

[3] UCL says Mr Rose's redundancy was genuine and implemented after a fair and robust process. UCL denies Mr Rose was discriminated against because of his union activities or that his dismissal was unjustified.

The employment agreement

[4] Mr Rose's terms of employment were set out in a written employment agreement. The relevant clauses provide for one week's notice of termination (clause 7.1) and a formula for the calculation of redundancy compensation (clause 7.3). Under the agreement redundancy is a situation where *...your position is superfluous to the Company for any reason* and an offer of an alternative position on no less favourable terms and conditions will be made if such a position exists (clause 7.3).

The redundancy process

[5] Mr Rose was invited to a meeting on 12 September. His depot manager, Anne Campbell and Dave Hare, UCL's national operations manager, were present. Mr Rose had not received notice of the purpose of the meeting and had not been invited to bring a representative with him. At the meeting Mr Hare told Mr Rose UCL had decided to centralise the stores function and, as he was the only storeman, his position was to be made redundant. The reason given was the downturn in business. Mr Rose was then invited to a meeting in a week's time but his evidence was he did not know what the meeting was about. In evidence Mr Hare said he told Mr Rose he wanted to meet with him in a week's time to discuss any redeployment options he (Mr Rose) might wish the company to consider.

[6] Mr Rose said in evidence that while he was aware business was decreasing – the number of containers coming into the depot had reduced – he was dumbfounded to be told his position was redundant. I accept this was the case; 12 September was the first time UCL had formally advised Mr Rose his position was redundant. There was no evidence that Mr Rose had been notified before this date that the stores function, or his position, were under review.

[7] Evidence in support of UCL suggests Mr Rose ought to have inferred from business circumstances that his position could be made redundant and that this would

have reduced the impact of the 12 September meeting. There is no reasonable basis upon which Mr Rose could draw such an inference from the observed downturn in business. There is no evidence that Mr Rose knew, or could reasonably have known, what his employer's response to the business downturn would be. He was not involved in that level of decision making in the business and was not privy to such discussions.

[8] UCL did not follow the 12 September meeting up with a letter. After the meeting Mr Rose contacted his EPMU organiser, Alvy Tata, who contacted Ms Campbell. Ms Tata asked Ms Campbell why there had been no consultation with Mr Rose about his redundancy. Ms Campbell said a meeting would be held on 18 September.

[9] The following day Mr Hare met with all depot staff to tell them about the restructuring of the stores function. He told them UCL was doing its best to protect their positions and outlined what steps were being taken to build the business. Mr Rose heard Mr Hare say to the meeting *"I've heard rumours about something and it is in your best interests that you do not get involved in it."* Mr Rose said this could only be a reference to the recent union activity on site. He did not ask Mr Hare, in the meeting or subsequently, what he meant. Mr Hare does not recall saying those words in the meeting.

[10] The next meeting with the parties was convened on 18 September. Mr Rose attended with two union representatives. Mr Hare and Ms Campbell were in attendance for UCL. Mr Hare's evidence is that he asked Mr Rose if he had any ideas for UCL's consideration, Mr Rose did not and Mr Hare then raised his concerns that he had heard Mr Rose had bad-mouthed UCL during the week and had not spoken to any other depot managers about possible alternatives to redundancy. Mr Hare then tabled a redundancy letter which included:

- Mr Rose had been made redundant because of a downturn in business and UCL's decision to centralise the stores function;
- Redeployment options, including further training had been considered but there were no reasonable employment options;

- Mr Rose would receive one weeks notice per the employment agreement, redundancy compensation of 10 weeks per the employment agreement (later corrected to 11 weeks at Mr Rose's prompting) and outstanding annual leave entitlement;
- CV and management support on work issues;
- Invitation to discuss these issues; and
- Expression of thanks and best wishes.

[11] Ms Tata's notes of the meeting show questions were asked about who would perform Mr Rose's duties and the quality of the process. This was Mr Rose's last day of employment. The proffered leaving function did not happen.

