

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

[2013] NZERA Auckland 272
5405195

BETWEEN VED HARDIKAR
Applicant

AND KLEIN LTD
Respondent

Member of Authority: Eleanor Robinson

Representatives: Emily Franco, Advocate for Applicant
Rachael Rush, Advocate for Respondent

Investigation Meeting: 17 June 2013 at Auckland

Submissions received: 17 June 2013 from Applicant and from Respondent

Determination: Monday 1 July 2013

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Ved Hardikar, claims that he was unjustifiably disadvantaged by the Respondent, Klein Limited (Klein), unilaterally altering his duties and responsibilities from Architectural Graduate – Level 3 to Project Architect.

[2] Mr Hardikar also claims that he was unjustifiably dismissed by Klein on 4 December 2009 when his position was made redundant following a restructuring exercise.

[3] Mr Hardikar further claims that he is owed monies by Klein in respect of payment for days in lieu.

[4] Klein denies that Mr Hardikar was unjustifiably dismissed or unjustifiably disadvantaged, and denies that Mr Hardikar has a valid claim for monies in lieu of payment for days in lieu.

Issues

[5] The issues for determination are whether Mr Hardikar was:

- unjustifiably disadvantaged by Klein unilaterally altering his duties and responsibilities from Architectural Graduate – Level 3 to Project Architect
- unjustifiably dismissed by Klein by way of redundancy
- owed payment in respect of days in lieu by Klein

Background Facts

[6] Klein is an architectural firm, specialising primarily in architectural projects for the public and private healthcare, retirement and aged care, sectors. At the time Mr Hardikar commenced employment in April 2007, Klein had approximately 30 employees.

[7] Mr Hardikar was employed by Klein on 10 April 2007 in the role of Documentation Manager. Prior to joining Klein, Mr Hardikar said he had registered as an Architect in India, and had worked there as an Architect for 7 years. Mr Hardikar said he had moved to Auckland to undertake a Master's Degree in Architecture; however he had only completed one semester before leaving and subsequently working in various architecture related positions for companies based in Auckland for several years.

[8] Mr Hardikar said he had intended to become qualified as an Architect in New Zealand; however he had not completed the necessary steps to do so.

First restructuring exercise

[9] In or about March or April 2009 Klein had carried out a restructuring exercise due to a fall in revenue, coupled with a desire to create a new graduate structure which would better align with its job descriptions and National Standards.

[10] As a result the restructure proposed to disestablish the Graduate Architect and Documentation Manager roles, and to introduce a number of new roles called Architectural Graduates, Levels 1, 2, and 3.

[11] Mr Steven Hill, at that time a director of Klein, had taken prime responsibility for the restructure proposal; however Ms Rachael Rush, then a director and now Managing Director of Klein, said she had been kept fully informed and updated by Mr Hill throughout the restructuring process.

[12] All the affected employees had been provided with a set of criteria arising from the relevant National Competency Standards against which they had been invited to write a self-assessment, and there had subsequently been individual feedback meetings.

[13] Ms Rush said that following the individual feedback meetings and consideration of the feedback provided, a decision had been made to proceed with the proposed restructure.

[14] Ms Rush said she had been involved in the selection process which had involved the affected employees being assessed, and had included consideration of their self-assessments against the relevant National Competency Standards criteria, and the feedback which had been provided.

Architectural Graduates

[15] Ms Rush explained that Architectural Graduate roles were for those employees who had obtained a qualification in Architecture (New Zealand degree or overseas equivalent) and were working towards becoming New Zealand Registered Architects, and that Klein had established 3 levels of competency: 1, 2, and 3, with level 3 being the highest graduate level.

[16] Ms Rush said that an Architectural Graduate – Level 3 would generally have 5 or more years of experience and would be nearing the point at which he or she met the New Zealand Registered Architectural Board (NZRAB) requirements for registration as an Architect in New Zealand.

[17] On 3 April 2009 Mr Hill confirmed by memorandum to Mr Hardikar that the feedback he had provided had been considered, and that he had been selected for, and appointed to, one of the new Architectural Graduate positions as an Architectural Graduate – Level 3.

[18] Mr Hardikar had been supplied with a copy of the job description for the Architectural Graduate positions which stated:

Architectural Graduate – level 3 (AG3) ... a limited level of supervision by an Architect being required, as would typically be required by a person nearing the point at which they would meet the NZRAB requirements for becoming registered as an Architect.

[19] Mr Hardikar said that although he had understood that the role of Architectural Graduate – Level 3 would require a limited level of supervision by an Architect, in practice he had been appointed without his agreement as a Project Architect, which position required a higher level of professional expertise.

