Determination Number: AA 264/06
File Number: AEA 1144/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Stuart John Thompson (Applicant)
AND	H J Cooper Limited (Respondent)
REPRESENTATIVES	Kristina Andersen for the applicant Tom Skinner for the respondent
MEMBER OF AUTHORITY	James Wilson
INVESTIGATION MEETING	27 June 2006
DATE OF DETERMINATION	11 August 2006

DETERMINATION OF THE AUTHORITY

Mr Thompson's employment relationship problem

[1] Stuart Thompson had been employed by H J Cooper Ltd as Production Engineering Manager since December 2003. On 21 July 2005 he was called to a meeting with the Managing Director, Ivan Ramsey. Mr Ramsey handed Mr Thompson a letter telling him that his position was redundant and giving him 4 weeks notice of the termination of his employment. Mr Thompson says that he believes that his dismissal was unjustified because:

- The redundancy was not genuine and arose in relation to performance issues that H.J. Cooper had raised with him in June 2005.
- H. J. Cooper did not consult with him prior to making the decision to make his position redundant.
- Mr Thompson was given no warning that his employment would be discussed at the meeting on 21 July or that a redundancy was a possibility, and was not advised to bring a representative with him to the meeting.

Mr Thompson seeks reimbursement of lost earnings, compensation for humiliation, loss of dignity etc of $15,000 and costs.

[2] H. J. Cooper, in response to Mr Thompson's claim, say that Mr Thompson was made redundant because the financial situation of the Company had become a matter of sufficient concern as to warrant immediate steps being taken to correct the situation. After reviewing the alternatives available they decided to make the position of Production Engineering Manager redundant. They say that this decision was entirely a business decision the Company was entitled to make. The Company says that the performance issues, raised with Mr Thompson prior to his being made redundant, were being addressed, were an entirely separate issue and had no bearing on the decision to disestablish his position.

The performance issues

[3] Apparently without prior discussion, on 22 June 2005 Mr Ramsey wrote a memorandum to Mr Thompson headed *Performance of your operational area.* This memo set out a number of issues which Mr Ramsey said the Company was unhappy with. Mr Ramsey also sent Mr Thompson an e-mail, on 25 June 2005, under the heading *Urgent compliance request.* This e-mail contained a list of actions Mr Ramsey required Mr Thompson to undertake. On 26 June Mr Thompson wrote a detailed response to Mr Ramsay and it appears there were subsequent meetings between the two to discuss the various issues raised by Mr Ramsay. Mr Thompson says that there was no further discussion or review of his performance following that meeting.

The respective arguments

H. J. Cooper's position

[4] H. J. Cooper agrees that they did not consult with Mr Thompson prior to making the decision to make his position redundant. They insist that the performance issues raised with Mr Thompson were being dealt with and had absolutely no bearing on the decision to restructure. However they are equally adamant that a review of their financial position made changes imperative to ensure the Company's ongoing financial viability. Mr Skinner, on behalf of H. J. Cooper, says that over the previous month's two other positions had been disestablished and that, once the decision to disestablish Mr Thompson's position had been made there were no suitable alternative positions available for him. Mr Skinner says:

> *It is a well-established law that redundancy involves the position and not the person and the company decided that the position of production manager was to be disestablished as a matter of business judgement made for good commercial reasons as the position was surplus to H. J. Cooper's requirements.*
>
> *An employer's decision to restructure its business and create redundancies is part of its managerial prerogative and as such it is not for the Court or the Authority to substitute its business judgement for that of the employer.*

Mr Skinner relies on the Court of Appeal judgements in *New Zealand Fasteners Stainless Limited v. Thwaites* [2000] 1 ERNZ and *G.N. Hale & Sons v. Wellington Caretakers etc IUOW*. [1990]. Mr Skinner also quotes from the Employment Court's recent decision in *Air New Zealand v Andrea Hudson* (Shaw C M 30 May 2006) to argue that H J Cooper's action was what *a fair and reasonable employer would have done.*

Mr Thompson's position

[5] Ms Anderson, for Mr Thompson, argues firstly that Mr Thompson was not genuinely redundant. She suggests that the financial information provided by H. J. Cooper did not conclusively demonstrate that it had been necessary to make Mr Thompson redundant. She argues

> *If the financial situation was of such an immediate concern then there would have been several redundancies at the same time. In any case even if the financial situation was as dire as claimed (and it is not accepted that it was) there is no evidence to justify why the applicant's redundancy was deemed to be the answer to that predicament (as opposed to other employees being made redundant). In any case the respondents claim as to knowledge of its financial position (early July) and/or Mr Ramsay's knowledge of the redundancy*

decision in about mid-July means that there was sufficient time for consultation to be carried out prior to the 21 July 2005 meeting.

Ms Anderson argues that a fair and reasonable employer would have consulted with its employee regarding issues that might lead to a future redundancy. She suggests there are very limited exceptions to the requirement to consult. These exceptions, she says, might possibly arise in a situation where the whole company has failed and the employer no longer has control. She points out however that that extreme and uncommon situation did not exist in this case.

[6] Ms Anderson also submits that section 4 of the Employment Relations Act reinforces the obligation of an employer to consult with its employees if it is considering a restructuring which will effect those employees.

Legal principles and discussion

The requirement to consult

[7] Ms Anderson, correctly, accepts that there are some rare exceptions to the duty of an employer to consult with its employees regarding prospective redundancies. (*Clemow v. McKechnie Pacific (NZ) Ltd* [1998] 1 ERNZ 36). However I agree with her assessment that this is not such a case. Even if it is accepted that the financial position H. J. Cooper found itself in required a reduction in overall staff numbers there is no evidence that such a decision had to be made in haste. On the contrary Mr Ramsay's evidence was that the Company had reduced its staff over several months. There is no evidence that Mr Thompson could not, or should not, have been consulted. Mr Thompson was a senior staff member and Mr Ramsay agreed that, in his position as Production Engineering Manager, Mr Thompson was involved in ongoing discussions regarding the day to day management of the company. Proper consultation with Mr Thompson could have taking place in a matter of days.

[8] Mr Skinner places great weight on the Court of Appeal decisions in *New Zealand Fasteners Stainless Ltd v. Thwaites* [2000] 1 ERNZ 739 to argue that the decision of an employer to restructure its business and create redundancies is part of its managerial prerogative and it is not for the Authority to substitute its business judgement for that of the employer. However the Court of Appeal in its decision in *Thwaites*, at page 747, said:

> *…The genuineness of any determination of redundancy can be reviewed. If it is not one the employer acting reasonably and in good faith could have reached it may be impeached. In any such review* ***it may be relevant that the employer did not consult with affected employees or consider whether the redundancy might have been avoided by redeployment or otherwise****. Absence of such steps might in particular circumstances indicate absence of genuineness in the determination. Where there is a genuine redundancy that will justify termination of the employment of the person in the position. In the course of the employer's consideration of the position* ***and in carrying out the dismissal the obligation of good faith and fair treatment applies.*** *Any failure to discharge that obligation that in itself is unjustifiable may result in remedies appropriate to the breach. (Emphasis added)*

[9] The obligation of an employer to consult with their employees was reinforced by amendments to the Employment Relations Act 2000 (the Act) enacted in 2004. The Act, at section 4 says:

> ***4 Parties to employment relationship to deal with each other in good faith***
> *(1) The parties to an employment relationship specified in subsection (2)—*
> *(a) must deal with each other in good faith; and*
> *(b)…..…*

The 2004 amendments added several new clauses to section 4, including:

> *(1A) The duty of good faith in subsection (1)—*
> *(a) is a wider in scope than the implied mutual obligations of trust and confidence; and*
> *(b) …*
> *(c) without limiting paragraph (b), requires an employee who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of one or more of his or their employees to provide the employees affected---*
> *(i) access to information, relevant to the continuation of the employees employment, about the decision; and*
> *(ii) an opportunity to comment on the information to the employer before the decision is made.*
> *(1B) Subsection (1A)(c) does not require an employer to provide access to confidential information if there is good reason to maintain the confidentiality of the information.*

(For completeness I note that H. J. Cooper do not argue that they were unable to consult with Mr Thompson because *there (was) good reason to maintain the confidentiality of the information.)*

[9] In the absence of consultation Mr Thompson was left to draw the logical inference that the termination of his employment was directly related to the issues of performance drawn to his attention only weeks before. Had Mr Ramsay taken the time to consult with Mr Thompson he could have explored with him options for addressing the Company's financial difficulties. Mr Ramsay says that the Company had no alternative but to disestablish Mr Thompson's position. This may have been the case but a fair and reasonable employer, acting in good faith, would have at least given the employee an opportunity to propose alternatives before the decision was made.

The genuineness of Mr Thomson's redundancy

[10] During the Authority's investigation H. J. Cooper produced information to support their contention that they had no option but to reduce staffing levels and that there were no alternatives to making Mr Thompson's position redundant. It is a great pity that this information (or at least the general gist of the Company's financial position) was not discussed with Mr Thompson before the decision was taken to terminate his employment. Ms Anderson has argued that the information provided is by no means conclusive and that the Company did have alternatives to making Mr Thompson redundant. I have reviewed all of this material including Mr Ramsay's verbal evidence about other employees' positions within the Company. I have reached the conclusion that, had H. J. Cooper followed a proper process of consultation it would have been opened to them to reach the conclusion that Mr Thompson's position should be disestablished. In other words, but for the lack of consultation, Mr Thompson was genuinely redundant.

Consultation regarding termination

[11] In her submissions Ms Anderson suggests that a fair and reasonable employer would have ensured that once the redundancy decision had been made it would then follow a fair process with regard to the affected employee. She says that this would include considering redeployment, the period of notice to be given, and how to make the employee's transition out of the business as easy as possible. She says that H.J. Cooper failed to consider any alternatives for Mr Thompson within the Company and H. J. Cooper made his period of notice, which they required him to work, awkward and uncomfortable. In response H.J. Cooper argue that if there were no alternative positions for Mr Thompson, he was offered assistance to help him find other employment. They say that Mr Thompson at no time approached the Company requesting any assistance or help whatsoever.

[12] Mr Thompson was entitled to at least the courtesy of a discussion regarding alternative positions within the Company, and some consultation as to how his transition out of the Company could be handled to minimise the inevitable stress and trauma. Neither of these discussions took place. While a personal discussion with Mr Thompson may not have ameliorated the stress and trauma he was feeling it would perhaps have helped him to come to terms with the Company's decision and assisted in maintaining his self-esteem and dignity. Instead the Company chose to assume that, because Mr Thompson did not take the initiative and ask for support, he did not require assistance. Merely indicating in a letter of termination that assistance is available is not sufficient for an employer to fulfil its obligation of fair and reasonable treatment.

Determination

[13] I have found that Mr Thompson's employment was terminated due to genuine redundancy. However I have also found that his employer, H. J. Cooper, failed to fulfil their obligations to consult with Mr Thompson before making the decision to disestablish his position and failed in their obligation to consult with him regarding the consequences of that decision. **H. J. Cooper's actions in failing to consult with Mr Thompson were not, in all the circumstances, those of a fair and reasonable employee and were therefore unjustified. Mr Thompson has a personal grievance against H. J. Cooper.**

Remedies

Contribution

[14] In terms of section 124 of the Act I am required to consider whether Mr Thompson's actions contributed to the situation that gave rise to his personal grievance. H. J. Cooper chose not to consult with Mr Thompson. Under these circumstances it cannot be said that Mr Thompson contributed to the situation in any way.

Reimbursement for wages lost

[15] As I have already indicated, if H. J. Cooper had fulfilled its obligations to consult with Mr Thompson, H. J. Cooper would probably have disestablished Mr Thompson's position. He would, in all probability have been made redundant. Under those circumstances he would have received the same period of notice i.e. one month. It is not appropriate to reimburse Mr Thompson for wages he would not have received.

Compensation for hurt humiliation

[15] Mr Thompson says that treatment of him during his period of notice was extremely humiliating and the situation was stressful for both him and his family causing his health to deteriorate. Mrs Thompson, in a written statement, said that the dismissal *had a huge impact on Stuart; (she) noticed that he was becoming depressed, anxious and irritable*. Even when a genuine redundancy is managed compassionately the effect on the employee concerned can be devastating. In this case H.J. Cooper failed to consult with Mr Thompson before making their decision, advised him of that decision without warning and without giving him the opportunity to obtain support or advice, and failed to properly appreciate the effect that their decision would have on Mr Thompson and his family. I have no doubt whatsoever that his employer's actions caused Mr Thompson a good deal of unnecessary stress, hurt and humiliation for which Mr Thompson is entitled to be compensated.

[16] **In terms of section 123(1)(c)(i) of the Employment Relations Act, H. J. Cooper Ltd is ordered to pay Mr Thompson $12,500 without deduction.**

COSTS

[17] Costs are reserved and the parties are urged to attempt to settle this question between themselves in the first instance. If they are unable to do so Mr Thompson may file and serve a submission in respect to costs within 28 days of the date of this Determination. Should such a submission be filed, H. J. Cooper will be given 14 days in which file and serve a response.

James Wilson
Member of Employment Relations Authority