Employment Court of New Zealand

HP Industries (NZ) Limited v Davison AC44/08 [2008] NZEmpC 104 (7 November 2008)

Last Updated: 14 November 2008

IN THE EMPLOYMENT COURT

AUCKLANDAC 44/08ARC 26/08

IN THE MATTER OF a challenge to a determination of the Employment Relations Authority

BETWEEN HP INDUSTRIES (NZ) LIMITED
Plaintiff

AND JOSEPH DAVISON
Defendant

Hearing: 11 September 2008

(Heard at Auckland)

Appearances: Rob Towner, Counsel for Plaintiff
Greg Muller, Counsel for Defendant

Judgment: 7 November 2008

JUDGMENT OF JUDGE C M SHAW

[1] On 4 December 2006 Joseph Davison was dismissed from his employment with HP Industries (NZ) Limited ("HP") because his position had been disestablished. He brought a personal grievance alleging unjustified dismissal.
[2] The Employment Relations Authority found that while his dismissal resulted from genuine restructuring his particular employment was not genuinely redundant. It determined that his dismissal was unjustifiable because he was not treated fairly and sensitively.
[3] The Authority noted that Mr Davison was not entitled to compensation for the loss of the job itself but awarded compensation for the effects of the unlawful termination in the sum of $9,000. Costs were reserved but remain unresolved.

The challenge

[4] HP challenges the determination. It alleges that:

- Mr Davison's position had been disestablished and he was genuinely redundant.
- The dismissal was carried out fairly. Any limitation on consultation was as a result of Mr Davison's unwillingness to participate in it.
- HP met all its redundancy obligations in the individual employment agreement in relation to notice and compensation.
- The plaintiff's actions were what a fair and reasonable employer would have done in the circumstances.

[5] In defending the challenge Mr Muller on behalf of Mr Davison accepted that his position was genuinely surplus and therefore the dismissal was substantively justified. Mr Davison's only claim is that he was unjustifiably disadvantaged in his employment and seeks compensation for that.
[6] The basis for the personal grievance at the hearing of the challenge was therefore different from that determined by the Authority. It was limited to an assessment of the procedure adopted by HP before it decided to make Mr Davison redundant.

The issues

[7] The issues raised in this case are:

1. The obligation of employers and employees under s4(1A) of the Employment Relations Act 2000.
2. Whether HP acted as a fair and reasonable employer in all the circumstances.
3. If Mr Davison were unjustifiably disadvantaged what remedies should be awarded.

The law

[8] In 2004 an amendment to s4 of the Employment Relations Act 2000 enlarged the statutory requirements for parties to deal with each other in good faith. Section 4(1A)(c) is relevant to redundancies:

(c) without limiting paragraph (b), 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 1 or more of his or her employees to provide to the employees 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 the decision is made.

[9] In general s4 creates statutory obligations on both parties to an employment relationship, for example the requirement to be active and constructive in maintaining a productive employment relationship. However s4(1A)(c) imposes obligations only on the employer. In *Simpsons Farms Ltd v Aberhart*[1] Chief Judge Colgan held at paragraph 65:

... A fair and reasonable employer must, if challenged, be able to establish that he or she or it has complied with the statutory obligations of good faith dealing in s 4 including as to consultation because a fair and reasonable employer will comply with the law.

[10] Section 4(1A)(c) is applicable when a decision which will or is likely to have an adverse effect on the continued employment of an employee arises. The nature of such a decision is not limited by the statute.
[11] Generally where restructuring takes place there will have been at least two points at which decisions are made: first, where a review of the business leads to a decision that a restructure is necessary and second, the resulting decisions about how a restructure is to be implemented. At each of these stages the decision is likely to have an adverse effect on the continuation of the employment of employees and this gives rise to the employer's obligation to give information about the decision and an opportunity for the employee to comment on that information.
[12] The principles of consultation were reiterated and modified in the light of the amendments to s4 by Chief Judge Colgan in *Simpsons Farms* and because they are particularly relevant to this case, deserve repetition:

- *Consultation requires more than a mere prior notification and must be allowed sufficient time. It is to be a reality, not a charade. Consultation is never to be treated perfunctorily or as a mere formality.*
- *If consultation must precede change, a proposal must not be acted on until after consultation. Employees must know what is proposed before they can be expected to give their view.*
- *Sufficient precise information must be given to enable the employees to state a view, together with a reasonable opportunity to do so. This may include an opportunity to state views in writing or orally.*
- *Genuine efforts must be made to accommodate the views of the employees. It follows from consultation that there should be a 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.*

