IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 160/09
5132377

	BETWEEN	ANDREW SKELLY Applicant
	AND	CROXLEY STATIONERY LIMITED Respondent

Member of Authority:	R A Monaghan
Representatives:	AM McInally, counsel for applicant P Tremewan, advocate for respondent
Investigation meeting:	18 and 26 March 2009
Submissions received:	1 April 2009
Determination:	20 May 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Andrew Skelly says his former employer, Croxley Stationery Limited ("Croxley") dismissed him unjustifiably on the ground of redundancy.

[2] He says he was selected for redundancy because of his union activities, in particular because he was a union delegate. He seeks a finding that he was discriminated against on the ground of his union activities. He also says the process used in the selection for redundancy was unfair.

[3] Croxley says the selection was made as the result of a fair process, the criteria it used were appropriate and the criteria were applied in an appropriate way. It denies Mr Skelly was selected for redundancy because of his union activities and says the dismissal for redundancy was justified.

Events leading to the redundancy

1. Background

[4] Mr Skelly began his employment on 24 July 2000. He was elected as a delegate for the NZ EPMU ("the union") from 2003 to June 2008. At the material time he was employed at Croxley's Avondale site as an envelope machine adjuster, and was the leading hand for his shift.

[5] During February and March 2008 Croxley's manufacturing manager, Tom Connor, was reviewing the operation of the manufacturing unit. The envelope manufacturing division was part of this unit. Mr Connor concluded that the division had an overcapacity, and was over-manned compared with production requirements and sales being achieved. At or about the same time the Croxley Collective Agreement ("the cea"), which expired in February 2008, was being renegotiated. An unsuccessful attempt was made during the bargaining to address these and other issues associated with the operation of the manufacturing unit.

[6] In the absence of an agreement in that forum Mr Connor proceeded to develop a plan which included making 21 positions redundant in the unit overall, including 8 of 16 envelope machine adjusters' positions (apparently excluding the 3 supervisory positions). At the time envelope machine adjusters worked on two shifts, and there was to be a reduction to a single shift system.

[7] On 21 May 2008 Croxley announced the planned changes to the staff, advised of the proposed timetable for implementing the changes, and sought suggestions for alternatives. Union representatives were present. No alternatives were suggested and Croxley embarked on the timetable for implementing the changes.

[8] Further to the selection of staff for redundancy, the relevant provision in the cea read as follows:

> 3.4 Rights of redundant employees
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> …
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> It is recognised that the employer needs to maintain an efficient work force and an efficient operation which factors must be taken into consideration in the selection of employees to be

> made redundant. Wherever possible the employer will observe the principle of "last on, first off" in selecting employees to be made redundant."

[9] Mr Connor said he sought to focus on the maintenance of an efficient workforce and efficient operation, and final decisions were made accordingly. The 'last on - first off' principle was not applied and the company's position on that matter has not been challenged. In the context of the company's focus criteria for selection for redundancy were identified, and were also announced at the 21 May meeting. The criteria were: skills; experience; quality/quantity; flexibility; teamwork/attitude; timekeeping; attendance; and length of service. Mr Connor, the area manager Mark Gilchrist, and the HR manager developed the criteria.

[10] They also prepared a template for use in applying the criteria. In terms of the template each criterion had a weighting towards an overall score of 100. Within each criterion was what amounted to a scale identifying the extent to which the criterion was met, and specifying the sub score to be allocated accordingly. There was also a space for comments from the scorer.

2. The selection process

[11] The selection process was to begin on 22 May. In Mr Skelly's case, the two shift supervisors – Grant Newby and Alan Rudd – carried out separate assessments using the template. They did so in association with Haydn Evans, who was then the factory manager at Avondale.

[12] Despite a substantial difference between the shift supervisors' total scores, both sets of scores placed Mr Skelly inside the range of those who could expect to retain their positions if the scores were determinative. Mr Evans said during the investigation meeting that both sets of scores placed Mr Skelly in the 'top 4'.

[13] The most significant scores in terms of the issues here are that Mr Newby rated Mr Skelly at 10/20 (obliging) for flexibility/teamwork and 7/20 (sometimes negative) for attitude. Mr Rudd rated Mr Skelly at 16/20 (offers assistance) for 'flexibility/teamwork' and 16/20 (highly positive) for 'attitude'. Mr Rudd noted that Mr Skelly offered assistance and took over when the supervisor was away.

[14] Mr Evans also completed an assessment form. His original handwritten form was not available, but he identified his scores from a spreadsheet listing all of the scores and sub scores. He rated Mr Skelly at 7/20 (reluctant) for flexibility/teamwork and 7/20 for attitude. The total overall score was 59 out of 100. While not placing Mr Skelly in the 'top 4', the score was in the middle of the range of Mr Evans' scores and still indicated that Mr Skelly might expect to retain his position.

[15] Mr Evans discussed the assessment forms with Mr Gilchrist. At the time of the investigation meeting Mr Gilchrist was no longer employed by Croxley. He had left New Zealand permanently at the end of 2008 and gave no evidence beyond the contents of a very brief and generalised affidavit received after his departure.

[16] According to Mr Evans, he and Mr Gilchrist completed a further assessment form, in which Mr Skelly was scored at 56 out of 100. Mr Skelly was rated at 7/20 for flexibility/teamwork and 4/20 (negative outlook) for attitude. This placed him within the range of people whose employment might not be continued.

[17] The assessments were discussed with Mr Connor, but Mr Connor said at the investigation meeting that Mr Gilchrist was the final decision-maker. Elsewhere he said Mr Gilchrist's view prevailed. Whichever is more accurate, the effect was probably the same. Mr Connor said his own approach was to focus on who would be staying rather than who would be leaving, and to ensure that the team would deliver the required increase in productivity. For that reason, for example, he declined to accept a request for voluntary redundancy on the ground that the person concerned had skills the company needed.

[18] Mr Connor also said he did not recall anything in particular regarding Mr Skelly in the final discussions. On the other hand he, too, commented in general on his experience of what he considered to be Mr Skelly's confrontational and contrary approach. However he considered the matter to be one of personality rather than of Mr Skelly's position as a union delegate.

[19] The outcome of the selection process as it concerned the envelope machine adjusters was that 5 people volunteered for redundancy, with four of these being accepted. Three others were selected for redundancy, including Mr Skelly.

[20] There was a meeting with union representatives on 30 May. Although the selection template had been posted the union did not receive it, so a copy was provided at the meeting. There was confusion in the evidence about what occurred at this meeting, and at a subsequent meeting on 3 June. It appeared the 30 May meeting was to discuss the impact of the redundancies across the manufacturing unit, as well as a process for communicating the outcome to the staff. The union organiser present at the meeting, Cliff Gunning, made an undated file note which records the selection criteria were 'commented on'. Mr Gunning expressed a concern about the relative importance of experience and attitude, with Croxley maintaining the position that attitude was more important.

[21] There was a further meeting with the union on 3 June, after the final selection had been made. The final assessments were discussed with Mr Gunning, to the extent that he was given a list of the scores but without the names of the individual employees to which they related.

3. Advice of termination

[22] Mr Skelly's letter of termination was dated 2 June 2008. It contained information about arrangements associated with the redundancy, including details of the compensation to be paid, and identified a date of termination of 2 July 2008.

[23] The letter was given to Mr Skelly on 4 June. The overall intention was that affected employees be given an opportunity to view and discuss the final selection form with the HR manager. However, although the letter addressed a number of matters associated with the implementation of the redundancy, it did not mention the individual assessments or offer an opportunity to discuss them. Mr Skelly did not immediately raise the matter himself, among other things because personal family reasons meant he did not work through the notice period.

[24] Mr Skelly's assessment was questioned in a letter from the union dated 27 June 2008 seeking details of the assessment. The replies were not responsive, in that they did not answer the queries regarding the assessment process as they should have.

4. Union activities

[25] Mr Skelly disagreed with the assessments under the criteria of experience; flexibility/teamwork; and attitude. Regarding 'experience', he believed he should have been given the same score as the supervisors. However that was not the way in which the scale associated with that criterion was applied to leading hands and employees other than supervisors. More significantly for present purposes Mr Skelly disagreed with the assessment of 'reluctant' in his flexibility and teamwork, and denied that his attitude was 'negative and unhelpful'.

[26] From Mr Evans', and presumably Mr Gilchrist's, perspective, the assessments under both of these criteria centred on Mr Skelly's questioning approach. Mr Evans acknowledged that Mr Skelly worked well in a team and helped others. Nevertheless the questioning approach was of a kind that had a negative effect on the department.

[27] One incident on which Mr Evans relied in support of his view concerned his advice to staff in or about February 2008 that volunteers were required to work at the new company plant at Wiri. Mr Skelly consulted the union and informed Mr Evans that the company could not insist that people work at Wiri, although it could ask for volunteers. The cea provided that employees' place of work was at Avondale or 'such other sites as may be agreed from time to time with the employee'.[1]

[28] A second incident occurred in or about mid-2007 and concerned an attempted change in the 4 x 10 shift pattern operating at the time. Mr Evans had understood there was a 'gentlemen's agreement' that there would be no problems if the company sought to return to the 8 hour shifts previously operated. Mr Skelly challenged the company's right to make any unilateral change to the shift pattern. The cea provided that shifts may be worked as required by the employer, and that 'shifts shall be worked according to agreed shift patterns.'[2]

[29] A third incident involved Mr Skelly's questioning and challenging conduct during a disciplinary process in which he acted as a delegate supporting the employee concerned.

