

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 133
5390704

BETWEEN

SHARON MOORE
Applicant

A N D

CARTER HOLT HARVEY
LIMITED
Respondent

Member of Authority: K J Anderson

Representatives: P Cranney, Counsel for Applicant
D France, Counsel for Respondent

Investigation Meeting: 27 November 2012 at Rotorua

Date of Determination: 19 April 2013

DETERMINATION OF THE AUTHORITY

Introduction

[1] The applicant, Ms Sharon Moore, claims that her dismissal on the grounds of redundancy, effective from 28 July 2011, was unjustifiable. Ms Moore asks the Authority to find that she has a personal grievance and award her various remedies. Conversely, the respondent, Carter Holt Harvey Limited (CHH), rebuts the claims of Ms Moore and says that the termination of her employment was justifiable on the grounds of genuine redundancy; and a fair and reasonable process was adopted by the company in reaching its decision to disestablish the position held by Ms Moore.

Background

[2] Ms Moore was employed in the CHH Wood Products Kawerau Mill Re-manufacturing Division. She commenced her employment on 8 February 2000 and over the course of her employment Ms Moore had held the positions of Dry Mill entry

level operator, Dry Mill production operator and Dry Mill senior operator. At the time of her dismissal, Ms Moore was employed in the role of Remanufacturing operator. Her core duties were to wrap timber, albeit it seems that she was capable of carrying out a variety of roles. Ms Moore was also a site delegate for the National Distribution Union (NDU).

Restructuring

[3] For some time, the timber industry has been faced with economic difficulties. The evidence of Mr Paul Trow, the site manager of the Kawerau sawmill, is that in 2010 there were two restructurings at the mill: one in June, the other in December. The December restructuring led to the disestablishment of 26 full time equivalent positions and 15 employees were redeployed from the Dry Mill to the Remanufacturing Division (Reman) where there were vacancies due to voluntary redundancies being taken up. Ms Moore, along with other Dry Mill workers, was redeployed to the Reman area but was required to undergo training in order to obtain the skills necessary to adequately perform her duties in this area.

[4] The further evidence of Mr Trow is that between December 2010 and June 2011, he kept the site unions and staff regularly updated at team meetings and monthly union delegate meetings; as to the state of the market and the impact on the business. Mr Trow says that by June 2011, market conditions were still negatively impacting on the three CHH New Zealand sawmill businesses. The company had too much sawmilling capacity for the market and economic conditions and market forecasting pointed toward the slump continuing into 2012.

Review of Remanufacturing capacity

[5] Via an email dated 13 June 2011, Mr Trow informed Mr Tim Slade, the General Manager, Group Operations for CHH, that the Reman operation had surplus production capacity. Mr Trow proposed two options to address the surplus capacity. The first option was to reduce the staffing by six people. The second option was to attempt to obtain greater flexibility between tasks and departments and if this could be achieved, the six surplus staff in Reman could be utilised in the Green Mill and Dry Mill to cover leave and absenteeism. The company had been using Trade Staff labour hire to provide such cover.

[6] It subsequently transpired that the NDU was not prepared to agree to the flexibility required pertaining to the second option proposed by Mr Trow. Nonetheless, Mr Trow persisted and conveyed to Mr Rawiri Daniels, organiser-NDU, via an email on 24 May 2011, that if the flexibility being sought was not an option then it would be necessary to discuss the options of forced annual leave and/or redundancy. The evidence of Mr Trow is that, given the company could not achieve the flexibility it required to retain the employment of staff, he prepared a proposal to restructure the Reman division at the Kawerau site, which if implemented, would result in the disestablishment of six positions out of a total of twenty three.

Meeting with the unions

[7] On 20 June 2011, Mr Trow and the Human Resources Operations Manager, Ms Bronwen Davies, met with Mr Daniels (NDU) and an organiser from the New Zealand Amalgamated Engineering Printing and Manufacturing Union (EPMU) and site union delegates. The meeting was initially intended to be for the purpose of discussing five separate issues, including flexibility on the site. This then evolved into a meeting with the two full time union officers about the restructuring proposal and how that would proceed.

Meeting – 22 June 2011

[8] On 22 June 2011, CHH managers met with the union organisers and delegates, including Ms Moore; and all potentially affected employees. The restructuring proposal and consultation packs were presented.

[9] The evidence of Mr Trow is that the affected employees were invited to provide their views on the proposed changes via their representatives, or alternatively, a Consultation Feedback Form could be used.

[10] Following the meeting with the affected staff, management met with the union organisers and delegates to discuss the proposal document in more detail. One of the key points that was discussed was the selection criteria that would apply in regard to identifying the six employees who would be made redundant.

Selection criteria

[11] Following consultation/discussion with the unions, it was agreed that a FSA¹ skills assessment process would be used; with the addition of a personal attributes assessment. It was also agreed that a supervisor from the Dry Mill division, where some employees (including Ms Moore) had worked before being transferred to the Reman division, would be involved with the personal attributes assessment. This would be in addition to the assessment of the employee's current supervisor and manager. Subsequently, it was also agreed that an adaptability criteria would be added, to reflect the willingness and adaptability of employees to transfer between work centres and departments.

Voluntary redundancy

[12] The evidence is that during the restructuring discussions, the unions asked the company to call for volunteers to accept redundancy site-wide; and redundant employees should be chosen on a last on/first off basis. However, the response of CHH was that the company would not call for volunteers across the sawmill because the company needed to retain skills within the business. Mr Trow says that valuable skills had been built up and lost during the 2010 restructurings due to CHH choosing last on/first off and voluntary redundancies and the company could not afford for this to happen again. Additionally, the restructuring only affected the Reman division and selecting employees on a last on/first off basis would undermine the skill set in the Reman area.

Acceptance of the selection process

[13] The evidence of Mr Trow is that at the conclusion of the meeting with the unions on 23 June 2011, CHH had reached an agreement with the unions as to how the selection process would proceed. Mr Trow says that Mr Daniels made favourable comments as to the selection process being "fair and robust". But Mr Daniels denies that he made any such comments. Nonetheless it appears that the unions agreed in principle with the selection process to be adopted, as evidenced by a document dated 23 June 2011, that the Authority understands was prepared by the unions. Under the

¹ F – person needs full supervision;
S – person needs selected supervision;
A – person is able to perform the whole task train others etc.

heading: *PROPOSED KINLEITH HUB SELECTION CRITERIA* and *Suggestions, Comments and Feedback from Employees of the Reman Department* it is stated that:

We agree that the selection process is more favourable than the proposed FSA skills assessment process.

A request was made for an 'Employee Adaptability' criterion to be added and a supervisor or team leader from the Dry Mill area to be added to the selection panel. As mentioned earlier, this was agreed to by CHH.

[14] Nonetheless, the unions also asked:

Once the criteria has been filled out by Supervisors/Managers:

- Do we have a chance to query the results of this process?
- Do we get to ask questions about the results BEFORE you take them into consideration?

[15] The position of the unions as to the selection process is somewhat ambiguous. As evidenced by the document dated 23 June 2011, there appears to be acceptance of the selection process in principle, albeit possibly subject to receiving a satisfactory answer to the two questions set out above. However, in a letter dated 30 June 2011, from Mr Daniels to Mr Trow, the unions requested that CHH:

... withdraw from its redundancy process on the basis that no agreement or fair or genuine consultation has taken place.

[16] This request follows various comments in the letter about:

- (a) Not receiving any written feedback on the points raised in the document dated 23 June 2011;
- (b) A request for a full explanation regarding how the company decided that six employees are surplus to the Reman operation;
- (c) Querying why the company was not prepared to accept voluntary redundancies and a last-on/first-off criteria;
- (d) When and how redundant employees will be notified.

[17] Finally, the unions disputed that the company had acted:

... genuinely or in good faith with regards to this restructuring as the time line has been self imposed without allowing the workforce to

have full and frank discussions or consultation with their unions or directly with the company.

[18] On 30 June 2011, Mr Trow responded to Mr Daniels' letter of 23 June and conveyed that the company believed it had followed a fair process with the involvement of the unions and hence would be proceeding with the process to disestablish six positions.

The selection process

[19] The evidence is that on 27 June 2011, a panel began applying the FSA criteria and the personal attributes assessment to the Reman employees. The panel consisted of: Mr Richard Purcell (Reman supervisor), Mr Willie August (Dry Mill supervisor), and an EPMU delegate, Mr Brian Fortune, as an independent spokesperson with experience of the Reman division. The panel completed the scoring exercise by 29 June 2011.

[20] Also on this day, Mr Trow, Mr Daniels, Mr Stephen Hill (Dry Mill manager), and Ms Collette Firth (HR operations manager), attended sessions at which the selection criteria scores for each employee were reviewed.

[21] Mr Trow attests that Mr Daniels wanted the selection process discussion to include the union delegates (four or five people). But Mr Trow did not wish this to happen as one of the union delegates, Ms Moore, was a candidate for redundancy. The selection discussions took place in Mr Trow's office with the union delegates, including Ms Moore, in a room immediately next door to the office.²

[22] In his evidence, Mr Trow refers to the "moderation sessions" that took place on 29 June 2011. The Authority understands that the session involved the panel reviewing the results that had been arrived at by the process of applying the various selection criteria mentioned earlier in this determination; thereby identifying the six positions that were to be made redundant due to the respective individuals having the lowest accumulated scores. The evidence of Mr Trow is that Mr Daniels participated in the moderation process in that the scores of the affected staff, including Ms Moore, were discussed with him and reference has been made to the use of a white board with various names on it and discussion accordingly.

² There is some inconsistency in the evidence regarding how many people were present in this room, apart from Ms Moore.

Mr Trow attests that Mr Daniels acted as the “communication channel and spokesperson” for the affected employees. But Mr Daniels denies this. He says that the only person that he was able to communicate with was Ms Moore as a member of the NDU. It is the view of Mr Daniels that the CHH team had already decided who the people were who would be redundant and that the scores did not change.

[23] However, I conclude that while the scores of the respective employees had been clearly defined, there remained opportunity for input by Mr Daniels. Indeed, it appears that the involvement of Mr Daniels extended to him making submissions that another worker should be made redundant rather than Ms Moore. And while CHH was not prepared to remove Ms Moore’s name from the list of people who were potentially going to be made redundant due to the relevant order of the scores, it is clear that Mr Daniels had some influence in having one person being considered for redundancy being replaced by another person. Nonetheless, I accept that there is an issue for determination in regard to the overall authority of Mr Daniels to act on behalf of Ms Moore relating to whether or not she should have had the opportunity to be personally involved in making submissions about the selection process before a final decision was made. I will return to this matter in due course.

Notification to Ms Moore

[24] The involvement of Mr Daniels, acting for the NDU, is somewhat confusing. For example, given that Mr Daniels was participating (at least to some degree) in the selection process that took place on 29 June 2011, it is very puzzling that he should write as he did on 30 June 2011, disputing the process adopted by CHH and then concluding his letter thus:

We therefore request the company to withdraw from its redundancy process on the basis that no agreement or fair and genuine consultation has taken place.

[25] The evidence of Mr Trow that at the end of the session on 29 June 2011, Mr Daniels requested the opportunity to make final submissions and comments in writing. This was agreed to and it was Mr Trow’s expectation that Mr Daniels would provide something in writing by the end of the day. Mr Trow says he contacted Mr Daniels on the morning of 30 June 2011, as he had not received anything the previous day; and was informed that a letter would be forthcoming. In the meantime, employees were awaiting notification of redundancies and were becoming agitated,

according to Mr Trow. Mr Trow says that the company held off until 1:00p.m. but with nothing forthcoming from Mr Daniels, a meeting was held with staff, initially as a group, for the company to advise in general terms the position that had been reached. And then there were individual meetings with each employee in Reman to advise how the restructuring affected them. It appears that Mr Daniels' letter was not forthcoming until quite late in the day on 30 June and by then the outcome had been conveyed to employees.

[26] The evidence of Mr Trow is that an attempt was made to meet with the six employees selected for redundancy but only two of them were at work. Ms Moore came to work on 1 July 2011 and received a letter (dated 30 June 2011) confirming her redundancy. Ms Moore worked out the four week notice period and ceased her employment on 28 July 2011.

[27] Ms Moore challenges the termination of her employment on the grounds of redundancy and says that her dismissal was unjustifiable because:

- (a) CHH made its decision and implemented it without giving her access to relevant information and an opportunity to comment on it, as required by s.4(1A) of the Act;
- (b) The dismissal and the manner of it was not what a fair and reasonable employer would or could do in the circumstances; and
- (c) CHH failed to comply with its contractual obligations under clause 5 of the collective agreement.

Analysis and conclusions

[28] As with any dismissal, the test the Authority must apply is whether the decision to dismiss Ms Moore on the ground of redundancy was what a fair and reasonable employer could have done in the circumstances³.

(a) Did CHH breach the provisions of s.4(1A) of the Act?

[29] As I understand it, the argument from Ms Moore is that CHH failed to meet its obligations under s.4(1A)(c) of the Act. It provides that the duty of good faith:

³ Section 103A of the Act

- (c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected -
 - (i) access to information, relevant to the continuation of the employee's employment, about the decision; and
 - (ii) an opportunity to comment on the information to their employer before the decision is made.

[30] It is submitted for Ms Moore that she did not receive the information pertaining to her circumstances regarding the redundancy selection process that was applied by CHH. However, the evidence of Mr Trow and Mr Stephen Hill, the Dry Mill manager and manager of the Remanufacturing and Round Wood divisions, is that Mr Daniels was at all times (on 29 June 2011) acting on behalf of Ms Moore. It is the evidence for CHH (which I accept), that Mr Daniels had access to all relevant ranking information as it applied to Ms Moore and the other employees in Reman.

[31] Mr Trow says that Mr Daniels was provided with Ms Moore's personal attributes and the FSA assessment results and he took them to Ms Moore who was located in the room next door to Mr Trow's office. It is the evidence of Mr Trow (and Mr Hill) that Mr Daniels complained on behalf of Ms Moore that her Dry Mill skills/experience was not considered as part of the FSA matrix. Mr Trow says that "the message" they were getting back from Mr Daniels was that Ms Moore did not believe that her scores were fair and that Mr Purcell (her supervisor in Reman) was biased against her. However, the CHH team reiterated to Ms Moore (via Mr Daniels) that Mr August, Mr Hill and Mr Fortune (EPMU) were also present when the scoring of Ms Moore took place.

[32] It is the view of Mr Daniels that Ms Moore should have been permitted to have had direct access to all the scoring information, including the scoring of other employees, albeit he had access to such material and was able to convey the relevant comparisons to Ms Moore. Essentially, an argument is being advanced that Mr Daniels did not have authority to act on behalf of Ms Moore and relay her views to CHH management. But I do not accept that this is so. It is established to my satisfaction that Mr Daniels was acting as Ms Moore's authorised representative and CHH was entitled to rely on that representation in regard to providing relevant information to Ms Moore; to which she responded via Mr Daniels. It is simply not plausible for Mr Daniels to now claim (after the event) that he did not have the

essential authority to act on behalf of Ms Moore in regard to ensuring that she was made aware of the information that was being relied upon by CHH, pertaining to selecting her to be one of the people who was made redundant. And while it has to be accepted that it is always difficult for union officers to be closely involved in circumstances where a union member (or members) are facing redundancy, I have no doubt that Ms Moore had confidence in Mr Daniels to act appropriately on her behalf and the overall evidence is that he did so; including ensuring that she had access to all available information relevant to the requirements of s.4(1A)(c) of the Act. And, I am satisfied that Ms Moore had a fair and reasonable opportunity (via Mr Daniels) to comment on the relevant available information before a decision was made to confirm the redundancy of her position.

[33] In regard to the use of the word relevant used in s.4(1A)(c)(i): “*access to information, **relevant** to the continuation of the employee’s employment, about the decision*” the Employment Court in *Vice-Chancellor of Massey University v Wrigley*⁴ had this to say:

On this issue, we conclude that there is no reason to restrict the normal meaning of the word relevant in s 4(1A)(c). What is within the scope of s 4(1A)(c) in any given case will, however, depend on the particular circumstances of the case. The starting point must be the nature of the decision which the employer proposes to make. For example, if the employer has restructured its business and is deciding whether an employee whose position is disestablished is suitable for an alternative position, what will be relevant is information relating to that persons attributes and to the new position. On the other hand, if the employer is downsizing and selecting employees for dismissal on grounds of redundancy, the process is likely to be a comparative one and information about the other candidates will also be relevant. In both cases the perceptions and opinions of those involved in the process leading to a decision will be relevant.

