

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 322
5326465

BETWEEN	TRISIKHA SANTAWIRYA Applicant
AND	ADVANCE INTERNATIONAL CLEANING SYSTEMS (NZ) LIMITED Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	George Ngatai, advocate for Applicant Roger Waymouth, advocate for Respondent
Investigation Meeting:	5 April 2011
Submissions Received	5 and 12 April 2011
Determination:	21 July 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Trisikha Santawirya lodged an application with the Authority in November 2010, requesting it to investigate a complaint about “redundancy” which had affected his employment with the respondent Advance International Cleaning Systems (NZ) Ltd. Mr Santawirya’s position as Warehouse Supervisor had been disestablished by Advance in October 2010, bringing the employment to an end then.

[2] To resolve his employment relationship problem Mr Santawirya requested orders made by the Authority against Advance for his reinstatement, reimbursement of lost salary and compensation for hurt feelings, humiliation and distress. Those are remedies available under the Employment Relations Act 2000 where an employee has successfully established a personal grievance claim against an employer.

[3] It may be that Mr Santawirya has never raised a personal grievance of any kind directly with Advance but that he has purported to do so by lodging a statement of problem in the Authority. The Employment Relations Act 2000 requires a grievance to be raised separately from the lodging of an application with the Authority and to also be raised before that step is taken. There has been mediation between the parties and the Authority is of course not aware of the communications they had during that process to know if a grievance was raised then. No jurisdictional issue has been taken by Advance as to whether Mr Santawirya is able to claim the remedies he now seeks and the merits of his claim have been investigated.

[4] On 8 October 2010 Mr Santawirya attended a meeting with the company accountant, Mr Roger Waymouth, and the Managing Director of Advance, Mr Jiwa Nadan. Operational matters were discussed including a pending audit of the warehouse by the Ministry of Agriculture and Fisheries. Discussion then turned to the number of staff needed in the warehouse under Mr Santawirya's supervision, particularly in view of recent changes made to the company's methods of operation and its supply of branches, which Advance considered had led to a decline in activity in the warehouse with a downturn in sales occurring at the same time.

[5] During the discussion on 8 October, as he subsequently acknowledged in a letter to Advance dated 18 October, Mr Santawirya gave his view that there were several areas where savings could be made in the warehouse department, including by reduction in the number of positions from four to three. The discussion then turned to the possibility of Mr Santawirya's position as Warehouse Supervisor becoming redundant.

[6] Mr Waymouth wrote to Mr Santawirya on 11 October 2010, and with reference to the meeting on 8 October said:

We proposed that the role of Warehouse Supervisor would no longer exist as despatch volumes have decreased and we see the role as a leading hand position, actively involved in the pack and despatch functions of the department.

As this proposal will directly affect you, we ask that you consider and propose any alternative means to implement the necessary cost reductions in this area. Your input is important in this process and we would value any comments you have to make.

[7] Mr Waymouth advised that a further meeting would be held on 13 October to discuss Mr Santawirya's feedback and any available options he might suggest. Mr

Waymouth also advised that Mr Santawirya was welcome to have a support person present and encouraged him to seek independent advice, as his employment might be affected.

[8] At the meeting on 13 October, in relation to the proposal to disestablish Mr Santawirya's Warehouse Manager position Mr Waymouth advised that without it the warehouse staff would report in the interim to him. He also advised that the company intended creating a new senior management position to handle the total logistics, purchasing and production functions and that the warehouse staff would ultimately report to that person. Further, Mr Waymouth advised that no suitable positions had been identified as available for Mr Santawirya in the event that his was declared redundant.

[9] Following the 13 October meeting Mr Waymouth wrote again to Mr Santawirya confirming that the option of redeployment as put forward by him had been considered but no suitable positions matching his skills and experience had been identified. Mr Waymouth said in his letter that as Mr Santawirya had made no further comments or suggestions regarding the redundancy proposal he was once again asking him to consider those matters and propose any alternative means of achieving the necessary cost reductions in the warehouse department. He advised of a further meeting on 15 October to discuss anything Mr Santawirya might want to add that he had not raised already. He also advised that the meeting would be deferred if Mr Santawirya needed more time and that a final decision would not be made until all comment from him had been considered.

[10] Mr Santawirya wrote a detailed response on 18 October proposing four areas where savings could be made, including reduction of the four warehouse staff by one of the positions he supervised;

There are currently four staff including myself who are working within the department I currently supervise. I have identified that more and more of my time has now being doing a lot of the hands on work. There is an opportunity to look at rationalizing a position as I believe that we could reduce staff within my department to ensure that one position is disestablished. I have noticed over a period of 4 weeks that two of the four weeks are busy and two are not within the inwards and dispatching department. This could save the company \$30,000 per annum.

I still believe that the supervisors position is key in the mix for this company and would like to submit this idea or areas where we could make savings to you.

[11] Mr Santawirya proposed other savings could be made from freight charges. If electronic scales were bought by Advance he estimated about \$6,000 per annum could be saved, and the same amount he thought could be saved if staff were more careful in calculating the volume of orders delivered long distance by freight. He also proposed a more robust process with regard to stock movement which could assist in accounting more accurately for items and potentially lead to savings of \$2,100 in relation to one particular item.

[12] Mr Waymouth advised on 19 October that Advance had reviewed the alternatives put forward by Mr Santawirya but had reached the view that his proposals would not achieve the necessary savings needed in the department. He advised a preliminary decision had been made to make the Warehouse Supervisor position redundant with immediate effect but that a final decision would be deferred to allow Mr Santawirya time to make any further representations if he wished. Nothing more was received from Mr Santawirya and the decision to make his position redundant was confirmed with effect from 20 October 2010.

[13] Mr Santawirya in his application to the Authority stated his employment relationship problem to be as follows:

The redundancy process from start until finalisation took only eleven days (8 October to final letter 19 October 2010). Despite written correspondences to company during the time, their responses never answer any raised questions regarding reasons why the position was disestablished and to make redundancy occurs.

Secondly, I have no clear understanding on the process, from so called consultation to finalisation, why it needed to be rushed or executed that way so fast and what it was aiming to achieve in the short-term.

The other issue was around the selection of position to be redundant and the decision did not include the other three staff working under supervision because the company wanted a more hands on process involvement.

This I also believe was a pre-emption of my redundancy as the first meeting held was not to discuss my position but to discuss an upcoming annual MAF inspection. It happened that my position was then discussed at the meeting I was suddenly called to.

Test of justification

[14] The Authority has considered Mr Santawirya's application against the test of justification provided at s 103A (as it was prior to 1 April 2011) of the Employment Relations Act 2000, which is as follows:

103A Test of Justification

For the purposes of s.103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[15] In relation to redundancy cases and with reference to the test of justification the Employment Court has held it to be good law that;

So long as an employer acts genuinely and not out of ulterior motives, a business decision to make positions of employees redundant is for the employer to make and not for the Authority or the Court, even under s 103A.

At para [67] in *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825.

[16] The Authority is satisfied that the dismissal of Mr Santawirya was justified on the grounds of genuine redundancy and that Advance, in the way it concluded that the position was redundant, acted as a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

[17] Consultation has been viewed by the courts as being "the statement of a proposal not yet finally decided upon, listening to what others have to say, considering their responses, and then deciding what will be done." - from *Air New Zealand v Wellington International Airport*, CP 403/91, 6 January 1992. Consultation requires more than mere prior notification, and it must be allowed sufficient time.

[18] Mr Santawirya, I find, was fully consulted about the proposal to make his position redundant before a decision was made finally to that effect. During the investigation meeting he raised a suggestion that redundancy may have been just an excuse to cover up a problem the company had with him for trying to discipline a nephew of Mr Nadan, the Managing Director, employed in the warehouse. The evidence is strong however that the warehouse operation was overstaffed and had become less effective and economic since earlier changes had been made, including

the way stock was being forwarded to branches. I am satisfied that Mr Santawirya was not targeted personally because of some issue surrounding his treatment of the Managing Director's relative, but that he was the person holding a position seen as one that could be disestablished by having some of its duties and responsibilities redistributed to others such as Mr Waymouth.

[19] Further I am satisfied that the selection for redundancy of the Supervisor position over other more junior positions was justified. This was a single senior position maintained at greater cost than the others in the warehouse.

[20] No issue can be taken over the possibility of redeployment of Mr Santawirya into a position the company intended to create for a senior manager, for the company did not carry through its intentions by establishing that position or by advertising a vacancy for it or appointing anyone to it, either at the time of termination of Mr Santawirya or at any time since. This had been only an idea which was not followed through into practice. There were other reasons why Mr Santawirya cannot raise it as showing a lack of justification. The company had assessed him not to be qualified for the proposed position, a judgement it was entitled to make. He has raised some relevant experience he had acquired before employment with Advance when working at a senior management level in a bank, but this was unknown to Advance and only revealed during the investigation meeting.

[21] I therefore consider that Mr Santawirya, who was represented during the redundancy process, had a reasonable opportunity to question the employer's proposal, seek further information and provide feedback about it, before a decision was made. I consider that he was kept informed of the employer's views and reasons for the proposal before the decision was made.

[22] I do not consider there was any predetermination evident in the way the 8 October discussion with Mr Santawirya had shifted from the subject of the upcoming audit by MAF to cost cutting in the warehouse department of Advance. An employer must begin somewhere to communicate about such matters with employees who have knowledge of the subject. From that point on at a reasonably slow pace a careful track was followed from consultation through to decision making about the proposal to disestablish Mr Santawirya's position.

Determination

[23] Therefore reviewing the termination of Mr Santawirya's employment under s 103A of the Act, I conclude that the actions of Advance and the way it acted were justifiable and that there is no basis for a personal grievance. Consequently no orders are required to be made against Advance.

Costs

[24] Advance in its written submissions sought an award of \$850 as a reasonable contribution to advocacy costs incurred of \$1,500 plus GST. The invoice submitted by Mr Waymouth refers to "Advice prior to investigation meeting with company, advice on process and drafting/editing of Closing Submissions". It is evident from the written submissions that there was input into the case from a professional specialist in employment law.

[25] Before determining whether costs should be awarded against Mr Santawirya and the amount of any, he has 14 days from the date of this determination in which to reply to the application for an award that may be up to \$850 as costs against him.