[20] Ms Rush explained that Architectural Graduates are frequently given responsibility for a single project and are referred to as 'Project Architects'; however they have the background support of a registered Architect who provides guidance with key decisions and oversees their work. Ms Rush said that only a registered architect could be appointed as the actual Project Architect on a project.

[21] Mr Hardikar said that he had been Project Architect on the North Shore Hospital (NSH) project, and that this had been confirmed in an email dated 22 April 2009 from Mr Shaun Thompson who had stated:

*"Ved,
You in charge. I don't need a minute by minute up date.*

*Tell me what's going on. Don't cc me in on this stuff.
... You are more than capable to deal with this – just talk to me on a regular basis to keep my mind at ease.*

[22] Ms Rush said Mr Hardikar had been allocated to the NSH project because it involved lifts thus demonstrating a certain level of competency, and therefore could act as a vehicle towards Mr Hardikar's registration in accordance with NZRAB requirements.

[23] Ms Rush explained that although Mr Hardikar had been entrusted with sizeable responsibility for the NSH project, Mr Thompson, a senior architect, had had significant involvement in the NSH project and had interfaced with the client. In addition Mr Robin Hannah, also a senior architect, had been involved on the NSH project.

[24] Mr Hardikar agreed when questioned about the NSH project at the Investigation Meeting that the supervising architect had been Mr Hannah, and that Mr Thompson had operated as the Project Architect.

Second restructuring exercise

[25] Mr Hardikar said that on 26 November 2009 he had been advised during a meeting held that day that Klein was considering a proposal to reduce the number of Architectural Graduate – Level 3 positions from three to one. In the memorandum dated 26 November 2009 confirming what had been discussed at the meeting, Mr Hill had explained the reasons for the restructuring exercise as being:

- 1. A drop in revenue has created a need to consider reducing headcount.*

2. *The amount of available project work has slowed and therefore Klein only has enough work to justify one full-time Architectural Graduate – Level Three role; and*
3. *The “on site” projects currently being completed by the Company can be carried out by existing senior core staff.*

[26] As in the earlier restructuring exercise, attached to the memorandum was a relevant National Competency Standards criteria document, which the affected employees were asked to complete by way of self-assessment, and return.

[27] The affected employees were advised that there would be individual feedback meetings on 30 November 2009 to which they were invited to bring a support person.

[28] Ms Rush said she had been kept updated on the restructuring process for which Mr Hill again had prime responsibility, and that she had been aware of Mr Hardikar attending an individual feedback meeting on 30 November 2009.

[29] Mr Hardikar said he could not recall if he had provided Mr Hill with a completed copy of the relevant National Competency Standards criteria document at the meeting on 30 November 2009, but confirmed he had completed it and provided it to Mr Hill on or about that date.

[30] Ms Rush said she had been involved in the second restructuring selection process and that a copy of the relevant National Competency Standards criteria document completed by Mr Hardikar had been available at that time.

[31] Ms Rush said that after he had received the feedback from the affected employees, Mr Hill had advised her that he had decided to proceed with the decision to reduce the Architectural Graduate – Level 3 roles from three to one, and that she had been in agreement with this decision.

[32] Ms Rush said she had formed part of the assessment panel which had assessed the Architectural Graduate – Level 3 employees. The assessment panel had consisted of directors and senior managers. Ms Rush explained that the assessment panel had reviewed the self-assessment for each of the employees and collectively agreed a score for each competency, at the end of which process each employee ended up with a score out of a possible 750.

[33] Following this process, Ms Rush said Mr Hill had determined which of the three Architectural Graduate – Level 3 employees would be offered the remaining role.

[34] Ms Rush explained that the reasons Mr Hardikar had not been selected for the remaining Architectural Graduate – Level 3 role had been because:

- i. Although Mr Hardikar had a strong background in documentation, he had not scored higher than the two other Architectural Graduate – Level 3 employees in the design, project management or practice management areas; and
- ii. He had scored low in terms of attitude, communication and negotiating design proposals with clients, which Ms Rush said had been of concern because Klein depended on its architects to foster close relationships with clients to ensure successful and long-standing business relationships.

[35] On 4 December 2009 Mr Hardikar said that he had been advised in a meeting with Mr Hill that he had not been selected to the remaining Architectural Graduate – Level 3 role and that he would be made redundant effective 23 December 2009. This had subsequently been confirmed in a memorandum dated the same day.

Days in lieu payment

[36] The Individual Employment Agreement (the Employment Agreement) issued to Mr Hardikar stated at clause 4.2 entitled “Additional hours”:

We may also require you to undertake such reasonable additional hours as are necessary for you to perform your duties under this Agreement without additional remuneration.

[37] At clause 6.1 the Employment Agreement stated:

... The salary is in full recognition of all hours worked and no overtime will be paid unless agreed to by us in writing in advance of you working the hours concerned.

[38] Mr Hardikar said the NSH project had involved him working many additional hours, and in April 2009 he had had a discussion with Mr Hill about the additional hours he had worked. During this meeting Mr Hardikar said Mr Hill had agreed to pay him time in lieu on the basis of 1:1 for the additional hours he had worked.

[39] Mr Hardikar said the additional hours' time in lieu issue had been discussed between him and Mr Hill in May and July 2009 and that Ms Karen Webster, Office Manager, had known about the agreement.

[40] Mr Hardikar said that when he had been advised at a meeting with Mr Hill on 4 December 2009 that he was being made redundant, the additional time in lieu had been discussed and it had been agreed that he would be paid for these additional hours.

[41] Mr Hardikar said he had subsequently emailed a sheet detailing the additional hours to Mr Hill and provided a copy at the Investigation Meeting. Mr Hardikar said he had received no response to the emailed sheet of hours, nor had he subsequently received any payment in respect of the additional hours worked.

[42] Ms Webster, who has responsibility for emailing requests for payments to employees additional to their normal salary payments to the payroll administrator, said that in the 12 years she has been employed by Klein she had not known of any employee being paid for overtime hours.

[43] Ms Webster said that from time to time Klein employees were provided with time off in lieu if they had been working additional hours on projects; the process for this being that the Project Architect would confirm the arrangement in writing, and this would be countersigned by a director.

[44] Ms Webster said that she recalled Mr Hardikar taking time in lieu during mid-2009 but she did not know how many hours had been involved, and that she had not been advised of the time taken in lieu in writing.

[45] Ms Rush said she had been aware that Mr Hill had agreed to provide some of the employees with time in lieu during the early part of 2009, which was a wholly discretionary process within Klein, and that she understood that Mr Hardikar had been provided with 35 hours in lieu of additional time he had worked.

[46] Ms Rush said that on 11 December 2009 Mr Hardikar had sent an email to Mr Hill which referred to a discussion on Friday 4 December 2009 and stated: "*I have added up the extra hours I have worked, going back to the beginning of NSH 2010 (sic) documentation since May this year.*" In the email Mr Hardikar had entered the number of hours claimed and referred Mr Hill to his timesheets for verification.

[47] Ms Rush said that she recalled Mr Hill confirming to her at that time that he had not agreed to giving Mr Hardikar time in lieu for extra hours worked apart from the one instance

earlier in 2009, and her understanding was that Mr Hill had told Mr Hardikar before he had finished working for Klein that no payment in respect of time in lieu would be made to him.

[48] Ms Rush confirmed that employees at Klein were never paid for additional hours worked, and explained that the employees were salaried professionals who were recognised for additional effort by means of bonus payments or additional responsibility.

Determination

Was Mr Hardikar unjustifiably disadvantaged by Klein unilaterally altering his duties and responsibilities from Architectural Graduate – Level 3 to Project Architect?

[49] As Architectural Graduate – Level 3 I find that Mr Hardikar was provided with the opportunity to take charge of the NSH project and it is clear that Mr Thompson regarded him as having the requisite skills to carry out the responsibilities he had been assigned. However I observe that this was with the proviso that Mr Hardikar kept Mr Thompson as Senior Architect on the project regularly updated.

[50] I find this requirement that Mr Hardikar keep Mr Thompson regularly updated, as stated in the email dated 22 April 2009, to be consistent with the Graduate Architect - Level 3 job description expectations.

[51] I further note that it had been Mr Thompson who had taken all the significant decisions on the NSH project and interfaced with the client. In addition Mr Hannah, also a registered architect, had been involved and would have been able to proffer advice to Mr Hardikar if required to do so. Indeed when questioned at the Investigation Meeting, Mr Hardikar referred to Mr Hannah as the supervising architect and Mr Thompson as the Project Architect on the NSH project.

[52] Whilst Mr Hardikar was referred to as “Project Architect” on the NSH project, I find that the term was used colloquially by Klein in reference to an Architectural Graduate - Level 3 who took responsibility for a certain project, and I accept Ms Rush’s evidence that Klein would allow only an employee who had registered as an Architect in accordance with the NZRAB requirements to act as a Project Architect.

[53] I find that Mr Hardikar was not required to work without the supervision and advice of the senior architects on the NSH project and that this was consistent with the duties and responsibilities of a Graduate Architect – Level 3.

[54] I determine that Mr Hardikar was not unjustifiably disadvantaged by Klein unilaterally altering his duties and responsibilities from Architectural Graduate – Level 3 to Project Architect.

Was Mr Hardikar unjustifiably dismissed by Klein by way of redundancy?

1. Did Klein have a genuine reason for the restructuring exercise?

[55] Klein had based the decision for the restructuring exercises in both March and November 2009 on a fall in revenue, and in November 2009 had also identified that the existing projects upon which the Architectural Graduate – Level 3 employees had been working had reached completion leaving sufficient work for one Architectural Graduate–Level 3 only.

[56] Ms Rush stated that the more junior positions such as the Architectural Graduate–Level 3 positions had been selected for restructuring on the basis that the more senior employees could undertake wider responsibility without supervision.

[57] I determine that NZSE had genuine and reasonable commercial reasons for undertaking a restructuring exercise.

2. Did Klein follow a fair and proper process during the selection process?

[58] The Test of Justification as set out in s 103A of the Employment Relations Act 2000 (the Act) addresses the question of whether or not an action was justifiable or is unjustifiable and states:

S103A Test of Justification

- i. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- ii. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[59] Other provisions of the Act govern questions of justification for dismissal and, in particular, by reason of redundancy. Section 4 of the Act addresses the requirement for parties to the employment relationship to deal with each other in good faith. Section 4(1A)(c) in particular is relevant to a redundancy situation and requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of an employee, to provide to the employee affected:

“(i) access to information, relevant to the continuation of the employees’ employment, about the decision; and

(ii) an opportunity to comment on the information to their employer before a decision is made.” s4 (1A)(i) and (ii).

[60] I find that Mr Hardikar was provided with relevant information prior to the decision being made about his continued employment, including a written memorandum containing information which had been discussed at the meeting on 26 November 2009, and a copy of the proposed relevant selection criteria.

[61] In relation to an opportunity to comment on the information, I find that Mr Hardikar was given the opportunity to provide a self-assessment on the selection criteria and the opportunity to provide feedback at his individual meeting with Mr Hill on 30 November 2009.

[62] Mr Hardikar claimed that he had not been given a sufficient time period in which to provide feedback. I observe that the period between 26 and 30 November 2009 had included a weekend; additionally Mr Hardikar was familiar with the process having previously been involved in a restructuring exercise earlier that year for which he had also completed a self-assessment selection criteria document.

[63] I also note that Mr Hardikar had not requested an extension of time in which to provide his feedback. On this basis I do not find that the time period given for feedback was unreasonable.

[64] I consider it relevant that the restructuring process in November 2009 had been the same process as that undertaken earlier in March that year, and that Mr Hardikar had agreed at the Investigation Meeting that the restructuring exercise in March 2009 had been a fair process.

[65] Mr Hardikar had not been scored as highly as the other candidates on the relevant selection criteria, which I note were based on relevant National Competency Standards. This had been a process undertaken by a panel of senior Klein employees and in relation to which Mr Hardikar had completed a self-assessment. I find no evidence that there had been pre-determination or bias in this part of the restructuring exercise.

[66] Mr Hardikar's employment had been terminated in accordance with Klein's contractual obligations. I also observe that although Mr Hardikar had been notified of the redundancy decision on 4 December 2009, the notice was not effective until 23 December 2009 which ensured that Mr Hardikar received payment in respect of the Christmas and New Year statutory holidays. In this respect, I find that Klein had acted in good faith towards Mr Hardikar.

[67] I determine that Klein followed due and proper process in making Mr Hardikar redundant.

[68] I determine that Mr Hardikar was not unjustifiably dismissed by Klein by way of redundancy

Is Mr Hardikar owed payment in respect of days in lieu by Klein?

[69] Ms Webster and Ms Rush both gave evidence that additional hours worked by employees may be recognised from time to time through the provision of time off in lieu. It is clear that this situation had applied to Mr Hardikar during the early part of 2009.

[70] However both Ms Webster and Ms Rush agreed that Klein did not make a payment to employees in respect of any additional hours worked. This evidence supports the contractual position on additional hours as set out in the Employment Agreement at clauses 4.2 and 6.1.

[71] Although Mr Hardikar had emailed Mr Hill on 11 December 2009, I find that this indicates that whilst there may have been a discussion between them about additional hours worked by Mr Hardikar on the NSH project, there is no evidence that Mr Hill agreed to pay Mr Hardikar for the additional hours worked, which, as set out at clause 6.1 of the Employment Agreement, needed to be agreed by Klein in writing.

[72] Ms Webster said that although she had been aware of Mr Hardikar taking time in lieu during mid-2009 she had not been advised, and knew of no agreement, to pay Mr Hardikar for additional hours as would have been the process if a payment was to have been made to an employee which was additional to their normal salary payment.

[73] In the absence of any contractual entitlement to payment in respect of the additional hours worked, or of any written agreement by Mr Hill or any Klein representative for payment to Mr Hardikar in respect of additional hours worked, I determine that Mr Hardikar is not owed payment in respect of promised days in lieu by Klein

Costs

[74] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority