IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 45
5313462

BETWEEN	DAVID WAYNE ALDRIDGE Applicant
A N D	SAFE AIR LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Greg Lloyd, Counsel for Applicant Tim Cleary, Counsel for Respondent
Investigation Meeting:	25 October 2011 at Blenheim
Date of Determination:	13 March 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Aldridge) alleges that he was unjustifiably dismissed by the respondent (Safe) for redundancy, unjustifiably disadvantaged by reason of the process adopted by Safe, suffered the consequences of bad faith because of breaches by Safe of its statutory obligations pursuant to section 4(1A)(c) of the Employment Relations Act 2000 (the Act) and lastly suffered because of breaches by Safe of the operative collective agreement.

[2] Safe resists each and every one of those allegations and contends that Mr Aldridge was dismissed for redundancy after an extensive reorganisation process resulted in the employer's conclusion that his job was no longer a necessary part of the business going forward. Safe also say that they did not breach their statutory duties of good faith, nor did they disadvantage Mr Aldridge by unjustified actions, nor did they breach their obligations under the operative employment agreement.

[3] Mr Aldridge commenced employment with Safe on 19 May 1980. He worked initially as an aircraft tradesperson and then transferred to what was at that time, the

only machine shop on site. That single machine shop performed both engine and propeller machining. Then with the decommissioning of aircraft being maintained by Safe, engine machining work ceased and the machine shop performed almost exclusively propeller machining work.

[4] That situation continued for 15 years with the one machining shop performing primarily propeller machining work. Then in 1998, Safe took over engineering work from the air force and with it absorbed a machining shop which developed work in engine and general machining leaving the existing machine workshop to continue to do exclusively propeller machining.

[5] A further workshop called the engine repair shop was eventually merged with the existing machine workshop performing propeller machining to form the propulsion centre. That change was initiated in 2009 and predated the restructure which led to the disestablishment of Mr Aldridge's role, about which the present proceedings are concerned.

[6] When Safe lost the planned for work on upgrading the C130 aircraft fleet, the loss of that work resulted in a large scale restructure which Safe says affected all departments of the enterprise. However, it is a fundamental building block of Mr Aldridge's claim that his particular position at Safe ought not to have been affected in any way by the restructure because he had never been involved in work concerned with the C130 fleet.

[7] In any event, Safe made a pronouncement to all staff on 17 February 2010 which amongst other things proposed a reduction in the total number of aircraft engineers (one of which was the role which Mr Aldridge filled).

[8] After a process of consultation a final decision was taken to reduce the total number of aircraft engineers from 40 to 29 and a matrix was developed in consultation with officials of the New Zealand Engineering Printing and Manufacturing Union Inc. (the Union), of which Mr Aldridge was a longstanding member, and an assessment was then carried out using that matrix as a consequence of which Mr Aldridge's position disappeared and he was made redundant with effect from 29 April 2010.

[9] Mediation between the parties failed to resolve the issue and the matter then proceeded to the Authority in the usual way.

Issues

[10] It will be useful if the Authority addresses the following questions:

a. Was the redundancy a genuine one?

b. Was the redundancy effected fairly? and

c. Was the statutory duty of good faith breached?

Was the redundancy a genuine one?

[11] Safe claim that the redundancy was a genuine one and that no issue is taken by Mr Aldridge about the genuineness of the redundancy. While the Authority accepts at face value Safe's assessment of its own claim, the Authority does not accept that Mr Aldridge is saying that the redundancy was a genuine one. A central allegation made by Mr Aldridge is that there was no need for his position to be disestablished and there was no justification for that position being disestablished. That means that Mr Aldridge is contending that insofar as the restructure disestablished his position, it was not a genuine restructure. No doubt it can be accurately contended that Mr Aldridge is not claiming that the total restructure is wrongheaded; however, on the issue of his own position, it is clear he regards the restructure as anything but genuine and if that assessment needs any confirmation, it can be found in Mr Aldridge's contention that he ought to be reinstated to his old position. That must mean that he thinks the disestablishment of his role was not a genuine decision of the employer. It follows that in the Authority's view, Mr Aldridge is contending that the decision to disestablish his position is not genuine and the process adopted by the employer in proceeding with the restructure which led to the loss of his employment, was itself also unfair and unjust.

[12] Mr Aldridge's argument in this regard is based on his view about the necessity or otherwise for his role being disestablished. He acknowledges that the employer has a general right to restructure its business to make it more efficient. He also acknowledges that with the loss of the C130 contract, a loss not attributed in any way to Safe, the employer of necessity had to make fundamental changes to the structure of the business.

[13] What Mr Aldridge does not accept is that those fundamental changes should have gone so far as to include his position. And he argues that point by the very simple expedient of pointing out the fact that his work was never in any way affected by the future or otherwise of the C130 contract. This was because he did not do any work associated with the C130 project and was thus fully employed prior to the restructure and indeed afterwards. The veracity of the latter point is confirmed, according to Mr Aldridge, by the fact that Safe is continuing with his old position but with somebody else in it.

[14] Conversely, what Safe says about the restructure is that it made the decision to look at the total number of aircraft engineers that it required right across the business, that it reduced that total number from 40 to 29 as a consequence of the application of the matrix scoring system which it developed in conjunction with the union and that on the application of that criteria to Mr Aldridge, he was found less fit to continue in the generic role than other potential candidates.

[15] In particular, Safe reject absolutely the contention that Mr Aldridge was in some sort of specialist role. Safe explicitly rejects Mr Aldridge's characterisation of his position as a specialist prop shop machinist for example. Furthermore, Safe rejects Mr Aldridge's claim that he was in a "sole charge" position. Notwithstanding that contention by Safe, the Authority is satisfied that the factual position was that to use Mr Aldridge's own words he was "the only one who worked there so he must have been in sole charge".

[16] Mr Harragan, the operations manager of Safe told the Authority that Safe had made the decision to treat all of the workers doing similar work similarly and assess them on their core trades skills not on where they worked in the enterprise.

[17] An important aspect of this dispute is the question of whether the various machinist roles (a colloquial but accurate label for the position Mr Aldridge held along with a number of others at Safe) were actually interchangeable or not. Mr Aldridge says that "it is just plain wrong for the company to say that a machinist is a machinist and we're all interchangeable". He maintained throughout his evidence that he was a specialist and he told the Authority in his oral evidence that he had "developed a body of experience around propellers which another general machinist would not have". So Mr Aldridge's clear evidence was that notwithstanding the label attached to his role or indeed to similar roles held by others, the jobs being performed

within that generic heading were quite different. As the Authority has just recorded, Mr Aldridge claimed a special body of experience and indeed went further and denied Safe's claim that the machinists could be readily interchanged. Mr Aldridge said that just as other machinists could not fulfil the role that he had fulfilled, so also he would have difficulty in performing all of the tasks that general machinists or machinists involved with aircraft engines would habitually perform. Indeed, when we come to the next section of this determination, and consider the way in which Mr Aldridge was assessed for the diminished number of positions, we will see that one of his complaints was again to use his own words "I was assessed in the operation of machines that I had never operated or had access to. As an experienced machinist I could operate these machines but would need time to learn how."

[18] To support Mr Aldridge's contention that his position was specialised he gave evidence to the Authority that he had never been asked in recent times by Safe to assist elsewhere. In other words, Mr Aldridge was inviting the Authority to conclude that Safe regarded his position as so specialised that he was not able to be considered for roles, temporary or otherwise, elsewhere in the structure. Mr Aldridge confirmed that historically he had been asked to relieve elsewhere but that had not happened for many years. And to support that evidence further, Mr Harragan responded to a question from the Authority at the investigation meeting by confirming that he had never asked Mr Aldridge to serve elsewhere. Moreover, Mr Aldridge gave unchallenged evidence that when he went on leave generally nobody relieved him; the work simply built up until he got back.

[19] The Authority will be loath to quarrel with a commercial judgment of an employer about a restructure. A decision to shorten down a workforce as a consequence of a major change in business fortunes is plainly a decision that is available to an employer to make. However, the consequences of such a decision must be fair and equitable and in conformity with the law.

[20] In the present case, Mr Aldridge, while not contesting Safe's right to restructure in a general sense, does contest Safe's conclusions about his role being unspecialised when his specialisation is borne out not just by his evidence but also by the evidence of Safe's only witness. The Authority agrees that the position is a specialised one. It is particularly difficult to see any other proper conclusion available when first it seems that both parties behave as if the role was specialised, both parties

agree that Mr Aldridge did not relieve elsewhere and nobody relieved him, and post restructure, the position remained. Having concluded that this is a specialised position, it follows that there is unfairness in lumping the position in with others. That unfairness will sound in remedies.

[21] However, the Authority is not persuaded there is any evidence of bias or predetermination by Safe nor is the Authority satisfied there was any evidence whatever to support a conviction that Safe had decided to "get rid of" Mr Aldridge because of perceived weaknesses. Having reached that conclusion and having already accepted in the broad sense that it is an employer's right to restructure its business to meet commercial objectives, the Authority is most reluctant to seek to interfere because, the consequence effectively replaces Safe's commercial judgment with the pronouncement of the Authority and there is ample precedent to discourage the Authority from taking that step. However, the Authority is troubled by the conclusion that Safe have simply proceeded with a restructure using a generic job description for a common role on the site, without factoring in the very significant differences in skill sets for the different roles. That aspect, will be taken up in the next section of this determination.

Was the redundancy effected fairly?

[22] The Authority is satisfied that this redundancy was not effected fairly. The concerns the Authority has already expressed in the last section of this determination inform a general unease as to the fairness of the process. If an employer overlooks the manifest differences in role notwithstanding the same generic title, that can lead to unfairness and it is difficult, in the circumstances of this case not to be critical of Safe's decision to deal with all the machinists as if they were interchangeable, when the evidence the Authority was persuaded by, suggests the converse is the case.

[23] Moreover, there must be criticism of the assessment process as it applied to Mr Aldridge. First of all, Mr Aldridge was assessed by Mr Harragan. Mr Harragan is the operations manager of Safe and impressed the Authority as a straightforward and honourable man but he readily conceded that he did not have line management authority over Mr Aldridge and the area in which he worked and had not done so since 2007. It was also apparent from the evidence of both parties that they had virtually no working relationship at all. Mr Aldridge told the Authority for instance that he "had no interaction with Clive (Mr Harragan) whatsoever". On that basis, it is

difficult to see how Mr Harragan could have made a fair and just assessment of Mr Aldridge when they effectively had no working relationship at all. Of necessity, Mr Harragan had to rely on selected supervisors and other line managers to comment to him on the respective skill sets.

[24] Worse than that, it became evident to the Authority in the course of the investigation meeting that the effect of the generic approach taken by Safe to all their machinists was to seek to evaluate all of the like trades people in respect of a range of general machinist skills including the operation of machinery that Mr Aldridge had never worked on before. Even if it were true that Safe sought to have all their machinists capable of performing work on all of the machines that they evaluated in their matrix, (and that argument must be wrong because not all of the machines that Safe evaluated candidates on are used in the propeller centre for instance) the fact remains that because Mr Aldridge had not worked on a number of the machines that he was tested on, he scored badly. Mr Harragan defended the process in his evidence by saying that the machinists all needed core competencies but as the Authority has already noted, some of the machinery involved in those so called core competencies was not required for the propulsion centre at all but other skills that were not tested were. Given that Safe had not decommissioned the propulsion centre and the position that Mr Aldridge used to occupy still exists, the Authority must conclude that Safe's determination to treat these skills generically was not just mistaken but also unfair to Mr Aldridge.

[25] A particular example of this difficulty for Safe involves a machine called a CMC mill/router. Mr Aldridge's evidence is that there was no such machine in the propeller shop and so he scored nought for the operation of that machine. He knows that he scored nought because he has now seen his score; he did not see it before he was dismissed for redundancy, which is another difficulty that Safe has which the Authority will come to shortly. In any event, for present purposes, it is a fact that Mr Aldridge failed to trouble the scorer in relation to the operation of the CMC mill/router. However, in cross-examination, Mr Harragan conceded that that machine was not a core competency of all machinists, notwithstanding the fact that it had been assessed as such in the matrix which chose the machinists who would leave and the machinists who would stay after the restructure. Worse than that, Mr Harragan also conceded in cross-examination that if one was to take out that factor from the matrix scores then Mr Aldridge would have overtaken one of the successful appointees.

[26] Mr Aldridge contends that of the total of 97 points which were effectively available to him from the matrix score fully 54 of those points related to skills or work which was not familiar to him because of the specialised nature of his role. But in addition to that, Mr Aldridge also contends that he scored very poorly in operating the grinder. He says *I was the most skilled person there in the use of a whole range of grinders. I should have scored the maximum for that one*. But of course because Mr Aldridge was not shown his scores before dismissal and they were simply applied and redundancy declared on the basis of the arithmetical calculation, he was never able to comment on those matters. That is unfair and is not what a good and just employer would do.

[27] In *Simpsons Farms Ltd v. Aberhart* [2006] ERNZ 825, Chief Judge Colgan discussed the law relating to justification in redundancy cases. His Honour said at para 65:

> *"the Authority … must consider, on an objective basis, whether the decisions made by the employer, and the employer's manner of making those decisions, were what a fair and reasonable employer would have done in all the circumstances at the relevant time."*

[28] The Authority is not satisfied that a fair and reasonable employer would have lumped all of the machinists together (as Safe did) when the weight of evidence, to say nothing of Mr Aldridge's protestations on the subject, supported the view that the role Mr Aldridge filled was different in kind from the other machinist roles. It is plain on the evidence that Mr Aldridge raised with Safe the issue of the uniqueness of his role, was supported by his union in that regard, but notwithstanding those representations, Safe persevered with the generic view that all machinists were one and the same.

[29] Nor can Safe successfully defend its consultation process either. The Authority is satisfied that what happened was that there was a rough and ready kind of agreement between the union and Safe about the structure of the process at a "macro" level. Safe says this is enough; it is not. The Authority is satisfied that Safe ought also to have engaged with employees about their matrix scores if as a consequence of those scores, it appeared more likely than not that that employee would be dismissed for redundancy. In Mr Aldridge's case, it is plain that he would have protested vociferously about the mark given him in respect to the use of grinders, for example. His evidence to the Authority suggested that he was quite genuinely perplexed at how

he could have rated so poorly on that aspect when he says he was acknowledged as an expert in the use of grinders, on the site.

[30] In *Simpson's Farms*, the Chief Judge said at para 62:

> *"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".

[31] In the present case, the only consultation that took place was consultation with the union about the process. There was no consultation at all about the selection of individual employees such as Mr Aldridge and that being the position, the Authority is satisfied that it cannot be said that Safe has *sought consensus* or has *listened to what others have to say* or indeed *considered their responses*. As the Authority has already remarked in its contemporaneous decision *Bainbridge v Safe Air Limited* [2012] NZERA Christchurch 42, the law in this area was developed for the purpose of giving persons affected by a restructuring proposal the chance to be involved in it and to comment on it before dismissal eventuates. Mr Aldridge was denied that opportunity and the Authority is satisfied that where there is no consultation around who was actually affected by a restructuring proposal then in truth it is not a *genuine effort … to accommodate the views of the employees ….*

Was the statutory duty of good faith breached?

[32] The Authority is satisfied that the statutory duty of good faith was breached by Safe in the way in which it dealt with Mr Aldridge's dismissal for redundancy. The leading case on this aspect is now *Wrigley & Ors v Massey University* [2011] NZEMPC 37. In *Wrigley*, the full court emphasised the inequality of employment relationships especially in respect to redundancy situations. At para 48, the Court said:

> *"Recognition of the inequality of power in employment relationships is also directly relevant. When a business is restructured, the employer will in most cases, have almost total power over the outcome. To the extent that effected employees may influence the employer's final decision, they can do so only if they have knowledge and understanding of the relevant issues and a real opportunity to express their thoughts about those issues. In this sense, knowledge is the key to giving employees some measure of power to reduce the*

> *otherwise overwhelming inequality of power in favour of the employer."*

[33] It follows from the foregoing passage that Safe has failed absolutely to fulfil its obligations as a good and fair employer and in particular has breached its duty of good faith by failing to make available to Mr Aldridge sufficient information to give him a genuine opportunity to participate. In particular, Safe has failed to provide Mr Aldridge with information in respect to his matrix score and the likelihood that he would be made redundant such as to enable Mr Aldridge to engage appropriately with the employer and participate actively in its process. Mr Aldridge simply did not know until after he was dismissed what his matrix score was, nor even who had assessed him. Had he had those pieces of information, he would have been able to engage with Safe in a real way and dispute their marking of him, and the person who had presided over that assessment. That last observation is not meant to be critical of Mr Harragan but only to reflect Mr Aldridge's contention that because Mr Harragan was not his line manager (a point accepted by Mr Harragan himself) it was not appropriate for him to be responsible for presiding over Mr Aldridge's assessment. As the Authority noted in *Bainbridge*, the provision of the information just referred to would likely have resulted in an exchange between the parties which might have suggested an alternative way forward or perhaps promoted a better understanding between the parties such as to make the litigation currently underway, unnecessary. After all, s4(1A)(c) of the Act *requires the employer to give the employee an 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: Wrigley* per Travis J.

[34] In the present case, the paucity of the information provided by Safe actually precluded any prospect of a genuine engagement between the parties. There was in truth no real prospect of Mr Aldridge commenting on the restructuring proposal. Again, in *Simpson's Farms*, the Chief Judge observed:

> *"A fair and reasonable employer must, if challenged, be able to establish that he or she or it has complied with the statutory obligations of good faith dealing in section 4 including as to consultation because a fair and reasonable employer will comply with the law."*

[35] Here, the employer has failed to meet the minimum standards required of the law on consultation, before declaring redundancy. That is the effect of the application

of the principles in *Simpson's Farms* and the more recent decision in *Wrigley.* In a redundancy setting, the statutory obligations conferred on an employer by section 4 of the Act revolve principally around the requirements as to consultation. *Wrigley* has determined the extent of that consultation and it is fair to characterise the court's view as a generous one in terms of the provision of information to an employee potentially affected adversely by a restructuring proposal. Having considered the leading cases, and reflected on the evidence heard, the Authority's conclusion is that Safe has failed to meet the obligations of good faith required by the statute. It follows that Safe is in breach of its good faith obligation in respect of its failure to adequately consult with Mr Aldridge because it chose to withhold from him information which it had in its possession which was not imbued with confidence in terms of s4(1B) and (1C), particularly in their refusal to provide to Mr Aldridge the matrix scores and the reasons for those scores and be prepared to engage with him around how Safe had reached the conclusions it had, particularly having regard to Mr Harragan's lack of familiarity with Mr Aldridge.

[36] As the Chief Judge observed in *Simpson's Farms*:

Consultation requires more than a 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.

The reality of this restructure is that by virtue of the apparent reluctance by Safe to supply Mr Aldridge with pertinent information about his own circumstances, they were denying him the ability to be heard and thus, it could be said that there was no real consultation at all in a meaningful way and no more than a "charade".

Determination

[37] The Authority is satisfied that Mr Aldridge has proved his claim to the limited extent available at law as a consequence of breaches of process in a redundancy situation. The contention of a breach of the good faith obligations is also made out. While the Authority is satisfied that Mr Aldridge has argued against the genuineness of the redundancy as it affected him, the Authority is not persuaded that that is made out. The employer is entitled to some significant latitude in the management of its affairs and it is available to an employer to restructure its business to meet a reduction in demand and not to have the fundamental judgments it makes in that regard "second

guessed" by the Authority. That however is not a licence for an employer to ignore its obligations of honest and fair dealing and its statutory duty of good faith, nor is it a licence to ignore the obligations of the operative employment agreement.

[38] As the law allows compensation only for the wrong done and the Authority has concluded only that the process of the redundancy was unfair it is that and only that that can attract compensation. In any event, Mr Aldridge has been paid compensation for the loss of his position.

[39] The Authority is not persuaded there is a separate head of damage by way of unjustified action causing disadvantage. However the matter is analysed, the Authority is not satisfied that there is more than one head of damage as to personal grievance. The Authority intends to take account of the breach of the statutory duty of good faith in considering the compensatory award to remedy the identified default. While the breach of the operative collective agreement is separately pleaded, the Authority has chosen to analyse the evidence under the wider personal grievance banner and to consider the established breaches as part of the proved grievance.

[40] The Authority must consider whether Mr Aldridge has done anything to contribute to the circumstances giving rise to his personal grievance. There is no evidence before the Authority to suggest that he has: s124 of the Act applied.

[41] Mr Aldridge claims compensation under s123(1C)(1) of the Act together with lost wages and reinstatement. Dealing with each of those matters in turn, the claim for compensation is made out but only on the limited basis circumscribed by the procedural failings. The evidence given by Mr Aldridge and his partner as to the hurt, humiliation and injury to feelings dealt more with the loss of the position than the losses associated with the procedural failings by Safe but the Authority is satisfied that there is enough in the evidence before it to identify a proper basis for awarding some compensation again on that limited platform.

[42] In relation to lost wages, the Authority's view is that Mr Aldridge has lost wages not as a consequence of the procedural failings of the employer but because the job has gone as a consequence of a restructure which the employer was entitled to undertake. It follows that there can be no remedy for lost wages applied. Lastly, Mr Aldridge seeks reinstatement. There is no claim for interim reinstatement. Mr Aldridge maintains that the law that the Authority ought to apply in respect to his

reinstatement claim is the law prior to 1 April 2011 and Safe maintain that the Authority should apply the current statutory enactment, that is the law after 1 April 2011.

[43] The Authority's conclusion is that it does not need to determine which statutory test applies because in either regard, Mr Aldridge's claim for reinstatement must fail. This is because his success in his personal grievance is on a strictly limited footing based as it is on the procedural errors the Authority has found Safe has made in dealing with a genuine redundancy situation and the Authority is satisfied that reinstatement is not practicable.

[44] The first of those conclusions is self evident but the Authority desires to add that the issue of practicality is in the Authority's view based squarely on the evidence from the employer. Mr Harragan for Safe makes the assertion that there is no current position for a machinist and the Authority is disposed to accept that evidence at face value. In the Authority's opinion, it is not appropriate for it to hoist an extra employee onto an employer who has undertaken a restructure precisely because of a need to shed costs from the business. The Authority notes also that Mr Aldridge has a preference for appointment under the collective agreement if a vacancy for a machinist should arise. Mr Harragan in his evidence quite properly draws attention to that provision as well.

[45] It follows from the foregoing analysis that the only remedy that the Authority can contemplate to resolve Mr Aldridge's personal grievance is compensation under s123(1C)(1) of the Act. In that regard, and to remedy the grievance identified, the Authority directs that Safe is to pay to Mr Aldridge the sum of $5,000 under that section of the statute. That sum reflects the limited aspects of the loss and the breaches of the employment agreement which the Authority has analysed as part of the personal grievance.

Costs

[46] Costs are reserved.

James Crichton
Member of the Employment Relations Authority