Discrimination on the basis of Union activity

[12] Mr Rose says it is more than a coincidence that he was made redundant the day after he met with the EPMU organiser, Alvy Tata, on site and handed into the UCL wage clerk 14 union fee deduction forms. He points to the following in support of his claim of discrimination:

- (i) An initiation of bargaining notice had been displayed in the workplace just days prior;
- (ii) The owner of the business came into the office in which Mr Rose was meeting with Ms Tata and said he was waiting for the printer, when in Mr Rose's experience the owner had never sent a print job to that office;
- (iii) Mr Rose observed later that evening that three senior managers were meeting on the premises when he went to lock the gate between 6.15pm and 6.30pm; and
- (iv) During the 13 September meeting Mr Hare said to the staff meeting *"I've heard rumours about something and it is in your best interests that you do not get involved in it."*

[13] UCL denies any discrimination on the basis of union activity. It points to:

- (i) Some history of union activity at UCL Auckland sites including an expired collective employment agreement with the EPMU;
- (ii) Mr Hare contacted EPMU organiser, Steve Westoby, on 10 September to advise of the restructuring of the Jellico Road stores function;
- (iii) UCL and the EPMU were to commence bargaining for a collective employment agreement;
- (iv) The EPMU did not raise any concerns about UCL's reaction to Mr Rose's union activity during bargaining; and
- (v) UCL had an extant collective employment agreement with another union at its Tauranga location.

[14] In considering a claim of discrimination the Authority must objectively assess the employer's state of mind from its conduct and surrounding circumstances¹. It is understandable that Mr Rose would query what prompted his sudden redundancy in September when UCL's documents show the matter had been considered in March and August and no action had been taken. However, I am not satisfied, on an objective assessment of UCL's conduct and the relevant circumstances that the answer is that he was discriminated against on the basis of his union activity. The claim of discrimination is declined.

Was Mr Rose's dismissal unjustified?

[15] Parties to employment relationships are obliged to deal with each other in good faith². The obligation of good faith requires parties to conduct themselves in a manner which actively and constructively establishes and maintains a productive employment relationship³ and extends to proposals which may impact on an employee's employment⁴ including redundancy⁵.

[16] A dismissal is justified if the employer's actions can be objectively judged fair and reasonable in all the circumstances at the time⁶. In applying this test to a

¹ *NZ Workers IUOW v Sarita Farm Partnership* [1991] 1 ERNZ 510

² Section 4(1)(a) Employment Relations Act 2000

³ Section 4(1A)(b) Employment Relations Act 2000

⁴ Section 4(4)(d) Employment Relations Act 2000

⁵ Section 4(4)(e) Employment Relations Act 2000

⁶ Section 103A Employment Relations Act 2000

dismissal for redundancy the Authority considers two factors – the genuineness of the redundancy and the process followed.

(i) genuineness

[17] There is no dispute that UCL experienced a business downturn in the first half of 2007. In such circumstances it is conceivable that UCL would look at its business and assess where cost savings could be made and that such an assessment might cover a position like Mr Roses' unique, as it was, in the business. The documentary evidence shows UCL was considering the restructuring of stores in March and early August and had considered how this might impact on Mr Rose. This evidence weighs in favour of a genuinely motivated redundancy.

[18] Weighing against genuineness is the failure to consult on any redundancy proposal, the speed in which the redundancy was implemented, the paucity of evidence around the selection process UCL used to identify Mr Rose's role as redundant, the lack of consultation around the consideration and elimination of redeployment options and Mr Hare's negative reaction to Mr Rose's alleged expressions of dissatisfaction with his redundancy, first raised with him at the meeting of 18 September.

[19] I find the factors against genuineness outweigh those in favour of genuine. UCL has not discharged the burden of establishing Mr Rose's dismissal was justified for genuine reasons.

(ii) process

[20] Mr Hare told Mr Rose on 12 September that his position had been made redundant. This was the first notice Mr Rose had received of any restructuring proposal or outcome of restructuring. Notification is not consultation⁷. UCL failed to consult with Mr Rose about the restructuring of his position. UCL had an obligation to consult with Mr Rose about the proposal to restructure his position; this was not a situation where the business had failed, rendering consultation extraneous. Mr Hare acted with good intentions in contacting the EPMU organiser with whom he was

⁷ *Assn of Salaried Medical Specialists v Otago DHB* [2006] 1 ERNZ 492

engaged in bargaining. However, notice to the union of the decision to restructure Mr Rose's position falls short of consultation.

[21] UCL also failed to fairly consult with Mr Rose about the redeployment options it had considered and excluded. A fair consultation process would have seen UCL put the redeployment options to Mr Rose to comment on and consider those comments. If UCL had approached redeployment consultation in this way Mr Rose would have clearly understood what was happening and would have had a fairer chance of being engaged in the process.

[22] The 12 September meeting was not fairly convened. Mr Rose ought to have been given notice of the meeting and its purpose so he could arrange a representative. He would have been better able to absorb the news that his position had been made redundant and would have known clearly what the next steps were ie, that Mr Hare wanted Mr Rose to contact the Auckland depot managers to see if any redeployment options existed.

[23] The significant flaws, alone, in this redundancy process render the dismissal unjustified.

Remedies

[24] Mr Rose has established he has a personal grievance for unjustified dismissal. He is entitled to a consideration of the remedies he sought.

(i) lost wages

[25] Under his employment agreement Mr Rose was entitled to redundancy compensation totalling 11 weeks plus one weeks notice. I understand from the wages evidence that he has received 12 weeks wages, meeting the section 128(2) reimbursement provision. Under the employment agreement overtime was voluntary (clause 2). Such work falls outside expected ordinary hours.

[26] Mr Rose seeks an award pursuant to section 128(3) of the Act reimbursing wages beyond the section 128(2) three months. He secured alternative employment in

March 2008 however, that employment is on lesser terms and conditions and requires considerably more travelling to and from work. I accept Mr Rose has taken reasonable steps to mitigate his losses.

[27] Taking into account Mr Rose's efforts to find another position, his personal circumstances and redundancy compensation received I set the award of lost wages at one months ordinary time wages being \$2235.20 (gross) pursuant to section 128(3) of the Act.

(ii) hurt and humiliation

[28] Mr Rose seeks an award of \$8000 to compensate him for the humiliation, distress and injury to feelings suffered as a consequence of his personal grievance. Mr Rose said he was dumbfounded when Mr Hare advised him on 12 September that his position was redundant and shocked when he was handed notice of redundancy on 18 September. He said the notice letter appeared to have been hastily written because the calculation of redundancy compensation was incorrect and his name was wrongly spelt. I accept UCL's casual approach to Mr Rose's leaving function caused him further embarrassment; it reflects poorly on UCL that it has attempted to shift the blame for the organisation of the function onto Mr Rose. Mr Rose said this matter *was eating [him] up inside*. He gave evidence of sleeplessness and irritability suffered after his dismissal. He said he had difficulty finding another job and felt this was compounded by his disability (which UCL was aware of).

[29] I set the award for compensation at \$7000 pursuant to section 123(1)(c)(i) of the Act.

(iii) contribution

[30] Mr Rose has not contributed to the events giving rise to his dismissal⁸.

⁸ Section 124 Employment Relations Act 2000

Costs

[31] Costs are reserved. The parties are invited to attempt to resolve this issue themselves. If they are unable to then Ms McNally should file and serve a memorandum as to costs within 14 days of the date of determination and Mr Munro may file any reply within a further 14 days. Given the proximity to the end of the year leave is granted to the parties to seek to vary this timetable.

Marija Urlich

Member of the Employment Relations Authority