[34] In the case of Ms Moore the process was a “comparative one” and via Mr Daniels, as her authorised representative, she had access to the information (including information about the other candidates) relevant to the continuation of her employment. In summary, I find that CHH met its obligations under s.4(1A)(c) of the Act.

⁴ [2011] NZEmpC 37 at para [62]

(b) **Was there a breach of any of the provisions of Part 5 of the collective employment agreement?**

[35] The CEA at Part 5, sets out comprehensive provisions in the event of redundancy circumstances arising. The statement of problem filed for Ms Moore claims that CHH did not comply with its contractual obligations but there has been very little put before the Authority as to why this is so.

[36] The evidence of Ms Moore is that she believes that CHH did not comply with clause 5.3 of the CEA. This clause provides that at the time of any redundancy, CHH will establish a job search programme and appoint a job search coordinator, who shall assist individual employees to find alternative employment; either within CHH or with other employers in the immediate locality. Given the general economic circumstances of the industry, it seems there was little or no likelihood of alternative employment within CHH. And in regard to other possible employers, it appears that Trade Staff was the only option in regard to alternative employment. Ms Moore told the Authority that she did not make contact with Trade Staff as the pay rates were too low.

[37] The evidence of Mr Trow is that a job search programme was established and a job search coordinator was appointed (Collette Firth). An email dated 25 July 2011 to Ms Firth records that a person from a recruitment company met with Ms Moore on this day and intended to meet with other redundant employees the next day.

[38] Ms Moore also had access to the CHH confidential employee assistance programme (EAP) and as evidenced from an email dated 21 July 2011 from Mr Purcell, Ms Moore attended counselling “on a regular basis”, that is, at least twice a week while she was working out the notice period.

[39] There has also been some suggestion that other employees should have been given the opportunity to make a request to take the place of Ms Moore as a redundant employee under clause 5.5 of the CEA. But it appears to have been the position of CHH that the company wished to retain a productive skill base and it would not have been practicable for another employee to have taken the place of Ms Moore, albeit it has to be said that very little evidence was placed before the Authority one way or the other.

[40] In summary, I conclude that there is no material evidence to suggest that CHH failed to meet its obligations to Ms Moore under the CEA.

(c) **Was the process adopted by CHH too hasty resulting in some unfairness to Ms Moore?**

[41] The submissions for Ms Moore refer the Authority to the timetable that was adopted by CHH in regard to the redundancy of the six positions in the Reman division whereby a meeting took place with potentially affected employees on 22 June 2011 and the redundant employees were subsequently informed of the loss of their position on 30 June 2011.

[42] While it has to be accepted that the process was very rapid, which in turn can possibly raise doubt about whether the process was as thorough as it could be, there has been no substantive evidence placed before the Authority to suggest that the pace of the process resulted in any unfairness towards Ms Moore.

Determination

[43] As with any loss of employment because of redundancy, it is understandable that an affected employee, such as Ms Moore, would question why it was her who was selected to lose her job rather than someone else. The evidence is that Ms Moore was a versatile and adaptable person, as evidenced by her ability to fulfil various roles over the years. But equally, it is also evident that other employees had a mix of skills and attributes that CHH wished to retain. The selection criteria that applied placed Ms Moore in a group of six employees who scored somewhat less than the employees who were retained.

[44] On consideration of the overall evidence, I conclude that CHH adopted fair and reasonable selection criteria, with substantial input from the two unions involved, and the criteria was applied fairly to Ms Moore during the selection process.

[45] I also find that the process applied by CHH was carried out in good faith, consistent with the requirements of s.4(1A)(c) of the Act and that the termination of Ms Moore's employment on the ground of redundancy was something that a fair and reasonable employer could do in all of the circumstances.

[46] It follows that I find that the dismissal of Ms Moore was justifiable and her claims are not successful.

Costs

[47] Costs are reserved. The parties are invited to resolve this issue if they can but in the event that a resolution cannot be reached, the respondent has 28 days from the date of this determination to file and serve submissions. The applicant has a further 14 days to respond.

K J Anderson
Member of the Employment Relations Authority