

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 141/09
File Number: 5152615

BETWEEN Peter Smith
Applicant

AND Konica Minolta (NZ) Limited
Respondent

Member of Authority: Denis Asher

Representatives: Jills Angus Burney for Mr Smith
Gillian Service & Emily Moore for the Company

Investigation Meeting Palmerston North, 10 September 2009

Submissions Received by 22 September 2009

Determination: 24 September 2009

DETERMINATION OF THE AUTHORITY

The Problem

[1] Mr Smith says he is owed redundancy compensation and that he was unjustifiably dismissed – amended statement of problem received 26 March 2009.

[2] The Company says Mr Smith received the relevant provisions of his employment contract in respect of his redundancy and that his dismissal was

procedurally and substantively justified – amended statement in reply received 15 April.

- [3] This problem was not resolved at mediation.
- [4] The parties usefully provided the Authority with witness statements and an agreed bundle of documents in advance of the investigation.
- [5] In her closing submissions received on 16 September, Ms Burney advanced for the first time an amended remedies claim that, in the circumstances of the Authority finding an unjustified dismissal, Mr Smith is seeking increased compensation for humiliation of up to \$18,000.

Background

- [6] Mr Smith had been employed for over 13 years by the Company and its predecessors as a service technician when his employment was terminated because of redundancy on 10 October 2008.
- [7] At a meeting on 31 July 2008 the Company advised its Palmerston North staff including Mr Smith of a decision to evaluate possible changes to its local structure including disestablishing two field technician roles. Feedback was sought and further meetings were promised along with the option of attending with a support person (doc 9).
- [8] From that time the management of the restructuring process was effectively undertaken by Craig Bailey, the respondent's recently appointed (early in 2008) Palmerston North branch manager.
- [9] A further meeting took place on 4 August (doc 10).
- [10] By email dated 15 August affected staff including Mr Smith were advised of the Company's proposal to disestablish two field technician roles; attached to the email was a "*Selection Criteria Matrix*" (doc 11). Feed back was sought by 19 August; again, the offer of meeting with staff with a support representation was communicated to those affected including the applicant.

- [11] Mr Smith says he forwarded his views about ways and means of addressing the financial issues behind the Company's restructuring review (doc 12): the Company says it has no record of receiving his communication.
- [12] By email dated 20 August the Company confirmed its decision to reduce the number of field technicians by two, that the advised criteria would be applied and the outcome communicated on Friday 22 August: individual meeting times were promised, as was the opportunity to have a support person present (doc 15).
- [13] Shortly afterwards Mr Smith's union advised the Company it opposed any meetings taking place with its members (including, by implication, the applicant) until it had an opportunity to vet the process and meet with its members (doc 31). At that time Mr Smith was unaware of his union's initiative and proceeded, with his wife as his support person, to meet with Mr Bailey on 22 August. The parties differ as to the circumstances of that meeting but it was clearly tense, difficult and unhappy for all concerned, not least because – on the eve of taking an overseas holiday – Mr Smith was shocked to discover his position was to go.
- [14] Following considerable communication between the parties, Mr Smith's termination was effected on 10 October (doc 21).

Applicant's Position Summarised

- [15] Mr Smith challenges the procedural and substantive fairness of the redundancy and says he was unjustifiably dismissed. He does not seek lost wages as he promptly found fresh employment but does claim \$8,000 compensation for hurt – amended to \$18,000 following the investigation (see par 5 above).
- [16] Mr Smith says that he received from the Company in 2005 a proposed new individual employment agreement (doc 2 in the agreed bundle) and that – after making changes to it – he signed and returned it to the Company: the applicant says it is thereby binding on the respondent and, hence, he is owed redundancy compensation which he calculates at approximately \$25,000.

- [17] Mr Smith does not agree that his 1996 individual employment contract (doc 1) was applicable at the time of his termination, and says that other employment agreements were entered into subsequent to 1996, including a 2000 agreement.

Respondent's Position Summarised

- [18] The Company agree it offered Mr Smith a new individual employment agreement in 2005 but that he rejected it: it denies receiving a signed copy and relies on the 1996 individual contract (doc 1), which makes no provision for redundancy compensation.
- [19] It says that Mr Smith's redundancy was procedurally fairly effected and substantively genuine.

Discussion and Findings

1996 Contract or 2005 Agreement?

- [20] I do not accept the parties ever concluded a 2005 individual employment agreement. The evidence is plainly obvious: the Company offered Mr Smith a new agreement but, as his evidence (properly) makes clear, Mr Smith did not accept it in the form offered but instead returned a significantly revised counter-proposal (which the Company says it never received).
- [21] There is no evidence of the respondent ever agreeing to Mr Smith's counter-proposals, which the applicant calculates – with the additional changes sought by him – would have been worth in the vicinity of \$30,000 over and above the offer originally put to him.
- [22] It is not possible to go past the variations sought by Mr Smith: he did not agree to the original offer but instead sought significant change. There is no evidence or reason to believe the Company ever acceded to those proposed changes. The parties therefore cannot be said to have reached agreement on new terms and conditions.
- [23] There is no evidence of a 2000 agreement between the parties either: the reason for various changes to Mr Smith's terms and conditions of

employment (e.g. the provision of a larger car) are disputed by the parties and do not – on a balance of probabilities basis – support the applicant’s claim they were because of a post-1996 employment agreement being concluded by the parties.

[24] It follows that, in the absence of any proof of any other employment agreement, the Company justifiably relied on the 1996 individual employment contract as the document that set out Mr Smith’s terms and conditions of employment (doc 1).

[25] As that contract did not contain a redundancy compensation provision the Company was and is entitled to decline Mr Smith’s request for the same.

Unjustified Termination Claim

[26] As is made clear above, the Company made use of a selection matrix to implement its restructuring and to effect two redundancies. The matrix provided for six equally weighted criteria including “*experience and technical capability*”, “*customer service*”, “*conduct/culture fit*” and “*willingness to learn/adapt to change*” (doc 11). Each technician, including the applicant and two other staff members recruited earlier in the year, were assessed under the headings by Mr Bailey and awarded a value on a 1 minimum to 5 maximum scale.

[27] Mr Bailey checked his assessments with his manager, Tony Day, the Company’s general manager – services, before implementing the results.

[28] The evidence before the Authority confirmed that Mr Bailey, then a manager of 7-months experience in the Company, was the effective decision maker.

[29] Mr Smith says he first saw his completed matrix the night before the Authority’s investigation (doc 35).

[30] During the Authority’s investigation Mr Bailey conceded he attributed scores to Mr Smith that reflected complaints (“*Customer Service*”) which had never been put to the applicant. Similarly, he conceded he had not put to Mr Smith complaints he (Mr Bailey) had received that impacted in his assessment of the applicant’s “*Willingness to learn/adapt to change*”. Issues that impacted on

Mr Bailey's assessment of Mr Smith's "*Conduct/Culture fit*" were also not put to the applicant.

- [31] Mr Bailey also accepted he had not made use of Mr Smith's 2007 performance review in making his evaluation ("*I haven't read it*" – oral evidence) nor had he completed a performance review of the applicant for 2008.
- [32] As a result of Mr Bailey's assessment of Mr Smith where he took into account performance issues not raised with the applicant he was marked at the same level or less than, for example, two new technicians employed by the Company earlier that year.
- [33] In *Coutts Cars Ltd v Baguley* [2001] ERNZ 660 the Court of Appeal held that the duty of good faith required consultation with affected employees in a threatened redundancy situation whenever that was reasonably practicable. Selection criteria used by an employer to determine redundancy should be disclosed to the employees affected by it, subject to confidentiality in relation to the application of those criteria to other employees. However, non-disclosure of selection criteria does not necessarily cause a dismissal for redundancy to be flawed: "*if the criteria were properly formulated and applied according to the standard of a reasonable employer acting fairly and in good faith towards the employee, subsequent challenge would be unlikely to be fruitful*", *Simpson Farms Limited v Aberhart* [2006] 1 ERNZ 825, par 52.
- [34] As was found by the Employment Court in *Simpsons Farms* (above), s. 4(1A) of the Act emphasises that the duty of good faith is wider in scope than the implied mutual obligations of trust and confidence at common law in employment contracts, the parties to those contracts are required to be "*active and constructive*" and the duty of good faith requires an employer in redundancy situations "*to provide them with access to information, relevant to the continuation of their employment ... and to provide the(m) an opportunity to comment ... before the decision is made*" to make them redundant: par 58, above.
- [35] Consistent with the above case law, I am satisfied a fair and reasonable employer, objectively measured and in all the circumstances at the time, consistent with the duty of being active, constructive and communicative, would have advised the applicant in advance of these matters and provided

him with an opportunity to comment before proceeding to rely on those matters and terminate his employment for redundancy. The same employer would have also had regard to an employee's formal performance review(s). These steps were all the more important given Mr Bailey's limited working experience (7-months) with the applicant.

[36] I accept Mr Smith's submissions that the reasons given for his redundancy were not transparent. That is because he was 'marked down' (my term) relative to others as a result of performance matters never brought to his attention and which were also applied in his ignorance. No regard was had to his performance review from the year before (or earlier). The basis of the points awarded staff with less than 2 months experience is not clear. In respect of an employee of more than 13 years experience, the picture relied on by the respondent was neither complete nor tested: the criteria therefore cannot be said to have been objectively measurable and properly applied (see *EDS (NZ) Ltd v Shaddox* [2004] 1 ERNZ 497; *Smith v Sovereign Ltd* [2005] 1 ERNZ 832; etc).

[37] The applicant's side of the story in respect of those performance matters, if properly heard, could have transformed his assessment ratings. Because he was not informed nor heard on negative assessments relied on by his employer to effect his redundancy Mr Smith was thereby unjustifiably dismissed both procedurally and – because the decision to terminate was based on a flawed and non-transparent process – substantively.

Remedies

[38] Mr Smith originally sought \$8,000 compensation for humiliation: in closing submissions received on behalf after the investigation an amount of up to \$18,000 was sought, should the Authority find he had been unjustifiably dismissed.

[39] The evidence tested by the Authority clearly supports the applicant's original claim: no argument or evidence is advanced such as to support the increase sought after the investigation of up to \$18,000. It is just in all the circumstances to award the original compensation sum claimed.

Contributory Fault

[40] Because the selection process was entirely in the hands of the respondent, and as Mr Smith was given no opportunity to be heard it, cannot be said that his actions in any way contributed towards the situation that gave rise to his successful personal grievance: s. 124 of the Act applied.

Determination

[41] Mr Smith was unjustifiably dismissed and the Company is to pay him \$8,000 (eight thousand dollars) compensation for humiliation.

[42] Costs are reserved.

Denis Asher

Member of the Employment Relations Authority