

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 576  
5407704

BETWEEN                      PETER OTTO SCHULTZ  
   Applicant  
  
AND                                M.R. and R.P. and E.F. VIGIS  
   trading as EXPRESS SUPPLIES  
   Respondent

Member of Authority:        K J Anderson  
  
Representatives:              S Austin, Advocate for the Applicant  
   S Schofield, Counsel for the Respondent  
  
Investigation Meeting:        22 August 2013 at Gisborne  
  
Submissions Received:        12 September 2013 and 24 September 2013 for the  
   Respondent  
   13 September 2013 for the Applicant  
  
Determination:                17 December 2013

---

**DETERMINATION OF THE AUTHORITY**

---

**Introduction**

[1]     The applicant, Mr Peter Otto Schultz, claims that he was unjustifiably dismissed, effective from 9 November 2012. Mr Schultz asks the Authority to find that he has a personal grievance and award him the remedies of reimbursement of lost wages and compensation for distress.

[2]     The respondent, M.R. and R.P. and E.F. Vigis, a partnership trading as Express Supplies (Express Supplies) rebuts the claims of Mr Schultz and says that the termination of his employment on the grounds of redundancy was justified and in accordance with the terms of his employment agreement.

## **Background**

[3] From March 2006 until November 2012 Mr Schultz was employed by Express Supplies in the role of store manager/invoicing manager.

[4] Express Supplies is the trading name of a partnership that comprises Mr Randall Vigis, and his wife, Mrs Elizabeth Vigis, and his brother, Mr Michael Vigis.

[5] Mr Randall Vigis gave evidence to the Authority and explained that there are two parts to the business that is owned and operated by the partnership. There is a small company, BSN Fittings Limited (BSN); this is a wholesale supplier with a small range of products and a “tiny” customer base. The second arm of the business, Express Supplies, retails a wide range of fasteners, hardware and abrasives to a broad range of customers.

[6] Relevant to the position that was held by Mr Schultz, the majority of the packing and re-packing of product is done for BSN. Mr Vigis explained that the invoicing for BSN is simple as there is a small number of wholesale customers who buy at the same fixed prices and order a large quantity each month. Because the inventory for BSN is limited, the stock levels are monitored manually. However, BSN has been using an Accredo accounting software for invoicing (only) for about five years. But more recently, BSN started using Accredo for inventory assessment.

[7] In comparison to BSN, Express Supplies has a large base of smaller customers. There are numerous pricing levels, depending on the category of the customer. Express Supplies also sells a diverse range of products and each “stock group” has a different pricing rate, and invoice values are usually a fraction of BSN invoices.

[8] The evidence of Mr Vigis is that the duties of Mr Schultz included checking off locally purchased inward goods, including entering them on to the Accredo system in the case of BSN product; packing the goods away, re-packing goods, advising the purchasing officer when goods were unavailable, and invoicing out all Express Supplies orders on the Excel software manual invoicing and pricing system. Mr Schultz was also required to keep statement balances for Express Supplies on the Excel based system, to enter payments on to this system and to send out invoices and statements to customers at the end of the month. In addition, daily, or as often as

possible, Mr Schultz was required to email Express Supplies packing slips to customers.

### **Expansion of the use of the Accredo system**

[9] The evidence of Mr Vigis is that since 2009 the primary task of Mr Schultz had been the manual invoicing on the Excel based system.

[10] The partnership made a decision to change the Express Supplies part of the business on to the Accredo system and to utilise the full functionality of this system. The changeover began in May 2012, but as the business was unsure how large or long this changeover project would be, and to reduce any disruption to the business, the old Excel based system was run parallel with the Accredo software until the end of August 2012. The benefit of utilising the Accredo software system was that each stock item did not have to be loaded on to the system separately as it could import thousands of items at a time. Because of the IT issues involved, outside contract staff were used in the set up.

[11] The evidence of Mr Vigis is that until the end of August 2012, Mr Schultz was still involved in manual invoicing and statements for Express Supplies, but these were being duplicated by the contract staff on to the Accredo system.

