IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 35/08
5079908

	BETWEEN	MICHAEL PATRICK ORGAN Applicant
	AND	INTEGRAL TECHNOLOGY GROUP LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Rodger Pool for Applicant Chris Patterson for Respondent
Investigation Meeting:	17 December 2007 at Auckland
Determination:	8 February 2008

DETERMINATION OF THE AUTHORITY

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[1] The Applicant says he was unjustifiably dismissed for redundancy from a position providing technical sales support for the Respondent. He says the Respondent misled him about the viability of that position at the time he agreed to move from his previous role as a sales account manager for the Respondent. He says the redundancy decision was neither genuine nor fairly carried out. He sought remedies of lost wages, paid notice that had been withheld from him, outstanding holiday pay and commission entitlements, distress compensation, a penalty for breach of good faith and his costs.

[2] During the investigation meeting the Respondent accepted that aspects of how it carried out its redundancy decision were unjustified and that it had wrongly withheld certain payments to the Applicant. It agreed to pay for a notice period that had been agreed with the Applicant and an entitlement to a commission bonus that

had been withheld. It also agreed to pay holiday pay entitlements and interest on the amounts due.

[3] However the Respondent maintains that its decision on the redundancy of the position was made for genuine commercial reasons – so that lost wages are not due to the Applicant – and that any distress compensation for the unjustified aspects of the process of carrying out the redundancy should be less than $5000.

[4] Accordingly the issues remaining for resolution in this determination are:

(i) was the redundancy of the position made for genuine business reasons in October 2006, or earlier as the Applicant asserts; and

(ii) what compensation for the hurt and humiliation of the admittedly unjustified process should be awarded to the Applicant?

The investigation

[5] This matter was not resolved in earlier mediation. To assist the Authority's investigation witness statements were lodged by the Applicant; his former manager Darren Sweetman, who at the time was the Respondent's National Sales Manager; the Respondent's managing director, Ray Noonan; and Martin Barry, a recruitment consultant. Sandy Good, a human resources consultant for the Respondent at the relevant time, provided additional sworn oral evidence about the redundancy process with the Applicant. All witnesses, under oath or affirmation, also answered questions from the Authority and counsel. Counsel provided oral closing arguments.

The law

[6] The Applicant's individual employment agreement expressly excludes payment of compensation for redundancy which it defines as "*a situation where the Employee's employment is liable to be terminated, wholly or mainly, owing to the fact that the Employee's position is, or will become, superfluous to the needs of the Employer*". It also provides that where the Respondent terminates the employment, it "*may elect to pay wages/salary in lieu of the Employee having to work out the notice period*".

[7] Under s103A of the Employment Relations Act 2000 ("the Act"), the

Respondent's decision to make the Applicant's position redundant, and how it went about dealing with him over any proposal, decision and consequences of redundancy, is justifiable if its actions were what a fair and reasonable employer would have done in all the circumstances at the time of the decision and dealings around it.

[8] The application of s103A to personal grievances involving redundancy was described in this way in *Simpsons Farms Ltd v Aberhart* [2006] 1 ERNZ 825 (EC):

> *[65] … the statutory obligations of good faith dealing and, in particular, those under s4(1A)(c) inform the decision under s103A about how the employer acted. A fair and reasonable employer must, if challenged, be able to establish that he or she or it has complied with the statutory obligations of good faith dealing in s4 including as to consultation because a fair and reasonable employer will comply with the law.*
> …
>
> *[67] … so long as an employer acts genuinely and not out of ulterior motives, a business decision to make positions or employees redundant is for the employer to make and not for the Authority or the Court, even under s103A.*

[9] The Authority must be satisfied on two general points – whether the business decision to make a position redundant was made genuinely and not for ulterior motives; and whether the Respondent acted in a fair and open way in carrying out that decision – particularly did it consult properly about the proposal to make the Applicant's position redundant and otherwise act in a way that was not likely to mislead or deceive him, that is in good faith?