The facts

[13] Mr Davison had been employed by HP or its predecessor companies since 1987, first as an apprentice engineer, then a technician. He was a single process engineer since 2001, 2002.
[14] His individual employment agreement included a provision for redundancy which stated, "*If a need for redundancy occurs the conditions would be as per those detailed in the Site Industries Collective Employment Contract.*" Clause 10 of that contract (an employee protection provision) defined redundancy, provided for four weeks notice of termination and a formula for calculating redundancy compensation. It contains a consultation clause but this is limited to restructuring where all or part of the business is undertaken for the employer by another person or the business is sold or transferred to another person. It is silent as to the process to be undertaken in relation to redundancy in other circumstances.
[15] Mr Davison worked in the single stage area of HP's plastics factory supervising 18 plastics machines. His job included tooling trials, machine trials, process improvement and services work. As the work of the single stage area was shrinking and production was being changed over to another department known as the two stage area a restructure of the company was necessary.
[16] The restructure was overseen by David Ralph, the operations manager. Through 2005 and 2006 about 60 employees were made redundant in several stages. This was carried out by Mr Ralph in consultation with the relevant union. He also took legal and human resources advice.
[17] In the course of this process Mr Ralph had sought assistance from Mr Davison to assess the performance of other employees who were affected by the restructuring but Mr Davison was not advised that his own position was in jeopardy.
[18] Before deciding on the restructure the general manager and owners of HP had conducted reviews and as a result developed a proposal to reduce costs and create greater efficiencies by disestablishing five positions in the single stage area including that of Mr Davison and some union members. Mr Ralph had earlier disclosed the managers' review to the union representatives who were fully aware of the company's situation and the various options available. However, Mr Ralph did not discuss these matters with Mr Davison nor did he forewarn him that his position may be disestablished. The company aimed to achieve restructure by Christmas 2006.
[19] On 15 November 2006, knowing that there was a proposal that might adversely affect Mr Davison's job Mr Ralph asked him to take control of the daily technical meeting where staff were told what work they were to be doing for that day because Mr Ralph had been concerned by the lack of direction at those meetings. Mr Davison regarded this as an expansion or at least an affirmation of his employment. This was disputed by Mr Ralph. Mr Davison's expectations were short-lived however because the next day he was called without warning to a meeting with Mr Ralph.

Meeting of 16 November

[20] Mr Ralph had decided to conduct a one on one meeting with stage one staff who were in the positions potentially affected by the proposal. The company's legal representative had e-mailed to him an explanatory letter to be given to each of those individuals.
[21] Mr Ralph said the purpose of this meeting was to outline to staff the proposed changes and the reasons why they were being proposed. In his diary he had made a record of these reasons which he intended to read out to the employees. No copy of that diary entry was retained nor was it given to the employees. Mr Ralph produced a document for the Court which shows a diagram of the proposed restructure but that was not available for Mr Davison at the time.
[22] Mr Ralph planned to meet Mr Davison at 4.00pm on 16 November but Mr Davison arrived earlier and as the pre-prepared letter had not been printed out Mr Ralph explained the purpose of the meeting without the letter in front of him.
[23] Mr Davison recalled that Mr Ralph said to him, *"I don't want to beat around the bush Joe, you are being made redundant."* Mr Ralph denies that. He said he told Mr Davison that the company was considering restructuring the single stage department and that his and several other positions could be affected. He went through the reasons for the down-sizing but did not talk about or suggest options or alternatives to redundancy.
[24] Mr Davison was taken by surprise. He had been called to a meeting without notice of what it was to be about. He had nothing in writing in front of him and he had not been given an opportunity to have a representative with him. In light of the events of the previous day he had every reason to believe that his employment was ongoing. Mr Ralph presumed without any basis that Mr Davison would have heard about the reasons for the meeting from casual talk amongst the factory workers. I accept that Mr Davison was not aware of the reason for the meeting until Mr Ralph told him.
[25] It is highly probable that whatever Mr Ralph said to him Mr Davison took it to mean that he was being made redundant. This impression was fortified by Mr Ralph telling him that the company felt it was in his best interests if he had time off before the next meeting to enable him to go through the issues and prepare for the next meeting

and that he should take his tools home with him. Mr Ralph told the Court this was because there had been instances of theft over the last 12 months and he was referring only to Mr Davison's tool trolley. Mr Davison thought he was told to take all his tools home and did so. These comprised three separate boxes with a combined weight of about 250 kilograms. He loaded them onto his one ton truck and left. It is most unlikely that Mr Davison would have done this if he had believed that he had a prospect of ongoing employment.

[26] There was a dispute about whether Mr Ralph had told Mr Davison to drop his keys and cellphone off before he left. I accept that Mr Ralph did not tell Mr Davison to do that because Mr Davison kept his keys and the cellphone until at least December when he was required to return them after the end of his employment.

[27] At the end of the meeting Mr Ralph printed out the pre-prepared letter, signed it and handed it to Mr Davison. It said the company was considering the redundancy of Mr Davison's position, spoke of options and alternatives to redundancy that he might raise and gave another time to discuss the options or other issues. The letter concluded, *"In the meantime, you are directed not to attend work and not to contact other employees, suppliers or customers."* This directive was somewhat softened by the following sentence, *"We want you to concentrate your efforts on considering alternatives to redundancy."*

[28] The defendant gave no explanation for the directive. In the light of its tone and wording I find that Mr Davison's understanding of the impending finality of his job was understandable whether it was intended or not. When Mr Davison left that meeting he believed his position was going to be made redundant. He went home and contacted a lawyer.

[29] The next day Mr Davison requested a copy of his employment agreement and the redundancy package with details of shares, superannuation, holiday pay and sick pay so that he could consider his options.

[30] Mr Ralph supplied the estimated redundancy calculations on 23 November and suggested meeting the following day to discuss options. This meeting was put off until 28 November because Mr Ralph had not yet provided the employment agreement. The agreement was only e-mailed to Mr Davison the day before the proposed meeting. During the e-mail exchanges about these meetings Mr Ralph said that he was more than happy for a meeting to occur the next Monday, 27 November. Mr Davison then asked for one day's delay because one of his children had been in Starship Hospital all weekend.

Meeting of 28 November

[31] Mr Ralph said that at the meeting at 3.00 pm Mr Davison and his lawyer did not raise any issues or concerns about the proposed restructuring or possible redundancy nor did they question why the company was making the changes. The discussion was focussed on whether there were options for other jobs for Mr Davison.

[32] Mr Davison asked about options and Mr Ralph asked him if he had any ideas. He expected that once Mr Davison put forward some proposals then they would open dialogue and start the consultation process. He was waiting for Mr Davison to suggest that he might be employed as a technician or in some other position with the company, but Mr Davison's legal representative suggested that that was for the company to suggest not Mr Davison.

[33] After the meeting Mr Ralph looked into alternatives and just after 9.00am the next morning he e-mailed Mr Davison to say that the only alternative was for a position as a shift technician paid hourly at *"the current going rate."* This rate was not specified. Mr Ralph said in his e-mail, *"We have delayed these feedback meetings for a while now and we would like to reach a conclusion."* He suggested a meeting at 3.00pm that day effectively giving Mr Davison six hours to consider the proposal.

[34] Mr Davison didn't read that e-mail until the end of the day when he e-mailed Mr Ralph saying that he would arrange a meeting as soon as his lawyer got back to him. Mr Ralph responded at 8.05am the next day which was 30 November.

Subject: RE: Review of options

Joe

Thank you for your response.

I think we are losing track of the process here. The purpose of the consultation period is for you to come back to us on concerns and issues you have about your position becoming redundant due to restructuring of the business. It is then up to the Company to respond to your concerns and issues. To date (two weeks) we have received nothing verbally or in writing from you while the company has come back to you, as promised, with an alternative. The Company has gone out of its way to allow you as much time as possible for consultation.

While we will obviously want to ensure that a meeting time to suit both parties is set up, we will not delay the process indefinitely.

I want to meet with you today at 3pm and expect you to be there *or else if this does not suit you contact me to arrange*

another time for today.

...

Meeting of 1 December

> [35] The next meeting was held on Friday, 1 December at 3.30pm. Before that Mr Ralph had asked Mr Davison to send an e-mail with his concerns, issues or alternatives before the meeting. Mr Davison's lawyer responded to that but Mr Ralph couldn't open the attachment before the meeting.
> [36] Mr Ralph started the meeting by saying that he wanted some resolution. He wanted a yes or no answer to the proposal for the alternative position of shift technician. At that point Mr Davison's lawyer gave him a hard-copy of the attachment. It was a without prejudice letter setting out concerns and issues on behalf of Mr Davison as requested by Mr Ralph.
> [37] Mr Ralph was annoyed by the letter. He ended the meeting and said that he would see them in Court. Before they left he printed out a pre-prepared letter which he gave to Mr Davison. This reiterated the process to date and formalised the offer of a shift technician's job. He was told that if he did not accept the shift technician position his employment would be terminated with one month's notice, redundancy compensation and other entitlements.
> [38] The letter gave no time limit for acceptance of the offer. On Monday, 4 December Mr Ralph prepared a letter to Mr Davison which set out the company's position on the process.

...

Since our first meeting with you on 16 November, we had given comprehensive consideration to our restructuring proposal and its consequences. In the absence of any feedback, suggestions, options or alternatives from you, we decided on Wednesday 29 November to disestablish your position of Single Stage Process Engineer.

On 29 November we confirmed to you in writing that we had identified a position of Shift Technician that we were pleased to offer you. Unfortunately, you did not demonstrate or express any interest in our offer and refused to make a decision without your lawyer's input.

Given our need to move on with the restructure, we wrote to you again on 30 November to put a timeframe on our offer or, at least, to meet with us to discuss the offer – by close of business on Friday 1 December.

We met with you on Friday 1 December, again in the company of your lawyer, with our express intent of discussing our offer to you of the position of Shift Technician and clarifying any questions that you might have about our offer.

Rather than wanting to discuss the offer, you and your lawyer wanted only to express your dissatisfaction with the process and present the 'without prejudice offer' to terminate your employment, as mentioned above. We were disappointed with this approach. It was obvious to us that you did not want to accept our offer of the position of Shift Technician.

It is with regret that we now reiterate to you that your position of Single Stage Process Engineer has been disestablished and advise you that your employment is to be terminated, effective today.

...

> [39] That letter was sent on Tuesday by e-mail to Mr Davison who was still contemplating the 1 December offer. Mr Davison said that when he received that e-mail he figured that his job was over at that point although he was not actually made redundant until he received the letter by courier on 8 December.
> [40] Mr Ralph accepted in evidence that the decision to make the position redundant had been made on 29 November before the meeting with Mr Davison on 1 December.
> [41] Following negotiations Mr Davison received redundancy compensation pursuant to the formula in the Site Industries Collective Contract. There is no dispute about the accuracy of the figures involved in that calculation.

Effects on Mr Davison

> [42] Mr Davison felt very stressed and demoralised throughout this period. It was just prior to Christmas and Mr Ralph and other staff knew that his wife was pregnant with twins due to be born in April. They already had four children under seven at that time one of whom had been hospitalised during the redundancy process.
> [43] As this was the only place he had ever worked since leaving school he felt that he was heading into the unknown which to him was a terrible feeling. Mr Davison also spoke of events after the termination of his employment. His twins were born prematurely and suffered health problems which affected his ability to take up other employment. He has since become self-employed.

Discussion and findings

[44] It is no longer disputed by Mr Davison that there were good reasons for the restructuring and that the redundancy was genuine. The central question is whether HP acted justifiably towards Mr Davison in the circumstances that presented themselves in the period up to the termination of his employment. I find that those circumstances were:

1. The company's urgent and impending need to restructure to reduce its uneconomic work force.
2. There had been and continued to be a number of other redundancies in the same work place including those of employees who were members of a union.
3. HP had consulted with the union about the redundancies of its members and had disclosed the management review to the union.
4. HP had recourse to the expertise of legal and HR advisors.
5. Mr Davison had worked for 20 years in the same work place.
6. The company knew of Mr Davison's family circumstances.

[45] In the light of those circumstances I find that there were significant and unjustified process failures by the company. First was the inconsistent treatment of Mr Davison as an employee covered by an individual employment agreement compared with employees who had union representation. The union was privy to the management review but Mr Davison was only told of it in relation to his own employment on 16 November. Until then he had not been told that his employment was to be adversely affected.
[46] On that day, without warning or the support of a representative, Mr Davison was verbally given a list of reasons for the restructuring and told immediately to leave his work place although on full pay. That he had been asked to run important work meetings only the day before increased his surprise.
[47] The letter given to him at the end of the 16 November meeting expressed what Mr Ralph intended to say to Mr Davison but I have strong doubts that he followed the format of the letter when speaking to him. Mr Davison came away from the meeting with a very different understanding from that which Mr Ralph intended to convey. This was partially because he did not have the chance to read the letter at the meeting and clarify matters with Mr Ralph before leaving.
[48] The meeting on 16 November was not consultation in the proper sense. Mr Davison was notified of a restructure that was necessarily having to proceed and was told that he needed to consider his options but was not provided with sufficient information at that stage in a form that would enable him to do this. For example he was given no indication of what options the company may have had available for him.
[49] The direction to Mr Davison not to attend work and cease contact with other employees was harsh. Although it appears it was intended to give Mr Davison time to consider his options, in the absence of information about those options and, because he had been told to take his tools home, it is understandable that he believed the decision had already been made.
[50] Mr Ralph was wrong to believe that the real consultation would only begin once Mr Davison put forward some proposals. Mr Towner submitted for HP that although Mr Davison was given time to consider the proposal and opportunity for feedback he chose not to provide. The implication of this submission is that Mr Davison bore the obligation to do so.
[51] Section 4(1A) recognises that the provision of information relevant to the continuation of an employee's employment is the responsibility of the employer. The obligation is on the employer to provide the employee with information about possible alternatives to redundancy or options for redeployment. Without that information Mr Ralph's request for Mr Davison to initiate the discussion on options was unreasonable. For example the diagram which Mr Ralph produced for the Court's benefit would have been a useful piece of information for Mr Davison to assist his consideration of his position as would an early indication that a shift technician's position would be an option.
[52] Having begun what Mr Ralph saw as consultation by asking Mr Davison for his comments on the issues, Mr Ralph then summarily terminated it by abruptly ending the meeting on 1 December without engaging with the matters raised in Mr Davison's lawyer's letter which meant that even on his terms there was no consultation at all.
[53] The company's letter sent to Mr Davison after that meeting demonstrates the extent of the unfairness of the process towards Mr Davison. The letter said that HP had given *"comprehensive consideration"* to their restructuring proposal and its consequences since first meeting with Mr Davison. There is no evidence that the results of this comprehensive consideration had been conveyed to Mr Davison. Next, the letter shows that the entire burden of coming up with options lay with Mr Davison. Mr Davison's reaction to the offer of shift technician was to seek his lawyer's advice. The letter shows that HP regarded this as a refusal to make a decision without the lawyer's input. Given that the offer had not been accompanied by any pay rates or other information the company's negative reaction to Mr Davison's desire to seek legal advice was unfair. Finally, having asked for Mr Davison to provide comments and issues to him Mr Ralph then expressed frustration with the fact that those concerns and issues had been raised by Mr Davison's lawyer.
[54] Overall the sense conveyed by that letter is of a company frustrated by its own process and annoyed by Mr Davison's engagement of a lawyer and his failure to acquiesce to the decision which it was to make.

[55] The process was extremely hasty. Mr Ralph's complaints about the delays were not justified. The longest delay was caused by him getting very relevant information to Mr Davison. He could not reasonably have been expected to make any decisions at all until he had at least copies of his agreement and redundancy package. Mr Ralph gave no indication until 29 November that he was concerned about delays. His investigation of the alternative position available for Mr Davison came at the end of the process, was offered to him without a time frame within which he was to accept it, and then terminated without warning before he had had time to consider it.
[56] On a personal level, Mr Ralph was aware that one of Mr Davison's children was in hospital for a time during this process and that his wife was expecting twins. Given that he was facing the termination of his employment of 20 years I find that HP acted with undue haste which caused him anxiety and stress and, I infer, a good deal of frustration.

Conclusion

[57] HP was in breach of its obligation under s4(1A) to give Mr Davison access to information relevant to the continuation of his employment and as such cannot be said to have acted as a fair and reasonable employer. A fair and reasonable employer would have complied with its statutory obligations of good faith as expressed in s4. It would have given Mr Davison more notice that his position was at risk and made efforts to find an alternative for him at the beginning rather than the end of the process. For this reason I find that HP acted in a manner towards Mr Davison which unjustifiably affected him to his disadvantage.

Remedies

[58] Mr Davison received redundancy compensation pursuant to his agreement and was therefore compensated for the loss of his position. As the redundancy was accepted to have been genuine any remedies due to Mr Davison are limited to compensation under s123(1)(c). There can therefore be no award for loss of wages.
[59] The Authority awarded Mr Davison $9,000. In his closing submissions Mr Muller indicated that Mr Davison did not take exception to that award. Mr Towner suggested that that sum should be reduced because the Authority had found that reasons for Mr Davison's redundancy were genuine and that the award of $9,000 must have reflected this at least in part meaning that $9,000 should be reduced to no more than $5,000.
[60] I do not accept that submission. The Authority made an award for the loss of earnings but that remedy was not pursued on the challenge. The Authority expressly said that Mr Davison is not entitled to compensation for the loss of his job itself and awarded the $9,000 for the effects on him of the unlawful termination. The sum of $9,000 is a modest award but appropriate in all the circumstances which existed prior to the termination of his employment.

Costs

[61] The Authority did not award costs and they remain to be fixed as do the costs on the challenge.
[62] Counsel are invited to reach agreement on both of these matters but if they are unable to do so counsel for the defendant is to file a memorandum as to costs in the Authority and the Court within 28 days of this decision. The plaintiff has 14 days to respond to that memorandum.

C M SHAW

JUDGE

Judgment signed at 10.00 am on 7 November 2008

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[1] [2006] NZEmpC 92; [2006] ERNZ 825
