

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Ilaisa Mateiwai (First Applicant)
AND Rua Mataora (Second Applicant)
AND Ray Vavau (Third Applicant)
AND Fritz Schwalger (Fourth Applicant)
AND Peter Telea (Fifth Applicant)
AND Fred Natoealofa (Sixth Applicant)
AND Losini Leolahi (Seventh Applicant)

AND Sensation New Zealand Limited (Respondent)

REPRESENTATIVES Paul Pa'u, Counsel for Applicants
Garry Pollak, Counsel for Respondent

MEMBER OF AUTHORITY Y S Oldfield

INVESTIGATION MEETING 29 March, 30 March, 29 April 2004

SUBMISSIONS 21 May, 25 May 2004

DATE OF DETERMINATION 3 September 2004

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

Of the seven applicants, Mr Leolahi and Mr Mataora did not attend the Authority's investigation meeting. Mr Pa'u now advises that Mr Mataora's problem is withdrawn. As for Mr Leolahi, Mr Pa'u told me that he had travelled to Australia in search of work and did not wish to progress the matter at that stage. However, he sought leave to have his employment relationship problem investigated should he return at some point in the future. This course of action was not opposed by the respondents and poses no problem for the Authority. The investigation of Mr Leolahi's problem will therefore be abandoned until the Authority receives further notice from him.

The remaining five applicants are all boat builders who were made redundant from the respondent's systems and structure division in June 2003. They say that their dismissals were unjustified and each seeks remedies of lost earnings as well as compensation of \$15,000.00.

Chronology of Events

1. During 2003 the main project for the respondent had been the completion of a vessel referred to as SY 18, which was the largest private vessel ever made in NZ. By June of that

year work on SY 18 was winding down, according to schedule. This fact did not initially give rise to any fears amongst staff that their jobs might be at risk. The design process for a substantial piece of work (to be known as SY 27) was complete and a contract under negotiation, and staff had been advised of this.

2. Without warning, the party with whom the respondent had been negotiating pulled out of the discussions in June 2003. SY 27 was to have been a steel and aluminium boat. With no new work of comparable scale due to come on stream, the respondent found itself heavily overstaffed in relation to the skills required in steel and aluminium construction. It proceeded at short notice to implement a redundancy process.
3. This situation was not unprecedented. Twelve months earlier the respondent had faced similar circumstances and had found itself with insufficient work for its current levels of staff. At that time it had undergone a lengthy redundancy process with all staff and had reduced staff numbers significantly. The applicants in the present matter were all survivors of the 2002 round of redundancies.

The 2002 process

4. The applicants and the respondent considered the process followed in 2002 to have a bearing on what happened in 2003. The 2002 redundancies arose in a context where the respondent needed to restructure as well as downsize.
5. It commenced with a full staff meeting at which staff were told that redundancies were expected and that a selection process was about to begin.
6. In the weeks that followed, each and every staff member was individually interviewed by his supervisor along with Human Resources Manager, Marie Park. The skill set of each person was assessed against a list of specific criteria and graded one to ten, with one being the highest.
7. Mr Jason Carter, the Respondent's Production Co-ordinator for the Systems and Structure Division at Sensation Yachts during mid 2003, told me that the 2002 process took considerable time. He said:

“The Union was consulted as per our collective employment obligations and the Union Organiser and a number of staff involved were very critical about the consultation process. The Union and some of our employees complained that it was simply taking too long, creating uncertainty and stress for all concerned.”
8. At that time, 60% of the staff at Sensation Yachts were members of the Engineering, Printing and Manufacturing Union (EPMU). The union organiser for the site was a Mr Mike Loughlin. At my initiative, arrangements were made for him to give evidence at the investigation meeting.
9. Mr Loughlin confirmed that the process followed in 2002 was “very long and involved” and centred round consideration of a very detailed skill set. He said that the members understood that the company required detailed information on the skill sets of the whole workforce. However he had conveyed to management that there were two major criticisms of the process. These were that the members felt that they did not know ‘where they stood’ for a long time and in addition, those who were eventually made redundant were required to work out their notice, which hampered their efforts to find new jobs.

10. The applicants were all involved in the 2002 process and were successful in retaining their jobs then. They told me that they had had faith in the 2002 process and felt it provided them with a better opportunity to discuss or debate personal gradings than did the 2003 process.

2003 process

11. Respondent witnesses could not tell me the precise date that they got the unwelcome and unexpected news that SY 27 was cancelled however they said that it came at the start of or shortly before the week beginning 9 June. The steps described below took place over the course of that week.
12. Respondent witnesses told me that because of the size of the contract which was lost it was immediately apparent that a number of the workforce would have to be laid off. At this time, the total staff in the Structures and Systems Division numbered 83 of which 12 were self employed contractors who were to be let go first.
13. On or about Monday 9 June a small selection panel (Mr Carter and two fabrication coordinators) met to discuss the potential staff cuts. Over the course of the next few days, a list was drawn up containing approximately 30 names from which 21 to be made redundant would be selected via an interview process.
14. I asked Mr Carter how the 30 who were to be interviewed were identified out of the 70 employed in the Division. He told me that the selectors started with the production plan to identify the numbers required in each skill area for the 'composite' work in hand. From this they calculated that 21 positions in total were surplus to requirements (although this figure was later reduced.)
15. I was provided with a table showing the break down. All but a handful of the surplus positions were in four categories: plumbers, aluminium fabricators, steel welders and steel fabricators. Several skill categories relating to "composite" work were not overstaffed at all and were therefore excluded from the process immediately.
16. I was told that next, the best performers in each category were identified and excluded from the process. After that, each remaining employee was discussed by the group. Past performance reviews were taken into consideration but current perceptions of skill levels, attitude and teamwork were the primary determinants of who was on the list.
17. Once the list had been drawn up it was reviewed and approved by Ms Park and the two other supervisors, one of whom was a Mr Birch.
18. The selection panel then proceeded to grade the individuals using a form setting out specific categories relating to skills and performance. The form had been redesigned by Ms Park since the 2002 process. The categories had been simplified because previously the company had been looking to move some people to engineering and had developed a specific matrix to assess the skills needed there.
19. Five criteria were used. These were:
- *Timekeeping*; based on six months worth of computer generated time records;
 - *Health and Safety*; based on accident records etc.
 - *Attitude*; assessed by supervisors
 - *Quantity of work*; assessed by supervisors

- *Quality of work*; assessed by supervisors
20. A further criterion, disciplinary record, was later taken out of the process at the request of the union; in any event none on the list had a disciplinary record.
 21. Once the gradings had been completed Ms Park prepared individual forms for each of those who were to be interviewed.
 22. On the afternoon of Friday 13 Ms Park telephoned Mr Loughlin with the news that SY 27 was cancelled and that around 21 staff would have to be laid off. Mr Loughlin then telephoned site delegate Dave Stephenson to pass the information on to him.
 23. On Monday 16 June Ms Park and Mr Carter met with Mr Loughlin. They told him that they had drawn up a list of potential interviewees. They proposed to meet with each of these individuals as soon as possible and on this basis to select those who would be made redundant.
 24. Mr Loughlin agreed that since the entire staff were interviewed only a year before it was not necessary to interview them all again. He advised that the union supported selective interviewing limited to those who were known from the previous process to be in affected skill areas. He also supported a quick process to be concluded within the week.
 25. Finally, he requested that notice be paid in lieu. All of these points were agreed by management.

