IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 163/09
5277097 & 5277097

	BETWEEN	Brian Tuuta, Mark Gladding, Patrick Toa-Wairere and Renata Pue Applicants
	AND	Olex New Zealand Limited Respondent/Applicant
	AND	New Zealand Amalgamated Engineering Printing & Manufacturing Union Incorporated Respondent to file no. 5277097
Member of Authority:	Denis Asher	
Representatives:	Jills Angus Burney for Messrs Tuuta, Gladding, Toa-Wairere and Pue and the Union Caroline McLorinan for the Company	
Investigation Meeting	New Plymouth, 30 September and 1 October 2009	
Submissions Received	By 16 October 2009	
Determination:	27 October 2009	

DETERMINATION OF THE AUTHORITY

The Problem

[1] Mr Tuuta and his colleagues say they were unjustifiably dismissed as the decision to make them redundant was not one a fair and reasonable employer would have reached in all the circumstances. They also say that, in making its decision to dismiss them as redundant, the Company failed to apply the terms of their collective employment agreement.

[2] The Company claims the applicants' Union failed to act in good faith in that it failed to actively participate in the consultation process culminating in the applicants' termination.

Developments

[3] This matter originated initially by way of an urgent application filed on 3 August 2009 by the Union on behalf of Mr Tuuta and his colleagues in which interim reinstatement and other remedies were sought. During the Authority's conference call on 4 August the parties agreed to a two-day substantive investigation in New Plymouth commencing 30 September, and the interim application by agreement was put aside.

[4] The parties usefully provided an agreed bundle of documents.

[5] At the commencement of the second day of the investigation Mr Tuuta and his colleagues confirmed they were no longer seeking reinstatement. In closing submissions on the applicants' behalf, their counsel, Ms Burney, identified the remedies being sought as $18,000 for each man to compensate them for their hurt and loss of dignity.

Background

[6] The respondent is a manufacturing company with a plant in New Plymouth.

[7] During 2009 and because of a marked deterioration in demand the Company attempted with no success to effect a number of cost savings initiatives. The

Company therefore, in June, initiated a restructuring so as to achieve desired savings. A number of staff including the applicants were made redundant.

[8] The applicants and the Union oppose their selection for redundancy on a number of grounds including reliance on clause 12.2.2 of the applicable collective agreement which provides that:

> *In the event of a redundancy situation arising the union will be given the maximum possible notification before notice is given to the employee(s) concerned. Before confirming any redundancies efforts will first be made to offer those staff affected another suitable position in Olex.* ***Production technicians employed prior to 26 April 2005 will be the last considered in a redundancy circumstance****.*
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> (emphasis added; doc 1)

[9] The applicants and the Union argue that, in effect, clause 12.2.2 has the effect of requiring staff employed after 26 April 2005 to be made redundant before them, that it is a form of last on first off, but this did not happen.

[10] The Company disputes that interpretation and also relies on clause 12.2.3 which provides that:

> *If redundancies are required, Olex reserves the right to continue the employment of selected employees who by reason of special skills and attributes are, in the Company's opinion, necessary for continuing operations.*

[11] In determining to make redundancies, the Company made use of standardised selection criteria and ranked employees from 1 to 5 by way of 5 criteria, namely attendance, attitude, productivity, skills and teamwork.

[12] During the Authority's investigation it became apparent that, in undertaking an evaluation of the applicants, various matters that counted against them (caused them to be marked down) and which they disputed:

- were not raised;

- or only partly raised with the applicants before the decision to make them redundant;

- or were raised too late to influence the Company's decision to terminate them.

Discussion and Findings

[13] Having regard to the facts and parties' arguments I accept the Company's submission that three questions need to be answered:

a. Was the Company entitled to make the applicants redundant? This is a two-fold question as it entails interpreting the CEA and determining whether or not the selection criteria were that which a fair and reasonable employer would use in all the circumstances; and

b. Was the selection criteria appropriately applied by the Company to the applicants? If not, what remedies are available to them given they have withdrawn their claim for reinstatement? And,

c. Has the Union breached its obligation of good faith with regard to the consultation process and if so what penalty should then be awarded?

Was the Company entitled to make the applicants redundant?

[14] I am satisfied the Company was able to make the applicants redundant because of the wording of clause 12.2.2, and because of the combined effect of clauses 12.2.2. & 12.2.3. There is a plain meaning to the sentence, *"Production Technicians employed prior to 26 April 2005 will be the last considered in a redundancy circumstance"* (12.2.2), i.e. the Company will first consider technicians employed after 26 April 2005 in a redundancy circumstances. The operative word is *"considered"*: it is not the term *'make redundant'*. The phrase imposes no obligation on the Company to first make technicians employed after 26 April 2005 redundant before considering those employed before for the same, but rather to first consider, or look at, that group before having regard to others.

[15] The evidence provided by the Company is that it first considered technicians employed after 26 April 2005 for redundancy but then found the need to consider those employed before that date so as to achieve the desired staff reductions and savings while retaining an appropriate skills balance. That approach is consistent with the provisions set out in clause 12.2.3. To paraphrase that clause: *as redundancies were still required, Olex reserved the right to continue the employment of selected employees who by reason of special skills and attributes were, in its opinion, necessary for continuing operations*.

[16] In other words, and consistent with the self evident meaning of the two clauses, and after considering last those technicians employed prior to 26 April 2005, the Company elected to retain technicians employed after that date in preference to some employed before after determining who, by reason of special skills and attributes were necessary for continuing operations.

[17] Because of the clause's plain meaning, reinforced as it is by 12.2.3, I do not accept the Company acted contrary to it by failing to apply a last on first off policy in selecting employees for redundancy.

Was the selection criteria that which a fair and reasonable employer would use in all the circumstances?

[18] I have no evidence or reason with which to challenge the fairness of the Company's selection matrix, comprising as it did five categories for which a 1 to 5 assessment of the affected employees was made by their area production managers. As is conceded by the applicants in their submission at par 46, *"On the face of it, the blank matrix represented a genuine attempt to provide an objective and transparent analysis by the employer of the skills and abilities of each employee to perform their work in the context of changing needs"*.

[19] I do not accept that because of the absence of a category entitled *special skills and attributes* per clause 12.2.3 that the Company was unable to measure the same with the information derived from the five criteria it did identify and

measure. That is, provided they were applied fairly and reasonably, the categories set out in the matrix would have provided the Company with sufficient and suitable information about employees to apply the requirements specified in clauses 12.2.2 & 12.2.3.

Was the selection criteria appropriately applied by the Company to the applicants? If not, what remedies are available to them given they have withdrawn their claim for reinstatement?

[20] I accept the Union's submission that, *"While on its face the matrix held out to employees was not unreasonable the way it was … used was misleading and thus unfair"* (par 54 of the Union's submission dated 8 October 2009). I reach that conclusion because the points awarded the applicants by the area production managers relied very much on their subjective assessment of the applicants. In particular they downgraded their assessments of the applicants because of complaints that were not raised with them at the time they were alleged to have occurred, or were not put to the applicants during the restructuring process or were put too late to influence the Company's points decisions in respect of the applicants.

[21] Some of the reasons for downgrading ratings were plainly wrong (e.g. Mr Gladding's alleged communication with a senior manager).

[22] The area production managers and final decision makers had no performance reviews to cross-compare their assessments of the applicants (or of other employees) with. It was a system requiring a more exacting and fairer application particularly in respect of negative performance matters never put to the applicants, or put too late for them to fairly respond.

[23] For the reasons set out above the relevant criteria cannot be said to have been objectively measured and fairly and reasonably applied.

[24] Section 4 of the Act requires the parties to an employment relationship to be active and constructive in maintaining a productive relationship: this is an important obligation, particularly when – as in this instance – decisions are

made on the basis of views not shared with employees resulting in their termination.

[25] An inevitable conclusion follows: a fair and reasonable employer in all the circumstances at the time, objectively assessed, would not draw a figure out of the air but instead would correlate that figure to objectively measurable factors and – in situations were adverse findings were being made – would put those findings to the employee concerned for comment when, because of adverse conclusions, their ongoing employment was in jeopardy.

[26] In reaching this conclusion I entirely accept the Company's proposition (par 48 of the submissions dated 15 October 2009) that *"in applying a selection criteria the difference between one employee and another may not be a lot but the Company has to make a call … "*. The challenge of course is to make a fine but fair call and in this instance the Company falls just short.

If the selection criteria were not properly applied, what remedies are available to the applicants given they have withdrawn their claim for reinstatement?

[27] As set out in par 129 of the 8 October 2009 submissions on behalf of the applicants, the remaining remedy sought by Mr Tuuta and his colleagues is compensation for hurt and loss of dignity resulting from the Company's unfair application of the selection matrix.

[28] $18,000 compensation is sought. I am satisfied the evidence given by the applicants of their humiliation does not support that figure and having regard to the fact it cannot be said that, had a fair process been employed, the applicants would not have been made redundant, am instead satisfied that awards of $4,000 to each of the applicants is appropriate in all the circumstances.

Has the Union breached its obligation of good faith with regard to the consultation process and if so what penalty should then be awarded?

[29] The Company says the Union, in breach of s.4, failed to be responsive and communicative. It says that, in meetings on 22 & 23 June and 3 July the Union did not question the Company's intentions or challenge its planned processes, nor did it protest the decision to dismiss the applicants as redundant when they were notified on a preliminary basis on 7 July and had it confirmed on 10 July. The Company says the first time clause 12.2.2 was specifically raised by the Union was by letter dated 14 July. The Company says this failure to actively engage in the restructuring process amounts to a sustained failure to be active and constructive and therefore represents a breach of the s. 4 good faith requirements.

[30] The Union disputes these allegations and says it and its delegates raised concerns about clause 12.2.2 as early as 22 June: it says par 2.8 of the Company's statement of problem confirms this. It denies the Company's claim there was no discussion of clause 12.2.2 at the meeting with staff on 23 June and, in particular, says it was only late in the restructuring process that the Union discovered that some staff employed before 2005 were facing redundancy. It was only on 10 July when redundancy letters were issued to Mr Tuuta and his colleagues that the unfair application of the selection criteria became clear.

[31] I find as follows: this was a restructuring undertaken at speed consistent with the Company's legitimate need to effect prompt savings in the face of a rapidly deteriorating market. Initial attempts to make those savings by changing hours and wage decreases were rejected by its employees. Inevitably, the respondent was obliged to consider cutting staff numbers. The speed of the exercise inevitably tested all parties' powers of communication. The evidence is clear that some concerns were raised by the Union, and in particular by Mr Pue, one of the applicants (refer par 22 of his affidavit of 30 July). Wrongly, as I find above, the view was effectively advanced that the Company had to make all technicians employed post 26 April 2005 redundant before considering those employed before that date.

[32] I conclude that, with the benefit of retrospection, both parties would have communicated their respective positions more effectively. However, I am not satisfied what ever shortcomings characterised the Union's actions that they amount to a breach of good faith.

Determination

[39] Because of the unfair process adopted by the Company in respect of each of the applicants, the respondent is to pay to Messrs Tuuta, Pue, Toa-Wairere and Gladding as compensation for hurt the sum of $4,000 (four thousand dollars).

[40] As requested, costs are reserved.

Denis Asher
Member of the Employment Relations Authority