

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 160
5383213

BETWEEN THOMAS WANG
Applicant

AND TEKRON INTERNATIONAL
LIMITED
Respondent

Member of Authority: G J Wood

Representatives: Nicola Ridder for the Applicant
Ray Parmenter for the Respondent

Investigation Meeting: 24 October 2012 at Wellington

Submissions Received: 24 October 2012

Determination: 17 December 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Thomas Wang, disputes the genuineness of his redundancy from the employment of the respondent (Tekron). He also claims that the dismissal was predetermined and not carried out in a fair manner. Tekron denies all of these claims.

[2] The issues for determination are:

- Was the redundancy genuine, or were there other reasons for the dismissal;
- Was the redundancy predetermined; and
- Was the redundancy implemented fairly and was Mr Wang dealt with in good faith?

Factual discussion

[3] Tekron designs and sells GPS clocks. It is a small firm of eleven staff, with a turnover of around \$4m per year. It sells these clocks throughout the world, with large contracts in Asia.

[4] Tekron has been Mr Wang's sole employer in New Zealand since he graduated from Massey University with a Bachelor of Engineering in Telecommunications Engineering in 2006. After his degree, he worked as a development and assembly engineer. In 2009 he was promoted to the role of production manager. He was also to be involved in a development engineering role, on an as required basis. The promotion meant that he lost responsibility for the shipping function to the office manager.

[5] In 2010 there were major changes at Tekron with the retirement of one of its founders. Mr Charles Norwood, the marketing manager, was promoted to general manager. Mr Norwood took his promotion very seriously and was committed to improving production and reducing costs in the business. He had a number of concerns about Mr Wang's performance and contribution to the business, one of which resulted in an unchallenged warning.

[6] Mr Wang also had some difficulties in his relationship with the technical manager, which Mr Norwood needed to counsel him about.

[7] In early 2012 Mr Norwood made some changes to the running of Tekron by appointing a contract administrator to run a new order with a large Japanese company, which required that person to have good skills in the Japanese language. He also appointed a new technical support engineer to replace someone who had left the previous year. I accept that Mr Norwood made these decisions as a result of genuine business considerations.

[8] Those particular changes were of no concern to Mr Wang at the time. This is particularly because Mr Norwood stated, on 26 January:

As you all know, the company is in a strong position and I expect to see some significant growth in the next couple of years. I suspect that we will see more people join our team in the coming year.

[9] However, other changes were put into place by Mr Norwood on 10 February. Mr Norwood's email announcing the changes, which he stated were about a *minor organisational change*, noted the appointment of the new contract administrator, and also stated:

It makes sense to take this opportunity to look at our company structure. Historically, production has been part of R & D; this is because, when we were smaller, SRX was managed by our engineers. However, some time ago Thomas was made production manager, with his principal task being to coordinate the production of our products, but, also be involved in R&D projects.

As we have grown, it has become clear that we need a full time production manager that focuses only on our contract manufacturer and suppliers and making sure that our products are manufactured and delivered in as short a time as possible, at the lowest cost possible and highest quality possible. Therefore I am moving the production department out of R&D and placing it in the administration department. As from today Thomas will report directly to me and will only be involved in production management. He will not be involved in any R&D projects at all. ...

[10] Those changes were to take effect that day. By that time, as noted above, Mr Norwood had limited Mr Wang's role in development engineering, because Mr Norwood did not consider that Mr Wang's efforts had been successful and thus he was no longer to be needed or allowed to work there.

[11] Mr Wang objected to Mr Norwood's initiatives, in that he stated at the time that he did not agree that he was not capable of doing the R&D work, although he said nothing about the other changes. Mr Norwood made it clear that there would be no changes to his plan. If there were any issues that may have led to a personal grievance over these rushed changes, no personal grievance was raised. However these changes may be assessed as evidence of predetermination and/or a sham redundancy.

[12] I accept Mr Norwood's evidence that as a result of the change of reporting line he became more aware of what Mr Wang did and (more importantly for him) what he did not do. This was confirmed in Mr Norwood's mind when Mr Wang went on annual leave between 8 April and 1 May 2012. He observed that the person he had asked to cover Mr Wang's job in his absence could do it easily, on top of that person's existing duties.

[13] On Mr Wang's return from leave, Mr Norwood had a conversation with him about these issues. Mr Norwood asked Mr Wang to consider whether he would take back the shipping function but he declined, and instead he proposed that he do more research and development work. Unfortunately, Mr Norwood had already concluded that R&D projects were not Mr Wang's forte, and so the discussions came to nought.

[14] Very soon thereafter Mr Norwood wrote a memorandum to the Board seeking permission to proceed with a redundancy. The memo stated:

It is clear to me that the position of Production Manager at Teckron is un-required. The main duties that Thomas Wang currently carries out are order processing and picking products up from SRX for shipment by Teckron. We do not require a full time person in a managerial position to do this and these duties can easily be picked up by other Teckron staff as was evidenced when Thomas recently took an extended 31/2 week holiday.

Unfortunately we are not able to assign Thomas other duties in Teckron as the only vacancies we have are in sales, for which Thomas does not have the skills.

I therefore recommend that Thomas is made redundant, effective as soon as practically possible.

[15] Mr Norwood went on to note that if approved he would then consult an employment lawyer.

[16] Mr Norwood received almost immediate positive responses from the Board members. He therefore consulted Mr Parmenter, and then wrote to Mr Wang in the following terms on 7 May 2012:

I am sorry to have to write to you about something that will cause you concern but I want to raise with you the subject of your possible redundancy. This is how it seems to me:

1. ...
5. *It does seem to me that your role is superfluous to the business's needs. Were your position to be declared redundant, there would not be any hiring to replace you, as I would go back to the system I put in place while you were on holiday, ie all of your functions would be absorbed within the role of the Technical Support Engineer.*
6. *In the medium term, were business to pick up appreciably, even then, I cannot see that the business would need more than an administrative assistant for about 2-3 hours per day to process orders and issue production notices and, perhaps, co-ordinate the shipping.*

7. *From a financial perspective, as harsh as this sounds, the redundancy of your position would simply add \$60,000 to the bottom line and, in these tough times, I can see that as only positive.*

So, I'd like to meet with you to discuss the contents of this letter; you might disagree with some or all of my propositions then, indeed, might have some ideas which would cause me to rethink my proposal. Could we meet in the Board Room on Thursday 10 May at 9am?

[17] The letter then sets out Mr Wang's right to representation and Tekron's proposed provisions for dealing with the redundancy of Mr Wang's position.

[18] The meeting was postponed until 15 May. At the commencement of the meeting Mr Wang presented a three page document highlighting the work that he did at Tekron (focussing on it being a busy role), suggesting that he could do quality assurance work or R&D work, and noting his concern that his role was being disestablished when Teckron had just hired a new staff member.

[19] In response, Mr Norwood noted that this was not about any performance issues. After questioning, Mr Norwood indicated that there were no alternative positions open to Mr Wang for which he would be suited. It was made clear on behalf of Mr Wang that the genuineness of the redundancy and Mr Wang's selection were being questioned. The speed with which the redundancy was initiated, and it coming straight after Mr Wang had been on an extended holiday were also raised as issues of concern.

[20] The meeting ended at cross purposes as to whether or not there would be another meeting.

[21] On 17 May Mr Norwood wrote again to Mr Wang, rebutting many of the points that Mr Wang raised in his letter and reiterating that he was unsuited to R&D work. His conclusion remained that Mr Wang's position should be made redundant and that he would be paid in lieu of notice. Upon receipt of the letter at work there was discussion of the letter, in a meeting between Mr Wang and Mr Norwood, which lasted around one hour and a half. Mr Norwood advised Mr Wang that he was to leave forthwith after he had packed up his belongings. I accept that Mr Wang was at the office that day for over two hours.

[22] Mr Wang promptly raised a personal grievance, but despite mediation directed by the Authority the issues remain unresolved.

The law

[23] In determining whether a dismissal is justified the Authority must, applying the considerations set out in s.103A(3) of the Act, determine whether what Tekron did, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time.

[24] In *Vice Chancellor of Massey University v. Wrigley & Kelly* [2011] NZEmpC 37, it was held as follows regarding the provision of information in a redundancy situation:

[55] ...the purpose of s.4(1A)(c) is to be found in paragraph (ii) which requires the employer to give the employee the opportunity to comment before the decision is made. That opportunity must be real and not limited by the extent of the information made available by the employer. ...

[56] ...adopting a relatively narrow approach to what is relevant may exclude information which militates against the employer's proposal. In most cases, information that is "relevant to the continuation of the employee's employment" will include a good deal more than the information the employer relies on for the proposal for change. Power does not confer insight or wisdom. Fully informed employees may have ideas of equal or greater merit than those of their employers.

[57] ... Between parties acting in good faith, the process of providing access to information may also be a dynamic one. An employer will normally take the initiative by providing employees with the information it thinks is most relevant and helpful. If employees request access to further information, the employer will then provide that to the extent it is relevant to the decision the employer proposes to make.

Determination

[25] I am satisfied that Tekron did not enter into the pretence of redundancy in order to avoid its responsibilities to performance manage Mr Wang, given that it had concerns about his performance. Rather, I accept Mr Norwood's evidence that once he had Mr Wang report directly to him, he noticed that Mr Wang did not have what Mr Norwood considered to be a full workload. This was confirmed during his absence for three or four weeks, during which another staff member did what Mr Norwood considered were all of Mr Wang's duties in around a quarter to a third of his

time. Mr Norwood therefore drew the conclusion that Mr Wang's position could not justify a full-time office holder.

[26] Then Mr Norwood entered into discussions with Mr Wang to find other ways that he could do to take up his time. However Mr Wang declined to take up the one suggestion made by Mr Norwood, and offered instead the suggestion of doing more R&D work, which Mr Norwood had previously categorically ruled out. I accept that this led Mr Norwood into considering the prospect of redundancy.

[27] The fact that Mr Wang has not been replaced, and that the person who has taken on his roles can cover Mr Wang's old work in around a quarter of his time, are also strong reasons why the redundancy is genuine.

[28] Furthermore, I do not accept that either of the two people Mr Wang believes were employed to replace him were employed for any such reason. The first person was a straight replacement for another staff member who had left, while the other person was required to speak fluent Japanese (which Mr Wang did not), in order to assist with a large new contract with a Japanese firm. For all these reasons, I accept that the genuineness of the redundancy was not a issue.

[29] The issue of pre-determination is more finely balanced, however. First, while Mr Norwood claimed that he had an open mind to any suggestions Mr Wang may have come up with, it is clear from his memo to the Board, and what later eventuated, that it would have taken something completely from left field to change Mr Norwood's mind. In particular, this can be gleaned from the short timeframe within which Mr Norwood wished to pursue the redundancy process, and his wording in the memo that he wanted it all done as soon as possible.

[30] On the other hand, an employer is entitled to develop a working proposal, and no fair and reasonable employer would develop such a proposal thinking it was less than likely to proceed, or that it was not, at that time, the optimal proposal for the business that the management are responsible for.

[31] On balance, I accept Mr Norwood's evidence that he did have confidence in his proposal, but that he was prepared to consider any options Mr Wang put up. Furthermore, Mr Wang had the opportunity to put up such "game changing" proposals, but instead defended his existing position and the work that he felt was required. I conclude that it was open to Mr Norwood, acting as a fair and reasonable

employer, to have a different view and to take the stand that the business could be run more effectively without Mr Wang's position. Similarly, the fact that Tekron was prepared to give Mr Wang more time to prepare his position, helped demonstrate a lack of predetermination.

[32] Second, Mr Norwood removed Mr Wang from any responsibilities in the R&D area. I accept Mr Norwood's evidence that Mr Wang's performance in the R&D area had not been successful, and that was the reason for that (as required) work no longer being required of him. I therefore reject the claims that the redundancy was predetermined.

[33] In terms of process, Tekron consulted Mr Wang and genuinely considered his responses. In particular, it provided Mr Wang with the core reasons for his position being made redundant that were provided to the Board. It did not provide the thinking of the Board members as relayed to Mr Norwood, but Mr Wang did not ask for that information, principally perhaps because he did not know about it, which is, however, not surprising. By providing him with the core of the Board memo, Tekron was providing Mr Wang with the information it thought most relevant and helpful. The fact remains that he did not request access to further information. It therefore follows that Tekron met the requirement for providing access to information relevant to continuation of Mr Wang's employment about the redundancy proposal.

[34] I conclude, on the basis of probabilities by the closest margin (balancing the facts of Tekron's small size with its use of legal advice), that Mr Wang's redundancy process was not so swift, and his exit not so undignified, as to constitute an unjustified disadvantage or dismissal. The employment agreement provided for pay in lieu of notice, even in a redundancy setting. Tekron took up this option, as it did not want any potentially disenchanted staff members with access to company computers and the like, being at work. While this may appear to be a rather risk averse (and perhaps even uncharitable) approach, it can not be said to be so unfair as to vitiate Tekron's genuine actions and constitute a disadvantage or dismissal grievance.

[35] Similarly, while the 2.5 to 3 hours provided to Mr Wang to pack up and leave was not particularly conducive to him saying goodbye to staff properly, he did otherwise have a dignified exit. I thus conclude that this was a failure to implement best practice, rather than being a fatal flaw in the redundancy process.

[36] I therefore dismiss Mr Wang's claims against Tekron International Limited.

Costs

[37] Costs are reserved.

G J Wood
Member of the Employment Relations Authority