

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 290/07
5079806

BETWEEN SUE GREEN
 Applicant

AND NORSKE SKOG TASMAN LTD
 First Respondent

Member of Authority: Vicki Campbell

Representatives: Simon Mitchell for Applicant
 Kylie Dunn for Respondent

Investigation Meeting 25 JULY 2007 at HAMILTON

Submissions Received: 14 August from Applicant
 3 and 22 August 2007 from Respondent

Determination: 18 September 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Sue Green was employed by Norske Skog Tasman (NST) initially as a Health Centre Administrator in August 2002, and then as a Payroll Administrator. Ms Green acted as payroll administrator from 1 December 2003 until she was made permanent in June 2005. Ms Green was dismissed by way of redundancy in March 2007 and claims that dismissal was unjustified.

[2] Norske Skog Australia (NS Australia) and NST had been exploring for some time the development of common administration systems between the three mills. The project was called the Australia New Zealand Optimisation Project ("ANZOP"). Initially the project contemplated centralisation of the finance functions and some procurement process functions. A decision regarding the restructuring of these areas was made in early 2006 with redundancies occurring in the finance department at NST.

[3] Initially payroll administration was to remain at NST however, a decision was made in August 2006 to transfer the administration of NST's payroll from Kawerau to the Regional Business Support Centre in Tasmania, Australia. NST

says that as a result of that decision Ms Green's role as Payroll Administrator was disestablished as it was no longer required. NST denies Ms Green's dismissal for redundancy was unjustified.

[4] I am required to scrutinise NST's actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The section states:

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.

[5] The test of justification does not change the longstanding principles about justification for redundancy (see *Simpson Farms v Aberhart*, unreported, Employment Court, Colgan CJ, [2006] 1 ERNZ 825).

Relevant terms and conditions of employment

[6] Ms Green was subject to an individual employment agreement. The agreement provided for redundancy in the following way at clause 14.3:

Your employment may also be terminated on the grounds of redundancy. Continual change in organisation and businesses in which Norske Skogg Tasman is involved is inevitable if Norske Skog Tasman is to remain a vibrant company.

As a consequence of this change process, the position you hold may become redundant. In this event, Norske Skog Tasman will endeavour to:

- secure ongoing employment for you with the new owner, in the case of the business in which you operate being sold; or
- find appropriate employment for you in the wider Norske Skog Tasman.

In the event that Norske Skog Tasman is not successful in its endeavours to provide you with ongoing employment, your employment will be terminated on the grounds of redundancy.

Should you be made redundant, Norske Skog Tasman will apply the provisions of the company Redundancy Policy at that time.

[7] Also relevant to this matter is the NST Redundancy and Redeployment policy which provides for redeployment in circumstances where an employee's position is redundant, but they have elected not to apply for voluntary redundancy.

[8] Clause 3.5 and 3.6 of the policy states:

In identifying work groups from which interest in voluntary redundancy could be sought the following factors would be considered:

- (a) The willingness of employees in redundant positions to be redeployed to other work areas.
- (b) Whether employees from other work areas want to take voluntary redundancy.
- (c) Whether employees to be redeployed are able to be retrained to the new position within an agreed timeframe.

In a case of potential redundancy as referred to in clause 3.5, an employee wanting to be redeployed will be considered by the appropriate selection panel representatives of the work group and appropriate management against the normal selection criteria for the position, and must be able to achieve a satisfactory level of competence within an agreed timeframe. A position identified as a possible position for a redeploying employee will not be opened up to the normal contestable process of the work area concerned given that the process is due to a redundancy rather than a normal vacancy.

[9] In April 2006 NST embarked on a consultation process with Ms Green regarding a proposal to include the payroll administration in the ANZOP project. The proposal would see the payroll administration for the two NS Australia sites plus the NST site being centralised regionally at the Regional Business Service Centre at the Boyer Mill in Tasmania.

Genuineness of redundancy

[10] The Employment Court in *Simpsons Farms* reiterated the right of an employer to make genuine commercial decisions relating to how its business operations will function including decisions to make positions or employees redundant.

[11] It was common ground that Ms Green's role was to ensure employees at the Tasman site were paid correctly and on time. Her role included calculating salary increments or pay changes which were checked by the Human Resource Advisors (HRA's) and who would then sign them off before Ms Green paid them. It was common ground that if any questions regarding the application of the CEA arose which Ms Green was unable to answer, she would take her questions to the HRA's for clarification.

[12] NST is the New Zealand subsidiary of the Norske Skog group of companies. Its parent company is Norske Skog Industries Australia Limited, which has responsibility for the three Norske Skog paper mills in Australasia, which includes NST.

[13] As a result of a shrinking paper market NST and NS Australia have been under pressure to improve efficiencies and reduce costs. This has resulted in a number of restructuring initiatives at NST, including the closure of a paper machine in July 2006.

[14] Ms Green was aware changes were occurring in the workplace and that redundancies were being made by NST. There had previously been a general call for employees who wished to take voluntary redundancy and a list of those who had made that offer was being maintained by the HR team.

[15] Ms Green was aware NST was centralising the finance function at the Boyer Mill and it was common ground that in April 2006, Ms Green was advised NST was now contemplating including payroll in the centralisation to Boyer.

[16] Ms Green received formal notification of her redundancy on 12 August 2006 during a meeting with Ms Lois Smith. Ms Smith had been seconded by NS Australia to work at the Organisational Change Manager at NST. Ms Green was advised of NST's decision to centralise the payroll function at Boyer and as a result of that decision her position would become surplus to requirements as at 31 December 2006. As events transpired, Ms Green's employment was extended, by agreement, beyond 31 December and finally ended on 31 March 2007.

[17] Ms Green was also advised of an additional payroll position being established at the Boyer Mill and which would be advertised in the near future. Ms Green applied for that position but was unsuccessful.

[18] Having reviewed the evidence I am satisfied the decision to disestablish the payroll administrator roll was based on a genuine commercial decision by NST to centralise its payroll function at the Boyer Mill. All payroll processing is now being done from Australia.

Consultation

[19] In *Simpsons Farms* the Employment Court reiterated the longstanding principle that consultation requires more than a mere prior notification and must be allowed sufficient time. Further, it is to be a reality, not a charade and is never to be treated perfunctorily or as a mere formality.

[20] The Court went on to state:

Genuine efforts must be made to accommodate the views of the employees. It follows from consultation that there should be tendency to at least seek consensus. Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and then deciding what will be done. The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and even start anew.

[21] Ms Green says that she was subject to an almost twelve month process during which she was unclear as to whether or not her role with NST would be ongoing. She contends that during that period NST did not properly consult, and did not genuinely assess whether or not there was an ongoing role for her.

[22] Further, Ms Green contends that opportunities for redeployment were not properly considered by NST during the course of the discussions, and NST failed to follow its own procedure.

[23] In his submissions on behalf of Ms Green, Mr Mitchell submits that NST failed to consult properly. I don't agree with Mr Mitchell's submissions. Ms Green was provided with an opportunity to provide feedback to NST on the proposal to centralise the payroll function and took that opportunity. Following the meeting in April 2006, Ms Green provided NST with a full and constructive paper on the issues which she anticipated would arise with a centralisation to Boyer.

[24] At a meeting on 12 August Ms Smith discussed her responses to each of Ms Green's points and provided Ms Green with a letter outlining her response to each of the points Ms Green had raised in her paper to NST. The delay between the initial meeting with Ms Green and the follow up meeting in August was explainable. Unfortunately Ms Green's father passed away in May, and this was followed by a period of time when Ms Green advised Ms Smith that she was not yet ready to discuss matters. When meetings were set down by agreement they were then adjourned as a result of Ms Green's representative not being available.

[25] Ms Green says the consultation process was a sham because her position was advertised on 30 April 2006 (three days after she had provided her feedback paper to NST). Ms Green says this indicates that the decision to centralise payroll administration had already been made by NST before her comments and feedback had been given consideration. I am satisfied that the position advertised in April 2006 was one of the two Australian payroll jobs, which were affected by the restructuring in that country. A decision had already been made by NS Australia to centralise its payroll function and the resulting vacancy was as a direct result of that decision and had nothing to do with the process being worked through with NST.

[26] Ms Scott's evidence, which I accept, was that while a decision had been made by NS Australia for the two payroll jobs in Australia to go to Boyer, NST was always able to stand outside that decision and make its own conclusions about where to provide payroll administration. Ms Scott gave the example of the Procurement department which did not centralise its operations to Tasmania, but instead made a decision to keep procurement as a function to be carried out in New Zealand.

[27] Ms Scott says no decision was made about the payroll function until August 2006. Ms Scott told me that if it didn't make practical sense, to put the NST payroll in Boyer, then it would not be done. She told me that Ms Green's paper was considered at length, but that a lot of the issues she raised, although not

exactly the same, generally had previously also been raised during the consultation process with the restructuring of the finance group. I am satisfied Ms Green had an opportunity to influence the decision as to whether payroll would be centralised or not.

[28] As already set out Ms Green was given notification in August that her role would be disestablished on 31 December, however, as a result of problems encountered with the transfer of the payroll function, Ms Green's employment was extended twice, by agreement, and ended on 31 March 2007.

[29] I am satisfied NST met its obligations to consult with Ms Green over whether or not the payroll function should be centralised. I am also satisfied NST provided Ms Green with an opportunity to feedback into that decision and that Ms Green's feedback was given consideration, prior to any decision being made. Ms Green was represented throughout the consultation process.

Redeployment

[30] In terms of the requirements of the employment agreement NST was required to identify appropriate alternative employment for Ms Green. This is consistent with a general obligation on employers to explore such opportunities (see *Coutts Cars Ltd v Baguley* [2002] 2 NZLR 533).

[31] NST says Ms Green was encouraged, and did apply for a 50/50 payroll/finance position advertised in Boyer in August 2006 but was unsuccessful. Ms Green received feedback from her interview and was given the opportunity to seek a summary of the psychometric assessment she undertook as part of the interview process in Australia.

[32] Ms Green also applied for a position as an Administrative Assistant, however, her secretarial skills did not meet the requisite standard as the successful person needed to be fully trained and competent in the role as soon as they started. Ms Green was one of three employees facing redundancy, who were interviewed for this position.

[33] It was common ground that Mr Vincent provided Ms Green with feedback about her application which ended with an acknowledgement by Ms Green that she would require some training to get up to the required standard. Mr Vincent says, although Ms Green does not recall, that Ms Green thought she may have found the pressure of the position hard to take.

[34] At a meeting on 11 January 2007 Ms Green, together with her representative met with Ms Scott where options regarding redeployment were

discussed. At the investigation meeting Ms Green acknowledged that at the time redeployment options were being discussed no vacancies existed at NTS. Ms Scott says that the purpose of the discussion that day was to try and explore areas that Ms Green may wish to be redeployed if any jobs did become available. Ms Scott says she spoke regularly to the HR Advisors about whether there were any voluntary redundancy people who would look at a swap with Ms Green, plus it was on the agenda of the meetings she held every week with the HRAs.

[35] Ms Scott told me the company had a call out for voluntary redundancies at the time she met with Ms Green in January and so had a list of employees who had already identified that they would like to take voluntary redundancy. Unfortunately for Ms Green there were no suitable roles for her.

[36] As already mentioned Ms Green was represented throughout the consultation process by Ms Pauline Mitchell, President of the Tasman Staff Association. At the investigation meeting Ms Mitchell told me that in relation to redeployment Ms Green was treated differently to other staff employed in the mill. Concurrently with the ANZOP project implementation, Norske Skog was also closing down one of its paper machines. In relation to that restructuring NST and the unions had entered into a document referred to as 315k.

[37] Ms Mitchell says that the 315K document allowed employees to move from one role to another even where comprehensive training was required. By way of example Ms Mitchell told me one employee went from a plumbing role to a maintenance role with a comprehensive training plan.

[38] In response Ms Scott says the employee referred to by Ms Mitchell was in the maintenance area and there was an existing negotiated agreement with the Union to reshuffle only within the department and to avoid any forced redundancies. NST and the Union also agreed that they would keep everything within that particular work group. Consistent with this, and also as part of the agreement any vacancies arising in maintenance would not be contestable site wide.

[39] I am satisfied that the differences between the treatment of Ms Green and those workers employed in the maintenance area are explainable by the contractual agreements NST had reached with the union and which applied to that particular work area.

Ms Tanya Gardiner and Ms Abi Latham

[40] I heard considerable evidence about the situation surrounding these two employees. Ms Latham and Ms Gardiner were two of a group of three HR Co-

ordinators which, as a result of the closure of the paper machine in mid July 2006, had been reduced to one. Ms Latham had originally applied for voluntary redundancy and was due to leave her employment on 31 October 2006. Ms Gardiner was absent on a period of parental leave and had not made a decision as to whether she would return to work following the ending of that leave.

[41] Before Ms Latham's notice expired, Ms Gardiner's partner had been appointed to a role with NS Australia. Ms Latham and Ms Gardiner discussed with each other the possibility of swapping their roles. That is, Ms Latham would stay in her position, and Ms Gardiner would elect voluntary redundancy. They both, individually, approached Ms Scott and sought approval for Ms Gardiner to take voluntary redundancy and for Ms Latham to remain in employment. This swap of redundancies was agreed to.

[42] Ms Green says, NST should not have agreed to this swap while she was being made redundant as a vacant HR co-ordinator role could have been a redeployment option for her. Ms Scott confirmed that if Ms Gardiner had resigned from her position while on parental leave and Ms Latham had taken her voluntary redundancy option, which had been confirmed, Ms Green would have been given consideration for the vacant role. Ms Scott says that the two employees came to their own arrangements and those arrangements were approved by NST.

[43] The Act is clear on the duty of the employer to act in good faith, specifically in a redundancy setting. It was, therefore incumbent on NST, before agreeing to the arrangement between Ms Latham and Ms Gardiner, to consider Ms Green's situation. It is apparent to me, from the evidence, that no such consideration was made. However, as a matter of degree, this one factor will not cause an otherwise justifiable dismissal to have been unjustifiable.

Outplacement

[44] Ms Green was provided with outplacement support and EAP services during the final six months of her employment, to assist her with the redundancy situation. NST also made a commitment post-employment for Ms Green to undertake training in the use and execution of Excel. Unfortunately Ms Green did not take up this training opportunity.

I find Ms Green's dismissal due to redundancy to be justified. The redundancy was based on genuine commercial reasons and the way in which the redundancy was implemented was what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred. I am unable to be of further assistance to Ms Green.

Costs

[45] Costs are reserved. The parties are encouraged to discuss and resolve the matter of costs between them. In the event that they are unable to do so they may lodge and serve memorandum in the Authority for consideration.

Vicki Campbell
Member of Employment Relations Authority