

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Mukesh Chand (Applicant)
AND Goodman Fielder Milling & Baking NZ Ltd (Respondent)
REPRESENTATIVES Mukesh Chand, in person
Tony Waddel, for the respondent
MEMBER OF AUTHORITY James Wilson
INVESTIGATION MEETING 22 June 2001
DATE OF DETERMINATION 7 August 2001

DETERMINATION OF THE AUTHORITY

The employment relationship problem.

1. The applicant, Mukesh (Mike) Chand, was made redundant by his employer, Goodman Fielder Milling & Baking NZ Ltd, on 8 November 2000. Up to that date he had been employed as Laboratory/QA Manager at the Champion Flourmills plant in Fort St, Auckland. He had held that position since 20 December 1999. Before taking up this position Mr Chand had been employed by Meadow Lea Foods (a member of the Goodman Fielder Group of Companies) from 23 August 1999.
2. In a statement of problem received by the Authority on 15 February 2001, Mr Chand raised 5 issues that he wished the Authority to address.
 - 1). The period of notice which he had been given by Goodman Fielder was nine days short of the one month to which he was entitled.
 - 2). The redundancy compensation paid was, according to Mr Chand's interpretation of his employment contract, two weeks short of his entitlement.
 - 3). The calculation of the payout from his superannuation was, again according to Mr Chand's calculations and interpretation, some \$1079 short.
 - 4). Goodman Fielder had not fulfilled their duty of good faith in that they had failed to sufficiently explore options and/or support him in applications for alternative positions within the Goodman Fielder group. In this regard Mr Chand says that he, on his own initiative, applied for a number of positions within the Goodman Fielder Group but had received little support or assistance and had often not received responses for the positions he applied for.

5). Goodman Fielder should have transferred him to a position at the Mt Maunganui plant which, he says, was in fact the position he had held at the Auckland plant.

It should be noted that the above list is a summary only of the issues Mr Chand raised in his statement of problem.

Background

3. Following a process of consultation, staff at the Goodman Fielder Fort Street plant were advised in June 2000 that the plant would be closing and that over the next 6 months the majority of work would be transferred to the Mt Maunganui plant. Staff were also advised that a process of consultation, redeployment and redundancy would take place over the next few months.

4. At the time the closure announcements were made all staff were advised, both verbally and in writing, of the process to be followed over the next few months. Staff were advised that:

- if they were interested in applying for relocation to the Mt Maunganui mill they should complete an “expression of interest” form. Staff were provided with a list of the positions available. (This included the position of Laboratory Team Leader).
- consultants would be available to provide counselling and job search assistance.
- individual staff would be provided with an estimate of their redundancy entitlement.

Included in the written material provided to staff was a series of questions and answers addressing possible concerns.

5. Apart from the obviously technical points surrounding notice, redundancy and superannuation entitlements, Mr Chand's grievances focus on what he considers to have been a lack of support provided to him. Goodman Fielder's view is that, as stated by the then Human Resource Manager, Mr Gary Cox:

Mr Chand was not accepting of assistance offered when it was given and expected everyone he dealt with to offer him any position he applied for regardless of his ability to do the job. He blamed Goodman Fielder for his plight and expected management to provide him with any job he thought he could do.

Issue # 1: Period of notice

6. Subsequent to Mr Chand's original application to the Authority, Goodman Fielder acknowledged that he had not received his full contractual entitlement to one month's notice. They have since paid him his entitlement.

Issue # 2: Redundancy entitlement

7. Mr Chand's contract of employment, under the heading **redundancy**, says:

Redundancy..... Provides for four weeks compensation for the first year of service and two weeks compensation for each subsequent year up to a maximum of thirty four weeks calculated at your base salary rate of pay.

8. Mr Chand argues that as he had worked for Goodman Fielder for more than one year (including his employment with Meadow Lea) he should be entitled to six weeks redundancy compensation. Goodman Fielder believe that the correct interpretation, and their practice, is that only completed years of service should be counted -- in Mr Chand's case one completed year of service entitling him to four weeks compensation.

9. I agree with Goodman Fielder's interpretation. Mr Chand's contract states that, after the first year of service, the additional compensation is payable *for each subsequent year*. In the absence of any statement to the contrary a *year* must mean a full year i.e. 365 days. Mr Chand was entitled to receive four weeks redundancy compensation. **I find therefore, that Mr Chand has received his full contractual entitlement to redundancy compensation.**

Issue # 3: Superannuation

10. Mr Chand's claim in respect to his superannuation entitlements is set out in his closing submissions. He says:

My retirement plan should be paid to me in full because it was part of my employment benefit. The company terminated my services and therefore I am entitled to my benefit. I have not divorced the company. The company has divorced me and I should therefore be paid my benefit. The actual calculation of my final superannuation is not correct. According to my calculation, the figures should look like this.

GFRA (3%) $0.03 \times \$4098 = \$113.$
Of this \$31 is already paid. Therefore \$82 is outstanding.

GFMA (company @ 3.75%) $0.0375 \times \$4098 = \$153.$
Of this \$39 is already paid. Therefore \$114 is outstanding.

Total amount owing from superannuation is $\$730 + \$82 + \$114 = \926

The \$730 is the **retirement account** to which Mr Chand believes he is entitled. The balance is, according to Mr Chand, due to the miscalculation of his entitlements.

11. The Goodman Fielder superannuation scheme is administered by Watson & Wyatt Ltd. Details of the scheme are set out in a member's booklet. A copy of this booklet was provided to Mr Chand when he joined the scheme. The relevant page of the booklet says:

Leaving service benefit.

If you leave the employment of the company for any reason other than death or total and permanent disablement, you will receive a leaving service benefit.

Your leaving service benefit will be a cash lump sum equal to:

- *your member account (i.e. your regular contributions with interest), plus*
- *your voluntarily account (i.e. your extra contributions with interest), plus*
- *your employer account (i.e. the additional employer contributions with interest), plus*
- *if you have completed at least ten years company service, your retirement account (i.e. the basic employer contributions with interest). (My emphasis)*

12. With respect to Mr Chand's entitlement to receive the **retirement account**, the wording of the superannuation conditions appears clear. While Mr Chand may consider the Company to have a moral obligation to pay him this money, they have no legal or contractual obligation to do so. Mr Chand did not complete *10 years company service* -- **he is not therefore entitled to receive the retirement account.**

13. I am unable to determine whether the other payments made to Mr Chand have been correctly calculated. Mr Cox in his evidence says that he has been assured by Watson & Wyatt that the calculations are correct. If Mr Chand wishes to pursue this matter further I can only suggest that he contact Watson & Wyatt and request that they review their calculations.

The law relating to redundancy

14. Before considering Mr Chand's issues # 4 and 5, it is necessary to consider the legal position in respect to redundancy. In *Baguley v. Coultts Cars Limited*, AC 25/01, 3 April 2001, the Employment Court discussed the principles surrounding dismissal on the grounds of redundancy in the light of the Employment Relations Act 2000. The Court said:

Although a dismissal for redundancy can be a justified dismissal, it too must pass the test of fairness and reasonableness if it is to qualify as just. What is fair and reasonable now depends on the facts and circumstances of each case.

And later:

Thus the provisions of the Act require a new approach to the question whether the particular employer acted as a fair and reasonable employer would. This is still a question of fact and degree in each case but it is informed and illuminated by Parliament's declared intention to reform the nature of the employment relationship. That question of fact and degree as so informed involves a common sense assessment of the situation, bearing in mind:

- (i) the employer's business requirements;*
- (ii) the employee's right to relevant information;*
- (iii) the employer's ability to mitigate the blow to the employee;*
- (iv) the nature of the employment relationship as one calling for good faith.*

These factors can be further developed in this way. Under (i), the employer wants to make a commercial decision, cannot postpone it indefinitely but can reasonably be expected to postpone it for a short time, long enough to accommodate the other factors. Of these, factor (ii) will usually require some real dialogue with the employee starting with the provision, in all good faith, of accurate information. The employer needs to find out what will cause the greatest havoc to the employee in order to try to avoid it, what will injure him the least in order to try and achieve it, whether the employee can be used in another position though his or her current position may be redundant, and which employees should be selected for redundancy if there is a choice to be made. It is convenient to call this dialogue consultation but that term does not imply that the employer has to seek the employees' concurrence in the commercial decision, although sometimes employers may have found other solutions as a result of the employees' input. The timely provision of useful information will often be decisive of the justness or lack of it of the employer's actions. Factor (iii) speaks for itself but, as with factor (ii), the answer may not be obvious without a contribution to it from the affected employee. Factor (iv) involves recognising the employee's worth as a human being even if no longer valued or required as an employee.

15. Mr Chand has not suggested that Goodman Fielder did not adequately consult its employees when making its decision to close the Fort Street plant. His argument is that they did not fulfil their obligation to him personally to find out whether *the employee (Mr Chand) could be used in another position.*

Issue # 4: Support in applying for other positions etc

16. From the time he heard that his position might become redundant until he finally left the Company, Mr Chand applied for more than 20 jobs, both in New Zealand and Australia, within the Goodman Fielder group. In his original letter raising his grievance Mr Chand said:

I have applied for a number of jobs within the Goodman Fielder group. There were hardly any responses for the positions so applied for! It is common practice in Goodman Fielder not to get a response for jobs one applies for. I have many proves (sic) for this. Whatever responses I got were because I followed it myself. Why did the company not try to help me finding a job? Many of these that I applied for, I could have easily slotted into. The company did not have the courtesy to interview or talk to me of the many positions advertised internally.

17. In his statement of evidence to the Authority Mr Chand said:

What efforts did the company make in exploring options in finding me work? In fact I was told not to apply for jobs unless I have the track record. Isn't this an open discrimination? To me it was apparent that there were alternative jobs available but the company was not interested in employing me anywhere in the organisation.

18. In response Mr Cox (the Human Resources Manager) said in his evidence:

.... I became aware that Mr Chand had been applying for a large number of roles within Australia and New Zealand. Managers were contacting me to inquire what Mr Chand was up to. In most cases he did not appear to have the qualifications, skill, or background history to perform the roles. In some cases I contacted Mr Chand on behalf of the Manager concerned to explain why he did not get an interview.

Some of the roles that Mr Chand applied for were,

- *Materials Planner*
- *Operations Cost Improvement Manager*
- *Programme Manager x 2*
- *State Operations Manager*
- *Operations Director*
- *Food Safety/Quality Assurance*
- *Manufacturing Configuration Analyst*
- *Grain Buyer.*

At some point I am unsure of the timing I met with Mr Chand to discuss this issue. My intention was to provide Mr Chand with some support and to get him to focus on the roles for which he had the necessary qualifications and experience. I was willing to provide one on one support, to identify the skills and look at the roles that would suit, and as I had with others actually help him complete applications for specific roles. Mr Chand was not interested in this. He made the comment that he wouldn't take a job in this company. Mr

Chand was clearly frustrated but in my view it was not because we had failed to provide Mr Chand with the support.

19. In evidence given verbally to the Authority, Mr Chand said that he had no recollection of meeting with Mr Cox or discussing this issue. In fact there is a major disagreement between Mr Chand and Mr Cox regarding the level of personal contact between them and the level of personal support provided to Mr Chand over the period in question. Mr Cox says that he met with Mr Chand on several occasions. Mr Chand says that the contact was infrequent and perfunctory. Mr Cox says that his contact with Mr Chand was frequent and that he had *spent more time with Mr Chand than with any other staff member.*

20. Mr Cox is supported in his recollection of events by Mr Garth Gillam, Mill Manager at the Fort Street site. Both Mr Gillam and Mr Cox point to the written material made available to staff, the various general staff meetings, the one on one meetings held with individual staff and the offers of support made both generally to all staff and specifically to Mr Chand.

21. I find that under the circumstances, in respect to support in applying for other positions, Mr Chand was treated fairly. As the Court said in *Baguley*, whether Goodman Fielder treated Mr Chand in a fair and reasonable manner in his endeavours to secure a new position *depends on the facts and circumstances* of this case and is a *question of fact and degree*. Apart from some well-meaning advice from Mr Cox suggesting he confine his applications to jobs for which he was qualified, Mr Chand was not discouraged from seeking other positions. He was offered, although appears to have rejected, assistance with such things as CV preparation etc. There is no evidence that he was discriminated against or that anyone in Goodman Fielder took any action to stop him from being appointed to any position for which he applied. (I leave aside for the moment Mr Chand's particular contention that the position at the Mt Maunganui plant was, in effect, his position -see issue # 5 below). Mr Chand believed that he had the ability to undertake all of the positions for which he applied. While this may or may not be the case he was applying for positions in a competitive market place. I have no doubt at all that for most of these positions there will have been a number of other applicants, many of whom would have had more directly relevant qualifications and experience. While Goodman Fielder did have an obligation to ascertain whether Mr Chand could be *used in another position* (*Baguley supra*) this obligation did not extend to considering Mr Chand for positions for which, in the opinion of the managers concerned, he was not suitably qualified.

Issue # 5: the Mt Maunganui position

22. In the information provided to staff when the closure of the Fort Street plant was announced was a list of positions available at the Mt Maunganui plant. Included in this list was:

Laboratory Team Leader.

- *Person who was responsible for assistance and management of staff to ensure an effective and efficient quality product is produced with effective safeguards and measures.*
- *Salaried position.*

23. In the same information pack, under the heading **relocation opportunities**, it was stated:

If you want to be considered for relocation to the Mt Maunganui Mill please complete the "Expression of Interest Form" and post or fax it to the contact person for positions at that site.

24. In the first instance Mr Chand chose not to complete an “expression of interest form” for the position at Mt Maunganui. When asked at the investigation meeting why he did not do so, Mr Chand said that he felt that the Company had already decided who was to be appointed and that completing the form would be a waste of time. Although Mr Chand disputes discussing his non-application with Mr Cox, Mr Cox says that Mr Chand was asked why he had not applied for the position in Mt Maunganui. He says that Mr Chand indicated that he did not want the role and did not wish to move to Mt Maunganui.

25. Several weeks after the initial restructuring announcements, the Company reviewed the still vacant position in the laboratory at Mt Maunganui. It was decided to advertise a new position, this time incorporating a technical support function i.e. a requirement that the incumbent go out to advise customers and work alongside them in fixing practical difficulties with the Company's product. Mr Chand applied for this position and after some confusion was interviewed by Mr Cox and Mr Gillam. In the statement of evidence Mr Gillam says:

Garry Cox and I discussed the interview and ultimately decided that Mr Chand did not have the technical expertise required to do the role, and notified Mr Chand of our decision.

26. Mr Chand says that the Mt Maunganui position was for all intents and purposes the same as his position at the Fort Street plant. He says that the second advertisement was the same as the original advertisement and that the additional duties were added to justify his non-appointment. He says that in any event he was capable of undertaking the new duties.

27. Mr Gillam described to the Authority how, when it was clear that no suitable applicants were available for the Mt Maunganui position, the Company reviewed the need for both laboratory/QA services and technical support functions. He was able to outline in some detail what had happened to each of the possible appointees and why it was appropriate to amalgamate the various functions.

28. It is perhaps unfortunate that Mr Chand chose not to express an interest in redeployment to Mt Maunganui when he was first given the opportunity. Even if I accept that he did not indicate, as suggested by Mr Cox, that he did not wish to transfer to Mt Maunganui, his decision not to complete an “expression of interest form” sent a very clear message to his employer.

29. I accept Mr Gillam's evidence and **find that the “restructured” position at Mt Maunganui was a new position and that it incorporated responsibilities that were not part of Mr Chand's Fort Street position.** Mr Chand may have been unhappy with the way in which his job interview was arranged. He may also dispute Mr Gillam's opinion that he did not have the necessary technical expertise to carry out in the role. However Mr Chand had no automatic right to be appointed to this position. I am satisfied that Mr Gillam carried out a fair assessment, based on his knowledge of Mr Chand and the requirements of the new job. Even if the way in which the interview was arranged left Mr Chand at a disadvantage, the interview by itself was not pivotal. Mr Chand had reported to Mr Gillam for several months in their respective roles at the Fort Street plant and Mr Gillam was therefore familiar with Mr Chand's abilities.

30. The Mt Maunganui position was not Mr Chand's Fort Street position and he had no automatic right to be appointed to it. In considering his application Goodman Fielder treated him fairly and reasonably.

Summary of findings

31. Mr Chand brought five issues to the Authority for determination. By way of summary of the findings set out above:

- 1). The respondent has acknowledged that Mr Chand was paid nine days less notice than he was entitled to and has corrected this error.
- 2). Mr Chand has received his full contractual entitlement to redundancy compensation.
- 3). Mr Chand is not entitled to receive the superannuation “retirement account” and, if he is still unhappy with the calculation of his superannuation payout, he should take this up directly with Watson & Wyatt Ltd.
- 4). In applying for other positions Mr Chand was treated fairly and reasonably by Goodman Fielder.
- 5). The senior laboratory position at the Mt Maunganui plant was not the same as Mr Chand's position at the Fort Street plant and he was not entitled to be redeployed to it.

32. I have found that Mr Chand has received all of his contractual entitlements from Goodman Fielder and that he has been treated fairly and reasonably by them throughout the period leading up to his redundancy. In dealing with Mr Chand, using a *common sense assessment of the situation* and taken into account the principles outlined by the Employment Court in *Baguley* (supra), Goodman Fielder have met all of their obligations. **Mr Chand does not have a personal grievance against his employer, Goodman Fielder Milling & Baking NZ Ltd.**

Costs

33. Costs are reserved meantime. I note that Mr Chand is now living in Melbourne but, at the time of the investigation meeting, had not obtained permanent work. Should the respondent wish to pursue the issue of costs they should first contact Mr Chand to see if an agreement can be reached. If no such agreement is possible the respondent may, within 28 days of the date of this determination, apply to the Authority for an award in respect to costs. Mr Chand will then be given two weeks in which to respond.

James Wilson
Member of Employment Relations Authority