

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2017] NZERA Wellington 11
5604001

BETWEEN NICHOLAS ELLISON
Applicant

AND AGRESEARCH LIMITED
Respondent

Member of Authority: Trish MacKinnon

Representatives: Andy Bell, Counsel for Applicant
Fiona McMillan, Counsel for Respondent

Investigation Meeting: 6 October 2016 at Palmerston North

Submissions Received: 27 September, 12 October and 26 October 2016, from
Applicant
27 September and 19 October 2016, from Respondent

Determination: 28 February 2017

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Nicholas Ellison was a senior scientist with AgResearch Limited (AgResearch) when he was given notice of the termination of his employment for redundancy on 29 October 2015. Dr Ellison claims his dismissal was unjustifiable and he seeks financial remedies comprising payment of lost salary, compensation for humiliation and injury to feelings and costs.

[2] AgResearch says Dr Ellison's redundancy was for genuine business reasons following a fair and reasonable consultation process. It counterclaims the sum Dr Ellison was erroneously paid in redundancy compensation if the Authority finds his dismissal was not justified.

The Authority's investigation

[3] Dr Ellison provided evidence on his own behalf and four witnesses gave evidence for AgResearch. I have not referred in this determination to all the evidence and submissions received. I have, however, set out the material facts and made findings on issues relevant to the determination of Dr Ellison's claim in accordance with s.174E of the Employment Relations Act 2000 (the Act).

[4] This determination has been issued outside the statutory period of three months after receiving the last communication from one of the parties. When I advised the Chief of the Authority this would occur he decided, as he is permitted by s174D(3) of the Act to do, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the latest date specified in s174D(2) of the Act.

Background

[5] AgResearch is a Crown Research Institute (CRI) which, according to its website, "partners with the pastoral sector to identify and deliver the innovation that is needed to create value for New Zealand". It has employees spread across four campuses and farms in the Waikato, Manawatu, Canterbury and Otago. Before its formation in 1992 much of the pastoral agricultural research it undertakes was carried out by the now-defunct Department of Scientific and Industrial Research (DSIR) at the Grasslands campus.

[6] Dr Ellison had been employed as scientist from 1984 by AgResearch and DSIR. He worked mainly in the area of plant molecular biology. Before his position was made redundant, Dr Ellison worked in the Germplasm Development team. AgResearch organises its work into work into a number of science groups, within each of which are science teams. Germplasm Development sits within the Forage Improvement Group.¹

[7] On 24 September 2015 Dr Ellison was told in a meeting and by letter that his employer had reviewed "science roles and capability in the context of shifting customer demand and Government investment". AgResearch proposed to reduce the

¹ This group has since been renamed Forage Science but I will refer to it in this determination by the name it had at the time Dr Ellison's employment was terminated for redundancy

number of permanent scientist and technician roles and Dr Ellison's role of Senior Scientist was one of the roles it proposed to disestablish.

[8] The letter was signed by Anthony Conner, Science Group Leader Forage Improvement, who advised Dr Ellison that consultation on the proposal commenced that day. Dr Connor's letter informed Dr Ellison of the process that would be followed, which was in accordance with Dr Ellison's employment agreement and the relevant AgResearch change management policy, procedure and guidelines. Staff were invited to make submissions up to 9 October. An email address was provided to which submissions were to be sent.

[9] Dr Connor's letter assured Dr Ellison that both Professor Warren McNabb and he would ensure full consideration was given to all the ideas and questions submitted during the consultation period. Professor McNabb was, at the time, AgResearch's Research Director. He was also the sponsor of the review process that affected all five science groups. Dr Connor also assured Dr Ellison of the importance the employer placed on its people, particularly those in affected roles, and of its intention to provide them with all the information they needed to understand the reason behind the proposed changes. He informed Dr Ellison that he could talk with him at any time, email any questions to the address established for the consultation process and access information on AgResearch's intranet.

[10] A consultation document was made available that day. It contained the background to the proposal and relevant information, including that reductions were proposed for all five science groups in AgResearch, reflecting areas of reduced customer demand and reduced potential for impact. The Forage Improvement Group faced a reduction of up to 18 scientist roles, three of which were in Germplasm Development. One new role would potentially be created in forage genomics.

[11] The consultation document set out the proposed impact on each of the teams within the Forage Improvement group. It referred to a particular programme within Germplasm Development with which Dr Ellison was not involved, the MeriNet programme, noting the investment in that programme needed to be directed towards other pastoral sector impact areas. Two of the proposed scientist reductions in Germplasm development were associated with the MeriNet programme. The third role was Dr Ellison's.

[12] Affected staff were to make their submissions to a Change Consultation Team (CCT) which was being set up to collate, consider and summarise the feedback/submissions received from staff in response to the proposals. It was to "consider all pertinent information and review it objectively" and make recommendations to Professor McNabb. The consultation document set out the composition of the CCT. It would comprise three management appointees; three staff representatives elected by affected employees; the National Human Resources Manager; and a representative from the New Zealand Public Service Association Inc. (PSA), unless the union was already represented in the elected staff representatives. The consultation document included a proposed timetable for the CCT to meet and provide a report to Professor McNabb.

[13] Dr Ellison made a personal submission by email to the CCT on 7 October 2015 in which he highlighted specific responsibilities associated with his role which, in his view, impacted upon the proposal to disestablish his position. He drew attention to seven specific areas of responsibility, contending that the responsibilities associated with his position all represented "important ongoing work such that it would not be appropriate that it be disestablished at this time".

[14] The CCT met on 14 and 15 October 2015 to discuss and analyse the submissions and develop recommendations. During this time it also sought "additional and clarifying information from the Science Group Leaders (SGLs) and the office of the Research Director as needed".² As part of that process it had a discussion with Dr Connor about Dr Ellison's submission. The CCT presented its completed report to Professor McNabb on 19 October 2015.

[15] On 29 October 2015, in accordance with the timeframe set out in the consultation document, Dr Connor wrote to Dr Ellison notifying him of the decision to disestablish his position. His letter served as 13 weeks' notice of redundancy and informed Dr Ellison his last day of employment would be 29 January 2016. It also informed him that, if a similar position with AgResearch or another Crown research institute had not been identified for redeployment, he would be paid redundancy payment and any outstanding leave on that date.

² From the Executive Summary of "Recommendations on the 2015 Staff Change Proposal: Report by the Change Committee Team"

[16] Dr Connor's letter informed Dr Ellison that, during the notice period, he could apply for any suitable vacancy within AgResearch that might arise. Enclosed with the letter was a questionnaire to assist his Team Leader, James Crush, and AgResearch's Human Resources (HR) personnel to work with Dr Ellison to determine his individual preferences. He was asked to complete the questionnaire and return it to HR adviser, Megan Munro, or to bring it with him when he met with Dr Crush and Ms Munro.

[17] Dr Ellison did not engage with HR or AgResearch management over options for redeployment or outplacement. He raised a personal grievance with regard to the disestablishment of his role on 15 December 2015.

Issues

[18] The primary issue to be determined is whether AgResearch's termination of Dr Ellison's employment for redundancy was justifiable. Issues relevant to the determination of that question are:

- a. whether AgResearch followed a fair process leading up to the termination of Dr Ellison's employment; and
- b. whether Dr Ellison was genuinely surplus to his employer's requirements.

[19] If the termination of Dr Ellison's employment was not justifiable, further issues relating to appropriate remedies, and to AgResearch's counterclaim, will arise.

The legal test

[20] The test for assessing whether a dismissal was justifiable is set out at s 103A of the Employment Relations Act 2000 (the Act). It requires an objective assessment of whether the employer's actions and how the employer acted were what a fair and reasonable employer could do in all the circumstances at the time the dismissal occurred.

[21] In *Grace Team Accounting Ltd v Brake*³ the Court of Appeal confirmed that this is the relevant test for dismissals for redundancy but stated that "it will be necessary to interpret s 103A(3) in a way that adapts it to a situation not involving misconduct and to invoke s 103A(4) (allowing it to consider "any other factors it

³ [2014] NZCA 541

considers appropriate") in redundancy cases."⁴ In this instance it is appropriate to consider:

- a. whether, having regard to the resources available to AgResearch, it sufficiently investigated the matter before terminating Dr Ellison's employment for redundancy;
- b. whether AgResearch gave Dr Ellison a reasonable opportunity to respond to its proposal to disestablish his position before it decided to do so;
- c. whether it genuinely considered Dr Ellison's submission on the proposed disestablishment of his position before deciding to confirm its proposal to do so; and
- d. whether Dr Ellison's position was surplus to AgResearch's requirements.

[22] The Act requires that a dismissal must not be determined to be unjustifiable solely because of defects in the process followed by the employer if the defects were minor and did not result in the employee being treated unfairly.

[23] The employer's actions must also meet the requirements of good faith that are specified in detail in s 4 of the Act. The parties to an employment relationship have mutual obligations to deal with each other in good faith. These entail, amongst other matters, not doing anything, directly or indirectly, to mislead or deceive each other, or that is likely to mislead or deceive each other. Parties to the employment relationship are required to be active and constructive in maintaining a productive employment relationship in which they are responsive and communicative.

[24] The good faith requirements of s 4 impose particular duties on an employer proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of one or more of its employees. In that situation the employer must provide the affected employees access to information, relevant to the continuation of their employment, about the decision. It must also provide the employees with the opportunity to comment on the information before the decision is made by their employer.

⁴ n3 at [77]

The Employment Agreement

[25] Dr Ellison was employed on an individual employment agreement (IEA) that included the following redundancy provision:

A redundancy occurs when a position held by a staff member is or will become surplus to the needs of the employer. Should such a situation arise, it is important that employees are treated fairly and equitably and in accordance with company's restructuring process.

[26] The rest of the provision concerns the process and formula for redundancy compensation if, following the restructuring process, a staff surplus were to be declared.

Discussion

[27] Dr Ellison acknowledged he was aware AgResearch had been under pressure to reduce costs in recent years, driven mainly by a reduction in research funding from both government and the private sector. He did not dispute the need for his employer to save costs, or to embark on the September 2015 review. However, he did not believe his position should have been made redundant. In his view AgResearch gave too little consideration to the circumstances of his employment and the duties he was performing.

[28] Those duties in the main concerned a programme of work funded by a contract between AgResearch and the Ministry of Business, Innovation and Employment (MBIE), known as "Resilient Forages". Dr Ellison had been involved in the work programme since the contract commenced on 1 October 2012. He had been the science leader and key researcher for the contract since June 2014 and it was his evidence that he had worked full time on the programme since July 2014. He said the MBIE contract had funded his salary at 80% but that in AgResearch's budgets this was unilaterally reduced to 58%. In Dr Ellison's view this mischaracterised the funding situation and made him susceptible to redundancy.

[29] When Dr Ellison was notified in September 2015 of the review his employer intended to carry out, the contract had funding for a further twelve months. He said he had not believed his employment was at risk in the review but, nonetheless, he made a personal submission to the CCT as he did not wish to leave the matter to chance. In that submission Dr Ellison reflected his belief that his responsibilities would continue until the contract ended. This included sole accountability for the

completion of one of the three remaining active "Critical Steps" (also referred to as milestones) identified in the work programme under the contract. Dr Ellison also noted an intention to renegotiate a funding contract, before the MBIE contract expired, to continue the research.

[30] His submission to the CCT highlighted that another of his responsibilities was holding licensing for radioisotope care, which he said was essential for many facets of AgResearch's work. Other matters covered in the submission were his roles in the management of the germplasm collection; in hybrid plant verification; and in plant molecular cytogenetics. In each of these areas Dr Ellison referred to the importance of his role in relation to that of others in AgResearch. His submission had concluded with his view that the responsibilities of his role represented such important ongoing work that disestablishment of it would not be appropriate "at this time".

[31] He said he received no direct feedback from his submission but did see the report and recommendations document delivered by the CCT on 19 October 2015. In relation to the Germplasm Development proposal the report briefly summarised the submissions it had received and recommended that the proposal to disestablish the three scientist roles in plant Molecular Biology, including Dr Ellison's, be accepted.

[32] The report stated the CCT agreed demand in that area had declined as was reflected in the funding situation. It also noted there had been technological advances for which the capability was held elsewhere in the group and organisation which would meet any future demand.

[33] Dr Ellison said he had no contact with Dr Connor between making his submission to the CCT on 7 October and receiving notification of his redundancy from Dr Connor on 29 October. In oral evidence he said he had chosen to have contact with his direct manager, Dr Crush rather than with Dr Connor. He also said he had relied on the process and on Dr Connor being aware of his submission to the CCT. He said he had lost confidence in those conducting the process when the substance of his submission did not seem to have been considered in any real way by his employer before it made the decision to make his position redundant.

[34] Dr Crush's evidence was that he had explained to Dr Ellison there was no realistic prospect of further funding being obtained for the basic plant molecular genetics research in which Dr Ellison specialised. He said he had initiated two face to

face meetings with Dr Ellison in the course of the consultation phase during which he encouraged him to engage with senior managers on the rationale underpinning the decision to review his position. Dr Crush said he told Dr Ellison it was important for him to engage with the people who had developed the proposal. He said he had told Dr Ellison that, because he had not been involved with that, he was not prepared to discuss the rationale with him.

[35] Dr Connor had been involved in the development of the review proposals and his evidence was that he had made many attempts to talk with Dr Ellison both during the consultation period and after the notification of the outcome of the review on 29 October. He rejected the assertion put to him under cross examination that his attempts to talk to Dr Ellison had been confined to the period after 29 October when the decision to disestablish his position had been made and was unlikely to have been changed.

[36] I accept Dr Connor's evidence that he was available to answer any questions and discuss any matters that concerned Dr Ellison during the consultation phase of the review. Under questioning Dr Connor agreed that, in hindsight, when his attempts to talk with Dr Ellison were unsuccessful, he probably should have written to him setting out the detailed rationale for the proposed disestablishment of his role. He said that at the time he was busy with those employees who did choose to engage with him in the process.

[37] While it may have been helpful to Dr Ellison to have a detailed rationale in writing I do not find Dr Connor's failure to provide such a document to be fatal to AgResearch's process. He had advised his availability to Dr Ellison and had actively attempted to talk with him in the consultation process. Dr Crush had advised him to seek the information from senior managers, who were Dr Connor and Professor McNabb.

[38] The consultation document, which was available to Dr Ellison on 24 September, contained the rationale for the proposal and the CCT's report and recommendations document confirmed that team's agreement with the proposal and rationale. If Dr Ellison had concerns or queries about the CCT's conclusions he could have sought a discussion with Dr Connor or Professor McNabb, but there is no evidence of his doing so. I find the consultation process allowed Dr Ellison a fair and reasonable opportunity to be heard on the proposal affecting his role.

[39] There was no evidence sought or provided by any member of the CCT. The team's report seems reasonably comprehensive and I have no reason to doubt it diligently fulfilled the brief contained in its terms of reference. In particular, I have no reason to doubt Dr Connor's evidence of the CCT's comprehension and consideration of Dr Ellison's submission to it. I do not accept that, because the CCT recommended Dr Ellison's position (and two others in Germplasm Development) be disestablished, the team had not properly considered his submission to it.

[40] In submissions on behalf of Dr Ellison Mr Bell noted that it was necessary under the terms of Dr Ellison's IEA for him to be surplus to AgResearch's requirements before he could be made redundant. He submitted Dr Ellison could not have been surplus to his employer's requirements because of the continuation of work under the Resilient Forages contract until October 2016. Until that time Dr Ellison was project manager and key researcher on the contract.

[41] I reject this submission. The evidence of both Dr Crush and Dr Connor was that Dr Ellison's expertise was not required for the one remaining critical step in the Resilient Forages contract for which he claimed sole accountability. (Dr Ellison did not claim to be responsible for the other two remaining critical steps). This involved the requirement for a paper on DNA sequence phylogenetics to be accepted by a refereed journal by October 2016. Dr Crush said that Dr Ellison's name was not associated with the delivery of that paper in the contract. Further, there were other suitably qualified AgResearch staff involved with the contract who had stronger track records in publishing who could deliver the paper.

[42] Dr Connor also said this milestone could be achieved by other staff involved with the work programme. However, he also opined that the milestone could be considered to have been completed by the publication of at least one paper reported in an earlier annual report. He suggested that, while it was AgResearch's intention to deliver a further paper, that would be an enhancement on the required milestones for the contract.

[43] This opinion of Dr Connor's led to additional submissions being made on that matter by Mr Bell. I will not detail the submissions here as I do not believe the issue of whether the critical step had previously been completed or was still remaining to be achieved has any relevance to my determination of Dr Ellison's claims. This is because the Resilient Forages contract was an agreement for funding of a particular

programme of work between AgResearch and MBIE. The contract did not provide that Dr Ellison would remain in AgResearch's employment until its expiry on 30 September 2016 and nor did it guarantee that work under the contract would be performed by him. The decision of how best to deploy its resources was for the employer to make.

[44] For similar reasons I do not accept Dr Ellison's assertions regarding the mischaracterisation of the funding situation which he believed made him vulnerable to redundancy. How AgResearch accounted for his time for internal audit purposes and how it charged his time against the Resilient Forages contract was a matter for it as the employer to determine. The disestablishment of his position resulted from the downturn in demand for the work in which he specialised, and the accompanying downturn in funding. Dr Ellison's assertions are based on his view, which I have rejected, that his employment was guaranteed while the Resilient Forages contract was extant.

[45] In summary I do not accept the submission that Dr Ellison's position was not surplus to the needs of his employer. Although he was working on the Resilient Forages contract at the time his position was disestablished, he did not have an unassailable right to continue that work until the expiration of the contract. The contract was between AgResearch and MBIE and the obligations under the contract to complete certain specified tasks were obligations of AgResearch.

[46] I do not doubt Dr Ellison's commitment to his work and his desire to see it through. His employer's decision that he was not required to do so and that, if any work remained, it could be completed by another equally qualified employee may not have seemed fair or reasonable to Dr Ellison. However, the standard applicable in law, which is the test of justification, is to be made objectively, and not from the perspective of the affected employee or of the employer.

[47] I find AgResearch followed a fair and reasonable process that allowed Dr Ellison the opportunity to be heard and have his views considered by his employer before it made the decision to terminate his employment for redundancy. His position was surplus to AgResearch's requirements and the termination of his employment was justifiable.

Determination

[48] For the reasons given above I dismiss Dr Ellison's claim to have been unjustifiably dismissed.

Costs

[49] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority