 May 2011 at Invercargill
Submissions Received: On the day
Further Information: 5 and 6 May 2011
Date of Determination: 23 May 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Christopher McDonald worked at Slinkskins Tannery Limited (Slinkskins) from 12 August 1994. Slinkskins has a tannery operation in Southland. Mr McDonald worked when first employed in the position of lambskin grader. He then undertook a wide range of roles at the plant including working as a jumbo operator, working on the Nappa press, the schodel operator, the irons, shearing, tailing, shaving, toggling, fleshing, salting, drying and measuring. At the material time in 2009, Mr McDonald worked as a sheep skin grader.

[2] Mr McDonald says that he was unjustifiably dismissed from his employment. He was told that his dismissal was for reason of redundancy but says that the redundancy was not genuine and the process undertaken by Slinkskins was unfair and/or in the alternative, breached the collective agreement which covered his work.

[3] Mr McDonald is a member of the Otago Southland branch of the New Zealand Meatworkers' Union (the Union). The Union was party to a collective agreement 2008-2009 with Slinkskins at the material time Mr McDonald was dismissed.

[4] Mr McDonald seeks reimbursement of approximately six weeks lost wages from 23 October 2009 until he was able to obtain other work in December 2009 and compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of \$10,000. There is a claim for general damages in the alternative for breaches of the provisions of the collective agreement relating to seniority and requirements in the event of a redundancy. Mr McDonald initially wanted to be reinstated to his position with Slinkskins but had advised that he was no longer seeking that remedy as he had obtained employment. On the day of the investigation meeting however Mr McDonald advised that his employment had ended and he would like to go back to work at Slinkskins. Costs are also sought.

[5] Slinkskins says that in May 2009, as a result of global economic conditions impacting on overseas markets, a decision was made to seasonally lay staff off at the end of the season in June 2009. Most employees though returned again in or about August 2009 although four employees elected not to.

[6] On 23 October 2009, Slinkskins says that Mr McDonald and 10 other employees were made redundant because there was no improvement in the market at that time. In implementing that redundancy, Slinkskins says that it closely followed the provisions in the collective agreement and explained to Mr McDonald why he was selected.

[7] Another employer, Denise Andersen, was also dismissed for reason of redundancy on 23 October 2009. By agreement with Mr Churchman and Mr Rhodes, both personal grievances were investigated on the same day. There is a separate determination for Ms Andersen.

Issues

[8] The Authority is required to determine:

- Was the dismissal for the genuine reason of redundancy;
- Was the process followed fair and reasonable?

[9] The Authority must in determining these issues objectively consider the decisions made by Slinkskins and the manner of making the decisions and whether it was what a fair and reasonable employer would have done in all the circumstances at the relevant time – the former test for justification in s.103A under the Employment Relations Act 2000. That section has now been repealed and the new s.103A was substituted on 1 April 2011. This dismissal, however, took place before 1 April 2011 and the proceedings were lodged prior to that date – Interpretation Act 1999 (ss.17-19).

[10] The statutory obligations of good faith in s.4 of the Employment Relations Act 2000 required Slinkskins to deal with Mr McDonald in good faith throughout the process. These statutory obligations inform the decision under s.103A about how an employer acted – *Simpsons Farm Ltd v. Aberhart* [2006] ERNZ 825. There is a statutory obligation in s.4 (1A)(c) of the Employment Relations Act 2000 where an employer is proposing to make a decision where the decision will have an adverse effect on the continuation of employment to provide to the employee information relevant to the continuation of employment and an opportunity to comment on that information before a decision is made.

[11] In this case an important aspect in the decision to dismiss Mr McDonald was that the seniority list was departed from for the reason Slinkskins say that they wanted to retain employees less senior than Mr McDonald to meet its needs for skills, experience and knowledge. In the Employment Court judgment of *Jinkinson v Oceania (NZ) Ltd (No 2)* [2010] NZEMPC 102, 4 August 2010 it was stated in para. 38 that the selection process and its outcomes must form part of the employer's conduct to be reviewed in deciding whether the dismissal was justified.

Was the dismissal for the genuine reason of redundancy?

The collective agreement

[12] Clause 21 of the collective agreement is headed *SEASONAL CLOSEDOWN/ REDUNDANCY* and provides:

In the event of the Tannery being temporarily closed by the Employer at the conclusion of the season, then the following shall apply:

- 1) *All part-time workers will be laid off first after receiving one week's notice.*

- 2) *Seasonal workers will be laid off in order of Seniority from the bottom, after receiving one week's notice.*
- 3) *Workers will be offered re-employment each season in order of Seniority as long as the worker has the necessary skills required.*
- 4) *In the event of Redundancies the Employer shall make any selection based on the need to retain the necessary skills, knowledge and experience within the remaining workers. Seniority will be used in the first instance bearing in mind the above criteria.*
- 5) *Where the employment of the worker is terminated due to Redundancy, no compensation for redundancy shall be payable subject to the following:-*
 - a) *The company agrees that the terms and conditions of the agreement will apply if the business is taken over by another company or person.*
 - b) *If the business is closed, the employer will make every endeavour to place workers in any other position that Slinkskins and their subsidiaries have available.*
 - c) *If there are no positions available, the employer will assist in finding work for any worker that cannot get a job.*
 - d) *If a worker has to leave the district to find work, the employer will assist with the cost of shifting.*

[13] As at 23 October 2009, Mr McDonald was number 12 from the top of the seniority list of employees out of 26 employees and was one of the more senior employees.

[14] Jonny Hazlett is the general manager of Slinkskins and Lincoln Dearden is the factory manager. Mr Hazlett and Mr Dearden gave evidence about the need to respond to the global economic situation and the corresponding downturn in the business of Slinkskins that they said had become evident by the end of May 2010. Mr Dearden described some of the ways that the company had started to save money. The company commenced four day work weeks from 20 April 2009 that ran through to 10 August 2009 and also turned boilers off and some of the machines.

[15] Mr Hazlett and Mr Dearden said that they then attended meetings with staff on 12 June 2009 at the end of the season and advised them of some of the difficulties the company was facing.

[16] The Union secretary of the Otago Southland branch of the New Zealand Meatworkers', Gary Davis, was present at the meeting and took notes in his diary. He produced the corresponding diary entry at the investigation meeting and the entry reflects that the meeting took place on 11 June 2009 but nothing turns on that. It is evident there was some discussion at that meeting about some orders having finished and the downturn in business.

[17] I do not find it likely that there was a clear indication of the possibility of redundancies in the future. Mr Davis' notes do not reflect a statement to that effect that and therefore I cannot accept Mr Rhodes' submission that at that meeting staff were given four months' notice of pending redundancy.

16 October 2009

[18] Mr McDonald attended a meeting called on 16 October 2009. He was told along with other employees that he was to be made redundant. He said there was no discussion about why he had been selected. Mr Davis was also present at the meeting on 16 October 2009 and I shall refer to his evidence as to what took place because Mr Rhodes submits that the process and/or any deficiencies were in part alleviated by Mr Davis' presence at the meeting. It is important to record that the only information Mr Davis had going into the meeting was a list of the eleven employees to be made redundant. In all probability that was given to him on the day of the meeting.

[19] Mr Rhodes submits that the union through Mr Davis made no complaint about the process but the evidence does not support that. There was a meeting held at Mr Davis's initiative on 20 October 2009 to attempt to understand the selection of Mr McDonald and when the redundancy was nevertheless implemented on 23 October 2009 Mr Davis promptly raised a personal grievance seeking his re-employment on 30 October 2009. The response to these matters in my view makes Mr Rhodes submissions that the company may have been prepared if concerns about the process were raised to somehow revisit what had taken place somewhat less persuasive.