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[1] Clause 1.4
[2] Clause 2.3(a)

[30] Mr Evans summarised the concern by saying he found himself the meat in the sandwich. His manager would ask him to get things done, but he could not effectively carry out the requests without being challenged by Mr Skelly. When he was asked at the investigation meeting whether he would have had a negative view of Mr Skelly were it not for his activity as a delegate, he said 'probably not'. In the circumstances indicated by Mr Evans' evidence in particular I infer that Mr Gilchrist had a similar view. I have already recorded Mr Connor's view.

[31] This leads me to say that Mr Skelly was not dismissed merely because he had acted as a delegate, but nor can the fact that he acted as a delegate be discounted in addressing the assessments of his flexibility/teamwork and his attitude. On the examples I was given, the approach he took to his role as a delegate created concerns of the kind Mr Evans expressed. These were reflected in his and Mr Gilchrist's assessments in particular.

The justification for the dismissal

1. Relevant statutory provisions

[32] The justification for Mr Skelly's dismissal can be assessed broadly with reference to s 103A of the Employment Relations Act 2000, which reads:

> "… 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."

[33] Since the letter raising Mr Skelly's personal grievance also referred to bias against Mr Skelly either personally or as a 'union activist', and the statement of problem referred to discrimination because of Mr Skelly's union activity, there are further relevant provisions.

[34] Section 103 (1) of the Act includes in the definition of 'personal grievance' a claim that:

> "(c) .. the employee has been discriminated against in the employee's employment."

[35] Section 104 identifies the circumstances, including dismissal, in which actions may be discriminatory if they are carried out by reason directly or indirectly of any of the prohibited grounds of discrimination.

[36] One of the prohibited grounds is involvement in union activities in terms of s 107. Section 107 reads:

> "(1) … involvement in the activities of a union means that, within 12 months before the action complained of, the employee –
>
> a. …
>
> (g) was a delegate of other employees in dealing with the employer on matters relating to the employment of those employees."

[37] Mr Skelly was involved in union activities in terms of s 107.

[38] Section 119 provides:

> "(1) Subsection (2) applies if, in any matter before the Authority … -
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> (a) the employee establishes that the employer or the employer's representative took any action or omitted any action as described in … s 104(1) in relation to that employee; and
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> (b) if it is a case where the employee alleges that the discrimination was by reason directly or indirectly of the employee's involvement in the activities of a union, the employee establishes that he or she was a person described in s 107.
>
> (2) If this subsection applies, there is a rebuttable presumption that the employer or representative of the employer discriminated against the employee on the grounds, or for the reason, specified in s 104(1) and alleged by the employee."

2. The selection criteria

[39] I turn first to the justification for the dismissal with reference to the determination, communication and application of the selection criteria in their broader sense. I have been assisted by a full discussion of the law regarding selection criteria in Brooker's Personal Grievances at 6.8.10 and following.

[40] To summarise what is said about selection criteria in general:

a. in a genuine redundancy situation the employer is entitled to select employees for redundancy;
b. the selection criteria must be properly formulated and applied according to the standard of a reasonable employer acting fairly and in good faith;
c. the selection criteria should be disclosed;
d. in making the selection the employer is entitled to assess its employees' skills and attributes;
e. such assessment may include the employee's attitude, provided the assessment is made in good faith;
f. selection decisions should not be made with reference to irrelevant or incorrect information;
g. failure to adhere to any contractual criteria, or to apply them correctly, will probably render the process unfair.

[41] In **Dunn v Methanex NZ Limited**[3] the alleged areas of unfairness in a selection for redundancy included: the imposition of subjective selection criteria heavily weighted towards behaviour and attitudes**;** the lack of opportunity for meaningful consultation, input, or feedback; and an unfair and biased application of the criteria.

[42] The court in **Dunn** did not rule out the use of subjective criteria – including attitude in general or attitude to the employer company in particular – provided any assessment was made in good faith. If such an assessment were biased, or made in bad faith, the court would intervene.[4]

[43] On the facts in that case, four people made assessments independently of each other. The court commented that the number of assessors allowed the smoothing out of any individual's biases or prejudices. Here while four people completed assessments, the assessment which carried weight was Mr Gilchrist's. Stepping back and viewing the assessments overall, the more senior the assessor, the more adverse was the view of Mr Skelly's attitude. The potential for exposure to allegations of bias in the situation was exacerbated by the failure to allow individuals the opportunity to

[3] [1996] 2 ERNZ 222
[4] At p 231

comment on or discuss their assessments before the assessments were finalised. The provision of such opportunity was simply not part of the assessment process.

[44] An issue before the Employment Court in **Apiata v Telecom NZ Limited**[5] was whether Mr Apiata was unfairly selected for redundancy in that he was not consulted about the subjective assessments made of him even though the employer had acted in accordance with the terms of the applicable collective agreement. The court said:

> "The additional duty imposed by the common law was a duty for the employer to inform itself fairly of the attributes of each employee which were to be used as the basis for the dismissal. That principle of fairness must be applied to each case on its own facts and it may well have been that the employer … could inform itself of those attributes through an examination of its own records and through discussions with the appropriate supervisors and managers. But what is fair about a subjective assessment of an employee's attributes behind closed doors without any opportunity for the employee to comment on those subjective assessments? The exercise should have involved, in the present case, telling Mr Apiata what the individual assessments of him had been so that he could have the opportunity to object if he wished and in that case explain why he objected."[6]

[45] Similar principles apply here. An employer may take into account that an employee tends to be combative or argumentative, and that the tendency tends to be disruptive or impedes efficiency in the workplace. However if it takes such matters into account, it must do so in a fair way. Here Croxley did not take an approach of the kind set out in **Apiata**. I do not accept that any offer of an opportunity for review after the selection was made and communicated - and after the letter of termination of employment was issued - was sufficient to address that flaw.

[46] Croxley submitted that, with the exception of this employment relationship problem, the union has not challenged the process and procedures the company followed. If that is so, again it is not sufficient to address the flaw just identified in respect of Mr Skelly's selection for redundancy.

[47] Croxley also submitted that a consultation process was entered into with the union. That is so up to a point but I would not accept, for example, that the selection

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[5] [1998] 2 ERNZ 130
[6] p 137 - 138

process was an agreed one. Croxley decided the process, and communicated it to the union. Again, such consultation as occurred does not cure the flaw in the selection procedure.

3. Mr Skelly's role as union delegate

[48] As indicated, I do not accept the submission that Mr Skelly was dismissed simply because he was a union delegate. Aspects of his manner of performing the role underlay the relatively lower scores leading to his selection for redundancy. Remaining questions are whether this amounted to an unfair bias in the selection process, and whether such consideration was discriminatory as defined in the Act.

[49] With reference to s 119(1) of the Act in particular: Mr Skelly was dismissed as described in s 104(1); alleges in effect that the dismissal was carried out by reason of a prohibited ground of discrimination, being his involvement in the activities of a union; and has established that he was a person described in s 107. Accordingly there is a rebuttable presumption under s 119(2) that Mr Skelly was discriminated against on the grounds alleged.

[50] In effect Croxley seeks to rebut the presumption by saying Mr Skelly's position as delegate was not the reason for his selection for redundancy, rather the lower scores he achieved in the selection process were based on the questioning and confrontational aspects of his personality. It says further that the selection process was fair and was applied in the same way to all affected staff.

[51] None of the examples given of Mr Skelly's conduct involved Mr Skelly's taking a position that was unreasonable or unfounded with reference to applicable terms of the cea, or his right to argue robustly in support of a colleague facing a disciplinary procedure. In these circumstances concerns about Mr Skelly's attitude and flexibility were inextricably intertwined with his role as a union delegate.

[52] In **NZ Workers IUOW v Sarita Farm Partnership**[7] the Labour Court concluded that 'but for' the grievant's participation in union activities he would not have been selected for redundancy. That principle applies here. I am not persuaded

[7] [1991] 1 ERNZ 510

that there is sufficient distinction between concerns about Mr Skelly's attitude in general, and his attitude as indicated by the conduct of his role as union delegate, to warrant a different conclusion.

4. Conclusion

[53] For the above reasons I find Mr Skelly was unjustifiably dismissed and has a personal grievance.

Remedies

[54] Mr Skelly's claim for reimbursement of remuneration lost as a result of his personal grievance was withdrawn. The remedy he seeks is an order for compensation for the injury to his feelings arising from his personal grievance.

[55] Mr Skelly experienced at the time, and still experiences, a deep sense of unfairness in that his role as a delegate was not separated from his performance as an employee. He said he still has sleepless nights over the matter. While I recognise that as evidence of injury, it is not at the high end of the scale.

[56] Croxley is therefore ordered to compensate Mr Skelly for injury to his feelings in the sum of $5,000.

Costs

[57] Costs are reserved. The parties are invited to reach agreement on the matter. If they are unable to do so any party seeking costs shall have 28 days from the date of this determination in which to file and serve memoranda on the matter. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan
Member of the Employment Relations Authority