

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 94
5340658

BETWEEN LING SHI
 Applicant

AND LES MILLS AUCKLAND
 LIMITED
 Respondent

Member of Authority: Dzintra King

Representatives: Applicant in Person
 Richard Harrison, Counsel for Respondent

Hearing: 8 December 2011

Submissions: 9 December from Applicant

Determination: 14 March 2012

DETERMINATION OF THE AUTHORITY

[1] The applicant, Mr Ling Shi, says he has been unjustifiably dismissed by the respondent, Les Mills Auckland Limited (“Les Mills”). He seeks lost wages and compensation for humiliation and distress.

[2] Mr Shi was employed as a daytime cleaner by the respondent on 18 September 2006. In early 2011 Les Mills considered moving its cleaning requirements to OCS Limited (“OCS”), which was at that stage undertaking the night cleaning. Les Mills had discussions with OCS and OCS was agreeable to employing the Les Mills cleaning staff.

[3] Les Mills carried out a consultation process with its cleaners. The first meeting was held on 2 March 2011 and was attended by the cleaners, Mr Norm Phillips, the Gym Services Director, and Ms Marilyn Manning, the Human Resources Manager.

[4] Staff were told of the proposal and that they would likely have more opportunities with OCS as it was a larger company. There would be economies for Les Mills in terms of the supervision of cleaning being carried out by OCS. Staff were asked to think about the proposal and told that there would be a further meeting on 4 March to get staff feedback and answer any questions. They were encouraged to bring a support person.

[5] The meeting on 4 March was attended by Mr Phillips and Mr Malcolm Sun, the Operations Manager for OCS. Mr Sun was known to the staff as he oversaw the night cleaning. He was there in case staff had any questions about OCS.

[6] No questions were asked of Mr Sun. Mr Phillips explained the reasons for looking at contracting out the services and said that if anyone wished to ask anything of Mr Sun they were able to do so. One of the staff said that a family member had been badly treated by OCS when that person was an employee. That staff member made her dislike of OCS clear.

[7] There was no feedback about the proposal. Mr Phillips reiterated that staff could transfer to OCS and to think about doing that. A further meeting was scheduled for 7 March 2011.

[8] Mr Shi said that after that meeting none of the staff wanted to transfer to OCS. He thought Les Mills should reconsider their proposal but did not say so.

[9] On 7 March the cleaners were advised that the decision to contract out had been made and that it was a business decision that did not reflect adversely on any of the staff. Staff were again asked if anyone was interested in working for OCS. No one expressed interest and one staff member said he would not work for OCS. Mr Phillips told them that if anyone was interested they should let him know by 9 March 2011.

[10] After that meeting Mr Sun said he spoke to Mr Shi and told him he would be paid \$15 an hour. Mr Sun was keen to retain Mr Shi's services given his experience and Mr Sun thought Mr Shi had the potential to make a good team leader in the future. Mr Sun said Mr Shi said he would think about it.

[11] Mr Shi denies that this conversation took place. I prefer Mr Sun's evidence.

[12] On 10 March Mr Shi and Mr Phillips met to discuss the transfer and notice. Mr Phillips provided a reference for Mr Shi.

[13] Mr Shi's position was terminated on the grounds of redundancy on 10 March 2011 and he was paid a month's notice in lieu.

[14] On 20 May 2011 Mr Shi sent a letter saying he thought the redundancy was wrong and asking about mediation.

[15] Mr Sun said he was asked at a later stage by Les Mills if OCS was prepared to re-offer the position to Mr Shi. This was in preparation for mediation. Mr Sun confirmed that the offer was still open.

[16] Section 69A provides that specified categories of workers have the right to elect to transfer to the other employer on the same terms and conditions of employment. Mr Shi fell within that pursuant to schedule 1A (f).

[17] Section 69G deals with notice of the right to make an election:

(1) *Before a restructuring takes effect, the employer of the employees who will be affected by the restructuring must provide the employees affected with—*

(a) a reasonable opportunity to exercise the right to make an election under section 69I(1); and

(b) the date by which the right to make an election must be exercised; and

(c) information sufficient for the employees to make an informed decision about whether to exercise the right to make an election.

(2) *Without limiting subsection (1)(c), the information provided under that provision must include—*

(a) the name of the new employer:

(b) the nature and scope of the restructuring:

(c) the date on which the restructuring is to take effect:

(d) how to make an election, the person to whom an election is to be sent, and the form in which the election is to be sent (for example by post, fax, or email).

- (3) *If the restructuring is a contracting in or a subsequent contracting, person A in the definition that applies must give the employer sufficient notice of, and information about, the restructuring to enable the employer to comply with subsection (1)*
- (4) *An employer or other person who fails to comply with this section is liable to a penalty imposed by the Authority.*

[18] Section 69I provides that an employee may elect to transfer to the new employer.

[19] Les Mills was unaware of these provisions. Mr Harrison submitted that despite that, the provisions of s69G had in fact been complied with. I cannot accept that argument. These are mandatory provisions. To comply with the provisions it is necessary that affected staff be aware that they can make an election and must be given sufficient information to make an informed decision. While I agree that there was an awareness that they could transfer, the full scope of the legal obligations of the existing employer and the new employer were not conveyed to the cleaning staff.

[20] Mr Shi maintained that had he been aware that a transfer had to be on existing terms and conditions he would have transferred. I am satisfied that this is a position that Mr Shi took only when he became aware that there might be an advantage to him in doing so. It is readily apparent from the documentation that Mr Shi wanted to continue to work for Les Mills and he had formed an unfavourable view of OCS. The position he took regarding the terms and conditions being offered by OCS was not the position he took at the time of the redundancy, when the issue was not the terms and conditions being offered by OCS but the fact that he had formed a negative view of that company and did not wish to work for it. I am confirmed in my view that this is so by the fact of Mr Shi's rejection of the offer by Mr Sun of a position at the same pay rate on two occasions.

[21] Furthermore, in his closing submissions Mr Shi said he thought that not transferring was the correct decision for him and the rest of the staff. He reiterated that he did not want to work for OCS.

[22] Section 69G provides for a penalty for breach that section. Mr Shi has not made a claim that a penalty be awarded.

[23] The redundancy was substantively justified. Les Mills was entitled to form the view that its business could be run more efficiently if the day time cleaning were carried out by OCS. While the time frame was not lengthy, in the absence of any submissions by the cleaning staff regarding the proposal and there having been no request for an extension of time to consider the matter, it was in the circumstances reasonable. The redundancy was justified.

Costs

[24] The parties should endeavour to resolve the issue of costs.

[25] Failing that, the respondent is to file a costs' memorandum within 28 days of the date of this determination. The applicant is to file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King

Member of the Employment Relations Authority