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Kessick v Canterbury Wool Scourers Ltd CA 140/07 (Christchurch) [2007] NZERA 803 (19 November 2007)

Last Updated: 23 November 2021

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

CA 140/07 5031144

BETWEEN	GEOFFREY KESSICK Applicant
AND	CANTERBURY WOOL SCOURERS LIMITED Respondent

Member of Authority: Paul Montgomery

Representatives: Scott Wilson, Counsel for Applicant

Dave McLeod, Advocate for Respondent Investigation Meeting: 24 May 2007 at Timaru

Submissions received: 7 June and 14 June 2007 for Applicant

7 June and 14 June for Respondent

Determination: 19 November 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant alleges he was unjustifiably disadvantaged and then later dismissed on the ground of redundancy, which dismissal he alleges was also unjustified. Mr Kessick seeks reimbursement of remuneration lost from 1 January 2006 as a result of his dismissal, compensation for hurt and humiliation in the sum of \$15,000 and costs.

[2] The respondent denies the dismissal was unjustified, saying it arose from a genuine redundancy. Further, it says Mr Kessick was not disadvantaged at any stage of the process. Accordingly, it declines to meet the remedies sought.

[3] The parties attended mediation but were unable to resolve their differences.

What caused the problem?

[4] Mr Kessick was employed between 1985 and 2004 by Ferrier Wool Scourers and during the last 15 years held the position of Production Manager at the Winchester plant. Ferrier's business was purchased by the respondent company in 2004 and in August that year Mr Kessick was offered and accepted the role of Scourer Supervisor, a provision of the offer being that during the initial phase he would be employed to continue the role he had previously undertaken but that role may be amended in the future.

[5] As the respondent was winding down the Winchester operation the applicant continued as a Scourer Supervisor until March 2005. Once the wind down was completed, Mr Kessick was transferred to the company's Washdyke plant beginning work on 17 May 2005.

[6] The respondent presented Mr Kessick with another employment agreement which referred to a Production Coordinator position and stated that the duties and the responsibilities of that role were *to be developed*.

[7] Mr Kessick's view is that the duties he undertook at Washdyke plant were similar or became similar to those he had performed as Production Manager at Winchester.

[8] On 28 October 2005 Mr Tony Maurice, who was the company's Operations Manager, gave the applicant a letter dated 30 October 2005 which referred to a *restructure of position*.

[9] The letter reads:

Dear Geoff,

Restructure of position

As you will be aware, we restructured the management positions at Washdyke during July this year, and as a consequence a number of staff were reassigned to different and clarified roles within the organisation.

One of the positions clarified was that of Production Manager, but it was not filled at that time and it consequently remains vacant.

Due to the recent commissioning of the new plant, along with the settlement of the other management positions we now believe it is

time to appoint an appropriate person to the position of Production Manager.

The reason that I am writing to you is that we assess that the appointment of candidate to this position would hold the capacity to supersede the requirement for the current position. Accordingly, we seek to address two matters:

- 1. Meet with you and listen to your feedback to this proposition, and;*
- 2. Provide you with the opportunity to show interest in the position of Production Manager.*

Regrettably, should we adopt this proposal and should you not be successful in securing this or an alternative position, then your current position is likely to be declared redundant and your employment terminated.

Accordingly, I would like to formally meet with you at 1st November Tuesday 9am to discuss this and hear your response. You are welcome to bring a support person to this meeting should you wish to.

For clarity, I also attach a copy of the draft Production Manager position description.

Should you wish to discuss this, clarify or confirm any of the details, please contact me.

Yours faithfully, Tony Maurice Operations Manager

[10] Mr Kessick said that Mr Maurice told him to read the letter in front of him and as he did so Mr Maurice pointed to the paragraph which commenced with the word *Regrettably*. Further, Mr Kessick says that Mr Maurice assured him that if he did not get the job as Production Manager he would still have a job at CWS. He says that Mr Maurice told him he was doing a good job and that the company, not just him, was very happy with his work. Following receipt of the letter the applicant says he asked for a meeting with Mr Maurice to clarify a number of points in the letter and was given the time of 1pm on Monday, 31 October.

[11] The applicant was keen to discuss the letter with Mr Maurice because for him it left a number of things

unanswered. He says he was not aware of the restructuring of the management positions since he had arrived in Washdyke in May and was certainly not aware that a Production Manager position had been created but had been left vacant for some five months. He also wished to discuss how the Production Manager position was different from the Production Coordination position which he

currently held. The applicant also said that he was encouraged by what he had been told and by the details of the position description. However, he also wanted to know what the *different position* referred to in the letter was. He says these were the issues he was going to raise with Mr Maurice at the meeting on Monday 31 October.

[12] The applicant went to work as usual and went to see Mr Maurice at 1pm as arranged. Mr Maurice put the meeting back to 2.30pm and so Mr Kessick went back at 2.30pm to be told by Mr Maurice that he had no time to talk and that there would now be a formal meeting at 1pm on Tuesday 1 November which would in fact be a formal interview for the position. When the applicant inquired regarding the meeting to clarify the content and matters coming out of the letter of 30 October, Mr Kessick said Mr Maurice told him that such a meeting would be whenever he could find the time and that Michael Crooks would also need to be present. Mr Crooks was the General Manager of the company appointed in late October 2005.

[13] Mr Kessick went to work on 1 November having prepared as best he could for the interview at 1pm that day. He waited to be called to the interview, but no one came to get him. Later, at 5pm, the applicant was advised that the Managers did not have time to see him and that the interview would now take place the following day at 11am.

[14] That appointment too came and went, and Mr Maurice eventually came to the applicant telling him that he did not have time for the interview, postponing it but making no arrangements to fix a time. The applicant said at this stage he was becoming quite agitated and concerned about the way in which the interview was being handled and was all the more concerned at being unable to arrange for his son Martin to attend as a support person at the interview.

[15] A short time later, as Mr Kessick was having his lunch at his desk, Mr Maurice put his head around the door of the office and said to the applicant *come on, your interview is now*. This, says Mr Kessick, was at 12.25pm and he was taken completely by surprise, so put his sandwich down and went through to the meeting.

[16] Three management personnel conducted the interview, namely Mr Maurice, Mr John McKillop and Mr Crooks. Mr Crooks, whom the applicant said he met only the previous day, led the interview and the applicant says he was surprised that questions were not specific to scouring and did not follow in any way the format set

out in the Evaluation for Production Position form that had been drafted for the interview and given to him with the letter of 30 October 2005. His evidence was that the questions were particularly general. The applicant says that early on in the interview Mr Crooks put it to him that he would be unable to handle the pressure of the position, to which Mr Kessick replied that he had been in the industry for over 21 years and that for 15 of those had been in charge of the two scour operation at Winchester as a Production Manager. He says that at that point he turned to Mr McKillop who had worked alongside the applicant for a number of years at Winchester, saying he would know how the applicant worked and could vouch for the way in which he faced pressures. Mr Kessick said Mr McKillop did not give a definitive answer except than to say that it was all in the past now.

[17] Mr Kessick says that from that point the interview became more hostile and he gained the distinct impression that the Managers were not interested in his previous experience but were going through the motions. He says that while Mr Maurice asked a few more specific scouring questions which he had little trouble answering, he knew that they were in fact not receptive to what he was saying and the tone they had adopted conveyed that they had already made a decision as to how this position would be filled. The interview lasted no more than 20 minutes and Mr Kessick says at that point Mr Crooks got up and said that he did not think I was up to speed and he was *not interested in my previous experience, that's all in the past*. That was how the interview concluded. The applicant says he then left the room and returned to work.

[18] The following day when Mr Kessick returned to work he was approached around 3.30 in the afternoon and called into an office by Mr Maurice and Mr Crooks and told he was unsuccessful in securing the Production Manager job. He said he immediately asked why and Mr Crooks responded that it was not his business to know, it was theirs. The applicant says that Mr Crooks then told him that *there was work for two months and that I would finish at Christmas*.

[19] Mr Kessick says that he then asked them if there was an opening for him to fill the then vacant Health and Safety role. The applicant says that Mr Maurice told him that they had already spoken about employing him on contract work in a health and safety role to implement the ISO Quality System. The applicant says he confirmed he was qualified to undertake the role, that he would take a position such as this and then asked if everything that had been discussed at that time could be confirmed in writing.

He said Mr Crooks assured him that it would be put in writing and that he would receive a letter the following day.

[20] The following day Mr Kessick approached Mr Crooks to ask for a copy of the letter of confirmation and was told that the accounts clerk was typing it right there and then. He said he went to see her at 3.30pm and she told him that she did not have a letter for him and knew nothing about any letter she was supposed to type for him. He says he did not receive the letter on that day.

[21] On returning to work on Monday 7 November, he again asked for the letter only to be told it was not ready. Again, he went in on Tuesday and inquired about the letter and again was told that it was not ready. He says *I assumed there were problems with the letter which was no doubt because they weren't going to offer me any job at all*. He says he stopped keeping his diary as he realised that things were all over and there was really no longer any future for him at the company. To cut a particularly long and tedious story somewhat short, he eventually received this letter in the afternoon of Friday 29 November. Accompanying it was a reply to a letter he had written to Mr Maurice on 17 November and which was delivered to the company by Mrs Kessick when she was also delivering a medical certificate for the applicant who had been excused from work due to suffering from anxiety, insomnia and an angina attack. On 6 December 2005 the applicant was told that he was not longer required to come into work and could serve the balance of his notice period from home.

[22] The respondent does not take issue with most of the historical facts as set out above. It does, however, contest Mr Kessick's evidence that he was pressured to sign the individual employment agreement relating to the Production Coordinator's role at the Washdyke plant. It says this role incorporated some of the duties later included in the role of Production Manager but that that role included a wider range of duties with greater responsibility and accountability than the role held by the applicant.

[23] It says in late June and early July 2005, the company reconsidered the overall management of the Washdyke facility. Its position is that the role of Production Manager was considered at that time but left vacant until a decision was made to fill it in October 2005. The company also disputes the applicant's allegation that there was no consultation embarked on in the context of the possibility that the Production Coordinator's position might be disestablished. Further, it says that the selection

process was fair and that Mr Holland's appointment to the Production Management role was simply on the basis that he was the best candidate for the position. The company also says that it did make an effort to find alternative work for Mr Kessick but it was unable to do so. Its position is that throughout the process Mr Kessick was given individual attention and did not raise any concerns about the company's proposals at the time nor did he raise any protest at the time of his interview regarding the desire for support. In its statement in reply, the company said had Mr Kessick done so, the interview would have been postponed.

[24] The respondent says that the applicant was provided with considerable additional assistance by way of curriculum vitae preparation and that he was also provided with a reference. The curriculum was written by Mr Kessick and typed by the accounts clerk.

[25] In summary, the respondent is of the view that the disestablishment of the Production Coordinator role was due to genuine business needs, that it conducted the disestablishment of that role in a procedurally fair way, that it conducted itself in strict accordance with the applicant's employment agreement and actually went beyond the minimum requirements and takes the firm view it has no further obligations to Mr Kessick.

[26] In its statement in reply, the respondent takes issue with the applicant's possession of two emails dated 30 April 2005 and 1 May 2005 which it says had been obtained inappropriately. In the course of evidence given before the Authority Mr Kessick made it quite plain that he had not been an intended recipient of either email but that Mr Maurice had given him copies for his information.

The issues

[27] In order to determine this matter the Authority needs to resolve the following issues:

- Did the individual employment agreement comply with [s.65](#) of the [Employment Relations Act 2000](#); and
 - Was the redundancy genuine, that is, were the roles of Production Manager and Production Coordinator substantially different; and
- Was the procedure followed by the respondent fair and reasonable in the circumstances; and
 - Was the applicant unjustifiably disadvantaged by the procedure; and
 - Was redeployment genuinely pursued; and
 - Did the applicant contribute to the circumstances giving rise to his dismissal; and
 - If the applicant has a personal grievance, what remedies are due to him?

The test

[28] The test for justification in this matter is set out in [s.103A](#) of the [Employment Relations Act 2000](#). It requires the Authority or the Court to stand back and on an objective basis consider whether the actions of the employer, 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.

The investigation meeting

[29] At the investigation meeting the Authority received evidence from the applicant in person and his son, Martin, who is a qualified solicitor working in Dunedin. As the greater part of his evidence related to advice he had given to the applicant and the effects he observed following his father's termination, his evidence was admitted by consent.

[30] For the respondent, the Authority heard from Mr Maurice and from Mr Crooks.

[31] A striking aspect of the investigation meeting was the thoroughness with which Mr Kessick had taken contemporaneous diary notes of incidents that struck him as important which resulted in a very detailed statement of evidence covering almost 21 pages and running to 88 paragraphs. By comparison, those of Mr Maurice and Mr Crooks ran to 4 and 3 pages respectively.

[32] The applicant impressed as a sound and reliable witness who retained his composure under questioning and when explaining aspects of his evidence.

Mr Maurice was prepared to make some concessions in respect of his evidence, although his lack of detail was at times difficult to understand. Mr Crooks tended to express his *belief* with regard to relevant issues and was unconvincing when questioned around the interview, the letters following the interview and the general aftermath.

Discussion and analysis

The individual employment agreement

[33] For the applicant, counsel submitted that the failure to provide a position description for the Production Coordinator role was a breach of [s.65](#) of the Act. I tend to agree as it lacks *a description of the work to be performed by the employee*. Under the heading *Production Coordinator Job Description* Schedule B simply says *to be developed*.

[34] However, in this case, the relevance is significant given the later controversy over whether the Production Manager's role was substantially different from that of the Production Coordinator's position. The respondent says the Manager's role required *greater responsibility and accountability* than the other, but that is to be expected and the applicant had such experience as Production Manager at Winchester under Ferrier's ownership. Had the position description been completed in the period between mid May and early October 2005 with the input of the applicant, that controversy could have been avoided.

Genuineness of the redundancy

[35] It is virtually axiomatic that an employer is entitled to realign or restructure its workforce to better meet its

commercial requirements. In this matter the respondent had decided to put in place a Production Manager which position would absorb, and the company says expand, the role of Production Coordinator. The appointment would therefore render the Coordinator's role surplus to requirements. The respondent made this clear to the applicant in its letter of 27 October 2005 which was handed to the applicant on Friday 28 October.

[36] Having failed to define the duties and responsibilities of the Production Coordinator role before defining the duties and responsibilities of the Production

Management role, the company is in no position to assert the two positions are substantially different.

[37] From the letter of 27 October it is also clear that the position description for the Production Manager's role was only in draft form and thus subject to change. These critical issues could have been addressed prior to the interviews taking place. Mr Kessick's evidence was that in response to Mr Maurice's offer in the final sentence of that letter, *should you wish to discuss this, clarify or confirm any of the details, please contact me*, he made an appointment with Mr Maurice for 1pm on Monday 31 October 2005. The meeting was postponed by Mr Maurice until 2.30pm and when Mr Kessick went to that meeting he was told that Mr Maurice was too busy and that a formal meeting, which would be his interview, would take place at 1pm the following day.

[38] That, it appears to me, is Mr Maurice refusing to provide clarification, discussion and consultation around possible outcomes for the applicant in the event he was not successful at interview.

[39] This has to be viewed in the light of what I regard as the applicant's reliable evidence that when handing him the letter, Mr Maurice assured him that if he did not get the position he would still have a job with the company. The issue of what that might be was one of the matters Mr Kessick wanted to clarify prior to the interview and which was forestalled by Mr Maurice's ongoing unavailability.

[40] The applicant's diary note for Friday 28 October 2005 reads:

9am Meeting with TM re P/Man job

TM Gave me info re position as PM and informed me of formally meeting at 9am Tuesday 1.11.05

Tony has assured me that if I was not to be given the job as PM I would still have a job at CWS

Tony also told be [sic] I was doing a good job and CWS were very happy with my work

I requested a meeting with TM to clarify some points. Was given a time of 1pm Monday 31/10

[41] In *New Zealand Fasteners Stainless Ltd v. Thwaites* 2 NZLR [2000] at 571, the Court of Appeal says this:

*The principles are clear enough. Redundancy is determined in relation to the position not to the incumbent. Whether a position is truly redundant is a matter of business judgement for the employer. The genuineness of any determination of redundancy can be reviewed. If it is not one the employer acting reasonably and in good faith could have reached it may be impeached. In any such review it may be relevant that the employer did not consult with affected employees or consider whether the redundancy might have been avoided by redeployment or otherwise. **Absence of such steps might in particular circumstances indicate absence of genuineness in the determination.** Where there is a genuine redundancy that will justify termination of the employment of the person in the position. In the court of the employer's consideration of the position and carrying out the dismissal the obligation of good faith and fair treatment applies. Any failure to discharge that obligation that in itself is unjustifiable may result in remedies appropriate to the breach.*

[42] When the behaviour of the respondent in relation to the scheduling and re-scheduling and then summoning Mr Kessick without warning to the interview is added to the failure to consult, I am of the view that this is one of the exceptional cases where the behaviour of the respondent is thoroughly lacking in good faith and casts severe doubt on the genuineness of the redundancy.

Was the procedure followed by the respondent fair and reasonable in the circumstances?

[43] From what I have said above, it is clear that the procedure was seriously deficient. There are two other issues I

wish to address in respect to the procedure. The first is the heightened responsibility on the respondent when considering the termination of a long standing employee who is unlikely to find other comparable employment at age 62 within a relatively small and tight industry.

[44] The second relates to a conflict of interest which may have influenced the objectivity of the selection process. The Production Manager's position was not advertised externally and two existing employees were being considered. A third applicant came to the attention of the respondent with Mr McKillop, an employee of the respondent, introducing Mr Lindsay Holland to the company as a likely contender. There is no difficulty with that. The problem arises in that Mr McKillop was one of the interview panel employed in selecting the person for the position. As such he was in a position to influence the decision maker in Mr Holland's favour. While I accept the evidence that Mr McKillop was not present at Mr Holland's interview, that does not remove a serious taint from the process as any expression of a negative view of the other two contenders might promote Mr Holland's cause.

Was redeployment genuinely pursued

[45] As indicated above, I have accepted the evidence set out in the applicant's diary note of Friday 28 October 2005 in which Mr Maurice assured Mr Kessick that if he was unsuccessful in obtaining the Production Manager's job he would still have a position with the company. Following the decision to appoint Mr Holland the only discussion of an alternative position that arose was that of a part-time Health and Safety role which would encompass responsibility for ISO accreditation. Mr Kessick's evidence was that he would have accepted that position even though it was a contract role. His evidence was

I returned to work as normal on Monday 28 November in a genuine attempt to work my notice period out. I also wanted to show Michael (Crooks) as Tony had previously suggested on 3 November, my knowledge of the HSE and ISO documentation in the office and took him through the documentation that had been left in Barbara's (previous employee) office. It was apparent however that he wasn't interested in following this possibility and finally, on Tuesday 6 December 2005, he told me that I was no longer required to come to work and that I could serve the balance of my notice period out from home.

[46] Mr Maurice's refusal to discuss any alternative position with the applicant in the event that he was unsuccessful in securing the Production Manager role and Mr Crooks' clear disinterest in having Mr Kessick undertake the contract work that had been suggested by Mr Maurice, makes it clear that there was no genuine pursuit of an alternative for the applicant.

[47] On the basis of the evidence before the Authority, I am firmly of the view that the respondent initially believed Mr Kessick would likely be selected for the Production Manager position. That view is supported by the 1 May 2005 email from Nigel Hayles, the Chief Executive, regarding the applicant's prospects with the move to Washdyke. In it he says:

Hi Tony, Regarding Jeff's [sic] role at Washdyke. Please give some thought as to where Jeff could best be utilised going forward.

Given the problems we have at Washdyke I feel that Jeff has an important role to play.

[48] The balance of the email raises a number of thoughts the writer has with regard to how Mr Kessick's skills might best be deployed.

[49] The applicant had, in the absence of any job description, gone about the Production Coordinator's role doing the tasks he believed were required of him to meet the respondent's needs. He had been praised by Mr Maurice to whom he reported, and his work was not criticised during the period from mid May to 2 November, the day of the elusive interview.

[50] What changed was the introduction of an external prospect, Mr Holland, on whom the mantle of Production Manager eventually rested.

The determination

[51] Returning to the issues set out above in the determination, I find

- That the individual employment agreement in respect of the Production Coordinator's position does not

comply with [s.65](#) of the Act.

- The redundancy was not genuine and is characterised by a thorough lack of good faith and consultation.
- There was no consultation and in fact when Mr Kessick sought this from his direct manager, was simply fobbed off. The applicant was unjustifiably disadvantaged by this behaviour.
- While I stop short of finding that the interview process was unfair and unreasonable, the involvement of Mr McKillop in that process casts a considerable shadow.
- That while redeployment was promised to the applicant by Mr Maurice, the alternatives were never given to him prior to interview, and the post interview opportunity of the Health and Safety role was never pursued prior to the applicant being told he was no longer needed at the workplace and could work out the balance of his notice at home.
- That Mr Kessick has a personal grievance. As required under [s.124](#) of the Act, I have considered the evidence put before the Authority and find Mr Kessick did not contribute to the circumstances giving rise to his dismissal.

Remedies

Lost remuneration

[52] On the evidence put before the Authority I am satisfied that in spite of health difficulties the applicant attempted to mitigate his loss. I order the respondent to pay the applicant the sum of eight weeks lost remuneration plus the holiday pay appropriate. The respondent is to reimburse the applicant for remuneration lost between the expiry of his notice period until his commencement of employment at New Zealand Insulators. For the balance of the eight weeks, the respondent is to pay the applicant the difference between his former weekly gross of \$903.85 and his weekly gross in his new position of \$550.00, that is \$353.85 gross.

Compensation

[53] The evidence from the applicant and from his son Martin, clearly establish a high degree of humiliation, anxiety and injury to feelings in this case. This was heightened by the thoroughly cavalier treatment he received from the respondent.

[54] The respondent is ordered to pay the applicant the sum of \$15,000 without deduction pursuant to [s.123\(1\)\(c\)\(i\)](#) of the Act.

Costs

[55] Costs are reserved.

[56] The parties are urged to attempt to resolve this issue between themselves. If that is not possible, Mr Wilson is to file a memorandum within thirty days of the date of issue of this determination. Mr McLeod is to file his memorandum in response within fourteen days thereafter.

Paul Montgomery

Member of the Employment Relations Authority