[20] Mr Davis took a note in his diary about what was said at the 16 October meeting and produced that at the Authority investigation meeting. It was the only record of the meeting provided and I accept that, although jottings, the diary entry contained the key elements of the discussion. It is recorded that Mr Hazlett advised those present at the meeting on 16 October that there were not many orders and if

crusting starts then the workers would be brought back in February if possible. There is a note that if skins could be sold then fleshing etc would be started. It is also recorded that calf skins were down by 70%. Mr Davis noted in his diary entry that the company would pay Labour Day and long service. I accept that there was probably an invitation for those with questions to stay behind later and raise these with Mr Hazlett and Mr Dearden.

[21] Mr Dearden and Mr Hazlett say it was made clear although only at the time of announcing redundancies that selection was on the basis of the collective agreement using the seniority list in the first instance and then making sure they retained employees with the required skills, experience and knowledge.

[22] I find, to the extent that anything was said about the reason for the selection of Mr McDonald, it was more likely said during the meeting, requested by Mr Davis and held on 20 October 2009 before redundancies took effect on 23 October 2009 because of concerns raised with Mr Davis and Union delegate Bev Halder that others below Mr McDonald in the seniority list had been retained.

Meeting on 20 October 2009

[23] The meeting on 20 October 2009 involved Mr Hazlett, Mr Dearden, Mr Davis, Mr McDonald, Ms Andersen, and Ms Halder. The evidence supports a heated exchange took place between Mr Dearden and Mr McDonald. Mr McDonald alleged that Mr Dearden's response to the effect that they should sort it out somewhere else amounted to a threat. I think it likely there were unfortunate statements made by both men in the heat of the moment but I do not consider it necessary to make a specific finding about the words used by Mr Dearden. What took place though supports considerable frustration by Mr McDonald when he learnt that the seniority list had not been complied with but did not know why. The meeting was appropriately cut short and lasted about five minutes and the issues outstanding between the parties as to selection and redundancy were not resolved. I find it likely that at some stage of the meeting there was reference to the selection being because the company wanted to retain certain skills, experience and knowledge.

Letter dated 23 October 2009

[24] Mr McDonald's employment ended on 23 October 2009. He received the following letter which although with his name inserted appears to have been a template letter.

Dear Christopher,

The Slink lamb and Calf collection season has come to an end, this will mean a lower production level in the Tannery for the moment., unfortunately this also means our company has to reduce its staff numbers accordingly.

So further to our meeting on the 16th of October I am sorry to inform you that you will be one of the people I have to advise that will be made redundant.

For this reason your employment with us will cease on the 23rd of October 2009 at the end of your shift on this day.

We thank you for your efforts that have enabled us to process the raw skins for this coming season, and hope you gained some valuable experience in Tannery work whilst employed by Slinkskins Limited.

Lincoln Dearden
TANNERY MANAGER

[25] Mr McDonald obtain other employment in the Dunedin area after about six weeks in December 2009. He found the time away from his family difficult and took a local fixed term position in Invercargill which expired at the end of April 2011.

[26] Before finding employment, Mr McDonald attended mediation in February 2010 to attempt to resolve the issues. Mediation was not successful. The week before the Authority's investigation meeting, Mr Churchman was advised in an email from sent through Mr Rhodes' office, that in the period immediately after mediation, February/March 2010, eight employees were employed at Slinkskins. It was recorded in the email that most employees employed at that time had worked previously at Slinkskins but that none of those had any seniority. It was clarified during the Authority's investigation meeting that, of the eight, there were two new employees.

Conclusion

[27] The law recognises the right for Slinkskins to make its business more efficient and further recognises that an employee does not have the right to continued employment if the business could be run more efficiently without that employee – *GN Hale & Son Ltd v. Wellington Caretakers IUOW* [1991] 1 NZLR 151 (CA).

[28] The collective agreement provided that there could be at the conclusion of a season a seasonal closedown and set out a process in the event of that happening. In many ways, the process used in this case and then the re-employment of several employees made redundant a few months later by Slinkskins mirrored that of a seasonal lay off. The redundancy letters sent to Mr McDonald referred to lower production level in the tannery *for the moment*. There was also a hope expressed that workers would be taken back in February 2010 at the meeting on 16 October 2009. The evidence and some letters to employees from other shutdown events supported that the word redundancy were also used in letters sent after a seasonal closedown for insurance or other reasons.

[29] The respondent though did not try to argue that this was a seasonal closedown and justification therefore has to be assessed on the basis of a dismissal for reason of redundancy. What was clear however was that those who were re-employed in February or March 2010 lost any seniority and started as brand new employees at the bottom of the list. That would not have occurred if there had been a seasonal lay off and employees were re-employed. Seniority in that instance would have been retained.

[30] Mr Churchman, on behalf of Mr McDonald, submits that the redundancy was not genuine and was a sham as employees, some new and some who were laid off at the same time as Mr McDonald with no seniority, were re-employed in February and March 2010. Further, Mr Churchman submits there was no compliance with the requirements in terms of seniority and/or no discussion directly with Mr McDonald as to whether he had the necessary skills and experience in terms of Slinkskins needs at that time. He further submits there was no consultation. Following a slow period of about two weeks the evidence supports that Mr McDonald's work in the sheepskin area continued to need to be done but was performed by a managerial employee and then by others.

[31] Eleven staff were made redundant at the end of October 2009 and Slinkskins then employed eight staff in February and March 2010. The evidence supports that these eight individuals were telephoned about roles at Slinkskins. The only reason advanced as to why Mr McDonald was not telephoned was that he had not filled in an application form either provided to those present at the meeting on 16 October or indicated as being required in order to be considered for employment in the future.

[32] Mr Davis and Ms Halder could not recall any discussion about these application forms at the meeting on 16 October 2010. Mr Rhodes, at my request, provided copies of these application forms completed by the eight employees after the investigation meeting. These forms were all dated February or March 2010 and I accept that is consistent with evidence on behalf of Mr McDonald and particularly from Ms Halder that application forms were not required to be completed until after individuals had been telephoned in 2010 about employment opportunities at the tannery.

[33] I find the evidence about the application forms unconvincing to the extent I am not even satisfied there were any application forms either mentioned or provided during the October meeting. It follows, therefore, that I do not find an adequate reason why Mr McDonald was not contacted in February and offered a role.

[34] A failure to contact Mr McDonald and offer him employment when it is clear that other employees made redundant in October 2009 were telephoned does cast considerable doubt that the redundancy was the genuine reason for his dismissal.

[35] Although Mr Dearden and Mr Hazlett said they did give consideration to the seniority list, it is not disputed that others below Mr McDonald on that list retained their position. The reason that was advanced was that those other employees lower on the list had the necessary skills, knowledge and experience and were retained for that reason. Mr Hazlett confirmed that the work Mr McDonald previously performed in grading sheepskins continued to need to be performed but was performed by another manager/supervisor Greg Anderson. Ms Halder in her evidence confirmed that after a couple of quiet weeks after Mr McDonald was made redundant for grading sheepskin that work increased to its normal levels. In any event Mr McDonald said in his evidence that he was capable and had the skills to perform most of the work that others who were retained could have done.

[36] I accept Mr Churchman's submission that there is no real paper trail for what was objectively assessed quite a significant restructuring and redundancy situation. The absence of that paperwork become significant where the evidence is that the work Mr McDonald used to perform still needed to be undertaken. Alongside this going to the genuineness of the redundancy there was no compliance with the good faith or consultation requirement of s 4 (1A) (c) of the Employment Relations Act 2000.

[37] For the reasons I have set out above, I am not satisfied that Mr McDonald's position was genuinely redundant.

Was the process followed was fair and reasonable

[38] Mr McDonald was not provided with any information about the proposed decision to make his position redundant and did not have an opportunity to comment on it. He was simply told that his position was redundant and given at most a weeks notice.

