

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 154
5295376

BETWEEN THAMBIRAJAH (MAHAN)
MAHENDRAN
Applicant

AND CHIEF EXECUTIVE,
DEPARTMENT OF
INTERNAL AFFAIRS
Respondent

Member of Authority: G J Wood
Representatives: Andrew Cuming for the Applicant
Robert Foitzik for the Respondent
Investigation Meeting: 10 February 2011 at Wellington
Further Information: 1 April 2011
Determination: 12 October 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Thambirajah Mahendran (known as Mahan), claims that he was unjustifiably disadvantaged in his employment or dismissed from his position as a records officer in the Department of Prime Minister and Cabinet, due to a flawed procedure in making him redundant. Mahan was working in the office of the Prime Minister, but was employed by the Chief Executive of the Department of Internal Affairs, which administers the area known as Ministerial Services. In particular he claims that the respondent (Ministerial Services/Internal Affairs) rushed the redundancy process and withheld important information from him. The respondent, which manages Ministerial Services in Parliament, denies Mahan's allegations.

[2] Originally, Mahan claimed reinstatement, because he should never have lost his permanent employment with Ministerial Services and no *employment law procedures* were followed.

[3] At the initial investigation meeting on 10 February 2011, Ministerial Services provided Mahan with information about the breadth of the restructuring affecting him for the first time, including *before* and *after* staffing diagrams, which demonstrated to him that his redundancy was in fact genuine. His sole claim until the investigation meeting had been for reinstatement. As a result of this new information, Mahan amended his application along the lines set out in paragraph 1. Ministerial Services objected to what it saw as new claims, claiming he was estopped from changing any part of his application and/or the remedies sought.

[4] I rejected that claim at the time on the basis that the investigation was ongoing and was not a trial. I noted that Ministerial Services provided new information at the investigation meeting that should have been disclosed earlier. I therefore determined that it was appropriate for Mahan to be able to refocus his claim. In any event, the new focus on consultation provisions and good faith were covered in the initial statement of problem, albeit in a more general sense, in that it was claimed that “*no employment law procedures were followed*”. Ministerial Services was not prejudiced, as it had the opportunity to give additional information, evidence and submissions, which it took up. Such a determination was also consistent with s.122, in that the nature of a personal grievance may be found to be a different type from that alleged; and s.163, which provides that the Authority is not bound to treat a matter as being a matter of the type described by the parties, and may, in investigating the matter, concentrate on resolving the employment relationship problem however described. I concluded that the employment relationship problem is that set out in the first paragraph.

[5] Mahan now claims compensation for hurt and humiliation, together with costs.

Factual discussion

[6] There are no major disputes of fact in this case, and all witnesses are to be congratulated on giving clear, concise evidence to the Authority. Mahan worked for Ministerial Services between 1990 and 2009, being a records officer in the Office of the Prime Minister throughout that period. Accordingly, he had worked under a

number of governments of differing political persuasion. By the time of the 2008 general election, Mahan was one of only six staff of over 100 in Ministerial Services who were left in what is known as the professional cadre of apolitical public servants working in Ministerial Services, on what is known colloquially as a permanent employment basis. The vast majority of staff in Ministerial Services were, by contrast, appointed for fixed terms dependant on the election cycle.

[7] As a *permanent* employee, Mahan's terms of employment were grandparented from a long since expired collective contract, which provided for what were then standard-type surplus staffing provisions in the public service. Thus his terms of employment provided, in the event of a staff surplus situation, for reconfirmation, reassignment or, in the last resort, redundancy. In the case of redundancy, a severance payment was to be made.

[8] Mahan's position was graded at Grade 7. There were never any complaints about his work and he consistently received favourable annual assessments.

[9] When there is a change of government, as occurred in 2008, a new government may choose to restructure arrangements in Ministerial offices. Prior to the election, Mahan was told by Ministerial Services that if there were to be changes in the Office of the Prime Minister then, as with any potential change of government, there could be flow on ramifications for his job, but that the terms and conditions of his employment agreement would still apply.

[10] The incoming government chose to significantly restructure clerical support to the mail and records system in the Office of the Prime Minister. When in opposition it had operated a different mail system to the government of the day, and wished to adopt that when in government. As a result, there were a number of changes in clerical support roles. In particular, the new government decided that it wanted a more multi-skilled team. This meant the loss of the position held by Mahan as a records officer and its replacement by a more highly graded ministerial assistant at Grade 10. Despite representations from officers of Ministerial Services to maintain the status quo and hence keep Mahan in his job, representatives of the new government remained committed to their new mail and records system and the type of staff required to support it.

[11] This was all agreed in a very short time, within days of the election. In fact the new structure was confirmed by the new government by 19 November 2008. It therefore followed that Mahan's position was surplus to requirements and his subsequent redundancy was genuine, as is now agreed.

[12] Before Mahan could be informed of these developments, he received the unfortunate news of a family bereavement in Australia. In the circumstances, Ministerial Services advised Mahan not to worry about his job, but to leave immediately for the funeral. Upon Mahan's return, he was informed verbally and by letter that the mail system was to be changed and that new staff were to be employed. As a result, his role as a records officer no longer existed in the Prime Minister's office, and thus the surplus staffing provisions in his employment agreement applied. He was not given any detailed information, however, on the nature and form of the restructuring, such as *before* and *after* wiring diagrams and job descriptions, that the department ordinarily utilises in restructuring situations.

[13] It was agreed to postpone discussing alternative employment options until mid-January 2009. Mahan was offered access to the employee assistance programme, and CV and job interview assistance. He was asked to clear his desk on 4 December 2008.

[14] Mahan raised certain positions that might be available within Parliament, which were investigated, but there were no such positions free at the time.

[15] Mahan then left for Australia as he again had to deal with family matters there. Whilst overseas he had a serious fall, breaking an ankle. Thus, when Ministerial Services rang offering him the potential for a job within the Department as a records officer, he was unable to take it up and therefore the Department had to fill the role with a permanent appointee.

[16] It was not until 2 June 2009 that Mahan was finally well enough to work. Ministerial Services arranged for a trial in Internal Affairs' passport division, but unfortunately that was not successful. Ministerial Services did not give up looking for employment opportunities for Mahan, but unfortunately none could be found and in October 2009 it wrote to Mahan advising that it had exhausted all reconfirmation and reassignment opportunities, and that the redundancy provisions now applied.

[17] On 19 November 2009, Mahan was given one month's notice of redundancy. On 18 December 2009, his outstanding leave and his redundancy compensation payments were made.

[18] Despite mediation and other attempts during the investigation process by the parties to resolve matters, this has not proved possible. It therefore falls to the Authority to make a determination.

The law

[19] Section 4(1A) of the Act clarifies the obligations on parties to deal with each other in good faith, in that they are required to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative. In particular, an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of an employee is required to provide that employee affected access to information, relevant to the continuation of the employee's employment, about the decision; and an opportunity to comment on the information to their employer before the decision is made.

[20] As a Full Court of the Employment Court held in *Vice Chancellor of Massey University v. Wrigley and Kelly* [2011] NZEmpC 37 at para.[47]:

[47] *...More informed employee involvement will promote better decision making by employers and greater understanding by employees of the decisions finally made. That will avoid or reduce the sense of grievance which may otherwise result and thereby reduce the incidence of personal grievances and other employment relationship problems.*

[48] *Recognition of the inequality of power in employment relationships is also directly relevant. When a business is restructured, the employer will, in most cases, have almost total power over the outcome. To the extent that affected employees may influence the employer's final decision, they can only do so if they have knowledge and understanding of the relevant issues and a real opportunity to express their thoughts about these issues. In this sense, knowledge is the key to giving employees some measure of power to reduce the otherwise overwhelming inequality of power in favour of the employer.*

[49] *These broad objects are reinforced by the more general provisions in s.4. As an aspect of the duty of good faith, s 4(1A)(b) "requires the parties to an employment relationship to be active and constructive in establishing and maintaining*

a productive employment relationship in which the parties are, amongst other things, responsive and communicative". The obligations imposed by s 4(1A)(c) amplify the general requirement and the specific circumstances in which it applies. It follows that the obligation to provide access to "information, relevant to the continuation of the employee's employment" must be discharged in a manner which is active, constructive, responsive and communicative.

...

[62] ... *What is within the scope of s 4(1A)(c) in any given case will, however, depend on the particular circumstances of the case. The starting point must be the nature of the decision which the employer proposes to make. For example, if the employer has restructured its business and is deciding whether an employee whose position is disestablished is suitable for an alternative position, what will be relevant is information relating to that person's attributes and to the new position. ... the perceptions and opinions of those involved in the process leading to a decision will be relevant.*

[21] The Full Court also supported counsel's submissions, seen to be a rhetorical question, as to

"...why an employer who would be obliged to disclose in personal grievance proceedings all relevant information after dismissing an employee, should not disclose it in the course of the decision making process and thereby give the employee an opportunity to say why he or she ought not to be dismissed".

[22] In *New Zealand Fasteners Ltd v. Thwaites* [2000] 1 ERNZ 739 (CA), it was held, at para 22:

Where there is a genuine redundancy that will justify termination of the employment of the person in the position. In the course of the employer's consideration of the position and in carrying out the dismissal the obligation of good faith and fair treatment applies. Any failure to discharge that obligation that itself is unjustifiable may result in remedies appropriate to the breach.

[23] Fair treatment may properly include full information as to the reasons for the dismissal for redundancy.

[24] I also note that this case is similar to the leading case of *Simpsons Farms Ltd v. Aberhart* [2006] ERNZ 825 where a grievance was substantively justified, but a claim for unjustifiable disadvantage still arose because of how the employer acted. This refers to s.103A, where the Authority has to assess 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.

Determination

[25] I conclude, as in *Simpsons Farms*, that Mahan was not unjustifiably dismissed (because, as he now accepts, his dismissal was substantively justifiable for redundancy), but that he has been unjustifiably disadvantaged in his employment. Perhaps because Ministerial Services was effectively presented with a *fait accompli* about the structure of the mail services in the Office of the Prime Minister, there was no consultation with Mahan before the changes that would eventually see him lose his job were decided upon. Combined with Mahan's unfortunate need to be elsewhere than at work during the relevant period, this meant that he had no input into the changes and the upgraded position. Even though he was not the best person for the position there was still therefore a breach of the duty of good faith requiring proper consultation (*Thwaites* and *Wrigley* applied).

[26] Furthermore, it was not acceptable for Ministerial Services to fail to provide Mahan with the documentation which showed why his position had genuinely to be made redundant and how he was not the most suitable person for one of the new positions until an investigation meeting in the Authority (*Wrigley* applied). This was material that should have been available to him right from the start, so that he could have better understood why, after 20 years of loyal service to a number of Prime Ministers, his services were no longer required in the mail services unit. He is a proud man and was battling serious family issues at the time, and his belief that he had been improperly replaced had a profound effect on him. Indeed he believed until the investigation meeting, wrongly as it is now apparent and he now accepts, that he had been replaced by someone else doing his job, for reasons unknown and therefore seen as unfair.

[27] I accept his evidence on the effect on him. Compensation, however, must be directed at the breach, although Ministerial Services must *take each victim as it finds him*. In this context Ministerial Services should be congratulated on the efforts that it took to try and find Mahan another job over the next year or so (rather than replacing him immediately) and for the sensitive way it dealt with his personal family issues and accommodated his needs accordingly. Therefore compensation is to be limited to simply the lack of proper information and rushed lack of consultation.

[28] In all the circumstances, I consider that compensation in the sum of \$5,000 is appropriate.

[29] I therefore order the respondent, the Chief Executive of the Department of Internal Affairs, to pay to the applicant, Thambirajah (Mahan) Mahendran, the sum of \$5,000 compensation under s.123(1)(c)(i) of the Act.

Costs

[30] Costs are reserved.

G J Wood
Member of the Employment Relations Authority