

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 274
3024412

BETWEEN CHARLES DANIEL HALL
Applicant
A N D GENESIS ENERGY LIMITED
Respondent

Member of Authority: T G Tetitaha
Representatives: Applicant in person
R. Upton, Counsel for Respondent
Investigation Meeting: 26 July 2018 at Auckland
Submissions Received: 26 July 2018 from Applicant
26 July 2018 from Respondent
Date of Determination: 24 August 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. There were genuine reasons for Mr Hall’s redundancy and no defects in the process leading to dismissal. The personal grievance is dismissed.**
- B. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.**

Employment Relationship Problem

[1] Charles Daniel Hall was employed as a Channel Development Manager on 26 February 2016. He was made redundant on 14 July 2017 by his (then) employer,

Genesis Energy Limited (Genesis). He saw an advertisement for a Key Partnership Manager on 25 September 2017. He alleges this was the same, or similar, to his role that was disestablished. Therefore Mr Hall alleges his dismissal for redundancy was unjustified.

Issues

[2] At an earlier telephone conference,¹ the issues for hearing were as follows:

- a) Were the reasons for redundancy genuine?
- b) Was the process leading to redundancy fair and reasonable?
- c) Did the same actions give rise to unjustified disadvantages?
- d) Were the personal grievances raised within 90 days?

[3] At hearing Mr Hall raised a number of other grievances for determination which were outside of the scope of what had been discussed earlier. These included:

- (a) Whether Genesis Energy looked at suitable redeployment options pursuant to clause 42 of his employment agreement?
- (b) Whether he had been discriminated against by a manager in February/March 2017?

[4] Some of Mr Hall's grievances require leave to progress. I deal with this issue first.

Were the personal grievances raised within 90 days?

[5] Mr Hall's employment terminated on 14 July 2017. The last day for raising a personal grievance about the termination was 13 October 2017.

[6] Mr Hall raised a personal grievance about the unjustified dismissal for redundancy due to the Key Partnership Manager role being the same or similar to his previous role on 7 December 2017. This was 55 days outside of the date for raising a personal grievance. The grievances raised at hearing on 26 July 2018 are 286 days outside of the date for raising a personal grievance.

¹ Minute dated 16 March 2018.

[7] Mr Hall argues his time for raising a grievance restarts from the date he became aware of the Key Partnership Manager role on 25 September 2017. This submission requires consideration of the applicable law pertaining to raising a grievance.

[8] Section 114(1) of the Employment Relations Act 2000 (Act) states a grievance must be raised with an employer “within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later...”

[9] In determining when the 90 day period for raising a grievance begins, the Employment Court has held:²

“ ... the 90 day period will usually begin when the action alleged to amount to a personal grievance occurs but, if the circumstances in which that action was taken are an essential element of the personal grievance, it will begin when the employee becomes aware of those circumstances to the extent necessary to form a reasonable belief that the employer's action was unjustifiable.”

[10] The circumstances discovered on 25 September 2017 was the advertisement of the Key Partnership Manager role. This gave rise to a personal grievance about the genuineness of Mr Hall’s redundancy because he alleges the Key Partnership Manager role is the same or similar to the role he was made allegedly redundant from. I accept he does not require leave to bring a personal grievance about this circumstance because it was only known to him in September 2017.

[11] However it does not allow Mr Hall to raise a personal grievance in respect of the process leading to redundancy on the basis of discrimination or breaches of clause 42 of his agreement due to a failure to redeploy him. The circumstances pertaining to those grievances should have been known at the time of his dismissal for redundancy. The additional circumstance of the Key Partnership Manager advertisement does not restart the time limitation for bringing a personal grievance generally. He will need to seek leave to do so.

[12] Section 114(3) of the Act requires an employee seeking to raise a grievance out of time to seek leave from the Authority. They must demonstrate “that the delay

² *Silver Fern Farms Ltd v North* [2010] NZEmpC 79; [2010] ERNZ 172 at [43] citing with approval *Wyatt v Simpson Grierson* [2007] ERNZ 489.

in raising the personal grievance was occasioned by exceptional circumstances” and it is just to grant leave (s114(4)).

[13] The evidence at hearing was insufficient to warrant the granting of leave. Therefore those grievances are dismissed except for the personal grievance of whether the Key Partnership Manager role is the same or similar to the role Mr Hall had that was allegedly redundant.

Redundancy

[14] Generally, a redundancy will be genuine if it was made for valid commercial reasons. The Court of Appeal has held:³

If the decision to make an employee redundant is shown not to be genuine (where genuine means the decision is based on business requirements and not used as a pretext for dismissing a disliked employee), it is hard to see how it could be found to be what a fair and reasonable employer would or could do. The converse does not necessarily apply. But, if an employer can show the redundancy is genuine and that the notice and consultation requirements of s 4 of the Act have been duly complied with, that could be expected to go a long way towards satisfying the s 103A test. In the end the focus of the [Authority] has to be on the objective standard of a fair and reasonable employer, so the subjective findings about what the particular employer has done in any case still have to be measured against the [Authority's] assessment of what a fair and reasonable employer would (or, now, could) have done in the circumstances.

[15] Therefore to justify its decision to dismiss Mr Hall for redundancy, Genesis must show that the redundancy decision was based upon its business requirements and that it has met the notice and consultation requirements of s4 of the Act.

Were the reasons for redundancy genuine? Was the Key Partnership Manager role is the same or similar to the role Mr Hall had that was allegedly redundant?

[16] Troy Hicks was appointed on or about 8 May 2017 as the General Manager Business Segment. He was Mr Hall’s new direct line manager. He was also the person whom made the decision about Mr Hall’s redundancy.

³ *Grace Team Accounting Ltd v Brake* [2014] NZCA 541 at [85].

The redundancy business decision

[17] Genesis had changed its business model from the traditional waterfall model to an Agile model in April 2017. This resulted in small cross-functional teams delivering end to end products. Around the time of the redundancy, it is accepted that Genesis needed to have a greater sales focus. Mr Hicks was responsible for making sure his team met the businesses objectives.

[18] Mr Hicks undertook a review of his team including the Channel Development Manager role (CDM). He saw the CDM role as managing products thorough the existing channels such as phone and digital sales to ensure profitability and performance. A channel was a mode or method of bringing products to the market so they can be purchased by consumers. The role sought to make it easier for customers to purchase Genesis products. The CDM developed channels including digital strategies for the SME (small medium enterprises) customers focusing on how the products were delivered and moved through the relevant channels. Mr Hicks believed the role managed the existing channels that were in place, rather than proactively developing new channels through sales.

[19] From his review Mr Hicks believed there was no need for a dedicated position. The CDM role appeared to overlap duties now being undertaken by the digital marketing team, the sales team and the sales manager. The CDM existing SME relationships could be passed to these teams whom could deal with customers more effectively in his view.

[20] He had also identified a gap in his team. He believed the business required a Product Manager role, i.e. someone who could build products and take them to market. At the time of the redundancy he envisaged the role would have a technical focus as opposed to sales focus. There was no position within the existing team that undertook that task including the CDM.

[21] Mr Hicks then determined some form of restructuring was required. He had a FTE (full time equivalent) budget. This meant if he wished to establish one role he needed to disestablish another in order to meet FTE budget.

[22] Based on what he had observed he felt his wages budget could be better spent by establishing a Product Manager role and disestablishing the CDM. The two roles

had nothing to do with each other in terms of function. Mr Hicks felt the Product Manager role would better serve the business needs.

Notice and consultation requirements

[23] On 8 June 2017 Mr Hicks told Mr Hall about the restructuring and gave him a letter setting out what and why this was occurring. Mr Hall takes no issue with the notice and information he received about the restructuring. They met on 9 June 2017 where Mr Hall gave some feedback.

[24] On 12 June 2017, Mr Hicks followed up to ask if he wanted to provide any feedback in writing. He received an email that same day from Mr Hall confirming he had given all the feedback and had nothing more to add.

[25] On 14 June 2017 Mr Hicks advised Mr Hall that he had decided to disestablish his role as CDM and given there was no redeployment options he would be made redundant. Following the disestablishment, some CDM functions were found to be no longer needed. Other functions were split amongst the rest of the team.

September 2017 Key Partnership Manager

[26] In or about September 2017 Mr Hicks then decided that the business needed a different role to manage rural partnerships, with particular focus on their two main customers. He believed these were key relationships which would benefit from a dedicated contact person to grow the relationship and associated revenue. He also needed someone to develop new partnerships with other groups and organisations.

[27] The role of Key Partnership manager was developed and advertised in September 2017. It is this role Mr Hall submits is the same or similar to the CDM role he formerly held.

Is the Key Partnership Manager role the same or similar to the CDM?

[28] Genesis submits this is a different role than the CDM because it requires:

- managing and developing rural partnerships focused upon two main agricultural clients;
- engagement with the two clients to determine their needs;

- understanding of the agri-space;
- experience with sales and relationships including extracting value from existing relationships and sourcing new clients in the agri-space; and
- an account management role rather than channel development.

Job descriptions

[29] Both the Key Partnership Manager and CDM job descriptions were directed to be produced. Although there are similarities, this was mostly due to the job description attached to the employment agreement being drafted from generic templates.

[30] There are notable differences between the CDM and the Key Partnership Manager roles, primarily due to the sales focus of the latter. These are set out below:

- (a) ***Remuneration:*** The Key Partnership Manager role received remuneration at Band 17.
- (b) ***Commission/sales bonus:*** The Key Partnership Manager had a significant sales bonus. This was peculiar to persons whose roles had sales components.
- (c) ***Motor vehicle:*** The remuneration package included a car.
- (d) ***Different job focus:*** The Key Partnership Manager role was described in the advertisement as requiring s/he “proactively develop, own and execute the strategy for existing and new relationships for the purpose of delivering increased sales volumes, improved cross-sell and gross margin.”
- (e) ***Restraint of trade:*** The period of restraint of trade for the Key Partnership Manager was six months.

[31] By comparison the CDM role received band 15 remuneration. Mr Hall submitted that his remuneration still fell within the lower end of band 17. This does not take account of the evidence of Katie Wilkinson, Genesis People and Culture Manager. Ms Wilkinson prepared the Key Partnership Manager job description in conjunction with Mr Hicks. They sized the remuneration band as being significantly

higher than the CDM role due to the increased responsibilities and level of the new role.

[32] The CDM remuneration had no sales commission or bonuses. Mr Hall referred to receiving a small “apology bonus” once during his employment but this was not linked to sales.

[33] Although Mr Hall stated he had access to the company pool cars, he accepted the CDM role did not have a motor vehicle as part of its remuneration.

[34] The stated purpose of the CDM’s job was:

To successfully manage internal and external SME sales channels to achieve business growth and profitability objectives. To proactively manage the rural buying groups and associated relationship that Genesis Energy has and improve the sales and operational efficiency of these channels.

[35] The CDM role focused on managing existing channels. It was not responsible for improving sales and gross margin in the manner described for the Key Partnership Manager.

[36] The CDM’s restraint of trade was one month. I accept Mr Upton’s submission that a six month restraint is usual for sales persons only. Sales was not the focus or even a component of the CDM.

[37] Mr Hall referred to the similarities in clauses in the employment agreements for the two roles. These are employment agreements prepared from generic templates. There will be clauses that are required by law to be in all employment agreements such as those describing how to resolve employment relationship problems. I see no basis in those similarities that assists Mr Hall’s case. These roles were dissimilar.

[38] Mr Hall emphasised his personal experience with farming. I could not see the relevance of this submission to the similarities between the roles. It may have been directed at his unhappiness over his non-selection for the Key Partnership Manager role that he had applied for. I accept Ms Wilkinson’s evidence that the successful applicant was better qualified in the areas they were seeking for the new role. She has subsequently left and the role remains unfilled at this time.

[39] More importantly the evidence showed Mr Hick's decision to create this role was made after Mr Hall was dismissed for redundancy. Therefore it was not a redeployment option at the time of his dismissal.

[40] There was no defect in the process leading to dismissal for redundancy. The notice and consultation requirements have been met.

[41] There were genuine reasons for Mr Hall's redundancy and no defects in the process leading to dismissal. The personal grievance is dismissed.

[42] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

T G Tetitaha
Member of the Employment Relations Authority