[39] Mr McDonald would have retained his position if seniority had been followed in accordance with the list. The seniority list was departed from on the basis that employees were retained with skills and experience Slinkskins needed but there was no proper analysis undertaken with Mr McDonald about his skills, knowledge and experience and the work he had previously undertaken continued to need be performed.

[40] There was also no compliance with the provision in clause 21(5)(c) of the employment agreement that if employees were not able to find work, the employer would make endeavours to obtain work on their behalf. The only evidence about any steps the company took was to provide some WINZ application forms.

[41] I find, for all the reasons set out above, that the process followed by Slinkskins was not fair and reasonable.

Determination

[42] I find the decision to dismiss Mr McDonald was not what a fair and reasonable employer would have done in all the circumstances at the time of his dismissal. I find the dismissal was unjustified, both in terms of the genuineness of the redundancy and the procedure followed.

[43] Mr McDonald has a personal grievance and is entitled to remedies.

Lost wages

[44] I accept Mr McDonald made attempts to mitigate his loss and was successful in obtaining other employment in Dunedin after six weeks of unemployment. I find however that the chain of causation that is required to be considered in a claim of this

nature as to what Slinkskins may be liable for was broken after Mr McDonald left that role and then took on a fixed term role. Whilst I understand completely why he did that I do not find that it is the responsibility of Slinkskins to compensate him for lost wages after April 2011.

[45] Mr McDonald gave evidence that his net average weekly earnings from Slinkskins were \$600. No issue was taken with that averaging by Slinkskins which I shall apply over a six week period.

[46] I order Slinkskins Tannery Limited to pay to Christopher McDonald the sum of \$3,600 net under s.123(1)(b) of the Employment Relations Act 2000 being lost wages.

Compensation

[47] Mr McDonald spoke of his devastation when he found out the seniority list had not been complied with and when there was no adequate explanation about why that was so. Support for that is found in the way Mr McDonald engaged at the meeting on 20 October. I accept that there was on his part genuinely felt humiliation because of the way the company had acted. A further issue for Mr McDonald that caused hurt was when he heard a manger was undertaking his previous role. Although Mr McDonald was able to obtain employment quite quickly elsewhere it involved a commute and time away from family as he lived in Dunedin for a week at a time.

[48] I am of the view that, taking into account the evidence, an award of \$8,000 for compensation would be appropriate.

[49] I order Slinkskins Tannery Limited to pay to Christopher McDonald the sum of \$8,000 without deduction being compensation under s.123(1)(c)(i) of the Employment Relations Act 2000.

Reinstatement

[50] The claim for this remedy was in effect reinstated on the day of the investigation meeting, some considerable time after it was known Mr McDonald no longer wanted reinstatement. Mr Rhodes did not oppose that late notice as such however my questioning of Mr Hazlett identified some issues, not if Mr McDonald

was to apply and be appointed in the normal way as he would be happy for that to occur, but if he was to return by way of reinstatement order particularly with seniority.

[51] I have carefully reflected on the question of reinstatement and its practicability. The late claim for this in my view goes to the practicability of reinstatement in terms of issues like seniority and the desirability to end the issues between the parties. The current seniority list that I saw is different from the earlier 2009 list. In conclusion I am not satisfied that a reinstatement is practicable and I am not going to order Mr McDonald's reinstatement.

[52] There are no issues in this case with respect to contribution and no deduction is made in that regard.

General damages

[50] I make no separate award for damages in this case having found a personal grievance and awarded lost wages and compensation in relation to that.

Costs

[51] I reserve the issue of costs. I would encourage the parties to attempt to reach agreement about costs, failing which, Mr Churchman is to lodge and serve submissions as to costs by Monday 13 June 2011 and Mr Rhodes has until Monday 4 July 2011 to make submissions in reply.

Helen Doyle
Member of the Employment Relations Authority