

[3] Mr Orłowski was employed by Bridgestone as a tyre builder and in that capacity was covered by a collective employment agreement (the collective agreement).

[4] On 4 December 2007, Mr Orłowski was given a final written warning by Bridgestone for breach of the code of conduct which is an appendix to the collective agreement. Mr Orłowski was found to have tampered with a tyre building machine at the factory where he was employed.

[5] The final written warning, as well as referring to the alleged offence for which Mr Orłowski was warned and the investigation which followed on from that, indicates that Bridgestone had decided to transfer Mr Orłowski to another shift in the interests of *health and safety*. Bridgestone says that the relationship between Mr Orłowski and other workers on his original shift had deteriorated to such an extent that the health and safety of employees (including Mr Orłowski) might be at risk.

Issues

[6] There are three issues that require investigation:

- (a) Whether Bridgestone had the contractual ability to make the *involuntary* transfer between shifts;
- (b) Whether Bridgestone dealt appropriately with the disciplinary meeting, and in particular whether the health and safety concerns which formed the basis of the involuntary transfer were properly signalled to Mr Orłowski; and
- (c) If a personal grievance is found, what remedies ought to apply?

The contractual issues

[7] Quite properly, Bridgestone concedes that it has no unfettered right of involuntary transfer. Any transfer, whatever its circumstances, must be for proper reasons and Bridgestone submits (and I accept) that the test for whether a particular transfer is justifiable or not is the test contained in s.103A of the Employment Relations Act 2000.

[8] It is plain that the collective agreement is less than helpful on the issue of transfer from shift to shift. Bridgestone relies on provisions which refer to transfer by implication or which seem to contemplate such transfers without being specific as to when such transfers may be undertaken and when not. Bridgestone supports its position by also relying on evidence of involuntary transfers of other staff and the inclusion of a provision in new letters of appointment confirming the right to transfer.

[9] The two particular provisions in the collective agreement on which Bridgestone relies are clause 7.2 and clause 14. It is useful to set the relevant parts of those provisions out in full:

7.2 *We may vary the scope of your job because of new technology, change to customer requirements or other business reasons or appoint you to a different role, after discussion with you.*

14. *Salaries on transfer. If you are required to transfer or volunteer for a transfer then the following conditions apply:*

...

[10] It is plain that clause 7.2 contemplates job change after discussion, basically to cope with changes in business requirements. I have formed the view that clause 7.2 does not assist. Nothing in that provision suggests to me an entitlement to make involuntary transfers (that is, transfers where by definition a unilateral decision is made), and further nothing in that provision suggests the prospect that a transfer could be contemplated for reasons to do with health and safety. All of the explanations for change in position have to do with normal business requirements rather than the broader obligations of a good employer which the health and safety requirement would fall within.

[11] However, the position is otherwise with clause 14 where I accept that the words in the clause quite clearly proceed on the footing that there is more than one way of being transferred and that one way that is specified is on a voluntary basis. The alternative way of being transferred that is specified in the clause is where the employee is “required” to transfer, that is on an **involuntary** basis. The provision in question is disjunctive which tends to emphasise the *either/or* nature of the provision.

[12] However, Mr Orlowski maintains that this provision relates not so much to the transfer between shift patterns but to transfers from one job in the factory to another job but maintaining the same shift sequence. The whole thrust of Mr Orlowski’s

evidence is that employees develop their social and familial patterns around the shift sequence that they work and it is disruptive and unreasonable for that social pattern to be arbitrarily changed, as happened in this case.

[13] Furthermore, Mr Orłowski disputes the evidence of Bridgestone that there was a history of making these involuntary transfers. In referring to previous examples of this practice, Mr Orłowski's evidence (given through serving union officials) was that the examples given by Bridgestone were not comparing like with like; briefly, Mr Orłowski's view is that the examples referred to by Bridgestone relate to new employees who have been in training and who are then allocated to a particular working shift. Clearly, that is a different situation from Mr Orłowski's situation.

[14] Further, Mr Orłowski says that the two letters produced by way of example addressed to new employees have not been seen previously by the Union and have certainly not been approved by the Union.

[15] I am left with the uncomfortable conclusion that the collective agreement neither conclusively forbids unilateral transfer from shift to shift nor unequivocally allows of the same. I am reinforced in that nebulous conclusion by the action Bridgestone has taken in the recent past of endeavouring to make clear to new workers in its letter of engagement that such a transfer is possible.

[16] I have reached the conclusion that Bridgestone must have the right to manage its business appropriately, and that that right includes the right to deploy its labour in ways which either meet its business needs or meet its obligations pursuant to statute. It cannot be the position that once an employee is settled in a particular shift pattern, there are no circumstances in which the employer has a right to change that employee's shift cycle. I do not accept the evidence from Mr Orłowski's witnesses that clause 14 of the collective agreement must be read so as to refer only to the prospect of transfer from job to job but within the same shift sequence. There is no such qualification in the clause itself; none of the words in the whole provision seem to me to be capable of being interpreted in the way that the Union witnesses for Mr Orłowski allege is the only proper interpretation of the clause.

[17] It may be that the interpretation advanced by the Union witnesses is the most common use of the provision in question, but that does not mean the provision cannot be used for other purposes.

[18] I hold that the effect of the collective agreement is to allow the employer Bridgestone to make unilateral transfers from one shift to another, but subject always to the right of a disgruntled employee to challenge such an involuntary transfer by way of the raising of a personal grievance.

[19] Indeed, I am reinforced in the conclusion I reach on the meaning of the collective agreement by the availability of that process and its obvious applicability to the circumstances here. Only by a proper assessment of the justification test mandated by s.103A of the Employment Relations Act 2000 can the employer's behaviour be properly assessed.

The health and safety issue

[20] There can be no doubt about the obligation that all parties to the employment relationship have in respect to health and safety matters. Clause 19 of the collective agreement mandates compliance with the Health and Safety in Employment Act.

[21] That statute requires *all practical steps* to provide for the safety of workers while at work and to ensure the provision of a *safe working environment*. A *hazard* is defined in the statute as including the situation where a person's behaviour may be *an actual or potential cause ... of harm*.

[22] Next, I have to say that I was absolutely satisfied by the evidence of Mr Orłowski's former workmates that Mr Orłowski posed a genuine threat to health and safety in the workplace when he was employed on D shift (his original shift).

[23] The brief of evidence filed by Mr Graeme Tillman, the shift manager of D shift, contains a number of references to Mr Orłowski's behaviour in the workplace. For instance, at para.6 of his brief of evidence, Mr Tillman has this to say:

From my dealings with Mr Orłowski as his shift manager, I would describe him as a person who regularly uses aggressive and intimidating behaviour toward other Bridgestone staff. Many staff are nervous in his presence and people feel the need to "walk on eggshells" when he is on the factory floor.

[24] Later on in his brief when commenting on the disciplinary process and the meeting at which a decision was taken to involuntarily transfer Mr Orłowski, Mr Tillman made these observations at para.14 of his brief:

I shared with Messrs O'Connor and Dunne (the other members of the management team involved in the disciplinary meeting) that I was aware of and very concerned about the high level of friction between Mr Orłowski and other shift members and how I considered this had the potential to turn ugly. We felt there was a significant risk that unless we did something it was only a matter of time before matters boiled over and somebody got hurt.

[25] For his part, Mr Orłowski maintains that Bridgestone used the health and safety issue as a device to move him to another shift and that Bridgestone, to use Mr Davidson's words, ... *manufactured its concerns in order to justify what would otherwise be an unlawful involuntary transfer to another shift.*

[26] Mr Orłowski invites me to reach the conclusion that Bridgestone was activated by improper motives and somehow sought to disadvantage Mr Orłowski using health and safety issues as the basis for it. The difficulty with this thesis is there is simply no evidence that Bridgestone was activated by any other motive than a concern to fulfil its obligations under the Health and Safety in Employment Act. There is no reason for the unilateral transfer from Shift D other than the health and safety concern. There is no evidence whatever of any other basis for that change. Accordingly, I dismiss those contentions of Mr Orłowski as misplaced.

[27] However, the Authority needs to be satisfied that Mr Orłowski had a proper opportunity to respond to Bridgestone's concerns in the context of the disciplinary process. This was a situation where Mr Orłowski had been found to have breached the code of conduct included in the collective agreement for which he received a written warning. Although reluctant to do so, Mr Orłowski eventually accepted that it was available to Bridgestone to reach the conclusion it did in respect of that matter. What Mr Orłowski never assented to was the contention that by reason of his alleged contribution to health and safety deficits in Shift D, he should be moved to another shift cycle and it is Mr Orłowski's evidence that that suggestion effectively came *out of left field* as part of the disciplinary process.

[28] In particular, Mr Orłowski's evidence was that he was not forewarned of the health and safety issue when the disciplinary process was about to commence and that he had never received any previous warnings about health and safety issues.

[29] Indeed, Mr Orłowski goes further than that and alleges that the *health and safety* matter was *not formally raised with me at the meeting, nor was the prospect of*

being required to change shifts (the meeting referred to being the disciplinary meeting on 30 November 2007).

[30] I am satisfied that Mr Orłowski's recollection of this matter is faulty on this point. The company's witnesses all refer to the matter being squarely *put on the table* and even one of the Union officials who was present on Mr Orłowski's behalf (Mr Mike Dillon), remembers that the *health and safety* matter *became an issue as the meeting went on*. Mr Dillon expressed the Union's position in his oral evidence by saying it was the Union's preference that Bridgestone work with Mr Orłowski on his present shift to *fix the problem*.

[31] It seems clear then that the matter which I have loosely referred to as the *health and safety issue* was fairly and squarely discussed at the disciplinary meeting on 30 November 2007 and that not only did Mr Orłowski have the opportunity of responding to the allegations made, but that his Union representatives not only had the opportunity but in fact did respond on Mr Orłowski's behalf.

[32] I am reinforced in that conclusion by Mr Dillon remembering a particular phrase which the Human Resources Manager, Mr O'Connor, used at the meeting. Mr O'Connor's evidence was that he had told Mr Orłowski that most people on D shift *either fear you or loathe you* and when I asked Mr Dillon about that observation particularly, he remembered it clearly. It seems inconceivable that that observation could have been part of a disciplinary discussion concerned exclusively with whether Mr Orłowski had tampered with a machine or not; my view, to the contrary, is that that remark is evidence that the health and safety issue was squarely before Mr Orłowski during the disciplinary meeting on 30 November 2007.

[33] Accordingly, I am satisfied that Mr Orłowski had a proper opportunity to respond to the health and safety issues raised by the employer. I am not troubled by Mr Orłowski's evidence that he had no warning about the health and safety matter prior to the meeting; the case law is clear that the Authority's obligation is to look at an employer's conduct *in the round* and not to unreasonably delve into what Chief Judge Colgan in *Chief Executive of Unitech Institute of Technology v. Henderson* (EC Auckland AC 12/07 at para.[56]) referred to as *minute and pedantic scrutiny*. No doubt in a perfect process, that employer might flag the prospect that the relationship between the subject employee and others was in issue from a health and safety perspective, but in my judgement, that aspect flowed out of the nature of the breach

found to have been committed by Mr Orłowski and was a reasonable outcome of the original breach.

Personal grievance?

[34] I am satisfied on the balance of probabilities that Mr Orłowski has not sustained his argument that he has suffered a personal grievance by reason of an unjustified action by Bridgestone causing him disadvantage.

Determination

[35] For reasons which I have enunciated above, I am not persuaded that Mr Orłowski has met the test for either a breach of his employment agreement or indeed for a personal grievance by way of an unjustified action of Bridgestone causing him disadvantage. It follows that Mr Orłowski is not entitled to remedies and in particular not entitled to the principal remedy he seeks, namely a transfer back to the shift he was originally employed on.

Costs

[36] Costs are reserved.

James Crichton
Member of the Employment Relations Authority