IN THE EMPLOYMENT COURT
AUCKLAND

AC 6A/09
ARC 51/08

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	BAY MILK DISTRIBUTORS LIMITED Plaintiff
AND	MICHAEL JOPSON Defendant

Hearing: 27 August 2009
(Heard at Tauranga)

Appearances: Shima Grice and Kelly McLeish, Counsel for Plaintiff
Simon Scott, Counsel for Defendants

Judgment: 22 December 2009

JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] The questions for decision in this challenge to a determination of the Employment Relations Authority (AA 215/08) are whether Michael Jopson was dismissed justifiably for reasons of redundancy by his employer, Bay Milk Distributors Limited (BMDL), and, if so, the remedies to which he may be entitled.

[2] On 20 June 2008 the Authority determined that Mr Jopson had been dismissed unjustifiably and awarded him $2,500 as compensation under s123(1)(c) of the Employment Relations Act 2000 ("the Act").

[3] BMDL challenged that determination, claiming that the dismissal was genuinely for reasons of redundancy and had been carried out fairly. Mr Jopson brought a cross challenge saying that he ought to have been awarded compensation

for lost remuneration and significantly more distress compensation than $2,500. All matters are, therefore, at issue again.

[4] Mr Jopson was one of two employees dismissed for redundancy at the same time. His colleague brought parallel grievance proceedings in the Authority and was successful, along with Mr Jopson, and on the same grounds. This colleague was awarded the same remedies but BMDL has not pursued its challenge against the decision in favour of that other employee and he has not sought to increase his remedies as Mr Jopson has.

[5] BMDL is engaged in wholesale and retail milk deliveries to customers in the Bay of Plenty area. It had a number of drivers and *"runners"* to do this work. Mr Jopson was both a driver and a runner and had held this position for more than a year before the events in mid-2007 with which this case is concerned.

[6] The company received advice from its accountants that its labour costs were significantly greater than those of similar businesses and was advised to try to reduce these. It was warned that care would need to be taken to comply with employment law in doing so. BMDL also took advice from its solicitors before embarking on a process of consultation with employees to determine how it might reduce its labour costs. This was underpinned by a proposed restructuring of the company's delivery operations. The assessment was to determine which drivers and other staff would be best suited to operate these revised and reduced schedules.

[7] As a result of that exercise Mr Jopson and another employee lost their jobs for redundancy. Both challenged their dismissals in the Authority although, as already noted, the other employee's case is not now before the Court.

The Authority's determination

[8] It correctly identified the statutory test in s103A of the Act as being to determine, on an objective basis, whether the employer's actions and how the employer acted were what a fair and reasonable employer would have done in all the circumstances. The Authority applied this Court's judgment in *Simpson Farms Ltd v*

Aberhart[1] affecting dismissals for redundancy. The Authority considered that its role was to examine, first, the genuineness of the decision to dismiss in the sense that it was made for proper business reasons and not for ulterior motives. Next, the Authority identified the statutory and common law requirements of consultation about the employer's proposals affecting the employees and to act otherwise in a manner that neither misled nor deceived them or was likely to mislead or deceive them.

[9] The Authority concluded that the employer's decision to cut costs by rearranging its deliveries, thereby creating a superfluity of labour, was a genuine business decision taken for proper reasons. However, the Authority determined that Mr Jopson's dismissal was unjustified because the employer unfairly withheld from affected employees the existence or detail of a number of criteria it applied in selecting which employees were surplus to its requirements. Whereas, the Authority found, employees were told that there would be one criterion for redundancies ("last on, first off"), in fact the employer took into account a number of other unannounced factors such as skill levels, abilities to work new rosters, driver's licence qualifications, customer relationships, and distribution skills. In the particular case of Mr Jopson, the Authority found that the employer took into account, but without advice to the defendant, his presumed inability to work on weekends. It found that if this criterion had been made known to the defendant and discussed with him, he would have agreed to work on weekends. Instead, because the employer assumed that he would not be able or willing to do so, this factor was taken into account in the decision to dismiss him. The Authority found that the defendant was not given a proper opportunity to respond to the criteria used by the employer and to challenge or disprove its assumptions.

