

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Eric Schuster (Applicant)
AND AFFCO New Zealand Limited (Respondent)
REPRESENTATIVES Geoff O'Sullivan for the Applicant
Graeme Malone for the Respondent
MEMBER OF AUTHORITY P R Stapp
INVESTIGATION MEETING Palmerston North, 8 December 2006
DATE OF DETERMINATION 2 February 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Schuster has claimed that his dismissal for redundancy was unjustified. He is seeking reinstatement, reimbursement of lost wages and compensation. AFFCO denied the claims.

Background

[2] The facts can be succinctly summarised as follows.

[3] Mr Schuster had been employed at AFFCO for 12 and half years. He was employed as the Day Shift Boning Room Supervisor at its Manawatu plant in Feilding. This position was a salaried position.

[4] On 12 July 2006 the plant's manager, Ann Nuku, met with Mr Schuster. She informed him that his job had been disestablished. She offered him a new position "*with predominantly the same job description but different title i e Production Assistant.*" The terms for the role were outlined in a letter dated 12 July 2006 that involved a rate of pay amounting to \$23.50 per hour, a lump sum payment of \$5,000 to compensate for the loss of health cover, a change to seasonal work and 45 hours per week. The letter stated that the offer "*should deliver a similar or better annual income*".

[6] She also typed out a template contract that she says he could consider, but Mr Schuster understood she wanted him to sign the document. It was not a complete document. He was informed that she wished to finalise the details by Friday 14 July 2006.

[7] There was no consultation by Ms Nuku with Mr Schuster on the reasons for the decision to disestablish his position. At the time he was not told of her decision to select another employee to a QC Supervisor role or what the selection criteria and reasons for that decision were.

[8] Mr Schuster took time off work the next day because of the impact of the matter, to think about it and make up his mind on what he had been offered. He reported his absence. There was no problem and no issue taken with his absence.

[9] On 14 July Mr Schuster informed Ms Nuku he was getting legal advice. He wanted to understand the agreement and wanted his lawyer to identify the differences between his employment agreement, and what was being proposed and to clarify the hours. Mr Schuster says that Ms Nuku wanted him to make up his mind and he had until 2 pm to do so. He told her that his lawyer was handling the issue but that he was interested. She denied giving him a deadline.

[10] Later on that day Ms Nuku and Mr Schuster's lawyer had a discussion that she considered was without prejudice. Mr Schuster says that his lawyer told him Ms Nuku would provide more information and a properly drafted agreement. Ms Nuku denied agreeing to provide more information.

[11] Later again on the same day, Ms Nuku telephoned Mr Schuster and his partner Tania Hodson. There was a discussion about the job, its hours that could not be guaranteed and that the job would have to be seasonal. Ms Nuku disclosed there was a role for a QC Supervisor and that someone else was better qualified to fill it. Ms Nuku had been requested by Head Office to be informed that night whether redundancy monies needed to be set aside. Ms Nuku says that Ms Hodson said that they did want the redundancy money allowed for but Ms Hodson denied this and says she said to Ms Nuku "*it was up to them (AFFCO)*". Still later on 14 July, AFFCO head office advised Ms Nuku that the creation of a position for Mr Schuster had not been approved because it was not needed. He had not been advised that the creation of a position required head office approval. Ms Nuku in her evidence told the Authority that the decision was hers so long as it was cost neutral.

[12] On 17 July Ms Nuku met with Mr Schuster, Tania Hodson and Warren Mumby, another employee. Ms Nuku informed them that Mr Schuster's position had been disestablished and that he would be made redundant "*as there was no alternate position available as there was no need for it*". She had prepared a letter that she gave to them that said "*You have now indicated you do not want to take up this position and as there is no other position available, I regret to advise you that your employment with AFFCO will terminate on the grounds of redundancy*". He was required to work out his notice and his final day was 11 August 2006. He was offered time off during his notice to seek further employment, get assistance or use the Employment Assistance Programme, including counselling.

[13] His duties have since been shared around.

Decision

[14] Ms Nuku received an instruction from head office that she had to look to restructure operations to obtain efficiencies involving salaried staff. She decided she could make a number of changes. Indeed she made some decisions to change the work place roles. Mr Schuster had no opportunity for any input and comment before he received the decision impacting on his employment with the disestablishment of his job.

[15] The rationale for the instruction, received by Ms Nuku from head office, that she had to look to restructure operations to obtain efficiencies involving salaried staff, has not been established to justify Mr Schuster losing his job.

[16] AFFCO's decision to look to make efficiencies involving salaried staff involved no consultation with Mr Schuster. There should have been consultation. This was unfair and in breach of s 4 (1A) of the Employment Relations Act.

[17] Mr Schuster was offered a position by Ms Nuku. There was no explanation given to Mr Schuster that head office would be involved in any approval of the role although Ms Nuku says she could make a decision if the role was cost neutral. The lack of disclosure and lack of clarity in regard to Ms Nuku's role and that of head office to make a decision on a "*suitable alternative role*" was misleading. This was not the action of a fair and reasonable employer.

[18] Mr Schuster was offered another position with a different title and what he reasonably believed was a substantially similar job description. No document has ever been produced, if it

exists. An offer of a substantially similar job description and a change of title do not satisfy the requirement of making a position surplus. The matters raised by AFFCO on the offer were in the nature of a change of terms of employment and that is not sufficient proof of a position being made surplus.

[19] A fair and reasonable employer would have given Mr Schuster an opportunity for input before the decision was made because it involved his employment. It was also reasonable for him to seek legal advice and ask for more information and compare his employment agreement with what was being offered. This was because there were changes envisaged. Also, Ms Nuku was still to fledge out what the role would actually involve and there was no explanation on what was meant by “*should deliver a similar or better annual income*” on the offer. Ms Nuku knew that Mr Schuster had sought advice on the terms of the offer and he wanted more information on the hours and seasonality of the proposed role. This was a reasonable request.

[20] AFFCO provided no reasons for the urgency that was given to the matter, the timing of the deadline that was imposed, and which I hold necessitated Ms Nuku trying to get Mr Schuster’s commitment to the changes quickly, despite him going to his lawyer for assistance. Thus the rationale for the instruction to Ms Nuku has not been justified. I hold that the pressure she was under from head office was why she telephoned Mr Schuster again on 14 July, knowing by that time Mr Schuster was represented. Her action was not reasonable and can only be accounted for because of the pressure from head office, or the pressure she put on her self.

[21] The difficulty that AFFCO has is that there is no paper trail and it solely relies on the evidence of Ms Nuku for the instruction she received to make costs savings on permanent salaries. There have been at least three explanations advanced in regard to the termination of Mr Schuster’s employment. Mr Schuster has called her credibility into question on what transpired. Despite the differences in the evidence on the reasons being advanced for the dismissal I have not found that Ms Nuku was either lying or that she was unreliable. Her experience in such a situation is more likely to be in question given the failures in the process referred to in the evidence. It is more likely that AFFCO left her exposed to a step that was missed when the head office gave her an instruction and she made her decisions first without any consultation with Mr Schuster. I accept that she endeavoured to find some suitable alternative for Mr Schuster but that this was affected by head office making a decision instead.

[22] Mr Schuster was not consulted on what would happen if he did not accept the offer (see the 12 July letter) - that simply referred to the disestablishment of his position and put forward what Ms Nuku hoped would be a suitable alternative. Mr Schuster had no input and opportunity to comment before the decision was handed down. A fair and reasonable employer would have consulted throughout: s 4(1A) of the Act.

[23] The timing was also unreasonable in the absence of any good reason to impose a deadline that was impacting on Mr Schuster's right to get further information and involve his lawyer to assist him. This is especially so when the instruction was given by AFFCO head office to Ms Nuku in June.

[24] To summarise, I hold that Ms Nuku's decision to make Mr Schuster's position redundant without consulting him was flawed. AFFCO's instruction to Ms Nuku to make savings in fixed costs without including Mr Schuster for input was also flawed. Both actions did not meet the requirements for consultation considering there was an impact on Mr Schuster's employment.

[25] The Company has simply not justified its rationale for making the position redundant/dismissing Mr Schuster. There was also a serious failure to consult re the process, particularly to put all relevant information reasonably before him (e.g. for the possible alternate position, the role of head office, who was the decision-maker and an explanation on why head office decided an alternative position was not needed when supposedly Ms Nuku had some delegated power to offer an alternative position so long as it was cost neutral.).

[26] The dismissal was unjustified.

[27] Mr Schuster is entitled to redundancy unless where the dismissal was so bad and the employer has completely failed to justify the supposed redundancy to the point that there is any reinstatement. There is a serious case to reinstate him and this is a finely balanced decision to make. If he was to be reinstated he would have to pay back his redundancy and get lost wages. If there is no reinstatement, then redundancy is paid, obviously, as he's lost his job for that reason. Notwithstanding, the wholly inadequate explanation put forward for the instruction to Ms Nuku to make cost savings by AFFCO, I accept her evidence. I have not found her to be unreliable. However her practice was flawed not to have properly consulted when she had made the decision.

[28] I am satisfied that it would be difficult to reinstate Mr Schuster in regard to Ms Nuku's evidence. Reinstatement to his previous position would not be practicable as it is possible AFFCO would work through the process again. Indeed his claim involved an alternative should reinstatement not be ordered. I could not reinstate him to the position that was put forward by Ms Nuku as an alternative because the role was uncertain and that such a role had not been fleshed out. There is no evidence that such a role would not be less advantageous. He had difficulties accepting any seasonal employment in that role. He accepted that he did not have all the qualifications for the QC job offered to somebody else. Therefore Ms Nuku has put in place changes that have impacted on Mr Schuster's position.

[29] Also, I accept Ms Nuku's evidence that Mr Schuster's position would have been redundant because she had to implement an instruction from head office that impacted on his position.

[30] The matter can be resolved by financial remedies. I have considered contribution as I must under s 124 of the Act. There was none. Mr Schuster cannot be blamed for the situation. If the restructuring had been done properly Mr Schuster would have received redundancy pay that he was entitled to and it does not have to be off set.

[31] Because his dismissal was unjustified he is entitled to lost wages in addition. Furthermore, Mr Schuster has just sufficiently mitigated his loss. He went on holiday and visited his family first. He says he could not get work at other freezing works that he approached and he decided to wait upon the Authority to bring closure to his employment relationship problem. His action was barely adequate in approaching other plants and deciding to wait on the outcome of his employment relationship problem being determined to mitigate his loss. He was paid a month for working out his notice. His final day was 11 August 2006 after he worked out the month's notice. He was paid a salary of \$42,707 per annum. He is therefore entitled to \$10,475.30 for 13 weeks (three months under the Act) and no more because of the barely adequate mitigation.

[32] Also, Mr Schuster is entitled to a sum of compensation for humiliation, loss of dignity and injury to feelings (s 123 (1) (c) (i) of the Act). He is entitled to this compensation in regard to the abysmal absence of any consultation by AFFCO on the decision to investigate cost savings and the decision that impacted on his employment including making redundant his job without consultation and proper justification. I order AFFCO to pay Mr Schuster \$12,000 compensation for the shock of what happened and the impact of the employer's action on him for failing to consult that I am satisfied affected Mr Schuster's feelings. I observed Mr Schuster giving his evidence and I agree

that he is stoical. However, he has clearly demonstrated sufficient upset that related to the way he was treated without proper consultation, even although he got a lawyer involved, and there was pressure on him to make a decision on the alternative offer of employment. That pressure was unreasonable given that AFFCO head office decided not to approve “*a suitable alternative*” without his full input and Ms Nuku having to decide to put aside redundancy money. There was evidence of the impact of the unjustified dismissal on him from Tania Hodson. Some impact was inevitable given his length of service and the wholly unsatisfactory lack of consultation despite Ms Nuku’s attempt to find an alternative position.

[33] AFFCO New Zealand Limited is to pay Mr Schuster \$10,475.30 for 13 weeks loss of wages and \$12,000 compensation for humiliation loss of dignity and injury to feelings.

[34] Costs are reserved.

P R Stapp
Member of the Authority