

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[20011] NZERA Auckland 73
5311584

BETWEEN ALEX BROUGHTON
Applicant

AND MICROSOFT NEW
ZEALAND LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Tony Drake, Counsel for Applicant
Mark Lawlor and Adam Weal, Counsel for Respondent

Investigation Meeting: 29 September 2010
30 September 2010 (part day)
22 November 2010
23 November 2010

Submissions: 06 December 2010, Applicant's submissions
17 December 2010, Respondent's submissions
24 December 2010, Applicant's submissions in reply

Determination: 24 February 2011

DETERMINATION OF THE AUTHORITY

- A The termination of Alex Broughton's employment by Microsoft New Zealand Limited ("MSNZ") on the grounds of redundancy was justified.**
- B Mr Broughton's personal grievance claim for unjustified dismissal is not upheld.**
- C MSNZ did not breach its good faith obligations under section 4 of the Employment Relations Act 2000 ("the Act").**
- D MSNZ did not breach Mr Broughton's employment agreement.**

Employment Relationship Problem

[1] Mr Broughton was employed by MSNZ from February 2007 until 10 January 2010, when his employment terminated on the grounds of redundancy. In 2008 Mr Broughton was appointed to a position which was referred to within MSNZ as Citizenship Lead, but which was known externally as Director - Corporate Relations.¹

[2] Mr Broughton claimed his redundancy was a sham. He said his Citizenship Lead role was duplicated specifically so MSNZ could make him redundant. He alleged the consultation process was a sham because MSNZ had predetermined to terminate his employment. Mr Broughton claimed key information was not provided to him during the restructuring process and that his redundancy was carried out in a procedurally unfair manner. Mr Broughton said he should have been redeployed instead of being made redundant.

[3] In his Statement of Problem, Mr Broughton also claimed MSNZ had breached the implied terms of his employment agreement because it;

- a. Failed to deal with him in good faith, contrary to the Act;
- b. Failed to treat him in a fair and reasonable manner;
- c. Conducted itself in a manner which was likely to;
 - i. Destroy or seriously damage his reputation; or
 - ii. Cause him anxiety, humiliation, loss of dignity and injury to his feelings; or
 - iii. Damage the relationship of trust and confidence between them.

[4] Mr Broughton claimed MSNZ had breached its statutory duty of good faith under the Act because it had failed to provide him with information relevant to the continuation of his employment and an opportunity to comment on it. He also alleged that MSNZ misled and deceived him over redeployment and provision of information issues. He sought penalties against MSNZ for alleged breaches of his employment agreement and of the good faith provisions in the Act.

¹ Citizenship Lead was the internal MSNZ title for that position. However, Mr Broughton was allowed to choose the title which would be used for his position outside MSNZ (such as on business cards), and he decided to call himself Director – Corporate Relations. Both titles relate to the same position, so I have used the title Citizenship Lead in this determination.

[5] MSNZ said Mr Broughton's redundancy was substantively justified and was carried out in a procedurally fair manner. MSNZ denied breaching Mr Broughton's employment agreement or its good faith obligations. It said he was treated fairly and reasonably and was not misled.

[6] MSNZ said that the restructuring of Mr Broughton's position was a genuine commercial decision, made for valid business reasons, which was not based on any personal or irrelevant factors. MSNZ stated there was no ulterior motive for Mr Broughton's redundancy. MSNZ said Mr Broughton's role was disestablished, not duplicated. It maintained its consultation process and his subsequent redundancy were not shams.

[7] MSNZ believed it had properly consulted with Mr Broughton, and that the process it adopted was fair and reasonable. MSNZ said it advised Mr Broughton of the proposed changes, provided him with all relevant information, and gave him an opportunity to provide feedback, before it decided to disestablish his position. MSNZ said it had considered redeploying Mr Broughton but, after objectively assessing his skills and experience via a competency based interview process, concluded he was not suitable for appointment to either of the two vacant roles.

Issues

- [8] The issues to be determined are;
- a. Was the disestablishment of the Citizenship Lead position substantively justified?
 - b. Was MSNZ's proposal to disestablish the Citizenship Lead position carried out in a procedurally fair manner?
 - c. Should MSNZ have redeployed Mr Broughton instead of making him redundant?
 - d. Did MSNZ breach its good faith obligations under the Act?
 - e. Did MSNZ breach Mr Broughton's employment agreement?
 - f. What, if any, remedies should be awarded?
 - g. Should a penalty be imposed on MSNZ?

Relevant Facts

[9] Mr Broughton commenced employment with MSNZ in February 2007. From June 2008 until his employment ended on 10 January 2010, he held the position of Citizenship Lead.

[10] The global financial crisis was a catalyst for Microsoft Corporation to undertake a worldwide review of its structures, which resulted in subsidiaries (including MSNZ) being given revised headcounts. As a result of that, MSNZ undertook an optimization exercise which involved disestablishing positions and where possible creating revenue-generating positions during restructurings which occurred in January, May, and November 2009.

[11] In May 2009, 17 positions were disestablished and 12 employees were made redundant. In August 2009, MSNZ received advice from Microsoft Corporation that it needed to further reduce its headcount. Sally Doherty, Human Resources (“HR”) Director MSNZ, then led another optimization review which particularly focused on the number of revenue generating positions compared to non-revenue positions, areas of under or over resource, and the local organisational design compared to other Microsoft subsidiaries of similar size and maturity.

[12] As a result of that exercise, Ms Doherty reached a preliminary view that four positions could potentially be restructured: Original Equipment Manufacturers (“OEM”) Technical Specialist, Public Relations (“PR”) Manager, Citizenship Lead, and National Technology Officer (“NTO”).

[13] Ms Doherty initially considered that the Citizenship Lead position might be able to be combined with the PR position, so she submitted a preliminary business case justification in September 2009 which reflected that thinking. However, after subsequently obtaining more information about MSNZ’s needs, it was agreed that a fully dedicated PR position was required, so Ms Dougherty’s initial suggestion of combining the Citizenship Lead and PR Manager roles did not progress to the consultation stage.

[14] At the same time it also became apparent to MSNZ that the duties of the Citizenship Lead position might be able to be devolved to the other existing positions. This was the proposal that MSNZ ultimately decided to adopt, and it was the proposal about consulted Mr Broughton over.

[15] MSNZ's consultation process with Mr Broughton, about the proposed assimilation of his duties into other existing positions, began earlier than expected because on 16 October 2009 he requested a meeting to discuss various employment concerns.

[16] There was a global mandate to start discussions with affected staff on 4 November 2009, but Mr Ackhurst and Ms Dougherty felt they could not have an open discussion with Mr Broughton unless they could indicate there was a possibility his role might be disestablished in a new round of restructuring. They did not want to wait until 4 November 2009 to meet Mr Broughton, so got special permission to start consultation with him before the global consultation had started.

[17] Mr Broughton, Mr Ackhurst, and Ms Dougherty met on 23 October 2009, during which the various issues raised by Mr Broughton were discussed. This included discussion about the New Zealand based Corporate Affairs role, which was the Legal & Corporate Affairs Australia & New Zealand ("LCA-ANZ") role which Jeff Bullwinkel, Head of LCA-ANZ, decided in October 2009 to relocate to NZ ("the Corporate Affairs position").

[18] Mr Ackhurst explained that the Corporate Affairs and the Citizenship Lead positions were distinct and different and he informed Mr Broughton what the Corporate Affairs position would be doing in terms of government lobbying and policy. He also told Mr Broughton that as a result of the current economic environment, MSNZ was looking to better utilise its workforce, and that whilst no decisions had been made, there was a possibility his role may not be sustainable. Mr Ackhurst said he made it clear that view had nothing to do with the Corporate Affairs position.

[19] In Microsoft Corporation, the LCA department is set up to provide independent oversight of its business operations around the world. It is structured (as

is HR services) in a specific way which preserves its independence from the various Microsoft Corporation entities it advises (“the service users”). The aim of this is to ensure that LCA is truly independent and cannot be improperly influenced by its service users. This is a critical “check and balance” in terms of Microsoft Corporation’s internal risk management.

[20] LCA’s independence is protected because it is a standalone organization within Microsoft Corporation and it has its own budget, headcount, and internal reporting lines to ensure it remains entirely separate from service users, such as MSNZ. LCA employees report to regional LCA managers responsible for specified geographical areas. The regional managers report to a senior LCA executive in Microsoft Corporation’s headquarters in the USA. The only LCA employee who does not report to another LCA position is Microsoft Corporation’s General Counsel, who reports to the Microsoft Corporation Chief Executive Officer.

[21] Because of the independent structure of the LCA departments, all decisions regarding the creation and deployment of roles within LCA are made by LCA managers, who independently decide how to allocate LCA resources. LCA has a specified headcount and only LCA managers have authority to recruit and hire LCA personnel in accordance with the headcount allocation. LCA is a service organisation so its hiring decisions are informed, but not mandated, by input from service users regarding their needs, but the ultimate decision regarding the creation, elimination, deployment, or relocation of LCA roles, sits with LCA, not with the service users.

[22] In January 2009, Jeff Bullwinkel became the Head of LCA-ANZ. LCA-ANZ had (and continues to have) responsibility for MSNZ’s corporate affairs and policy work in both Australia and NZ. Pre October 2009, LCA-ANZ mainly conducted NZ corporate affairs work remotely from Sydney, with periodic visits to NZ. Mr Bullwinkel considered the level of corporate affairs support LCA-ANZ provided to MSNZ was inadequate, particularly in light of the significant policy challenges faced in NZ, so he decided to reallocate one of the LCA-ANZ headcount to NZ.

[23] During a telephone conversation in July 2009, Mr Bullwinkel indicated to Mr Ackhurst that he was considering relocating one of the LCA-ANZ positions to NZ in order to meet particular challenges, which were of considerable importance to

Microsoft Corporation and, which were being faced in NZ. Mr Ackhurst immediately discussed that call with Mr Broughton, in the belief Mr Broughton would be enthusiastic about it. However, Mr Broughton interpreted it as a threat to his role.

Legal test

[24] Whether Mr Broughton's redundancy was justified has to be determined with regard to the justification test in s103A of the Act. Objective consideration is required of whether MSNZ's actions, and how MSNZ acted, were what a fair and reasonable employer would have done in all the circumstances at the time it made Mr Broughton redundant.

[25] This requires examination of the reasons for the disestablishment of the Citizenship Lead and the process used. MSNZ is also required to justify its decision not to redeploy Mr Broughton, by establishing that it had good reasons for not redeploying him, and that it followed a fair process before reaching that decision.

Was the disestablishment of the Citizenship Lead position substantively justified?

Was the Corporate Affairs role a duplication of the Citizenship Lead role?

[26] Although Mr Broughton claimed the Corporate Affairs role was a duplication of the Citizenship Lead role, to the extent that it was exactly the same job but with a different title, the evidence did not support his view.

[27] There was substantial evidence which established these two roles were significantly different. Whilst there was some co-ordination between the roles, the functions, objectives, responsibilities, and reporting lines were different. Each role had a different focus, required entirely different skills, and sat within different Microsoft Corporation entities.

[28] The Citizenship Lead was responsible for coordinating "citizenship initiatives", which aimed to increase external communications about MSNZ's and Microsoft Corporation's positive impact on communities with a view to improving its image and reputation within the community and also with government elites and their

influencers. A major emphasis of the role was to drive collaboration and coordination across multiple MSNZ groups in order to increase the impact of unrelated activities and image related programmes. The Citizenship Lead role was important in terms of internal coordination and program management and in relation to external engagement with influential members of the community.

[29] The aim of the Corporate Affairs role was to identify key policy challenges and opportunities as they impacted on Microsoft Corporation's business, and to advance its overall public policy agenda. The role is heavily focused on engagement with government on substantive matters of policy, as opposed to the general relationship building and interaction with government officials which the Citizenship Lead and others within MSNZ are involved with. The Corporate Affairs role had overarching responsibility for building and strengthening relationships with top tier government elites. A key component of its unique role was the ability to drive in-depth engagement on complex matters of legislation and policy.

[30] I find the Corporate Affairs role was not a duplicate of the Citizenship Lead role. The two roles were substantially and significantly different.

Did Mr Ackhurst create the Corporate Affairs role so he could make Mr Broughton redundant?

[31] The evidence did not support Mr Broughton's allegation that Mr Ackhurst created the Corporate Affairs position so he could make him redundant.

