

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN William Katipo (Applicant)
AND New Era Plastics Limited (Respondent)
REPRESENTATIVES Boris Samujh, Advocate for Applicant
Paula Sullivan, Counsel for Respondent
MEMBER OF AUTHORITY Alastair Dumbleton
INVESTIGATION MEETING 22 February 2006
DATE OF DETERMINATION 10 May 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Mr William Katipo was notified by his employer the respondent New Era Plastics Limited (“NEP”), that his position was redundant and that consequently his employment was being terminated. This advice was confirmed in writing on 5 August 2005 by the Managing Director of NEP, Mr Malcolm Fergusson. His letter also advised Mr Katipo that a period of four weeks notice would apply to the termination and that if he wished he could remain working during that time. At termination Mr Katipo had been employed by NEP for just over two years, as Factory Manager for about half of that time.

[2] Mr Katipo promptly engaged an employment law advisor, Mr Boris Samujh, who formally challenged the lawfulness of the termination and the employer’s actions in relation to it. Amongst other things he alleged that the purported redundancy was not genuine and that procedurally the decision to dismiss was unfair and unreasonable in the circumstances. NEP also retained an advisor and she refuted those allegations. As the parties have not resolved their differences even after mediation, the Authority has investigated the employment relationship problem and now gives this determination to dispose of it.

[3] Mr Katipo has asked the Authority to reinstate him as well as order NEP to compensate him for hurt feelings and humiliation and reimburse to him lost wages. With regard to remedies it is relevant that Mr Katipo found new employment within a week of his termination, although at a pay rate \$2 per hour less than he received at NEP.

NEP

[4] The business of NEP is plastic manufacturing and design. (That situation may have changed, as at the time of the investigation meeting in February it was anticipated by Mr Fergusson that the

company was then about to be wound up.) At material times ownership of the company was divided one third each between Mr Fergusson, his wife Mrs Sonya Fergusson, and her father Mr Ian Jennings jointly with his wife, Ms Gayanne Jennings. Mr Jennings was the chairman of NEP's board and from time to time had been putting money of his own into the company to boost its finances.

Need for change

[5] NEP had been underperforming for several years and its financial situation deteriorated even further, I find, in the year to 31 March 2005. This is verified by the draft financial statements prepared for the company in early July 2005 by KPMG, a copy of which was produced to the Authority. These show that operating and administration expenses significantly exceeded revenue from sales. I accept from Mr Fergusson that the company's loss situation had been caused in part by expenditure to meet a large order expected from district health boards. Unfortunately that order was not finally gained and as a consequence the company lost future revenue and got no return on the setting up costs. A trend towards aggregation in the plastics industry had also made trading more difficult.

[6] NEP's poor results led to a board decision that Mr Jennings and his daughter Ms Sonya Fergusson would participate more directly and frequently in management of the company. Mr Jennings who was not an employee was to take responsibility for financial reporting and his daughter was to take over some of its marketing. This reorganisation was intended to leave Mr Fergusson enough free time to be able to concentrate on managing the factory in which the company's products were made and in which about a dozen people were employed. Mr Jennings increased involvement was potentially a saving in wage costs, as his work was to be unpaid. Mrs Fergusson's increased involvement was intended to be on the same basis.

Consultation

[7] I am satisfied from the evidence that before NEP reached any decisions that might have effected Mr Katipo's employment, on 1 August 2005 all the factory staff were told by Mr Fergusson that a potential redundancy situation existed. They were invited to offer any suggestions they might have for avoiding this. NEP thereby discharged its obligations as a fair and reasonable employer to consult meaningfully with employees who might be affected by a decision it made. The company also discharged its duty to act in good faith towards potentially affected staff.

[8] I find that Mr Katipo was unable to offer Mr Fergusson any practicable suggestions as to how his position could be retained while at the same time enable the company to start improving its financial situation. Not altogether in jest, Mr Katipo had suggested to Mr Fergusson that he could be redeployed as the chairman of NEP. However that was an unpaid position and, as Mr Katipo acknowledged, his financial skills in business were limited compared to those of Mr Jennings.

