Determination Number: AA 11/06
File Number: AEA 1263/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Geoffrey Ian Aberhart (Applicant)
AND	Simpsons Farms Limited (Respondent)
REPRESENTATIVES	L J Yukich, Advocate for Applicant Simon Menzies, Counsel for Respondent
MEMBER OF AUTHORITY	Vicki Campbell
INVESTIGATION MEETING	18 January 2006
DATE OF DETERMINATION	20 January 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Simpson's Farms Limited ("SFL") operate six properties including 3 dairy farms, 2 drystock farms, and a farm at Horotiu predominantly used for growing maize crops. One of the drystock farms is a 1500 acre farm located at Waingaro, the other is a smaller property at Te Akau.

[2] Mr Geoffrey Aberhart commenced employment for SFL in April 1990 as a working manager. Mr Aberhart was employed to manage the then 900 acre farm at Waingaro. The farm runs beef, sheep and cows. During the period of his employment further land was purchased by the company which saw the farm expand to 1500 acres.

[3] As a result of restructuring, a new position of Farms Manager – Drystock Farms was created and Mr Aberhart's position disestablished. Mr Aberhart's employment was terminated on 10 January 2006 following 5 weeks notice. Mr Aberhart claims the termination of his employment amounts to an unjustified dismissal and seeks remedies.

[4] The issues for this determination are whether:

- The redundancy was genuine; and
- The process followed by the respondent was fair and reasonable, and met the requirements of the Employment Relations Act 2000.

Was the redundancy genuine?

[5] The Court of Appeal in *GN Hale & Son Ltd v Wellington Caretakers IUOW* [1991] 1 NZLR 151, cemented an employer's right to:

> …make his business more efficient, as for example by automation, abandonment or unprofitable activities, re-organisation or other cost-saving steps, no matter whether or not the business would otherwise go to the wall. A worker does not have the right to continued employment if the business could be run more efficiently without him. [my emphasis]

[6] Genuineness is considered by the Court in relation to whether or not the redundancy was the actual reason for dismissal rather than being a sham (see *Staykov v Cap Gemini Ernst & Young NZ Ltd*, unreported, Travis J, AC 18/05, 20 April 2005).

Mr Aberhart's employment

[7] At the time of his employment Mr Aberhart's duties included responsibility for:

- the well being of all classes of stock on the property although numbers of stock are determined by the directors;
- maintaining the home and grounds in a clean and tidy fashion;
- undertaking all facets of stock work including general farm work and maintenance; and
- management of the general labourer employed on the farm.

[8] Mr Aberhart confirmed for me at the investigation meeting that these duties continued to be the duties he performed up to his final day of employment, with the exception that the farm and consequently stock numbers had increased in size.

[9] Initially Mr Aberharts' terms and conditions of employment were set out in a document entitled "Job Description and Working Manager on 900 Acres at Waingaro". One of the terms of Mr Aberhart's employment was the provision of accommodation for him and his family.

[10] In October 2004 Mr Aberhart signed a new written employment agreement which set out in the terms and conditions applicable to his employment from that point forward. The agreement provided for redundancy in the following terms:

> Where the Employee's employment is terminated by reason of redundancy following consultation between the parties, the Employee shall receive notice in terms of that stipulated in clause 18.1(i) of this agreement.
>
> In the event of redundancy, it is agreed that the Employee shall not be entitled to any redundancy compensation.

[11] Clause 18.1(i) states:

> Four weeks notice of termination of employment shall be given by the Employee.

[12] Clause 18.1(ii) states:

> The above period of notice, specified in sub-clause (i) above, shall be given by the Employer in situations where the Employee is dismissed for misconduct or other due cause.

[13] Mr Aberhart was given written notice of the termination of his employment on 5 December 2005 with an effective date of 10 January 2006. Although the agreement provides for no redundancy compensation to be paid, SFL paid Mr Aberhart the equivalent of 15 weeks pay as compensation for the loss of his job.

The restructure

[14] Each of the three drystock farms was operated as an independent unit. Waingaro and Te Akau were managed by two different farm managers, Mr Aberhart and Mr Oldham. The increase in the number and size of the properties, saw a proportionate increase in Mr Simpson's duties. Mr Simpson is an executive director of SFL. All staff including the dairy farm managers, reported directly to Mr Simpson.

[15] The directors felt the properties of SFL would be better managed if one manager assumed responsibility for all the dry stock farming operations and another manager assumed responsibility for the three dairy farms. This would result in Mr Simpson's direct reports dropping from six, to two.

[16] The directors discussed and agreed that a new position should be established with responsibility for the overall management of all three drystock farms including all resources to maximize productivity and profit. The new position would also be responsible for maximizing heifer performance, when grazing on the drystock properties, which includes weighing the dairy cattle every two months and providing reports on cattle performance at monthly management meetings. As the Waingaro farm was the largest property of the drystock farms the directors decided that the new position would be based at that property and should incorporate all the tasks currently undertaken by Mr Aberhart. This then became the basis for the disestablishment of Mr Aberhart's position.

[17] Mr Aberhart says that his work has not disappeared as the new position contains all the work that he has carried out at Waingaro. Mr Simpson told the Authority that the work is still required to be carried out but that the new position has increased responsibility, in that the incumbent will be required to manage not just Waingaro, but also the properties at Te Akau and

Horotiu and to manage the resources, stock, feed and all other aspects of the three properties with the objective of making the properties more productive and profitable.

[18] Mr Yukich on behalf of Mr Aberhart, submitted that the new position differs only slightly from Mr Aberhart's position and referred the Authority to a wide range of case law dealing with redundancies, including the decision of *McCulloch v New Zealand Fire Service Commission* [1998] 3 ERNZ 378 where Chief Judge Goddard found:

> If the work is still there and needs to be done, it cannot be said that the incumbents are redundant.

[19] That case can be distinguished on its facts. The Fire Service had declared that all its staff were to be made redundant and were required to apply for jobs within a restructured fire service. The Court determined that there was no genuine commercial need to declare all staff redundant as the work was still there to be carried out and found that the work was to be the same, although differently apportioned, and it was all within the job the fire fighters were employed to do.

[20] In this matter SFL identified a need to have a person operating at a higher level than either of the two farm managers it employed, with more accountability for production and productivity. It was common ground that Mr Aberhart was not required to manage more than the day to day functions of the Waingaro farm, with the exception that when feeding stock he was required to consider feed requirements for up to two months in advance.

[21] The remuneration package for the new position is more than 40% above that being paid for the job Mr Aberhart had been undertaking. While the remuneration package was open for negotiation, the level of remuneration reflects the increased responsibility required from the incumbent of the new position.

I am satisfied that the restructuring of Mr Aberhart's job was for genuine commercial reasons as a direct result of the need to reorganize the management structure of the farms to achieve efficiencies and to make the business more effective. This falls squarely within the ambit of the employers' right to make the business more efficient as stated by the Court of Appeal in *Hale*.

Was the process followed by the respondent fair and reasonable?

[22] Section 4 of the Employment Relations Act 2000 requires SFL to deal with Mr Aberhart, in good faith. This duty is to be exercised not only generally but in specific situations, including redundancy.

[23] The duty of good faith set out in the Act requires an employer who is proposing to make a decision that will have an adverse affect on the continuation of employment of an employee to provide to that employee, access to information relevant to the continuation of the employee's employment, about the decision, and an opportunity to comment on the information before the decision is made. The requirement to consult is therefore, a statutory obligation.

[24] In *Communication & Energy Workers Union Inc v Telecom NZ Ltd* [1993] 2 ERNZ 429, the Court discussed the meaning of "consultation" in the context of redundancy, and listed a series of propositions extracted from the Court of Appeal's decision in *Wellington International Airport Ltd v Air NZ* [1993] 1 NZLR 671 (CA). In particular, the Court noted:

> (a) Consultation requires more than mere prior notification and must be allowed sufficient time. It is to be a reality, not a charade. Consultation is never to be treated perfunctorily or as a mere formality.
> (b) If consultation must precede change, a proposal must not be acted on until after consultation. Employees must know what is proposed before they can be expected to give their view.
> (c) Sufficiently precise information must be given to enable the employees to state a view, together with a reasonable opportunity to do so. This may include an opportunity to state views in writing or orally.
> (d) Genuine efforts must be made to accommodate the views of the employees. It follows from consultation that there should be a tendency to at least seek consensus. Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and then deciding what will be done.
> (e) The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and even start anew.

[25] On 24 June 2005 Mr Aberhart and Mr Simpson met and discussed the proposal to restructure the Management positions for SFL. Present at that meeting was Mr Aberhart's partner, Ms Kate Green. Mr Simpson had prepared a draft organizational structure showing the current structure and the proposed new structure. During the meeting Mr Aberhart identified that it was his position that would be disestablished and this was confirmed by Mr Simpson.

[26] Mr Simpson explained to Mr Aberhart the reasons why it was necessary to restructure the management of the farms. It was common ground that the discussion also included notice to Mr Aberhart that the proposed new structure would be implemented in about 6 months and Mr Aberhart was invited to apply for the position, on the understanding that the best person for the job would be appointed.

[27] Ms Green suggested to Mr Simpson that he consider appointing Mr Aberhart to the new position at that time on a trial basis. Mr Simpson told Ms Green that while he had a lot of respect for Mr Aberhart he would not make any appointments at that time. Mr Simpson told Ms Green he hoped Mr Aberhart would apply for the job.

[28] At the end of the meeting Mr Simpson provided Mr Aberhart with a copy of the proposed job description for the new position. I am surprised that Mr Simpson had the Job Description with him, but didn't take any time to go through the scope of the new role with Mr Aberhart at that meeting.

[29] Mr Simpson advised Mr Aberhart that they would meet a week later to discuss matters further including any questions or responses he had to the proposal. After Mr Simpson left, Mr Aberhart put the two documents away and never looked at them until just before he was to meet with Mr Simpson a week later.

[30] On 27 June 2005 Mr Simpson met with the Manager of the Te Akau property and discussed the proposed restructuring with him. Mr Simpson told me at the investigation meeting that he spoke with Mr Oldham and advised him of the new reporting line as that was the only affect the restructuring would have on him.

[31] On 1 July 2005 Mr Simpson returned as promised, to discuss the proposal further with Mr Aberhart. The meeting only lasted for about 10-15 minutes. Based on the information provided to the Authority I have concluded that it is more likely than not that at that meeting Mr Simpson advised Mr Aberhart that the restructuring would go ahead, that his job would be disestablished and that he was entitled to apply for the new position.

[32] During the ensuing months the directors of SFL met and finalized the restructuring of the farms. There were no further discussions with Mr Aberhart about the proposed restructuring until the final decision was made to advertise the new position. On 5 October Mr Simpson rang Mr Aberhart and advised him the position was to be advertised that week. Mr Aberhart was again invited to apply for the new position. After receiving advice from a family friend, Mr Aberhart chose not to apply for the new position.

[33] One of Mr Aberhart's complaints about the process followed by SFL was that he requested information several times but that the information was not forthcoming. Mr Aberhart's complaint in this regard was scrutinized thoroughly at the investigation meeting. I have concluded that SFL did respond to Mr Aberharts requests for information made on 5 and 17 October. He requested and was provided with copies of the proposal which consisted of the proposed organisation chart and job description. He also enquired about alternative options and received a response from Mr Simpson that no alternative options were available. During the course of that exchange Mr Simpson reiterated the offer for Mr Aberhart to apply for the new role.

[34] Applications for the new position were short-listed in early November with interviews being held on 16 and 23 November.

[35] On 15 November 2005 Mr Aberhart wrote to Mr Simpson requesting him to detail the difference between his current work and that of the new position. In his letter Mr Aberhart refers to earlier requests for this information, however, as discussed at the investigation meeting, I am satisfied this was the first such request made of SFL. Mr Aberhart also requested a copy of the proposed employment agreement for the new role.

[36] This letter was followed by a further letter on 21 November reiterating his request for information. No direct response was made by Mr Simpson to these communications, however, a meeting was held on 29 November 2005 at the offices of Harkness Henry & Co where Mr Aberhart was represented by Mr Yukich. The meeting on 29 November 2005 failed to address the questions Mr Aberhart had about the new position and the disestablishment of his position. In any event, the interviews for the new role had been completed.

[37] An offer of employment was made and accepted by the successful applicant for the new position, and on 5 December 2005 Mr Aberhart was advised that his employment would terminate on 10 January 2006.

[38] The process of consultation used by Mr Simpson does not meet the tests set by the Court in *Telecom* and as set out above. I have concluded that while Mr Simpson did discuss the proposed restructuring plan with Mr Aberhart at the meeting on 24 June 2005 he failed to discuss the detail and scope of the proposed new position. A week passed before Mr Aberhart looked at the job description left by Mr Simpson. Mr Aberhart was then left to interpret the job description without the benefit of Mr Simpson's input into the scope of each point in the job description and without reference to the objectives of the restructuring. I am satisfied that it was not until the investigation meeting that Mr Aberhart finally received precise information about the scope of the new role and was able to understand the reasons behind the restructuring.

[39] During the four months between the initial discussion with Mr Aberhart on 24 June 2005 and the decision to advertise the new role, no discussions took place with Mr Aberhart regarding the impact of the proposal on Mr Aberhart's position. This is surprising given that Mr Aberhart would

have to uplift his household and move from the house which he had occupied for 15 years. He would necessarily require time to make alternative arrangements for him, his family and his pets.

I find the dismissal of Mr Aberhart to be unjustified as a result of a lack of procedural fairness. Mr Aberthart is entitled to remedies.

[40] Mr Aberhart also raised concerns over breaches of the Employment Relations Act 2000 regarding the failure on the employer to provide information and for failing to negotiate a redundancy agreement pursuant to section 69K – O of the Employment Relations Act 2000 as amended. I am satisfied Mr Simpson responded to all Mr Aberhart's requests for information as they arose in correspondence. As discussed at that investigation meeting, the restructuring implemented by SFL in this matter does not fall under the scope of section 69K-O.

Remedies

Reinstatement/Lost wages

[41] Compensation may only relate to the procedural unfairness and not to the loss of employment (*Aoraki Corporation Ltd v McGavin* [1998] 1 ERNZ 601). As I have found the restructuring to be based on genuine commercial reasons Mr Aberhart could not be said to have lost any wages as a result of this unjustified dismissal. My finding on the genuineness of the restructuring also rules out any possibility of Mr Aberhart being reinstated to his disestablished job.

Compensation

[42] In setting an award I have been guided by the recent judgment of the Court of Appeal, *NCR (NZ) Corporation Limited v Blowes*, unreported, 23 September 2005, CA 186/05.

[43] Mr Aberhart was dismissed for redundancy through no fault of his own and therefore there is no issue of any contributory conduct by Mr Aberhart.

[44] Ms Green gave compelling evidence of the impact on Mr Aberhart of losing a job he had held for 15 years. While I accept Mr Aberhart was on notice from 24 June 2005 that his job was likely to be disestablished, the lack of any discussion or consultation for four months after the initial discussion made the final decision more of a blow than if discussions had taken place and offers of assistance made to help with finding alternative work and/or accommodation.

[45] During December arrangements were made for the staff Christmas function. After being told by Mr Simpson that he and Ms Green would be invited to the event, no invitation was

forthcoming. Mr Aberhart was still an employee. While he had raised a personal grievance, he was still entitled to be treated as a valued member of staff. Mr Simpson told me he decided not to invite Mr Aberhart and Ms Green to the function because of the tone of the correspondence he had received, the possibility of alcohol being consumed, and not knowing what Mr Aberhart might say to other staff. Mr Simpson did not tell Mr Aberhart about his decision nor did he discuss his concerns with him. It is my view that this action by Mr Simpson has only added to the humiliation experienced by Mr Aberhart.

[46] In coming to my conclusions about payment of compensation to Mr Aberhart I have taken into account that Mr Aberhart received more notice than required by his employment agreement and received a payment in excess of $10,000 as compensation for the redundancy. However, I have also taken into account that he was a long serving employee (15 years), and is 58 years old.

Simpson's Farms Limited is ordered to pay to Mr Aberhart $15,000 without deduction pursuant to s.123(c)(i) of the Employment Relations Act 2000 within 28 days of the date of this determination.

Costs

[47] The parties are encouraged to discuss and resolve the matter of costs between them. In the event that they are unable to do so they may lodge and serve memorandum in the Authority for consideration.

Vicki Campbell
Member of Employment Relations Authority