

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 406/10
5294116

BETWEEN MARTIN PIPER
 Applicant

AND NORSKE SKOG TASMAN
 LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Simon Mitchell for Applicant
 Kylie Dunn for Respondent

Investigation Meeting: 25 May and 21 June 2010

Submissions Received: 23 June 2010

Determination: 10 September 2010

DETERMINATION OF THE AUTHORITY

[1] Mr Martin Piper was employed by Norske Skog Tasman Limited (“Norske Skog”) as a Water and Waste Co-ordinator, a position he had held for nine years.

[2] In August 2009, and as part of a broader restructuring program, Norske Skog commenced a consultation process regarding a proposal to restructure the Waste and Water Co-ordinator and Process Technician roles.

[3] Initially the company intended to reduce the number of employees engaged as Water and Waste Co-ordinators from four to three, and the number of employees engaged as Process Technicians from four to three. However, during the consultation process concerns were raised about the ability of three employees in each group being able to provide the necessary coverage. It was agreed that the two groups would be amalgamated into one group.

[4] As a result of the amalgamation six new positions called Operations Support Technicians were established.

[5] On 21 October 2009 Mr Piper, along with the other seven directly affected employees, was advised that his position was to be disestablished and was invited to apply for one of the six new roles.

[6] Mr Piper was unsuccessful in his application and was given notice of his dismissal by reason of redundancy on 19 February 2010. Mr Piper says his dismissal was unjustified and seeks remedies including reinstatement, lost wages and compensation for hurt and humiliation.

[7] The issue for determination in this matter is whether Mr Piper's dismissal by reason of redundancy is unjustified and if it is what remedies (if any) should follow.

Was the dismissal justified?

[8] There is no dispute that the restructuring by Norske Skog was for genuine commercial reasons. Mr Piper claims the process used by Norske Skog was flawed. In his statement of problem Mr Piper claims the managers who made the decision not to appoint him to one of the new roles were biased and predetermined the outcome.

[9] In reaching conclusions under this heading the Authority is required to scrutinise Norske Skog's actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The section states:

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.

[10] The Authority must be satisfied that the respondent acted in a fair and open way in carrying out the decision to make Mr Piper redundant.

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

[12] With respect to the process used by Norske Skog, 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.

Was the decision not to appoint Mr Piper affected by bias?

[13] As already set out in this determination, Mr Piper was one of eight employees who were advised their positions were being disestablished and six new positions established. This notification followed a lengthy period of consultation with the affected employees. Each of the eight employees was invited to apply for the six new positions.

[14] All those who lodged applications for the new roles were interviewed by two managers, Mr Henara Kapa and Mr Steve Brine. Ms Gaylene Turpie, the resident Human Resources Advisor was also present at each of the interviews.

[15] The closing date for applications was 3 November. On that day, Mr Maurice Lees took both his and Mr Piper's applications to Ms Turpie. While he was there Mr Lees says Ms Turpie told him only six applications had been received. Mr Lees and Mr Piper believed this was because two other employees, Mr Collier and Mr Wade, had decided to take voluntary redundancy.

[16] Ms Turpie denies she told Mr Lees anything about who had or had not applied for the positions. Ms Turpie says that by the time she received Mr Lees and Mr Piper's applications she had already received applications from Mr Collier and Mr Wade.

[17] In support of her evidence, which I accept as being more probable than not, Ms Turpie produced the signed applications by Mr Collier and Mr Wade. Both documents are dated 2 November.

[18] Mr Piper says that Ms Turpie provided assistance to Mr Wade and Mr Collier that was not provided to him, in that she typed up their applications. Ms Turpie admits she typed the letters for both gentlemen, however, she says she did so to assist them after they had sought her help. In her written evidence, which was not challenged at the investigation meeting, Ms Turpie explained that as an advisor, she is often called on to assist employees facing redundancy and that her assistance to Mr Wade and Mr Collier was not isolated.

[19] It is clear from the evidence that both Mr Wade and Mr Collier initially thought that voluntary redundancy was their best option and they made no secret of this in the workplace. However, after they approached Ms Turpie to discuss the voluntary redundancy option Ms Turpie advised them to go away and think about what they wanted to do. Ultimately both Mr Wade and Mr Collier decided to apply for one of the new roles, which they did.

[20] I am satisfied that whatever Mr Piper may have thought with regards Mr Collier and Mr Wade's intentions, it is clear they both made applications for the new roles and those applications were made within the timeframe required.

[21] I find it has not been established that the assistance provided to Mr Wade and Mr Collier by Ms Turpie affected the outcome of the interview process in any way. I am satisfied that had Mr Piper requested assistance with his application it would have been provided by Ms Turpie.

[22] Mr Piper says that Mr Kapa, one of the managers who ultimately decided on those to be appointed to the new roles, provided assistance to Mr Wade and Mr Collier that was not made available to him and that this led to bias and predetermination in the appointment process.

[23] Mr Kapa was Mr Wade's and Mr Collier's manager prior to the restructuring. Mr Wade and Mr Collier both questioned Mr Kapa about the interview process prior to the interviews taking place.

[24] All three men say Mr Kapa answered the questions in a very general way which did not disclose what questions would be asked or how to answer any questions. I am satisfied that Mr Kapa did not coach either Mr Wade or Mr Collier as to how they should answer the questions. The information Mr Kapa provided was very general in nature, for example he advised Mr Collier and Mr Wade that they would be asked questions and they would need to be able to provide examples to support their answers.

[25] I find that the evidence as to the assistance provided by Mr Kapa does not establish that the decision makers were biased toward Mr Piper nor that their decisions on who would be appointed was predetermined.

[26] In his submissions Mr Mitchell is critical of Norske Skog for not providing information about Mr Piper's ranking after the interview process. Mr Mitchell also criticises Norske Skog for being in breach of its own policy as there are questions as to whether the views of the Union had been sought about the selection methodology.

[27] The evidence shows that although the actual ranking system was not provided to Mr Piper prior to the interviews, he was provided with a copy of the job description and the list of skills and attributes against which all the applicants were being assessed. The purpose of providing such information is to allow applicants to address the criteria during the interview. I am satisfied that the information provided to Mr Piper was sufficient to enable him to address each skill and attribute fully at the interview.

[28] There is no evidence that Norske Skog is in breach of its redundancy policy.

Conclusion

[29] I find Mr Piper's dismissal by reason of redundancy is for genuine commercial reasons and that Norske Skog acted as a fair and reasonable employer would have in all the circumstances of this case.

[30] After being advised of his unsuccessful application in November 2009 Mr Piper did not receive notice of his redundancy until 15 January 2010. This was done in case one of the successful applicants changed their mind and decided to opt for voluntary redundancy thereby leaving a vacancy which Mr Piper may have been offered.

[31] Norske Skog attempted to find a redeployment option which would also have circumvented the need for terminating Mr Piper's employment. The evidence shows that Norske Skog extended Mr Piper's original termination date of 19 February to enable this process to play out to its final conclusion, which, unfortunately for Mr Piper was not successful.

[32] I find Norske Skog acted as a fair and reasonable employer would have acted in the circumstances of this case. Mr Piper has been unsuccessful in his application and I can be of no further assistance to him.

Costs

[33] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, Norske Skog Tasman Limited may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe unless prior leave has been sought.

Vicki Campbell
Member of Employment Relations Authority