

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 116
5290177

BETWEEN DAVID MILLS
 Applicant

AND BOSS NZ LIMITED
 Respondent

Member of Authority: G J Wood

Representatives: Brenda Osborne for the Applicant
 Kim Stretton for the Respondent

Investigation Meeting: 5 April 2011 at Palmerston North

Submissions Received: 16 May 2011

Determination: 6 July 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Mills claims that he was unjustifiably dismissed from his position as meat processing manager at Boss New Zealand Limited's Feilding pet food factory. In particular he claims that his dismissal for redundancy was a sham and/or that it was not handled fairly. In the alternative, he claims that he was constructively dismissed because if he is found to have resigned, then this was as a result of the sham redundancy process and pressure placed on him to leave, as well as Boss unilaterally altering the terms and conditions of his employment. In addition, a penalty for breach of good faith is sought.

[2] Boss claims that Mr Mills resigned of his own accord to take up his own home kill business, which would have contracted work from Boss amongst others, a proposal suggested by him in the course of a consultation process over possible redundancies at Boss.

Credibility

[3] There can be no certainty as to what happened in these matters, which took place several years ago. The Authority is, however, charged with determining what has happened on the balance of probabilities, i.e. what is more likely than not to have occurred. Unfortunately, in this case I have been unable to accept without question the evidence of the two main protagonists, Mr Mills and Mr Mark Russell (the key director of Boss in this case), although for entirely different reasons.

[4] Mr Mills appeared to be entirely genuine in his evidence, but unfortunately he suffered a serious brain injury many decades ago and still has severe memory problems. For this reason alone, I have not been able to rely on his written or oral evidence. In addition, Mr Mills delayed making serious complaints about his position until after he had left and noticed what he claimed to be his job advertised. I do not accept that, as the position was that of a casual boner who appeared to work only a very limited number of hours, and was required because Mr Mills had declined to do that work.

[5] Mr Russell's evidence, by contrast, can best be described as inconsistent, particularly when compared to previous statements he has made under caution to a MAF investigator. On the one hand he told the MAF investigator that Mr Mills was to be replaced as early as February 2009, yet his evidence before the Authority was that Boss was still going through a genuine redundancy process in August 2009 involving both him and the present processing manager. Furthermore, Mr Russell admitted in evidence to exaggerating the situation with Mr Mills so as to evade responsibility with MAF, and to being deceitful over giving Mr Mills a pay rise but not having it recorded in the books. In addition, Mr Russell offered to give Mr Mills a new reference but did not ever do so.

[6] I can therefore have no confidence in the evidence of either witness. Normally I would have recourse to documentation to help determine disputed events, but some of the documentation in this case presented by Boss may not have been created at the time. I have, however, relied on the documentation where it has not been disputed, or where it is typed and there are markings to show that the matters typed were discussed with Mr Mills, but I have disregarded any handwritten comments. I have also accepted as fact documents that Mr Mills received but did not object to at the time, although he may now object to their accuracy.

[7] Finally, I have relied on the evidence of Mr Mills' support person at the restructuring meetings even although Mr Mills believes he is beholden to Boss because he has subsequently received some work from it as a tradesperson. I do so for two reasons. First, I do not accept that the level of work received was sufficient to create the sort of attachment to Boss that Mr Mills believes his former friend and support person now has, thus causing him to give false evidence to the Authority. Second, having heard the support person give evidence, I find him to be a credible witness, supported as his evidence was by the steps Mr Mills took to set up his own home kill operation with the assistance of his support person. I have also relied on the evidence of the factory processing manager. Although he is closely aligned with Boss, being an existing employee, he appeared to give clear and consistent evidence, undisturbed by questioning.

Factual discussion

[8] Boss New Zealand Limited is a meat company based in Mount Maunganui that is run by Mr Russell and his father. It also operates pet food processing factories in Wanganui and Feilding. The leased Feilding factory opened in November 2007 with a frozen pet food division, plus a division that slaughtered culled sheep and down cows. Towards the end of 2008 the frozen pet food manufacturing division closed down, as that operation was contracted out. All staff in that division were made redundant.

[9] Mr Mills, however, had been employed as the manager of meat processing in January 2008 and worked with another worker until that worker was dismissed in October 2008. This left Mr Mills as the sole Boss employee at Feilding, apart from occasional casual labour.

[10] I accept that, because of his memory problems, Mr Mills was not as productive as he might have been and that this became of greater and greater concern to Mr Russell. This was particularly so as the Feilding plant was never profitable during Mr Mills' employment. During this period, Boss also had two major problems with MAF over animal welfare, for which Mr Mills and Boss blamed each other.

[11] In particular, I accept that in February or March 2009 Mr Mills was informed that Boss was to go ahead with organic stock processing for an American client and that the down cow trade could be increased significantly by offering to pay farmers

for down cows, as opposed to the strategy of their only competitor, which actually charged farmers to take away their down cows. While these ventures were to prove unsuccessful because the organic US trade did not eventuate at that time, and because farmers stuck with their existing down cow processor despite the cost differential, these were still genuine efforts by Boss to turn the financial situation at Feilding around.

[12] In about March, Mr Russell was advising Mr Mills that he was looking for someone to help him and had, without Mr Mills' knowledge, advertised for a processing factory manager. This was one of a number of discussions with Mr Mills whereby Mr Mills was informed of problems and potential solutions to the unprofitability of the Feilding plant. As a result, I accept that Mr Russell engaged the present manager, in line with Boss' expansion plans, even although Mr Mills was still nominally employed as the manager. I also accept that Mr Mills was informed of the intention to have two staff at Feilding but that he has forgotten that. In any event, the new employee did not start until May. The need to return full time staff levels to two resulted from the organic and down cow initiatives.

[13] In April 2009, Mr Russell made it clear to Mr Mills that productivity was unacceptable and that the weekly kill was to be supervised by a manager from one of Mr Russell's other companies. It certainly became clear from the production statistics that productivity was significantly greater under the later manager than under Mr Mills. In particular, the memo stated:

You've had a fairly free hand down there for the past four months and unfortunately the financial results are totally unacceptable. The effort you are putting in is not in question. The way in which you have been going about things is so this is what we need to focus on.

[14] Mr Mills wrote back responding to the fax about productivity, rejecting the claim because the cause of it was not him, but not enough help and inadequate machinery. Mr Russell's response was that production was Mr Mills' responsibility and it was not appropriate to blame other factors.

[15] In particular, I rely for the above findings on Mr Russell's marked up notes of a meeting with Mr Mills that stated:

Organic cow and sheep production – is going ahead so Mark is advertising for someone to manage it onsite whilst David remains

responsible for offsite slaughter. Andrea will remain doing the boning etc for both slaughtermen.

[16] It also noted that advertisements in the local paper for down cows were working.

[17] On 12 May the new employee started training. Mr Mills made no objection to the appointment of the new staff member. It was also made clear that Mr Mills was now to report to the new manager. I accept that Mr Mills made no objection to this either.

[18] Mr Mills did, however, ask how his job description had changed as a result of the new appointment. Mr Russell responded by stating:

You are still expected to perform the same tasks you always have but Gordon is now taking responsibility of the management (production rostering, animal welfare etc) aspects of the factory for reasons discussed last week and in the various earlier discussions we've had. ... At this point in time we think it best that you concentrate on the offsite slaughter leaving Gordon to focus on the onsite processing and factory management. ... To confirm your hours of work, wage rate etc are not changed.

[19] Mr Russell relied on the following clause in Mr Mills' employment agreement under the job title/description:

The employee is engaged to undertake meat processing and management. The employee is responsible to Mark Russell.

To ensure the continued operation of the business, the employee may be assigned alternative/additional duties by the employer from time to time when business requirements dictate.

[20] After the new manager was fully inducted and trained up, essentially by Mr Mills, Mr Mills concentrated almost entirely on off site slaughter work.

[21] During the period from when Mr Mills first became aware of the advertisement for the new staff member, he had started looking for alternative employment and organising to set up in business with his own home kill operation, such as registering for GST, looking for clients and equipment and registering a company.

[22] Unfortunately, the season was a very bad one for down cows and the US organic work was delayed. By early August Mr Russell had decided that he could not continue to employ two staff at Feilding any longer. Thus because losses were

increasing monthly, consultation was initiated by Mr Russell to determine whether the plant would continue to operate at all and, if so, whether more than one employee was required. At a meeting attended by Boss' directors (Mr Russell and his father), the two employees and Mr Mills' support person, the financial situation and thus the need for change was again emphasised. The options put forward by Boss were that the plant be closed, or that current staff numbers be reduced from two to one.

[23] It was clear from the evidence of Mr Mills' support person that he and Mr Mills knew beforehand that lay offs could occur and that Mr Mills had been thinking of doing home kill work as an alternative to employment with Boss. When Mr Russell asked for any further ideas, Mr Mills' support person suggested that Mr Mills could go contracting and be paid on a per head base for slaughter work done for Boss, as well as do his own home kill work. There was then discussion on this proposal, which was suggested to be offered on a labour-only basis, with Boss remaining the owner of the truck and equipment. Mr Russell wanted a rate to be tabled at the next meeting for the proposed contract work. Mr Russell said that if on the other hand there was to be a redundancy situation then there would be an assessment by him of both Mr Mills' and the new manager's merits. He then set out what the selection criteria would be.

[24] The next meeting was held on Tuesday, 11 August, with only Mr Russell, Mr Mills and his support person present. Mr Russell asked Mr Mills if he was still considering contract killing and he confirmed that that was his preference. Mr Mills stated that he wanted to work for two or three days a week doing contract killing for Boss and the rest of the time on his own home kill business. There was discussion about rates that would be charged per cow and who would provide plant and equipment. There was also a discussion about which other potential clients Mr Mills had discussed matters with.

[25] Mr Russell said that he did not want Mr Mills to commit to contracting by pressuring him to make a decision that day and that he was happy to give him a few more days to think it over. He offered Mr Mills the opportunity, in case he changed his mind, to then go through the assessment process. The assessment questions were covered off and Mr Mills again confirmed his preference for contracting. Mr Russell explained that if Mr Mills decided to terminate his position and go contracting, there

was no need to complete any redundancy process. Mr Mills said that he wanted to go home killing and would come back to Mr Russell with a rate.

[26] The meeting concluded with Mr Russell asking Mr Mills to confirm that that remained his position before Mr Mills went on holiday on Friday, 14 August. On 13 August, Mr Mills rang to confirm that he was going to take up the contracting option. It was agreed that he would work until 28 August and that other assistance would be given to him in his contracting business, such as use of Boss' truck.

[27] Mr Russell confirmed this notice in writing later that day because Mr Mills could not write out a resignation as requested, as he was covered in blood. The letter concluded:

We await receipt of your draft presenter next Wednesday, when you return from holiday, and further details on your contract service that you'll make available to our company.

[28] Because of the need for a casual boner to cover during his leave, one was engaged for the period of his absence, but that person has not been engaged subsequently.

[29] Mr Mills then went to the other employee and told him that he had done him a big favour and had resigned, and thus his job was safe, because Mr Mills had decided to leave to set up his home kill business. Mr Mills worked right up until 28 August, without raising his present claim that the letter of notice was completely wrong in that he had not resigned but that he had been made redundant.

[30] On Mr Mills' last day, the other employee checked with Mr Mills to ensure that he would be in on Monday to start the contract work, but was told that he was too busy doing his own work and would not be coming in. Subsequently there was more casual boning work advertised by Boss, because Mr Mills had upset Mr Russell by not doing the work that had been expected of him as a contractor that next week. As a result, there was never any agreement made for contracting by Mr Mills' company to Boss.

[31] In that last week, the other employee had provided Mr Mills with a reference as requested where he stated:

Unfortunately due to a restructure within the company, David's position has become redundant.

[32] I accept that the manager wrote this letter with the intention of making life easier for Mr Mills, whether or not it was strictly accurate with respect to that comment.

[33] Mr Mills claimed a benefit during the last week of his employment. Subsequently, the payroll manager for Boss stated that Mr Mills' position had been made redundant.

[34] Boss advertised for casual labour again at the end of September because of an upturn in work. In fact that worker was taken on permanently some eight months or so later when the organic work commenced. Even then, the work has been up and down, and the staff have been required to work at the Wanganui plant from time to time.

[35] Unfortunately, Mr Mills' home kill business was not a success.

[36] Mr Mills promptly raised a grievance on 8 September 2009, but the matter has not been able to be progressed quickly because of delays by Boss, particularly in attending mediation. Despite efforts at the Authority investigation meeting to resolve matters, this has not proved possible. It therefore falls to the Authority to make a determination.

Determination

[37] It is always open to an employer to change the way its business operates, even on a speculative basis, as long as it is genuine. Boss' initiatives involving taking on more staff in the hope of turning around a loss making operation is an example of such an initiative. On the facts here, I accept on the balance of probabilities that the initiative was genuine. It made sense to put Mr Mills, whose skills were in butchering and in dealing with farmers, in charge of the off site operations and bringing in someone else to run the on site operations. This role involved planning and paperwork skills that Mr Mills did not possess in great quantity because of no fault of his own, namely his brain injury. Just because the experiment failed did not mean that it was not a genuine effort to improve Boss' Feilding business. There was no evidence that the organics initiative was a ruse of some sort, nor that the down cow business initiative did not take place or that it had not failed.

[38] I can understand why, after only three months of there being two staff, Mr Mills would think that the changes were designed to bring the new employee on and replace him, and such was always anticipated by Mr Russell. That certainly is a possibility, but on the balance of probabilities, I conclude for the reasons given above that this was a genuine initiative. In particular, it is difficult to accept that Boss would spend over \$10,000 in advertising efforts for the down cows if this was simply a ruse for Boss to rid itself of Mr Mills.

[39] It therefore follows that Boss was then entitled to reconsider its staffing of Feilding, even though the second employee had only been there for a relatively short period of time, particularly compared with Mr Mills. The restructuring situation was therefore not a sham.

[40] I accept that in essence Mr Mills' role was made redundant, but that Mr Mills' employment was terminated by mutual agreement so that he could go home killing and contract such services back to the company part time. He was not therefore dismissed let alone unjustifiably.

[41] On the other hand, the way Mr Mills was treated could have led to a disadvantage grievance, particularly after he was relieved of management of the Feilding operation and the subsequent appointment of the second employee, who was to become manager in very short order. However, no such grievance was raised in time, nor pursued in the Authority. Given that the redundancy was genuine, that Mr Mills participated in the process to determine the future of the employees at Feilding and indeed the plant itself, and that he chose to pursue a contracting home kill business, meant that he was not dismissed, nor was he constructively dismissed as I have concluded that the initiative for his termination did not come from Boss. Rather he chose to make the best of a bad situation by opting to go home killing. It is certainly strange that Mr Mills and Boss never entered into an arrangement to do Boss' home killing at Feilding. That does not, however, make his decision to go contracting an unjustified dismissal.

[42] As can be seen from my determination of the facts, Mr Mills' position was made redundant. However, he was never dismissed for redundancy because he agreed to leave to take up a contracting position with Boss. However, this never eventuated because Mr Mills told Boss' Feilding manager that he was too busy to do work for it, even if that were not the case. As he was not dismissed, there can be no claim for

unjustified dismissal. Even if I were wrong in that finding, and Mr Mills was dismissed for redundancy, such redundancy was genuine for the reasons given above.

[43] Furthermore, I accept that the redundancy process operated by Boss was a fair one and that Mr Mills was forewarned of the issues and was able to fully take part in the consultation process. In fact, he provided a way forward for himself and Boss, which is consistent with the very purpose of fair consultation. There was no breach of duty by Boss in this regard.

[44] In addition, I conclude that there was no constructive dismissal. The initiative for Mr Mills' leaving his employment came about because of the potential for redundancy, not for any breach of duty by Boss. Indeed, where there was potentially a breach of duty by Boss to Mr Mills in removing his managerial status and responsibilities, any such breach did not cause Mr Mills to resign some months later and therefore can not support a claim for constructive dismissal.

[45] I therefore dismiss all of Mr Mills' claims.

Costs

[46] Costs are reserved.

G J Wood
Member of the Employment Relations Authority