

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 7
3008811

BETWEEN DUANE HAND
 Applicant

AND TECPAK INDUSTRIES LIMITED
 Respondent

Member of Authority: Peter van Keulen

Representatives: Jenny Guthrie, Counsel for Applicant
 Scott Worthy, Counsel for Respondent

Investigation Meeting: 2 November 2017 at Dunedin

Submissions received: 2 November 2017 from Applicant
 2 November 2017 from Respondent

Determination: 24 January 2018

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

- A. I decline Duane Hand’s claim for a personal grievance; Tecpak Industries Limited did not act in an unjustified way causing disadvantage to Mr Hand’s employment.**

- B. Tecpak Industries Limited did not breach the duty of good faith and I will not impose a penalty.**

- C. I reserve costs with a timetable set for submissions if required.**

Employment relationship problem

[1] Duane Hand worked at Tecpak Industries Limited for 15 years. In early 2016, he broke his leg whilst working and had two months off work recovering. After he returned to work, Tecpak undertook a restructuring and disestablished the role Mr Hand worked in (Site Co-ordinator) and then terminated his employment, as it had no other roles available for him to undertake.

[2] As a result of these actions, Mr Hand raised a personal grievance for unjustified action causing disadvantage. He seeks compensation for his personal grievance. He also says Tecpak's actions were a breach of the duty of good faith and he seeks a penalty for that breach.

[3] Tecpak denies these claims and says that it acted in good faith toward Mr Hand, first in undertaking his return to work and then second in carrying out the restructuring process, which it says was unconnected to Mr Hand's injury and time away from work.

Unjustified action causing disadvantage

[4] The issues that arise for the personal grievance of unjustified action causing disadvantage include:

- (a) Did Tecpak act in a manner that caused disadvantage to Mr Hand's employment?
- (b) If so, was that action or were those actions, justified, considering the statutory test for justification?

Breach of duty of good faith

[5] The issues that arise for the claimed penalty for breach of the duty of good faith include:

- (a) Has there been a breach or breaches of the duty of good faith; and

(b) If so, was the breach or were the breaches:

- i. deliberate, serious and sustained; or
- ii. intended to undermine an employment agreement;

Unjustified action causing disadvantage

Did Tecpak act in a manner that caused disadvantage to Mr Hand's employment?

[6] The actions that Mr Hand complains of can be grouped into three areas:

- (a) Tecpak was not open and communicative about his job, particularly on his return to work after his injury, but rather, it misled him about the security of his position.
- (b) Tecpak did not carry out a fair consultation in connection with the proposed restructure and redundancy and, in fact, the decision to disestablish the Site Co-ordinator role was predetermined.
- (c) The disestablishment of the Site Co-ordinator role was not substantively justified.

[7] I will consider each of these areas in turn.

Communication regarding the security of Mr Hand's job

[8] On 26 January 2016, Mr Hand slipped at work and fractured his ankle. Mr Hand was off work until 29 March 2016.

[9] During the two months that Mr Hand was away from work a colleague told him that his manager, Darryl Mudgway, had told other employees that Mr Hand's job was going to change.

[10] Mr Mudgway denies this.

[11] Mr Hand then asked Mr Mudgway about this. The evidence on when this occurred was disputed but both Mr Mudgway and Mr Hand accept that a conversation about whether Mr Hand's job was going to change did occur. Mr Mudgway reassured Mr Hand that he was not going to change his job and his plan was to get Mr Hand back to work on the return to work plan that had been put in place. He also told Mr Hand that he should not listen to rumours.

[12] When Mr Hand returned to work, he was assigned tasks that Mr Mudgway believed were in line with the return to work plan that had been put in place. In his evidence, Mr Hand expressed some frustration about this. He believed he could have done, and should have done, many other tasks that had been part of his Site Co-ordinator role prior to his injury such as ordering and monitoring supplies.

[13] Mr Hand describes the five week period of work after he returned as not being "back to business as usual or to my pre-accident role" Mr Mudgway accepts this and says that this was what was required because Mr Hand was on a return to work plan which meant he could not perform his full duties.

