

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 5/10
5287706

BETWEEN DEREK WAYNE GILBERT
 Applicant

AND TRANSFIELD SERVICES
 (NEW ZEALAND) LIMITED
 Respondent

Member of Authority: Paul Montgomery

Representatives: Lou Yukich, Advocate for Applicant
 Gillian Service, Counsel for Respondent

Investigation Meeting: 11 January 2010 at Christchurch

Submissions Received: On the day

Determination: 15 January 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant seeks interim reinstatement to his role as a Technician with the respondent following redundancy which ended his employment on 1 October 2009. The applicant challenges the dismissal which he claims was unjustified both substantively and procedurally.

[2] Mr Gilbert also raises a dispute with the respondent in respect of its application of clause 46 of the collective employment agreement. In respect of this dispute, Mr Gilbert seeks an interim order restraining the respondent from implementing the decision to terminate his employment until the employment agreement is complied with.

Arguable case

[3] Mr Gilbert's position is as follows:

- He was offered no *genuine business reasons* to justify his selection for redundancy.
- His position was not *superfluous* as another employee has been placed in what he says was his position. He claims a dispute over the respondent's interpretation of clause 46 of the agreement.
- There is no efficiency gain for the respondent flowing from his redundancy given his skill and experience.
- His skills were never assessed and those skills, he claims, *outweigh* those held by employees retained by the company.
- He has been discriminated against because of his Union delegate status and his position on the Health and Safety Committee, and it is unfair for him to remain out of work whilst the respondent *attempts to prove this was not the case*.
- The selection criteria applied were not reasonable and necessary for his position.

[4] In response, the respondent submits these allegations are not supported by the evidence. It says, following *GN Hale & Son Ltd v. Wellington Caretakers IUOU* [1991] 1 NZLR 151 and other precedent cases, an employer is able to restructure its business if it has genuine commercial reasons for doing so.

[5] The terms of its new agreement with Chorus required the respondent to reconfigure its operations in order to meet the key performance indicators in that agreement. This, coupled with the reduced maintenance work required fewer technicians than previously, the respondent submits. Further, it says that while the type of work Mr Gilbert was largely engaged in doing still remains, the allocation of that reduced work to other technicians as part of its efficiency drive is permissible.

[6] Also, the respondent observes Mr Gilbert did not challenge the company's compliance with the collective agreement until these proceedings were lodged with the Authority. The point made is that at no time during the consultation period nor in interviews and feedback sessions, did the applicant raise this issue.

[7] The threshold to establish an arguable case is relatively low. Considering the arguable case elements in the affidavits of Mr Gilbert and a Mr Johnson, I find the bar has been cleared on the as yet untried evidence, but by a slender margin.

Adequate remedy

[8] The question is whether Mr Gilbert can be compensated adequately if he is unsuccessful in this application for interim reinstatement but successful in his substantive claims.

[9] Mr Yukich submits Mr Gilbert will suffer detriment by being unable to be considered for redeployment to other positions internally or to find alternative employment within the industry in Christchurch. Further, it is submitted the applicant will *lose his right to work* and suffer the loss of his house should he not secure employment before February 2010.

[10] For the respondent, Ms Service submits that should the applicant succeed in the substantive application, he can be adequately compensated for any financial loss suffered while absent from the company. Mr Evans' evidence is that there is no vacancy in his operation at this time, and should up to three technicians tender resignations, he would not replace them given the downturn in contract work.

[11] In the light of the Authority's proposal to deal with the substantive matter in the final week of January or the first two weeks of February 2010, undue disruption of the respondent's implementation of its restructured operation is, I find, unwarranted. The applicant has an adequate alternative remedy available to him.

Overall justice

[12] Notwithstanding the allegation of selection for redundancy on the basis of his Union activities, which needs to be addressed in the substantive investigation, I am of the preliminary view that this issue, along with several others were never raised in the course of the consultation process, when Mr Gilbert was assigned to the review pool,

nor in his interviews, yet Mr Gilbert seeks to rely on them at this belated stage. These issues can be canvassed thoroughly in the course of the substantive investigation.

[13] Had Mr Gilbert been the only person whose role was selected for redundancy rather than being one of eleven in Christchurch and of one hundred in the country, his claim of discrimination might carry more weight.

[14] His challenge to the process and the selection criteria employed is genuine, yet, in the wider context of a very significant national restructure employing what appears, on the untested evidence, to have only a modest chance of success.

[15] Standing back and reviewing the factual matrix including the applicant's financial situation, and the legal aspects of Mr Gilbert's case, I find the overall justice favours the respondent.

The dispute

[16] On the facts before the Authority at this time, I have considered this facet of Mr Gilbert's claim in an interim setting. I have taken the preliminary view that this dispute forms part of the challenge to the validity of his dismissal and have not addressed the matter separately at this time.

[17] Mr Gilbert will have the opportunity at the substantive investigation meeting to clarify whether this element is viewed as an issue separate to his claim of unjustified dismissal.

Determination

[18] The applicant's application for interim reinstatement is declined.

Costs

[19] Costs are reserved.