

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 419  
5450093

BETWEEN COLIN MARK PHILLIPS  
Applicant

AND JUKEN NEW ZEALAND  
LIMITED  
Respondent

Member of Authority: Robin Arthur

Representatives: Sally Leftley, Advocate for the Applicant  
Penny Swarbrick, Counsel for the Respondent

Investigation Meeting: 2 September 2014 in Whangarei

Determination: 10 October 2014

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**DETERMINATION OF THE AUTHORITY**

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- A. Juken New Zealand Limited (Juken) had genuine business reasons to disestablish a position held by Colin Phillips but acted unjustifiably in how it consulted him about that decision and subsequently dismissed him for redundancy.**
- B. Within 28 days of the date of this determination Juken must settle Mr Phillips' personal grievance by paying him \$8000 as compensation for humiliation, loss of dignity and injury to his feelings.**
- C. Costs are reserved.**

**Employment relationship problem**

[1] On 8 November 2013 Juken New Zealand Limited (Juken) gave Colin Phillips notice of dismissal for redundancy from his position as Warehouse Manager at its panel wood production mill in Kaitaia. Mr Phillips' last day of employment was 6 December 2013. Under a term of his employment agreement with Juken Mr Phillips was paid 20 weeks wages as compensation for the termination of his employment but he raised a personal grievance alleging the redundancy was not decided on for genuine reasons and was carried out in an unfair way.

[2] In his application to the Authority he sought lost wages and compensation for hurt and humiliation caused by how he was treated by Juken.

[3] In reply Juken said its mill manager Dennis Clarke gave Mr Phillips information about the proposal to restructure the mill's warehouse operation and disestablish the Warehouse Manager role, gave him opportunities to provide feedback about the proposal, and considered Mr Phillips' request for redeployment to other roles (but was not able to identify a suitable alternative position).

**Investigation**

[4] For the purposes of the Authority's investigation Mr Phillips and Mr Clarke lodged witness statements and various relevant documents additional to those lodged with the statement of problem. Each man attended the investigation meeting and answered questions from me and the parties' representatives. The representatives also provided closing submissions on the facts and legal principles applicable to determining Mr Phillips' claim.

[5] As permitted by s174 of the Employment Relations Act 2000 (the Act) this determination has not set out all evidence and submissions received but has stated findings on the facts and legal issues, expressed conclusions on matters for determination and, on the basis of those conclusions, specified orders to resolve those matters.

**Issues**

[6] The issues for determination by the Authority were:

- (i) Whether the redundancy of the Warehouse Manager role was:
  - (a) decided for genuine commercial reasons; and
  - (b) carried out in a fair way (with genuine consultation and consideration of alternatives before a decision was made)?
- (ii) If not, what remedies should be awarded, considering Mr Phillips' claims for lost wages and compensation for hurt and humiliation?
- (iii) If any remedies were awarded, was any reduction of those remedies required for conduct by Mr Phillips contributing to his grievance?
- (iv) Should either party contribute towards reasonably incurred costs and expenses of the other party?

[7] In addressing those issues it was necessary to first consider which party bore the burden of proof on certain aspects of their respective arguments and whether their evidence was sufficient to meet that burden.

### **The burden of proof and the parties' evidence**

[8] Juken bore the onus of establishing that its dismissal of Mr Phillips for redundancy was objectively justified. To do so Juken had to satisfy the Authority that the decision (and how its decision-maker, Mr Clarke, went about making it) was one of the responses or outcomes that a notional fair and reasonable employer could have made or reached in all the circumstances at the time.<sup>1</sup>

[9] Such decisions (and related actions) must be made for genuine business reasons (in respect of the position), without ulterior motive (in respect of the employee holding that position) and in compliance with the employer's statutory good faith obligations.<sup>2</sup> A fair and reasonable employer could not provide materially false and misleading information or insufficient information about the rationale for a proposed redundancy decision.<sup>3</sup>

[10] A "*significant paper trail or other solid foundation of evidence*" is an important indicator as to whether the employer's decision on the redundancy of a

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<sup>1</sup> *Rittson-Thomas t/a Totara Hills Farm v Davidson* [2013] NZEmp 39 at [53]-[56] and *Angus v Ports of Auckland Limited* [2011] NZEmpC 160 at [23].

<sup>2</sup> *Simpson Farms Ltd v Aberhart* [2006] ERNZ 825 at [65] and [67].

<sup>3</sup> Section 4 of the Employment Relations Act 2000 (the Act) and *Tan v Morningstar Institute of Education Limited* [2013] NZEmpC 82 at [53].

position was for genuine commercial reasons.<sup>4</sup>

[11] Mr Phillips had the burden of proving the substance of his allegation that Mr Clarke's decision was really an engineered dismissal, masking some other different and inappropriate motive.<sup>5</sup>

[12] Matters in the Authority are determined on the balance of probabilities – that is what is more likely than not – after considering what the evidence from witnesses and documents (particularly those created at or around the relevant times) reveal about what happened and how it happened. Assessment of that evidence may include questions of credibility, consistency and the degree to which what witnesses say is or is not corroborated by the accounts of others.

[13] The conclusions reached in this determination are based on somewhat sparse evidence about the substantive issues (being whether Juken's business decision was genuine and its consultation with Mr Phillips was fair). That evidence comprised the starkly different and uncorroborated accounts of Mr Phillips and Mr Clarke and – on the rationale for the redundancy – only one document. The document was an email dated 22 October 2013 from Mr Clarke to Mike Fisher, Juken's Auckland-based General Affairs Manager at the time. The email listed three reasons – in brief, bullet-point form – for removing the Warehouse Manager position.

#### **Genuineness of the decision to disestablish the position**

[14] Mr Phillips' evidence for his theory of an engineered dismissal – that the redundancy was an excuse to get rid of him for other reasons – lacked sufficient strength to carry it across the threshold from what was possible to what was probable.

[15] He recounted instances where Mr Clarke had sworn at him and, in one event, had called him incompetent because a problem with a piece of equipment was not properly and promptly resolved. While Mr Clarke accepted those instances occurred, Mr Phillips' own evidence also suggested that he was not singled out for harsh comments as Mr Clarke had behaved in the same way towards other staff who remained in their jobs. Mr Clarke also had a cogent explanation about his outburst

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<sup>4</sup> *Rolls v Wellington Gas Co* [1998] 3 ERNZ 116, 123 (EC).

<sup>5</sup> *Savage v Unlimited Architecture Limited* [1999] 2 ERNZ 40 at 49-50 (EC); *na Nagara v McGrath, Chief Executive of the Auckland College of Education* (unreported, EC, 13 September 1996, AEC56/96, Judge Travis) at 11; and *Trotter v Telecom Corporation of NZ Ltd* [1993] 2 ERNZ 659 at 682.

over the equipment problem that suggested his comments were made in frustration during a robust exchange between managers, rather than revealing a motivation to get rid of Mr Phillips.

[16] Mr Phillips also accepted that it was simply speculation on his part to suggest that he was dismissed to remove him as a competitor for the position of Mill Manager when Mr Clarke eventually retired. There was no evidence to support that view or even that Mr Clarke's retirement was sufficiently close in time to make it a more likely than not motivation.

[17] While I concluded Mr Phillips had not established sufficient substance to his theory of an ulterior motive, Juken still bore the burden of showing it was more likely than not that there were genuine commercial reasons for Mr Clarke's decision to remove the Warehouse Manager position. Doing so was made more difficult for Juken by the absence of any significant paper trail.

[18] Mr Clarke's evidence was that he came up with the proposal through discussion over a number of weeks with the Assistant Mill Manager and Production Manager, Iain Snelling. Mr Clarke also talked by telephone to Mr Fisher about the process required and sent him a five line email on 22 October 2013 setting out the rationale for the proposal. The three reasons given (which I have paraphrased) were that removing the Warehouse Manager position would:

- (a) bring all manufacturing, finishing and dispatch functions under one manager, the Production Manager position held by Mr Snelling; and
- (b) make the warehouse the same as other areas of the mill that ran with a supervisor reporting directly to the Production Manager; and
- (c) leave the warehouse able to function adequately with only a supervisor.

[19] According to Mr Clarke nothing else was committed to paper,. There was no recorded assessment of whether all the duties of the Warehouse Manager were necessary or merely duplicated work done by the Warehouse Supervisor and whether all necessary residual duties could be adequately carried out by the Production Manager and the Warehouse Supervisor.

[20] However Juken submitted the proposal was "*a simplistic, straightforward removal of a layer of management*" primarily motivated by efficiency requirements

and with the benefit of saving the salary cost of one management position. No evidence from Mr Phillips displaced the inherent logic of that rationale. Having the Warehouse Supervisor report directly to the Production Manager was consistent with the structure in other production areas in the plant, reduced transactions in transferring information and still resulted in necessary duties being carried out.

[21] Although I concluded – for reasons set out further below – that Mr Clarke failed to adequately consult Mr Phillips about the proposal, the evidence did not establish that such consultation would have resulted in the business reasons for the proposal being effectively challenged or that another viable option could and would have resulted. Even if Mr Phillips had been able to develop a different proposal that did not involve disestablishing his position, I could not say that a fair and reasonable employer could not have chosen to go ahead with its own initial proposal over such a (hypothetical) alternative. In the particular circumstances of this matter, such a decision could have been open to a fair and reasonable employer.

[22] The result was that the failure to consult and consider alternatives here was not so substantive as to constitute evidence of a lack of genuineness in the business decision about the Warehouse Manager position. Rather, it was a procedural failing in the way the decision and subsequent dismissal was made and carried out.<sup>6</sup>

### **Inadequate consultation and consideration of alternatives**

[23] Mr Clarke's own account confirmed the inadequacy of his consultation with Mr Phillips over the proposal. He called him by telephone to come to a meeting on 1 November 2013 without any notice or indication of the topic of the meeting, and consequently with no opportunity for Mr Phillips to arrange for a representative or supporter to accompany him.

[24] Mr Clarke described the meeting as "*pretty informal*". He took no notes. He provided no written information to Mr Phillips about the proposal or its rationale. The result of that approach was that Mr Clarke could not produce any documentary evidence that might have tipped the balance of probability against Mr Phillips'

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<sup>6</sup> *New Zealand Fasteners Stainless Ltd v Thwaites* [2000] 1 ERNZ 739 at [27] (per Gault J).

equally uncorroborated allegations that he was not asked to comment about the proposal and that its outcome was not put to him in any way that was tentative.

[25] The evidence of both men confirmed there was some discussion about whether there were any other roles in the plant to which Mr Phillips could be redeployed. However they differed over whether Mr Phillips had, in response to a query from Mr Clarke, agreed to consider only an alternative managerial or supervisory job (as Mr Clarke maintained) or whether (as Mr Phillips maintained) he said he just needed a job and was “*prepared to do anything*”. The meeting ended without any firm arrangement to continue the discussion but the evidence of both men confirmed an expectation that Mr Clarke would make inquiries about alternative roles of some kind.

[26] Mr Clarke’s own evidence confirmed Mr Phillips appeared shocked by the news about his position. In the course of what both men agreed was a meeting that took around 12 minutes, Mr Clarke recalled Mr Phillips’ contribution comprised only saying “*no*” to one question (about whether he had any comments on the proposal), saying “*yes*” to a second question (about whether he would consider another position), and shaking his head when asked if he had any questions or comments. Mr Phillips’ evidence differed only slightly on this point in that he recalled saying he needed a job, was prepared to do anything and believed he still had experience and skills to offer.

[27] A restructuring of the Warehouse operation – including a major change to the shift structure – was carried out late in 2012 and operative from January 2013. The Warehouse Supervisor position had been added in October 2012 and the restructuring had removed two team leader positions. There was nothing to indicate Mr Phillips had any forewarning that his position was likely to be seen as surplus to Juken’s requirements by late 2013. Mr Clarke accepted, in answer to a question at the investigation, that Mr Phillips would have been surprised by the news. I concluded Mr Phillips was stunned by what he heard and could not there and then, as Mr Clarke expected him to, comment meaningfully on the proposal.

[28] Mr Phillips was called to a further meeting with Mr Clarke on 7 November 2013, again without any notice or opportunity to bring a representative or supporter. Mr Clarke told him there were no other suitable roles, either as a supervisor or to replace other managers that might retire in the near future. Mr Phillips was given one month’s notice and told a letter of termination would be provided the next day.

[29] The failure of Mr Clarke to make any note of his discussion with Mr Phillips meant that he could not, on the balance of probabilities, establish that he had explored all potential alternative roles or that Mr Phillips had not (when Mr Phillips said he had) indicated he would take an operator's role if no supervisory or managerial job was available. A fair and reasonable employer, in those circumstances, could also have done more to enquire about whether an operator-level job was something Mr Phillips would do (even if only on an interim basis while he looked for other work). Some such jobs were available at the time but Mr Clarke's evidence was that he considered it was up to Mr Phillips to have asked about that prospect rather than Juken exploring and offering that option.