[14] What is clear is that any insecurity Mr Hand felt about his job because of the rumours he had heard during his time away from work was not alleviated by the reduced workload he was given when he returned. And, he says he continued to have colleagues asking him about his job and whether it was changing. This added to his anxiety.

[15] The return to work plan did not run smoothly. Mr Hand wanted to do more of his original tasks than he was allocated, such as ordering and on a couple of occasions he did this. Mr Hand also suffered a wrist injury which appeared to be a repetitive strain injury from the tasks he was allocated. As a result, there were further discussions between Mr Mudgway and Mr Hand about his work.

[16] The details of these events are not relevant but three things are evident from them. First, Mr Mudgway was frustrated at how Mr Hand was performing the return to work plan and his subsequent wrist injury. Second, Mr Hand was frustrated at the limited work he was

offered and the ongoing talk about his job changing. Third, Mr Hand sought assurances, again, that his job was not changing and Mr Mudgway provided this, as well as insisting that Mr Hand needed to stick to the return to work plan.

[17] On 22 April 2016, Mr Hand's doctor cleared him to return to full duties at work.

[18] Despite the reassurances from Tecpak about Mr Hand's role, the ongoing commitment by Tecpak to the return to work plan, and Mr Hand's recuperation back to being able to undertake full duties, on 10 May 2016 Tecpak commenced consultation over restructuring of the Site Co-ordinator role.

[19] From Mr Hand's perspective, this sequence of events does not look good. He had heard rumours his job was changing, he was restricted to light duties when he returned despite the fact he thought he could do many of his normal tasks, he saw others doing aspects of the Site Co-ordinator role and he knew Mr Mudgway was frustrated with him. He sought reassurances about the security of his job and received those only to find out a few weeks later, after he was fully fit to work, that the Site Co-ordinator role was going to be disestablished.

[20] It is this sequence that informed Mr Hand's view that Tecpak must have made the decision to disestablish the Site Co-ordinator role whilst he was off work with his injury and, when he returned Mr Mudgway was not honest with him, misleading him and delaying the consultation to his detriment.

[21] The key question therefore is when did Tecpak decide that restructuring and disestablishing the Site Co-ordinator role was a viable option and it should progress with this through a consultation process?

[22] Tecpak's evidence on this issue was clear and credible and it stood up to scrutiny from my questioning and cross-examination. It was also consistent across two witnesses and it was backed up by contemporaneous documents and further evidence from a third Tecpak witness. I was particularly careful to analyse and question the evidence as, on face value, it seemed too

convenient and, to apply a cliché, “too good to be true” in terms of explaining the otherwise unfavourable timing of events set out above.

[23] Tecpak’s explanation of the events leading up to Mr Hand’s redundancy was that the timing with his absence from work and then the return was a coincidence. Mr Mudgway did not prompt the restructuring in the first instance but rather it came from the HR team, in particular, Amber Kingston a Human Resources Advisor employed to provide HR advice and support to ten sites across New Zealand which are part of the businesses owned and operated by Pact Group Holdings (NZ) Limited. This included the Tecpak site in Dunedin.

[24] Ms Kingston’s evidence was that as part of her role with the Pact Group she would speak to managers at the ten sites about head count and possible cost saving measures. This was consistent with the evidence given by Patrick White the General Manager for Tecpak up until 2017.

[25] Ms Kingston says that as part of this role she spoke to Mr Mudgway on 14 April 2016 about headcount in production. It was in the course of discussing the employees Mr Mudgway was responsible for that the Site Co-ordinator role came up and was identified as a possible role that could be reduced or disestablished because the various parts of the role could be dispensed with or assigned to other employees.

[26] Mr Mudgway confirmed this in evidence and the contemporaneous email exchanges and diary notes are consistent with this evidence.

[27] Mr Mudgway’s evidence was that he then produced a short summary of how he thought the various aspects of the Site Co-ordinator role could be absorbed by other roles or outsourced. Mr Mudgway and Ms Kingston then did some further work on the proposal and presented this to Mr White on 1 May 2016 for him to review and approve the proposal (or not) as he had the “final sign off” on such matters at Tecpak.

[28] Mr Mudgway then met with Mr White and discussed the proposal and Mr White then gave approval for the proposal to proceed through consultation. Mr Mudgway was given a mandate to make the decision on the proposal once the consultation was complete.

[29] I have considered this evidence very closely and looked at consistency with all of the evidence including the contemporaneous documents. I have also considered how well the evidence stacks up overall or hangs together as an explanation for what occurred. I have weighed against this the concerns raised by Mr Hand and the possible inferences to be drawn from the timing of the events.

[30] Overall, I conclude that Tecpak's evidence is credible and I accept its explanation for what occurred in terms of Mr Hand's accident, time away from work, the back to work plan and its implementation, the initial discussions around the proposed restructuring and the development of that proposal.

[31] I therefore conclude that Tecpak has not misled Mr Hand about the security of his job, it had not considered the proposed restructuring based on Mr Hand's absence and it had not predetermined it based on the events occurring when Mr Hand returned to work. Whilst Mr Mudgway may have been frustrated with some of Mr Hand's behaviour during the return to work plan this did not motivate or inform the restructure proposal. Similarly, whilst Mr Hand may have felt insecure as a result of the rumours and the reduced role he had under the return to work plan this was nothing more than rumour and the reality of the operation of a carefully managed return to work programme. Mr Mudgway was committed to getting Mr Hand back to work and acted on this before the proposed restructuring became a possibility.

[32] I am satisfied that Tecpak did not act in a manner that caused disadvantage to Mr Hand's employment and on this group of complaints Mr Hand's grievance is not made out.

Consultation over restructuring and redundancy

[33] Mr Hand's complaint is that Tecpak did not carry out a fair consultation in connection with the proposed restructure and redundancy. He says this was a series of unjustified acts causing disadvantage to his employment.

[34] Having made the decision to proceed with consultation over the proposed restructure Tecpak commenced consultation with Mr Hand on 10 May 2016. Tecpak carried out this consultation through until 20 June 2016.

[35] So, Tecpak did carry out a series of acts which caused disadvantage to Mr Hand's employment – the proposed restructure made his job less secure at put him at risk of dismissal.

[36] The next issue to resolve then is whether these acts were justified.

[37] In *Grace Team Accounting Ltd v. Brake*¹, the Court of Appeal said that if an employer can show that a redundancy is genuine and that consultation requirements have been met then the test of showing that the dismissal was justified is likely to be met. The Court stated at [85]:

If an employer can show the redundancy is genuine and that the notice and consultation requirements of s.4 of the Act have been duly complied with, that could be expected to go a long way towards satisfying the s.103A test. In the end the focus of the [Authority] has to be on the objective standard of a fair and reasonable employer, so the subjective findings of what the particular employer has done in any case will still have to be measured against the [Authority's] assessment of what a fair and reasonable employer ... could ... have done in the circumstances.

[38] So the question of whether an action is justifiable, as expressed in s 103A of the Employment Relations Act 2000 (the Act) is to consider whether the process by which the consultation and implementation of the restructure and subsequent redundancy was a fair one. As the Court of Appeal expressed, the consultation requirements of s 4 of the Act is the starting point for that, but there may be other considerations in terms of the process. In my view I need to consider:

¹ [2014] NZCA 541

- (a) Did Tecpak disclose sufficient information to Mr Hand to enable him to make informed comments on the proposed restructure;
- (b) Did Tecpak make a genuine effort to consult with Mr Hand once it had provided that information? Did it give him an adequate opportunity to respond;
- (c) Did Tecpak then considered any responses Mr Hand gave to it;
- (d) Once a decision was made to implement the restructure and disestablish the Site Co-ordinator role, did Tecpak consult with Mr Hand and consider alternatives to dismissal²?

[39] I am satisfied that each of these steps was met by Tecpak:

- (a) The information setting out the proposed restructure was comprehensive yet easy to understand. It clearly set out what was proposed and specifically identified how each part of the Site Co-ordinator role could be undertaken using existing resources or outsourcing and it identified the cost saving.
- (b) Tecpak met with Mr Hand to provide the information on the proposed restructure and then it subsequently met with him and his lawyer to listen to his feedback. The opportunity was adequate, particularly the amount of time Mr Hand was given to consider the information and prepare his response, including at his request an adjournment of one meeting.
- (c) Mr Hand gave little to Tecpak as feedback on the proposal. In fact he and his lawyer accepted that there were cost saving and efficiency gains for Tecpak based on the proposed restructure. Mr Hand's main point of feedback was his concern that the decision to restructure and disestablish the Site Co-ordinator role had been made whilst he was away from work and other employees knew

² Particularly redeployment, applying *Jinkinson v Oceania Gold (NZ) Ltd* [2010] NZEmpC 102

of this before him. Mr Mudgway did consider what Mr Hand and his lawyer had to say and decided it was appropriate to proceed with the restructure.

- (d) The consultation over possible alternatives to dismissal, as a result of the disestablishment of the Site Co-ordinator role, was straightforward. There were only two ways to avoid dismissal – finding a new role for Mr Hand at the Tecpak site or Mr Hand relocating to another site. There were no suitable roles available for Mr Hand at the Tecpak site and in discussion, Mr Hand made it very clear that he was not prepared to relocate out of Dunedin. That effectively ended any prospect of redeployment and dismissal became inevitable.

[40] In all of the circumstances, I conclude that Tecpak's consultation over the proposed restructure and the dismissal of Mr Hand was procedurally justified. And on this group of complaints Mr Hand's grievance is not made out.

Substantive justification for restructuring

[41] Mr Hand's other complaint is that the disestablishment of the Site Co-ordinator role was not substantively justified. Again, the act complained of has occurred, that is the Site Co-ordinator role was disestablished, so the issue is whether that decision was substantively justified.

[42] In *Scarborough v. Micron Securities Products Ltd*³, the Employment Court said:

Section 103A(2) of the Act provides that the test for justification is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred. The Court of Appeal has recently confirmed the Court was entitled to inquire into the merits of the redundancy business decision. The genuineness of the redundancy remains a key focus. Once that is established, if an employer concludes that the employee is surplus to its needs, the Court is not to substitute its business judgment for that of the employer.

³ [2015] NZEmpC 39

[43] It is not my role to substitute my business judgment for that of Tecpak. What I must do is look at what Tecpak did to determine that the restructure was required and what it based its assessment on. I must consider whether the conclusion to restructure based on that analysis was one that a fair and reasonable employer could have made in those circumstances.

[44] I am satisfied that Mr Mudgway made a comprehensive investigation into the proposed disestablishment of the Site Co-ordinator role by assessing the differing aspects of the role, how those functions could be undertaken elsewhere and whether those alternatives created a cost saving. As I have already determined Mr Mudgway then consulted over that and made his decision after feedback was received. Based on my assessment of these factors and without substituting my business judgment for Tecpak's I am satisfied that the decision to restructure was one that a fair and reasonable employer could have made in those circumstances.

[45] It follows from my conclusions that the decision to implement the proposed restructure was substantively justified. And on this group of complaints Mr Hand's grievance is not made out.

Conclusion on personal grievance

[46] Either the actions that Mr Hand complains of did not cause disadvantage to his employment or if they did, the actions were justified – there is no personal grievance for unjustified action causing disadvantage.

Breach of duty of good faith

[47] The events that give rise to Mr Hand's allegations of breach of the duty of good faith are the same ones that inform his claim for a personal grievance. Based on my analysis above I conclude that Tecpak has not breached the duty of good faith. I will not impose a penalty against it.

Determination

[48] I decline Mr Hand's claim for a personal grievance; Tecpak did not act in an unjustified way causing disadvantage to Mr Hand's employment.

[49] Tecpak did not breach the duty of good faith and I will not impose a penalty.

Costs

[50] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[51] If they are not able to do so and a determination on costs is needed, any party seeking costs may lodge and serve a memorandum on costs within 28 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority