

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2011] NZERA Auckland 471  
5342736**

BETWEEN

MATTHEW PETTIGREW  
Applicant

AND

STAINLESS DOWN UNDER  
N.Z. LIMITED  
Respondent

Member of Authority: Eleanor Robinson

Representatives: Warwick Reid, Counsel/Advocate for Applicant  
Andrew Lilly for Respondent

Investigation Meeting: 13 September 2011 at Tauranga

Submissions received: 20 September 2011 from Applicant and from Respondent

Determination: 1 November 2011

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Applicant, Mr Matthew Pettigrew, claims that he was unjustifiably dismissed from his employment. Specifically Mr Pettigrew claims that his selection for redundancy by the Respondent, Stainless Down Under N.Z. Limited, (“SDU”) was unreasonable and that his position was not surplus to requirements.

[2] SDU deny that Mr Pettigrew’s position was not genuinely surplus to requirements and claim that Mr Pettigrew was justifiably dismissed on the basis of a genuine redundancy.

**Issues**

[3] The following issues require determination:

- a. Whether the position of Mr Pettigrew was genuinely redundant
- b. Whether the selection criteria used by SDU were fair and reasonable

- c. Whether SDU followed a fair procedure in making Mr Pettigrew redundant

### **Background Facts**

[4] SDU, a company started in April 2001 by Mr Andrew Lilly and his wife, is in the business of manufacturing marine hardware for the super yacht market. Initially the products manufactured were high end marine fittings and hardware, predominantly for the export market, mainly comprising hatches, doors, bollards, cleats and portholes. During 2010 SDU began aluminium production for some products.

[5] Mr Pettigrew commenced employment with SDU on 13 September 2004 in the position of Assembler/Trainee Polisher. Mr Pettigrew received training in this position from Mr Lilly, and other members of staff.

[6] Mr Pettigrew's position at commencement was predominantly polishing with some assembly work. Following the resignation of the then Foreman prior to the move of SDU to new factory premises in 2007, Mr Pettigrew was offered, and accepted, the position of Foreman.

[7] Mr Lilly said that Mr Pettigrew was a natural choice for the position as he was well respected by the team, and that he and Mr Pettigrew had a good working relationship. Mr Pettigrew received a salary increase of \$2.00 per hour upon commencing the Foreman role.

[8] Mr Lilly stated that Mr Pettigrew received a job description for the Foreman role, and that he had gone through and discussed this with Mr Pettigrew; however Mr Pettigrew denied that he had received a job description.

[9] Mr Lilly explained that Mr Pettigrew's role as Foreman involved him supervising staff, organising upcoming workloads for the staff, advising on health and safety issues, opening the factory at the beginning of the day, and locking it up at the close of the day. Additionally Mr Pettigrew problem-solved various production problems as they arose with staff, ordered supplies from the office and kept track of the jobs in production and the hours spent on them. Mr Lilly said that the role grew over the two years following Mr Pettigrew's appointment and that specific training was given to Mr Pettigrew in the area of Lean Manufacturing principles.

[10] Mr Pettigrew said that he ensured quality of product by doing a cursory visual check though each stage of production by walking through the factory three times each day, usually

on his walks to and from the smoko room located under the offices. Mr Pettigrew explained that if any members of staff were experiencing minor problems, they would make these known to him during the rest and lunch breaks. Mr Pettigrew said he did not need to tell staff what to do as each week each department received a computer generated report detailing jobs expected, parts that had to be produced in sequence, and materials that needed to be ordered.

[11] Mr Pettigrew described his role as very limited; however Mr Lilly said that he believed the role involved a significant part of Mr Pettigrew's time, and that another employee had been appointed to full-time polishing work to replace Mr Pettigrew in that position on his appointment as Foreman.