[10] The Authority concluded that, the redundancy having been for genuine reasons, the defendant was unable to claim lost wages or compensation for the loss of his job. It confined his remedies to compensation for the effects of the employer's failure to consult properly about the criteria against which he was assessed for redundancy. The Authority did not address in its determination whether, if the

[1] [2006] 1 ERNZ 825.

employer had acted lawfully, the defendant may not have been made redundant which would have at least opened the possibility of a claim for remuneration loss.

[11] The Authority determined that the defendant's claim of $10,000 for compensation for hurt and humiliation was largely unsupported by evidence and awarded Mr Jopson the modest sum of $2,500 under s123(1)(c) of the Act.

Obligations on proposed restructuring

[12] These were both statutory and contractual. Section 4(1A)(c) of the Act required that the employer, when proposing to make a decision that would or was likely to have an adverse effect on the continuation of employment of its employees, to provide to those affected both access to information about the decision relevant to the continuation of their employment and, second, an opportunity to comment on the information before the decision was made. This was a part of the broader statutory obligation to act in good faith including not to do anything, whether directly or indirectly, to mislead or deceive the employees, or that was likely to mislead or deceive them: s4(1)(b).

[13] Mr Jopson's employment agreement also dealt expressly with such events in clause 21. Although the actual restructuring that was intended did not meet the express definition of that word in the legislation (a contracting out or sale or transfer of the business or the loss to another entity of the business), this contractual definition of restructuring was not so limited. I conclude, as a matter of interpretation of the agreement, that the employer's plan to save labour costs by rearranging its working methods and creating thereby the redundancy of two full-time equivalent positions, was a restructuring pursuant to clause 21.1 of the employment agreement.

[14] Clause 21.3 required the employer to consult Mr Jopson *"a reasonable time in advance of any final decision"* and to provide him with information, relevant to the continuation of his employment, about the decision. BMDL was also obliged to provide Mr Jopson *"a reasonable amount of time to consider the information provided and an opportunity to comment on the information"*. Next, the employer's obligation was to *"discuss, investigate, and consider any alternatives"* that Mr Jopson might suggest although the company was not bound to accept these. Finally,

BMDL was required to discuss with him any possible redeployment if such a possibility existed.

[15] Clause 21.5 provided that if no suitable alternative or continuing employment could be arranged, Mr Jopson was to be given no less than 2 weeks' written notice of the termination of his employment or 2 weeks' pay in lieu of notice. Finally, clause 21.6 provided: *"In the event of a restructuring, no payment by way of damages or compensation will be payable."*

[16] *"Redundancy"* was also dealt with separately in the employment agreement. It was defined as including, but not limited to, the situation in which *"the position held by the Employee becomes surplus to the requirements of the Employer."* A redundancy was also defined as including where *"the position held by the Employee is otherwise disestablished as a result of … a reduction in work available or as a result of a decision of the Employer that the business can be operated more efficiently by disestablishing the position."*

[17] In the event of a redundancy which, I find as a matter of interpretation, included the circumstances facing Mr Jopson, clause 21.7 of the employment agreement required BMDL to discuss possible redeployment, if any existed, to assist him, if requested, in obtaining alternative employment and to *"provide counselling if necessary to assist the Employee."* Clause 21.8 also provided that there would be no entitlement to damages or compensation in the event of a redundancy.

Discussion and decision

[18] The justification for Mr Jopson's dismissal is challenged in three separate ways in this challenge by hearing de novo. First, Mr Jopson contends that his dismissal was not genuinely for reasons of redundancy but, rather, because of his employer's dislike of him following a final employment warning relating to timesheet errors issued a few weeks before his dismissal. Second, Mr Jopson says that BMDL did not identify correctly in its discussions with him the criteria that it proposed to use to determine which of a number of employees might either be made redundant or be persuaded to alter their work patterns. In particular, Mr Jopson says that the employer assumed erroneously that he would not be prepared to work at

weekends although, if he had been asked and had agreed to do so as he says he would have, it is probable that he would not have been dismissed. Third, Mr Jopson says that the employer breached his employment agreement by not offering him counselling to deal with the effects of his dismissal for redundancy. I deal with each of these grounds separately.

Non-genuine redundancy?

[19] A few weeks before BMDL's restructuring exercise, Mr Jopson was the subject of a disciplinary inquiry conducted by the employer into allegations of erroneous timesheet completion by him. He accepted that information he had supplied was incorrect but said that this was an honest and innocent mistake. The company concluded that the provision of erroneous information amounted to serious misconduct but in allowing for, if not accepting, the innocent explanation, it issued Mr Jopson with a final employment warning rather than dismissing him summarily for serious misconduct. Although unwillingly, Mr Jopson accepted that outcome in the sense of not challenging it. The merits of this allegation and of the employer's conduct of its investigation into, and disposition of, it were not before me on this challenge.

[20] Although it is understandable that Mr Jopson regarded his dismissal for redundancy within a matter of a few weeks as being a charade in that it was a vindictive response by his employer to previous events, an examination of the comprehensive documentation of those events kept by the employer leads me to conclude, on balance, that this was not so. That is also because, as in the Authority, BMDL has established that it had independent and genuine commercial reasons for needing to reduce its operating costs including by reducing its labour costs.

[21] I am satisfied that a fair and reasonable employer in these circumstances would have taken steps to reduce its labour costs including by a combination of redundancies and changing work hours and patterns as the plaintiff did. I agree with the Authority that Mr Jopson's redundancy was genuinely fort that reason.

Consultation unfairness?

[22] This is Mr Jopson's strongest ground of contest to the justification for his dismissal and is indeed the ground upheld by the Authority which is challenged by the employer.

[23] The owner of the business, Frank Bourgeois, did not make the criteria for selection of redundant employees entirely clear to those affected including Mr Jopson. He referred to applying the principle of "last on, first off" but without more. He left those affected, including the defendant, with the initial impression that this would be the manner in which redundancies would be selected.

[24] In fact, this was not simply by application of the principle of last on, first off. It was the way in which Mr Bourgeois selected the pool of three employees from which two were eventually selected for redundancy and one retained in employment although on different terms and conditions. The three employees, including Mr Jopson, were indeed those who were "last on" the plaintiff's relevant staff of milk delivery people. However, Mr Bourgeois applied other criteria in making the particular selections from that pool. These included whether employees held a current Class 2 motor driver's licence. Mr Jopson did hold this class of licence and that criterion was not held against him in the selection process. Other criteria applied by the employer did not disadvantage Mr Jopson in comparison to his colleagues. Another criterion was the ability/preparedness of each employee to work at weekends as would be necessary under the company's proposed restructuring operations.

[25] Mr Jopson did not then work at weekends. Although he needed to, and made it clear to Mr Bourgeois that he wished to continue to work for 40 hours per week, Mr Bourgeois assumed in the following circumstances that Mr Jopson could or would not change his arrangements to work on weekends. Those included that Mr Jopson had child custody responsibilities each weekend beginning on Friday nights and that he had remunerative employment as a Sunday newspaper delivery person early each Sunday morning. BMDL's deliveries took place beginning in the early hours of the morning and were largely concluded by the middle of the day.

Although, as Mr Jopson said, Mr Bourgeois did not ask him directly whether he would be able and/or prepared to change his working hours to include weekends, Mr Jopson's commitments were discussed by and with Mr Bourgeois in the course of the consultations preceding the redundancies and Mr Jopson confirmed his commitments to Mr Bourgeois.

[26] Mr Bourgeois told affected employees, including Mr Jopson, that the criterion for redundancy selection would be "last on/first off". As I discussed with Mr Bourgeois in evidence, that is usually a phrase qualified by words such as "all other things being equal". That would mean that in a workplace where there are a number of employees performing the same job to the same standard so that there is nothing on merit to choose between them, those to be dismissed for redundancy will be the employees with the least (usually continuous) service. Here, however, there was no such qualification to the phrase used by Mr Bourgeois.

[27] What only emerged after dismissal was that the last on/first off test was applied by Mr Bourgeois not to which employee or employees were to be selected for redundancy, but to the creation of a pool of potential redundant employees from which a selection would be made on other grounds. That pool constituted three persons of whom Mr Jopson had the most seniority.

[28] Although I accept, as the Authority found, that Mr Bourgeois' initial advice about the grounds for redundancy selection (last on/first off) was misleading in the sense that it gave the impression that other criteria would not be used, it must have been obvious to the defendant (and the other two employees in the pool selected by the last on/first off process) that other criteria would nevertheless be in issue and were to be used. If it had been otherwise, there would have been no point to the discussions about availability for weekend work, Class 2 driving qualifications, and the like. Nor would such a position have been consistent with the offers, including to Mr Jopson, to make suggestions as to how the business might be reorganised and his having done so.

[29] At all stages during several consultations Mr Bourgeois made clear to Mr Jopson and other affected employees that he sought their suggestions about how the

company's costs of labour might be reduced including by rearranging operations and duties. Although Mr Jopson made a number of suggestions affecting other employees and could have made proposals about his own circumstances, he did not do so. In these circumstances I accept that it was fair and reasonable for Mr Bourgeois to have concluded, as he did, that Mr Jopson was unprepared to undertake weekend work. A fair and reasonable employer in all these circumstances would, as Mr Bourgeois did, have assumed that Mr Jopson would be unable to work at weekends and to have taken this into account when determining whether he was to be made redundant or offered altered terms and conditions of employment. Although, especially with the benefit of hindsight, counsel of perfection may have required Mr Bourgeois to have gone the extra step and actually asked Mr Jopson whether he would be prepared to work weekends, the test of what a fair and reasonable employer would have done in all the circumstances does not require that standard.

[30] None of the other criteria used by the employer disadvantaged Mr Jopson. Further, I am satisfied that the employer complied with both the relevant contractual provisions for restructuring and redundancy, on the one hand, and the statutory requirements for consultation in such circumstances on the other.

[31] Standing back from the detail and determining whether the process by which BMDL selected employees for redundancy was what a fair and reasonable employer would have undertaken in all the circumstances, I am satisfied that this test has been met and, so, that the Authority's conclusion (that it had not) was wrong.

[32] The company and Mr Bourgeois went to more than usual lengths to take professional advice, to record events, to consult several times with affected employees, and considered carefully its decision to necessarily rearrange its business including by making some employees redundant. Although Mr Jopson's disappointment at the loss of his job is understandable, it was justified dismissal as this is determined by applying the test under s103A of the Act.

Counselling

[33] One of Mr Jopson's grounds of unfairness and lack of justification for dismissal was that BMDL did not provide him with *"counselling"* on the termination of his employment. Although such was required by the employment agreement, that was in circumstances where it was *"necessary"*. I am not satisfied that this condition of necessity existed which would have triggered the obligation on the employer. Not only were the relevant conversations and correspondence between Mr Bourgeois and Mr Jopson civil and even positive, but they were, on the employer's part, sensitively conducted. Mr Jopson was not surprised to learn that his employer needed to make labour cost savings and indeed endorsed that course by providing suggested alternatives but which did not include the loss of his own job. Possible redundancies were discussed from an early point. In his advice to Mr Jopson of his dismissal for redundancy, Mr Bourgeois wrote:

> *We understand this is a particularly difficult time and appreciate the impact of the redundancy. If we can be of assistance to you during this time please do not hesitate to contact me. We are sincerely grateful for the contributions you have made during your time with Bay Milk Distributors and hope that you will find future employment to suit your abilities and interests.*

[34] Mr Jopson did not respond to that invitation for assistance which would have included counselling if that had been necessary. Mr Scott argued that it would have been unnatural and inappropriate for Mr Jopson to have sought counselling from the employer which had just dismissed him and that the company ought to have provided an employee assistance programme as a matter of course allowing counselling to be independent. I do not understand that it was intended that Mr Bourgeois would counsel Mr Jopson himself. The logical implication of the clause is that this would have been arranged with an appropriate professional organisation had it been sought and necessary. However, I consider that was not only not required by the parties' agreement but it is unrealistic in the circumstances of these parties.

[35] There was no breach of any obligation, whether contractual or as an element of a fair process of dismissal for redundancy, by failing or refusing to provide counselling for Mr Jopson.

Summary of challenge

[36] For reasons set out, the employer's challenge to the Authority's determination succeeds and, under s188(2) of the Act, the Authority's determination is set aside and replaced by this judgment which finds that Mr Jopson was dismissed justifiably by BMDL.

[37] If costs (including costs in the Authority) cannot be agreed between the parties, the plaintiff may apply by memorandum filed and served by 1 March 2010 with the defendant having the period of one month to respond by memorandum.

GL Colgan
Chief Judge

Judgment signed at 4.30 pm on Tuesday 22 December 2009