Determination Number: CA 168/06
File Number: CEA 87/06

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH OFFICE

BETWEEN	John Currie (Applicant)
AND	McVicar Timber Group Limited (Respondent)
REPRESENTATIVES	Ian Thompson, Advocate for Applicant Peter Macdonald, Advocate for Respondent
MEMBER OF AUTHORITY	Robin Arthur
INVESTIGATION MEETING	23 August 2006
DATE OF DETERMINATION	5 December 2006

DETERMINATION OF THE AUTHORITY

[1] The applicant alleges his dismissal for redundancy on 10 February 2006 was unjustified and that he was unjustifiably disadvantaged by his employer not honouring a contractual obligation to negotiate terms and conditions of redundancy with him.

[2] The respondent, which changed its company name in May 2006, replies that the redundancy of the applicant's position was for genuine reasons and made in a fair way. It denies there was any contractual obligation to negotiate terms and conditions of the redundancy with the applicant.

The issues

[3] This matter was not resolved in mediation. At a one-day investigation meeting I had written witness statements and heard additional oral evidence from the applicant; his partner Suzanne Elley; the respondent's general manager John McVicar; the respondent's former chief executive and father of John McVicar, Gary McVicar; and the respondent's financial controller Geoff Clark. The parties' representatives asked additional questions and gave initial oral closing submissions. They later lodged written closing submissions.

[4] There are two issues to address in resolving this employment relationship problem:
(i) whether the redundancy was for genuine reasons and carried out in a fair way; and
(ii) whether the respondent was bound by a contractual term to negotiate the terms and conditions on which the applicant was to be made redundant.

The terms of employment

[5] The applicant worked for thirty years in the respondent's largely family-owned sawmilling and timber supply business. He started work in the timber yard as a 20 year old in 1975.

[6] By January 1997 he held the position of Export Manager. He was offered that role in the previous September. At that time he was a union member and covered by an applicable

collective employment contract negotiated between the respondent company and the Wood Industries Union ("the collective contract").

[7] On appointment as Export Manager no new or different terms were discussed except for a change of title and the salary. The applicant's evidence, which I accept, was that apart from being told his new salary, the discussion about the terms and duties of the new job consisted of being told by Gary McVicar to "*get the bloody timber out the gate*". Within a few months he was also provided with a car, petrol car and cell phone. Mr Clark also suggested to the applicant that as he was now a manager he should resign from the union, which he did. There were no changes to his holiday or sick leave entitlements as far as the applicant was aware.

[8] After considering the evidence of Mr Clark, Gary McVicar and Mr Currie on this point, I accept that the terms and conditions of the applicant's employment were based on the collective contract in place at the time of his promotion to Export Manager. Gary McVicar did not recall discussing more than the salary at the time of that appointment. He recalls no specific verbal agreement setting out the terms and conditions. In those circumstances, and on that evidence, I consider it more likely than not that the mutual intention of the parties was for the terms and conditions of the applicant to remain unchanged – apart from salary and title – from those which he enjoyed under the collective contract. This does not mean – as suggested by the respondent's submissions – that he could not be employed on the terms of that collective. Rather its means that the terms of his individual employment contract entered into at that time (and unchanged since) included all the relevant terms of that collective contract. The collective contract's stated expectation that "employees employed in substantially supervisory positions involving the hiring of staff" similarly does not preclude the applicant from having had an individual contract based on all its other terms. However the sometimes different terms of subsequent collective agreements – particularly a current collective employment agreement – did not apply to the applicant as he was not a union member.

[9] At no stage were the applicant's entire terms and conditions reduced to writing. As an existing individual employment contract entered into under the Employment Contracts Act 1991, it remains enforceable under the present Act's transitional provisions (s242).

[10] In these circumstances I find that the terms of the applicant's individual employment agreement at the time of his dismissal for redundancy from the post of Export Manager included those which continued unchanged from his previous employment under the collective contract. These terms did not include any provision for the payment of redundancy compensation. Instead, the important term for present purposes – incorporated from the collective – is:

> *All employees to be declared redundancy will receive not less than four weeks' written notice of the termination of their employment and Union will be advised before such notice is given. The terms and conditions of such redundancy shall be negotiated by the employer and the Union.*

[11] In the case of its incorporation as an individual term, the reference to notifying and negotiating with the union must be read as providing for those processes to occur with the individual directly or through his representative.

Management changes

[12] In early December 2005 Gary McVicar announced that he would be standing down as chief executive and that his son John McVicar would take over as general manager from 9 January 2006.

[13] Around this time Gary McVicar spoke with the applicant about the prospect of appointing him as manager of the respondent's new sawmill being built in New South Wales. The applicant's evidence was that the post was offered to him and that he was asked to talk with his family over the Christmas break. Gary McVicar's evidence was that he had discussed the idea but made no offer. Rather he says he put the suggestion more tentatively to the

applicant as something that John McVicar might want to do. "*He may use you, is how I put it*", he told me during the investigation meeting.

[14] I find that there was a discussion between the applicant and Gary McVicar about the prospect of the applicant moving to Australia to work as a manager for the respondent and that the applicant was asked to talk with his family over the Christmas break about this prospect. The prospect of an Australian post was at that stage still an inquiry with no definitive elements of an offer, such as salary, moving dates and other terms discussed.

[15] The applicant did discuss this prospect with his partner over the Christmas break and returned to work on 16 January 2006 ready to take up what he saw as an offer of a post in Australia.

Restructuring

[16] Soon after returning to work the applicant was handed an envelope by John McVicar, now the respondent's general manager. It contained a letter referring to recent changes in the company and "*realities of the current market*". It advised that John McVicar and the company's employment law advisor Peter Macdonald wanted to meet the applicant in two days time "*to discuss the possibility of additional structural changes in the company*". It stated that those changes could have a significant impact on "*your employment* security". It also stated that "*because the subject of our proposal and discussions with you could well have a substantial impact on your employment, you are encouraged to be accompanied by a witness/advisor of your choice*".

[17] By email to the applicant's advisor Ian Thompson the next day Mr Macdonald advised that the meeting concerned "*severe market pressures*" in the respondent's industry and its need to consider "*the possibility of restructuring the senior management team*".

[18] The applicant and his representative met company representatives on 18 and 20 January for discussions which were described as being on a without prejudice basis. However in written and oral evidence both parties chose to give to the Authority investigation, the parties waived their privilege in the content of those meetings.

[19] The applicant was advised on 18 January that the company wanted to make his position redundant. There was discussion of a "cash settlement". He was offered $25,000 less the amount of $5000 if he wanted to keep his company car.

[20] On Saturday 21 January the applicant contacted John McVicar by telephone and arranged a private meeting. They met at the company office without their respective advisors. During the meeting they discussed the value of the company vehicle which might be deducted from any settlement amount paid. The applicant told John McVicar he was not accepting the company's offer and wanted a payment of between $40,000 and $50,000. Mr McVicar said the company's original offer would remain open until Monday 23 January. The applicant's evidence, which I accept, was that Mr McVicar told him it was a "take it or leave it" offer.

[21] The applicant did not attend work after the 20 January meeting until his dismissal for redundancy on 10 February. He provided medical certificates from his general practitioner during this time describing him as being on "stress leave".

[22] A letter from Dr Paul Petersen dated 26 July 2006 was provided to the investigation meeting. It described an appointment with the applicant, his patient for 20 years, on 23 January and the doctor's diagnosis of the applicant as suffering a reactive depression serious enough to warrant a course of anti-depressant medication.

[23] Having not secured settlement with the applicant by 23 January, the respondent then continued a formal process of consultation regarding reorganisation. Following written notice of a "proposed reorganisation", a meeting was held with the applicant and his advisor on 2 February. The applicant was told, according to Mr Macdonald's notes, that the company was in

a precarious position and that a new management regime meant a new policy. Mr Thompson indicated that the applicant wanted to discuss the previously unaccepted offer but was told that the cash settlement offer had lapsed. The applicant was asked to provide any comments or suggestions regarding reorganisation at a further meeting arranged for 9 February. At that meeting, Mr Macdonald noted Mr Thompson as saying the applicant had no suggestions or comments as there seemed to be no possible outcome except redundancy.

[24] The following day the respondent confirmed in writing its decision to disestablish the position of Export Manager. The letter stated:

> *"The terms of your redundancy are as follows:*
>
> - *Notice: four weeks notice.*
> - *Holiday pay: Any holiday pay that is owing as of the date of termination of employment will be paid.*
> - *Termination of Employment Date: Effective from 5.00pm Friday 10 February 2006 – Agreed notice to be paid in lieu."*

[25] Within a few days the applicant's representative gave notice of a personal grievance.

Was the redundancy genuine and fairly carried out?

[26] In considering the applicant's dismissal for redundancy and how the employer came to that decision and carried it out, the Authority considers, on an objective basis, whether the employer's actions and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time.

[27] The law recognises the right of employers to exercise their commercial judgement in restructuring their businesses for genuine reasons. There is no real challenge by the applicant as to whether the respondent genuinely considered it needed to restructure, including dispensing with the position of Export Manager. The strength of the New Zealand dollar was affecting profitability of the company's export products. John McVicar as the new general manager considered that the work done by the Export Manager could be effectively reassigned to himself and other managers. Making that position redundant was a better cost-saver than reducing the production staff positions

[28] In considering changes to the business, including making employees redundant, the employer has statutory obligations of good faith to provide information and an opportunity to comment. Both parties are also obliged to actively and constructively respond and communicate.

[29] In the circumstances of this case, what was required of a fair and reasonable employer was to firstly consult with the applicant on the restructuring proposal and consider his responses before making any decision. It was a process that had to be fairly and sensitively handled, and take into account any contractual obligations of the respondent to the applicant.

[30] While there was some attention to the procedural requirements – such as giving the applicant notice of a meeting and advising of his right to representation – at the start of the process, I am satisfied for reasons set out below that the respondent's handling of the process was unfair and amounted to an unjustified disadvantage to the applicant prior to issuing him with written notice of dismissal for redundancy.

[31] The applicant may have been aware of the commercial difficulties of the company before Christmas. Gary McVicar's evidence was that he spoke with the applicant at length about this one day in December. However the applicant is unlikely to have anticipated any vulnerability of his own job. To the contrary he quite understandably believed that his future was secure because of the prospect of appointment to the position of manager of the respondent's sawmill site in New South Wales. Within hours of returning from leave to work on 16 January he was abruptly presented with notice of a meeting where his "economic security" was in doubt.

[32] His real prospects were readily apparent at the two "without prejudice" meetings on 18

and 20 January. He was unexpectedly to lose his job and was being offer a cash buyout.

[33] During the investigation meeting John McVicar said: "*The offer was on the basis that we'd do the right thing by John but he'd do the right thing by us – not talk to staff or our customers and he'd go quietly. He didn't do that. He talked to our staff and our customers.*"

[34] John McVicar accepted that he had no specific examples of what he called "commercial ramifications" and instability caused by customers and staff hearing rumours of change in the business. However he considered what he believed to be breaches of confidentiality by the applicant as "disappointing".

[35] There is no evidence that the respondent put this concern to the applicant for his response. His own evidence at the investigation meeting was that he had been rung by staff and customers on his company cell phone but had not disclosed that his position would be redundant. He had to tell customers that rang him about orders during that time that he was not at work.

[36] Having listened carefully to John McVicar's evidence I am satisfied that by 23 January he considered there was no prospect that the applicant would "*go quietly*". At that point he resolved to follow what he called "*the other path*" – that resulted in the two further formal meetings held with the applicant on 2 and 9 February. He was also determined that through this process the applicant would get no more than the minimum that Mr McVicar considered he was entitled – that is four weeks notice.

[37] It is clear that the applicant's representative attempted to revive the cash offer in those meetings – including seeking a higher payment. The respondent's representatives rejected that attempt but also did little or nothing to discuss how the redundancy would be handled. John McVicar says that the applicant "*was given the chance to come up with ideas*" but had none. Importantly the respondent does not appear to have offered any ideas of how it could sensitively handle laying off the applicant – the only staff member it laid off in this restructuring process. It says it considered whether any other positions might have been available but there were only "yard" or non-management jobs. However it did little else. A fair and sensitive employer would have discussed options with the applicant such as:

- whether an extended period of notice was viable (and in which the applicant would be better placed to apply for jobs with other employers);
- whether career and personal counselling would be useful (for an employee who had been with one employer for 30 years);
- whether the respondent could canvas job prospects with other employers.

[38] Instead the employer imposed a four week notice period, paid in lieu, and termination of employment effective from the day after its decision to dismiss for redundancy was made.

[39] In these circumstances I find that the respondent carried out the redundancy and carrying it out in an unfair and insensitive manner amounting to an unjustified disadvantage to the applicant.

Was the respondent obliged to negotiate terms of redundancy?

[40] I do not accept the applicant's submission that his contractual term for negotiation of terms and conditions of redundancy, and a failure of the respondent to negotiate in good faith, allows the Authority to determine the terms that should have been agreed. His representative suggests the Authority should determine an amount of redundancy compensation based on industry expectations and a period of reasonable notice based on case law. He suggests the respondent should be ordered to pay its original offer of $25,000 to the applicant.

[41] The applicant seeks to rely on the decisions made about a disputed redundancy compensation clause in *Vaughan v Canterbury Spinners* [2001] ERNZ 399 (EC) and *Canterbury Spinners Ltd v Vaughan* [2002] 1 ERNZ 255 (CA) and *Vaughan v Canterbury Spinners* [2003] 2 ERNZ 495 (EC). The present matter is not a sufficiently similar for the

conclusions reached in those cases to apply here. The disputed term in the present matter does not simply involve the ascertainment of an amount for a payment that the parties have already agreed should be made. Rather there are a range of unspecified options which the parties have agreed to negotiate.

[42] However, applying the question that Justice Blanchard described as proper in the *Canterbury Spinners* case ([2002] 1 ERNZ 255 at [44]), I do consider that the disputed clause in the present matter is more than agreement to agree or a direction of a certain procedure. It is capable of creating a contractual right – specifically that the terms and conditions of redundancy shall be negotiated. To negotiate means to try to reach an agreement or compromise by discussion with others (Concise Oxford English Dictionary, 11th edition). In this particular clause that negotiation is required to be on the subject of terms and conditions of redundancy. It does not specifically require discussion or agreement of the payment of redundancy compensation. Equally it is not limited to that. It is a legally enforceable right to negotiate on the range of items or matters which might comprise terms and conditions of redundancy. On the evidence that I heard, I find that the employer offered only compensation, and once that offer lapsed without acceptance, closed its mind to consideration of other terms and conditions of redundancy which it was obliged to at least discuss but not required to agree. It did not discuss and agree the four week notice period. That was imposed. Having failed to consider other terms, the respondent breached its obligation to negotiate. That was an unjustifiable action of the employer disadvantaging the employee in respect of a condition of his employment.

Determination

[43] Accordingly, for the reasons given above, I find that the applicant was unjustifiably disadvantaged by his employer's actions in making him redundant and has a personal grievance which requires remedies to settle.

Remedies

Loss of benefit

[44] The respondent's breach of its obligation to properly negotiate terms and conditions of redundancy denied the applicant a real opportunity to secure a more favourable outcome to the termination of his employment. That is harm for which compensation is capable of being assessed.

[45] I do not accept the applicant's submission that the appropriate measure of that loss is the $25,000 offer made by the respondent on 20 January. That offer was expressly rejected by the applicant on 21 January. It was made for reasons which had changed by the time of the 2 and 9 February meetings. However it does establish that the respondent accepted that "doing right" by the applicant involved expenditure of more than the four weeks notice in lieu that it subsequently imposed as the sole term of redundancy. There was a real and substantial chance that the respondent approaching the issue with a properly open mind would have agreed to implementing the redundancy on terms better than four weeks notice but below the full measure of redundancy compensation it originally offered.

[46] The applicant was denied the opportunity to properly negotiate over terms which – with an employer acting fairly – could reasonably have been expected to have included career and personal counselling, extended notice (to allow for job search activities) and, possibly, a redundancy compensation payment of a lower amount than that initially offered by the employer.

[47] Taking a moderate approach to assessing the value of that lost opportunity I consider the most likely outcome, if properly negotiated, would have at least been an extended notice period. The applicant says he should have been provided with an extended notice period of two or three months. I accept that 12 weeks is the appropriate measure here of notice that

the applicant would have received as a benefit of the negotiation clause had the unjustified disadvantage not occurred. From that 12 weeks must be deducted the four weeks notice paid in lieu.

[48] Accordingly, under s123(1)(c)(ii) of the Act, I order the respondent to pay to the applicant as compensation for a loss of benefit an amount equivalent to an additional eight weeks paid notice. Payment to be made within 28 days of the date of this determination.

Distress

[49] The applicant's partner Ms Elley gave evidence of the effect on the applicant of the news of the redundancy on him. She described him as "totally distraught" and in "absolute shock" after having made plans over Christmas for a move to Australia.

[50] His GP diagnosed a severe stress disorder requiring anti-depressant medication. He is no longer on that medication.

[51] The applicant, while having a prospect rather than a promise of a post in Australia, was understandably rocked by the turn of his employment fortunes on returning to work in January. He was relatively abruptly removed from the security of a job where he had worked for thirty years.

[52] The impact was not such as to prevent the applicant from being able to find another job. Within a few weeks he found work, albeit on a lower salary, for three months. At the time of the investigation meeting he had recently begun a better paid sales job with another timber exporting company.

[53] However the employer's actions in effecting the redundancy clearly caused a loss of dignity and injury to his feelings. Accordingly, under s123(1)(c)(i) of the Act, I order the respondent to pay to the applicant as compensation for humiliation, loss of dignity and injury to his feelings the amount of $5000. Payment to be made within 28 days of the date of this determination.

Contribution

[54] I am required by s124 of the Act to consider whether actions of the applicant contributed towards the situation giving rise to the personal grievance. This was a dismissal for redundancy – that is a situation where the employee is not considered to be at fault. There is no evidence of actions by the applicant amounting to blameworthy conduct requiring a reduction of remedies.

Summary of orders

[55] **The respondent is to pay to the applicant within 28 days of the date of this determination, the following amounts:**
(i) An additional eight weeks notice under s123(1)(c)(ii) of the Act; and
(ii) $5000 as compensation for humiliation, loss of dignity and injury to feelings under s123(1)(c)(i) of the Act.

Costs

[56] The parties are encouraged to resolve costs between themselves. If they are unable to do so, the applicant may apply to the Authority to determine costs. The respondent will have an opportunity to reply before costs are determined.

Robin Arthur
Member of Employment Relations Authority