

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2011] NZERA Auckland 438
5297534**

BETWEEN MICHAEL HEGEDUS
Applicant

AND ACTRONIC LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: No appearance for the Applicant
Ray Parmenter, Counsel for the Respondent

Investigation Meeting: 6 October 2011

Determination: 7 October 2011

DETERMINATION OF THE AUTHORITY

A. The personal grievance application of Michael Hegedus is declined.

B. Costs are reserved.

Employment Relationship Problem

[1] Michael Hegedus is a United States citizen with New Zealand residency status. He worked for Actronic Limited, a New Zealand registered company, from 2 April 2007 until 30 September 2009 when he was dismissed for redundancy. In September 2007 he had accepted Actronic's offer of a role as Global OEM Business Manager to be based in the United States. He then moved to Charlotte, North Carolina.

[2] His personal grievance application challenged whether his dismissal for redundancy was the result of a genuine need to restructure the business or was really

for the ulterior motive of removing him because he had criticised decisions and conduct of his managers.

[3] Actronic, in reply, defended its decision about the viability of his position as resulting from a review of its operation which did not target Mr Hegedus for the reasons he alleged but was needed because of the business environment during the global financial crisis. The review also resulted in Actronic cutting other jobs.

The Authority's investigation

[4] Four sets of investigation meeting dates were notified for this matter. The three earlier ones were cancelled for various reasons.

[5] A hearing notified for 8 and 9 February 2011 (as agreed in a case management conference in November 2010) was vacated because Mr Hegedus considered Actronic had not adequately responded to his request for documents relevant to his claim.

[6] Hearing dates for 29 and 30 March 2011 were vacated because Mr Hegedus had not complied with timetable directions (agreed in a case management conference in December 2010) to lodge and serve witness statements.

[7] A hearing notified for 2 and 3 August 2011 was cancelled because Mr Hegedus wanted to travel to the Philippines to support his wife whose mother was undergoing heart surgery there. Mr Hegedus advised the Authority he had cancelled his New Zealand flight plans although, on further inquiry of him, it emerged he had not made any actual flight bookings anyway.

[8] During a case management conference by telephone on 29 August 2011 an investigation meeting date of 6 October 2011 was agreed and duly notified. On 4 October Mr Hegedus sent an Authority support officer the following email:

In view of my inability to pay for airline tickets and lodging, and inability to obtain a teleconference hearing and justice, I have chosen to pay my rent and eat rather than fly to New Zealand this week.

[9] Mr Hegedus did not attend the Authority investigation meeting on 6 October.

I exercised the power given to the Authority to proceed where, without good cause shown, a party fails to attend or be represented.¹ Mr Hegedus had been warned that was the likely consequence of not attending (in Minutes of the Authority issued on 11 August and 29 September 2011). Mr Hegedus showed no good cause for his non-attendance. In various correspondence to the Authority he said he could not afford to travel to New Zealand but mentioned travel in recent months to the Philippines and the United States' West Coast. He provided no verified evidence that he lacked the resources to pay for or borrow the cost of travelling to Auckland for the investigation.

[10] He had however repeatedly requested that he attend the Authority hearing by video or telephone conference rather than in person. This request was first considered in April 2010, with arrangements made for the parties' to give submissions on whether attendance by telephone or video conference was appropriate in this case. For reasons set out in a Minute of the Authority dated 23 September 2010 Mr Hegedus was, as a matter of procedure, declined leave to attend by telephone or video conference only.

[11] In summary the reasons concerned logistics, cost and ability to test credibility of witnesses. As reiterated in response to repeated requests by Mr Hegedus for the Authority to revisit its decision on this procedural point, the concern about assessing credibility arose from the nature of his allegations. Mr Hegedus' case, in essence, alleged Actronic's chief executive officer at the time, Mark Templeton, and its US-based regional manager, Nathan Cables, had conspired to remove him from his position and lied about their motives for doing so. He also alleged they were wrong about whether promises had been made to relocate him to New Zealand should his role in the US come to an end. This put matters of credibility – of Mr Templeton, of Mr Cables and of Mr Hegedus – at the centre of the case. In those circumstances, I considered it was essential Mr Hegedus attend in person and it was not satisfactory to assess his credibility over a telephone or video link. A request from Actronic for Mr Cables to attend by telephone or video link was also refused on the same grounds.

[12] There are instances where the Authority does allow a party or witness to attend by such means but no general rule, rather it may be agreed to where the particular circumstances of the investigation require it, and where the party seeking to have

¹ Clause 12 of Schedule 2 of the Employment Relations Act 2000.

witnesses attend by that means bears the cost and makes the necessary technical arrangements. Consistent with the practice and principles in other jurisdictions, it is less likely where there are matters of credibility to be assessed. In this case Mr Hegedus was not only a party, but also his own representative and his own main and, as it transpired, sole witness.

[13] Mr Hegedus was however given leave for as many as four overseas witnesses to attend by video conference – one from Australia, one from the Netherlands and two from the United States – provided he met the cost and made the necessary technical arrangements. They were not main witnesses but were said to be able to provide supporting evidence on some points of fact. However nothing further was done about those witnesses because Mr Hegedus did not provide any written witness statements from them or do anything further about having them heard.

[14] At the investigation meeting held on 6 October Mr Templeton and Mr Cables both attended in person and, under affirmation, confirmed the contents of their written witness statements. They answered questions about their statement from the Authority member. Paula Reid, an Actronic executive assistant, also attended and, under affirmation, explained how human resource administration was arranged in the relevant period. Actronic counsel had provided a written opening statement some days in advance to the Authority and Mr Hegedus. That statement was treated as Actronic's closing submissions with no further oral argument.

