

BETWEEN BRUCE FLOOD
 Applicant

AND FAR NORTH DISTRICT
 COUNCIL
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Bryce Quarrie, Counsel for Applicant
 John Verry, Counsel for Respondent

Investigation Meeting: 17 January 2013 at Whangarei

Submissions received: 17 January 2013 from Applicant and Respondent

Determination: 5 March 2013

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Bruce Flood, claims that he was unjustifiably dismissed on 19 December 2009. Specifically Mr Flood claims that the restructuring exercise undertaken by the Respondent, Far North District Council (FNDC), which resulted in the termination of his employment on the grounds of redundancy, was not genuine and the consultation process was inadequate and defective.

[2] FNDC denies that Mr Flood was unjustifiably dismissed and claims that it had genuine reasons for the restructuring exercise, and that it followed a fair and proper process in relation to the restructure and the subsequent selection process.

Issues

- [3] The following issues require determination:
- a. Whether FNDC had genuine reasons for the restructuring exercise
 - b. Whether FNDC followed a fair and proper process

Background Facts

[4] Mr Flood, who commenced employment with FNDC on 1 September 1997, was employed as a Building Control Officer in the Environment Management Department (the Department) pursuant to the Far North District Council Building Officers Collective Agreement (the Collective Agreement). The Parties to the Collective Agreement were the FNDC and the New Zealand Public Service Association (PSA).

[5] In his role as a Building Control Inspector, Mr Flood said he had carried out inspections of new structural work including the processing of Building Consent Applications for the Kaitaia area, and that prior to 1991 he had completed Code Compliance Certification.

[6] Mr Paul Cook, FNDC Building Manager, said Mr Flood had been primarily responsible for undertaking Field Inspections which involved making site visits and completing the necessary forms to indicate compliance with relevant factors, however he had not been responsible for Code Compliance Certification to any significant degree.

[7] Mr Cook explained that Code Compliance Certification requires a comprehensive and complete review of a building involving a high degree of technical review in addition to consideration in detail of the Building Act 1991 and the Building Act 2004.

Restructuring Proposal

[8] Ms Lesley Elliott, Human Resources Manager for the FNDC, explained that in or around September 2009, Ms Fran Mikulicic, Environmental General Manager at the FNDC that time, had undertaken a review of the Department which included Environmental Management, Resource Management, and Environmental Protection and Building teams. Following her review, Ms Mikulicic had developed a proposal to restructure the Department.

[9] Mr Cook said that the key rationale behind the proposal to restructure the Department had been discussed with him by Ms Mikulicic as being:

- (i) There had been a reduction in building consent applications and associated building consent authority work from 2006 onwards; and
- (ii) There was a need to develop the compliance function in the building team because there had been a significant backlog in compliance related tasks.

[10] Mr Cook said that as a result following the review Ms Mikulicic had put forward a proposal to decrease the number of Building Control Officer roles and create new Building Compliance Officer roles. The proposal contained two options for achieving the objective, the first option envisaged two sub-teams with the distinct functions of Building Control and Building Compliance, the second option envisaged splitting the Building Team into sub-teams, based on geography: a 'North' and a 'South' approach.

[11] Mr Cook explained that prior to the restructure, building compliance activity carried out by some Building Control Officers related primarily to the investigation of outstanding notices, following up aspects of structural compliance, collating evidence and dealing with customers who had been served notices relating to regulatory functions requiring attention. Mr Cook said Ms Mikulicic had also considered that there were a range of other compliance functions which needed attention, which would be performed by the proposed new Building Compliance Officer roles.

18 September 2009 Meeting

[12] Mr Flood said that on the morning of 18 September 2009 Ms Mikulicic had called a meeting of all FNDC's Building Officers, of which there were 10 full-time and 1 part-time at this time. In addition there had been a cadet, 2 Senior Building Inspectors and a Team Leader.

[13] Mr Flood said Ms Mikulicic had explained at the meeting that there was to be a re-organisation of the Department, and that one of her top priorities had been to bring the compliance aspect of the Department's work up to speed, in particular the Building warrants of Fitness, Pools, and illegal building work.

[14] Mr Flood said he had understood Ms Mikulicic to be saying that she wanted to create a new, separate, Compliance Team. After Ms Mikulicic had left the meeting, Mr Flood said that the Team Leader Tyrone had drawn a diagram with two columns on it, one headed Building Inspectors, the other Building Compliance.

[15] Mr Flood said that at his request his name had been put on the diagram under Building Compliance because he had thought it was simply necessary to choose in which team he wished to work.

[16] Mr Flood said that when Ms Mikulicic returned to the meeting approximately a half hour later, Tyrone had said that one person would leave the current building team.

[17] Mr Cook and Ms Elliott said they had been unaware of the morning meeting described by Mr Flood, however they confirmed that a meeting had been held on the afternoon of 18 September 2009 with all the employees who worked in the Department, approximately 75 employees in total including Mr Flood.

[18] Ms Elliott said that prior to the afternoon meeting she had notified the PSA that a meeting would be taking place and PSA representatives had attended the meeting.

[19] Mr Cook said that at the meeting on 18 September 2009 Ms Mikulicic had explained her rationale for the proposal involving the creation of two distinct functions in the Building Team.

[20] Ms Elliott said Ms Mikulicic had led the meeting and had used a slideshow presentation to assist her in describing the proposed restructure. During the presentation Ms Elliott said Ms Mikulicic had explained the following points:

- a. That FDNC was considering a proposal to restructure the Department;
- b. That FDNC was commencing a consultation process regarding the proposed changes;
- c. The purpose of the proposal was to improve customer service, provide stronger leadership, ensure collaboration between teams, improve ownership and accountability, and create efficient, effective teams;
- d. The changes were proposed for the Environmental Resource Management, Environmental Protection and Building teams;
- e. Employee feedback on the proposal was sought. Written feedback could be provided by 25 September 2009, or any employee could request a one-to-one meeting in which to provide their feedback;
- f. A decision regarding the proposal to restructure would be made by 2 October 2009; and
- g. That, if the restructure proceeded, a reorganisation of the Department would take place in October and November 2009.

[21] Ms Elliott said that in relation to the Building Team of which Mr Flood was a member, the slideshow presentation had recorded a proposed reduction in the number of Building Control Officers, and that she recalled Ms Mikulicic explaining that while there would be vacancies, redundancy could still occur.

[22] Ms Elliott and Mr Cook explained that at the conclusion of the meeting hard copies of the slideshow presentation in addition to a Question and Answer sheet had been made available to all employees and Ms Mikulicic had also explained that electronic copies of the slideshow presentation could be requested.

[23] The Question and Answer Sheet included questions and answers concerned with redundancy and stated:

Q1 Am I redundant if my role is disestablished?

A No. It is the position that has been disestablished not the individual, Council will be advertising a number of positions and you will have an opportunity to apply for positions. If there are no positions suitable for your skills after filling these vacant roles your position will be come redundant.

Q2 When will I know if my job has been disestablished?

A Once feedback has been received on the proposed new structure some changes may occur, therefore, it will not be until after the new structure is confirmed. This is planned to be confirmed on or about the 2nd October 2009.

Q 14 Are there likely to be any redundancies?

A At this stage we don't expect many, however this depends on a number of factors ...

Q 15 How much does a position have to change by to be considered a new position?

A Approximately 25%.

[24] Mr Cook said that all employees had the opportunity to present feedback which was confirmed in one of the slides in the slideshow presentation which stated:

Next Steps

- *Please provide your feedback*
- *Feedback is due 5.00 pm 25 September*
- *Structure confirmed on the 2 October*
- *Management interviews completed by 30 October*
- *Ideally reorganisation to be complete 30 November*

[25] At the Investigation Meeting Mr Flood agreed that he should have been aware that he could provide feedback on the proposals, but he had not done so, however he had tried to clarify the interview situation with Tyrone.

[26] Mr Cook said that a second meeting had been held with all employees on 2 October 2009 at which Ms Mikulicic had announced that the restructure would proceed with the Building Team split into two teams, Building Compliance and Building Control. Mr Cook explained that the confirmed restructure meant that the Building Team would be losing 4 of its 10 Building Control Officer roles and that 3 new Building Compliance roles would be created. There would also be a new Team Leader (Compliance) role.

[27] Ms Elliott said that the PSA had been given advance notification of the meeting and had again attended it. Ms Elliott confirmed that during the meeting the current Building Control Officers were told that they could apply for the 6 remaining Building Control Officer roles and any of the 3 newly created Building Compliance roles.

[28] Mr Flood said that he did not recall being present at the meeting on 2 October 2009, although it is possible that he may have been.

[29] Ms Elliott said that Ms Mikulicic had written to all the affected employees following the restructure notification. The letter to Mr Flood was dated 23 October 2009 and explained:

- The 'reorganisation proposal' initially discussed at the meeting on 18 September and also at the meeting on 2 October 2009 and which could result in the disestablishment of a number of positions, was confirmed;

- As a result of the reorganisation, the number of Building Control Officer roles would be reduced from : “10.4 FTE’s to 6.4 FTE’s.”;
- The new and vacant positions, including Compliance Officer and Building Compliance Team Leader, would be advertised in the week commencing 26 October 2009;
- Interviews would take place in the week commencing 2 November 2009;
- That the Employee Assistance Programme was available.

[30] Ms Mikulicic had also written in the letter: “*I encourage you to explore all employment opportunities in the Environment Management department and Council generally.*”

[31] Mr Flood had responded to this letter by sending Ms Elliott an email dated 27 October 2009 stating that he did not consider there was a 25% change to his job, and therefore he did not consider his position as having been disestablished. Mr Flood also asked what he must do to prevent himself from being made redundant.

[32] Ms Elliott responded to Mr Flood’s email the next day, 29 October 2009, explaining that Mr Cook would be sending out an email: “*in a few minutes*” setting out the process by which all of the Building Control Officers could complete expressions of interest for any or all positions in which they were interested. Ms Elliott had also encouraged Mr Flood in the email to contact her if he had any further queries once he had read Mr Cook’s email.

[33] The email from Mr Cook had been addressed to the ‘Building Officers Group’, explained in detail the interview process to be followed, and included a brief description of the responsibilities of each role involved.

[34] Mr Flood said that although Human Resources had said that job descriptions for the proposed positions would be provided prior to the interviews taking place he had not received these, however he had received application forms.

[35] Ms Elliott said that job descriptions for each of the roles had been provided to the candidates before their interviews.

[36] An email sent from Ms Sue Wallace, the member of the Human Resources team responsible for recruitment, on 28 October 2009 to Mr Flood stated that: “*Please find attached Job Descriptions as requested.*” Attachments to this email were indicated as being: “*JD Building Compliance Officer pdf; JD Team Leader Building Compliance. Pdf*”.

Interview Process

[37] Ms Elliott explained that:

- The new Building Compliance Officer and Building Compliance Team Leader positions had been advertised internally between 26 October and 2 November 2009.
- Mr Flood had provided expressions of interest for the two new roles on 28 October 2009.
- Employees, who, like Mr Flood, had supplied expressions of interest for one or more roles, were given one interview. In Mr Flood’s case this interview was used to assess his suitability for the remaining Building Control Officer roles and his suitability for the new Building Compliance Officer and Building Compliance Team Leader roles.

[38] Mr Cook explained that he had been part of the interview panel for the Building Control Officer, Building Compliance Officer and Building Compliance Team Leader roles. The interview panel had consisted of himself, Ms Mikulicic, and Ms Wallace.

[39] Mr Cook explained that selections for the roles were competency based, and applicants had been informed of this prior to each interview. Mr Flood said he did not recall having been informed that the roles were competency based.

[40] Mr Cook said there had been a specific points criteria document for each of the three roles which outlined six key areas for each role, known as ‘Critical Factors’, for which points were to be awarded. Mr Cook explained that each Critical Factor was given a different weighting, to reflect the significance of that factor to the particular role. Each applicant was given a score out of ten for each critical factor, which was then calculated in accordance with its weighting.

[41] Prior to the interviews Mr Cook said he and Ms Mikulicic had prepared the Critical factors and a set of questions for each role. The same set of questions had been used for each

applicant with questions being allocated to members of the panel to read out in each interview and the answers being written down.

[42] Mr Cook said that each member of the panel independently scored each applicant for each of the Critical Factor. After the interview, the selection panel had discussed the individual scores and collectively agreed a score for each applicant for each Critical Factor.

[43] Mr Flood confirmed that the explanation of the interview process as outlined by Mr Cook had been correct.

[44] Mr Flood said he had been advised by letter dated 20 November 2009, written by Mr David Edmunds, CEO, and signed by Ms Mikulicic, that he had been unsuccessful in all the positions for which he had applied.

[45] Mr Cook said Mr Flood had been unsuccessful in his application for the positions because:

Building Control Officer:

- (i) Mr Flood had been the lowest scoring candidate of the eleven applicants, all of whom had been existing Building Control Officers and had carried out the role prior to the restructure;

Building Compliance Officer

- (ii) Five candidates had been interviewed for three new Building Compliance Officer roles. Mr Flood had a low score against the Critical Factors and the panel had not considered him suitable for, or capable of carrying out, the Building Compliance role. Two of the roles had been filled internally, and the remaining role was advertised externally;

Team Leader Compliance

- (iii) Given that the panel had considered Mr Flood did not have the necessary skills or experience for the Building Compliance Officer role, it also considered that he was not suitable for the Team Leader Compliance role. The role had been filled internally.

[46] The letter dated 20 November 2009 advised Mr Flood that he had one months' notice of the termination of his employment, his last day of work would be 19 December 2009, and

in accordance with his employment agreement he would be paid 18 weeks' redundancy notice.

[47] Mr Flood said he had been shocked to be informed that he had not been successful, and he had been absent on sick leave throughout the notice period.

[48] In June 2010 FNDC attended mediation with Mr Flood, but this did not resolve matters.

[49] In August 2010 Ms Elliott said Ms Mikulicic offered Mr Flood some casual work, sending him a casual offer of employment which stated that the term of the appointment was to be from 2 August 2010 until 29 July 2011.

[50] Mr Flood had been asked to indicate his acceptance of the offer of casual employment by signing and returning the duplicate copy letter, however Mr Flood had not returned the copy letter and had not undertaken any work for FNDC.

[51] Mr Flood said he had not accepted the casual job offer as he had been looking for work of a more permanent nature and explained that he had also been informed by an ex-work colleague that there had been no work available.

[52] Mr Elliott said that in February 2011, after flooding in Northland, Ms Mikulicic had again offered Mr Flood some casual work. Ms Elliott said that her understanding had been that Ms Mikulicic had spoken with Mr Flood and negotiated a start date, and that Ms Nicole Wooster, Ms Mikulicic's Executive Assistant, had notified the Human Resources department by email dated 11 February 2011 that Mr Flood's start date would be 14 February 2011.

[53] The letter confirming the offer of casual employment dated 11 February 2011 was sent to Mr Flood and stated that the term of the appointment was to be from 14 February 2011 until 10 February 2012.

[54] Mr Flood had again been asked to indicate his acceptance of the offer of casual employment by signing and returning the duplicate copy letter, however Ms Elliott said Mr Flood had not returned the copy letter and had not presented for work on 14 February 2011.

[55] Mr Flood said he had again been informed by an ex-work colleague that there had been no work available and on this basis he had not accepted the offer of casual employment.

Determination

Did FNDC have a genuine reason for the restructuring exercise?

[56] The Court of Appeal in *GN Hale & Son Ltd v Wellington Caretakers IUOW*¹ clarified that:

An employer is entitled to make his business more efficient, as for example by automation, abandonment of unprofitable activities, re-organisation or other cost-saving steps, no matter whether or not the business would otherwise go to the wall. A worker does not have a right to continued employment if the business can be run more efficiently without him.

[57] I find that FNDC undertook the restructuring for reasons of increasing efficiency and effectiveness in the Environmental Management Department, considering that the revised structure would improve accountability and customer service.

[58] The decision to restructure took place against a background in which there had been a reduction in Building Control Officer duties and a need to develop building compliance exemplified by a backlog in compliance related tasks. I find that this had resulted in FNDC reaching the conclusion by September 2009 that a restructure of the organisation was necessary which would involve a reduction in the current Building Control Officer roles and the creation of newly defined Building Compliance Officer roles.

[59] I note that although PSA representatives had attended the meetings on 18 September and 2 October 2009, they had not raised any objection to the genuine nature of the restructuring proposal.

[60] I determine that FNDC had genuine commercial reasons for undertaking a restructuring exercise.

Did FNDC follow a fair and proper process?