Meeting Tuesday 17 June 2003

26. At 11.00am on the following day, Tuesday 17 June, the entire Systems and Structure division were gathered together for a meeting in the main workshop. Present to speak with them were Ms Park, Mr Loughlin, and Operations Manager, Mervyn Stephens.
27. Mr Stephens told the men that SY 27 was not going ahead and that staff numbers had to be reduced.
28. This was the first advice the staff had received of this although Mr Stephens told me that staff may have had some inkling that there was bad news coming as preparation for construction had not begun. He told me that he felt the division accepted that it was inevitable that redundancies would follow the loss of the contract for SY 27.
29. Ms Park then took over to outline the process that would be followed. She told the meeting:
 - Individual staff members would be called to an interview and could have a representative at this meeting if they wished;
 - Once all the interviews were complete, the supervisors would review all the information and decide who would be redundant;
 - Those who were to be made redundant would be told by Friday of that week.
30. Mr Stephenson gave the meeting an opportunity to ask questions. One person asked about the criteria for selection. Mr Stephenson replied that the criteria would be the same as

previously. Another asked whether redundant staff would be required to work out their notice and was told that they would not.

31. After about 40 minutes Mr Stephenson and Ms Park left the meeting.
32. Mr Loughlin wanted to be available for anyone who had questions and stayed on, along with the union delegate, to speak with those present, members and non-members alike. He told me that there was a good relationship on site between members and others, whom he considered as potential members.
33. Questions were asked but none went into areas that had not already been covered. Mr Loughlin told me that he believed those present had a clear understanding of the situation since it was only a year since they had been through it before, and 'there was always a cloud over people's heads in this industry.'
34. Mr Loughlin told me that overall he felt happy with the way everything was being handled. After about 15-20 minutes the meeting concluded and those present left for an early lunch break.

Interviews, Wednesday 18 June 2003

35. In the event, only 23 were interviewed because a redeployment opportunity was identified for the mechanical engineers.
36. Mr Carter told me that the individuals who were to be interviewed were not given prior notice of this because this was not felt appropriate. He said that there was a history of gossip within the company and he did not want to cause undue stress by posting an interview list.
37. Instead, during the course of the day the individuals on the list were approached one by one at their workstations by a union delegate. They were advised that they were required at a meeting, and to put down their tools and accompany the delegate straight up to the office. They had no idea up until this point that they were to be interviewed.
38. Mr Carter was present at each interview, along with a supervisor and a union delegate. Each person's grading was read out to him, his comments were sought and he was asked if he had any additional skills which had not been identified. The scoring system was the reverse of the 2002 system, with 1 now the lowest score and 5 the highest. Mr Carter asserted to me that he specifically explained this, but the applicants dispute that. He also said that the person going through the sheet turned it round so that the interviewee across the table could read it. Mr Carter did not provide interviewees with a copy because he considered this would "generate too much stress."
39. Different delegates attended different interviews. It is not in dispute that the delegates maintained a very low key presence and did not contribute to the discussion.
40. The applicants were not advised of the basis of each assessment and had no knowledge of the human resources records on which the timekeeping and health and safety scores were based.
41. The company does not dispute that it did not engage in consultation in the widest sense and argues that there was no opportunity for this since there was nowhere to redeploy staff to.

42. Neither Mr Stephens nor Ms Park attended the individual selection interviews. However, Mr Stephens told me that:

“On each occasion there was a Union representative. In previous redundancy situations we had not asked the Union delegate to be present at interviews for non-Union employees but had had issues about whether employees had been selected because of their Union representation or not. We intended to avoid that completely. No-one took any objection to this and it was important to Marie and I that the Union delegates were there to ensure consistency and the same approach was applied to everyone.

43. Mr Carter told me that he did not know for sure who were union members and who were not. He told me that each interviewee had been asked whether the union delegate should remain, and no-one had raised any objection to this. The applicants all confirmed this evidence however Mr Schwalger stressed that this did not mean they had endorsed the delegate as their representative.

44. Two of the five applicants to whom this determination relates, Mr Mateiwai and Mr Natoealofa were union members. Mr Natoealofa was also still an apprentice as was Mr Schwalger however unlike some other apprentices on site they were not being funded to study by the respondent.

45. The applicants all told me that they felt unprepared for the meeting and felt they did not have enough information to make a meaningful response. They said it was difficult to respond when they had no prior advice of their gradings and were unsure how they were arrived at. They were given nothing in writing and Mr Schwalger expressed a view that it was not possible to respond usefully to a numerical score that was not set in any context. He told me:

“I got 2s and 3s, they asked me if I was ‘happy with that.’ I asked them if a 2 or a 3 is good or bad. They told me it was okay. I received no paperwork at the meeting.”

46. Mr Carter confirmed that the interviewees had not been told what skill set was sought in those who were to remain. He believed that it should have been clear that the company would want people who could do composite work.

Selection meeting, Thursday 19 June

47. The next morning the original selection panel sat down with the other two supervisors and discussed each score and interview one by one. Scores were then ranked and some adjustments made. No reference was made to other material at this stage; the supervisors considered only the interview notes, the gradings and their own opinions of the individuals.

48. The process took all day. Late that afternoon they telephoned Mr Stephens and ran over the list with him on the phone.

49. Of the 23 who were interviewed 12 were made redundant, one was redeployed, 2 took voluntary redundancy and one resigned.

50. One of the biggest concerns expressed by the applicants was that they felt that Mr Lindsay Birch, a former supervisor who they felt knew their work particularly well, should have been involved in making the decision about whether they would be kept on. Because he had not been at their interviews, they assumed he had had no input into the process. At my request, Mr Birch was called in to answer questions at the investigation meeting. He told me that he had had input into three stages of the selection process:

- He had reviewed the “first cut” of 30 names to be interviewed around Monday 9 June;
- Later that week, once the gradings had been completed by Mr Carter and the other two fabrication supervisors, he had reviewed the figures. He had been ‘a little disappointed’ since members of his team had not fared well, but he approved the scores nonetheless;
- He was part of the group of five who spent Thursday finalising the list of redundant employees.

51. A second round of individual meetings was conducted on the Friday. This time, Mr Stephens did attend. Each of those who had been interviewed previously was called in again, and those who had been selected for redundancy were advised of this. Redundant workers were advised that they could finish that day. However pay in lieu of notice was paid on weekly basis because the company could not pay in one lump sum.

52. Mr Pollack has correctly noted in submissions that the Authority was presented with no evidence regarding lost earnings and very little relating to hurt and humiliation.

53. In October of 2003 30 more people were made redundant. These were a mixture of design and management staff and ‘overhead staff’ in stores, finance, purchasing and cleaning.

Determination

Mr Pa’u argues in submissions for the applicants that the respondent failed in its obligations to the applicants by:

- Making the “first cut” on arbitrary assessments;
- Failing to advise of changes to the selection criteria since the 2002 round of redundancies;
- Failing to give sufficient notice of which individuals would be interviewed and failing to provide sufficient time and information to enable interviewees to prepare for their interviews;
- Failing to provide an opportunity for them to seek advice and representation, (he notes that although the union represented some of the applicants ‘this does not excuse the unfair and unjustified way in which the applicants were treated by the respondents.’)
- Conducting unfair interviews in which the applicants could not make a meaningful contribution, in a fashion similar to that in *Apiata v Telecom New Zealand Ltd* (unreported) AEC 124/97.

In relation to the last point, Mr Pa’u argued that:

“The overall ranking that employees received was pivotal to the employer’s decision as to whether to make the group of employees that were interviewed redundant. It appeared...that a number were borderline and some of the applicants themselves were only one or two marks away from retaining their positions. The employer did not even advise the employees as to the types of skill sets that they were looking for. Accordingly, when the employer asked about additional skills, there was no focus to the questioning or proper and reasonable advice to the employees as to the number of people that they were seeking to retain., and the types of skills that they required...”

data that went into preparing the criteria such as timekeeping, health and safety, quality of output and quantity of output, was not available to the employees prior to the interview or even at the interview.”

Mr Pollak for his part argues that the respondent acted at all times in good faith and had genuine (and undisputed) reasons for laying off staff.

He says also that the process was fair and that its speed did not, without more, render it unfair. All employees were treated the same. The criteria had not changed since 2002, rather they had merely been simplified. The applicants all have in common that their experience was almost exclusively in steel construction. Their skills were not therefore the composite skills required for future construction. They were made redundant for this reason and no other.

Conclusions

At an early stage of the investigation of the employment relationship problem the following facts were clearly established:

- the loss of the contract for “SY 27” in June 2003 necessitated significant cuts in staff numbers;
- The nature of the work remaining to the respondent meant that limited opportunities for redeployment were available and only to those with particular skill sets.

Because of this, redundancies were substantively justified, as was a selection process focussed on identification of staff with skills in “composite” construction.

I also accept that the respondent embarked in good faith on a process to select the individuals to be made redundant. The only questions for determination are:

- whether that process was in fact fair to the individuals concerned, and
- if it was not, whether any flaws in it were sufficiently serious as to render the dismissals substantively unjustified.

Was the selection process fair?

With some qualifications, the concerns set out in Mr Pa’u’s list above are in my view valid.

The first qualification relates to the ‘first cut.’ The evidence indicated that this was not entirely arbitrary. Certain skill groups were still required in their entirety, with the effect that about 30 individuals from those groups were excluded from any consideration for redundancy. I accept that this was entirely reasonable. Although it appears that many of the workforce had skills in a number of areas, I accept that those who were currently employed as say, mechanical fitters had priority for the positions of mechanical fitter.

After these had been taken out of the equation, another group were excluded on the basis of being clearly top performers. This also was not arbitrary because it was based on objective assessments made only a year before, and because it was discussed and agreed by all the supervisors.

The only criticism I make of the ‘first cut’ is that it was not done in a transparent manner. Indeed the applicants had no idea of its basis until I asked respondent witnesses about it at the investigation meeting.

As for Mr Pa'u's other concerns, the main qualification I make here is to distinguish between the union members and the others. For this reason they are now discussed separately.

Mr Vavau, Mr Schwalger, and Mr Telea.

I totally reject the suggestion that the union delegate who sat in on each of these employee's interviews was there in the capacity of representative to any of them. I consider it clear from Mr Stephens' evidence that a delegate sat in on all interviews in large part to ensure consistency of treatment as between union members and others. It is correct that each of the applicants consented to his presence. This does not amount however to an indication that he was there to represent them. There is nothing in the evidence to indicate an express arrangement between him and any of these three men or even to give rise to an inference that he was there to assist or advise them in any way. I find that these three men were not represented at their interviews.

I further conclude that they were not given adequate opportunity to seek advice and representation. Although I accept on balance that Ms Park told the Tuesday meeting that all were entitled to advice and representation, the failure to advise who would be interviewed and when meant that this advice was of little practical effect at this point. The individuals concerned could not be expected to arrange the attendance of a representative when they did not know when, or even whether, they might personally be interviewed.

I accept also that the lack of notice of the interviews, and failure to provide relevant information to them beforehand, prevented interviewees from being able to prepare for their interviews. Mr Schwalger made the point well when he noted that he was unable to respond properly to a grading that was presented to him with no context, especially when both the criteria, and the method of scoring, had been amended since the previous round of redundancies.

All of this combined, as Mr Pa'u has argued, to an unfair interview in which the applicants could not make a meaningful contribution.

For all these reasons I accept that the selection process was not fair to Mr Vavau, Mr Schwalger, and Mr Telea.

Mr Mateiwai and Mr Natoealofa

The circumstances of these two applicants differ from those of their co-workers in one crucial regard. That is the fact of representation.

