

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2014] NZERA Auckland 229
5433938**

BETWEEN KRISTAPS MAULVURFS
 Applicant

AND TURNCO ENGINEERING
 LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Catherine Murray, Advocate for Applicant
 Keith O'Connell, Advocate for Respondent

Investigation Meeting: 9 May 2014 at Auckland

Submissions received: 9 May 2014 from Applicant and from Respondent

Determination: 11 June 2014

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Kristaps Maulvurfs, was employed as a Fitter/Turner by the Respondent, Turnco Engineering Limited (Turnco), for 11 years prior to his employment being terminated by reason of redundancy on 20 May 2013.

[2] Mr Maulvurfs claims that he was unjustifiably dismissed on the basis that the reason he was selected for redundancy was as a result of the health and safety issues he raised.

[3] Turnco denies that Mr Maulvurfs was unjustifiably dismissed and claims that he was justifiably dismissed on the basis that his established position as a Fitter/Turner was genuinely redundant.

Issues

[4] The issue for determination is whether or not Mr Maulvurfs was unjustifiably dismissed by Turnco.

Background Facts

[5] Turnco is an engineering business that builds high quality plant and equipment for the mining and quarrying industries, employing approximately 10 employees including Mr Maulvurfs and one other Fitter/Turner, fabricator welders, general hands and a foreman.

[6] Mr Maulvurfs was employed as a Fitter/Turner, however during the period of his employment he had also carried out assembly, fabrication, rebuilding, grinding, drilling and fitting tasks.

[7] Mr Bob Cockle, Director and Manager, said that at the commencement of Mr Maulvurfs' employment, Turnco had customers including the Ford Motor Company, Alcan Aluminium and Solid Energy, and the work carried out on their behalf had included a significant amount of machining work. This situation had resulted in the level of turning work carried out by Mr Maulvurfs constituting approximately 90% of his work load.

[8] However since 2008 Turnco's customer base had changed and the requirement for specialist turning services had reduced significantly. During the period prior to 2011 it had been necessary to reduce the hours of all the employees and there had been a redundancy situation.

[9] Mr Cockle explained that since 2011 the operational situation had improved. Currently Turnco's largest customer is Award Attachments for whom it builds container tilters. This work includes fabrication and assembly; however there is no machining content. As a result of these changes there was virtually no demand for specialist turning services.

[10] Mr Maulvurfs agreed that some of the major customers for whom he had done turning work in the past had closed down or reduced their demand for machining services, however he said that he had still been busy and had carried out turning work.

[11] Mr Maulvurfs said that during late 2012 he had been aware that Mr Cockle was assigning turning work to other employees. Mr Cockle said that Mr Maulvurfs would carry out all sizeable turning jobs; however in the absence of turning work, he had assigned Mr Maulvurfs to alternative work. If a small turning job came in whilst Mr Maulvurfs was engaged on another task, he would ask another employee to undertake it rather than disturb Mr Maulvurfs in the task he was carrying out.

Meeting 21 February 2013

[12] Mr Cockle said that Mr Maulvurfs had been reluctant to undertake alternative work to turning and he had invited him to a meeting to be held on 21 February 2013 to discuss that issue and a number of others. In the letter dated 19 February 2013 Mr Cockle had referred to:

- *A drop off in turning work e.g. Solid Energy work cut back and container tilters parts are now being imported from China*
- *Your reluctance to perform alternative work that you are capable of doing*

[13] Mr Cockle also noted in the letter that the meeting to be held on 21 February 2013 was not a disciplinary meeting but: “*one to clear the air, identify problems in the employment relationship and agree on how both parties can work co-operatively together*”.

[14] Mr Maulvurfs agreed that his undertaking alternative work had been discussed and he had agreed to do so.

[15] Mr Maulvurfs said that during the meeting on 21 February 2013 health and safety in the workplace had been discussed and he had asked where the accident record book was kept, what procedures were followed in accordance with it, and the identity of the health and safety representatives.

[16] Mr Cockle said that immediately following the meeting he had actioned the health and safety queries raised by Mr Maulvurfs, who agreed at the Investigation Meeting that the information had been provided as he had requested.

[17] In addition Mr Maulvurfs had raised a concern in relation to the amount of painting and welding work being undertaken on site because there was no extraction system and he did not feel well as a result of the fumes generated by the painting and welding processes.

[18] Mr Cockle said that prior to the meeting held on 21 February 2013 he had issued an instruction that all painting was to be carried out outside the premises during working hours wherever possible, and inside only at the close of the working day.

[19] He explained that the Turnco premises were impressive in size, covering a large area as Turnco catered for the heavy equipment used in the mining and quarrying industries. It contained several rugby field size storage areas, a very large machine shop area, and had 8m x 8m clear opening doors which were usually open during the working day. Consequently there was good ventilation.

[20] Although he had not considered there was a problem with the air quality, he had responded to Mr Maulvurfs' concerns by contacting several companies enquiring about an air quality survey being carried out.

[21] On 4 April 2013 Mr Maulvurfs wrote to Mr Cockle outlining his continued concern about the painting and welding fumes. He concluded the letter:

Health Issues

My health is affected by the amount of air pollution.

My doctor reports that the X-ray results are good. But it is only when welding, painting and ARC dust of all kinds is going on with doors shut and no ventilation, my health gets worse.

Alternative Duties

If Bob can take me off turning three times or so a day to do other work, why cannot Bob take me off alternative work to get back to turning?

[22] Mr Cockle responded by letter dated 15 April 2013 stating:

Painting

A record of all painting completed from 20th March to 13th April is attached for your information. On the one occasion you complained about the painting, it was being done outside.

Welding

All welding wire and rods etc. do have a health warning but you do not complete welding and the number of hours our welders actually weld should not constitute overexposure to you. ...

Ventilation

We are awaiting quotes from two ventilation specialists and another quote to test atmosphere. The building is still ventilated even when all the doors are shut, which would only occur very rarely.

Health issues

You have given no examples or evidence of how your health is being affected. Because the building is constantly ventilated and you are not welding the problems with fumes and dust should be minimal. Masks are available for you to wear them and you do wear them.

Alternative Duties

When turning work is not available, turners are put on other duties, when it becomes available the turners will be asked to complete it.

[23] During the Investigation Meeting Mr Maulvurfs confirmed that he had not provided Turnco with medical evidence that his health had been affected in any way by fumes from the painting and welding operations.

[24] A further meeting was held between Mr Maulvurfs and Mr Cockle. At the meeting Mr Cockle explained the control plans being utilised by Turnco in regard to painting and he provided an update on the testing of the air quality by an independent third party, Air Matters.

[25] Mr Cockle said he had, as requested by Air Matters, asked Mr Maulvurfs if he was prepared to wear a monitor on his lapel in order to ascertain if he was being subjected to toxic fumes, but his response provided by letter dated 2 May 2013 had been that it would be fair to have all the employees wear the devices, although he had subsequently agreed to do so.

[26] Mr Cockle said that the cost of all employees wearing the monitors would have been prohibitive, however subsequently three other employees had agreed to wear the monitors, one of whom was a welder. The results of the tests carried out by Air Matters were that the level of fumes and gases in the Turnco premises were below Worksafe NZ's Workplace Exposure Standards.

Restructuring Process

[27] In May 2013 Mr Cockle devised a business plan because since January that year he had been struggling to fully utilise the two specialist machinists. As a result he had arranged a staff meeting to be held on 6 May 2013.

[28] During a staff meeting on 6 May 2013 Mr Cockle said he had discussed the situation with the employees and presented a proposal to close down the machine shop. All employees were provided with a copy of the Business Plan proposal which set out the reasons for the proposal as including:

-Container filter orders to increase with 14 filters in the next quarter and more in the months following including more orders for rebuilds.

-Filter work is completed at minimal profit or breakeven depending on hours taken to manufacture but as we see it, during these tough economic times it is work to carry us through till the world economy gets back to normal ...

-Turning and machining work is completed on an ad hoc basis, not a contractual agreement and looks set to continue its substantial drop off

-Solid Energy, it could be years before they start to order machined parts again

-Several previous large customers have downsized or closed down ...

-There is no likelihood of turning and machining work returning to past levels because specialist engineering workshops are becoming more cost effective as competition and their capabilities increase as they move towards CNC equipment.

[29] The notice concluded with a proposal to close down the machine shop which: "... is currently not economic to keep open" and stated :

*This is a proposal only at this stage and we would value your suggestions on this proposal. Bob will be having one to one meetings with all staff members to discuss this proposal during **9th and 10th May**. If you would like to bring a support person with you to that meeting please let Bob know so he can organise a meeting time.*

[30] During the following week Mr Cockle held one to one meetings with all the employees at which various suggestions were made including providing alternative work for the machinists, reducing working hours and working a 4 day week, and creating a general hand position.

[31] Mr Maulvurfs said he was invited to attend a one to one meeting with his support person on 10 May 2013 or as an alternative on 16 May 2013. As his support person was not available, Mr Maulvurfs said he had attended a one to one meeting with Mr Cockle on 15 May 2013 without his support person.

[32] During the meeting Mr Maulvurfs had told Mr Cockle that he was willing to be flexible if and when the machine shop closed and that he would be willing to undertake any other type of work.

[33] Mr Cockle convened a further staff meeting on 17 May 2013 at which he announced that the machine shop would close with effect from 17 May 2013. Mr Maulvurfs said that the other Fitter/Turner had asked if any employee would be leaving Turnco as a result and Mr Cockle had responded: "No".

[34] Mr Cockle said that the other Fitter/Turner had yelled out: "*am I going to be sacked?*" to which he had replied that no decision had been made as he still had to talk to him and Mr Maulvurfs.

[35] That same day, 17 May 2013, Mr Cockle wrote to Mr Maulvurfs asking him to attend a meeting on 20 May 2013 to discuss the machine shop closure and "*alternative employment opportunities*".

[36] Mr Maulvurfs responded that he was unable to attend the proposed meeting as his representative was not available on that date, but that he would attend a meeting after he returned from the annual leave. As a result the meeting was postponed until 17 June 2013.

[37] During the end of May 2013 Mr Cockle said he had met with the other Fitter/Turner affected by the machine shop closure and had offered him a position in a general hands position on the basis that he had longer continuous service with Turnco than Mr Maulvurfs.

[38] When Mr Maulvurfs attended for work on 17 June 2013 prior to the meeting with Mr Cockle scheduled to take place at 8.30 a.m., he had noticed that the rubbish bin in the machine room was full with swaff resulting from drilling which could only have been done in the machine room, and that there were parts of a crusher in the lathe. He therefore concluded that there was still machine shop and turning work to be done.

[39] Mr Cockle explained that one of the employees had a job to repair rock crushers, one of which was in for repair. As a result he had put one of the components in the lathe to check it, however there had been no subsequent machining undertaken.

[40] As regards the swaff, there had been a small amount of drilling undertaken by an employee working on aluminium wheels.

[41] At the meeting held with Mr Maulvurfs on 17 June 2013 Mr Cockle advised Mr Maulvurfs that his position was redundant as a result of: “*the down turn of the economy, the substantial drop off in turning and machining work and the change of the focus of our business to fabrication to meet demand*”. This was confirmed by letter dated 17 June 2013

[42] Mr Maulvurfs said he had written to Mr Cockle the following day and requested to be reinstated as he was sure there was still work for him to do. Mr Cockle had responded by letter dated 20 June 2013 advising him that since the decision to close the machine shop had been made there had been no turning work undertaken and that: “*... the reality of the situation is that we haven't had enough work to fully employ two machinists for some time and it looks like there will be no change in the foreseeable future*”.

[43] Mr Maulvurfs said he was upset when he read in the letter that the other Fitter/Turner had been offered alternative employment:

The decision to close the machine shop was made after all the employees were consulted and their suggestions about alternatives were reviewed. One of the suggestions to employee (sic) a general hand/cleaner/storeman was implemented. This job was offered Jim, who had longer service than you. He accepted and has been employed on new terms and conditions of employment.

[44] Mr Maulvurfs raised a personal grievance on 26 August 2013 by letter to Mr Cockle and requested that his position be reinstated. Mr Cockle replied on 2 September 2013 reiterating that the situation had not improved and there was no work in Turnco for Turner/Fitters.

[45] On 28 January 2014 Mr Maulvurfs filed a Statement of Problem with the Authority. The parties subsequently attended mediation, but this did not resolve the matters between them.