[9] Mr Fergusson's role as 'Managing Director' had in large part been reassigned to Mr Jennings and Mrs Fergusson. The question in this case is whether Mr Fergusson was found another position by exchanging him for Mr Katipo as 'Factory Manager.' If so, there was no genuine redundancy. It is trite law that redundancy pertains to 'positions' of employment and not to the individuals who are employed to occupy them. Also, the title that a position has been given will not usually be what in substance distinguishes that position from another, for the title may be little more than an arbitrary label of management. It is the duties and responsibilities of the position that truly identify it. There is unlikely to be a genuine redundancy following a restructuring if the same duties and responsibilities are substantially retained in the same position. There is a redundancy if a significant proportion of the duties and responsibilities are transferred or reassigned to one or more other positions.

[10] A basic diagrammatic representation produced by Mr Fergusson during one of his discussions with Mr Katipo showed that after restructuring a box with the name 'Factory Manager' in it was replaced by another box with 'Managing Director' in it. To Mr Katipo this seemed to show that his position had disappeared. In substance however there were still duties and responsibilities of his former position that needed to be performed. It is a question of fact and degree as to whether the extent of those duties and responsibilities meant that despite the different label the position of 'Managing Director' was identical or substantially similar to the position of 'Factory Manager.'

[11] In his evidence Mr Fergusson described himself as having taken over the job of factory manager from Mr Katipo. He said he remained responsible for designing products, liaising with customers on new projects, marketing and reporting to the directors of the company. Mr Fergusson described himself as having stepped out of the managing directors shoes into the shoes of the factory manager, but that he was also responsible for customer development and customer liaison.

[12] Mr Fergusson pointed to the 'external' role he retained in dealing with customers. He contrasted this with the 'internal' role that Mr katipo had been restricted to in dealing mainly with factory staff and management. This difference was also reflected in the greater 'hands-on' role Mr Katipo had taken on the production line in the factory. Mr Fergusson considered he had a lesser role in this regard.

[13] In assessing the situation it is relevant to consider not only the changes to the position filled by the worker made redundant (Mr Katipo) but changes to other positions occupied by other workers (including Mr Fergusson). This was held to be a correct approach in *New Zealand Nurses Union v Air New Zealand Ltd* [1992] 3 ERNZ 548, at page 571.

[14] I am satisfied that the position Mr Katipo had occupied became surplus to the requirements of NEP after the board acted to address the growing loss making situation the company was in. Mr Katipo's position was redundant for genuine commercial reasons and therefore NEP had grounds to justifiably terminate his employment. Responsibility for managing the factory was transferred by NEP to Mr Fergusson but he also retained responsibilities for design, marketing and customer relations. Mr Katipo had not had those responsibilities. As a legitimate exercise of business judgement by NEP, parts of the former positions of Managing Director and Factory Manager were amalgamated into a different position. NEP was entitled to select the person (Mr Fergusson) who was to fill that position.

Other matters

[15] If there were issues about Mr Katipo's employment agreement, they cannot usefully be resolved now. Essential terms were agreed by conduct over a period of time if not orally. The remedy of a penalty has not been sought and is not available more than one year after there has been any failure to comply with s.62 of the Employment Relations Act 2000.

[16] If the individual employment agreement was adopted by NEP and Mr Katipo then the definition of redundancy in it at clause 14 was satisfied in the circumstances. I find that the condition faced by NEP was one where it had "*staff surplus to requirements because of the reorganisation ... of the whole or any part of the employer's operations ... due to ... economic circumstances ... requiring a reduction in the number of employees.*"

[17] If NEP can be criticised it is only in respect of the way Mr Fergusson began to understudy Mr Katipo as Factory Manager without telling him he was doing so to help the company decide on whether it should make that position redundant, as subsequently happened. Management must be entitled to view the way operations are performed, with whatever objective they may have in mind.

I am not satisfied that NEP breached a requirement that Mr Katipo be given production work during this period and the notice period which followed. As he acknowledged, there was very little production work available and he did agree with Mr Fergusson to spend time doing the maintenance and repairs to the factory. There had been nothing else for him to do, he said. Mr Katipo was also offered the option of being paid out in lieu of notice but chose to stay and work the period out.

Determination

[18] For the above reasons I find the employment relationship problem brought to the Authority for resolution does not require the Authority to make any orders against NEP. The termination of employment was justified on the grounds of genuine redundancy and in all other respects I find that NEP acted lawfully.

Costs

[19] Costs are reserved to allow the parties' representatives time to confer and hopefully themselves dispose of that question. Application by memorandum may be made to the Authority if that proves not to be possible.