

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Russell Trotter (Applicant)
AND AMP Services (NZ) Ltd (Respondent)
REPRESENTATIVES Peter Cranney for Applicant
Karen Spackman for Respondent
MEMBER OF AUTHORITY G J Wood
INVESTIGATION Wellington, 16 November 2006
MEETING
FURTHER SUBMISSIONS Received by 4 December 2006
DATE OF 19 January 2007
DETERMINATION

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

1. Mr Trotter claims that his dismissal for redundancy was not genuine as his job remained throughout. Further, in breach of the employment agreement, he was never asked to accept any changes to his job suggested by AMP; AMP had not explored all reasonable redeployment opportunities and that it did not act in good faith. He seeks reinstatement, lost wages, compensation and costs. AMP denies each of Mr Trotter's claims.

The Facts

2. Mr Trotter was a skilled and experienced employee of AMP who commenced work for it in 1990. In the course of employment with AMP he became fully qualified as an actuary. Between 1998 and 2004 he worked as a Financial Services Actuary. Following restructuring in that year, Mr Trotter's position as a Financial Services Actuary was made redundant. He carried on working for AMP from July in unit pricing work. In September 2004, he was appointed Manager of Unit Pricing, which meant that an important role in AMP was filled and Mr Trotter was able to continue

on in employment. This role was within AMP's New Zealand Financial Services Division.

3. Unit pricing involves setting a daily price for units in AMP's various financial products, such as unit trusts. The manager's role involved the oversight of several staff and included two main functions: the mechanics of unit pricing and the support functions, i.e. the checking and auditing role, known as fund accounting.
4. The detail of Mr Trotter's job was contained in a role description attached to an offer of employment. Mr Trotter also signed an individual employment agreement, which constituted the entire agreement and required any variation to be recorded in writing and agreed by the parties.
5. Clause 18 dealt with redundancy. This was defined as:

“A situation where the employee's employment is terminated by AMP, the termination being attributed wholly or mainly to the fact that the position filled by that employee is, or will become, superfluous to the needs of AMP or where there is to be a significant change to the duties required to be performed in terms of the position held by that employee, which the employee does not agree to accept.”

6. The redundancy clause provides for redeployment. It states:

“(c) Redeployment

- (i) If the Employee's position has become superfluous, AMP will explore all reasonable redeployment options that may be identified by either party.*
- (ii) Any offer of redeployment will be in writing and will include sufficient information to enable the Employee to make an informed decision on whether to accept the offer. If the Employee receives an offer of redeployment he/she will be given 7 days to decide upon the offer or 14 days in the case of redeployment which requires a change of residence.*
- (iii) If the Employee declines an offer of a Directly Comparable Position he/she may be made Redundant but will not be entitled to receive any Redundancy Compensation.*
- (iv) If where the Employee is offered redeployment to a position which is not Directly Comparable, the Employee will be entitled to decline that offer without forfeiting his/her entitlement to Redundancy compensation.*

(v) *As an alternative to Redundancy, AMP may offer the option of continued employment in a position with a lower job level on the following basis:*

(aa) *The offer is an alternative to Redundancy with the objective of allowing the Employee to continue in employment;*

(bb) *The Employee may choose to accept the lower evaluated position or to take Redundancy.”*

7. In October 2004, Mr Trotter became responsible to Mr Rhys Clark, when the latter was employed as Manager Accounting Operations. It was clear from both Mr Trotter and Mr Clark's evidence that for various reasons the unit pricing area was not running smoothly. AMP itself was going through major changes. There was very high staff turnover. Mr Trotter had to oversee a new spreadsheet to compile daily unit prices and the need to focus on unit pricing (which had to be done daily) meant that fund accounting aspects were being neglected.
8. In part at least to address these problems, Mr Clark employed a contractor with a background in audit work to report directly to him on some fund accounting matters. No change to Mr Trotter's employment agreement was made as a result, at least not in writing as required by his individual employment agreement. This meant that Mr Trotter's involvement in fund accounting lessened even more, although he still remained responsible for other staff who had fund accounting responsibilities. From Mr Clark's perspective, this was an initiative to try and assist the effectiveness of the Unit Pricing Division as a whole. I accept that this contractor assisted the Unit Pricing Division's operations, but the appointment did not change Mr Trotter's responsibilities on his job description - in particular, as Mr Trotter, as an actuary, had the ability to oversee the fund accounting parts of his role.
9. Mr Roger Perry was and is the General Manager of Savings and Investment. Savings and Investment was responsible for product manufacture, sales and customer administration, such as the registry function. Thus Mr Perry's area was directly affected by the unit pricing function. He had no managerial oversight for it, however.

10. As a result of all of the above concerns, the AMP Executive put forward a proposal to align the production aspects of the Unit Pricing Division, namely unit pricing, with Savings and Investment (Mr Perry's area) and to have a discrete fund accounting role continuing to report to Mr Clark. In essence, the proposal was designed to separate the transactional work from the auditing and support work. I accept that there were good business reasons to do so, especially given the benefits of separating "*the checking from the doing*". One consequence of this proposal would mean the disestablishment of Mr Trotter's position and its replacement by two new, but lower graded management positions. While Mr Trotter accepted that there were good grounds for this separation, he did not accept that this should mean that he should lose his job.
11. The first time Mr Trotter became aware that there was any possibility of changes to his position was on 1 June 2005 when he was called to a meeting with Mr Clark and Ms Tanya Fletcher-Dunlop of Human Resources. At that meeting, Mr Trotter was told that AMP proposed in effect splitting his job in two. Contrary to Mr Trotter's evidence, I find that he was told he would be consulted later about the implementation of the proposal. I also find that there was no statement from Ms Fletcher-Dunlop to the effect that this was not a restructuring exercise.
12. On 7 June, a meeting was held with Mr Trotter's staff telling them that Unit Pricing would move from Finance to Savings and Investment, that Fund Accounting would stay in Finance and that work on the separation process was continuing.
13. Mr Clark and Ms Fletcher-Dunlop had another meeting with Mr Trotter that day and told him that as his role was more than 30% different than the new Unit Pricing Manager's role, his position would be disestablished. Mr Trotter's position was the only one affected within his team.
14. On 10 June 2005, Mr Clark sent Mr Trotter a letter stating the following:

"Further to our recent discussions, the purpose of this letter is to confirm AMP's decision to split and realign accountability for Unit Pricing together with the reasons for this, and to consult with you about the process to be followed in giving effect to this change and its impact on the role you currently occupy, Manager, Unit Pricing.

...

As a result of AMP's decision to split and realign the Unit Pricing function as part of the process of creating greater business line accountability, your role as Unit Pricing Manager has been directly affected. This is not notice of termination, it is notice that your role will cease, not your employment.

The proposed consultation process for giving effect to AMP's decision is set out below. However, it is important that you have the opportunity to comment on the proposed process outlined in this letter and the impact of the decision on the role you currently carry out. I would welcome any comments you have regarding these matters, including if you would like for us to explore other options for you that are not outlined in this letter, by 5:00pm, Friday, 17th of June 2005.

Redeployment

In line with the redeployment provisions of your Employment Agreement, I will make formal enquiries within AMP to identify possible redeployment options for you. I would also like you to think about possible redeployment options that you would like to explore further. If you do not wish for AMP to identify possible redeployment opportunities for you, please let me know.

In the event that we are unable to identify and offer you a suitable alternative position, a formal notice of redundancy will be issued."

15. Mr Trotter responded on 20 June 2005, in effect endorsing the shift to separate Fund Accounting from Unit Pricing, but also seeking a technical role by way of redeployment:

"In response to your letter of 10 June 2005 these are my comments on the proposed change in reporting line and responsibilities of the Unit Pricing manager role:

I do not oppose the change in reporting line, although tend to think that unit pricing is more closely aligned to accounting functions than product.

I think that separating Fund Accounting from the Unit Pricing Manager responsibility is a positive step.

I feel there is scope in AMP Services for a role aligned towards having a sound overall understanding of Unit Pricing. The role would be around monitoring and improving Unit Pricing processes.

...

I see the role as a technical role (non managerial).

I am happy to discuss"

16. In mid-July, Mr Trotter and Mr Clark had discussions about what would happen to him as a result of the changes to the Unit Pricing Division. As a result, Mr Clark sent Mr Trotter an email on 17 July 2005. The email states:

“As previously advised, effective from Monday 18th of July you will change your reporting line to Roger Perry and will continue to have accountability for managing the unit pricing team (BAU) including daily unit pricing until a Manager, Unit Pricing Operations (S&I) is appointed. When the new appointee commences in this role, the daily unit pricing component of your role (and the team that conducts this function) will be transitioned to the new daily Unit Pricing Operations functions in S&I.

Upon the appointment of the Manager, Unit Pricing Operations there will be a maximum three month transition period between yourself and the new appointee to enable an effective hand-over of responsibilities. A transition plan detailing the transfer of duties to the new role and by when will be agreed with you shortly.

During the transition period we will commence an assessment of the ongoing need for technical Unit Pricing resource and capacity for this will be determined by Roger Perry. At this time we will also explore and discuss suitable redeployment opportunities with you. Please note that you have an important role to play in the redeployment process in that you are expected to look for and identify any redeployment opportunities you wish for us to explore.

The new role of Manager Unit Pricing Operations has been advertised both internally and externally and we are currently receiving cv's so that we may prepare a short-list for interviewing. At this stage, we expect the recruitment process to take at least 6-8 weeks from today's date. You are currently assisting Roger and I with the recruitment of the two Unit Pricing Analyst vacancies – thank you for your support with this process to date.”

17. Mr Trotter gave evidence, which Mr Clark denied, that Mr Trotter approached Mr Clark the next day to ask him whether he should apply for the Unit Pricing Manager's position and Mr Clark told him that AMP did not want him as the Unit Pricing Manager. I find that Mr Clark made no such clear direct statement to Mr Trotter, even though Mr Trotter's evidence was supported by what he told his wife later, by Mr Clark's imperfect recollection of the period and the tone of the email of the previous day. Rather I find that Mr Trotter is mistaken about what Mr Clark told him, given the passage of time, on the balance of probabilities. I do so in part because I do not accept that Mr Trotter correctly ascertained what he was told at the meeting of 1 June. This is not a criticism of Mr Trotter, who no doubt was shocked by the proposal/decision being put forward, but it shows that his memory may be faulty. It therefore makes it more likely that he was mistaken about his later conversation with Mr Clark. Furthermore, Mr Trotter did not raise this conversation in any of his subsequent dealings with AMP, whether in writing or orally, and the

letter of grievance raised by his union does not refer to this key point. Mr Trotter knew that the position reported to Mr Perry and he could have raised the issues with him but did not, other than later questioning him as to whether Mr Trotter had been fairly treated. Mr Perry replied that he believed that Mr Trotter had, in all the circumstances.

18. I therefore conclude that Mr Trotter and Mr Clark did have a conversation on the day in question and that Mr Trotter did come away with a clear view that he was not wanted by AMP as the Unit Pricing Manager, but that this was not as a result of a direct statement by Mr Clark.
19. Over the next few months, Mr Trotter acted as the new Unit Pricing Operations Manager until a permanent appointment was made and even then on occasions in the new appointee's absence.
20. The new manager, Mr Ben Weston, decided that there was no requirement for a new technical position such as that suggested by Mr Trotter. Mr Perry therefore decided he had no alternative but to end the transition period and thus Mr Trotter's employment as at 18 November. He accordingly wrote to him on 7 September 2005 stating:

“Following on from our discussions in the last few weeks, the realignment of the Unit Pricing function between Savings & Investment and Finance has been confirmed, directly affecting your position as Manager, Unit Pricing.

Redeployment opportunities have been explored by both parties, and while we have not been able to find you any permanent roles, we are able to confirm that there will still be some transition work available for you for the next three months.

...

AMP will continue to look for alternative redeployment opportunities for you during this transition period. Could you also please advise us if there are any other redeployment options that you would like us to explore further.

...

If no redeployment opportunities are available, AMP will provide you with no less than 6 weeks written notice of termination or a payment in lieu of all or part of the required period of notice.”

21. I note that this confirms that redeployment opportunities had at that time been sought already, but had not resulted in any positive outcome for Mr Trotter. In this regard, I assume that efforts had focused on the technical position proposed by Mr Trotter.
22. Mr Trotter later accepted the further transitional work offered without prejudice to his concerns over the validity of the redundancy.
23. In October, Ms Melanie Sutherland, the new Human Resources Manager, sought to meet with Mr Trotter about his concerns, but no meeting of any significance took place. On 31 October Ms Sutherland emailed all relevant managers to ensure that no redeployment opportunities had been missed. On 3 November, Mr Trotter's redundancy was confirmed with effect from 18 November, together with a payment in lieu of notice of another four weeks.
24. The parties have made numerous efforts, including undertaking mediation, to resolve matters between them but that has proved unsuccessful. It therefore falls to the Authority to make a determination.

Credibility

25. There can be no certainty about events which occurred many months before. The Authority is required to make determinations on the balance of probabilities, i.e. what is more likely to have happened than not. In doing so, the Authority is required to look first at independent sources of evidence as to what occurred, such as contemporaneous correspondence, and then to evaluate matters in the context of the overall circumstances surrounding the matters in dispute.
26. In this case, I have decided matters of credibility not on any basis of determining that witnesses were not telling the Authority the truth, but rather on which set of perceptions were more likely to be accurate in each disputed event.

The Law

27. The leading case on personal grievances involving redundancy is *Simpsons Farms Ltd v. Aberhart*, unreported, Colgan CJ, AC52/06, 14 September 2006.

28. In para.[67] the Court held:

“So long as an employer acts genuinely and not out of ulterior motives, a business decision to make positions of employees redundant is for the employer to make and not for the Authority or the Court, even under s.103A.”

29. In *Aberhart* the Court was dealing with a farm manager whose position was made redundant following restructuring whereby a new position of Dry Stock Manager for a number of farms was created and the Manager’s position that Mr Aberhart held on one particular farm was disestablished.

30. The Court held, at para.[68] ff:

“[68]Pursuant to s013A, I am satisfied that a fair and reasonable employer would have concluded that in all the circumstances then confronting SFL in early to mid 2005, managerial restructuring was not only appropriate but necessary. Staying with “the employer’s actions” under this section, I am satisfied that a fair and reasonable employer in all the circumstances at that time, and following consultation with Mr Aberhart, would have concluded, as SFL did, that both a drystock farms’ manager’s position should have been created and that the position at the Te Akau farm occupied by Mr Aberhart would have to be disestablished. I am reinforced in those conclusions by Mr Aberhart’s own acknowledgement to SFL during this process that he understood and accepted the business needs leading to these decisions. It follows, also in my conclusion, that once a decision had been made to disestablish the Te Akau farm manager position and Mr Aberhart had not applied for or of course been successful in obtaining the new managerial position, it was fair and reasonable that he be dismissed on notice as he was. [69]It is the other statutory consideration under s103A (“how the employer acted”) and whether a fair and reasonable employer would have so acted in all the circumstances at the time of dismissal or disadvantage action in employment, that provides difficulty for SFL in this case. [70]For reasons earlier set out, consultation with Mr Aberhart was necessary before SFL made its restructuring decisions. As part of consultation, Ms Green’s reasonable proposal made on behalf of Mr Aberhart that he be trialled in the proposed new position to gauge his suitability for it, was rejected immediately, out of hand, and without any consideration by Mr Simpson. That is not to say, of course, that SFL was bound to have agreed to this proposal. But it was, as I have already found, a reasonable suggestion warranting consideration in all the circumstances. The principles of consultation now accepted by SFL’s counsel required open-minded consideration by the employer and not immediate rejection that indicated a closed mind, if not predetermination. That was the first breach by SFL of its consultation and other good faith dealing obligations under s4 that constituted an unjustified disadvantage in employment to Mr Aberhart.

[70] Later in the process, Mr Aberhart wanted to consider alternatives to the disestablishment of his position and indicated this to SFL at an early stage. He reasonably sought information about the proposed reorganisation and about the new position to be created. Although I accept that a draft employment agreement had not been prepared even at the stage of interviewing applicants for the position, it is inconceivable that no thought whatsoever had been given to terms and conditions of employment. Some information, in addition to a draft job description, would have been available, not only to outside applicants for the position but to Mr Aberhart who was considering his options. SFL did not respond at all to that reasonable request for information from Mr Aberhart. It is difficult to understand why it could not have done so in the circumstances and the refusal even to acknowledge his reasonable requests, let alone the failure to supply any information at all, was a breach of the consultation requirements of Mr Aberhart's employment agreement and of s4 of the Act. That was an independent element of unjustified disadvantage in employment."

31. In assessing compensation, the Court also looked at whether Mr Aberhart should have applied for the new position and held at para.[84]:

"[84] The evidence in this case does not go so far as to establish what may have happened had SFL dealt with Mr Aberhart in good faith as s4 requires. He may have applied for the drystock farm manager position although, against that, his second reason for not doing so (he felt he should not have to apply for his own job) may not have been dislodged. It is even more speculative whether Mr Aberhart might have been appointed to the position had he applied. Although I would not go so far as to conclude that his decision not to apply for the job was conduct that contributed to the personal grievance that should reduce his remedies (because the unjustified disadvantage was brought about by SFL's acts and omissions before the opportunity to apply was closed off), with the benefit of hindsight Mr Aberhart may have been better advised to have attempted to keep his options more open by applying for the new position."

Determination

32. I find that *Aberhart* has significant similarities with Mr Trotter's situation, albeit that Mr Trotter's employment agreement is far more prescriptive in terms of what constitutes redundancy, the redundancy process and, in particular, how redeployment options should be approached.
33. Looking specifically at the employment agreement, it is clear that as a result of AMP deciding to split the Unit Pricing and Fund Accounting roles, Mr Trotter's position (particularly as it had not been formally or in practice changed, or for that matter

ratified by agreement in writing as required) was superfluous to the needs of AMP. The changes to his position were significant and took place for genuine business reasons, which Mr Trotter in essence agreed with. Given that this part of the redundancy definition was met there is no need to assess whether the latter criterion (involving a need for Mr Trotter to decline to accept changes) was met. It therefore follows that Mr Trotter's dismissal for redundancy was substantially justified.

34. AMP was also required to explore reasonable redeployment options that may be identified by either party. Mr Trotter explicitly suggested one proposal for redeployment. I accept that this was genuinely looked into by Mr Perry and then by Mr Weston, but that they believed that a genuine business case for it could not be sustained. I accept Mr Perry's evidence in this regard, albeit that he deferred to Mr Weston because Mr Weston was the manager responsible.
35. I also accept that Mr Clark and Mr Perry made attempts in advance of Ms Sutherland's formal letter of 31 October to identify alternative redeployment options for Mr Trotter. As noted in the correspondence, at first these focused on Mr Trotter's proposal and identified vacancies (of which there were none suitable). Finally, Ms Sutherland sought to meet with Mr Trotter and formally notified all managers of the need to ascertain whether Mr Trotter's employment could be continued by way of redeployment, albeit at a later stage than would be desirable.
36. In all the circumstances I conclude that AMP met its requirements to explore all reasonable redeployment options.
37. Under clause 18(c)(v), AMP may offer continued employment in a position with a lower job level as an alternative to redundancy if the employee is agreeable to it. There is no evidence that Mr Trotter would have accepted the position of Unit Pricing Operations Manager at the lower salary that was being offered. In particular, he did not apply for it. The lower salary would have affected his redundancy entitlements and it was not an actuarial position, although Mr Trotter had not directly held such a position for some time. In any event, this provision is permissive and does not require AMP to offer staff going through the redundancy process such alternative positions at a lower job level. The fact that it widely advertised the

position is evidence that it made a conscious decision not to offer the job to Mr Trotter by way of redeployment.

38. In this case I am satisfied from Mr Perry's evidence that had Mr Trotter applied for the position of Unit Pricing Operations Manager, he would have been considered along with all other applicants, but that he did not encourage his own staff to apply for particular positions because that could lead to downstream complications.
39. I therefore conclude that AMP met its redeployment responsibilities.
40. Further to these issues of substantive justification for redundancy, the law also requires employers to adopt a fair procedure in implementing redundancies, to ensure, for example, a dignified exit for staff who have done no wrong but whose positions are no longer required by an employer. Pursuant to its general obligations, particularly under s.4 of the Act, consultation is mandatory. Consultation requires more than just mere prior notification and proposals must not be acted upon until after consultation. While an employer is entitled to have a working plan already in mind, it must have an open mind and be ready to change and even start anew following consultation.
41. In this case, I find that AMP effectively limited its consultation with Mr Trotter to issues about how the new unit pricing and fund accounting roles would operate and how this would impact on Mr Trotter's employment. His position, however, was effectively redundant already because the decision had been made, albeit that it was couched as a proposal, that Mr Trotter's position would be disestablished by 1 June at the latest.
42. Thus, on 1 June, while the matter was put to Mr Trotter as a proposal, in effect there was no consultation with him sought or undertaken before he and his staff were told on 7 June that the changes would definitely take place. Thus the consultation that followed, while it met the requirements of consultation about the impact on Mr Trotter of the changed structure, could not possibly deal with AMP's obligations under s.4(1A)(c) requiring an employer who is proposing to make a decision that will have an adverse effect on the continuation of employment of an employee to provide to that employee access to information relevant to the continuation of his

employment, about the decision; and an opportunity to comment on the information to the employer before the decision was made.

43. Despite this fundamental failure by AMP, I find that this does not mean that its business rationale, accepted by Mr Trotter, is called into question. As a result the substantive justification for Mr Trotter's termination of employment for redundancy still applies.
44. Consistent with *Aberhart*, I find that this constitutes actions to Mr Trotter's disadvantage rather than a personal grievance for unjustified dismissal. It is also a breach of AMP's obligations of good faith towards Mr Trotter, but that is simply restating the above conclusion and can lead to no change in remedies.

Remedies

45. Consistent with *Aberhart*, I find that as the dismissal was justified in substance, the claim for lost wages can not succeed. Mr Trotter is, however, entitled to compensation. As a longstanding employee of seniority he was clearly affected by the decision to present him with a *fait accompli*, which eventually meant that he lost his job and his income. The contractual provision of redundancy compensation goes little way to assuage the shock he felt at the time, particularly as evidenced by his wife. He felt AMP had decided to jettison him once he had completed the difficult task of implementing a new spreadsheet, a feeling which may have been allayed somewhat with meaningful consultation.
46. In *Aberhart* the Court found that compensation of \$15,000 was an appropriate sum to be awarded. I consider that a similar amount is appropriate here. I therefore award Mr Trotter the sum of \$15,000 compensation under s.123 (1)(c)(i).
47. I find that there was no contributory fault by Mr Trotter in not applying for the Unit Pricing Operations Manager position. He was not encouraged to apply for it and genuinely felt that he was not wanted in that position by AMP. Furthermore it would have led to a significant reduction in his salary.

Costs

48. Costs are reserved.

G J Wood
Member of the Employment Relations Authority