[30] As a result I concluded Juken had failed to establish that it had done what a fair and reasonable employer could have done in all the circumstances to seek Mr Phillips' response and any ideas on alternatives to the redundancy of his position and to explore options for potential redeployment as an alternative to his dismissal. Its actions were unjustified because those failures were defects in its procedure. It resulted in Mr Phillips being treated unfairly in this way: firstly, he was too stunned by the news on 1 November to comment properly at that time; secondly, he was not given information about the proposal in a form that he could take away to study and comment on its viability or to suggest alternatives; thirdly, the options for continued employment were narrowed to certain roles with Mr Phillips left to propose alternatives rather than Juken making reasonable endeavours to consider other possibilities.

[31] Mr Clarke's failure to offer Mr Phillips any job search assistance or EAP counselling on the termination of his employment confirmed Juken's general lack of sensitivity in carrying out his dismissal for redundancy.

### **Remedies**

[32] Mr Phillips established that he had a personal grievance as a result of Juken's failure to fairly consult with him about the redundancy of his position and to fully consider alternatives to his resulting dismissal. However it was more likely than not that his employment would have ended even if Juken had followed a proper process, so no award for lost wages was appropriate.

[33] He was entitled to an award of compensation for the humiliation, loss of dignity and injury to his feelings that resulted from how Juken had acted in making its decision and dismissing him.

[34] Mr Phillips averred to feeling humiliated by the experience of losing his job of the previous nine years in a relatively abrupt manner. His apparent shock at the news he received on 7 November was confirmed by Mr Clarke's evidence. He felt embarrassed in the relatively small community of Kaitaia to lose a position that he had gained by working his way up the ranks.

[35] In assessing the effects on Mr Phillips I did not, however, take account of the upset he said he felt due to hearing rumours, relayed to him by his young adult children, that he was dismissed for reasons other than redundancy. Some such speculation may be inevitable but was not relevant unless its source was more clearly connected with an action by the employer. No connection was established here.

[36] Mr Phillips did suffer some ongoing distress resulting from have to spend time away from extended family members in his Kaitaia household when he sought and got short-term work in Whangarei. However, on the day before the Authority investigation meeting, he had started a new permanent public sector job closer to home and there was no evidence he suffered any ongoing distress or any negative health effects arising from the manner of his dismissal.

[37] Juken submitted any award of compensation under s123(1)(c)(i) of the Act should be at "*the lower end*" of the usual range, at around \$5000. Dicta in the Court of Appeal decision in *New Zealand Fasteners Stainless Limited v Thwaites* – cited earlier in this determination in support of Juken's business decision as being genuine – was also relevant on this point.<sup>7</sup> In the year 2000 the Court found an award of \$10,000 was appropriate compensation for distress and humiliation suffered by a finance manager who had thought his position secure but received abrupt news that he would no longer have a job in a restructuring of his work section.<sup>8</sup> The case was about circumstances where the business decision to disestablish the position was not unjustified but the manner of carrying it out was.

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<sup>7</sup> [2000] 1 ERNZ 729.

<sup>8</sup> Above at [31].

[38] Allowing for the passage of time and inflation over 14 years and the broad similarities of that case with Mr Phillips' case, \$8000 was an appropriate, relatively modest award of compensation under s123(1)(c)(i) for him.<sup>9</sup>

[39] The compensation sum awarded took no account of the money paid to Mr Phillips under his contractual term for redundancy compensation. His contractual payment was for the loss of his job, not to compensate him for distress caused by his dismissal for redundancy being decided and carried out in an inadequate manner.

### **No reduction of remedies**

[40] Mr Phillips' dismissal for redundancy was, but its very nature, on a 'no fault' basis. His personal grievance arose from the inadequacies of how the consultation and dismissal was carried out, and the responsibility for that lay with Mr Clarke, not Mr Phillips. I concluded no reduction of the sole remedy awarded to Mr Phillips was required under s124 of the Act.

### **Costs**

[41] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Mr Phillips may lodge (and then should serve) a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Juken would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted. The parties could expect the Authority to determine costs, if asked to do so, on its usual daily tariff basis, unless particular circumstances or factors required an adjustment upwards or downwards.<sup>10</sup>

Robin Arthur  
Member of the Employment Relations Authority

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<sup>9</sup> See *Telecom New Zealand Limited v Nutter* [2004] 1 ERNZ 315 (CA) at [85].

<sup>10</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808.