[10] The Authority does not substitute its judgment for that of an employer as to whether there are genuine commercial reasons for a redundancy. As stated by the Court of Appeal in *GNH Hale & Sons Ltd v Wellington Caretakers and Cleaners Union* [1990] 2 NZILR 1079:

> *An employer is entitled to make his business more efficient, as for example by automation, abandonment of unprofitable activities, reorganisation or other cost saving steps, no matter whether or not the business would otherwise go to the wall. A worker does not have the right to continued employment if the business can be run more efficiently without him. The personal grievance provisions … should not be treated as derogating from the rights of employers to make management decisions genuinely on such grounds.*

[11] However, as explained by the Court in *Russell Harris v Charter Trucks Limited* (unreported EC, CC16/07, 11 September 2007, Judge Couch) at [105]:

> *In many cases, an unfair process leading to a dismissal for redundancy will result in an award of compensation for the distress caused by the process but not to remedies for loss of the job. This is because it can properly be said that the redundancy was genuine and that the employee would inevitably have been dismissed for redundancy even if an appropriate process had been followed.*

[12] A just employer – observing its obligations of confidence, trust and fair dealing and the statutory duty of good faith – will consult on a redundancy proposal and implement any redundancy decision in a fair and sensitive way. Fair treatment may call for counselling, career and financial advice, retraining and related financial support.[1] This requires more than "*going through the motions*" and will not justify a course of conduct carried out in a way that bruises rather than reasonably minimises the impact on the employee.[2]

[13] The good faith obligations of the Act required the Respondent to be active and constructive, responsive and communicative in consulting the Applicant about changes to the business and proposals which might impact on him, including redundancy: s4, s4(1A) and s4(4). This included providing access to relevant information and an opportunity to comment of the information before the redundancy decision was made: s4(1A)(c).

Genuineness of the decision

[14] The Applicant suggests that at the time he was persuaded to change from an account management role to a technical support role in the first half of 2006, the Respondent already had plans to disestablish his new position once all his accounts were transferred to other staff.

[15] He claims the Respondent, through its chairman David Sutherland, deliberately misled him because Mr Sutherland told him in March 2006 that the restructuring of roles would leave the Applicant with "the safest job in the company".

[16] He says that from July 2006, Mr Noonan and Mr Sweetman – the latter man being the Applicant's manager – talked on a number of occasions about making the

[1] *Aoraki Corporation Ltd v McGavin* [1998] 1 ERNZ 601, at 619 and 631 (CA).
[2] *Coutts Cars Ltd v Baguley* [2001] 1 ERNZ 660, 673 (CA).

Applicant's position redundant but did not inform the Applicant of that prospect or properly consult him about it.

[17] I do not accept that the evidence supports the Applicant's contentions about what would amount to a pre-conceived plan to make him redundant. Rather I prefer Mr Sweetman's evidence, which paints a different picture.

[18] I do so partly because Mr Sweetman's own employment with the Respondent was also terminated on the grounds of redundancy in the month following the Applicant. While he told me that his own employment ended without acrimony and that he received a severance payment as part of an agreement with the Respondent, his evidence was, I considered, more likely to be independent from the Respondent. Its relative independence and credibility was confirmed by some important differences from that of the Applicant and the Respondent witnesses and its frankness about whether his own role in the redundancy decision and process for the Applicant was entirely satisfactory.

[19] That evidence confirmed Mr Noonan's description of a number of discussions during the period between July and October 2006 between him and Mr Sweetman about how the reallocation of duties and the Applicant's new position was working out. That discussion was part of ongoing informal review of operations that forms a normal part of management and does not, of itself, confirm the Applicant's supposition that a secret decision was made during that period to make his position redundant.

[20] Neither is such discussion surprising. Throughout this period the Applicant himself was also expressing concern to Mr Sweetman and others about the amount of work there was for him to do in the new role. The Applicant's evidence was that he continued to help one of the sales account manager with technical work but this work "*started to reduce and become more piecemeal*" and apart from some retail work by October 2006 "*I now had virtually nothing to do*".

[21] While the restructuring exercise implemented in the first half of 2006 – including a new position for the Applicant – was not producing the results desired by the Respondent, its failure does not mean that the subsequent redundancy of the

Applicant's new position was not made for genuine business reasons or that he should have been entitled to remain in his previous account management role. While his sales performance in that previous role was well above budget, the Respondent was entitled to make the decisions it did to move him to another role, as the extracts from the *Hale* case cited above shows. That entitlement does not change where such decisions fail to bring the desired improvements in profitability and efficiency.

Compensation for unjustified process

[22] By October 2006 Mr Noonan and Mr Sweetman had come to the view that the Applicant's position could no longer be sustained. They also discussed whether any alternative roles might "fit" the Applicant but could not identify any. Mr Sweetman was charged with the responsibility of talking with the Applicant about the prospect of redundancy.

[23] Mr Sweetman had what he called a "heads up" meeting with the Applicant on Friday, 27 October and told him that his role was redundant. The Applicant was invited to think about his options over the weekend and attend a meeting on Monday, 30 October to discuss those options.

[24] Although a letter given by Mr Sweetman to the Applicant on 27 October refers to the company's "*initial assessment*" of the "*ongoing feasibility*" of the Applicant's position and a "*potential redundancy*", it was clear from the evidence of Mr Sweetman and the Applicant that the informal "heads up" meeting that day was less equivocal. The Applicant was suddenly presented with what was really a *fait accompli* – that the company had made a decision that his position was redundant and to think over the weekend of whether he could suggest any alternative roles.

[25] During the investigation meeting the Respondent accepted that this aspect of the process was unjustified as the Applicant was not properly consulted about the prospect of redundancy. Rather Mr Sweetman's comments had on 27 October indicated that the outcome was already decided before the 30 October meeting.

[26] It also became apparent from Mr Sweetman's evidence that the Respondent had not fully explored whether additional work could have been arranged for the

Applicant's role. Instead the discussion focussed on the Applicant's view that he had been "squeezed" out by the earlier restructuring. While he was asked about redeployment, the onus was put on him to suggest where else he could work rather than there being any discussion of whether there were any realistic options for redeployment or additional work. The Applicant turned down the option to take more time to consider possible redeployment to other areas of the business, saying there was no other area where he could be integrated.

[27] The Respondent's human resources consultant Sandy Good accompanied Mr Sweetman in his 30 October meeting with the Applicant. Her evidence – both from notes made immediately after the meeting and from her memory – was that the Applicant was "*clearly upset*" and "*very shaken*" during the meeting. While there was also some evidence that the conversational tone of parts of the meeting was jovial or at least convivial, it is also clear that the Applicant was to some extent trying to put on a 'brave face' to minimise the sense of embarrassment for himself, and Mr Sweetman and Ms Good, all of whom expressed discomfort with the situation.

[28] When Mr Sweetman confirmed that it was likely the Applicant's position would be made redundant, the Applicant said words to the effect: "*Well I will be off now then, no point in staying around*". Mr Sweetman did not disagree with the Applicant's view that he should leave immediately. Instead Mr Sweetman told him that while the Respondent would not pay redundancy compensation, the Applicant would be paid two months salary as notice and his outstanding commissions for sales to date. No conditions were stated for the payments.

[29] Although the Applicant did not use express words of acceptance of the arrangements for those payments, I find that this was clear from his conduct in standing up, shaking Mr Sweetman's hand, returning to his desk and promptly leaving the building.

[30] It is clear from Mr Sweetman's immediate subsequent conduct that he had the same understanding. He spoke with the Respondent's financial officer at the time and made arrangements for the payments due to be calculated and prepared for the Applicant.

[31] However the payment of the notice and commissions later became controversial. Some wages were paid to the Applicant the next day. Two days later he rang the Respondent's financial officer to ask when the rest would be paid. At this point he was told to contact Mr Sweetman to sign a form. When he did so he was asked to sign a form that would make those payments part of a "full and final settlement" for any personal grievance and wages or other monies owing.

[32] Although the form prepared with the Applicant's details was not available, either in original form or as a copy, it became apparent from the evidence of Mr Noonan and Mr Sweetman that the Respondent had a standard form for settlement agreements with departing employees. Mr Sweetman himself later signed such a form when his employment was terminated.

[33] The Applicant refused to sign such a form as it had not been a pre-condition of the payment of notice and commission that Mr Sweetman said he would receive. The Respondent subsequently withheld those payments to him. It changed its position on those payments in the light of Mr Sweetman's evidence during the investigation meeting. In addition to the paid notice that the Applicant had been promised, it became clear that he also qualified for a bonus under the Respondent's commission plan but payment of this had been wrongly denied to him.

[34] Since the termination of the Applicant's employment he has not gained a permanent full-time job. There was some evidence of a number of job applications made here and in Australia and Britain.

[35] Mr Barry, the recruitment consultant that the Respondent asked the Authority to interview for its investigation, was critical of the range of the Applicant's job search and whether he had done enough to find a suitable position. The Applicant was also criticised for not having taken up the Respondent's offer of providing counselling or career guidance. However these points do not assist this determination because, having found the redundancy was made for genuine reasons, the question of liability for lost wages does not arise. Rather the inquiry is limited to what compensation may be due for the hurt, humiliation and distress occasioned by the flaws in how the redundancy decision was implemented.

[36] Here I take account of the abruptness of the news of redundancy of the position, lack of consultation about the decision, the limited exploration of redeployment or alternative work prospects, and the withholding of payments of notice and commission to the Applicant. The latter action was clearly for the purpose of pressuring him to sign a full and final settlement agreement and, I find, was improper in the circumstances.

[37] While the process of being laid off from a job for redundancy is inevitably unpleasant, those actions of the Respondent were not fair and sensitive. They were, in the circumstances at the time, unjustified. The Applicant has a personal grievance that requires remedy.

[38] The Respondent has already agreed to pay outstanding salary and bonus with interest and additional holiday pay entitlements. The remaining remedy for consideration is an award of compensation under s123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to feelings.

[39] In setting the amount of such an award I take into account the hurt and distress arising from the actions outlined above. I exclude the impact and disappointment arising from the loss of the job itself. Under s124 of the Act I have also taken into account the Applicant's failure to take up the Respondent's offer of counselling or career guidance. This has likely contributed to the impact of the employer's actions on him and I have reduced the amount award by ten per cent.

[40] Taking those factors into account, all the particular circumstances of the case, the general range of awards in cases of this type, and after applying the reduction for contribution, I set the award for compensation under s123(1)(c)(i) at $6300.

Determination

[41] For the reasons given I find that the Applicant has not established that the Respondent lacked genuine commercial reasons for the decision to make his position redundant or had ulterior motives for doing so. However I have found that the Applicant has a personal grievance for the unjustified actions of the Respondent in

how it carried out its redundancy decision regarding the Applicant's position and the effect of those actions on him.

[42] The Respondent is to pay to the Applicant the sum of $6300 in compensation under s123(1)(c)(i) of the Act.

[43] The Applicant has also sought a penalty for breach of good faith by the Respondent. I do not find there is sufficient evidence of deliberate actions by the Respondent that would warrant the award of such a penalty.

Costs

[44] Costs are reserved. The parties are encouraged to resolve any question of costs between them. Should they be unable to do so and wish the Authority to determine costs, the Applicant may lodge a memorandum on costs within 28 days of the date of this determination. The Respondent has 14 days from that date to lodge any memorandum in reply.

Robin Arthur
Member of the Employment Relations Authority