[15] As permitted under s174 of the Act this determination does not record all the evidence and submissions received. Rather it sets out findings of fact and law, and expresses conclusions on the matters for determination. The findings and conclusions were reached after reviewing all the written and oral evidence (including Mr Hegedus' statement of problem and what he tendered as his witness statement, although not sworn or affirmed), the background documents provided by the parties, and Actronic's closing submission.

Issues

[16] The issues for determination were:

- (i) whether Actronic's decision to disestablish the Global OEM Business

Manager position held by Mr Hegedus was made for genuine commercial reasons or for a predominantly ulterior purpose; and

- (ii) whether the redundancy decision and process was made and carried out fairly; and
- (iii) if Actronic's decision or how it acted was unjustified, what remedies are due, considering (a) lost wages (if the decision is found not to have been for predominantly genuine commercial reasons) and (b) compensation for humiliation, loss of dignity and injury to feelings; and
- (iv) whether Actronic was obliged to repatriate Mr Hegedus to New Zealand and meet his costs of doing so, and if so, what reimbursement or compensation is required.

Reasons for redundancy

[17] The Authority may not substitute its judgement for that of Actronic as to whether there were genuine commercial reasons for a redundancy. Its inquiry is within a scope defined by the Court of Appeal in this way:²

An employer is entitled to make his business more efficient, as for example by automation, abandonment of unprofitable activities, reorganisation 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 can be run more efficiently without him. The personal grievance provisions ... should not be treated as derogating from the rights of employers to make management decisions genuinely on such grounds.

...

When a dismissal is based on redundancy, it is the good faith of that basis and the fairness of the procedure followed that may fall to be examined on a complaint of unjustifiable dismissal. ... For instance, a suggestion that alleged redundancy was being used as a camouflage for getting rid of an unsatisfactory employee might warrant examination.

[18] Having raised the allegation that his dismissal was engineered for an ulterior purpose or tainted by some inappropriate motive, Mr Hegedus bore the burden of convincing the Authority that his theory had substance.³ He has, I find, not done so.

[19] Apart from his bare assertions there is nothing to corroborate his contention

² *GNH Hale & Sons Ltd v Wellington Caretakers and Cleaners Union* ERNZ Sel Cas 843, 849 (per Cooke P).

³ *Savage v Unlimited Architecture Limited* [1999] 2 ERNZ 40, 49-50 (EC).

about what motivated the decisions taken by Mr Templeton.

[20] During 2008 and 2009 Actronic disestablished at least 14 positions among its workforce of around 65, including three of the six jobs based in the United States. The role held by Mr Hegedus had focussed on business relationships and Actronic decided it needed a greater emphasis on sales for reasons which were set out in a review document given to him for comment before a decision was made. It was a decision made in the context of a global financial crisis in which Actronic was experiencing decreased revenue and profits. For that reason I accept Mr Templeton's conclusion to his written witness statement that

... there has never been any sort of plot to get even with Mike for something by dismissing him. This has never been a performance issue; I had to make hard decisions for the company's well-being.

[21] Similarly I accept Mr Cables' explanation of the business nature of the decision taken on the viability of Mr Hegedus' position:

[W]e had redundancies all over the business during the financial melt-down; it was not a pleasant thing to have to be involved in but ensuring the survival of the business in the middle of the worst meltdown since WW2 was the primary motivating factor for Mike's redundancy.

A fair process

[22] I also find Actronic followed a fair process in consulting Mr Hegedus fully about the future of his position, providing him an adequate opportunity to comment and properly considering his responses before making a decision, and, having made the decision, considering the prospects for relocation or redeployment to alternative positions and taking steps to minimise the effect of the dismissal on him.

[23] This process included providing him with an explanation of the rationale for change and seeking his comment, surveying a number of staff for their input on the likely effect of change, and analysing responses from Mr Hegedus and other staff.

[24] After deciding the Global OEM Business Manager position was to be disestablished, Mr Templeton then considered whether there were any positions to

which Mr Hegedus might be reassigned. However Mr Templeton was also frank in advising there were not likely to be any suitable positions with Actronic in the US or elsewhere given the market and financial situation at the time. He did consider Mr Hegedus' suggestions of reduced salary in a sales role or relocation to another market but neither were viable options in the context of Actronic reducing overall staff numbers.

[25] Mr Templeton also proposed Mr Hegedus receive redundancy provisions which were more than provided by his employment agreement. This included slightly longer than the required one month's notice, redundancy compensation of four weeks' pay (around US\$10,000), time off for job interviews, and outplacement support of \$1000. He also proposed a further severance payment of around US\$15,000 in return for Mr Hegedus entering a four month restraint of trade. Mr Hegedus did not accept the restraint so was not paid that amount but was paid the redundancy compensation.

Relocation to New Zealand

[26] I do not accept Mr Hegedus' claim that Actronic had promised to relocate him to New Zealand in the event of the US role coming to an end. Mr Cables agreed in his evidence that he had talked to Mr Hegedus about the prospect of relocating to Europe at some point however both Mr Cables and Mr Templeton deny any promises were made to Mr Hegedus about a return to New Zealand. I accept their evidence.

[27] Mr Hegedus' own evidence included the following statement (Email to Authority, 11 February 2011, summarising his case):

I discussed with Mr Templeton my desire to be repatriated to NZ when my US assignment ended. At no time did he give any indication that this would not happen or that he disagreed.

[28] Even if that account is correct, it falls well short of the promise or positive obligation Mr Hegedus alleged was made to him.

Determination

[29] For the reasons given I find Mr Hegedus has failed to establish to the necessary standard of proof that Actronic did not act as a fair and reasonable

employer would have done in all the circumstances at the time. Accordingly his personal grievance application is declined and no remedies can be awarded to him.

Costs

[30] Costs are reserved.

Robin Arthur
Member of the Employment Relations Authority