

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 42
5399247

BETWEEN

NEEL GUPTA
Applicant

AND

INFOSYS TECHNOLOGIES
(AUSTRALIA) PTY LIMITED
Respondent

Member of Authority: G J Wood

Representatives: Neel Gupta on his own behalf
John Rooney for the Respondent

Investigation Meeting: 12 March 2013 at Wellington

Submissions Due: By 28 March 2013

Determination: 5 April 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Gupta seeks reinstatement to his employment with the respondent Infosys Technologies (Australia) Pty Limited (Infosys Technologies/Infosys Australia). He also claims that his probation period was wrongly extended, he was not supported in his placement at Telecom, his line manager was unilaterally changed and his performance review process was biased and unfair. Infosys Technologies resists his claims, in particular that for reinstatement, as it no longer has any employees.

Factual discussion

[2] Infosys Technologies is a fully owned subsidiary of Infosys Limited (Infosys), a multi-national company based in India employing some 145,000 people in the business consulting technology, engineering and out-sourcing service industries. After extensive pre-employment discussions Mr Gupta was hired from India, under a

work visa, to act as a senior project manager for Infosys Technologies, which had a staff of around 2,500 people.

[3] Schedule 1 of Mr Gupta's employment agreement set out who he was to report to. By the time Mr Gupta started work that person had been replaced. Mr Gupta complains that this could not occur without his agreement. This claim is misconceived, because clause 5 of the agreement allows Infosys Technologies to nominate a new reporting arrangement *at its discretion*. In any event, Mr Gupta did not complain about this arrangement until some months later when raising a personal grievance.

[4] On 15 September 2011 Mr Gupta commenced working as a senior project manager on an account with Telecom. However, on 3 October 2011 Mr Gupta was released from the Telecom project because Telecom advised Infosys Technologies they no longer wanted him working on its account. I accept the evidence of Infosys Technologies' witnesses that they did request Telecom to reconsider its position, but were unsuccessful. As a result I conclude that Mr Gupta was supported by Infosys Technologies during his placement with Telecom, at least to a reasonable degree.

[5] There can be no certainty about events that occurred many months ago, and Mr Gupta may be correct in some of his assertions. However, I must decide disputed issues on the balance of probabilities, i.e. what is more likely than not. The evidence was clear that the reason for his departure was most likely dissatisfaction by Telecom with Mr Gupta escalating issues to its senior management staff, rather than financial reasons, as Mr Gupta claims. This is because the former has been consistently claimed by Infosys Technologies, backed by contemporaneous documentation. One particular example was that Mr Gupta continued to contact senior Telecom managers even after he had been taken off the account. The document relied on by Mr Gupta does not refer to the need to make savings, just that there would be no extra costs for Telecom in replacing Mr Gupta, because Infosys Technologies was paying for the overlap involving Mr Gupta and his successor.

[6] Between October 2011 and January 2012 Mr Gupta did not work in any other firm as a project manager earning income for Infosys Technologies, but he did look for work within Infosys Technologies, and did some background work to assist tendering for work, such as with the Ministry of Social Development. I accept that for

an employee whose skills are designed to be and are best utilised in the field, on placement with fee paying customers, this situation was of little benefit to either party. As a result, Mr Gupta could not have reasonably expected the top marks assessment of his performance during his probation period that he did.

[7] Instead, as a result of a meeting about his probationary period, Infosys Technologies determined to extend Mr Gupta's probationary period until 15 February 2012. The extension was as a result of concerns about Mr Gupta's performance, including him being taken off the Telecom project. It chose not to terminate his employment following the probation period because it recognised that it should have provided Mr Gupta with its feedback at an earlier stage. Such was not the action of an employer whose managers, as Mr Gupta claimed, were determined to discredit him because they *felt overshadowed by what Neel brought to the table*.

[8] Mr Gupta promptly objected to this decision and raised it with Infosys Technologies' Chief Executive Officer. I accept, however, that the extension decision was one that a fair and reasonable employer could have come to. It reflected poor fee earnings and interpersonal difficulties that arose with both customers and staff, and followed the seeking of feedback and a formal meeting. On the other hand, as a newcomer to New Zealand, Mr Gupta simply may not have realised the negative response that unnecessarily escalating issues up the line usually has in New Zealand's business culture.

[9] Mr Gupta was given assistance with meeting his objectives over the extension period. I do not accept therefore that he was unfairly treated during this period. In particular, I do not accept that he was required to work over the Christmas holidays, as the project he was set had an initial reporting date of 20 January. I also do not accept that he was required by another manager to withdraw his complaint about the manager responsible for the probation extension decision. The contemporaneous documentation shows that Mr Gupta was advised to drop that matter and concentrate on his tasks during the extension period, which Mr Gupta wisely agreed to at the time. That manager had little else to do with Mr Gupta's employment. Finally, Infosys Technologies was unable to find another project on which Mr Gupta could be placed.

[10] Unfortunately, Infosys Technologies retained concerns about Mr Gupta's performance during the probation extension period. It sought to have a meeting with

him. Mr Gupta involved Infosys Limited's global head of human resources. As this process was never concluded it can not be said that Mr Gupta was disadvantaged in any way by the process adopted by Infosys Australia.

[11] On 29 February 2012 Infosys Technologies' Chief Executive Officer, Ms Jackie Kornohern, wrote to all staff about major changes affecting staff of Infosys Technologies, based on the parent company Infosys Limited's decision to simplify its business model. The decision was made; following discussions for around a year, that *effective 1st April 2012 Infosys Australia and New Zealand will be integrated with Infosys Limited*. Under a heading *What Does This Mean For You* it was stated that:

- *Current employees will be transitioned to become direct employees of Infosys Limited and you will receive a new employment contract to formalise this change.*

...

Other aspects such as those listed below remain unchanged:

- *Your role and location*
- *Current Leadership/Management reporting line*
- *In-flight projects and delivery to clients will continue on interrupted*

[12] These issues were confirmed in a staff meeting a week later.

[13] Like all other staff with the sole exception, as it turned out, of Mr Gupta, Ms Kornohern was to continue to serve as head of Infosys in Australia and New Zealand, but employed directly by Infosys, after 1 April 2012.

[14] Mr Gupta raised a personal grievance about his concerns about the trial period and other issues in his employment, but not about the integration, as he was not yet aware that it might negatively affect him. In its response on 28 March 2012, Mr Richard Logo, Associate Vice President, HRD of Infosys, informed Mr Gupta, as well as confirming that he was a permanent employee of Infosys Technologies, of the following:

...As you are well aware, Infosys Technologies is to be voluntarily wound up, effective 31 March 2012. The company will cease to operate at this time, although you will continue to receive your salary for April 2012.

As you will also be aware, Infosys Limited will operate in place of Infosys Technologies moving forward. Where there are positions

available, Infosys Technologies' employees are being offered the opportunity to transfer to Infosys Limited.

Infosys Limited has not identified a role in New Zealand which fits your skills, experience and job level. However, Infosys Limited has identified a role in India which would be suitable for you.

Attached with this email are the details pertaining to the role and the related employment information.

Please note that the concerns about your performance set out in our letter of 15 February 2012 will need to be addressed at the appropriate time if you accept the offer of the role with Infosys Limited. The offer of employment from Infosys Limited will remain open until 10 April 2012, at which point it will lapse.

If you do not wish to accept the offer from Infosys Limited we will need to meet with you to discuss the implications for your employment given that Infosys Technologies will be ceasing to operate.

[15] Clause 14 of the parties' employment agreement provided for the required employee protection process in the event of redundancy. It states amongst other things:

This clause applies in a restructuring (as defined in s.69 OI of the Employment Relations Act 2000) and therefore will apply where the company has entered into a contract or arrangement under which its business (or part of it) is to be undertaken by another person or entity, or where the company's business (or part of it) is to be sold or transferred to another person or entity.

In the event of such restructuring affecting your position, the company will, as soon as is reasonably practicable, taking into account the commercial and confidentiality requirements of the business, commence negotiations with the other party involved in the restructuring (other party) concerning the impact of the restructuring on you. ...

In negotiations with the other party, the company will, subject to any statutory, commercial confidence or privacy issues, provide the other party with all information about the employees who will be affected by the restructuring (including you), including all details of their terms and conditions of employment and it will encourage the other party to offer all affected employees, employment on the same or generally no less favourable terms and conditions of employment than they currently enjoy with the company.

Whether the other party offers you ongoing employment and on what terms and conditions, will ultimately be the decision of that other party.

If you are not offered employment with the other party, the company will meet with you to discuss:

- *Whether there are any options available for you to remain in employment with the company; and/or*
- *Your redundancy entitlements (if any) under this agreement and what this could mean for you, including notice arrangements.*

[16] The key resulting concern for Mr Gupta, who had just emigrated to New Zealand, was that the job that he was being offered was in India. It therefore could not be described as having the same location as he had been previously offered. Similarly, it was not employment on the same or generally no less favourable terms and conditions of employment. This is despite the fact that on 10 April Infosys Technologies' HR team claimed that it was on comparable terms and conditions.

[17] I note that the offer gave Mr Gupta only four working days within which to respond. He responded on 11 April seeking Infosys Technologies' *co-operation further as I weigh the merits in this regard and weigh my options.*

[18] On 23 May 2012 Infosys Technologies wrote back to Mr Gupta requiring him to make a decision. The letter stated amongst other things:

... There is no ongoing role available within the company and it is therefore our intention to terminate your employment in accordance with the notice provisions in your employment agreement.

Before we do this, we are happy to consider any feedback or comments you may have by no later than 25th May 2012. ...

If we do not hear from you by the time stated above, we will provide you with formal notice of the termination of your employment.

[19] On 25 May Mr Gupta wrote back stating that he had intended to respond earlier but:

...I have been hindered by lawyers being on vacation ... As stated earlier it is important that I take a correct decision further in this regard. I would certainly reach out to your kindness the moment I have further information.

I request your co-operation further in this regard.

[20] The response received on 29 May was one of termination of employment. Mr Gupta was told:

It is neither practical nor preferable for the company to allow the present situation to continue. As previously advised, due to the winding up, there is no ongoing role available for you with the company.

Therefore, we write to provide you with formal notice of the termination of your employment.

[21] Mr Gupta then contacted his present solicitor in June 2012. On 1 August Mr Gupta raised a personal grievance and sought reinstatement. His claims remain unresolved.

The law

[22] In *Angus & McKean v. Ports of Auckland* [2011] NZEmpC 160 the Full Court dealt with the application of s.103A in practise. It held at para [57]ff:

[57] *The Authority or the Court must first determine, as matters of fact, what the employer did leading to the employer's dismissal or disadvantaging of the employee, and how the employer did it. This may include findings about what occurred which brought about the employer's acts or omissions that led to the dismissal or disadvantage, if the facts about material events are disputed.*

[58] *Next, relying upon evidence, relevant legal provisions, relevant documents or instruments and upon the specialist knowledge of employment relations, the Authority and the Court must determine what a fair and reasonable employer could have done, and how a fair and reasonable employer could have done it, in all the relevant circumstances at the time at which the dismissal or disadvantage occurred. These relevant circumstances will include those of the employer, of the employee, of the nature of the employer's enterprise or the work, and any other circumstances that may be relevant to the determination of what a fair and reasonable employer could have done and how a fair and reasonable employer could have done it. Subsections 3, 4 and 5 must be applied to this exercise.*

[59] *Finally, in determining justification under new s103A, the Authority or the Court must determine whether what the employer did and how the employer did it, were what that notional fair and reasonable employer in the circumstances could have done, bearing in mind that there may be more than one justifiable process and/or outcome. The Court or the Authority must do so objectively, that is ensuring that they*

do not substitute their own decisions for that of a fair and reasonable employer in all the circumstances.

[23] Subsections 3-5 of section 103A of the Act provide as follows:

(3) *In applying the test in subsection (2), the Authority or the Court must consider –*

(a) *whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*

(b) *whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*

(c) *whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*

(d) *whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*

(4) *In addition to the factors described in subsection (3), the Authority or the Court may consider any other factors it considers appropriate.*

(5) *The Authority or the Court must not determine a dismissal or an action 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.*

[24] The Full Court also held at paras.[61] and [62]:

[61] Reinstatement is now no longer the primary remedy for unjustified disadvantage in, or unjustified dismissal from, employment. The remedy of reinstatement is available but now has no more or less prominence than the other statutory remedies for these personal grievances. That is not to say that in a particular case, reinstatement may not still be the most significant remedy claimed because it is of particular importance to the grievant. As in the past, the Authority and the Court will need to examine, on a case by case basis, whether an order for reinstatement should be made if it is sought.

[62] *Not only must the Authority and the Court be satisfied that the remedy for reinstatement is practicable in any particular case, but they must also now be satisfied that it is reasonable to make such an order. Parliament has clearly intended that there be factors which are additional to those of practicability as the Employment Court and the Court of Appeal have interpreted that notion.*

[25] Reinstatement is not practicable simply because it is possible, irrespective of any consequences. Furthermore, reasonableness, as held in *Angus & McKee*, invokes a broad inquiry into the equities of the parties' cases so far as the prospective consideration of reinstatement is concerned.

Determination

[26] It is clear from my findings of fact that before the redundancy process was entered into by Infosys Australia, what it did and how it acted towards Mr Gupta was not outside the range of actions open to a fair and reasonable employer. Similarly, Mr Gupta was not unjustifiably dismissed in that, technically, his employment had to end by virtue of redundancy, given that Infosys Australia was winding-up its business.

[27] I conclude that Mr Gupta was, however, most certainly unjustifiably disadvantaged in his employment. Mr Gupta, just like his other two and a half thousand colleagues in Infosys Australia, was entitled to be treated by it in accordance with the parties' employment agreements. Infosys Australia was required, under clause 14 of Mr Gupta's agreement, to commence negotiations with Infosys concerning the impact of the restructuring on Mr Gupta as soon as was reasonably practical. It was also required to encourage Infosys to offer Mr Gupta employment on the same (or generally no less favourable) terms and conditions than he currently enjoyed. Instead, most likely because Mr Gupta had escalated an internal employment matter to global heads of departments, Infosys management made a unchallenged decision to not offer Mr Gupta employment on generally no less favourable terms and conditions. Instead, it made Mr Gupta an offer of employment in India, which was clearly less favourable to Mr Gupta, as Infosys would have been aware, given the efforts Mr Gupta had made to shift from India to New Zealand the year before. Infosys Australia was under a duty to encourage Infosys to offer Mr Gupta a job with no less favourable terms. It chose not to do so and instead Infosys Australia accepted Infosys' approach as a *fait accompli*. It did not provide any encouragement or support to Mr Gupta and was therefore in breach of the parties' employment agreement. This breach of the parties' employment agreement seriously

disadvantaged Mr Gupta, who had no desire to return to live in India, but wishes to work in Australasia.

[28] In addition, section 4(1A) of the Act requires an employer who is proposing to make a decision likely to have an adverse effect on the continuation of the employment of employees, to provide such employees with access to information relevant to the continuation of the employees' employment about the decision and an opportunity to comment on the information to their employer, before the decision is made. There was no such consultation with Mr Gupta before the decision was made to disestablish his position as a result of the integration of Infosys Australia with Infosys. This can be clearly seen when contrasting that on 29 February he was informed that he would be transitioned to become a direct employee of Infosys Limited, yet on 28 March he was told that the only suitable position for him would be one in India.

[29] Furthermore, in its evidence Infosys Technologies claimed that it is so large it was not possible for it to consult with all its employees, which does not appear consistent with its obligations under the Act. It is simply unacceptable for Infosys Technologies to claim that it was too large to be required to fulfil its consultation obligations, particularly as it is a technology consultancy company and thus should be a leader in information dissemination.

