

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 95
5376834

BETWEEN	ROBERT FORD Applicant
AND	JOHN HOLLAND NEW ZEALAND LIMITED Respondent

Member of Authority:	R A Monaghan
Representatives:	A Goldstone, advocate for applicant M Quigg, counsel for respondent
Investigation meeting:	30 January 2013
Additional information provided:	1 and 12 February 2013
Determination:	21 March 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Robert Ford is a qualified engineer, specialising in high voltage transmission lines. John Holland New Zealand Limited (JHNZL) is the New Zealand division of the John Holland Group (JHG) based in Australia. The group provides contracting and engineering services to large public and private sector projects, including in the power and energy sector.

[2] In mid-2011 JHNZL was targeting a national grid maintenance contract which Transpower New Zealand (Transpower) was to offer for tender. JHNZL employs fewer than 10 staff members in New Zealand, and JHG's practice when a manager was required for a bidding process was to send a person from Australia. This time it was intending to tender in a joint venture, and decided to recruit a bid manager in New Zealand.

[3] At about the same time Mr Ford's existing employment had ended by reason of redundancy and he was seeking a new position. He spoke to a recruitment consultant, who advised him JHNZL sought someone to manage the bid for the maintenance contract, with a possibility of other tasks. Through the consultant he came into contact with James Leach, JHNZL's country manager for New Zealand.

[4] Messrs Ford and Leach met to discuss the position. It was common ground that they discussed the requirement for a bid manager for the maintenance contract, and that in the event of a successful bid there would be ongoing work under the contract. According to Mr Ford, the two also discussed the possibility of JHNZL making other bids for other contracts. One project in particular was mentioned - another Transpower project referred to at the time as the 'Line C' transmission line construction contract. Mr Ford would work on the bidding process for that contract - a process expected to commence towards the end of 2011.

[5] Consistently with his view of the discussion, Mr Leach informed the consultant in a message dated 22 July 2011:

We are keen to progress Bob's recruitment and we are thinking of a three-month initial contract commencing Monday 1st August ...

Can you please speak to Bob and confirm that he is interested in a short term role and what his salary expectations for such an arrangement would be. As discussed with Bob, we want him to lead a tender and a full-time position in New Zealand is likely to be available to Bob should we be successful.

[6] Mr Ford was also interviewed by Jeff Hayes, new business manager power for John Holland Pty Ltd in Australia. A message from Mr Leach to Mr Hayes indicated a similar intention regarding Mr Ford's employment to that contained in the message to the consultant.

[7] An offer of employment was duly made to Mr Ford. The offer was contained in a letter dated 26 July 2011. The letter set out the terms and conditions of employment, including:

1. Position and Location

You will initially be appointed as a full time employee in the position of bid manager for the Transpower Project bid ...

[8] The offer did not include a provision for fixed term employment, nor did it make any mention of what would happen when the outcome of the bid for the maintenance contract was known. Mr Ford was entitled to understand he was being offered permanent employment, but not to overlook the fact that the position offered was expressed to be that of 'bid manager for the Transpower project bid'. At the time both parties were optimistic about the likely outcome, but Mr Ford knew others would bid for Transpower contracts so should also have understood there was no certainty about the matter. He was not entitled to conclude he was being promised ongoing employment even if the 'Transpower project' bid was not successful and no other suitable work was available. No such promise was made.

[9] Moreover at the time of his recruitment Mr Ford had been discussing employment opportunities with other companies, at least one of which was also interested in the Transpower project. He chose the JHNZL position for the various reasons he gave, which included assessments that the outcome of the bidding process would be known in or about April 2012 and that the JHNZL position might give him access to wider opportunities in the John Holland organisation.

[10] The absence of a fixed term provision means JHNZL has been obliged to address the termination of Mr Ford's employment as the termination of a permanent position on the ground of redundancy. The terms and conditions contained in Mr Ford's offer of employment provided for redundancy, with the most relevant provision being:

13. Restructuring and Redundancy

...

(b) If your employment is terminated for reasons of redundancy, your redundancy entitlements (if any) will be in accordance with Group policy.

[11] The group policy was based expressly and substantially on legislation applicable in Australia, although some of its provisions were capable of being applied in New Zealand. In particular the policy provided that '*Situations of redundancy must be treated with utmost due diligence*'. It obliged the 'HR' to consult to ensure that '*legislative obligations are met during this process*'. It also obliged 'an employer' to '*investigate suitable alternative positions*' and required '*information about the*

employee's willingness to relocate and an accurate record of their skills, qualifications and experience which must be recorded on [form].

[12] Mr Ford's employment began on or about 1 August 2011. He worked on preparing the bid for the maintenance contract. In the early weeks of his employment he also carried out preparatory activities for the 'Line C' project. JHNZL planned to provide an Expression of Interest in the project to support its bid for the maintenance contract. It did not intend to proceed to bid for the Line C work if it was unsuccessful in securing the maintenance contract.

[13] Thus a draft work plan prepared in August 2011, and provided to Mr Ford, noted the preparatory work on the Line C project, and recorded:

... success with the current national grid maintenance and project services RFP is critical to the success of the Joint Venture in gaining a share of the transmission lines projects going forward.