The employment of Mr Mateiwai and Mr Natoealofa was governed by the terms and conditions of a Collective Agreement between the NZEPMU and the respondent. That agreement imposes upon the respondent obligations to consult with the union "in relation to matters that impact on the employment relationship" and sets out specific requirements in relation to redundancy situations. Mr Loughlin is and was satisfied that the respondent met its obligations in relation to all these provisions.

The respondent was both entitled and obliged to accept the organiser and delegate of NZEPMU as the representatives of union members in its employ. It could not do otherwise without express instructions to that effect from the individuals concerned. There is no evidence that the union members, Mr Mateiwai and Mr Natoealofa, gave any such instructions. The union members are unable to say that they were not represented, as they clearly were, by both Mr Loughlin and their union delegate.

On behalf of his members, Mr Loughlin approved the overall process adopted by the respondent. The two union members in this case therefore have no basis for complaint about that process as a whole.

It does not necessarily follow however that the process as approved was applied in a fair way to individual members. Nor does it follow that because a delegate was present at each interview, all the defects identified by Mr Pa'u are automatically cured.

The extent of the members' opportunity to speak privately with their representative was in the few moments spent walking with him to the office. This is in my view clearly inadequate. In addition, as Mr Stephens' evidence shows, the principal role played by the delegate seems to have been to act as watch dog to ensure consistency of treatment between members and non-members.

Whether because of these factors or for other reasons, the delegate did not appear to play an active role in the meetings, certainly not that of a fully participating representative.

I am satisfied that the union members were handicapped as were the other three by the lack of the notice of the interview and the lack of information presented. The limited nature of the delegates' involvement in the interview process was such that it did not remedy these defects.

Were the individual redundancies justified?

The final question for determination is whether the flaws in the selection process were sufficiently serious as to render the dismissals substantively unjustified.

I have concluded that they were not. The process overall was in my view extremely robust and thorough. None of the applicants were able to point to any information that could have changed his ranking on the list. In particular, I note that several applicants told me that they had faith in Mr Birch to assess their skills properly. It was because of this that I called for him to give evidence. As I have set out above, he explained that he had been fully involved in the selection process, including the long final day of deliberations on the Thursday. His evidence was that a great deal of effort and thought had gone into this process, and I was very favourably impressed by him as a witness. I am satisfied that the basis for the selection of redundant employees was sound.

The respondent's failures have understandably had an impact on how the applicants viewed their dismissals but in my view nothing could have changed the outcomes. I am satisfied that these were genuine redundancies.

Remedies

It follows that there can be no awards for loss of earnings.

However, it remains open to me to make awards of compensation for the distress arising out of the procedural failings. To some extent all of these can be characterised as failures to keep the applicants properly informed. For example, the lack of advice as to how the interview list was arrived at undermined confidence in the objectivity and fairness of the process. So did the perception that Mr Birch had not had input into the decisions about who should go.

I acknowledge that the respondent endeavoured in good faith to conduct a fair process. In an attempt to make it quick it missed out some crucial steps, and made the inevitable pain of redundancy worse as a result. Having undertaken to conduct individual interviews, it was obliged to ensure that they constituted real and effective opportunities for input. Unfortunately they were not.

On that basis modest awards of compensation are called for.

I note that I have distinguished between certain procedural failings in the case of the union members and more extensive failings in the cases of the non-members. Since compensation is not punitive in nature, however, and because the individuals did not distinguish between the distress caused by different elements of the respondent's conduct, I have decided that it most equitable to award all the applicants the same sum pursuant to s.123.

I stress that the awards are to remedy the distress arising out of the procedural defects only and do not remedy the loss of the job itself.

The respondent is ordered to pay each of the applicants the sum of \$3,000.00.

Costs

This matter is reserved and the parties are invited to attempt to resolve it between themselves. If that proves impossible, they have a period of 28 days from the date of this decision in which to make a request that I determine the issue.

Yvonne Oldfield,
Member of Employment Relations Authority