[61] The Test of Justification prior to the amendment on 1 April 2011 and which is applicable in this case, is set out at s 103A of the Employment Relations Act 2000 (“the Act”):

¹ [1991] 1 NZLR 151

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering 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 the dismissal or action occurred"

[62] Other provisions of the Act govern questions of justification for dismissal and, in particular, by reason of redundancy. Section 4 of the Act addresses the requirement for parties to the employment relationship to deal with each other in good faith. Section 4(1A)(c) in particular is relevant to a redundancy situation and requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of an employee to provide to the employee affected:

"(i) access to information, relevant to the continuation of the employees' employment, about the decision; and

(ii) an opportunity to comment on the information to their employer before a decision is made." s4 (1A)(i) and (ii).

[63] In a redundancy situation a fair and reasonable employer must, if challenged, be able to establish that he or she has complied with the statutory obligations of good faith dealing in s4 of the Act. His Honour Chief Judge Colgan in *Simpsons Farms Limited v Aberhart*² noted that this compliance with good faith dealing includes consultation "*as the fair and reasonable employer will comply with the law*"³

[64] The Employment Court further made clear in *Vice-Chancellor of Massey University v Wrigley*⁴ that consultation is essential to any fair process, stating that:⁵

The purpose of s4(1A)(c) ... requires the employer to give the employees an opportunity to comment before a decision is made. The opportunity must be real and not limited by the extent of the information available to the employer.

[65] Mr Flood had understood from the first meeting with Ms Mikulicic on 18 September 2009 that there was to be a reorganisation of the Department, but following the subsequent

² [2006] ERNZ 825,842

³ Ibid at para [40]

⁴ [2011] NZEmpC 37

⁵ Ibid at para [55]

discussion with the Team Leader Tyrone, he claimed that he had been under the impression that he had merely to choose the team in which he wished to work.

[66] Mr Flood had been present at the full Departmental meeting later that day at which Ms Mikulicic had given a detailed explanation of the rationale behind the restructuring proposal team meeting. Significantly Ms Mikulicic had explained that some redundancies could occur, and this possibility had also been referred in the Question and Answer information sheets made available to all employees.

[67] I find that the meeting and the hard copy of the slide show presentation confirmed that Mr Flood had the opportunity to provide feedback of the restructuring proposal. Had he done so, this may have clarified the situation for him personally, however he had chosen not to do so.

[68] Mr Flood stated that he did not recall being present at the second meeting on 2 October 2009. I accept that there were personal circumstances at that time which may have resulted in Mr Flood not recalling the meeting, however I find that the letter from Ms Mikulicic dated 23 October 2009 had clearly confirmed that the restructuring which could result in the disestablishment of a number of positions would proceed.

[69] I consider that the email Mr Flood sent to Ms Elliott on 27 October 2009 establishes that by that date, Mr Flood had appreciated that his position was at risk of being made redundant.

[70] Although the email from Ms Elliott did not directly answer Mr Flood's comment that he did not consider there had been a 25% change in his job, it did refer to the email from Mr Cook which set out in detail the interview process, and advised Mr Flood to revert to Ms Elliott if he still had queries following the receipt of that email. There is no evidence that Mr Flood did do so, which I consider infers that he had accepted that his position as Building Control Officer had been affected by the reorganisation.

[71] In consideration of these circumstances I find that Mr Flood had been provided with a real opportunity to provide comments on the restructuring proposal prior to a decision having been made.

[72] Mr Flood said he had not received the job descriptions for the positions for which he had applied prior to the interviews. The email from Ms Wallace dated 28 October 2009 referred to attached job descriptions and I consider that had these not been attached, Mr Flood

would have queried this, however there is no evidence that he had done so. On this basis, I consider that Mr Flood had been properly supplied with the requested job descriptions.

[73] In relation to the interview process, I find that the Selection Criteria adopted by FNDC, specifically the Critical Factors, were properly formulated with different weightings allocated to the particular roles for which selection was to take place.

[74] I further find that the Critical Factors were equally applied to the candidates and the decisions as regards selection for the roles were arrived at by an independent assessment of the selection criteria by each of the interviewers, which were then amalgamated to provide a total interview panel outcome.

[75] I find that Mr Flood had had his skills and experience assessed for each of the roles for which he had applied, and that the conclusion of the interview panel that he did not have the requisite skills and experience for these roles was a decision open to a fair and reasonable employer.

[76] I determine that FNDC followed a fair and proper process.

[77] I further determine that Mr Flood was justifiably dismissed as a result of his position having been disestablished by FNDC.

Costs

[78] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority