

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 459/09

5127764

BETWEEN PETER SHEPHERD
 Applicant

AND STEELSERV LIMITED
 Respondent

Member of Authority: Marija Urlich

Representatives: Applicant, in person
 Philip Skelton, counsel for Respondent

Investigation Meeting: 26 February and 9 April 2009

Submissions received: 27 April, 21 May and 12 June 2009

Determination: 18 December 2009

DETERMINATION OF THE AUTHORITY

[1] Mr Shepherd is a longstanding employee of SteelServ and its predecessors – 28 years service at time of hearing. In 2000 he was appointed to the position of operations manager - the position from which this employment relationship problem arises.

[2] Mr Shepherd says that he has been demoted and his role compressed as a consequence of the restructuring of the business in 2008. Mr Shepherd says these changes to his role are unjustified and were unfairly imposed without consultation. To remedy these alleged breaches of his employment agreement Mr Shepherd seeks an apology and either reinstatement to his position prior to the restructuring or redundancy compensation as set out in his employment agreement. He also seeks the implementation of justified changes.

[3] SteelServ says Mr Shepherd is a valued employee and that his position is not redundant. It says the change in reporting line was implemented following due consultation and this change has not resulted in a demotion for Mr Shepherd.

[4] A note on remedies: As discussed with the parties during the investigation meeting I am only able to award remedies which are set out in the governing statute¹. I do not have the power to award an apology. A mediated settlement of an employment relationship problem may include an apology; that method of dispute resolution gives parties the flexibility to craft their own terms of settlement.

Relevant legal principles

[5] It is well established that a managerial prerogative exists to alter employment terms and restructure businesses. This prerogative is tempered by the general rule that a contract of employment cannot be altered without the consent of both parties.

[6] The question of whether an employer is justified in altering a term of employment and whether that alteration can be seen as a substantial alteration affecting an employee's employment will depend on the circumstances of the particular case. If the alteration is substantial then the employee could assert their employment had been effected to their disadvantage.

[7] There is no dispute that Mr Shepherd's terms of employment have been altered as a consequence of the restructuring of the business – he no longer reports directly to the general manager. The questions before the Authority are whether that change amounts to a substantial change which has effected Mr Shepherd's employment to his disadvantage and whether that change was fairly and reasonably implemented read against the statutory test for justifiability².

The effect of the change

[8] Mr Shepherd says the change in reporting line has significantly altered his position. He says he has been demoted from a second tier to a third tier position in the

¹ Employment Relations Act 2000

² Section 103A Employment Relations Act 2000

management structure, that his role has been compressed and his responsibilities for higher level, longer term activities have been reallocated to the business development manager. Mr Shepherd gives the following specific examples:

- no longer reports to the general manager;
- no longer responsible for the longer term higher level activities;
- no longer reports on the operations side of the business, with the exception of overtime, to the weekly senior management meeting, unless the business development manager is absent;
- no longer completes the monthly operations report, that is now done by the business development manager;
- no longer receives monthly reports from senior managers including the general manager;
- no longer involved in providing information to the finance manager for budget setting for the annual plan and monthly predictions;
- less involvement in the NZ Steel collective employment agreement negotiations;
- less communication with senior customer representatives; and
- no longer involved with meeting and hosting visiting overseas directors.

[9] SteelServ says this is not the case and the change in reporting line is not a demotion:

- as the operations manager Mr Shepherd is responsible for all day-to-day operational matters;
- his terms and conditions of employment remain the same;
- he has not been excluded from training courses;
- he was involved in the SteelServe/NZ Steel negotiating team regarding the site collective employment agreement;
- he is involved in the renewal process for the NZ Steel/SteelServ contract
- after April 2008 his role expanded;

- Mr Grala consults closely with Mr Shepherd about operational and strategic matters; and
- Members of the management team seek out Mr Shepherd's views on operational and strategic issues.

[10] In assessing the evidence it was difficult to pin-point the exact place where Mr Shepherd says his employment has been effected to his disadvantage. The disadvantage appears to be the loss of two intangible benefits of the original reporting line – influence and perception. Neither of these are terms of employment however I accept they are important elements of a senior position. Having carefully assessed the evidence, I am not convinced these intangible benefits have been significantly eroded. Mr Shepherd has not established that his position has been significantly altered as a consequence of the restructuring. For the avoidance of doubt, I find Mr Shepherd's position has not been made redundant.

Was the change fairly and reasonably implemented?

[11] In early April 2008 Mr Shepherd wrote to Iain Graham, the acting general manager, confirming his commitment to an interim structure which included the new reporting line.

...

The interim structure for the operations areas (excluding aggregates) that Barry Gibbon asked us to work under is as follows:

Keith Grala: Operations Manager in charge of Shift Managers

Peter Shepherd: Operations Manager in charge of Processing Services

Ian Dallas: Operations Manager in charge of Mill Services

I find the interim structure very difficult to work under, as Keith is directly in charge of the shift managers who in turn are in charge of the employees working in the Processing Services area. I told Barry at the time that I did not think that the structure was workable because there is no correlation between authority and responsibility. However I gave him an undertaking that I would support that system and I will continue to do so until the new General Manager is appointed.

The reason for this letter is to advise you of my position. I would like the Operations Manager job when the new reorganisation is completed.

...

If for any reason the Company decides that I will not be the Operations Manager after the restructure has been completed I ask that I be made redundant.

[12] On 17 April Mr Graham announced the interim management structure to be in place until a permanent appointment to the general manager role was made. In this structure Mr Shepherd retained the role of operations manager but the reporting line changed; instead of reporting directly to Mr Graham he reported to Mr Grala, who in turn reported to Mr Graham.

[13] Mr Shepherd was very concerned by this change in reporting lines. A meeting was held to discuss those concerns. Mr Shepherd then wrote to Mr Graham on 19 April:

...
As pointed out at the meeting this [the change in reporting line] is a demotion for me as I have always reported directly to the General Manager.

The reason for this letter is two fold. Firstly it is to again advise you of my position. I would like the Operations Manager role, reporting directly to the General Manager when the new organisation is completed. As stated in my previous letter, I believe it is the job I had before we restructured and split the position in two (Processing and Mill Services).

...

[14] The letter continues with Mr Shepherd restating his wish for redundancy in the event he is not appointed to the operations manager role (or equivalent), his continued commitment to the interim structure and a request for a regular three monthly formal meeting to discuss changes to the management structure and any consequent impact on Mr Shepherd.

[15] In May the interim structure was confirmed: Mr Shepherd was confirmed as operations manager reporting to Mr Grala as business development manager. Steelserv convened a meeting with Mr Shepherd on 23 May to discuss his role in the confirmed structure and his previously expressed concerns. Present at the meeting were Mr Shepherd, Mr Graham, Mr Attore and David Adams (SteelServ's parent company director of human resources based in London). Mr Attore acknowledged the concerns Mr Shepherd had expressed in his correspondence to the company, thanked him for his support during the interim structure and assured him his responsibilities would not change. Mr Shepherd said he felt he had been demoted as a result of the

new reporting line. Mr Attore said the reporting line was the only change to the role and was made to align the reporting strategic functions with the business and operations roles. Mr Shepherd said, aside from the reporting line, he had no issue with the new structure and thought the responsibilities for the role were correct for the business. The meeting concluded with a discussion about Mr Shepherd's disappointment at not having had an opportunity to apply for the business development manager's role.

[16] Mr Graham wrote to Mr Shepherd on 26 May confirming the outcome of the 23 May meeting including:

...

You will remain in your role as Operations Manager maintaining responsibility for the Operational areas of SteelServ. All employment terms and conditions remain unchanged.

The Company has for strategic reasons decided that your position will now report to the new role of Business Manager.

[17] The new general manager commenced on 23 June. Mr Shepherd raised a personal grievance on 26 June. The parties attended mediation, unsuccessfully, on 7 July. Discussions continued between the parties in an attempt to address Mr Shepherd's concerns.

[18] Parties to employment relationships must deal with each other in good faith³. The duty of good faith applies, in particular, to consultation concerning changes to an employer's business which may effect an employee⁴.

[19] There can be no doubt that extensive discussions were held with Mr Shepherd about the interim structure and opportunities provided for his concerns to be aired and considered. What is not apparent is the consultation process SteelServ conducted with Mr Shepherd prior to its decision to confirm the interim structure.

³ Section 4(1) Employment Relations Act 2000

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

[20] I find SteelServ was obliged to consult with Mr Shepherd about the decision to confirm the interim structure and that that consultation should have occurred prior to the decision being made⁵. The evidence shows the interim structure was confirmed and SteelServ then set out to discuss Mr Shepherd's concerns in detail. At that point consultation could not be said to be genuine or effective.

[21] I find Mr Shepherd has established a personal grievance for unjustified action causing disadvantage. SteelServ had an obligation to consult with him prior to making a decision to confirm the interim structure. It failed to do so in breach of obligations owed to him and I accept this has had a disadvantageous impact on his employment.

[22] The effect of this disadvantage has been ameliorated by the discussions between the parties concerning the interim structure – Mr Shepherd cannot say the confirmation of the structure came out as a surprise. What he can say is he was entitled to be consulted about a permanent change to his terms of employment, notwithstanding that those changes were not significant or that they had been implemented on an interim basis.

Remedies

[23] Having established a personal grievance Mr Shepherd is entitled to a consideration of remedies sought. Taking into account Mr Shepherd's evidence of damage consequent to this established breach I set remedies at \$3000 pursuant to section 123(1)(c)(i) of the Act.

[24] There is no evidence that Mr Shepherd contributed in a blameworthy way to the circumstances which gave rise to his personal grievance⁶.

⁵ *Wellington International Airport Ltd v Air NZ* [1993] 1 NZLR 671 (CA)

⁶ Section 124 Employment Relations Act 2000

Costs

[25] Costs are reserved. The parties are invited to attempt to resolve this issue themselves. If this is not possible then application may be made to the Authority to set a costs timetable within 21 days of the date of this determination.

Marija Urlich

Member of the Employment Relations Authority