

Attention is drawn to the paragraph prohibiting publication of certain information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 119
5323000

BETWEEN DANIEL CUMMINGS
Applicant

A N D WYMA ENGINEERING (NZ)
LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: David Beck, Counsel for Applicant
Peter Zwart, Advocate for Respondent

Investigation Meeting 16 June 2011

Further information: 17 and 21 June 2011

Submissions Received: 23 June 2011 from Applicant
1 July 2011 from Respondent

Date of Determination: 5 August 2011

DETERMINATION OF THE AUTHORITY

Prohibition from publication

[1] I prohibit from publication under clause 10(1) of Schedule 2 of the Employment Relations Act 2000 document "B" that identifies the names and scorings of all employees considered during the restructuring process. I also prohibit from publication any commercial/financial information about the business of Wyma Engineering (NZ) Limited except to the extent that there is reference to such in this determination.

Employment relationship problem

[2] Daniel Cummings was employed at the material time as a team leader on the vegetable polishing machines section by Wyma Engineering (NZ) Limited (Wyma). Wyma is a manufacturer of packing shed equipment specialising in root crop vegetables. Mr Cummings had first worked for Wyma in or about 2007 as a temporary trade assistant leaving after about a year. Three months after Mr Cummings left Wyma he was asked to return and was then promoted to a temporary team leader position working on the vegetable polishing machine section.

[3] Mr Cummings was party to an individual employment agreement with Wyma that he signed on 7 July 2008. When he was promoted he signed an individual schedule to the agreement on 27 July 2009 and his position title became team leader vege-polisher. On 24 September 2010 Mr Cummings was advised that his position was redundant and he was paid a month's salary in lieu of notice.

[4] He says that he was unjustifiably dismissed and/or disadvantaged by unjustified actions of Wyma resulting from the process adopted by them and the manner in which he was selected to be made redundant. A further claim he makes is that his employment agreement was breached as the redundancy process did not adequately establish that his position of team leader was surplus to Wyma's requirement.

[5] Mr Cummings seeks lost earnings in the amount of seven week's pay, compensation for distress and humiliation in the sum of \$10,000 and costs.

[6] Wyma say that Mr Cummings' redundancy was genuine and that the process adopted to implement his dismissal on the grounds of redundancy was fair and in accordance with good faith obligations.

The issues

[7] The Authority is required to determine:

- Was the redundancy genuine?
- Was the process of consultation, selection and implementation of the redundancy carried out in a fair and reasonable manner and in accordance with good faith obligations?

- If the Authority gets to the point of remedies then what remedies should be awarded and are there issues of mitigation and contribution?

[8] In assessing justification the Authority is required to have regard to s.103A of the Employment Relations Act 2000 and consider on an objective basis whether the decision made by Wyma and the manner of making the decision were what a fair and reasonable employer would have done in all the circumstances at the time – *Simpsons Farms Ltd v Aberhart* [2006] 1 ERNZ 825. The statutory obligations of good faith dealing inform the decision under s 103A about how the employer acted – *Simpsons Farm Ltd*.

Individual employment agreement

[9] On page 9 of the individual employment agreement the following is provided under the heading redundancy:

The Employee shall be regarded as redundant when the position held by the Employee becomes surplus to the requirements of the Employer because of the closing down of all or any part of the Employer's operations, or a reduction in work available, or a change in plant, methods, materials, or products, or as a result of any other business genuine decision of the Employer.

[10] At the top of page 10 of the individual employment agreement it provides that in the event of a termination for redundancy, the Employer shall provide one months notice or equivalent wages or salary in lieu of notice of termination for redundancy and that the parties agree that no redundancy compensation shall be payable in the event of redundancy.

Reasons for review of staff numbers in September 2009

[11] The Authority heard evidence about the reasons for the restructuring and redundancies in 2010 from Peter Suckling, the Managing Director of Wyma, and Mathew Williams, at the material time the Global Manufacturing Manager responsible for all manufacturing, supply chain and after sales service.

[12] Mr Williams explained in his written evidence that Wyma primarily focuses on exports and in 2000 exports were in excess of 95% of the business undertaken by Wyma.

[13] Mr Suckling said in his evidence that the company had experienced growth over the period 2002 to 2008 when staff numbers increased from 35 in 2002 to 99 in 2008. In 2009 Mr Suckling's evidence was there was only a reduction of 20% of company turnover due to existing contracts ongoing at the start of the global financial crisis. In 2010 Mr Suckling's evidence is that there was a further reduction of orders. This was he said due to capital equipment spent being effectively frozen in all markets and at the worst of the period Mr Suckling said that order intakes were running at approximately 25% of previous years. Mr Suckling also referred to the increase in price pressure brought about by the rising New Zealand dollar at this time.

[14] The company undertook a series of cost cutting exercises over the 2009 and 2010 period that included an initial round of redundancies in June and October 2009, shorter working weeks for management and extended leave for staff. Mr Suckling said that in September 2010 there was no choice but to reduce staff members and that required the company to cut both factory and management positions to reduce overall expenditure by \$1.5m to \$2m. Mr Williams own employment with Wyma was terminated in December 2010 on the grounds of redundancy.

[15] Mr Suckling said that in the months leading up to September 2010 he regularly briefed all employees about the financial state of the company and the difficulties the company was experiencing at that time. Mr Williams described in his role a concern that leading up to September 2009 people were standing around twiddling their thumbs and that the company was looking at a blank order book.

[16] Mr Cummings accepted in his evidence that in 2010 the company was struggling with a lack of contracted sales orders and he agreed that he was asked in confidence by his staff to see where things were at. On that basis Mr Cummings approached the Commercial/Finance Manager, David Smith on a confidential basis about the lack of sales orders and minimal production work for the team in or about July or August of 2010. Mr Cummings said that he was reassured in these discussions that further orders were in the pipeline. He agreed that there was a possibility that he mentioned to Mr Smith that he had been looking for some time to join the Police. Mr Cummings accepted that Mr Suckling discussed financial matters pertaining to the company at meetings in 2010 although he did not think it would get to the stage of redundancy.

The process and meetings held

[17] Wyma proposed to reduce overall staff members in September 2010 by 16 being 7 office positions and 9 positions in the factory. Mr Cummings position was considered along with the others in the factory. Wyma's proposal about the factory positions included ranking all factory staff including team leaders against five criteria. Employees were scored by their supervisors and/or team leaders and by Mr Williams and scores were then weighted on the importance of the criteria to the business. A list was then created showing the employees and their scores highest to lowest. Document B shows that 36 employees were scored. As a result of the initial ranking Mr Cummings fell within the group of 9 potentially selected staff on the basis that they had the lowest scores as ranked on the basis of attendance, overtime, teamwork, flexibility and work ethic.

[18] The scoring took place before employees were advised of a possibility of redundancy and without their knowledge. Mr Cummings records in his oral evidence in answer to a question from the Authority that *a month to a fortnight prior to 14 September* he was asked because he was a team leader to rank staff. Mr Cummings did not accept that he was told why he was ranking staff, but he assumed that Wyma was looking at redundancies at some time. Mr Williams said that he expected in requesting team leaders and supervisors to undertake ranking of employees he would have told them the reason why they were ranking other employees.

[19] Mr Cummings was on bereavement leave from 14 to 20 September 2010. Whilst on bereavement leave he was approached by a co-worker and advised that other employees, including members of Mr Cummings own team were being made redundant. Meetings had been held with 8 of the 9 affected employees as a result of the initial rankings on 15 September 2010. That date is inconsistent with the date in the letter handed to Mr Cummings on 21 September 2010 that refers to such meeting having taken place on 14 September 2010 but is consistent with the evidence and documentation provided during the Authority's investigation.

21 September 2010

[20] Mr Cummings returned to work on 20 September 2010 but was not invited to a meeting on that date. At about 8.15 am on 21 September 2010 Mr Williams asked

Mr Cummings to meet with him. Mr Williams handed Mr Cummings a letter dated 21 September 2010 that provided:

Ref: Proposed Redundancy.

21st September 2010

To Factory Floor staff (Directly Affected Staff).

As outlined at the meeting held on the 14th September 2010 we have continued to struggle with the ever increasing dollar, market downturn and increasing discounting pressure.

As a result of the above it is now essential that the company streamlines its operation to reduce costs. For the company to survive through this, we propose to cut both overheads and factory staff across the company. If we proceed with this proposal it will potentially result in both redundancies and reduced hours of work for some.

Our proposal is to restructure the company by either disestablishing or making redundant 16 positions.

We propose to make nine factory staff redundant. These redundancies have been selected on the basis of Attendance, Overtime, Teamwork, Flexibility, Work ethic, skills sets.

In adopting this selection criteria your position will be one of those selected as surplus to requirement. Please find enclosed a breakdown of the criteria and your rating under that criteria.

This criteria has been applied across all factory departments.

We wish to point out that this is only a proposal and no final decision will be made until consultation has taken place with you. Feedback may either be in writing or at a personal meeting. My preference is to complete the consultation process by the end of this week so if you wish to meet with me please contact me before noon Thursday 23rd September 2010 to arrange a time.

Consultation may include but not be limited to:

- the proposal to disestablish nine factory positions;*
- the selection criteria used, including the score given to you in applying that criteria;*
- the consequences of the proposal on you if it goes ahead;*
- the consultation process including timeframes.*

This is clearly a difficult time for all involved and we remind you of your rights to seek and have present representation at any discussions.

Should you have any questions relating to any of the above please do not hesitate to get in contact with me.

Yours sincerely,

Mathew Williams

[21] Attached to that letter was a description of how the selection criterion was applied and Mr Cummings raw score. I accept that at the meeting on 21 September Mr Williams spoke to the letter and discussed the key points. Mr Cummings was not required to, and the evidence does not support he did, make any particular comment. He was given the rest of the day off on pay to think about the situation. Although Mr Cummings could not recall if Mr Williams referred to have a representative at further discussions, such advice does appear in the letter.

[22] Both Mr Cummings and Mr Williams made a note following each meeting. Mr Cummings made entries in a diary starting on 21 September 2009 and Mr Williams had a running typewritten file note for each meeting. Both sets of notes have sufficient similarities for me to conclude that they were made shortly after each meeting and largely reflect what was said. I have relied on what both Mr Cummings and Mr Williams wrote to achieve a fuller picture of the nature of the discussions that took place before Mr Cummings was made redundant. I have had to assess the reliability or likelihood of some of the contents of the notes.

[23] Mr Cummings in his evidence said that after his meeting with Mr Williams he went home and felt the scores he had been provided with did not reflect an accurate picture of him as an employee. He also spoke to his father who was with a placement agency about whether there was other work he could undertake. Mr Cummings in his written evidence said he recalled being advised at the 21 September meeting that the vege-polisher team position would be retained. That does not appear in his diary in relation to 21 September and Mr Williams did not accept that he told Mr Cummings this. Mr Williams said that he did recall saying something like *The VP team will always be there as it is our flagship product*. I conclude Mr Cummings was most likely mistaken in his recollection about that.

22 September 2010

[24] Mr Cummings in anticipation of a further meeting with Mr Williams following the 21 September 2010 meeting wrote out some questions in his diary and he said that he took the diary with him to the meeting and asked the questions. Mr Williams could not recall Mr Cummings having the diary with him at the meeting or making entries. I find it likely that the entries in the diary were, if not made at the meeting, made

shortly thereafter. There was a dispute in the evidence about who initiated the meeting that took place on this date. Although not particularly material, because I accept that Mr Williams was happy to have a meeting, I prefer Mr Cummings' evidence that he initiated the meeting notwithstanding Mr Williams' file note to the contrary. The letter of 21 September 2010 invited the recipient to indicate whether they wished to have a further meeting; and it is clear that Mr Cummings thought the initiation of this meeting was important because it is included in the letter raising the personal grievance dated 29 September 2010.

[25] At the meeting on 22 September 2010 Mr Cummings requested a breakdown of his scores. I find it likely that such a breakdown was provided to Mr Cummings later that same day. Mr Cummings asked the questions that he set out in his diary. One question has a recorded answer that is disputed by Mr Williams. Mr Cummings records that he asked a question *Team-Leaders role redundant or me?* The answer is recorded *Team leader's role safe due to my skills is why on list.*

[26] Mr Williams denies that he told Mr Cummings that his position would not be disestablished. He said that no positions were safe at that time and all positions in the factory were assessed on the same basis as Mr Cummings. Mr Williams said that once the restructuring was completed two assembly teams were combined with welding into one and team leader positions were reduced by 2. I think it likely that what Mr Cummings recorded is his understanding of what was said. Mr Williams own notes reflect that he made a comment to the effect that there would be fewer teams in the structure going forward and therefore could expect less team leaders. It was clear then that there was always going to be a team leader role although Mr Cummings may have misunderstood that to mean it was his position that was safe. It was also true that Mr Cummings was at that stage unless things changed not going to be part of any further decision making into who the team leader or leaders would be because of his scores that did not include leadership qualities.

[27] Mr Cummings also asked some questions about why his team leader skills were not taken into account. Mr Williams file note reflects that he responded that leadership was not in the criteria. I find that it was likely Mr Cummings mentioned the possibility that he may have a role commencing on the Monday and questioned whether the process would be finished by then. Mr Williams advised he was not sure.

23 September 2010

[28] On 23 September 2010 a further meeting took place. At this stage Mr Cummings had a chance of temporary work from a placement agency and he wanted to explore if he could leave immediately. Mr Williams suggested that Mr Cummings think about the matter overnight and he was given a form in the nature of a redundancy acceptance form and advised that he should take that home. Mr Cummings asked some further questions about the scores and why he had scored so low. He recorded in his diary that Mr Williams was unsure why he had received a 2 for overtime or a 2 for teamwork when he was a team leader. Mr Cummings was also given an amended score sheet that increased his score somewhat although it did not affect his placement as one of the lowest ranked 9 employees.

24 September 2010

[29] After reflecting on the situation overnight, Mr Cummings decided not to leave his employment and he approached Mr Williams on the morning of the 24th, which was a Friday. Mr Cummings advised that he wanted to stay as his view was that he had an uncertain future and wanted some job security. Mr Cummings was asked by Mr Williams if he had any further feedback to give and Mr Cummings advised that he did not.

[30] Mr Williams then discussed the matter with Mr Suckling and they decided to progress the redundancy. Mr Cummings was then called to a meeting at about 3 pm on that same day. He was not advised prior to the meeting to obtain representation but was handed a letter which advised him that his role was being made redundant and that it was Wyma's intention to make to him a payment in lieu of notice of one month and that his employment would therefore formally end on 24 September 2010. Mr Cummings was advised that his wages and holiday pay would be made up for him on that day.

[31] Mr Cummings said that he was quite annoyed that the letter handed to him giving him notice of redundancy referred to generic factory staff without mentioning his team leader role.

[32] Mr Cummings received the payments that were owing to him and he attempted to find other work. He also sought legal advice and on 29 September 2010

a personal grievance was raised on his behalf of unjustified dismissal and disadvantage and one of the remedies sought was reinstatement.

[33] On 11 October Mr Williams left a message on Mr Cummings' telephone asking if he would be interested in temporary work for four weeks at \$23 per hour that had been Mr Cummings hourly rate before he was made redundant. Mr Cummings said that he did not pursue that opportunity as he felt his job had wrongly been turned into a temporary position and he had lost trust in his employer.

[34] Mr Cummings was able to obtain some temporary work although he did not obtain permanent employment until March 2011. During the period following his redundancy he had around 6 to 7 weeks with no work.

New Orders

[35] The Authority heard evidence about an order being confirmed in late September 2010, just a few days after the termination of Mr Cummings' employment, for three 518 vegetable polishers. Wyma had to advertise for temporary employees. Mr Cummings said that he was surprised about this turn of events because of the confirmation of redundancies at Wyma. The Authority and Mr Beck requested further information to establish when this order was confirmed and when work began on the order. The further information received about the order did support Mr Suckling's and Mr Williams' evidence that work on these orders did not commence until October, which in turn supported that the order had not been confirmed at the time of the redundancies.

Conclusions as to genuineness of the redundancy

[36] I am satisfied that the restructuring proposal to reduce the number of employees at Wyma in the factory in September 2010 was motivated by genuine business operational requirements due to a reduction in orders and corresponding reduction in company turnover. I am further satisfied that the confirmation of the order shortly after 24 September 2010 resulting in further work was unexpected and that in itself would not have impacted on the genuineness of the redundancy – *Mathews v. Bay of Islands Building Ltd* Unrep AEC 12/98.

[37] I need to consider however whether as at 24 September 2010 Mr Cummings' position was surplus to the requirements of Wyma within the definition in his employment agreement.

[38] I am not satisfied that a fair and reasonable employer would have concluded Mr Cummings' position was genuinely redundant as at 24 September 2010 in all the circumstances at that time. I conclude this for the reason that at 24 September 2010 there had been no decision as to how many team leaders would be required at Wyma and such a decision was not available until the restructuring of those in the factory had been completed and it was known what the new structure would be. I accept as Mr Beck submits the approach taken by Wyma supports that it focused on Mr Cummings rather than whether his position was surplus. Redundancy is determined in relation to the position, not the incumbent – *NZ Fasteners Stainless Ltd v Thwaites* [2000] 1 ERNZ 739. After the restructuring, team leader positions were reduced, but Mr Cummings dismissal before then on 24 September 2010 was at best premature and at worst may not have occurred at all.

[39] In conclusion Mr Cummings' position was not genuinely redundant. Mr Cummings has a personal grievance that he was unjustifiably dismissed and is entitled to remedies. For completeness the procedure adopted was also unfair and consultation was inadequate primarily because it was not known at the time what would happen with the team leader positions.

Remedies

Lost Wages

[40] Mr Cummings was offered four weeks casual work at his previous hourly rate by Wyma. This may well have extended to more work. I find although he was upset at his dismissal it would not have been unreasonable for him to take up that offer until he found something else. I am satisfied that he attempted to otherwise mitigate his loss. I find that his claim for lost wages is limited to reimbursement for three weeks lost wages.

[41] I order Wyma Engineering (NZ) Ltd to pay to Daniel Cummings a sum equivalent to three week's wages under section 123(1)(b) of the Employment Relations Act 2000 being reimbursement of lost wages. If there is difficulty with such a calculation then either party may return to the Authority for assistance.

Compensation

[42] Mr Cummings gave evidence about the effect of his dismissal on him following 24 September 2010. He said that he had self doubt if he still had the skills to do engineering and that he became stressed as a result. Mr Cummings said that he did not know what he had done wrong at Wyma because he had not previously received any warnings about his performance and he worked hard at Wyma for the period that he was there and met objectives. Mr Cummings' partner provided a statement of evidence and there was no objection taken to that being read although she could not be present to give evidence. She described Mr Cummings as becoming quiet, stressed, shut off and mildly depressed and that his confidence was affected.

[43] I accept that the evidence from Mr Cummings and the statement of Ms Bryant supported he suffered humiliation and loss of dignity and injury to his feelings. I felt there was a genuine confusion on his part about why he was redundant and that in turn impacted on his confidence about his own skills. Mr Cummings seeks \$10,000. I do take into account that he was offered some casual work by Wyma and that Mr Cummings did find some temporary work reasonably quickly. In all the circumstances I consider \$6000 to be an appropriate award.

[44] I order Wyma Engineering (NZ) Ltd to pay to Daniel Cummings the sum of \$6,000 being payment of compensation for humiliation, loss of dignity and injury to feelings under s. 123 (1)(c)(i) of the Employment Relations Act 2000.

Contribution

[45] I do not find that Mr Cummings contributed to his personal grievance and no deduction is called for.

Costs

[46] I reserve the issue of costs. Mr Beck has until 26 August 2011 to lodge and serve submissions as to cost and Mr Zwart has until 9 September 2011 to lodge and serve submissions in reply.