



New Zealand Employment Relations Authority Decisions

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Side v Refrigeration Engineering Co Limited (Auckland) [2011] NZERA 442; [2011] NZERA Auckland 289 (6 July 2011)

Last Updated: 14 July 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 289 5291762

BETWEEN

AND

ROBERT SIDE
Applicant

REFRIGERATION ENGINEERING CO LIMITED Respondent

Member of Authority: Representatives:

Investigation Meeting:

Additional Evidence Received:

Dzintra King

Jonathon Fairclough, Counsel for Applicant Parvez Akbar, Counsel for Respondent

21 February 2011 1 March 2011

18 March 2011

Submissions Received:

Determination:

26 April 2011 from Applicant

10 May 2011 from Respondent

6 July 2011

DETERMINATION OF THE AUTHORITY

[1] The applicant, Mr Robert Side, says he was unjustifiably dismissed and unjustifiably disadvantaged by the respondent, Refrigeration Engineering Co Ltd.

[2] The applicant says the redundancy was predetermined and unfair. There is no challenge to the substantive justification.

[3] The respondent says Mr Side's employment was terminated as a result of a genuine redundancy which was fairly carried out.

[4] Mr Side was employed by the respondent on 19 August 1974 and his employment terminated on 8 June 2009. At that time he was employed as National Products Manager

[5] As a result of cash flow issues and a downturn in business in 2009 the respondent reviewed its business. The review included its Australian and New Zealand operations.

[6] Mr Robert Hunt, the Australasian Wholesaling General Manager, identified Mr Side's position as one that might be disestablished. Although Mr Hunt disputed this, I am satisfied the evidence shows this to be the case.

[7] On 28 May 2009 the Chief Executive Officer of the Realcold Group, Mr Graham Dun, telephoned Mr Side from Australia saying there was to be a meeting on Tuesday 2 June 2009. Mr Dun had a set of notes which he used when contacting Mr Side. These show that he referred to a proposed restructure which could have an impact in continued employment, that is, the position may become redundant.

[8] The same day Mr Side received an email from Ms Linda Ross, the Human Resources Manager, confirming the meeting. The email referred to a possible redundancy.

Hello Bob

This email is confirmation of the meeting on Tuesday 2 June, as per Graham Dun's call today. The meeting with Graham will be at 8.30 am in the Prescott Street Boardroom, and I will also be present.

The purpose of the meeting is to consult with you regarding several proposed changes to the structure of Realcold Components which, if implemented, could impact on your current position, (ie it could become redundant).

As Graham advised, you are entitled to have a support person or representative with you at the meeting, if wished.

Regards Linda [9] Although this clearly refers to a possible redundancy, Mr Side interpreted this to mean that his job might change, as there had been a number of changes to his job over his thirty five year employment period.

2 June Meeting

[10] At the 2 June meeting a copy of the job description was given to Mr Side. Mr Side was invited to consider this position. Mr Side said he was told his position would be made redundant. Mr Side confirmed at the investigation meeting that the words "*your position has gone*" were not said. However, he felt the tone and content of the meeting conveyed that message.

[11] Mr Dun said Mr Side was told there had been serious cash flow problems for some time and that the owners had invested heavily in the company. They did not wish to divest themselves of the company and had analysed the business to find ways to reduce costs. The Board had been examining the current business model and proposed changes.

[12] A team of consultants had been analysing the supply chain operations. In addition to disestablishing some positions several new positions would be created.

[13] Mr Side was given a proposed organisational chart and position description for the proposed new supply chain position. A further meeting for Mr Side to comment and provide feedback was arranged for 4 June.

4 June Meeting

[14] Mr Side referred to the new role as "*exiting and challenging*" and accepted it would be hard to apply "*ready-built formulas here*".

[15] Mr Dun explained the differences between the new role and a standard purchasing manager's role. The proposed new role had no reports and was more of an overview, strategist role. It had overall responsibility for the performance of the entire supply chain operation in New Zealand and Australia and was a more senior role than the one Mr Side held.

[16] Mr Side said he was not invited to apply for this role and that it had been compiled so that he could not apply. This was because the position required a tertiary qualification which he did not possess. The position was discussed with Mr Side and he was emailed regarding the position. He chose not to apply.

[17] Mr Side maintained he was the Australasian Purchasing Manager but was unable to explain what aspects of the job he did or the reporting lines.

[18] It was Mr Hunt who drafted the new job description and highlighted the differences in the roles.

June 5 Meeting

[19] It was not until this meeting that Mr Side was advised that his position was redundant

8 June

[20] Mr Side agreed to work out his notice to 30 June and during the notice period signed a fixed term employment agreement, finishing employment on 31 August.

[21] Mr Side said he was asked to train a new employee, Ms Manuela Koenig, over the last four days of his employment. This is not correct. As the Purchasing Administrator was absent on extended sick leave Ms Koenig had to discuss processes and

practices with Mr Side.

[22] Having looked at the job descriptions and taken account of the oral evidence, I am satisfied that Mr Side's position and the position held by Ms Koenig are different positions.

[23] Mr Hunt drafted the new job description and highlighted the differences in the roles.

Consultant's Report

[24] Mr Side said that while he had seen the ADR Consultant's report he had never been given an opportunity to read through it. The report was referred to in the Statement in Reply and a copy was provided to his representative in August 2010. However, there was no any mention in the witness statements that the report had not been provided or that there was an issue regarding it.

[25] Since the investigation the respondent found a copy of the report with Mr Side's handwriting throughout it. It is clear that Mr Side had access to the report prior to the disestablishment of his position and it is not accurate that the first time he read it was after the proceedings were commenced.

[26] Mr Dun confirmed that he did not fully understand the report and that it had little relevance to the proposal to disestablish the position.

[27] I accept that the proposal to restructure was not based on the report and that Mr Side has not been disadvantaged.

Decision

[28] While Mr Side had not served thirty five years, which service entitled him to additional benefits, the company calculated redundancy entitlement as at thirty five year, provided a gift voucher, gave four weeks' additional leave, a discretionary long service payment and company funded career transition support. This does not have the hallmark of an organisation wishing to dispense with Mr Side's services. Neither does the fact that it employed him on a fixed term contract for which he was paid twice his normal salary.

[29] Eighteen positions were disestablished. Mr Hunt, the General Manager at the time, had selected and recommended all the positions that could be made redundant. Not all the positions recommended for redundancy were made redundant. Of all the proposed redundancies, ten did not eventuate after consultation with the individuals concerned. That the respondent was prepared to take account of comments and submissions on its proposal is evidenced by the fact that not all the positions identified as potentially redundant were in fact made redundant.

[30] The consultation period was very short. However, Mr Side made no request for an extension of time nor did he seek additional information. Mr Side said he was "*ambushed*" and had no opportunity to obtain legal advice. Mr Side did not seek an adjournment. Mr Side was told what the meeting on 4 June was about and sent a confirming email.

[31] He was not dissuaded from applying from the new position. He chose not to after having discussed the position at the meeting on 5 June.

[32] The redundancy was a genuine redundancy and it was neither premeditated nor unfair.

[33] While I understand Mr Side's shock at having been made redundant after thirty five' service, the dismissal was justified and Mr Side does not have a personal grievance.

Costs

[34] If the parties are unable to resolve the issue of costs the respondent should file a memorandum within 28 days of the date of this determination. The applicant is to file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King

Member of the Employment Relations Authority