

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Matthew Lees (Applicant)
AND Norske Skog Tasman Limited (Respondent)
REPRESENTATIVES Matthew Lees In person
Lewis Turner, Counsel for Respondent
MEMBER OF AUTHORITY R A Monaghan
INVESTIGATION MEETING 23 May 2005
DATE OF DETERMINATION 26 July 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Norske Skog Tasman Limited (“Norske Skog”) employed Matthew Lees as a process cleaner in the wood processing division associated with the pulp and paper mills at Kawerau. Both Norske Skog and Carter Holt Harvey Limited (“Carter Holt Harvey”) used wood chip produced by the division in their respective mills, and they operated the division as a joint venture. The division’s employees, however, were all employees of Norske Skog.

[2] In August 2003 Carter Holt Harvey announced an intention to contract out its wood processing needs, and the work was put up for tender. On 7 July 2004 Carter Holt Harvey informed Norske Skog and relevant unions that a third party, Pedersen Industries Limited (“Pedersen’s”) had been awarded the contract.

[3] This led to a redundancy situation, and Mr Lees’ employment with Norske Skog ended by reason of redundancy on 31 August 2004. Mr Lees was offered employment at Pedersen’s, which he accepted, but feels he was pressured to take that employment when what he wanted was to retain his employment as a process cleaner. He says his treatment in that respect was unfair. In his statement of problem he said he wanted compensation for the unfair treatment, for stress, and for loss of income in that he earned less at Pedersen’s than at Norske Skog. During the investigation meeting he said he also seeks reinstatement to a process cleaner’s position.

[4] Mr Lees did not identify any particular cause of action when raising his employment relationship problem. However the remedies he seeks flow from the establishment of a personal grievance as defined in the Employment Relationship Act 2000. In addition some of his concerns, if properly founded, are capable of amounting to a breach of good faith. I have approached the problem with that in mind.

The redundancy procedure

[5] On 8 July 2004 Joseph Akari, Norske Skog's HR advisor, met with Norske Skog's wood processing division employees to give a presentation about what would happen as a result of Pedersen's successful tender. The presentation included advice that:

- (i) contracting out the Carter Holt Harvey work to Pedersen's meant there would be a reduction in the overall workload of the wood processing division, requiring the disestablishment of 19 positions;
- (ii) options available to affected employees were, -
 - . to apply for a job with Pedersen's and, if successful, retain eligibility for redundancy compensation from Norske Skog, or
 - . to take voluntary redundancy from Norske Skog, or
 - . if neither of the above options was chosen, to proceed in accordance with Norske Skog's redundancy policy with a possibility of redeployment.

[6] In July 2004 Mr Lees was working in another position, to which he had been seconded some months earlier. The position to which he was seconded would disappear. However, of the five process cleaner's positions, three would remain.

[7] As he attempted to do with all affected employees, Mr Akari met with Mr Lees and his union representative to discuss the options with Mr Lees on an individual basis and in more detail. The meeting went ahead on or about 8 July. Mr Akari asked Mr Lees whether he had a preference for any of the three available options at that stage. Mr Lees replied that any interest he had in a position at Pedersen's depended on the terms and conditions Pedersen's offered. At the time, those details were not available.

[8] Mr Lees also indicated that he wanted to keep open the possibility of redeployment, although by that he meant he preferred to remain employed as a process cleaner. He did not indicate any wish to be considered for redeployment to any other position. Nevertheless Mr Akari commented to Mr Lees during their July discussion that he believed redundancy would be the likely outcome if the redeployment option was chosen, since he did not see any redeployment opportunities.

[9] These attempts to address the circumstances of individual employees were made against a background of considerable industrial unrest. The union had already expressed concern about the implications for its members of Carter Holt Harvey's contracting out of some of the joint venture work and sought to resist the action. In addition the parties were due to renegotiate an expired collective employment agreement. A strike began on the afternoon of 30 July 2004.

[10] The strike action was the subject of an application to the Employment Court for an interim injunction to stop it, pending the determination of its lawfulness. The court granted the injunction in **Norske Skog Tasman Limited v The Pulp and Paper Industry Council of the Manufacturing and Construction Workers Union** (31 July 2004, Judge Colgan, AC 42/04). The court also directed the parties to mediation.

[11] Mediation - which seems to have been detailed and wide-ranging - led to a settlement of all issues between the parties in August 2004 ("the mediated settlement"). One of the heads of settlement concerned the fate of certain identified 'surplus employees' who were not successful in obtaining work with Pedersen's. One of those employees was a process cleaner. The terms of settlement required that she be redeployed in Norske Skog.

[12] Against all of that background, as far as Mr Lees' ongoing employment was concerned, Mr Akari's assessment was:

- (i) there was no question of Mr Lees remaining in his seconded position as all of those positions were to be disestablished;
- (ii) three process cleaner's positions remained available, but in the event that more than three people sought them a policy of last-on first-off would have to apply;
- (iii) at least two process cleaners had longer service than Mr Lees;
- (iv) the mediated settlement effectively obliged the company to redeploy a third person to a process cleaner's position, even though that person did not have longer service than Mr Lees;
- (v) because of (iii) and (iv) above there would not be a process cleaner's position available for Mr Lees - nor was any other position available - and Mr Lees' redundancy from Norske Skog was inevitable.

[13] That assessment led Mr Akari to encourage Mr Lees to apply for a position at Pedersen's. In Mr Akari's view Mr Lees would be made redundant and receive a redundancy compensation package whether he applied for a job at Pedersen's or not, but if he did apply and was successful then he would also have a job. Mr Lees applied, was successful, and received the redundancy-related benefits to which he was entitled when his employment with Norske Skog ended.

[14] Mr Lees started work at Pedersen's in or about September 2004, and remains there.

The allegations of unfair treatment

[15] Mr Lees has a general sense of being treated unfairly because he was a long-standing, loyal and well-regarded employee of Norske Skog. Despite this, not only has he lost the process cleaner's position he wanted to keep, but he can see that process cleaner's positions still exist at Norske Skog and he feels that one of them is his. The following are the specific grounds of unfairness he has raised.

1. Accepting the secondment disadvantaged Mr Lees

[16] There was no evidence that Mr Lees' agreeing to take up his seconded position disadvantaged him when it came to the redundancy process. I do not believe Mr Lees' being on secondment affected Mr Akari's assessment of the availability of a position for Mr Lees.

[17] I understood Mr Lees also to be saying that, when he was seconded, he was told his cleaner's position would remain open to him. That may be true, but it reflected the nature of secondments rather than amounting to a promise that the position would be kept open even in the face of genuine redundancies. When a genuine redundancy situation occurred, the continued existence of Mr Lees' cleaner's position was considered along with the existence of all of the cleaners' positions.

2. Being bullied into taking a position at Pedersen's

[18] Mr Lees interpreted as bullying Mr Akari's encouragement regarding a position at Pedersen's. He said in evidence he felt pressured into taking the Pedersen's position because he had a family to support and did not want to be out of work.

[19] There was no evidence that Mr Lees was bullied. Mr Lees' supporters alleged that the options available to certain other employees were discussed with them in a manner amounting to bullying, but there was nothing beyond assertion to establish that was the case and in any event that does not in itself mean Mr Lees was bullied too.

[20] Here all Mr Akari did was make a genuine attempt to explain to Mr Lees the realities of his situation as Mr Akari saw them. Those realities were certainly not palatable to Mr Lees, and he had to make a hard decision about which option to pursue. He was under pressure, but the pressure flowed from the circumstances and not from any bullying on Mr Akari's part.

[21] A second element of the allegations about bullying and pressure seems to arise out of reactions to the mediated settlement when it was announced to the employees. Questions were again raised about what would happen to employees who were offered employment at Pedersen's but refused the offer. The answer was that Norske Skog's redundancy policy would apply. On receiving this information it seems some employees, including Mr Lees, concluded they had no alternative but to accept the Pedersen's offer.