[32] The NZ based Corporate Affairs position is "owned" by the LCA organisation, not by MSNZ. It was not within Mr Ackhurst's power to either create or make a hiring decision about that role. Such decisions were within Mr Bullwinkel's sole discretion. Mr Bullwinkel was very clear that Mr Ackhurst had not influenced his decision making and he provided credible explanations for why he decided to repurpose one of the existing LCA-ANZ headcount to NZ. I accept his evidence.

Was Mr Broughton doing Corporate Affairs work?

[33] Mr Broughton's case was that he had been doing corporate affairs work, which he said proved his redundancy was personally motivated and a sham. MSNZ denied that Mr Broughton had been doing corporate affairs work.

[34] I have accepted the evidence of Mr Ackhurst and Mr Bullwinkel that the work Mr Broughton said was corporate affairs work was actually citizenship activities which he had undertaken as part of his normal Citizenship Lead role. These two witnesses were able to provide clear, detailed, and credible explanations about why Mr Broughton had not been doing corporate affairs work.

[35] Mr Broughton's 2010 commitments (which were effectively his KPIs) did not include any corporate affairs activities, which would not have been the case had he been doing corporate affairs work.

[36] Because of the unique structure of LCA departments, anyone wholly or partly doing LCA work had to sit within the LCA organisation. Mr Broughton did not sit within, or report to, LCA. He was employed by MSNZ and reported to Mr Ackhurst.

[37] LCA required its staff to have either a legal background or public policy expertise. Mr Broughton is not legally trained and he is not a public policy expert. Microsoft Corporation's global policy was that all public policy work had to go through LCA and I consider it unlikely that Mr Broughton was the sole exception to this.

[38] Mr Broughton was unable to produce documentation which established he had been doing substantive public policy work or advocacy, which was core corporate affairs work. He also struggled to explain what corporate affairs work he had done and why he believed such activities were part of his Citizenship Lead position. I consider Mr Broughton failed to demonstrate the understanding of public policy issues I would have expected, if he had been undertaking that type of work.

[39] The evidence did not satisfy me Mr Broughton had been doing substantive corporate affairs work.

Did MSNZ have genuine commercial reasons for disestablishing the Citizenship Lead position?

[40] Mr Broughton alleged that Mr Akhurst created a sham redundancy to get rid of him. Whilst MSNZ has the burden of proving Mr Broughton's redundancy was genuine and justified, Mr Broughton bears the burden of establishing his sham theory has substance.²

[41] The evidence did not establish that Mr Ackhurst had animosity towards Mr Broughton. Mr Ackhurst had appointed him to the Citizenship Lead position the previous year. He spoke highly of Mr Broughton in public and was supportive of him. He gave Mr Broughton positive performance reviews, and any feedback was constructive. Mr Ackhurst approved Mr Broughton for a prestigious "Gold Star" performance award and had not been negative about Mr Broughton to any of the witnesses I heard from. I find that Mr Ackhurst also went out of his way to offer extra support and assistance to Mr Broughton during the restructuring process.

[42] MSNZ was entitled to exercise its management prerogative to restructure its business in accordance with its needs going forward. The totality of the evidence indicated the decision to disestablish the Citizenship Lead position was a genuine commercial decision. MSNZ decided the Citizenship Lead responsibilities should be devolved to other existing MSNZ positions, so that it could apply the resource it saved to a revenue generating role. That is what occurred.

[43] I find that MSNZ had genuine commercial reasons for disestablishing the Citizenship Lead position and it was substantively justified in doing so.

² *Nagara v Chief Executive of Auckland College of Education* 13/9/96, Travis J, AEC 56/96

Was MSNZ's proposal to disestablish Mr Broughton's position carried out in a procedurally fair manner?

Did MSNZ use a fair process?

[44] Mr Broughton was given an informal 'heads up' that his position could possibly be restructured at the meeting he had with Ms Dougherty and Mr Ackhurst on 23 October 2009.

[45] The formal consultation process commenced when Mr Ackhurst and Ms Dougherty met with Mr Broughton on 2 November 2009 and handed him the restructuring proposal letter. This set out the background to the proposed changes, the proposal and the reasons for it, and the potential impact on Mr Broughton's employment. Mr Ackhurst explained the reasons for the proposed restructure, and Ms Dougherty talked through the process in terms of consultation, feedback, and the potential redeployment opportunities and process. Mr Broughton was offered paid time off work to give him sufficient time to prepare his feedback.

[46] At his request, Mr Broughton was provided with his redundancy entitlements and information about how these were calculated. He was informed how the duties of his Citizenship Lead position might be devolved to other existing positions and given information about the vacant Corporate Affairs and OEM Director positions.

[47] A feedback meeting was held on 10 November 2009, but this was adjourned part way through to give Mr Broughton more time to consider the information he had been provided with.

[48] On 11 November 2009 Mr Broughton was sent the LCA organisational chart. Mr Bullwinkel also emailed him explaining the changes within the Asia Regional LCA team.

[49] Mr Broughton asked for the business case proposal that led to the NZ based Corporate Affairs role. He was advised there was not one, but Ms Dougherty set out her understanding of the reasons Mr Bullwinkel had decided to relocate one of his

LCA-ANZ team to NZ. She invited Mr Broughton to talk to Mr Bullwinkel directly if he had any questions or wanted further information.

[50] Mr Bullwinkel followed that up with an email to Mr Broughton which confirmed no formal business case proposal existed because the change was just a reallocation of existing LCA-ANZ headcount. Mr Bullwinkel also set out his reasons for moving the role to NZ and offered to discuss the situation with Mr Broughton. Mr Broughton did not accept his offer.

[51] Mr Ackhurst and Ms Dougherty met with Mr Broughton on 17 November 2009 to get his feedback to the proposal. During the discussion Mr Broughton was asked to explain why he believed he had been doing corporate affairs work, but he did not do so.

[52] This meeting was also adjourned because Mr Broughton said he wanted more time to consider what had been discussed. Mr Ackhurst offered to make himself available after the meeting to discuss any further questions Mr Broughton may have. Mr Ackhurst subsequently emailed Mr Broughton and again offered to meet with him to respond to any questions he had. Mr Broughton did not avail himself of these offers.

[53] Mr Broughton was asked to provide his feedback by 20 November 2009, so MSNZ could make decisions about the proposal the week commencing 23 November 2009. Mr Broughton responded he would not be making further comment because he did not have the level of information he required to enable him to do so.

[54] On 23 November 2009 Ms Dougherty wrote to Mr Broughton summarising the information he had been given. She also asked Mr Bullwinkel to prepare a memorandum to Mr Broughton which again explained the Corporate Affairs role and the reasons for it, and this was sent to him. Ms Dougherty advised Mr Broughton that his feedback would be considered and that she and Mr Ackhurst would meet with him on 25 November 2009 to give him their preliminary view on the whether his role would be disestablished.

[55] At the 25 November 2009 meeting Mr Broughton was advised that MSNZ's preliminary view, subject to any final feedback he wanted to give, was to disestablish his Citizenship Lead role. Mr Broughton's response was that he did not have enough information to provide feedback and that he would be applying for the OEM Director and Corporate Affairs positions.

[56] MSNZ's final decision to disestablish the Citizenship Lead position was communicated to Mr Broughton via email on 25 November 2009.

[57] I find that MSNZ properly consulted with Mr Broughton. It told him what was proposed and what impact the proposal would have on him if it was adopted. MSNZ provided him with relevant information, it responded to the issues he raised, and it gave him a reasonable opportunity to provide feedback on the proposal, before it made a final decision on it.

[58] I find that MSNZ followed a fair and proper process before disestablishing the Citizenship Lead position.

When should consultation have occurred?

[59] Mr Broughton submitted that any genuine consultation should have taken place between mid June and mid September 2009 which was the period during which Mr Bullwinkel was considering the Corporate Affairs position and Ms Dougherty was thinking about combining the PR and Citizenship Lead positions.

[60] I find there was no requirement for MSNZ to consult Mr Broughton over the Corporate Affairs position. This was a LCA-ANZ position, funded by the LCA-ANZ budget, and it was entirely up to LCA-ANZ to determine how it wished to deploy its people. LCA-ANZ did not employ Mr Broughton and had no obligation to consult with him. Mr Bullwinkel made a decision about how best to deploy LCA-ANZ resources, and MSNZ was not involved in that.

