IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 107/08
5080237

	BETWEEN	MARTIN ROWE Applicant
	AND	VIRCOM EMS LIMITED Respondent

Member of Authority:	Paul Montgomery
Representatives:	Mark Nutsford, Advocate for Applicant Neil McPhail, Advocate for Respondent
Investigation Meeting:	2 February 2008
Submissions received:	26 February 2008 from both parties
Determination:	24 July 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant claimed in his statement of problem that he was "dismissed by way of redundancy with no consideration given to alternatives to dismissal namely redeployment". Mr Rowe had been employed with the respondent and its predecessor since January 2001 as a meter installer and later in an office based administrative role. He seeks remuneration lost as a result of his alleged grievance, compensation for distress and costs.

[2] The respondent says the redundancy was genuine, was part of a national downsizing restructure and at the time of the applicant's position being disestablished, there were no positions, including field installer positions available. It declines the remedies Mr Rowe is seeking.

What caused the problem

[3] The applicant's evidence was that *on Monday 4 September 2006, right out of the blue, I was given a letter stating that my role as a Quality and Compliance Assistant was being evaluated and that my feedback would be welcome at a meeting on Friday 8 September 2006. The letter referred to recent meetings but there were no meetings that I was aware of or that I had attended*.

[4] Both parties agreed a meeting was a held on 8 September 2006 as scheduled and the applicant gave his views including his proposal that he return to installing meters. He said he had the impression *that they weren't really interested in my submissions as the meeting was fairly brief and there wasn't much feedback coming through. I felt that no matter what I said or wrote it wouldn't have made a difference*.

[5] While there is some dispute about the length of this meeting both parties agree another meeting was called at 4 pm that day at which the applicant was told his position was being disestablished and his employment would end on 22 September 2006. In his evidence Mr Rowe says *I couldn't believe how fast it all happened.*

[6] The respondent was represented at the meeting by Mr Graham Boocock, the company's Southern Regional Manager and Ms Charlotte Pulley, Technical Services Manager. Their evidence was that they were interested in hearing the applicant's proposals, but that given that there were no positions of any kind to which Mr Rowe could be re-deployed and it proposing to make the role he held redundant, they had no alternative but to lay him off.

[7] In their evidence regarding the respondent's expression of interest [EOI] in securing contract work from another company, the Authority was told that even had field installation work become available when this contract was eventually secured, the company would not have had the confidence in the applicant due to his health problems, and would not have considered him for a such a role.

The issues

[8] To resolve this matter the Authority needs to determine the following issues:

- Was the redundancy genuine; and
- Was the process adopted by the respondent fair and reasonable; and

- If the answer to either of the above is no, what, if any, remedies are available to the applicant.

The investigation meeting

[9] The meeting was straightforward and open with witnesses speaking frankly when questioned by the Authority and the respective advocates. For the applicant evidence was presented by Mr Rowe and Mrs Rowe while for the respondent, the Authority heard from Mr Boocock, Ms Pulley and Mr Wayne Jackson.

[10] With the assistance of the advocates the meeting was conducted efficiently and I thank all for their co-operation.

Analysis and discussion

[11] The principles needing to be observed when redundancy is considered are well established in case law. I have been referred to *NZ Fasteners Ltd v. Thwaites,* [2000] 1 ERNZ 739, *Aoraki Corp Limited v. McGavin* [1998] 1 ERNZ 601 and in a procedural setting *Forest Park (New Zealand) Limited v. Adams* [2000] 2 ERNZ 310 by Mr McPail. Mr Nutsford referred me to s.4 of the Act and to *Polkey v. Dayton Services Limited* [1989] ICR 142, 162/3 in support of his client's claims. As this is an English case I quote the relevant section:

> *In the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by re-deployment within his own organisation.*

[12] Addressing the issue of genuineness, I do not believe this was under serious challenge. To avoid any doubt I accept the evidence before the Authority that the company needed to address financial concerns because of reduced forward work, and disestablish eleven positions in its national operation as well as that of Mr Rowe.

[13] Turning to the procedural issues on which the applicant challenges the respondent, and in particular its failing to consider re-deployment, it is suggested that that section of the process undertaken on 8 September 2006 was done in some haste. However, as became clear at the investigation meeting, Mr Rowe's recollection that he had not known of or attended any meetings prior to that on 4 September 2006 was incorrect. The minutes of those earlier meetings clearly outline the company's need

to address significant business issues and clearly establish that Mr Rowe was in attendance. The meeting with him on 4 September 2006 may have been unexpected from his viewpoint, but it did not come *out of the blue*. The company having drawn his attention to the possibility of him being affected by the restructure gave him three full days in which to prepare his feedback to the dis-establishment proposal and that seemed sufficient time, while not overly generous.

[14] The respondent in respect of the two meetings on 8 September 2006, has confirmed that following the earlier meeting with Mr Rowe it considered his responses and proposals, took advice from Mr Shepherd and decided in the light of these considerations and discussions to disestablish the applicant's position, as it no longer required that role and had, at the time, no position to which it could deploy him. On balance I am satisfied that Mr Rowe was heard, his views considered by the respondent, and regrettably was unable to have his proposals accepted.

[15] While the respondent did not require Mr Rowe to work out his notice because it says it wanted to allow him that time to search for other employment, there was no evidence before the Authority that it provided any other assistance to him.

[16] That however, is not the end of the matter. At the time the position was disestablished the respondent had no work of any type to which it could deploy. That is accepted.

[17] What it failed to disclose to the applicant was its EOI to Arc Innovations for new contract work, which if successful, would require field installation work such as the applicant had previously undertaken satisfactorily for the respondent.

[18] It is accepted that following some episodes of fainting related to stress and a medical condition in early 2005, the company had transferred the applicant from installation work to an inside position. However, it is clear from the respondent's evidence, in particular that of Ms Pulley, that there was no possibility she would consider Mr Rowe for a installers position as he would pose a serious risk to himself, to the company, and compliance with Health and Safety regulations. The concerns, on the surface, are genuine.

[19] However, had the respondent's representatives been sufficiently open with Mr Rowe, an employee for some six years, on the matter of the EOI, and had it inquired as to whether his health was able to be confirmed by medical specialists to enable him

to undertake possible future work, the redundancy would not have been avoided but re-employment when the Arc contract was later confirmed was a distinct prospect for Mr Rowe. But the respondent's evidence was quite unequivocal that it would not have him in such a role. Clearly, this was on the basis of information which was somewhat dated and possibly now inaccurate.

[20] Mr Boocock said they did not contact the applicant when testing the market for electricians and metering technicians for two reasons. He says Mr Rowe *had given mixed messages to us during the consultation period regarding his desire to carry on this sort of work.* The second was the medical certificate issued on 24 April 2005 which stated *I feel he should ensure that his work be mainly managerial.* The respondent, to its credit, found him alternative inside work and as the Authority understands, no further *turns* occurred.

[21] It is not unfair to say, but for these *turns* the respondent would have considered offering Mr Rowe a field position, and but for its view that his medical condition posed significant risks.

[22] The difficulty it faces is that it failed to inquire whether the applicant's condition had improved, had been dealt with by medication, or had continued. The failure to inquire may have denied Mr Rowe the chance to be re-employed albeit some months later.

The determination

[23] Returning to the issues set out above in this determination I find:

- The redundancy was genuine;
- The process adopted by the respondent was full and the outcome not premeditated;
- That the respondent owed the applicant a duty in good faith to inquire formally into his state of health and his ability to undertake field work should that have become available later. As a result of the respondent failing to disclose the EOI and to discuss the **possibility** of work should it be secured, constituted the loss of a chance of re-employment. To that extent the procedure was flawed.

- That the chance of continuous employment was not available at the time of the redundancy.

- In no way did Mr Rowe contribute to the circumstances giving rise to his dismissal.

- That the respondent owed the applicant the chance to apply for field positions if they became available *more so given the excellent service that you have given the company during the time of your employment*. [Dismissal letter]

Remedies

[24] The fault on the part of the respondent is not fatal to its defence of the substantive claim, nor was the omission occasioned by malice. It does however, call for modest compensation to be awarded to the applicant. I set that remedy at $1200 under section 123 (1)(c)(i).

Comment

[25] Although the Authority has had no need to consider the applicant's mitigation of his loss following his dismissal, I make it plain that the attempt to submit Mr Boocock's evidence as to Mr Rowe's suitability for the positions for which he applied following his dismissal, by way of submission, was grossly inappropriate. The Authority had requested fuller information on his job applications from Mr Rowe and the applicant and his advocate willing and promptly complied. This ensured Mr McPhail had the information before submissions were due to be lodged and served.

[26] The attempt to put untested evidence, or more accurately, personal opinion before the Authority in such a manner indicates a serious lack of understanding on the part of Mr Boocock and an extraordinary lapse of judgment on the part of Mr McPhail.

Costs

[27] Costs are reserved.

Paul Montgomery
Member of the Employment Relations Authority