IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 27
5290248

	BETWEEN	MARCUS COVERDALE Applicant
	AND	RUSH SECURITY SERVICES LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	John Minto for Applicant Larissa Rush for Respondent
Investigation Meeting:	7 December 2010
Determination:	20 January 2011

DETERMINATION OF THE AUTHORITY

A. Marcus Coverdale was unjustifiably disadvantaged by how Rush Security Services Limited (RSSL) went about deciding to disestablish his position and dismiss him for redundancy.

B. RSSL is to pay $3000 to Mr Coverdale as compensation under s123(1)(c)(i) of the Employment Relations Act 2000.

Employment Relationship Problem

[1] Marcus Coverdale claimed Rush Security Service Limited (RSSL) acted unjustifiably by dismissing him for redundancy while keeping on another worker employed only a fortnight beforehand.

[2] RSSL defended its decision to disestablish Mr Coverdale's position as being made for genuine commercial and operational reasons after a fair process of consultation.

[3] The issues for resolution by the Authority were:

(i) was RSSL's decision to disestablish the position in which Mr Coverdale worked fairly made for a genuine commercial reason or predominantly for an ulterior purpose such as poor performance; and

(ii) if the decision or how it was made was unjustified, what remedies are due (considering lost wages, subject to mitigation, and compensation for hurt and humiliation).

The investigation

[4] Written witness statements were provided by Mr Coverdale and RSSL's general manager Larissa Rush. Both witnesses attended the meeting and, under oath or affirmation, answered questions from the Authority member. Mr Coverdale's representative and Ms Rush each had an opportunity to ask additional questions and provide oral closing arguments.

The law

[5] RSSL's actions are to be assessed under the test set by s103A of the Employment Relations Act 2000 (the Act). Its decision to disestablish Mr Coverdale's position, and how it went about dealing with him about any proposal, decision and consequences of redundancy, was justifiable if its actions were what a fair and reasonable employer would have done in all the circumstances at the time of the decision and dealings around it.

[6] The application of s103A to personal grievances involving redundancy was described this way in *Simpsons Farms Limited v Aberhart* [2006] ERNZ 825:

> *[65] … The statutory obligations of good faith dealing and, in particular, those under s4(1A)(c) inform the decision under s103A about how the employer acted. 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 s4 including as to consultation because a fair and reasonable employer will comply with the law.*

…

> *[67] … So long as an employer acts genuinely and not out of ulterior motives, a business decision to make positions or employees redundant is for the employer to make and not for the Authority or the Court, even under s103A.*

[7] So the Authority must be satisfied on two general points – whether the business decision to make a position redundant in this case was made genuinely and not for ulterior motives; and whether RSSL acted in a fair and open way in carrying out that decision – particularly did it consult properly Mr Coverdale about the proposal to make his position redundant and otherwise act in a way that was not likely to mislead or deceive him, that is in good faith?

Motives

[8] A genuine redundancy is determined in relation to the position not the incumbent.[1] The integrity of a restructuring scheme, even where motivated by genuine operational requirements, may be compromised by its application to particular individuals for reasons other than that their jobs have gone. Where the selection of an employer for redundancy is "*tainted by some inappropriate motive*" or is "*masking another and different reason*", the worker will have a valid grievance.[2]

[9] The grievant raising an allegation of an engineered dismissal has the burden of convincing the Authority that the theory has substance.

[10] Where the Authority finds "*mixed motives*" – such as genuine business reasons but with underlying personality or performance concerns[3] – the employer bears the burden in justifying a redundancy dismissal of persuading the Authority that the redundancy was both genuine and the predominant motive or reason for dismissal. If the predominant motive was a genuine commercial decision, the dismissal will be justified if carried out in a fair manner. If the predominant motive was for another

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[1] *NZ Fasteners Stainless Ltd v Thwaites* [2000] 1 ERNZ 739 at 747.
[2] *Savage v Unlimited Architecture Ltd* [1999] 2 ERNZ 40, 49-50 (EC).
[3] The example given in *Nelson Aero Club Inc v Palmer* (unreported, EC Wellington, 7 March 2000, WC10A/00, Judge Shaw).

reason, the dismissal will be unjustified.[4]

Procedural fairness

[11] A just employer – subject to mutual obligations of confidence, trust and fair dealing and the statutory duty of good faith – will consult on a redundancy proposal and implement any redundancy decision in a fair and sensitive way. Fair treatment may call for counselling, career and financial advice, retraining and related financial support.[5] This requires more than "*going through the motions*" and will not justify a course of conduct carried out in a way that bruises rather than reasonably minimises the impact on the employee.[6]

[12] The good faith obligations of the Act required RSSL to be active and constructive, responsive and communicative in consulting Mr Coverdale about changes to the business and proposals which might impact on him, including redundancy: s4, s4(1A) and s4(4). This included providing access to relevant information and an opportunity to comment of the information before the redundancy decision was made: s4(1A)(c).

[13] Inadequate consultation and inadequate exploration of redeployment possibilities may cast doubt on the genuineness of an alleged redundancy.[7]

The work

[14] Mr Coverdale was employed in May 2009 as a security officer with a level 1 ranking. He was one of three level 1 officers along with two supervisors who worked in RSSL's alarm monitoring control room. He mostly worked day shift. At the time of starting this job Mr Coverdale's work included a large amount of work dealing with incoming telephone calls and emails about administrative and technical matters for all parts of the RSSL business as well as alarm monitoring.

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[4] *Forest Park (NZ) Ltd v Adams* [2000] 2 ERNZ 310, 322 (EC).
[5] *Aoraki Corporation Limited v McGavin* [1998] 1 ERNZ 601at 619 and 631 (CA).
[6] *Coutts Cars Ltd v Baguley* [2001] 1 ERNZ 660, 673 (CA).
[7] *Aoraki*, above, at 618; *NZ Fasteners Stainless Ltd* , above, at 747.

[15] Ms Rush and Mr Coverdale agreed in their evidence that the volume of this work was large. Ms Rush said it was often more than could be humanly done while Mr Coverdale said it was often "*chaotic*".

[16] As a result of those demands RSSL implemented three significant changes between June and September 2009:

> (i) The work of scheduling work for technicians was shifted from the control room to a newly-created position of co-ordinator based in the technical department with a new staff member appointed to that position in August; and
>
> (ii) a new telephone routing system was installed which provided electronic options for inbound calls and reduced the number of calls for the control room to process; and
>
> (iii) a manager's role on the day shift was disestablished and a further supervisor position on the night shift was established.

[17] On 16 September 2009 Mr Coverdale was given a letter inviting him to a consultation meeting on restructuring the proposal. The letter stated that it had:

> *become apparent to management in the last few months that the Control Room performance was falling short of the company's expectations with regards to quality performance. This has prompted management to rethink the way the company's Control Room operates from both cost and seniority perspectives and the required quality assurance standards.*

[18] The restructuring proposal was for two of the three full-time roles as level 1 security officers to be disestablished. The selection criteria was to include "*any rostering constraints*" and for the "*least experienced operators to be considered first for redundancy*".

[19] At the consultation meeting on 21 September Mr Coverdale and his union representative proposed that the selection criteria should be on the basis of service with RSSL. He considered another of the three officers, who had only started work

on 14 September, should be made redundant first.

[20] By letter written later on 21 September Ms Rush advised Mr Coverdale's position was disestablished and he was given one week's notice.

[21] This explanation of the selection criteria was given:

> *The company has considered all 3 first ranking officers as candidates for redundancy including the last hired employee. … [It] was decided that business needs to retain people with the most amount of industry experience. All candidates were then evaluated based on that criterion. The Company did not use length of service at DRS as the criterion but total years of service in the Alarm Monitoring/Dispatch overall. You have admitted that you have minimal experience in Alarm Monitoring – 3 months – which is the time employed at DRS. As a result, your position was affected, as you are one of the bottom two employees with the least experience in the field.*

[22] It also commented on Mr Coverdale questioning the genuineness of the redundancy proposal. It stated RSSL was restructuring other divisions and the control room was not the only area of attention for "*costs optimisation and productivity increases*".

Commercial motivation

[23] I accept Ms Rush's evidence regarding the genuine operational reasons for the changes to how technical scheduling was arranged and for the introduction of a new telephone system. Those two changes affected the volume of work previously done by day shift alarm monitoring staff including Mr Coverdale. A further factor was the general impact of the economic recession on the level of business. While Mr Coverdale said he did not notice any significant change in the number of client service contracts, he accepted the other changes did affect the volume of work.

[24] I do not accept that Mr Coverdale met the evidential burden of establishing RSSL's decision to disestablish two Level 1 security officer positions and then select him for redundancy was predominantly motivated by some other ulterior motive.

[25] Even accepting Mr Coverdale's evidence that he had an argument with RSSL managing director Darien Rush about an incident at work and that he had complained to Ms Rush about not getting proper breaks during his shifts, there was nothing more in his evidence that would support an inference that those disagreements motivated RSSL's decision on the positions or his selection for redundancy. The best he could say in support of that theory was "*it could of*". That is not enough.

[26] I find the decision to disestablish the positions was made for predominantly genuine commercial reasons.

Flaws in how decision made and carried out

[27] Mr Coverdale's employment agreement included terms in the event of redundancy:

> *A redundancy situation arises when the employment is terminated due to the fact that the position held by the employee is, or will become, superfluous to the needs of the employer.*
>
> *In such case the employer will follow a fair procedure, will consult with the affected employees and explore any alternative options before terminating the employment.*
> …
> *No additional compensation for redundancy is payable.*

[28] I find the following significant failures of fairness in the procedure followed by RSSL prior to Mr Coverdale's dismissal for redundancy:

(i) inadequate consultation about the likely impact of shifting technical scheduling to the technical department and introducing a new telephone system; and

(ii) inadequate consultation about the appointment of a third Level 1 security officer only a fortnight before the redundancy proposal; and

(iii) inadequate consideration of alternatives to the redundancy and dismissal.

[29] The legislative requirement of the Employment Relations Act 2000 for good faith behaviour includes situations where employees will be affected by changes to the employer's business and any proposal by the employer that might impact on the employer's employees.

[30] The creation in August of a technical services co-ordinator position, working within the technical department, and the implementation of a new call routing system (also in August) were two such situations of change with the potential to impact on or affect the work of Mr Coverdale and the other security officers working on the alarm monitoring day shift. In fact, as the evidence of Ms Rush confirmed, the very purpose of those changes was to alleviate identified inadequacies in their ability to satisfactorily deal with that work.

[31] However Ms Rush's evidence also confirmed that no real attention or thought was given at the time to the impact of those changes on the viability of the alarm monitoring jobs. While she said RSSL did not know in August that it would need to look at restructuring in September, I do not consider the company met its obligations at the time. She accepted the work to be done by the technical co-ordinator was work previously done by the monitoring staff and, I find, some discussion should have been contemplated with those staff about the likely effect of that change.

[32] Similarly RSSL's decision to fill a vacant alarm monitoring role only two weeks before proposing two of the three positions be made redundant demonstrated a further failure to consult staff about matters which might affect them. Ms Rush's explanation was that a staff member had resigned and the role was advertised and filled because "*sometimes [we] do not have time to think about all objectives*". I find that rationale unlikely in light of other moves being undertaken in the business at the time to streamline work and costs.

[33] RSSL's evidence also failed to confirm any real efforts were made to identify alternatives to dismissing Mr Coverdale for redundancy once it made the decision to disestablish the two alarm monitoring jobs. Nothing was said of any such consideration of alternatives in its statement in reply or Ms Rush's witness statement. Her evidence on it was limited to a response to a question from the Authority in which she said that she had asked the guard manager whether there was any other jobs available but was told "*nothing really*". Its efforts, if that is all they were, were inadequate in light of the contractual obligation (reinforced by relevant case law) to explore alternatives, and to be able to provide evidence if required of having made a

real effort to do so.

[34] In this case there was a real prospect, I find, that Mr Coverdale could have been redeployed to another role, such as that of technical co-ordinator, if RSSL had properly paid attention to its consultation obligations several weeks earlier and not just belatedly when it developed a proposal focussed solely on the future of three alarm monitoring jobs.

[35] However I do not accept RSSL's actions were unjustified in selecting Mr Coverdale for redundancy over another officer who had only two weeks service with the company. The selection criteria included the length of experience with alarm monitoring. Mr Coverdale's direct experience in that area was less than four months. The person who was selected for the one remaining role had more than six years experience. I accept the criteria applied by RSSL in making that decision were legitimate and transparent.

[36] Mr Coverdale argued that RSSL should apply a different criterion: last-on-first-off. It was an argument he was entitled to make but it was also one, in these particular circumstances, that RSSL was entitled to reject. Mr Coverdale was aware that last-on-first-off "*happened in other jobs*" but accepted, in answers to questions in the Authority, that RSSL employment agreements did not have a term binding the company to follow such a selection policy.

Determination

[37] Because of the flaws identified in how RSSL went about making decisions about changes in its business through August and September, I find Mr Coverdale was disadvantaged. That disadvantage was unjustified because RSSL had not met its statutory and contractual obligations to Mr Coverdale before making what I have accepted was a commercially genuine decision to dismiss him for redundancy.

[38] Consequently Mr Coverdale has a personal grievance which requires remedies. Those remedies may address only the distress caused to him by how he was treated prior to his dismissal for redundancy, not the loss of the job itself. While

Mr Coverdale missed out on several months' income before getting more work elsewhere, the Authority cannot award lost wages in this case.

[39] He gave evidence of not feeling valued because of the way in which he was dismissed. I accept this amounted to evidence of humiliation, loss of dignity and injury to feeling, albeit at the lower end of the scale. Considering the particular circumstances and the general range of awards in cases of this type, I order RSSL to pay Mr Coverdale $3000 as compensation for the consequences for him of the manner of its dismissal of him. The award is made under s123(1)(c)(i) of the Act.

Costs

[40] Mr Coverdale was represented by his union advocate in preparing for and attending the Authority investigation. If the matter cannot be agreed between the parties, he may seek an order for costs in relation to that representation. Subject to whatever submissions may be received, if it is necessary for the Authority to determine costs, I can indicate on a preliminary basis that a likely award for what was a relatively straight forward half-day meeting would be $1500. Any application to the Authority for determination of costs should be made within 28 days of the date of this determination and RSSL will have 14 days from the date of service of such an application to lodge a reply memorandum. No application for costs will be considered outside this timetable without prior leave being sought.

Robin Arthur
Member of the Employment Relations Authority