[61] The evidence did not establish there was more than a very minimal (less than 5%) potential overlap between the Corporate Affairs and Citizenship Lead positions. I

find the impact of the Corporate Affairs position on Mr Broughton was not such that consultation with him was required.

[62] I find that MSNZ was not required to consult with Mr Broughton about a potential combined PR and Citizenship Lead role because, after preliminary consideration of that idea, MSNZ had discounted it as a viable option. MSNZ was not required to consult with Mr Broughton about a course of action which it had decided not to pursue.

[63] MSNZ was required to consult over its proposal to disperse the functions of the Citizenship Lead role to existing staff once it had identified that as a proposal which it intended to pursue. MSNZ identified that as a viable proposal in mid October 2009, the possibility of a restructure was raised informally with Mr Broughton on 23 October 2009, and then formally on 2 November 2009. I find that consultation occurred at the appropriate time.

Was the consultation process a sham?

[64] Mr Broughton alleged consultation was a sham because he said the decision made by MSNZ to disestablish his position was predetermined.

[65] The evidence satisfied me that was not the case. MSNZ kept an open mind and actively engaged with Mr Broughton during the consultation process. It gave him a number of opportunities to ask questions and provide feedback. It was also responsive to the matters he raised. MSNZ was entitled to have a working plan in mind, that did not amount to predetermination.

[66] I accept the evidence of Ms Dougherty and Mr Ackhurst that a final decision to implement the proposal to disestablish the Citizenship Lead position was not made until after consultation with Mr Broughton.

[67] I find the consultation process was not a sham and the disestablishment of the Citizenship Lead position was not predetermined.

Should MSNZ have redeployed Mr Broughton instead of making him redundant?

Obligation to redeploy

[68] MSNZ had an obligation as a fair and reasonable employer to consider alternatives to making Mr Broughton redundant, so it bears the onus of justifying its decision not to redeploy him.

[69] I find there was no obligation on MSNZ to automatically redeploy Mr Broughton to the OEM Director or Corporate Affairs positions because they were significantly different from his Citizenship Lead position and it was not clear that he had the skills and experience to do either role.

[70] An employer such as MSNZ would not normally be obliged to redeploy an employee into an entirely separate legal entity, such as LCA-ANZ, unless it had imposed a contractual obligation on itself to do so. Ms Dougherty told me that MSNZ's practice was to redeploy potentially redundant staff into suitable vacancies within the Microsoft Corporation group, so that is the standard it is to be held to.

[71] Mr Broughton had expressed an interest in the vacant OEM Director and Corporate Affairs positions, with the latter being a LCA-ANZ, not MSNZ, role. I consider MSNZ had an obligation to consider Mr Broughton for the OEM Director position and to facilitate LCA-ANZ's consideration of him for the NZ based Corporate Affairs position.

Assistance with redeployment

[72] Redeployment was MSNZ's preferred option so Mr Broughton was given preference over other candidates for the two vacant roles. MSNZ also gave him considerable support to assist him with redeployment.

[73] MSNZ provided Mr Broughton with outplacement support to assist him in preparing for the interviews. Mr Broughton was offered time off work to prepare for the interviews and Mr Ackhurst offered to assist Mr Broughton with his work

commitments to enable him to focus on preparing for the interviews. HR also provided information to assist Mr Broughton's preparation for the interviews.

[74] Mr Broughton was offered an "informational" (i.e. a one to one discussion prior to the interview which aimed to assist him to prepare for it) session with Mr Bullwinkel regarding the NZ based Corporate Affairs role. He also had an informational about the OEM Director role with Ms Ferguson, who said she imparted as much knowledge about the role as she could. In addition, Mr Ackhurst offered to meet with Mr Broughton to discuss the OEM role and also asked him if there was any extra information he needed.

Redeployment process

[75] As soon as Ms Dougherty became aware of the potential restructure of Mr Broughton's position, the recruitment processes which had been underway since September 2009 for the OEM Director and Corporate Affairs roles were suspended. Mr Broughton was given priority consideration for these two roles, which meant that had he been assessed as suitable for the positions, he would have been offered them.

[76] Mr Broughton was sent the selection criteria for these two vacant roles and advised about the competency based interview technique. He was told the interviewers would be basing their decisions on questions that specifically related to the competencies and experience required by the job description. Mr Broughton was provided with the competencies against which he would be assessed.

[77] Mr Broughton was given preparation meetings with one of the interviewers for each position. This was followed by competency-based interviews conducted by a number of different interviewers, who each had considerable knowledge about the vacant positions.

Assessment of Mr Broughton's suitability for the Corporate Affairs position

[78] Mr Broughton's assessment for the Corporate Affairs role was conducted via an interview with Chris Bryce, LCA and Simons Edwards, Head of Corporate Affairs for LCA-ANZ. That was followed by an interview with Mr Bullwinkel.

[79] All three LCA interviewers independently reached the conclusion that Mr Broughton was not suitable for the role. The reasons for that view were recorded by each interviewer in feedback notes, which were backed up by references to responses Mr Broughton had given during his various interviews. I consider the interview notes demonstrated there had been a balanced and objective assessment of Mr Broughton's skills and experience as they related to the Corporate Affairs position.

[80] Mr Bullwinkel's evidence was that Mr Broughton did not have the requisite skills, experience, or substantive knowledge needed for depth and breadth engagement on the complex public policy issues that LCA was focused on addressing and that the gap between where he was and what the position demanded was so great he could not be upskilled in to the position. Mr Bullwinkel's evidence was reasoned and considered, and I accept his assessment that Mr Broughton was unsuitable for the Corporate Affairs role.

Assessment of suitability for OEM Director position

[81] Mr Broughton was interviewed for the OEM Director role by Nicola Ferguson, former OEM Director, and Mr Ackhurst together, then subsequently by Emilio Umeoka, who was Mr Ackhurst's manager, and then finally by John MacLellan, Regulatory Lead for OEM business. All four interviewers concluded that Mr Broughton was unsuitable for the role and that training was not realistic, so he should not be appointed.

[82] Mr Ackhurst and Ms Ferguson explained that consideration was given to whether Mr Broughton could be up-skilled in to the OEM Director role, but concluded that training would not be sufficient to enable him to meet the requirements of the role. The reasons for that view were explained during their evidence. The OEM Director position was a senior sales role and Mr Broughton did not have sales experience with MSNZ. There was concern that Mr Broughton did not have the high level of attention to detail and numeracy skills required for the role. He had also failed to display the sales competencies required for the role.

[83] The OEM Director role required a particular skill-set including the right balance of strategic planning, a detailed understanding of the metrics of the business, and a day to day execution focus. The interviewers identified a very significant gap between Mr Broughton's skills and experience and that which was required for the role, to the extent training was not seen as feasible or appropriate.

[84] After interviewing Mr Broughton, MSNZ concluded he did not understand the OEM landscape and lacked a sufficient understanding of the PC and server landscapes, which was considered essential to the role. There was also concern that whilst the role was a very hands on one, Mr Broughton had not demonstrated the ability to actually execute work as opposed to facilitating or overseeing it.

[85] The unanimous conclusion of the four interviewers was that Mr Broughton was not suitable for the role and that even with training he would not meet the requirements of the position. The interviewers did not consider it appropriate to train him as a result of the observations recorded in the interviewers' notes which were made about Mr Broughton's responses during the various interviews. There was nothing in the interviewers' notes or the evidence I heard which indicated the interviewers' assessment was unfair, unreasonable, or unfounded.

Conclusion on redeployment

[86] There was no proper evidential basis for Mr Broughton's allegation Mr Ackhurst was biased against him and therefore should not have interviewed him. Nor was there any evidence to support Mr Broughton's suggestion that Mr Ackhurst had improperly influenced Ms Ferguson against him. Based on their respective positions and experience, Mr Ackhurst and MS Ferguson were both well placed to assess Mr Broughton's suitability for the OEM Director role.

[87] Mr Broughton was interviewed by seven different interviewers, who all concluded he was unsuitable for the two positions he was interested in. The interviewers' notes demonstrate there were reasoned and legitimate reasons for that conclusion. There was no evidence before me which suggested irrelevant factors had been taken into account or that any of the interviewers were anything but impartial.

[88] I find that the use of the competency based interview process was appropriate and that the interviewers were well placed to make the necessary assessments of Mr Broughton's suitability for the vacant positions.

[89] I am satisfied MSNZ had good reasons for not redeploying Mr Broughton and that it followed a fair and proper process before reaching that conclusion.

Did MSNZ breach its good faith obligations under the Act?

[90] Mr Broughton alleged that MSNZ had breached section 4(1A)(c)(i) and (ii) of the Act because it did not provide him with;

- a. the Business Justification document for the proposal to introduce a new Corporate Affairs Manager position in NZ; and
- b. an emailed letter from Mr Bullwinkel to his manager dated 28 September 2009 which referred to Mr Bullwinkel's view that one of the LCA-ANZ team should be relocated to NZ.

[91] I find MSNZ was not obliged to provide the information Mr Broughton identified above. Firstly, it was LCA-ANZ information and Mr Broughton was not employed by LCA. Secondly, the information he identified did not impact on his ongoing employment, so would not have had to have been provided. Thirdly, I accept Mr Bullwinkel's evidence that no Business Justification document existed because the LCA-ANZ existing headcount remained unchanged. Failure to provide a document which does not exist cannot amount to a breach of good faith.

[92] Despite there being no legal obligation on MSNZ to provide Mr Broughton with any information about the Corporate Affairs role, it did in fact go out of its way to provide him with sufficient information to enable him to understand what Mr Bullwinkel's thinking was in relation to that role. A number of offers were also made for Mr Broughton to discuss the matter directly with Mr Bullwinkel.

[93] Mr Broughton's submissions do not identify what (if any) information he says he should have been, but was not, given about the proposal to disestablish his position and Mr Broughton did not address that in his evidence. I find that he was

provided with all relevant information about the proposed disestablishment of the Citizenship Lead position.

[94] Mr Broughton alleged that MSNZ had misled and deceived him contrary to section 4(1)(a) and (b)(i) of the Act because it told him he would be redeployed when it had no intention of doing so. Mr Broughton also alleged that MSNZ misled and deceived him by informing him information he had requested did not exist.

[95] The evidence did not support these allegations. Mr Broughton was told from the outset his suitability for the two vacant roles would be assessed by competency based interviews. I also find that MSNZ did not mislead or deceive Mr Broughton about information issues.

Did MSNZ breach Mr Broughton's employment agreement?

[96] I find that MSNZ did not breach Mr Broughton's employment agreement. It dealt with him in good faith, and he was treated fairly. MSNZ's conduct towards Mr Broughton was not inappropriate and could not have damaged their relationship or his reputation, as he alleged.

What, if any, remedies should be awarded?

[97] Remedies are not applicable.

Should a penalty be imposed on MSNZ?

[98] No breach was established, so the penalty provisions in the Act do not apply.

Summary

[99] MSNZ's actions and how it acted were what a fair and reasonable employer would have done in all of the circumstances. MSNZ had genuine commercial reasons for disestablishing Mr Broughton's role. It followed a fair and proper process, which included providing him with relevant information, giving him a reasonable

opportunity to comment on the proposal, and considering his feedback before a final decision was made to adopt it.

[100] MSNZ also properly considered the possibility of redeployment but, after objectively assessing Mr Broughton, was justified in concluding he was not suitable for appointment to the OEM Director role. LCA-ANZ formed the same conclusion about the NZ based Corporate Affairs role, which I find was also justified in all of the circumstances.

[101] All of Mr Broughton's claims are without merit and are accordingly dismissed.

Costs

[102] MSNZ has been wholly successful, and is entitled to a contribution towards its actual legal costs. The parties are encouraged to resolve cost themselves, but if that is not possible, MSNZ has 14 days within which to apply for costs. Mr Broughton has 14 days thereafter within which to file his submissions, and MSNZ a further 7 days to file any submissions in reply. This timetable will be strictly enforced and may only be departed from with the prior leave of the Authority.

[103] If costs are sought, the parties are invited to provide submissions on whether the manner in which Mr Broughton conducted his case unnecessarily lengthened the investigation meeting and, if so, whether that should be reflected in a costs award. If disbursements are sought, these must be particularised and supported by evidence.

Rachel Larmer

Member of the Employment Relations Authority