Determination

Genuine reason for the redundancy

[46] It is clear from the evidence provided that Turnco's business base had changed during the years in which Mr Maulvurfs had been employed; significantly a number of large customers had closed or reduced their demand for turning services. As a result of the change in the customer base, Turnco's financial position had been impacted negatively prior to 2011,

which resulted in a redundancy exercise and a reduction in the working week for the employees.

[47] Whilst the operational situation had improved from 2011, this was attributable to an increased customer demand for fabrication and assembly services, but not for specialist turning services.

[48] The change in the customer demand for services resulted in the machine shop services being surplus to requirements and accordingly the positions of the two Fitter/Turners becoming redundant

[49] I find that there were genuine reasons for Mr Maulvurfs' position being made redundant.

Fair Procedure

[50] The Test of Justification as set out in s 103A of the Employment Relations Act 2000 (the Act) addresses the question of whether or not an action was justifiable or is unjustifiable and states:

S103A Test of Justification

- i. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- ii. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[51] Other provisions of the Act govern questions of justification for dismissal and, in particular, by reason of redundancy. Section 4 of the Act addresses the requirement for parties to the employment relationship to deal with each other in good faith. Section 4(1A)(c) in particular is relevant to a redundancy situation and requires 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, to provide to the employee affected:

“(i) access to information, relevant to the continuation of the employees’ employment, about the decision; and

(ii) an opportunity to comment on the information to their employer before a decision is made.” s4 (1A)(i) and (ii).

[52] I find that Turnco did adopt a fair procedure. During the meeting held on 6 May 2013 all the employees, including Mr Maulvurfs, were advised of a business plan which included a proposal to close the machine shop, and the reasons for that proposal were provided to them in writing for consideration prior to a series of one to one meetings which were to be held during 9 and 10 May 2013.

[53] All the employees were told that the business plan was only a proposal at that time and they were invited to provide feedback at the one to one meetings, including Mr Maulvurfs. Although Mr Maulvurfs did not provide feedback, the other employees did so and I find that Mr Cockle gave these suggestions full and proper consideration, subsequently adopting the suggestion to appoint a general handyman.

[54] I conclude that Mr Maulvurfs was provided with relevant information prior to the decision being made about his continued employment, including the opportunity for him to comment on the proposal to close the machine shop and provide suggestions to assist with averting the redundancy situation.

Selection

[55] Mr Maulvurfs’ evidence was that he attributed his selection for redundancy to the fact that he had raised health and safety in the workplace concerns. I find that Turnco responded positively and cooperatively to Mr Maulvurfs concerns. The concerns were taken seriously, and time and expense were incurred in arranging for the air quality survey and testing which was carried out by an independent company, and also instructions were given that the painting was to be carried out outside the premises and inside only after normal working hours.

[56] I do not find that Mr Maulvurfs was selected for redundancy because he raised health and safety in the workplace concerns, but because his established position as a Fitter/Turner was no longer required as a result of a change in the business operation of Turnco.

[57] Mr Maulvurfs said that he thought it was unfair that the other Fitter/Turner had been offered the general handyman position rather than him. Mr Cockle explained that the other Fitter/Turner had been offered the position on the basis of his longer continuous service with Turnco. In the absence of any other selection criteria, and Mr Maulvaufs did not raise any

such criteria, I observe that LOFO (Last On First Off) is an acceptable selection criteria in New Zealand.

[58] Moreover the general handyman position was not a comparable position with that of Fitter/Turner, involving significantly different duties and less attractive terms and conditions of employment.

[59] I have considered whether or not Turnco mislead Mr Maulvurfs into believing his employment was secure, particularly by the request to “*discuss the machine shop closure and alternative employment opportunities*” in the letter dated 17 May 2013. Given the context, I find that the information provided to Mr Maulvurfs since the meeting of 6 May 2013 had made it clear that the machine shop was to close and in that event, the employment opportunities for on-going full-time employment with Turnco were limited.

[60] On that basis I do not consider that Mr Maulvurfs was misled into thinking there was ongoing employment, which had been made clear at the 6 May 2013 meeting, rather what was being explored were the options for possible casual employment as was subsequently referred to in the letter dated 20 June 2013.

[61] In all the circumstances I find that Turnco adopted a fair procedure.

[62] I determine that Mr Maulvurfs was justifiably dismissed by Turnco on the basis of a redundancy situation, and I am unable to assist him further.

Costs

[63] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority