

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

AA 198/09
5135731

BETWEEN WAYNE HAMLIN
 Applicant

AND JENNIAN SERVICES LTD
 Respondent

Member of Authority: Marija Urlich

Representatives: Mark Nutsford, for Applicant
 , for Respondent

Investigation Meeting: Monday 4 May 2009
 Conference Room, Bethlehem Motor Inn
 176 Moffatt Road, Bethlehem

Submissions received: Monday 8 September 2008 from Applicant
 Monday 29 September 2008 from Respondent

Determination: Monday 22 June 2009

DETERMINATION OF THE AUTHORITY

[1] Mr Hamlin worked for Jennian Services from November 2004 until July 2008 when his position as technical services manager was made redundant. Mr Hamlin does not challenge the fairness of the restructuring process. He brings his claim before the Authority because he says the disestablishment of his position was unjustified and his employment was disadvantaged by the failure of Jennian Services to offer him one of the new positions in the structure. He also says Jennian Services has failed to maintain its obligations of good faith towards him because the decision to disestablish his position was made prior to the consultation process.

[2] Jennian Services denies the claims made by Mr Hamlin. It says he was treated fairly and reasonably through the consultation process, that it approached its decision-making with an open mind and gave Mr Hamlin a fair opportunity to apply for one of the two new positions in the structure.

[3] To determine this employment relationship problem the Authority must decide the following issues:

- (i) Was Mr Hamlin's position genuinely redundant?
- (ii) Was Jennian Services obliged to offer Mr Hamlin one of the positions in the new structure by way of redeployment?

A genuine redundancy?

[4] A genuine redundancy is one where a business decision is made, without ulterior motive, to declare a position superfluous¹.

[5] Mr Hamlin's challenge to the genuineness of his redundancy has two aspects – first, Mr Hamlin says it makes no sense to disestablish his position and create two new positions, and second, he says the outcome of the consultation process was predetermined.

(i) substantive justification

[6] I have reviewed the detailed correspondence between the parties during the consultation phase. I find Jennian Services engaged in a thorough and detailed consultation process with Mr Hamlin. The restructuring proposal was fairly put to him, he was given a fair opportunity to provide a response and, I am satisfied, that response was fairly considered.

[7] I also find that Mr Hamlin engaged in the consultation process in good faith; his concerns about the restructuring were sincerely held and constructively expressed. I accept that Mr Hamlin has a firm view that the restructuring is not justified. However, I am satisfied that the decision was a genuine business decision made without ulterior motive.

[8] A gloss on the above challenge to justification is that the splitting of the position into two roles is not a genuine restructuring because the two roles are

¹ *Simpsons Farms Ltd v Aberhart* [2006] 1 ERNZ 825, para 67

identical to the original position. In submissions Mr Nutsford describes this as *amoebic cloning*.

[9] I think the correct application of the biological reference would be if Jennian Services had created two technical manager positions. I agree that in such a situation Mr Hamlin's position would not be redundant. However, that is not what happened. Jennian Services divided the technical manager duties between two new positions; draughting manager and estimating manager. A consequence of this is that the technical manager position no longer exists.

(ii) outcome predetermined?

[10] A further aspect of Mr Hamlin's challenge to the genuineness of his redundancy concerns information reported to him during the course of the consultation process. He says, based on this information, the outcome of the consultation process was predetermined. I accept, as a matter of principle, that a fair consultation process could not be conducted in such a situation and doubt would be cast on the genuineness of any consequent redundancy.

[11] The information Mr Hamlin seeks to rely on is as follows: A colleague, Katherine Banks, relayed to him in late June 2008, a conversation between a friend of hers, Clayton Kellet, and Stephen Murray, Jennian Services' general manager, at the local surf club. She told Mr Hamlin that about 6 – 8 weeks prior to their discussion (that of Ms Banks and Mr Hamlin) Mr Murray had mentioned a draughting manager position to Mr Kellet. Mr Hamlin took from this that Mr Murray was sounding out Mr Kellet's interest in the role.

[12] Mr Kellet gave evidence to the Authority. His recollection of the surf club discussion was limited. He vaguely recalled a discussion with Mr Murray about the limited availability of skilled staff but did not recall the draughting manager position being mentioned. Some weeks later, when he saw the position advertised, Mr Kellet had what he described as a tongue in cheek discussion with Ms Banks about whether he should apply. This was the first discussion Mr Kellet had with Ms Banks about the issue. This was the discussion Ms Banks reported to Mr Hamlin who then asked her to clarify the timeframe with Mr Kellet, which she did.

[13] Mr Murray said the discussion with Mr Kellet was held in early June and after consultation with staff had been completed. He said he initiated a discussion with Mr Kellet about recruiting skilled staff because he knew he was involved in the industry and that he had similar discussions with other business contacts. He denied offering Mr Kellet a position in the new structure.

[14] Mr Hamlin said he was concerned that the matter had been discussed with an outside party and that it appeared Mr Murray had formed a view about the shape of the new structure. Mr Hamlin did not approach Mr Murray with his concerns or contact Mr Kellet to ask him directly what Mr Murray had told him. He said he did not approach Mr Murray with his concerns because this issue had come to his attention after the decision to restructure his position had been made.

[15] The evidence does not establish that Mr Murray offered Mr Kellet a role in the new structure. The direct evidence of the surf club discussion is that recruitment of skilled staff was discussed. Such a discussion did not breach any obligation owed by Jennian Services to Mr Hamlin. The outcome of the consultation process was not predetermined.

Redeployment?

[16] In a redundancy setting it may be reasonable for an employer to consider alternatives to dismissal such as redeployment. A redeployment option is a position which a redundant employee can be transferred to because it is so similar in duties and conditions to that from which they have been made redundant. A position which is significantly different in duties and terms is not a redeployment option. This is the situation the parties faced – the restructured positions were not redeployment options because their terms and duties were significantly different to that of the redundant position. I accept there were no other redeployment options.

[17] Mr Hamlin chose not to apply for one of the two positions in the new structure. He was provided with detailed information about the positions and encouraged by Mr Murray to apply. Mr Hamlin told me he did not submit an application because he was not sure that he wanted to be part of Jennian Services. In the absence of any interest in the new position by Mr Hamlin it is

difficult to speculate whether he would have been appointed to one of the positions or, taking a step back, whether Jennian Services would have fairly considered his application.

[18] The employment agreement does not contain a redeployment preference clause or other provision which would entitle Mr Hamlin to priority. In the absence of an express contractual term it is unlikely employees have a contractual right to reappointment².

Costs

[19] Costs are reserved. The parties are invited, through their representatives, to attempt to resolve this issue themselves. If they cannot then leave is granted for application to be made to the Authority to set a timetable for the filing of costs memoranda. Such application should be made within 14 days of the date of this determination.

Marija Urlich

Member of the Employment Relations Authority

² *Brooker's Employment Law* ER103.26(2)