[22] Employees could choose the certainty of having a position at Pedersen's, or the uncertainty of being placed in a redeployment pool. While that might be Hobson's choice, I do not believe it amounts to unfairness actionable against Norske Skog. It is certainly not bullying.

3. Mr Akari's assessment of the availability of a position for Mr Lees

[23] Mr Akari's assessment of the availability of cleaner's positions was questioned in that:

- (a) Of the employees with longer service than Mr Lees, one, Anita, had indicated she would be seeking voluntary redundancy - so her position should have been made available to Mr Lees - and the other was expected to retire in a year or so;
- (b) It was not fair that two employees with less service than Mr Lees retained their positions.

A. Employees with longer service with Mr Lees

[24] Anita was also on a secondment in July 2004, but because of her length of service Mr Akari took the view Norske Skog would have to return her to a cleaner's position in due course if that was her wish. The company engaged a temporary employee to fill Anita's cleaner's position until she was ready to return to it.

[25] It was alleged on behalf of Mr Lees that Norske Skog knew all along Anita would not return to her cleaner's position. There was no evidence in support of the allegation. The secondment was extended well beyond its original period, and Anita remained in the seconded position for some months after Mr Lees took up his new position at Pedersen's. On 1 December 2004, while still on secondment, she made a formal application for voluntary redundancy with a release date of 24 December 2004. Her application was approved.

[26] I do not believe her circumstances called into question the genuineness of Mr Akari's assessment of Mr Lees' options as at July or August 2004.

[27] As for the second employee with longer service than Mr Lees, if Mr Akari had selected that employee for redundancy on the ground of his pending retirement, he would have been acting unlawfully. It is not reasonable to argue Mr Lees should have been preferred to that employee.

B. Employees with shorter service than Mr Lees

[28] One of the employees with a shorter period of service than Mr Lees was the temporary employee - albeit an existing process cleaner - whose services were retained pending Anita's return.

During July and August 2004 Mr Akari expected Anita to return, and that the temporary employee would then lose her employment.

[29] Anita did not return and the employee remained in employment. While I understand Mr Lees' seeing that as unfair, Mr Akari's actions must be assessed on the state of his knowledge as at July and August 2004. The temporary employee may have been fortunate, but her good fortune came from the way circumstances developed after August 2004. Only with hindsight could that be identified. Such an application of hindsight is not capable of undermining the genuine assessment Mr Akari made in mid-2004, or providing Mr Lees with an actionable claim.

[30] The second of the employees with less service than Mr Lees was the employee whose circumstances were addressed in the mediated settlement. Norske Skog was obliged to continue to employ her by virtue of that settlement. Preferring Mr Lees to her would have placed Norske Skog in breach of the settlement.

[31] Mr Lees' supporters considered the employee concerned was an inferior performer. I understood that to aggravate their feeling that it was unfair to give her a position instead of Mr Lees, who was a good performer. If their assessment is correct their feeling is understandable, but it cannot be invoked to require Norske Skog to breach the mediated settlement.

Does Mr Lees have a remedy?

[32] For these reasons I do not believe Mr Lees was subjected to unfair treatment of a kind that rendered unjustified the termination of his employment on the ground of redundancy, or of a kind that amounted to an unjustifiable action affecting his employment to his disadvantage. Accordingly I cannot order his reinstatement, and nor can I order the compensation or reimbursement of lost income he has sought.

[33] Mr Lees' concerns also have the flavour of a claim of breach of the employer's duty to deal with him in good faith. Again, for the reasons I have set out, if I were asked to do so I would find there was no such breach.

[34] Accordingly no remedy is available to Mr Lees and the Authority is unable to assist him.

Costs

Costs are reserved. The parties are invited to agree on the matter themselves. If they are unable to do so they may seek a determination of the matter from the Authority.

R A Monaghan
Member, Employment Relations Authority