

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 333
5320730

BETWEEN ALASTAIR HALSE
Applicant
AND CONNORS WINDOWS LTD
Respondent

Member of Authority: Vicki Campbell
Representatives: Danny Jacobson for Applicant
Adam Hopkinson for Respondent
Investigation Meeting: 23 May 2011 at Tauranga
Submissions Received: 3 June 2011
Determination: 26 July 2011

DETERMINATION OF THE AUTHORITY

- A Mr Halse was dismissed justifiably by reason of redundancy.**
- B Mr Halse does not have a personal grievance for unjustified disadvantage.**
- C Costs are reserved.**
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[1] Mr Alastair Halse was employed as a salesperson by Connors Windows Limited (CWL) on or about 2 September 2008. Mr Halse's employment was subject to an individual employment agreement.

[2] In September 2009 Mr Halse says he was invited to buy in to the business and invest funding into it. He says that in May 2010 there was further discussion but that on 5 May 2010 the offer was withdrawn by Mr David Steens, Managing Director of CWL and issues raised regarding Mr Halse's performance.

[3] Mr Halse points to 5 May 2010 as being the start of a deterioration in the employment relationship between himself and Mr Steens. He says that from that point

on, Mr Steens continually criticised his performance which resulted in an altercation between the two men.

[4] In July 2010 a proposal to restructure the office was advised to Mr Halse and eventually lead to Mr Halse's employment being terminated by reason of redundancy. Mr Halse challenges that dismissal and says it was unjustified and that he suffered a disadvantage in his employment. CWL denies the dismissal was unjustified.

[5] In reaching its conclusions the Authority is required to scrutinise CWL'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.

Was the dismissal justified?

[6] The test of justification does not change the longstanding principles about justification for redundancy¹.

[7] The Authority must be satisfied on two general points – that the business decision to make a position redundant was made genuinely and not for ulterior motives; and that the respondent acted in a fair and open way in carrying out that decision – particularly, did it consult properly about the proposal to make Mr Halse redundant and otherwise act in a way that was not likely to mislead or deceive him, that is, in good faith?

Was the redundancy for genuine commercial reasons

[8] The Court of Appeal in *GN Hale & Son Ltd v Wellington Caretakers IUOW*², cemented an employers right 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 the right to continued employment if the business could be run more efficiently without him.

[9] Further, the Employment Court in *Simpsons Farms*³ reiterated the right of an employer to make genuine commercial decisions relating to how its business

¹ *Simpson Farms v Aberhart*, unreported, Employment Court, Colgan CJ, [2006] 1 ERNZ 825.

² [1991] 1 NZLR 151.

operations will function including decisions to make positions or employees redundant.

[10] Mr Halse was one of two sales people working in Tauranga and covering the Tauranga, Coromandel and Hamilton areas. The letter of appointment sets out CWL's commitment with regards to redundancy. It states:

If your position is made redundant, you will be given the notice set out in the termination clause after we have advised you of the possibility of redundancy, have given you an opportunity to make suggestions or comments on how to avoid redundancy and have considered such comments or suggestions. No redundancy compensation is due to you under those circumstances.

[11] On 14 September 2009 Mr Steens wrote to Mr Halse confirming a discussion the two men had had regarding Mr Halse purchasing shares in CWL. The offer was that Mr Halse could purchase 15% of the shares. The letter set out the current gross value of CWL and the anticipated purchase price.

[12] In addition the letter set out the conditions attached to the purchase of the shares which included the payment of a sum as a "loan" to CWL. The purchase was conditional on Mr Halse remaining an employee. If the employment ended Mr Halse would be required to sell the shares back to the other shareholders.

[13] At the same time as the discussions were ensuing about the sale of shares Mr Halse's salary was adjusted upwards. In the letter confirming the salary adjustment Mr Steens reiterated the discussion around Mr Halse's performance and the pleasure of working with Mr Halse. The increased salary was a recognition of Mr Halse's efforts in maintaining sales in a difficult time.

[14] Further Mr Steens advised Mr Halse that he looked forward to Mr Halse filling the senior sales role and mentoring and guiding the other sales person in his sales process. Mr Steens asked Mr Halse to become the "...volume builder..." recognizing Mr Halse's comments in respect of the burden that would bring, however, Mr Steens reiterated that in the long term there would be a person to do the customer maintenance role so that Mr Halse could focus on the relationships and develop other customers. In essence Mr Halse was being asked to step up and become a Sales/Business Development Manager for CWL.

³ Supra n 1.

[15] On 5 March 2010 Mr Halse was advised by Mr Steens in writing that Mr Halse would receive a further increase in his salary plus receive the payment of a bonus in recognition of his efforts in achieving budgeted sales for the year.

[16] By May 2010 no progress had been made on the offer to purchase shares and in May 2010 Mr Steens formally withdrew the offer to sell shares in CWL to Mr Halse. Concurrently CWL was experiencing a deterioration in the market conditions.

[17] On 30 June 2010 Mr Halse attended a meeting with Mr Steens where Mr Steens advised Mr Halse he was considering restructuring the two sales roles. Mr Halse was advised that if the proposal to restructure was implemented, it would result in a new position being established in Hamilton with one role remaining in Tauranga.