[12] The further evidence of Mr Vigis is that when the business stopped using the old system a “dramatic shift” in the way the business operated was revealed. Mr Vigis says the business was spending more time with IT problems but the invoicing and statements that Mr Schultz had been doing manually on the Excel based system, was being done by the sales people as they entered the orders.

[13] Due to the more substantial use of the Accredo system and the impact on the business, Mr Schultz was required to conduct an extensive up to date stocktake of the inventory, with a view to ensuring that the stock levels were accurate.

[14] It is the common evidence of Mr Schultz and Mr Vigis that Mr Schultz inquired as to what he would be doing once the business stopped using the manual Excel system for record keeping. Mr Schultz says that he made this inquiry around mid October 2012. Mr Vigis attests that as the business was going through a “radical phase” with significant changes he responded to the inquiry of Mr Schultz that he

would get back to him as soon as he knew with more certainty about the effect on Mr Schultz's role.

### **Notification of a potential change for Mr Schultz**

[15] While it is undated, it seems to be accepted that the following letter was given to Mr Schultz on 29 October 2012:

Dear Otto,

As you are aware, we have recently started using the Accredo program for invoicing for Express Supplies and this means we are no longer required to process invoices manually. This impacts significantly on your daily tasks.

We have also been conducting a general review of the business to look at ways to free up my time so that I can focus on sales, rather than being office-based focusing on IT and financial reporting as I have been increasingly doing.

We believe that the business is short of accounting and technology skills and we are considering our options.

One option we have identified would be to create a new role of Inventory and Finance Manager that would be responsible for financial and inventory control from the Accredo system and incorporating Inwards Goods. If we did this, we believe that your current role would no longer be required. I attach a potential position description of what the new role could look like.

We have not yet made a decision on how to proceed.

I wish to have a meeting with you on 1/11/12 to discuss the above. I would propose to meet at 10.30am in the office through yours (Becca's office). You are entitled to take advice about this and to bring a support person or representative with you to the meeting, if you wish to do so. If the time is not convenient please let me know as soon as possible, and we will try and accommodate you with a more convenient time.

The purpose of this meeting is to provide you with an opportunity to comment/respond to the above and make alternative suggestions, so that your views can be taken into account before any decision is made.

If you require any further information, or I can do anything to assist between now and the meeting, please don't hesitate to ask.

Yours sincerely,  
Randall Vigis (Financial Controller)

[16] Attached to the letter was a *TENTATIVE NEW POSITION DESCRIPTION* for the position of *Finance and Inventory Administrator*.

### **Meeting 1 November 2012**

[17] Mr Schultz met with Randall and Michael Vigis on 1 November 2012. Randall Vigis attests that the purpose of the meeting was to discuss him returning to a sales role and a new position, related to IT and financial matters, being created.

[18] Notes were taken of the meeting and a typed version of these has been provided to the Authority. Mr Schultz confirms that he received a copy of the notes on 2 November 2012.

[19] It seems that Mr Schultz and Mr Vigis had a somewhat different perspective of the meeting. Mr Vigis says that the outcome of the meeting was that, having heard the views of Mr Schultz on the proposed changes, it was decided that a list of tasks, relative to the new position, would be compiled in order to assess what Mr Schultz was capable of doing. But the evidence of Mr Schultz is that he felt that the meeting was a waste of time and he said so because, in his view, “all the changes had been made already”. However, Mr Schultz also says that he advanced the view that he could be trained to do more with the Accredo system.

[20] The evidence of Mr Vigis is that following the meeting on 1 November 2012, there was some discussion with a business consultant. It was confirmed that the introduction of the Accredo software, while removing the manual system of invoicing and data entry, was taking up a larger amount of the time that Mr Vigis should have been spending on sales. As a consequence, there was a decrease in sales and this was having a negative effect on the finances of the business. The advice of the business consultant was that Mr Vigis needed to get back into sales and marketing for the business or there would be no benefit from the new technology. The consultant advised IT and financial management skills needed to be introduced into the business.

### **Meeting 6 November 2012**

[21] Mr Schultz met again with the Vigis brothers (the partners) on 6 November 2012. It is commonly accepted that Mr Schultz indicated that he believed that he was capable of performing the majority of the work associated with the new proposed position, provided he received appropriate training. Mr Vigis says that Mr Schultz

was asked about his knowledge of accounting and his response was that he had a “small understanding” as he had run his own business in the past.

[22] The further evidence of Mr Vigis is that he explained to Mr Schultz that the business could not afford to train him if this applied to most of the requirements of the new position. But if Mr Schultz only required training for a small percentage of the new role, then that could be done.

[23] It is clear from the notes of the meeting held on 6 November 2012 that the partners believed that the person appointed to the new position would be required to be competent in accounting, IT and despatch duties. The meeting appears to have concluded on the basis that the duties associated with the new role would be broken down into specific tasks. The notes of the meeting record that Randall Vigis expressed the view that if there was only 10% of the duties that Mr Schultz could not perform, “that’s one thing” but if Mr Schultz could not do 90% of the duties, that would not work for the business.

#### **Meeting 7 November 2012**

[24] This was the final meeting between Mr Schultz and the partners. There is little evidence from Mr Schultz pertaining to this meeting. The evidence of Randall Vigis is that he had broken down the new proposed position into the components of time that he assessed were required for each task associated with the new role. The purpose of this exercise was to identify which tasks Mr Schultz could fulfil with minimum training and which tasks would require more extensive training. It was the assessment of Mr Vigis that 27% of the time required for the new position could be fulfilled by Mr Schultz but the remaining 73% of the role would be “a lot more difficult” for him to carry out.

[25] Mr Schultz says that he was never given this breakdown. But Mr Vigis disputes this. On the weight of the evidence, including the notes of the 7 November meeting, I conclude that it is more probable than not that at the meeting on 7 November 2012, Mr Schultz was made fully aware of the analysis that Mr Vigis had carried out.

[26] The evidence of Mr Vigis is that he and his brother believed that it would be “extremely difficult” to re-deploy Mr Schultz into the new position. This is because it

was considered by the partners that the skill sets required for the role were fundamentally and substantially different to those possessed by Mr Schultz.

[27] The notes of the meeting on 7 November 2012 record that there was some discussion in regard to the requirement that accounting expertise would be required to operate the Accredo system, as the system is accounting based. Cashflow forecasting was discussed and profit and loss and trial balance sheet requirements were mentioned.

### **The redundancy of Mr Schultz**

[28] On 9 November 2012 Mr Vigis gave Mr Schultz a letter that notified of the redundancy of Mr Schultz's position; the germane content being:

I have identified that I need to focus on sales and that I cannot do so unless I can pass on the administration/financial tasks that I have been dealing with directly. We have also identified that your own role has been substantially affected by the installation of Accredo software. The business has been affected by falling sales and we cannot justify retaining your role just to undertake receipting of goods. We believe that "inwards goods" could be managed by other roles, and within the new role.

We have decided that your role has become redundant. We have looked at any way there would be to re-deploy you efficiently in the company within the guidelines of the direction we have to take to move the business forward from this point. We have conducted a thorough analysis of the requirements of the business and the skill sets required for the new role and position. It is evident that to effectively re-deploy you within the business would require a degree of training, and a timeframe that would far outweigh the benefits afforded to the company, especially in the near future (where progress is critical).

[29] Mr Schultz was informed that he was being provided with one month's notice of termination and that his employment would therefore end on 7 December 2012. It subsequently transpired that Mr Schultz was not required to work out his notice and he was paid in lieu of such.

[30] Mr Schultz challenges the decision made by Express Supplies to terminate his employment; largely on the grounds that by introducing the Accredo system and reallocating some of his work to another employee, Mr Whitely, Express Supplies effectively orchestrated his redundancy. Further, Mr Schultz appears to be of the view that he could have been re-trained into the proposed new position given time, but this

did not happen because of his age (64). There is also some suggestion in the submissions for Mr Schultz that Express Supplies could have, at least, retained Mr Schultz in a part-time role.

### **Analysis and conclusions**

[31] As with any other dismissal, when a termination of employment, on the grounds of redundancy, is challenged as being unjustifiable, the Authority must apply the test provided by s.103A(2) of the Employment Relations Act 2000. That is: Whether the employer's actions and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[32] It has been established by the Court of Appeal, and very recently confirmed by the Employment Court in *Rittson-Thomas t/a Totara Hills Farm v. Davidson*<sup>1</sup> and *Brake v. Grace Team Accounting Ltd*<sup>2</sup> that:

An employer is entitled to make his business more efficient, as for example by automation, abandonment of unprofitable activities, reorganisation or other cost saving steps, no matter whether or not the business would go to the wall. A worker does not have a right to continued employment if the business can be run more efficiently without him.<sup>3</sup>

[33] In *Rittson-Thomas* the Chief Judge of the Employment Court, referring to s.103A of the Employment Relations Act in a redundancy setting, held that the Court (or the Authority) must determine whether what was done and how it was done were what a fair and reasonable employer could have done in all the circumstances at the time.

So the standard is not the Court's (or the Authority's) own assessment but, rather, its assessment of what a fair and reasonable employer could have done and how those are separate and distinct standards.

[34] It is also well established that before making a final decision to make a position redundant there is an obligation to consult with an affected employee, such as Mr Schultz.

---

<sup>1</sup> [2013] NZEmpC 39

<sup>2</sup> [2013] NZEmpC 81

<sup>3</sup> *GN Hale & Son Ltd v. Wellington etc Caretakers etc IUOW* [1990] 2 NZILR 1079

[35] Having closely considered all of the evidence placed before the Authority I accept that it was most unfortunate that Mr Schultz lost his employment on the ground of redundancy. But as with most redundancy circumstances, the loss of his position was not due to any fault on his part. Rather, the loss of Mr Schultz's employment was a direct, and probably inevitable, outcome of the introduction of the Accredo system.

[36] Perhaps, if given enough time, it may have been possible that Mr Schultz could have been retrained for the proposed role. However, Express Supplies, having considered that option, decided that it was not practicable in the circumstances facing the business. I conclude that this was a decision that the partnership was entitled to make, after consulting with Mr Schultz; as occurred. It also has to be accepted that a high level of IT and accounting skills was required for the new role. Indeed, to his credit, Mr Schultz appeared to acknowledge this under cross-examination by Mr Schofield, whereby Mr Schulz accepted that the business required: "... *a sales person and an Accredo person. If Randall [Mr Vigis] does sales – have to get a highly qualified Accredo person to do what Randall was doing*".

[37] There is no evidence to support the proposition that Mr Schultz was discriminated against because of his age or that his work was reallocated to others. Rather, I conclude that quite simply his position evolved in a different direction and he did not have the necessary accounting or IT skill base to allow Express Supplies to retain Mr Schultz in the proposed new role. The evidence is that Express Supplies decided not to appoint anyone to the role and instead continued to use outside contractors with the essential skills that the business required, in order to allow Mr Vigis to return to the sales and marketing role that was essential to the viability of the business.

[38] The Authority has considerable empathy for the situation that Mr Schultz found himself in, particularly given that it seems to be mutually accepted that he had given good service to Express Supplies. However, I conclude that the partnership acted in good faith towards Mr Schultz and that the decision to terminate his position was something that a fair and reasonable employer could do in the circumstances. It follows that I find that Mr Schultz was not unjustifiably dismissed.

[39] In conclusion, pursuant to s.122 of the Employment Relations Act, I do not find that Mr Schultz was unjustifiably disadvantaged as urged by the submissions for him, and indeed this claim was never formally put forward.

**Costs**

[40] Costs are reserved. The parties are invited to resolve this matter. In the event that a resolution cannot be achieved, the respondent has 28 days from the date of this determination to file and serve submissions. The applicant has a further 14 days to respond.

**K J Anderson**  
**Member of the Employment Relations Authority**