[12] In 2007 SDU had moved to a new factory. This had been built on land purchased by Mr and Mrs Lilly personally, and which had been leased to SDU. During 2009 Mr Lilly said that contracts on which SDU had received deposits did not proceed and were suspended. As there were potential contracts in the future and SDU did not want to lose employees, hours were reduced to 4 days a week and staff were utilised on internal projects.

[13] When this work ran out and other measures to address the work and cashflow problems had been exhausted, SDU sought restructuring advice from the Employers and Manufacturing Association ("EMA"). At this time, four employee positions were made redundant.

[14] In January 2010 SDU received a deposit on a new product. Due to the prospect of this increased work, one employee was reinstated in March 2010 and another in July 2010.

[15] In approximately May 2010 Mr Pettigrew said that SDU started aluminium production for doors. This process utilised the use of chemicals which SDU had not previously used, and Mr Pettigrew said that, as Foreman, he had received complaints from employees about the chemicals and the lack of the appropriate safety gear which the employees had expected him to address with Mr Lilly.

[16] Mr Pettigrew said that he had raised the issue with Mr Lilly but had not had a positive response. However upon subsequently raising the issue with Mr Philip Langley, a contractor Design Engineer with SDU, during Mr Lilly's absence in the USA, alternative safety equipment had been ordered. Upon Mr Lilly's return from the USA, Mr Pettigrew said that the chemical had ceased being used and an alternative method for preparing the aluminium for painting had been found.

[17] Mr Pettigrew said that, following Mr Lilly's return from the USA, there arose a new area of complaint relating to the painting of the aluminium doors. Mr Pettigrew explained

that this involved the spray painting of doors inside a booth within the assembly area of the factory. The booth had an extractor fan for dispelling fumes and had the product been left to dry within the booth, no issue would have arisen.

[18] However the product had been being taken from the booth before it had dried, in order to move a greater quantity of product through the spray booth. This had resulted in the painted doors giving off odorous fumes during the drying process. Mr Pettigrew said that the employees on the factory floor had complained to him of headaches, breathing problems and nausea, and had expected him as Foreman to raise this issue with Mr Lilly.

[19] Mr Pettigrew said that he had found Mr Lilly to be unreceptive. Mr Pettigrew said that Mr Lilly had advised moving the assembly of the products to the polishing area; however Mr Pettigrew said he did not consider this to be a realistic solution as the assembly of glass products could not be done around sanding due to the risk of scratching the products. Mr Pettigrew said that after these issues he began to feel unhappy in his role as Foreman.

[20] Mr Lilly stated that he had addressed the paint issue immediately.

[21] Mr Lilly explained that during 2010 the work available to SDU changed from smaller projects with a value of approximately \$200,000.00, to larger projects with values in excess of \$1,000,000.00. Mr Lilly said that Mr Pettigrew appeared to be stressed and unable to adequately cope with this change, and the decision was taken to appoint Mr Dave McDermott.

[22] Mr McDermott was employed in the role of Mechanical Engineer/Project Manager on 2 August 2010. Mr Lilly said that Mr McDermott was experienced in the area of Lean Manufacturing principles and was able to bridge the gap between himself, the Design Engineers and the factory staff. Mr Lilly said that Mr McDermott's appointment was intended to lessen the stress on Mr Pettigrew.

[23] Mr Pettigrew said that Mr McDermott's appointment had been an additional factor which had persuaded him to resign as Foreman. Mr Pettigrew stated that Mr McDermott constantly interfered with the production process for which he was responsible. Mr Pettigrew explained that Mr McDermott would take an employee away from a task which Mr Pettigrew needed him to do in order to have a particular product ready, and that he would do this without consulting Mr Pettigrew.

[24] Mr Pettigrew said that he began receiving complaints from employees who said that they did not know what they were meant to be doing, and he had complained about Mr McDermott to Mr Lilly, telling Mr Lilly to "*sort it out – Dave needs a punch in the head*".

[25] Mr Lilly said that he had considered this comment, and an incident with another employee the previous month which had involved an altercation, to have been unacceptable, and Mr Pettigrew had been issued with a formal warning.