[14] With further reference to the relationship between the maintenance contract and the Line C project, Mr Leach commented to Mr Ford in a message dated 26 October 2011:

(I still see our competitive advantage as the jv as being able to offer a reduction for delivering both contracts from the shared overhead and reduced interface risks?)

[15] Financial projections in or about August 2011 showed the value to the joint venture of the maintenance contract was some 10 times that of the Line C work. In a series of steps from October 2011 the Line C project was broken into several separate but related contracts, each of which was available for tender. JHNZL later concluded it was not in a position to place a competitive bid for the work and decided not to do so.

[16] JHNZL was not the successful bidder for the maintenance contract. As the bid manager, Mr Ford was the person to whom that advice was conveyed first. The advice came by phone call on 5 December 2011. Although dated 2 December 2011, written confirmation was received on or about 6 December. Mr Ford informed Mr Leach of the outcome, and began looking for other employment opportunities in New Zealand and Australia.

[17] Also on 5 December 2011 Mr Ford applied for a position as project development manager – power in a John Holland company in Australia. On his evidence he did so approximately one half hour before he was advised the Transpower bid was unsuccessful. He was advised the application was unsuccessful, but in January 2012 was advised that he was on a shortlist for the position. The apparent difference was unexplained.

[18] Most unfortunately, Mr Ford received an exit survey from Australia before there had been any formal discussion about the fate of his employment at JHNZL. This, too, was unexplained. Mr Ford raised a concern about the matter with Mr Leach, and within minutes received a letter dated 12 December 2011 notifying him of the termination of his employment.

[19] The letter expressed the view that the failure to secure the maintenance contract meant there was no longer a position for him and that a redundancy situation existed. It also said there was no suitable alternative position and informed him the employment relationship was terminated by reason of redundancy. Finally it said the employment would cease on 12 December 2011.

[20] Mr Ford received a ‘redundancy payment’ equivalent to one month’s notice.

[21] Mr Ford says the termination was an unjustified dismissal, and has raised a personal grievance.

[22] The issues he has raised are:

- a. should JHNZL have retained a position for him by entering into a bidding process for the ‘Line C’ project;
- b. was a suitable alternative position available; and
- c. was there an adequate consultation process.

Should a position have been retained by bidding for the Line C project

[23] Mr Ford believed his redundancy was substantively unjustified as he could have been gainfully engaged in bidding for the Line C project.

[24] JHNZL was not obliged to bid for work if for genuine business reasons it did not wish to, let alone in circumstances where it could not make a competitive bid. I do not accept that anything in the decision not to bid for the Line C project meant Mr Ford's redundancy amounted to an unjustified dismissal.

Was there a suitable alternative position

[25] There were no suitable alternative positions for Mr Ford in JHNZL. Indeed there was no suggestion to different effect.

[26] After the notification of his redundancy Mr Ford was known to be pursuing alternative employment in New Zealand with Northpower and another large infrastructure contractor Thiess Services New Zealand (Thiess). He had applied for a position with Northpower at the time of his recruitment by JHNZL, and towards the end of the year Northpower approached him again about employment with it. Mr Ford approached Thiess himself, and Mr Leach said in evidence he understood (apparently wrongly) that Mr Ford had secured employment with Thiess. He offered to support Mr Ford's job search by providing good references.

[27] Mr Ford had also indicated a willingness to move to Australia, and discussed the prospect of such a move with Mr Hayes in association with the redundancy. Mr Hayes was unable to identify a suitable position in the energy and power transmission area for which he was responsible.

[28] Mr Ford was also approached by another Australian company, and was interviewed in or about January 2012. Although he said the interview was successful, he accepted an offer from a fourth company based in the United Kingdom (from where he had emigrated in 2010). His employment in that position began on 13 February 2012.

[29] Mr Ford's concern centred on what he said was the lack of any attempt by JHNZL or JHG to find a position for him 'in rail', where he also had expertise. Although 'rail' was not included in Mr Hayes' own responsibilities, Mr Ford said Mr Hayes should at least have caused enquiries to be made regarding an alternative

position in that area. He said he raised his interest in rail with Mr Hayes. Mr Hayes did not give evidence.

[30] Mr Leach believed there was nothing available to JHG to indicate Mr Ford had an expertise in rail which should be followed up. He referred in particular to the lack of any emphasis on rail in Mr Ford's CV, while acknowledging this would not be expected in a CV prepared for the purposes of a senior power transmission position.

[31] JHG was given Mr Ford's CV when he was recruited. Although I was not provided with a copy of that document, I was provided with a copy of a CV which included reference to Mr Ford's employment at JHNZL. According to that CV Mr Ford had experience in railway signalling, acquired in the period 2007 – 2010, but the nature of the experience was not detailed. Otherwise Mr Ford had extensive experience in power transmission projects commencing in 1989. Mr Leach said the CV available to JHG emphasised Mr Ford's power transmission experience and gave it no reason to believe he had rail experience which could be followed up.

[32] Even if the CV provided to me gives some support to that point, JHG policy required that an accurate record of an employee's skills be kept. Bare reliance on a CV prepared for a particular purpose, and inevitably emphasising particular strengths and experience, does not suffice. There was no evidence that JHG or JHNZL took steps to obtain from Mr Ford the necessary record of Mr Ford's skills, and on the evidence no-one at JHNZL or JHG turned their mind to the possibility of alternative positions for Mr Ford other than power transmission positions.

[33] There was no evidence, either, that a suitable alternative position 'in rail' was available in Australia.

[34] For present purposes I conclude that JHNZL breached the group policy in failing to obtain an accurate record of Mr Ford's skills. Both for that reason and because there was some indication that Mr Ford at least had experience 'in rail', I find JHNZL also breached group policy in failing to investigate the possibility of a suitable alternative position 'in rail'. While Mr Hayes himself may not have been in a position to conduct such an investigation, either he or 'HR' should have referred the matter to someone who was.

Was there an adequate consultation process

[35] No consultation process was embarked on at all in respect of the termination of Mr Ford's employment.

[36] The failure to consult breaches the well-established duty of good faith set out in s 4(1A) of the Employment Relations Act 2000. It also breaches the obligations under the group policy to treat with 'the utmost due diligence' the redundancy situation Mr Ford faced, and to consult to ensure 'legislative obligations are met'.

Was the dismissal justified

[37] The applicable test of the justification for the termination of Mr Ford's employment is contained in s 103A of the Employment Relations Act as amended with effect on 1 April 2011.

[38] The test requires a determination, on an objective basis¹, of whether the employer's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.² In applying the test the Authority must consider whether the employer:

- having regard to the resources available to it, sufficiently investigated the allegations against the employee;
- raised concerns the employer had with the employee before dismissing the employee;
- gave the employee a reasonable opportunity to respond to the concerns before dismissing the employee; and
- generally considered the explanation of any allegations made against the employee.³

[39] The failure to consult in the redundancy situation here offends against these provisions as well as the duty of good faith in s 4(1A) and the employer's policy.

¹ s 103A(1)

² s 103A(2)

³ s 103A(3)

[40] Section 103A(5) provides:

The Authority ... must not determine a dismissal ... to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were –

- a. minor; and*
- b. did not result in the employee being treated unfairly.*

[41] JHNZL submitted that s 103A(5) should be applied here. It referred in support to a judgment of the Employment Court in *Clarke v Affco NZ Limited*.⁴ There three contractual procedures were found to be breached, but the breaches can readily be described as minor⁵ and no unfairness resulted. If the circumstances here were limited to the New Zealand operation, I might have found the failure to consult was minor bearing in mind what Mr Ford knew or should have known about prospects of continued employment by JHNZL if the bid was unsuccessful. However the JHNZL operation was treated as the New Zealand branch of JHG to the extent that Mr Hayes was involved as I have described, and the human resource management function was also apparently conducted from Australia. The failure to consult meant in particular that the prospect of employment elsewhere in JHG was not addressed as it should have been, and the failure was more than minor.

[42] For these reasons I find the dismissal was unjustified.

Remedies

[43] Mr Ford seeks:

- the reimbursement of remuneration lost from the end of the notice period to the date he began his new employment; and
- compensation for injury to his feelings caused by his personal grievance.

1.Reimbursement of lost remuneration

[44] This was a genuine redundancy situation and it is more likely than not that Mr Ford's employment would have terminated by reason of redundancy in any event. In

⁴ [2011] NZEmpC 17

⁵ They were: one union official attended a meeting instead of two; a required written record was not made; and there were no further negotiations with the union as to outcome in circumstances where the union declined to pursue the employee's grievance.

turn he would have lost remuneration in any event. As the loss of remuneration was not caused by his unjustified dismissal, there will be no order for reimbursement.

2. Compensation for injury to feelings

[45] Mr Ford's entitlement to compensation for injury to his feelings flows from the failure to consult, in respect of which I have found his dismissal unjustified.

[46] While JHNZL breached a number of its obligations, the level of compensation is determined by the extent of the injury suffered by the affected individual and not by the extent of the breaches. Here the evidence of injury to feelings was minimal, and amounted to bare assertion.

[47] In addition, on Mr Ford's evidence he had already started looking for another position when he became aware of the unsuccessful bid, and I do not accept the implications of the unsuccessful bid were lost on him. He was disappointed and inconvenienced, and exposed to the prospect of significant relocation costs, when JHG did not attempt to seek an alternative position for him in Australia outside of energy and power transmission. I accept the likelihood that a degree of stress arose from this, but not that Mr Ford was hurt or humiliated.

[48] For those reasons a modest award of compensation is warranted. JHNZL is ordered to compensate Mr Ford for injury to his feelings in the sum of \$4,000.

Summary of orders

[49] JHNZL is ordered to pay to Mr Ford the sum of \$4,000 under s 123(1)(c) of the Act.

Costs

[50] Costs are reserved.

[51] The parties are invited to reach agreement on the matter. If they are unable to do so any party seeking costs shall have 28 days from the date of this determination in

which to file and serve memoranda on the matter. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority