

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 347/09
5273528

BETWEEN

ENRICO FACTA
Applicant

AND

GILLESPIE ENGINEERING
LIMITED
Respondent

Member of Authority: Yvonne Oldfield

Representatives: Applicant in person
Scott Johnstone for Respondent

Investigation Meeting: 21 September 2009

Determination: 29 September 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This employment relationship problem concerns an allegation of unjustified dismissal. On 10 July 2009 Mr Facta was given one week's notice that his position was redundant and his employment was being terminated. Mr Facta does not accept that the redundancy was genuine or fair. He disputes the respondent's assertion that it had insufficient work to keep him on and believes he should have received more notice. He also felt it was unfair that the burden was put onto one person, and expected to see other staff having hours of work reduced before he or anyone was made redundant. By way of relief he seeks reinstatement for the duration of his work permit, which is due to expire in October 2009, and a month's pay in lieu of notice.

[2] Mr Facta made this application to the Authority on 14 July and (after some difficulties in serving the papers) the Authority received a statement in reply on 4 August. Mr Facta then made an application for urgency on the basis that his work permit did not have much longer to run. It was accepted that, in the circumstances, the

matter should be dealt with as soon as possible, although not on what would strictly be called an urgent basis. The case has therefore been given priority over other files of a similar age.

Issues

[3] There are two issues for determination in this case:

- i. whether the redundancy was genuine, and
- ii. whether the procedure by which it was effected was fair.

Was the redundancy genuine?

[4] The respondent operates a “jobbing shop” which offers services in computer controlled machining, gear cutting, milling, turning and grinding. Mr Johnstone explained that the respondent offered the full range of services because that was what its clients wanted but the core of its business (and the overwhelming bulk of its work) was in the computer controlled work. This work required specialised skills. Mr Johnstone told me that the company would always rely primarily on the staff in that area, which even in good times kept the company going.

[5] Mr Facta was employed by the respondent in March 2008. He is a qualified fitter and turner but does not have the skills to do computerised machining. At the time of his employment the respondent’s business was doing well, and it continued to do so for some months, with a further tradesman being taken on later in the year. By December, however, the effect of the recession was being felt. The respondent’s managers met with all staff to inform them of what steps were being taken to cope with the reduced workflows. The tradesman who had been taken on most recently had resigned and was not to be replaced, the sole dedicated salesperson was made redundant and his work picked up by members of the management team, and by agreement, Mr Facta and one other member of the production staff reduced to a three day week.

[6] In March 2009 the staff were called together again to be told that there had been no improvement in the tight work situation and there would not be the usual annual pay rise. The respondent succeeded in getting one significant contract which kept the company afloat over April and May but when this ended there was a shortage of work to be going on with. There is no dispute that for some time before he was made redundant Mr Facta had been kept busy with cleaning work. Meanwhile, week by week, management kept staff apprised of what work was (or was not) about to come on stream.

[7] On 17 June Mr Facta was informed that the Financial Controller, Scott Johnstone, and the Works Manager, Malcolm Tasker, wished to meet with him on 24 June. He was advised that he could bring a support person. Very shortly before this, Mr Facta had requested that the respondent support his application to have his work permit extended. This required that the company confirm that he had an ongoing job. He assumed, therefore, that the meeting was to discuss and arrange this. Instead, to his surprise, he heard that the company's position had deteriorated and it could not give him the confirmation he sought. Even worse, he was told that his position was being reviewed and it was possible that he could be made redundant before the expiry of his permit. He was told that he would be informed of the outcome of the review the following week.

[8] As it turned out Scott Johnston was ill the next week and the meeting did not take place until 10 July. Again Mr Facta was offered the opportunity to bring a support person with him, but did not. Mr Johnstone and Mr Tasker confirmed that the company's position had not improved and that it had been decided to make Mr Facta redundant in one week's time. Mr Facta asked if he could stay on the payroll until October (even if he was not given any work) in order to facilitate the extension of his work permit but Mr Johnstone and Mr Tasker felt that this would mislead the Immigration Service. Mr Facta worked until 17 July. Upon termination he received his outstanding wages, plus holiday pay and a further two days pay. His contract provided for one week's notice of termination and made no provision for redundancy pay.

[9] Although the parties concur that until he was laid off, the working relationship between Mr Facta and the respondent had always been harmonious, Mr Facta told me

that he simply did not accept that the company was doing as badly as Mr Johnstone has said. His evidence was that in the period before his redundancy many staff did overtime on a regular basis. Mr Johnstone agreed that overtime (most if not all of it in the computerised machining area) had been needed to complete the big April/May job which had been accepted on a tight deadline. Once it was done, he said, the company did not have sufficient work to go round.

[10] At the time the respondent was considering Mr Facta's future with the company, it had 18 on the payroll. This number included a full time workshop cleaner, someone who came in less than one day a week to oil the machines, Mr Johnstone, Mr Tasker, workshop foreman Colin Cole, the office manager and the two owners of the business. Of the production/trades staff employed at the time six had skills in computerised machining and worked mainly in that area. Mr Johnstone explained that those staff would always be the last to be considered for redundancy.

[11] Mr Facta was one of the remaining four trades' staff who did not have these skills and saw to the milling, grinding, gear cutting and turning work. During his employment Mr Facta worked exclusively on the lathe, doing turning work, which he agreed had dropped off significantly. Mr Facta's co-workers could move unsupervised between turning, milling, grinding and gear cutting, while Mr Facta still required supervision in those areas and required more experience, under supervision, before he could have done all four tasks independently.

[12] Mr Johnstone explained that if staff numbers were to be cut, it was important that those who were retained could work as flexibly as possible. This was the main reason he gave for making Mr Facta redundant ahead of his co-workers. In addition two of the other three staff suffered major changes to their conditions of work. The person who, like Mr Facta, had previously cut down to three days per week was now on call, but very rarely called out. Another is on extended unpaid leave. Only one is still working regularly, and unlike Mr Facta, he is not on a temporary work permit. He also has longer service than Mr Facta, who was the most recently employed of the respondent's staff. Mr Facta agreed in his evidence that there was no-one on the staff who was a more appropriate candidate for redundancy than him.

[13] Mr Johnstone told me that since making Mr Facta redundant the company has not experienced any improvement in business. Mr Facta has not been replaced, and the company has avoided a further redundancy only because two staff, as described, are not currently being paid. He told me the overall situation was not expected to change in the near future.

Determination

[14] Nothing before me calls into question Mr Johnstone's account of the difficulties the respondent company encountered as a result of the recent economic downturn. Prior to making Mr Facta redundant, the respondent had already shed one trades' position, and a sales role, and through consultation, had arranged for Mr Facta and one other to reduce to three days. Further cuts were needed. I heard nothing to suggest any reason for terminating Mr Facta's employment other than a serious drop off in business. The evidence has established that this was the motive for the termination.

[15] I also consider the basis on which he was selected for redundancy to be sound. Those who worked on computerised machining were the core of the business; the work they did effectively subsidised the other positions. They could not be let go. Then, as the number of "general" workshop staff reduced, it became essential that they could work on all tasks. This alone justified Mr Facta's selection. In addition, however, if the respondent had sought to keep Mr Facta on in preference to a staff member with permanent residence, it would have had to justify this to the Immigration service. It is hard to see how it could have done so. The selection criteria were fair and reasonable. I conclude that the redundancy was genuine.

Was the process fair?

[16] In a restructure or other proposed redundancy situation an employer has an obligation to consult with affected employees. The form and extent of the consultation to be expected will however depend on the circumstances, including the size of the enterprise and the nature of the exercise concerned. What may be demanded of a large enterprise seeking to streamline its organisation may be very different from what

is demanded of a small one facing difficulties in meeting cash flow obligations week by week.

[17] The evidence shows that from December 2008 the respondent kept Mr Facta and other staff informed of the company's situation. Consultation took place, with the result that Mr Facta and a co-worker reduced to three days a week. I am satisfied that the respondent did all this in good faith, in an attempt both to meet its obligations and to retain staff that it would need when an upturn came.

[18] At the very end, it failed to consult about the termination itself. As Mr Johnstone has explained things, it is now clear why. The company had run out of options. In all the circumstances, I do not consider this a serious breach of duty by the respondent, and do not accept that the redundancy could have been averted at that late stage. (Contrary to what Mr Facta maintains, the company was not obliged to share what little work there was evenly around the remaining staff.) Nor do I accept that a month's notice should have been given. The employment agreement provides for one weeks notice of termination, whatever the circumstances.

[19] By way of remedies, Mr Facta seeks reinstatement. Because this is a genuine redundancy, there can be no reinstatement. Mr Facta did not seek lost earnings or compensation, but for completeness, because he did not have legal representation, I record that in a genuine redundancy there can be no question of an award of lost earnings. The only remedy potentially available to Mr Facta for the defect in process would have been a small award of compensation. However, the respondent handled the termination in an otherwise sensitive and courteous way, and I do not accept that the failure to complete the consultation process caused any additional distress to Mr Facta (beyond the inevitable distress associated with the loss of the job.) Even if compensation for hurt and humiliation had been sought, I do not consider there to be a case for an award under this head.

Yvonne Oldfield

Member of the Employment Relations Authority