[30] Furthermore, the Chief Executive's letter was, as it happened, misleading to Mr Gupta, because unlike the other two and a half thousand employees written to by the Chief Executive, he was not transitioned to become a direct employee of Infosys with his role and location unchanged. Mr Gupta was instead only told of his different situation a month later.

[31] I accept, however, that Infosys Australia did try to meet with Mr Gupta to discuss whether there were other options available for him and over his redundancy entitlements, but Mr Gupta failed to respond to repeated invitations to meet. In these circumstances, any failure to have discussions was not a breach by Infosys Australia but by Mr Gupta.

[32] In summary, Infosys Australia's actions and how it acted were not what a fair and reasonable employer could have done in all the circumstances at the time. Instead, this simply appears as an opportunity used by Infosys Australia and its parent

company Infosys to use the restructuring as a device either to substantially alter Mr Gupta's terms of employment, or to terminate his employment.

Remedies

[33] I conclude that in this case it would not be practicable or reasonable to reinstate Mr Gupta to Infosys Australia's employment. Mr Gupta was made redundant by Infosys Australia, which now has no employees and conducts no business. It would therefore be impractical for it, as effectively a shell company, to have to take on one staff member, namely Mr Gupta. Furthermore, even if Infosys Technologies were required to re-employ Mr Gupta to work on projects where Infosys Technologies' previous staff now work for Infosys Limited, the evidence of Infosys Limited's staff was that there was no position for Mr Gupta to fill. While there may be positions in Australia, Mr Gupta does not have a work permit to work in Australia, only in New Zealand.

[34] Infosys Limited is not a party to these proceedings and therefore it is impossible for the Authority to consider reinstatement to it, being a company which has never employed Mr Gupta and which is not a party to the proceedings.

[35] For Mr Gupta to be able to be awarded lost remuneration he must have lost that remuneration as a result of the grievance. Given that Mr Gupta could not reasonably or practically have continued on employment with Infosys Australia after it ceased trading, then it could be said that like in many genuine redundancy situations, he is not entitled to remuneration for the loss of his job, because his job was gone anyway. On the other hand, it can be argued that Infosys Australia should have dealt with the performance concerns it had with Mr Gupta as an employee of Infosys, rather than make him redundant, as it did on a technical basis only with its two thousand five hundred other employees. Given my conclusion that Mr Gupta's position was genuinely made redundant in the sense that Infosys Australia was divesting itself of all its employees and was no longer trading, however, I conclude on balance that there can be no loss of remuneration.

[36] I accept that Mr Gupta had been greatly affected by his dismissal. He knows that he is the only employee amongst two thousand five hundred staff to have been treated like this during the integration process, and keenly feels his loss of employment. He also feels the pressure that places on him both in terms of not having

a job and not earning income. In addition, he gave unchallenged evidence of the stress that this loss of his employment has had on his health. On the other hand, his evidence was not corroborated by any medical or other supporting evidence. In all the circumstances, I consider that an appropriate sum of compensation is \$8,000.

[37] Under s.124 I must reduce any remedies that would otherwise have been awarded on the basis of any proven contribution by Mr Gupta towards the situation that gave rise to the personal grievance. There is no doubt that Mr Gupta's issues with Infosys Australia and his raising of his concerns about his employment at the highest level within Infosys Limited in India were a precursor to Infosys head office offering him what was demonstrably an inferior position. However, while Mr Gupta's behaviour may be said to be blameworthy in unnecessarily escalating his issues with Infosys Australia to head office in India, he has failed in his personal grievances over those issues. I therefore conclude that there has been no contribution to the situation that gave rise to the grievance he was successful over, because it was always Infosys Australia's responsibility to follow its employment agreement and it did not.

[38] I therefore order the respondent, Infosys Technologies Australia (Pty) Limited, to pay to the applicant, Mr Neel Gupta, the sum of \$8,000 in compensation under s.123 (1) (c) (i).

Costs

[39] Costs are reserved.

G J Wood
Member of the Employment Relations Authority