[26] Mr Pettigrew had at this time, August 2010, resigned from his position as Foreman. His resignation had been accepted and he had been reassigned to his previous position as Polisher/Assembler, however there had been no decrease to his salary in relation to his resignation from the position of Foreman.

[27] Following his resumption of the role of Polisher/Assembler Mr Pettigrew said that he personally had been very busy, working full-time, and that his perception was that it was busy in the polishing and assembly department, with a number of orders in progress. Mr Pettigrew understood that there were more orders coming in and that he had subsequently discovered that Mr Lilly had plans to expand the factory.

[28] During this period the work Mr Pettigrew was carrying out included the polishing and assembling of locks on a sub-contract basis for a company called Kiwi Closures.

[29] Kiwi Closures is the aluminium partner of SDU and a joint venture between Mr and Mrs Lilly and two others. The product range includes doors, sliders and windows for the super yacht industry. The work for this business was also carried out on the factory premises occupied by SDU. Mr Lilly explained that Kiwi Closures sub-contracted work out to SDU, and that Mr Pettigrew was paid by SDU for doing this work.

[30] Mr Lilly explained that the financial situation of SDU had deteriorated during September 2010 due to several factors:

- Work that had been halted was unable to progress due to information from the clients and certifying bodies not being received;
- A client who had ordered three boatloads of hatches had suspended work that was due to be paid for and shipped. SDU had been advised that the client could not pay for one boatload, and were unsure when they would be in a position to pay for the second boatload, although work continued on this project in order to keep staff employed;
- A large overseas contract had been revoked when the client went into receivership, thus that SDU not only lost the work but the deposit which had

been paid to SDU could be recalled by the receivers, this being deposit having been used to pay wages over the preceding months; and

- b. SDU had potentially lost the right to sales commission for glass sales which affected the ability to maintain capacity with staff. SDU had been relying on the commission due in order to pay and employ its employees.

[31] The workload was discussed at a staff meeting held on 10 September 2010. On Friday 1 October 2010 Mr Lilly met with Mr Pettigrew and informed him about the financial situation of the company. Mr Lilly explained what steps had been taken to manage the situation, and the meeting concluded with Mr Pettigrew being informed that he was entitled to representation throughout the process and that there would be a further meeting at which his feedback would be considered.

[32] At the second meeting on 4 October 2010 Mr Lilly updated Mr Pettigrew on the operational position of SDU. Mr Pettigrew asked if he was to be made redundant and Mr Lilly informed him that this was just one of the options, but that at this stage, redundancy had not been considered. It was agreed that another meeting would take place on 5 October 2010.

[33] The third meeting actually took place on 7 October 2010. Mr Pettigrew's feedback suggestion of reducing staff hours was discussed, and the option of redundancy.

[34] Mr Pettigrew had suggested that Mr McDermott and Dylan should be the employees selected for redundancy; however Mr Lilly had rejected this suggestion on the basis that Mr McDermott had been appointed to assist Mr Lilly and the Foreman, and for SDU to utilise his mechanical engineering expertise, Lean Manufacturing principles training and organisational skills and extra drafting. Mr Lilly explained that Dylan was a casual employee and was fully occupied in painting.

[35] Mr Lilly said that the areas which had surplus labour to requirements were polishing and apprentices. There were two employees engaged in polishing and it was Mr Pettigrew who was selected for redundancy. Influential factors additional to the identification of the polishing areas as one in which there was surplus labour Mr Lilly stated to have included:

- a. Mr Pettigrew's higher pay rate for performing an identical role;
- b. The fact that although the employee with the longest service, his length of service in the polishing role had been reduced due to his redeployment to the

Foreman's role, with the effect that the other polisher actually had the longer service in the role;

- c. A reduction in Mr Pettigrew's reliability due to unauthorised absenteeism; and
- d. Mr Pettigrew's lack of team attitude as evinced by his being the sole member of staff not in the SDU social club and his excluding himself from attending award ceremonies, in addition to the manifestation of aggressive and uncommunicative attitude towards other employees.

[36] Mr Lilly had stated that Mr Pettigrew's complaints regarding the use of chemicals and the spray painting had not influenced the decision to select Mr Pettigrew for redundancy.

[37] Mr Lilly explained that Mr Pettigrew could not be employed as a painter in that he lacked the requisite skills at the required level of paintwork required when working to a super yacht finish.

[38] On 8 October 2010 Mr Pettigrew was informed that his employment was being terminated on the basis of redundancy. In the letter confirming the redundancy, Mr Pettigrew was offered counselling session support and the opportunity to discuss any aspects of his redundancy with Mr Lilly.

## **Determination**

### **Was the position of Mr Pettigrew genuinely redundant?**

[39] The Court of Appeal in *GN Hale & Son Ltd v Wellington Caretakers IUOW*<sup>1</sup> clarified that:

*An employer is entitled to make his business more efficient, as for example by automation, abandonment of unprofitable activities, re-organisation or other cost-saving steps, no matter whether or not the business would otherwise go to the wall. A worker does not have a right to continued employment if the business can be run more efficiently without him.*

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<sup>1</sup> [1991] 1 NZLR 151

[40] The onus of proving that there were genuine commercial grounds for redundancy rests upon the employer. Mr Pettigrew has in his evidence referred to the fact that he had been fully employed and that his perception was that other SDU employees were similarly fully occupied.

[41] I note that Mr Pettigrew was not the only employee whose employment was terminated by reason of redundancy at this time, there was one other employee.

[42] It is clear that the business of SDU had fluctuated since the company had been formed in 2001. In 2009 due to contracts not proceeding as planned, hours had been reduced in anticipation of future contracts and in order to avoid staff reductions. In 2010 four employees had been made redundant.

[43] Business having improved thereafter due to a deposit on a new product being received, two of the terminated employees had been re-engaged.

[44] Mr Pettigrew pointed to a list depicting the major jobs worked on during June 2010 to January 2011 as substantiating his contention that there was sufficient work for all the employees.

[45] However I accept on the evidence as presented that at the time Mr Pettigrew was made redundant, SDU was unable to proceed on most of this work due to factors outside their control such as not having the necessary customer approval to proceed.

[46] I have also considered the situation regarding Kiwi Closures. Although there is evidence that SDU employees carried out work on a sub-contract basis for Kiwi Closures, these employees remained employed by SDU. Mr and Mrs Lilly are two of the shareholders of Kiwi Closures, there are two other shareholders who have no connection with SDU. I do not find that in the situation in which Kiwi Closures is an independent legal company, that it has any liability in regard to alleviating the redundancy situation affecting SDU.

[47] I determine that there was a genuine redundancy situation which resulted in Mr Pettigrew's position being made redundant.

**Were the selection criteria used by SDU fair and reasonable?**

[48] Application of selection criteria falls within an employer's exclusive management prerogative. However it is appropriate that the Authority should investigate whether SDU

applied the selection criteria in a fair and reasonable manner, whether it acted in good faith during the selection process, and whether it acted without regard to irrelevant criteria.

[49] It was for SDU to reach the conclusion that the polishing area was one of those most affected by the downturn in business. There were two employees in the position, both had equal skills. In selecting Mr Pettigrew rather than the other employee in the role for redundancy, SDU had applied various selection criteria.

*Higher hourly rate*

[50] Mr Pettigrew had been employed at a higher hourly rate than the other polisher as a result of the increase related to his previous position when he had been appointed as Foreman. After resigning from this position, Mr Pettigrew's hourly rate had not been reduced back to the previous level. The matter of a reduction had not been discussed with Mr Pettigrew at the time of his resignation of the Foreman's role or thereafter.

[51] I find the onus for such a reduction did not rest on Mr Pettigrew. Mr Pettigrew was not requested to reduce his salary level; his evidence was that if he had been asked to do so, he would have accepted a decrease. I do not find the application of this factor in the selection criteria to have been fair and reasonable.

*Service reduced by time in the Foreman role*

[52] Mr Pettigrew gave evidence that his role as Foreman occupied very little of his working day. Mr Lilly explained Mr Pettigrew's duties as Foreman in some detail and as being a significant part of his working day, certainly to have been sufficient to have necessitated the appointment of another full-time polisher.

[53] I find Mr Lilly's explanation to be the more credible. However I do not consider that it was fair and reasonable to view Mr Pettigrew's time in this role as acting to reduce his length of service in circumstances in which I accept that Mr Pettigrew still performed part of the polisher role throughout his working day and in which it is stated by Mr Lilly that both Mr Pettigrew and the other polisher had equal skills.

*Lack of reliability*

[54] Mr Lilly said that Mr Pettigrew had been reliable in the past, but that there had been a change in his character which had adversely affected his reliability. Specifically, Mr Lilly stated that Mr Pettigrew had left work on occasion without authorisation and had failed to inform SDU in a timely manner when absent through sickness, despite having been spoken to on this subject.

[55] There was no evidence produced in support of these allegations. There was no evidence of a formal or indeed of an informal process whereby Mr Pettigrew had been informed of SDU's expectations in this respect. There was no evidence to establish upon which dates Mr Pettigrew had been absent or had left early without authorisation. I do not find that it was fair and reasonable to take these unsubstantiated allegations into consideration in selecting Mr Pettigrew for redundancy.

#### *Team Attitude*

[56] It was not a condition of employment that Mr Pettigrew join the SDU social club or attend award ceremonies, although it might be desirable that employees do both and indeed it might enhance their level of employment satisfaction. Joining a social club or attending award ceremonies I do not find to be relevant considerations in the selection process

[57] Similarly being uncommunicative is not a relevant consideration, although it might have been relevant had Mr Pettigrew been in a supervisory capacity at the time of the redundancy selection process.

[58] There is evidence that Mr Pettigrew did not find it easy to work with Mr McDermott and that the appointment of Mr McDermott had been a factor in his resignation from the role of Foreman. Mr Pettigrew had forcibly expressed his feelings to Mr Lilly and had expressed the view to Mr Lilly that he should resolve the situation by means of a physical blow to Mr McDermott.

[59] Mr Pettigrew explained the comment at the Investigation Meeting as being the result of frustration and not meant to be taken literally. Mr Lilly had regarded the comment as inappropriate and had issued Mr Pettigrew with a formal warning. I consider it was open to Mr Lilly to have taken this matter into consideration, but not that of the alleged issue involving another employee, the details of which were disputed.

[60] I determine that SDU did not apply the selection criteria in a fair and reasonable manner.

#### **Did SDU follow a fair procedure in making Mr Pettigrew redundant?**

[61] Section 103A of the Employment Relations Act 2000 ("the Act") sets out the test of justification:

*For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.*

[62] Other provisions of the Act govern questions of justification for dismissal and, in particular, by reason of redundancy. Section 4 of the Act addresses the requirement for parties to the employment relationship to deal with each other in good faith. Section 4(1A)(c) in particular is relevant to a redundancy situation and 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 an employee to provide to the employee affected:

*“(i) access to information, relevant to the continuation of the employees’ employment, about the decision; and*

*(ii) an opportunity to comment on the information to their employer before a decision is made.” s4 (1A)(i) and (ii).*

[63] In a redundancy situation a fair and reasonable employer must, if challenged, be able to establish that he or she has complied with the statutory obligations of good faith dealing in s4 of the Act. His Honour Chief Judge Colgan in *Simpsons Farms Limited v Aberhart*<sup>2</sup> noted that this compliance with good faith dealing includes consultation “*as the fair and reasonable employer will comply with the law*”<sup>3</sup>

[64] I find that SDU advised Mr Pettigrew of his right to representation throughout the redundancy process and met with him on three occasions for consultation purposes, providing time for Mr Pettigrew to present feedback. Mr Pettigrew’s feedback suggestion of reducing staff hours had been considered and was discussed with Mr Pettigrew on the occasion of the third meeting.

[65] I find the reasons for the redundancy situation were discussed with Mr Pettigrew and there was ample opportunity for him to ask questions and seek further information. Following the decision Mr Pettigrew had been offered counselling and provided with a further opportunity to discuss his redundancy with Mr Lilly.

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<sup>2</sup> [2006] ERNZ 825,842

<sup>3</sup> Ibid at para [40]

[66] However the minutes of the meetings do not provide evidence that the selection criteria were discussed with Mr Pettigrew, or that he was provided with an opportunity to comment on them. Mr Pettigrew ought to have been given an opportunity to comment on the selection criteria pursuant to s4 (1A)(ii).

[67] I determine that this omission was sufficient to render the procedure followed in selecting Mr Pettigrew for redundancy unfair.

[68] I determine that Mr Pettigrew was unjustifiably dismissed by SDU.

### **Remedies**

[69] Mr Pettigrew has been unjustifiably dismissed and is entitled to remedies.

#### *Reimbursement of Lost Wages*

[70] I have found Mr Pettigrew's employment to have been unjustifiably terminated by SDU with effect from 8 October 2010. Mr Pettigrew said that he tried to mitigate the effects of the loss of his employment by looking for alternative employment via local newspapers and contacts with friends, but no evidence to substantiate this was produced.

[71] I am not convinced that Mr Pettigrew made a vigorous effort to mitigate his loss during the period of his unemployment by finding suitable alternative employment. However I note that Mr Pettigrew has had some casual labouring jobs mainly provided by friends.

[72] I award Mr Pettigrew 3 months lost wages pursuant to s 128(2) of the Act. I note that Mr Pettigrew was paid 1 weeks notice in lieu and take this into consideration.

[73] I order SDU to pay Mr Pettigrew the balance of 3 months lost wages, less the amount earned by way of casual employment during the period, and the deduction of the 1 week's notice which has been already paid. I would anticipate that the parties can resolve the amount. If not, leave is reserved to return to the Authority

[74] Mr Pettigrew is also seeking reimbursement for loss of future earnings. I have had consideration to the factors which the Court of Appeal identified in *Telecom New Zealand Ltd v Nutter*<sup>4</sup>, these being the contingencies of life, the possibility of alternative employment, the unemployment benefit and the need for moderation.

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<sup>4</sup> [2004] 1 ERNZ 315

[75] Mr Lilly submitted that despite the significant contract which had fallen into abeyance prior to October 2010 being reactivated in November 2010, this had not provided work for the SDU employees. Two employees had left in early 2011 and had not been replaced, which had alleviated the situation of having employees without any work pending approvals to proceed with manufacture.

[76] I consider that due to the demonstrated vicissitudes of life for SDU, Mr Pettigrew may have been facing a redundancy situation within a short period of time. Taking this into consideration as a contingency of life, together with the lack of evidence concerning Mr Pettigrew's efforts in respect of mitigation of loss, I am not minded to order an amount in recognition of future loss of earnings.

*Compensation for Hurt and Humiliation under s 123 (1) (c) (i).*

[77] Mr Pettigrew is also entitled to compensation for humiliation and distress. I find that in respect of his unjustifiable dismissal, Mr Pettigrew has experienced humiliation, loss of dignity and injury to feelings.

[78] In respect of the dismissal grievances, SDU is to pay Mr Pettigrew the sum of \$4,000.00, pursuant to s 123(1) (c) (i).

[79] I have considered the matter of contribution as I am required to do under s124. Mr Pettigrew did not contribute to the situation which gave rise the personal grievance. There is to be no reduction in remedies.

**Costs**

[80] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

