

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 96/10
5154344

BETWEEN

MICHAEL SEELEN
Applicant

A N D

ASH AIR (NZ) LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Ian Thompson, Advocate for Applicant
Peter Macdonald, Advocate for Respondent

Investigation Meeting: 20 November 2009 at Christchurch

Submissions Received: 20 November 2009 from Applicant
4 December 2009 from Respondent

Determination: 23 April 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Michael Seelen says that he was unjustifiably dismissed and unjustifiably disadvantaged in his employment with Ash Air (NZ) Limited (Ash Air) following the advice given to him on 3 February 2009 that his position as Service Engineer at Ash Air was redundant.

[2] Mr Seelen says that he was not given any advice prior to that meeting that his position was at risk and that he was not advised prior to the meeting on 3 February 2009 of its purpose or given an opportunity to seek representation.

[3] Ash Air is a specialist service company that is involved in the supply, installation and servicing of large equipment to companies. Ash Air does not accept that Mr Seelen was unjustifiably dismissed and/or disadvantaged in his employment.

It says it had no option because of economic circumstances but to re-organise its business and as a consequence of re-organisation two positions, including that of Mr Seelen were ultimately disestablished. Further Ash Air says its process of selection and that which it adopted in implementing the redundancy was fair and reasonable in all the circumstances.

The issues

[4] Mr Thompson advised the Authority that there was no issue about the genuineness of the redundancy and consistent with that there is no claim for lost wages in the amended statement of problem. Mr Macdonald in final submissions dealt briefly with this issue again because he said there was some evidence during the investigation meeting that touched on genuineness. Having considered the evidence I find that it was more about the selection of Mr Seelen from the pool of service engineers.

[5] I accept the focus in this case is on whether the process adopted by Ash Air was fair and reasonable and whether the selection of Mr Seelen was fair and reasonable.

[6] The Authority is required to determine on an objective basis under the test in s.103A of the Employment Relations Act 2000:

- Whether the process adopted by Ash Air in terms of the redundancy and the selection of Mr Seelen as one of the two employees made redundant was what a fair and reasonable employer would have done in all of the circumstances at the time;
- If it is determined that it was not, whether Mr Seelen has a personal grievance that he was unjustifiably dismissed and/or unjustifiably disadvantaged and what remedies is he entitled to.

Whether the process adopted by Ash Air and the selection of Mr Seelen as one of the two employees to be made redundant was what a fair and reasonable employer would have done in all circumstances at the time

[7] Mr Seelen commenced his employment with Ash Air on 13 February 2008 as a service engineer. He was a party to an individual employment agreement with Ash Air which was signed on 26 February 2008. Clause 18.3 of the Individual

Employment Agreement dealt with termination of employment and touched on redundancy. It provided:

18.3 Where a workers employment is to be terminated because of redundancy the employer shall give the employee two weeks notice of termination. Redundancy will be at the discretion of management and will take into [account] factors such as skill, experience, attitude and the requirements of the organisation.

[8] Mr Seelen considered he was good at his role and he described himself as thoroughly enjoying the work at Ash Air. Brent Marshall is the Southern Region Operations Manager of Ash Air. He has been with the company for 25 years and said in his evidence that during October, November and December 2008 the commercial viability of the ten Ash Air branches through New Zealand became a matter of concern.

13 January 2009 Memorandum

[9] Mr Marshall said that the concern he had about the viability of the company led to placement on the notice board at the Christchurch Branch of a memorandum which was headed *Important Memo*. The document was signed by Mr Marshall and it stated that the work load in Christchurch had dropped off and the non-charge hours had escalated significantly in recent months. Details of those hours were provided for October, November and December 2008 together with information about some steps the company had taken to try to stimulate work in the Christchurch area. These steps included sending an additional sales engineer from Auckland to canvas new and existing clients. Input was sought from staff as to how productivity could be improved and this input was to be brought to the attention of either Mr Marshall or the Christchurch Branch Manager Bruce Hartley. The memo concluded with the statement that the company would be analysing the situation over the next week in the hope that it could be improved.

Meeting 20 January 2009

[10] On 20 January 2009 a meeting was held at the Christchurch Branch of Ash Air. It was chaired by Mr Hartley. The reason for the meeting was to discuss with staff the downturn of work and high non-chargeable (workshop) hours as outlined in the 13 January 2009 memorandum. The meeting included a discussion about steps

taken to date to try to stimulate work and some ideas were suggested at the meeting to try to increase the work at the branch.

[11] There was a dispute in the evidence as to what was said at the meeting specifically about the possibility of redundancy. Minutes were provided to the Authority that Mr Marshall said were written up by Mr Hartley as his request following the meeting. Mr Seelen takes issue primarily with one part of the meeting. There is no particular issue with the balance.

[12] Mr Seelen says that at the meeting he questioned Mr Hartley as to whether staff should be concerned about redundancy. His evidence is that Mr Hartley responded and said *we are not talking about redundancy, we are talking about a solution to non-chargeable hours*. Mr Seelen's evidence was supported by two other previous employees of Ash Air who were at the meeting, Bruce Bell and Brent Lansdown. Mr Bell has since left his employment and Mr Lansdown was made redundant on the same day as Mr Seelen. The minutes show a statement *regrettably a reduction in the number of staff was an option that would need to be considered*. Nigel Malham, the Workshop Manager who was in attendance at the meeting gave evidence that redundancies as an option were discussed.

[13] Whilst a lot of emphasis was put on what was said at this meeting, in investigating the problem I do not find that the evidence was as far apart as first thought. I am satisfied that Mr Seelen knew that redundancies in the future could not be ruled out but equally Mr Marshall accepted that there was no definite proposal for redundancies at that point. I deal more with that in para. 15 of this determination.

[14] After that meeting Mr Hartley went on sick leave and was not from that point on physically at work before Mr Seelen was made redundant on 3 February 2009.

[15] Mr Marshall said that the branch results for the January month showed a further deterioration and at that point, I find on or about 2 February 2009, he made a decision to go to Christchurch from Auckland where he is based on 3 February and announce the redundancies that were required. In doing this Mr Marshall gave evidence that he had looked at the total hours lost and concluded at that point that there two men too many in the Christchurch Branch and that Christchurch was *on a limb with the other branches*. I find that at that time he made a decision as to who

should be the two individuals selected for redundancy. He made the decision that Mr Seelen was to be one such employee.

[16] Mr Marshall said that he selected the two employees on the basis of skills and versatility and in doing so talked by way of a cell phone discussion with Mr Hartley. He also prepared what he called a draft letter that was in fact handed to Mr Seelen on 3 February 2009. The letter is dated 2 February 2009 although Mr Marshall said that it was printed on 3 February. The letter provided:

Dear Mike

You will be well aware that for some time now the work load in Christchurch has dropped off. This is severely affecting the viability of the Christchurch operation and has forced Ash Air management to make some difficult decisions by reducing staff levels.

In addition to bringing our concerns to the attention of all employees at the branch (refer Staff memo and consequent meeting) the company has taken a number of steps in an effort to stimulate work in the Christchurch area. This has included sending additional sales engineers from Auckland to canvas both existing and new clients; regretfully this failed to produce results.

We have given careful consideration to the selection process including the consideration of last on first off, and in this case, the selection has been made based on skills and versatility as well.

We are sad to advise you that your position within the company has become redundant, effective immediately.

Mike, this is not an easy situation as you have served the company well in the past.

If we can be of any assistance in your search for further employment please do not hesitate to contact the writer.

Your final pay and redundancy as per your employment agreement will be forwarded to your bank account in the normal way.

We wish you well in your search for employment.

3 February 2009

[17] On 3 February 2009 Mr Seelen was working in the workshop. He was approached by Mr Marshall and Mr Malham. There is a dispute about where the meeting took place which I do not find necessary to resolve. For present purposes I simply accept Mr Seelen's evidence that it was in the office of Mr Hartley who was at that time away on sick leave.

[18] There was a dispute about whether Mr Seelen was advised that he could have a meeting at another time when he could have a support person available. Mr Seelen says that he doesn't recall being given this advice. Mr Marshall and Mr Malham said that this opportunity was given to Mr Seelen but he responded with *I know what this is about I have been waiting for it*.

[19] Mr Seelen does accept making a statement along the lines of *I know what this is about I have been waiting for it* but not in the context put by Mr Marshall and Mr Malham.

[20] I find it less likely that the offer by Mr Marshall to delay the meeting while Mr Seelen had the opportunity to seek advice was made. I form that view by having particular regard to statements made in documents closer to the time of the meeting of 3 February. I note for example Mr Marshall's letter of 12 February 2009 in response to Mr Thompson's letter of 5 February 2009 raising a personal grievance. There is no statement along the lines that this opportunity was given notwithstanding Mr Thompson in his letter specifically criticising the failure to give Mr Seelen the opportunity to seek advice or to have notice of the meeting. The first time that opportunity is mentioned is in the amended statement in reply.

[21] I also consider it less likely in the circumstances when Mr Marshall had flown from Auckland with a draft letter to give to Mr Seelen that he would have been minded to talk about an adjournment of the meeting. I find that the meeting that took place on that day was between 15-20 minutes long.

[22] There was a discussion about the contents of the letter, the reasons that Mr Seelen had been selected and primarily these turned on a view that Mr Seelen's skills were not as versatile as others. There was another service engineer who had commenced employment after Mr Seelen and the other employee made redundant but he was regarded as having an electrical background and fault finding skills. Mr Seelen understood his employment was to end that day and he was given an hour to return his van home and empty his personal gear from the van before returning it to Ash Air. Mr Marshall then took Mr Seelen back home after he had returned the work van.

[23] Mr Marshall did I find contact a perspective employer in the hope that he would be able to offer some employment for Mr Seelen. As sometimes happens

Mr Seelen was unaware that this step had been taken, but was fortunately able to obtain a position from that lead given to him, which he still held at the date of the investigation meeting. It is clear that his new employer holds him in high regard. Mr Seelen was paid two weeks in lieu of notice in accordance with the provisions in clause 18.3 of his Individual Employment Agreement.

[24] Mr Seelen said that he was hurt by the process adopted by his employer and described feeling guilty because he was not able to leave with any dignity. Mr Seelen's wife also gave evidence that Mr Seelen had become extremely withdrawn and there was a decline in his social activities and his self confidence was quite badly damaged.

[25] Mr Seelen's new position is out of Christchurch which means that he departs from his family for quite long periods of time and they are unable therefore to partake in the family social events that they used to enjoy.

Conclusion

[26] In this case it is accepted that the redundancy was genuine. The circumstances at the time against which to consider the justification of Ash Air's actions in implementing the redundancy were:

- There was an increase in non-chargeable hours at the Christchurch branch and an urgent need to address that by reducing the workforce at the branch by two.
- Mr Hartley was away on sick leave following the branch meeting on 20 January 2008 and in hearing the evidence I find it likely that Mr Marshall may well have formed a view that Mr Hartley had interacted more with employees about some of the decisions made than in fact had been the case.
- Mr Seelen was one of a group of seven service engineers and now there are only five service engineers and Mr Marshall said that work has continued to decline.
- There had been no other meeting or interaction with Mr Seelen after the staff meeting in 20 January 2009.

[27] In 2004 there was the following amendment to s.4 of the Employment Relations Act 2000 that is relevant to redundancies and requires the parties to deal with each other in good faith:

s.4(1A)(c) provides:

without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected –

- (i) access to information, relevant to the continuation of the employee's employment, about the decision; and*
- (ii) an opportunity to comment on the information to their employer before the decision is made.*

[28] In *Simpsons Farms v. Aberhart* [2006] ERNZ 825 which was a leading Employment Court judgment concerning a redundancy situation Chief Judge Colgan held at para [65] that:

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 s.4 including as to consultation because a fair and reasonable employer will comply with the law.

[29] Employees at Ash Air were advised through the memorandum of 13 January 2009 and the meeting on 20 January 2009 that the company was concerned about its non-chargeable hours increasing. The prospect of redundancies in the future was not ruled out and no doubt Mr Seelen was aware of a potential risk because he made a comment along those lines on 3 February 2009 although he said in the context of the difficulties in his relationship with Mr Malham. A fair and reasonable employer in the circumstances set out above would have advised the employees following on from the 20 January meeting that there was a proposal to restructure and reduce the work force by two positions.

[30] Mr Seelen was not told prior to 3 February 2009 that there was a proposal that two positions be disestablished and he was not provided with an opportunity to comment on that or the selection criteria. Both matters of course were likely to have an adverse impact on the continuation of his employment.

[31] Mr Marshall said that there was still an opportunity at the meeting on 3 February for Mr Seelen to provide input into the decision. In reality however the

decision that Mr Seelen's position was redundant had already been made and the meeting was to advise Mr Seelen of this.

[32] I have not found on the balance of probabilities that Mr Seelen was given an opportunity to obtain a representative and have the meeting at a later time.

[33] Mr Seelen says that he was selected for reasons other than those put forward by Mr Marshall. Mr Marshall does not accept that Mr Seelen's position was selected because of any difficulties in his relationship with Mr Malham. Mr Marshall said that he made the selection decision in discussions with Mr Hartley and that Mr Malham was not involved.

[34] Having carefully considered the evidence I am satisfied the reasons for Mr Seelen's selection for redundancy were not other than those put forward by Mr Marshall. I find that the selection criteria set out in the individual employment agreement is not inconsistent with that applied by Mr Marshall and I am not satisfied Mr Seelen was selected for any other reason. Nevertheless he had no input whatsoever into that decision and it is not surprising that he regards it with deep suspicion.

[35] Mr Seelen was required to immediately leave the workplace and there was no option of working out his notice although Ash Air considered that gave Mr Seelen an opportunity to look for another role. Mr Marshall did make some inquiries of a prospective employer and suggested to Mr Seelen as he drove him home that there was a possibility of employment at the particular site.

[36] Further Mr Marshall advised Mr Seelen on 31 March 2009 that since making his position redundant there had been a change to staffing requirements and that there was currently a position available for a service engineer. Mr Seelen did not take that offer up.

[37] I find in conclusion that the process adopted by Ash Air in selecting Mr Seelen and implementing his redundancy was not that of a fair and reasonable employer for the reasons set out above. A fair and reasonable employer would have in good faith provided Mr Seelen with information relevant to the continuation of his employment and given him an opportunity to comment on that information before making a decision. Ash Air did not do this.

Determination

[38] I find that Ash Air's actions were not those of a fair and reasonable employer. The problem lodged on behalf of Mr Seelen was done so as both an unjustified dismissal and an alleged unjustified disadvantage claim.

[39] In *Simpsons Farms* Chief Judge Colgan said that where the reason for dismissal was a genuine reason as opposed to some other ground dressed up as redundancy then the way the employer went about making that decision forms the basis of the grievance. In that case the Chief Judge concluded that the employee was unjustifiably disadvantaged in his employment but not unjustifiably dismissed.

[40] In this case I find that Mr Seelen was unjustifiably disadvantaged by the failure of Ash Air to act in good faith and further disadvantaged by not advising him in advance of the reason for the meeting on 3 February 2009 and giving an opportunity for him to be represented.

[41] I find in conclusion that Mr Seelen has a personal grievance that he was unjustifiably disadvantaged in his employment but not unjustifiably dismissed in circumstances where the redundancy was genuine.

Remedies

[42] Mr Seelen received two weeks pay in lieu of notice as required under his employment agreement. I am not satisfied that the evidence provides that the selection of Mr Seelen was outside of his individual employment agreement provisions and/or that had there been a fair process he would still not have been selected.

[43] There is no award for lost wages in this case.

Compensation

[44] I accept that Mr Seelen was hurt and humiliated as a result of the process adopted. As matters came as a surprise to him in terms of his selection and redundancy there was no opportunity for him to say farewell with any real dignity.

[45] In assessing compensation I am only able to compensate Mr Seelen for the unfair process adopted by Ash Air but not for the loss of his role.

[46] I am of the view taking all matters into account including the attempts made by Mr Marshall to provide a new employment opportunity that there should be award of compensation in the sum of \$6,000.

[47] I order Ash Air (NZ) Ltd to pay to Michael Seelen the sum of \$6,000 without deduction under s.123(1)(c)(i) of the Employment Relations Act 2000.

Costs

[48] Mr Thompson in his final submissions claims costs of \$3,500 together with a filing fee of \$70. He observed that Ash Air refused to go to mediation until the Authority directed the parties to attend during a telephone conference of 23 April 2009.

[49] Mr Macdonald has not as yet provided any submissions in response and I will therefore provide an opportunity for him to do so by 18 May 2010.

Helen Doyle
Member of the Employment Relations Authority