Determination Number: CA 41/06
File Number: CEA 318/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

BETWEEN	Russell Harris (Applicant)
AND	Charter Trucks Limited (Respondent)
REPRESENTATIVES	Robert Thompson, Advocate for Applicant Philip James, Counsel for Respondent
MEMBER OF AUTHORITY	Paul Montgomery
INVESTIGATION MEETING	2 February 2006
DATE OF DETERMINATION	22 March 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Harris alleges his dismissal on the ground of redundancy was unjustified because the company's decision was not genuine and because the company's process was unfair and unreasonable. He also claims that he was unjustifiably disadvantaged by being placed on a period of paid suspension. He seeks reinstatement to his former position, compensation for unjustified disadvantage and for hurt and humiliation arising from his dismissal in the sum of $28,000, reimbursement of lost wages and costs.

[2] The respondent denies it disadvantaged Mr Harris and also denies his dismissal was unjustified in any way. It declines to provide the remedies the applicant wants.

[3] The parties attempted to resolve their differences in mediation but without success.

[4] In the determination issued to the parties on 13 December 2005 I declined Mr Harris's application for interim reinstatement and now turn to the substantive claim.

A brief history

[5] The applicant was originally employed by a company named Rapid Transport Limited which was purchased by the respondent company. Mr Harris undertook employment with the respondent in early November 2004 and drove a swing lift truck which was predominantly used for servicing a contract with a large wholesale grocery business, Foodstuffs.

[6] In the course of his work the applicant suffered a fall from his truck on 9 August 2005. As a result he was off work on ACC until he returned on 5 September 2005. After Mr Harris had assisted with a re-enactment of his fall, Mr Harris says that Mr Sutherland, the Managing Director

of the respondent handed him a letter saying he wanted a meeting with the applicant. The meeting was scheduled for the following Thursday but was later moved to Monday 12 September 2005.

[7] The letter given to the applicant states that the meeting was to discuss "your position and your time off work. I will also discuss the possibility of your position being made redundant". The letter also invites the participation of the applicant's representative and provides the opportunity for Mr Harris to advance any suggestions or comments on the proposal.

[8] The meeting minutes were available to the Authority and indicate periods of testy interaction. The meeting closed with Mr James stating to the applicant that any proposal he made would be looked at and considered in the light of the best structure for the company. It is also clear that the company put forward the view that its workload required three drivers rather than four for swing lift operations, and was considering which of the three operators was the least adaptable.

[9] On 15 September 2005 Mr Thompson wrote to Mr Sutherland stating that his client did not accept that the process was fair or reasonable in that he had not been provided with all of the relevant information. Mr Thompson alleges that the process for selecting the applicant was flawed and lacked natural justice. In addition Mr Thompson raised the issue of his client being on paid suspension since 5 September 2005 saying that *To suspend or not allow our client to attend work is an unjustified action causing a disadvantage.* The letter goes on *It must be noted that we are aware that a decision is to be made on Friday 16 September 2005. We submit that you do not have enough information to make a decision on our client's future employment. Furthermore, you have not engaged in genuine process of consultation.* In closing Mr Thompson requests a copy of the transcript of the meeting held on 12 September 2005 which he says will enable his client to consider all the options available to him. Mr Thompson asked for an urgent reply.

[10] On 16 September 2005 Mr James wrote to Mr Thompson and said that as the respondent had received no further proposals from or on behalf of the applicant, it had proceeded to declare Mr Harris's position redundant.

[11] Mr Thompson responded claiming the matter set out in his letter of 15 September had been ignored, in particular that the company had not disclosed the selection criteria employed by the respondent to the applicant.

The issues

[12] In this matter the Authority needs to determine the following issues:

- Was the applicant unjustifiably disadvantaged in being asked not to report to work when he returned on 5 September 2005; and
- Was the respondent justified in reducing the number of swing lift drivers from four to three; and
- Did the respondent adopt appropriate selection criteria when identifying the applicant's position for redundancy; and
- What is the significance of the letter of 15 September 2005 from Mr Thompson to the respondent; and
- Was the dismissal unjustified, and if so, what remedies are due to the applicant.

The Investigation Meeting

[13] At the investigation meeting the Authority heard from the applicant in person and from Mr Noel Sutherland the Managing Director of the respondent company. On behalf of the applicant a Mr Neville Mead submitted an affidavit. Mr Mead says he resigned on 10 October 2005 to travel overseas. Further he says he had been a swing lift operator but asked to be moved to the general transport driving role some three months prior to his resignation. He says in his affidavit *I was not consulted about any possible redundancies. Had he come and consulted me I would have considered voluntary redundancy.* Mr Mead goes on to say that with his departure the company now had another vacancy for a driver.

Discussion and analysis

[14] Upon the applicant's return to work following three weeks on ACC he was advised of a meeting to discuss his position and his time off work. Mr Sutherland says that in explaining the letter to the applicant Mr Harris told him that if the company was going to sack him, he would like a years pay. Mr Sutherland told Mr Harris he was not sacking him, but that a review of the swing lift utilisation was being undertaken, and that at the time there was only a possibility of redundancy.

[15] There is no dispute that the applicant was asked not to attend work until the meeting which was a week away. The applicant says this was a suspension, the respondent says it was not. The respondent says that for 52 working days during the previous year the unit had not been used and that for the three weeks of Mr Harris's absence it had been totally idle. In the light of this Mr Sutherland says the company was undertaking a review of the viability of the equipment. He said *as there was no work for the applicant he did not require him to attend work.*

[16] In these circumstances it is difficult to see how the applicant was unjustifiably disadvantaged as he was on full pay but not required to work. Nor was the *suspension* in a disciplinary setting, it was to enable the employer to carry out an operational review.

[17] The events of 15 September 2005 are detailed in the recorded minutes. They confirm that the respondent wanted to discuss the issues set out in the letter of 5 September 2005 with Mr Harris in the light of the best structure for its business. They also confirm that the respondent had one more swing lift driver than it needed. They confirm the requisite that swing lift drivers need to be capable of a wide range of duties and that Mr Harris, because of medical conditions, is not able to provide the flexibility required. The other three in the company's view provide them with that flexibility hence the proposal to declare the applicant's position surplus. Further, it is clear that the respondent's view was the proposed restructuring would not cope with the driver who was unable to undertake a comprehensive range of tasks. The invitation to the applicant to provide any alternative proposals before 5pm on the following Thursday as the respondent would be making a decision on the Friday morning, is abundantly clear.

[18] The applicant and his representative advanced the view that Mr Harris's being less adaptable than the other three drivers had not been put to him by the respondent. The respondent's reply was that it had put a proposal and its rationale in order to give Mr Harris the opportunity to express his view and propose alternatives and that the selection criterion of adaptability was part of that proposal. In closing the meeting Mr James confirmed that he expected to hear from Mr Thompson by *5 o'clock on Thursday if you intend to make any submissions.* Mr Thompson replied *That's fine.*

[19] Mr Thompson's letter of 15 September 2005 is curious in that it offers no alternatives to the respondent's proposals but instead alleges the *suspension* amounts to an unjustified action and *that you do not have enough information to make a decision on our client's future employment. Furthermore, you have not engaged in a genuine process of consultation.* The letter does not

contest the respondent's views of the applicant's adaptability nor refer to his length of service. Nor does it ask for more time for the applicant to consider his response.

[20] In the course of the investigation meeting the respondent explained its analysis in respect of swing lift usage and as it did not have the paperwork detailing this, forwarded that to the Authority and to Mr Thompson immediately following the meeting. It clearly establishes that the equipment was under utilised and the decision to sell it was a decision open to the respondent. Further, the respondent confirmed that at the time of the consultation with the applicant it had been given notice that the Foodstuffs contract would end on 31 December 2005.

[21] The leading precedent in cases such as this is *Coutt's Cars Limited v Bagley* [2001] ERNZ 660 (CA). Addressing the issues of good faith and the requirement to consult the Court held at para 43 of the judgement:

> *Plainly the obligations to act in good faith and to avoid misleading and deceiving, together with the importance accorded the provision of information, will make consultation desirable, if not essential, in most cases. But as said in* Aoraki, *to impose an absolute requirement would lead to impracticabilities in some situations.*
>
> *[44] In the present case the issue was not so much the fact of consultation as its adequacy and timing. The nature of the restructuring was simple and the complaint of lack of detailed information is somewhat hollow. The employee affected was at a relatively low level so that the extent of consultation necessary in an area of business discretion must be realistically assessed. In this case, what occurred could hardly be said to cast doubt upon the genuineness of the redundancy.*

[22] Later at paragraph 47, the Court said:

> *We agree with the Employment Court that the real issue in this case is whether the process by which the dismissal was carried out was unjustifiable.*

[23] In determining the matter before me I have considered the principles set out above. In particular I have applied them to the minutes of the meeting of 12 September 2005 in which I can find no evidence of the refusal of the respondent company to disclose the selection criteria being applied. It is clear that the respondent provided the applicant and his representative with some three days within which they were able to respond with alternative proposals and, if required, to challenge the criteria put before them at that meeting.

[24] Mr Harris was not denied the opportunity to contest the selection criteria, nor was he denied the opportunity to have his position advocated with the respondent. Having agreed through his advocate at the close of the meeting that he had sufficient time before the deadline of 5pm the following Thursday to put his case to his employer, the applicant failed to do so and the respondent proceeded to declare Mr Harris's position surplus to its requirements.

The Determination

[25] I find that Mr Harris was not unjustifiably disadvantaged by being asked not to attend work while the respondent was conducting its review.

[26] I find that the redundancy was genuine in the sense that the respondent was entitled, following its review, to reduce the number of swing lift operators from four to three, particularly in the light of the loss of the Foodstuffs contract.

[27] I find the respondent, at the meeting of 12 September 2005 clearly established the criteria it intended to use to identify the position to be dispensed with, explained the reason for dispensing with one swing lift unit and provided the opportunity for the applicant to respond. Further, I find the letter of 15 September 2005 does not constitute a response on the matters sought by the respondent in a consultative setting.

[28] I find the letter of 15 September 2005 with allegations to the respondent which are at odds with the facts and in particular the content of the 12 September 2005 meeting. In attempting to heap coals of fire on the respondent's head, the letter fails to address the issues necessary in a consultative setting.

[29] I find the three days provided by the respondent for a response from the applicant was sufficient time in which to make his position clear to the respondent.

[30] I find that having had no response by the agreed time the respondent was entitled to implement its proposal.

[31] I find that Mr Harris does not have a personal grievance and the Authority is unable to assist him further.

Costs

[32] Costs are reserved.

Paul Montgomery
Member of Employment Relations Authority