

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 238  
5514841

BETWEEN KEVIN HUGH DAVID VAN  
DER MERWE  
Applicant

A N D GLASSHAPE LIMITED  
Respondent

Member of Authority: T G Tetitaha

Representatives: Applicant in person  
J Foden, Advocate for Respondent

Investigation meeting: 6 – 7 August 2015

Submissions received: 28 & 29 July and 7 August 2015

Date of Oral Determination: 7 August 2015

Date of Written Determination: 10 August 2015

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**ORAL DETERMINATION OF THE AUTHORITY**

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**A. The application for a personal grievance is dismissed.**

**B. Costs are reserved. If either party seeks an order for costs, a memorandum shall be filed and served 14 days from the date of the written determination. The other party shall have 14 days thereafter to file and serve a reply.**

**Employment Relationship Problem**

[1] Kevin Hugh David Van der Merwe filed an application about a personal grievance alleging he was unjustifiably dismissed for redundancy. He says his role was not superfluous, there was no consultation before the redundancy decision was

made on 3 July and he was selected because of his non-membership of the Brethren Church.

### **Facts leading to dispute**

[2] The facts leading to the dispute are as follows. The parties entered into an employment agreement on 26 November 2012. The applicant started work as a Production Manager or PDM.

[3] Clause 14.12 of the employment agreement provided for redundancy *where an employee's employment is terminated by the employer wholly or mainly due to the fact that the position filled by the employee is or will become superfluous to the needs of the employer*. Clauses 14.13 and 14.14 of the employment agreement also provided that notice shall where practicable be the period of notice specified in Schedule A of four weeks and there was no entitlement to redundancy compensation.

[4] During 2014 the respondent experienced an increase in production volume resulting in the applicant's workload being too much for one person.

[5] By July 2014 the respondent company had engaged the services of a consultant, Simply Lean Business Solutions. The consultant was to review the lean systems and training for the new team members and to give a lean refresher to the management team.

[6] On 3 July 2014 Rick Forrest, Respondent Managing Director met with the applicant and the consultant to discuss implementation of lean team principles. At the end of the day a further interaction occurred between Rick Forrest and the applicant. There is some dispute as to what was said and whether what was said resulted in the applicant's redundancy.

[7] The consultant provided a report suggesting a review of the company's structure to include a couple of Lean Team Leaders and a standardised work procedure for the team leaders.

[8] On 7 July 2014 a new role was advertised internally. There is some dispute as to whether this role was for the position of production administration assistant or not. This role was filled by Shaun O'Meara.

[9] On 16 July 2014 the applicant met with Clint Brickhill, HR Manager and Mr Forrest. At that meeting some changes to the PDM role were discussed. There is some dispute as to whether those changes were confirmation of a redundancy or not.

[10] On 22 July 2014 the applicant, in a response to a request from Mr Brickhill, emailed about his alleged changed role from his perspective. This included a proposition the Operations Manager was to assume the planning and administration functions of the applicant's role and the remainder of the role to fall to the applicant.

[11] As a result of that email Rick Forrest sent a letter to the applicant starting a formal process to consult about his job. There were three options given. Firstly the Operations Manager was to assume the planning and administration functions of the applicant's role and the remainder of the role to fall to the applicant; secondly to maintain the status quo; and thirdly any other options the applicant may suggest. The tenor of the letter was to start consultation about possible restructuring and/or redundancy.

[12] That same day around the same time, the applicant emailed Mr Brickhill seeking time off because he had arranged interviews with potential employers. The email also noted he would not be applying for the two new roles of production planning and administration assistant to the operations manager or lean team leader, factory foreman/leading hand supervisor.

[13] On 29 July 2014 the applicant met with Mr Brickhill and Mr Forrest. The purpose of the meeting was to discuss the redundancy proposal set out in the letter of 24 July 2014.

[14] On 30 July 2014 Mr Forrest wrote to the applicant noting their agreement that the current factory manager responsibilities were too much for one person and the creation of a new role of factory/production manager with planning and administration being transferred to the operations team. The factory/production manager position was offered to the applicant on the same terms as his current role with a modified job description. The applicant was given until 4 August to accept the role. His advice was also sought about whether he would express an interest in a sales team role. It also referred to an extended period of notice to 31 October and an offer to provide a reference and time off for interviews during the notice period.

[15] On 4 August 2014 the applicant advised by email that it was time for him to move on and he wished the company well.

[16] By letter dated 4 August 2014 Mr Forrest replied advising the applicant's employment would end on 31 October 2014 in accordance with the notice period provided and the extended notice period provided in the earlier letter of 30 July. He also advised that the position would be disestablished from 31 October 2014 and that they were planning a transition process to recruit for the new production manager.

[17] On 5 April 2015 the applicant emailed saying he had no option but to resign from his current role. That same day Mr Forrest emailed his various employees advising the applicant's role was being disestablished and that he had declined the role of production manager. On the same day he emailed the applicant accepting his formal resignation as at 5 August making his last working day 2 September 2014.

[18] On 6 August 2014 the respondent advertised on TradeMe for the full time permanent position of Lean Team Leader.

[19] On 13 August 2014 Mr Van der Merwe emailed Mr Forrest raising a personal grievance. His last day of work was 18 August 2015.

[20] By 20 August 2014 the matter was unable to be resolved and a statement of problem was filed. The matter is now before me for determination.

### **Issues**

[21] After some discussion at the beginning of the hearing the unjustified disadvantage grievance has been withdrawn and is dismissed.

[22] There are only two issues before the Authority. These are:

- (a) Whether the reasons for redundancy were genuine? and
- (b) Was the process leading to dismissal for redundancy what a fair and reasonable employer could have done in all the circumstances?

## **Applicants Submissions**

[23] At hearing the applicant submitted that all of his actions were based on a situation that was not created by him but by management. He tells me that it is management's actions that have brought about the breakdown of trust and communication. He states he would have expected the respondent to be more engaging and they should have given him the information they relied upon, such as the consultant's report and the organisation charts.

[24] In his written submission it is submitted the applicant was made redundant on 3 July 2014. He submits that as he was closing up on that day the respondent instructed him to commence the duties of a lean team leader on the factory floor full time and hand over all administrative/planning duties to another staff member. He further submits that he then put the respondent on notice that he saw this as a major change to his role, to the extent of over 80%, and did not consent to this.

[25] He then alleges the respondent put in place a retrospective restructuring process and relied upon discussions with the consultant and its recommendations in a consultant's report to justify the restructure. He states no other information was shared with him.

[26] While this process was underway he also asserts that new jobs were being advertised on the company notice board and that the applicant was training other staff in aspects of his role on the respondent's instructions. He submits that the respondent made him redundant on 30 July 2014 on the basis of the consultant's report and formally offered him a lesser role which he declined.

## **The Law**

[27] The law on redundancy is fairly well known. I may review the business decision to make an employee redundant to determine whether it is the decision and how it was reached were what a fair and reasonable employer could have done in all the relevant circumstances.<sup>1</sup>

[28] A decision to make an employee redundant must be shown to be genuine where genuine means the decision is based on business requirements and not used as a pretext for dismissing a disliked employee. If an employer can show the redundancy

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<sup>1</sup> *Rittson-Thomas T/A Totara Hills Farm v. Davidson* [2013] NZEmpC 39 at [53] – [54].

is genuine and that the notice and consultation requirements of s 4 of the Act have been duly complied with that could be expected to satisfy the s 103A test. The subjective findings about what the particular employer has done in any case still have to be measured against the Authority's assessment of what a fair and reasonable employer could have done in the circumstances.<sup>2</sup>

[29] The genuineness of a redundancy remains a key focus. Once that is established if an employer concludes that the employee is surplus to its needs the Authority is not to substitute its business judgment for that of the employer.<sup>3</sup>

[30] Where there is a substantial conflict of evidence between the parties which requires me to make express findings of credibility based upon the evidence I have heard. Credibility can be assessed on two bases: the witness personally and the story a witness tells. Some factors relevant to personal credibility include demeanour, inconsistencies and contradictions of all kinds, prevarication, reasons to lie and concessions made where due despite any perception by the witness of a risk to credibility in giving that evidence.

[31] Credibility of the story is an assessment of it within the context of other evidence, such as undisputed facts or facts unknown to the witness. I asked myself is this evidence absurd or is there other evidence which makes the conclusion inevitable?

[32] I may draw inferences and fill gaps in evidence by the application of common sense, knowledge of human affairs and the state of the industry and any matter that seems capable of being taken into account as indicating the probabilities of the situation.

[33] The burden of establishing each of the disputed factual elements lies with the applicant and the standard of proof is the balance of probabilities.<sup>4</sup>

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<sup>2</sup> *Grace v Brake Team Accounting* [2014] NZCA 541 , [2015] 2 NZLR 494, (2014) 10 NZELC 79-049, [2014] ERNZ 129, (2014) 12 NZELR 219 at [85].

<sup>3</sup> *Scarborough v Micron Security Products Ltd* [2015] NZEmpC 39 at [37].

<sup>4</sup> *Rooney Earthmoving Ltd v McTague* [2009] ERNZ 240 at [33].

## **Findings**

### ***3 July 2014***

[34] I was not attracted by and do not accept the applicant's evidence that he was made redundant on 3 July by an alleged instruction he train the Operations Manager Brendon Forrest and Shaun O'Meara, Production Assistant to Operations in all aspects of production planning and for the applicant to be 100% on the floor as a team leader.

[35] The applicant agreed the 3 July meeting with Mr Forrest was short, at the end of the day and Mr Forrest was due to leave to go overseas.

[36] It was put in cross examination to Mr Van der Merwe that he was told by Mr Forrest on 3 July that he needed to champion Simple Lean's principles 100% of the time, not be on the floor 100%. Initially Mr Van der Merwe denied Mr Forrest said this at all. He was then shown his email to Mr Brickell dated 24 July 2014 where this was what he had recorded had been said to him by Mr Forrest on 3 July. He then accepted Mr Forrest had said this and that there was a difference from being told to be on the factory floor 100% of the time as opposed to championing Simply Lean principles 100% of the time.

[37] I draw an inference that Mr Van der Merwe was in fact told that he was to champion Simple Lean's principles 100% of the time, not that he be on the factory floor for 100% of the time. This conclusion appears logical because the applicant accepts Mr Forrest never told him he would be demoted or be a second tier supervisor or have any reduction in salary. These may have been concerns if he was to be a Lean Team leader on the factory floor 100% of the time. There is no evidence either Brendan Forrest or Shaun O'Meara were intended or able to replace Mr Van der Merwe at 3 July in all non-factory floor aspects of his job. They lacked experience and had their own jobs to do. It appears more likely he was told to give the menial administration to these employees including training them to do those tasks.

[38] Mr Van der Merwe's evidence at times was unreliable. His written evidence inferred he had direct knowledge of what had occurred at Glasshape since he left and before he arrived. This evidence was based upon assumption and hearsay. His evidence referred to taking down an advertisement for a production manager role on 21 July 2014 which he showed me in the bundle of documents at page 123. I heard and accept the respondent's evidence that this advertisement was not created until 4 August or later. Mr Van der Merwe could not have seen that advertisement on 21 July – a fact he accepted in cross-examination including that he may have been mistaken.

[39] His written evidence alleged many steps had been taken to implement the redundancy decision on 3 July 2014. However, after extensive cross examination he conceded that the only step taken was the alleged statement by Mr Forrest on 3 July to train the other employees which I have dealt with above. I find no redundancy occurred on 3 July.

***Whether the reasons for redundancy were genuine?***

[40] Both parties agree something had to be done about the applicant's role. The evidence was his workload was too large for one person. From the applicant's oral evidence he agreed someone else could have undertaken the menial administrative tasks such as updating spreadsheets or producing run schedules as long as he had some input into the planning decision.

[41] I accept Mr Forrest's evidence that the respondent wished to keep the applicant and that he was attempting on 3 July to remove menial administrative planning tasks to reduce Mr Van der Merwe's work load which the applicant resisted.

[42] Having heard the evidence I came to the conclusion the applicant was the one who first raised possible redundancy on 22 July and his actions drove that option. He suggested splitting his job into two roles of administration and planning and factory floor work and refused all other low level intervention to reduce his work load such as giving menial tasks to others. The respondent was left with no other option. It had to look at the applicant's redundancy proposal about the production manager role as a consequence.

[43] In my view there were genuine reasons for the redundancy.

***Was the process leading to dismissal for redundancy what a fair and reasonable employer could have done in all the circumstances?***

[44] There is no evidence before me that membership or not of the Brethren Church was a factor which resulted in his selection for redundancy. This was specifically denied by Mr Forrest in the consultative meeting on 29 July 2014. The applicant accepted that that part of the meeting was correctly recorded in the minutes which had been produced.

[45] The primary issue about process was the non-provision of the consultant's report prior to the decision to dismiss. Initially I was concerned this was not given to the applicant prior to the decision to dismiss for redundancy. The applicant did not ask for information at the time but that does not mean that it should not have been produced to him.

[46] However after some consideration I find any defect was minor and did not cause unfairness to this applicant or breach good faith. This is because the applicant was aware of what was going to be in the consultant's report because it was discussed with him on 3 July 2014. He told me he was invigorated by the advice he received from the consultant about what was happening and could be done about it. The report did not specifically discuss his role or any changes to it. It made generic recommendations about what should occur within the company, not his role. He could not have been disadvantaged by the non-provision of the report as a consequence.

[47] Mr Forrest says he did rely upon oral advice from the consultant not contained in the report. This advice appears to be about removing menial administration tasks which was discussed with the applicant and rejected on 3 July and following. Therefore he could not have been disadvantaged. In my view prior to dismissal the applicant was well aware of what needed to be done to his role but was resistant to change.

[48] Mr Van der Merwe raised with me the lack of organisational charts at the time the decision was made. I understand such charts did not exist and were not an issue in the making of the redundancy decision at the time.

[49] In my view the process that was followed was what a fair and reasonable employer could have done in all the circumstances.

[50] Accordingly the application for a personal grievance is dismissed.

[51] Costs are reserved. If either party seeks an order for costs, a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days thereafter to file and serve a reply. Counsel are reminded that if they seek costs they are to file copies of the invoices and/or their time records otherwise they risk their application being dismissed.

**T G Tetitaha**  
**Member of the Employment Relations Authority**