[18] Mr Halse was advised that the basis for the decision to consider restructuring was the cost of travel associated with a sales representative travelling on a regular basis from the Bay of Plenty to the Waikato. It was not just the actual costs of the travel but also the significant downtime involved with a sales representative travelling on average 3 hours per trip. Mr Steens also considered that it would be more valuable to have a sales representative physically located in Hamilton to assist in the marketing of CWL.

[19] Mr Halse was aware that the volume of dwelling consents had dropped and he was quite concerned. In his oral evidence Mr Halse told the Authority that he had told Mr Steens that in order for CWL to go forward hard decisions would need to be made. Mr Halse had also acknowledged to Mr Steens that he was aware of the significant downtime associated with the travelling between the regions.

[20] On 5 July 2010 Mr Halse requested details about the proposed restructuring. Mr Halse became upset and attended his doctor who advised him to take two weeks sick leave due to stress.

[21] On 16 July 2010 CWL advised Mr Halse that the proposal was to have only one Tauranga based representative and another representative based in Hamilton. In effect the number of representatives would not change, however, the location of one of the representatives would move from Tauranga to Hamilton.

[22] Mr Halse says that at a meeting on 19 July 2010 to discuss the proposal he was not allowed to enter into any discussion about the detail of the roles or any

alternatives. Mr Halse says the discussion was to be about the new position and not the redundancy arising from the disestablishment of one of the Tauranga roles.

[23] Mr Halse contends that based on the fact that he was not allowed to discuss any of the issues there was no point to continuing. The meeting was discontinued in order to allow Mr Halse the opportunity to prepare a formal response to the issues and provide details of the alternatives.

[24] The agreement was that Mr Steens would provide additional information by Wednesday the following week, to allow Mr Halse the opportunity to respond by the following Friday. A second meeting was planned for Monday 26 July 2010.

[25] Mr Halse says Mr Steens refused to provide the additional information, however, he did make a formal response by Friday 23 July 2010 as agreed.

[26] Mr Halse says the meeting on Monday 26 July 2010 was extremely short. He says Mr Steens acknowledged he had received the proposal from Mr Halse, had read it over the weekend and did not want to enter into any discussion. Instead, Mr Steens advised Mr Halse that he would consider the matter and make a decision by 11.00am and Mr Halse was to attend a meeting at that time.

[27] At the meeting at 11.00am Mr Halse was provided with a letter advising him of the termination of his employment by reason of redundancy. Mr Steens advised Mr Halse that he had been through a selection process as a result of which Mr Halse had been selected for redundancy. Mr Halse was advised that a sales role was to be established, based in Hamilton and that he would be advised when the role was being advertised and suggested Mr Halse may wish to apply for it.

[28] Mr Steens says there were a number of reasons why CWL decided to disestablish a sales role in Tauranga and establish one in Hamilton including:

- The significant cost associated with a sales representative regularly travelling from the Bay of Plenty to the Waikato;
- The associated down-time for the sales representative during the travelling time;
- The ability to market CWL was reduced by not having a physical presence in the Waikato;

- The result of not having a physical presence in the Waikato meant CWL could not benefit from the passive marketing that occurs through networking.

[29] I am satisfied that the predominant motive for the restructuring of the two sales roles was to seek significant costs savings in light of the deteriorating sales experienced by CWL.

[30] At the investigation meeting Mr Halse confirmed that business had dropped off and that they were in the middle of a recession. He acknowledged that there was a need to increase sales volume or trim the fat in the business. Mr Halse was also aware of the cost cutting measures Mr Steens had implemented in other areas, for example changes had been made to the vehicle servicing intervals, mobile phone plans, fuel cards and internet costs. All these changes were to cut costs.

[31] As events transpired, having identified the position filled by Mr Halse as surplus to requirements, the intention was to create a sales position in Hamilton. However, due to the deteriorating financial position of CWL the proposed position was not established.

[32] I find the decision to terminate Mr Halse's employment by reason of redundancy was based on genuine commercial reasons and was not made for ulterior motives.

Process

[33] The Directors followed a process in making Mr Halse redundant which included formulating a proposal and considering options. As part of its consideration CWL sought advice from Advicewise which provided a report on the options of having two Tauranga based representatives versus having a representative based in Tauranga and another in Hamilton. A copy of the relevant part of the report was provided to Mr Halse during the consultation process.

[34] On 29 June 2010 Mr Steens met with the two potentially affected sales representatives and outlined the proposal and the consultation process CWL would follow before making a decision on the proposal. Mr Steens told Mr Halse he was available to discuss the proposal at any time but that individual meetings would take place on the morning of 1 July 2010 to give Mr Halse the opportunity to comment on the proposal.

[35] These discussions were confirmed in writing on 30 June 2010 where Mr Steens reiterated the reasons for the proposed restructuring, where were:

In essence our Waikato activity has not been paying off given the potential of the market for a reasonable market share and the costs of operation. We need to increase our presence in the market while substantially improving our productivity and cost per sales call.

A restructuring proposal is that we will have one Tauranga based representative and one Hamilton based representative. The reduced travelling time and cost savings will be applied to an improved call rate and the ability to be more in touch with the Waikato market. This means that one of the current Tauranga based sales positions would be disestablished. There would be a new Hamilton based position.

[36] Mr Halse did not turn up for the meeting on 1 July 2010 as he was on sick leave from that day until 15 July 2010. In the meantime Mr Steens met with the other sales representative and says he had a lengthy discussion with him regarding his views on the restructuring proposal.

[37] On 5 July 2010 Mr Halse wrote to Mr Steens advising him of his view that the restructuring proposal was not genuine, but rather was related to ongoing issues between himself and CWL. Mr Steens responded to the letter by sending Mr Halse a copy of the Advicewise report and setting out the proposed selection criteria which would be used if a decision was made to proceed with the proposal.

[38] When Mr Halse returned to work on 15 July 2010 Mr Steens advised him of the need to meet as soon as possible in order for Mr Halse to provide his comments on the restructuring proposal. That meeting took place on 16 July 2010.

[39] During the meeting Mr Halse was represented by legal counsel. Mr Steens says that at the beginning of the meeting Mr Halse was provided with a further letter regarding the restructuring proposal and that a lengthy discussion took place about it. During this discussion both Mr Halse and Mr Steens asked questions and made comments regarding the proposal. Mr Steens asked Mr Halse if, in the event the proposal went ahead, Mr Halse would be prepared to relocate to Hamilton. Mr Halse considered that to be an unreasonable request.

[40] The meeting was adjourned briefly to allow Mr Halse the opportunity to speak with his representative in private. On reconvening the meeting Mr Halse requested further information and sought a further opportunity to respond in writing with some alternative proposals. It was agreed the information would be provided by 21 July and Mr Halse would provide his additional written responses by 23 July 2010.

[41] The information was sent to Mr Halse on 19 July which included the business rationale for the restructuring. By email response Mr Halse requested the sales figures for the last 5 years. Mr Steens advised Mr Halse the figures were not relevant to the issues CWL was seeking to address through the restructuring proposal. In any event, Mr Halse had access to the sales figures which were contained on a database on CWL's computer system.

[42] Mr Halse provided a detailed response to the restructuring proposal which included six alternative options. Mr Steens then spent the next two days analyzing Mr Halse's document.

[43] A further meeting took place on 26 July 2010 where Mr Steens advised Mr Halse that he had spent a lot of time going through his 23 July document. Mr Steens advised Mr Halse that before any decisions were made he wanted to know if Mr Halse had any other comments. Mr Steens also advised that he needed to carry out a further cost-benefit analysis to compare the restructuring proposal with the alternative options, including those suggested by Mr Halse.

[44] After carrying out his further analysis and considering all the information Mr Steens decided CWL would proceed with the restructuring. He then carried out a selection process based on the selection criteria to determine which of the two positions would be disestablished.

[45] Mr Steens determined it would be Halse's position which was disestablished as Mr Halse was filling the position of the travelling representative, whereas the second sales representative was Tauranga based and had an established client base from which to continue to operate. The decision was advised to Mr Halse that afternoon and a letter to that effect was handed to him.

[46] I find CWL adopted a thorough and fair consultation process before it reached a decision to disestablish one of the sales positions in Tauranga and to select Mr Halse for redundancy. The consultation process took place over a period of almost 4 weeks.

Redeployment

[47] The Authority has considered whether Mr Halse ought to have been redeployed, rather than made redundant. Mr Halse was asked if he would be prepared to relocate to Hamilton for the new sales role if the proposal went ahead but the response from Mr Halse's representative was that the request was unreasonable. In light of that

response it was reasonable to conclude that the option of relocating Mr Halse to Hamilton would not be a viable option.

[48] As the primary motivator for the restructuring was improving the business efficiency in light of the deteriorating economic conditions I have concluded that there was no scope for the creation of an alternative role for Mr Halse.

[49] I have concluded Mr Halse was also of the opinion that redeployment was not a viable option as he commenced his search for new employment before the first meeting with Mr Steens in June 2010.

I find the dismissal of Mr Halse by reason of redundancy to be justified in all respects.

Unjustified disadvantage

[50] Mr Halse has not established that one or more conditions of his employment were affected to his disadvantage by any unjustifiable actions by CWL. As set out above, I am satisfied the process followed by CWL in implementing the restructuring was a fair and reasonable process. Mr Halse was represented throughout the process and had access to full information. He provided comprehensive feedback including identifying six options as alternatives to redundancy, which were carefully considered by Mr Steens.

I find Mr Halse does not have a personal grievance for unjustified disadvantage.

Costs

[51] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If they are not able to reach agreement on the matter of costs, CWL may lodge and serve a memorandum as to costs within 28 days of the date of this determination. Mr Halse 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.

[52] In order to assist the parties with resolving costs themselves, I can indicate (subject to any submissions) that a tariff based approach to costs is likely. In which case the usual starting point would be around \$3,000 (GST inclusive) per day. That figure would then be adjusted in light of the particular circumstances of this case.

Vicki Campbell
Member of Employment Relations Authority