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Ward v Downer Edi Engineering Limited [2011] NZERA 158; [2011] NZERA Wellington 45 (21 March 2011)

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Ward v Downer Edi Engineering Limited [2011] NZERA 158 (21 March 2011); [2011] NZERA Wellington 45

Last Updated: 9 June 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2011] NZERA Wellington 45 5336530

BETWEEN BRENT WARD

Applicant

AND DOWNER EDI

ENGINEERING LTD

Respondent

Member of Authority: P R Stapp

Representatives: M E Gould Counsel for the Applicant

A Russell Counsel for the Respondent

Investigation Meeting: 18 March 2011 at Wellington

Determination: 21 March 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is an application for interim reinstatement.

[2] The applicant has provided an undertaking for damages. The evidence has been produced by way of affidavits.

[3] The applicant's employment relationship problem is centred on his concerns about the process followed by the respondent (Downers) in that:

(a) He was not advised of the criteria to be used for selection;

(b) He was selected without any reasons being provided;

(c) He was not given an explanation and or any consideration given to why he could not return to his former role as a draughtsperson.

(d) That draughtspersons have been employed (in Auckland and one person in Wellington by the respondent).

[4] The applicant believes his selection for redundancy was unfair and unjustified given that he believes there was work available for him to undertake and his position at Downers was considered too narrowly as a designer without sufficient regard to his experience as a draughtsperson. He wants Downers' decision overturned.

The Issues

[5] As this is an interim reinstatement application the following principles apply:

(a) Consideration as to whether there is an arguable case, and whether there are alternative remedies available;

(b) Consideration of the balance of convenience;

(c) The overall justice of the matter.

The facts

[6] Mr Ward was employed by Downers EDI Engineering Ltd (Downers). At the start of his employment (19 August 2002) he was employed as a draughtsman. He received a salary increase on 24 September 2010 when he moved to a designer role that month. The parties are in dispute about the nature of that role, for instance Mr Ward says that he was *seconded* on a temporary basis to that role and could have returned to his role as a designer after 18 months. Downers say that his move to the designer role was a permanent role supported by the pay increase. The role was essentially to do with copper and not dependent on any particular project. Mr Ward's remuneration was increased. Mr Ward's change occurred when there were a number of projects for copper designers in the Wellington region and an expectation that the Government ultra fast broadband project would commence.

[7] Due to delays with the ultra fast broadband and with a copper recovery project coming to an end Downers found itself in the position of having an expanded designer team with a perceived increase in work that did not eventuate. Downers reconsidered its position and decided it would have to consider reducing the number of copper designers.

[8] On 19 January 2011 a restructuring was announced at a team meeting of the seven designers, and supported by a restructuring document (13). That document involved:

(a) A timetable for consultation;

(b) A time to receive feedback on the proposal to reduce the number of designers (by 5pm 26 January 2011);

(c) A time for a decision on the proposal (by 28 January 2011);

(d) Implementation of any changes (from 28 January 2011).

[9] Downers deposed that Mr Ward responded with a number of issues, but at no stage did he state that he was not a designer and only there on secondment or on a temporary basis for at least 18 months. Two witnesses have challenged Mr Ward on what he is now saying about this. Downers deposed that Mr Ward did not say that he should be able to return to his draughtsperson role if the restructuring proceeded (Shayne Bird National Design Manager, paragraph 14). Also, it was deposed that no other specific feedback was received from Mr Ward (Mr Bird).

[10] A decision was made to proceed with the restructuring (Mr Bird para.17). This was confirmed in writing (28 January

[11] On 28 January 2011 expressions of interest were requested from the affected employees. Mr Ward submitted an expression of interest (page 16).

[12] A structured interview process was followed (with a panel comprising three people). Interviews occurred on 3 February 2011, including Mr Ward. Interviews were conducted based on what Downers deposed was a normal company interview structure based on a belief that Mr Ward would have been familiar with it. It was deposed all employees were apparently aware of the interview structure and what was involved in its role and scope. Mr Ward had been previously interviewed for other positions using the process. It was deposed that he did not question the scope or purpose of the interview at the time (Mr Bird 22). It does seem to be common ground that the two documents relating to Mr Ward's interview, that is the criteria and the questions were not provided to Mr Ward at any stage until these proceedings.

[13] An interview sheet was completed for Mr Ward. He was compared with the other copper designers in the team for selection.

[14] On 4 February 2011 Mr Ward was informed that he would be made redundant, by Mr Bird. This was confirmed by letter (para.20). Afterwards he was advised of a vacancy for a designer in Christchurch if he was interested, and that he should consider it. He declined that offer.

[15] Mr Ward's last day at work for Downers was 25 February 2011. He has been effectively paid until 25 March 2011 with his redundancy pay (page 22 Redundancy Calculation).

Determination

Arguable case and alternative remedies

[16] Downers has opposed Mr Ward's application for interim reinstatement on the basis that:

- (a) There is no position available as the change related to the copper design team that Downers deposed was a permanent role for Mr Ward.
- (b) Other employees were located in Auckland because of relocation from Thailand, and their numbers have been reduced. In answer to Mr Ward's criticism that other employees were taken on, Downers deposed that these people came from Thailand, were located in Auckland, and were draughtspersons.
- (c) The appointment of a person in Wellington referred to by Mr Ward occurred before the restructuring and was appointed as a draughtsperson.
- (d) The restructuring will have to be redone if Mr Ward is reinstated to ensure cutting costs;
- (e) Reinstatement will create more anxiety for third parties.
- (f) There is a substantive fixture available on 14 April (less than four weeks away).

[17] There is a strong *prima facie* case to support a genuine restructuring exercise based on genuine commercial reasons. This has not been challenged. If anything this matter relates to the process used by Downers based on a selection choice and whether there was other work available for Mr Ward.

[18] There is a presumption that Mr Ward will be able to prove his case based on his claims, but Downers has deposed evidence in reply on each of the issues to rely on the procedure and that this will not be fatally flawed to substantively overturn the genuineness of the redundancy and not affect the outcome. This will need to be scrutinised on the basis of Mr Ward's claim that the decision was based on a narrow approach to his experience without proper regard to his previous role as a draughtsman. It remains to be seen whether there was any prejudicial action affecting the outcome.

[19] I hold that there are process issues relating to the restructuring that will require scrutiny. These are:

- a. Whether there was any consultation over the selection criteria and the reasons for Mr Ward's selection?
- b. If there has not been any consultation would the outcome have been any different and or fatal to the whole process?
- c. Whether there was any defect in the process particularly on any consultation in regard to the consideration of other options to give rise to a personal grievance?

- d. Whether all relevant circumstances were taken into account?
- e. Whether the situation will be affected by Mr Ward's claims that not enough attention was given to a placement elsewhere as a draughtsman and that his position was allegedly only a temporary one in the copper design team?

[20] On their own the possible procedural faults will arguably not be enough to make it significantly likely that reinstatement will be a foregone conclusion because of the employer's reasons to justify the decision based on a genuine redundancy situation existing. There will be findings of fact required in respect of the issue surrounding Mr Ward's role and whether there was a *secondment* and/or *temporary role for 18 months*. The company has denied that claim (two witnesses). In addition Downers has relied on Mr Ward being familiar with the role and scope of the interview process, which would have included Mr Ward knowing the criteria from a previous interview for a vacancy. This is likely to be an arguable point because of Mr Ward's claim that he was not consulted on the selection criteria. The challenge Mr Ward has made on there not being a fair process, to which Downers has responded that it did not seem a problem at the time for Mr Ward who provided an expression of interest and attended the interview without taking issue with the process. Downers has relied on there being no other work available and if this is established as the case then notwithstanding Mr Ward's lengthy experience as a designer then it is arguable the outcome may not have been different. It follows that there is an arguable case.

[21] If there has been a genuine redundancy it will not be likely that there will be any award of lost wages. Therefore, the only compensation the applicant would be able to expect would be for hurt, humiliation and loss of dignity and injury to feelings. This could only relate to the finding of any breach involved in the redundancy process and decision making process. If the redundancy was found to be genuine the remedies are not likely to be great and may not cover the applicant's losses in the absence of reinstatement. Compensation will hardly compensate the applicant for the loss of his job for which he has received redundancy compensation. If Downers' process was terribly flawed and highly prejudicial any reinstatement later would include lost wages being awarded (off set by the redundancy pay). There are no other remedies available to cover not reinstating Mr Ward.

Balance of convenience

[22] I now turn to the balance of convenience. Mr Ward is 58 years old. He has deposed that by being taken out of the workplace this will be detrimental to his ability to pick up a job again and to be reintegrated into the workforce in the future. There will be some time that will be involved before the investigation meeting and which will follow for the Authority to make its decision (in writing).

[23] He is concerned that he will have been out of work for a period in excess of two months and that the delay will be detrimental to him for two further reasons:

- (a) That any delay will be a significantly long period of time to be away from the workforce if he is to be successfully reintegrated into it should his claim for reinstatement be successful;
- (b) That his four weeks redundancy payment lasts only until 24/25 March 2011 and he has no other income.

[24] I accept he will be faced with a short period with no income, but if his redundancy is justified this is the position he would be in anyway. There has been no evidence deposed to highlight in the interim proceedings that any process defects have been highly prejudicial to render the redundancy substantively unjustified. Thus I hold that the applicant's deposed evidence is not enough to establish that reinstatement will be a foregone conclusion to make an order for four weeks.

[25] It was submitted that Downers being a large corporation with a large number of employees would have little difficulty restoring the applicant to employment. It goes without saying it should be able to afford the wages for the period. The counter to this is Downers deposed evidence that there is no position available and that it will need to redo the restructuring to save costs involving the copper design positions.

[26] Downers has argued that any interim reinstatement would have a greater detrimental effect on it, and more fundamentally, on other employees of Downers, than a non-reinstatement would have on the applicant, given that a substantive hearing is set down for 14 April. This is less than four weeks away from the interim hearing. It was submitted that the applicant has already received a payment of four weeks salary that would effectively take him to 25 March 2011 and that the substantive hearing is twenty days after that.

[27] Downers argued that it would have to rearrange its affairs for the purposes of a three week period in between the interim reinstatement hearing and the substantive hearing. It argued it has already made the economic decision to reduce numbers in its designer team in order to reduce costs and that the process was implemented in order to achieve this. It argues that an interim reinstatement order would cause any cost saving to be lost by such an order. Downers deposed that it would have to re-engage in a restructuring process in order to save costs.

[28] In addition Downers argued that any reinstatement would have a significant impact on third parties being the other employees of Downers. Mr Ward can not be held responsible for Downers' process in my opinion. According to Downers it might mean that someone would have to go and that at least someone would be made redundant as a result of the cost savings that it has to try and achieve. I hold that it follows there would be no guarantees in such a process for any employee, including the applicant where the process could be done in a couple of days as the interviews were. In other words it could be done in the time before the investigation and likely involve the Authority further. It was submitted that the impact on the employer would be significant and that the flow-on effects to other employees would probably be greater in this matter and that this should be considered as a significant factor that goes to the balance of convenience. I believe this has been overstated without sufficient detail provided by Downers and it is not enough to speculate on what might happen. Those employees would have some potential anxiety and uncertainty created by an interim order if Downers has to take some action in the four weeks. I have to agree however that any short term disruption to everybody will be alleviated by the short delay before a hearing and a decision. Mr Ward will suffer the detriment of not working and not being paid and have no other income before a substantive hearing in four weeks time. On the other hand his claim will not be compromised if he proves to be correct and where his claim is going to be heard quickly. The option for reinstatement will remain open to him because I am not satisfied that there is any evidence that in a few weeks time things will be substantially different. Thus, I conclude that overall the balance of convenience supports Mr Ward because of:

- a. His right to work;
- b. He will not receive any wages from Downers from 25March 2011;
- c. He deposed not having any other any income;
- d. Uncertainty and speculation about what Downers might do;
- e. Unspecified costs for Downers;
- f. Assertions that there is no work available for Mr Ward;
- g. Four weeks before a full hearing.

Overall justice

[29] The overall justice of the matter will involve consideration of reinstatement which is the primary remedy under the Act. If this is pursued the consideration later must include in a full hearing whether it is impracticable to reinstate him. This will be a very real issue given the reason for redundancy relied upon by the respondent and whether there is work for him. In this regard this must take into account whether or not there is a role for Mr Ward and since the decision was made for him to be made redundant, unless the decision was fatally flawed, would mean that reinstatement is not a strong possibility. Indeed the issues would tend to suggest that this matter will be one that is principally centred on procedural elements and has not involved any claim that there was any ulterior motive based on the existing information. It will not be until all the evidence is heard that a determination can be made on Mr Ward's claim that Downers focussed too narrowly on his experience and whether any other approach would have made any difference.

[30] The test the Authority will be required to undertake in terms of s.103A of the Employment Relations Act will involve a scrutiny and review of the employer's conduct, including its consultation and decision making to consider what a fair and reasonable employer would have done in all the circumstances.

[31] I am satisfied there are certainly legal and factual matters arising in regard to the employer's selection and use of information and whether or not the employer engaged the applicant in any discussion on options. These are potentially elements in the applicant's case, but I have not been convinced from the deposed evidence that any omissions and/or defects in the process and procedure will involve the procedure being fatally flawed. This must have an impact on Mr Ward's claim for reinstatement to a position at Downer EDI Engineering Ltd, and does not make reinstatement a reasonably predictable outcome. The overall justice lies with the respondent, I hold.

Conclusion

[32] Having regard to the above I summarise, there is an arguable case. The balance of convenience favours Mr Ward. The overall justice favours Downers. On balance because there is a hearing date available and organised for 14 April 2011 and given the nature of the issues to be argued and that reinstatement is not a foregone conclusion the application for interim reinstatement is declined.

Costs

[33] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority

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