

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2012] NZERA Auckland 471  
5339723

BETWEEN                      KABEER KHAN  
   Applicant  
  
A N D                              ORACLE NEW ZEALAND  
   LIMITED  
   Respondent

Member of Authority:        Alastair Dumbleton

Representatives:              Applicant in person  
   Carl Blake and Stephanie van der Wel, counsel for  
   Respondent

Investigation Meeting:        5 and 6 March 2012

Submissions Received:        22 March, 2 and 10 April 2012

Date of Determination:        21 December 2012

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**DETERMINATION OF THE AUTHORITY**

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- A.     Mr Kabeer Khan does not have a personal grievance. He was not unjustifiably dismissed, and the actions of his employer Oracle New Zealand Limited did not amount to a breach of the Employment Relations Act 2000 or Mr Khan's employment agreement.**
- B.     Costs are reserved.**

**Employment relationship problem**

[1]     The Authority has investigated personal grievance and other claims of the applicant, Mr Kabeer Khan, brought against his former employer the respondent, Oracle New Zealand Limited.

[2] Mr Khan was employed by Oracle from October 2007 until February 2011 as a Principal Consultant in the company's IT consultancy business in New Zealand.

[3] Mr Khan's dismissal was explained to him by Oracle management as necessitated by a downturn in the work available for staff employed in consultancy positions. In assessing its future need for having those positions the company told Mr Khan it had taken particular account of his specific skill-set, areas of expertise and experience as a consultant.

[4] Oracle's response to the personal grievance raised by Mr Kahn that his dismissal was unjustified has been that a genuine redundancy situation arose and that the company followed a fair and reasonable procedure, including consultation with Mr Khan, before reaching its decision to disestablish his position and terminate his employment in consequence. The company claims it provided to Mr Kahn all relevant information about its decision. Oracle relies on well established case law that where redundancy is genuine, and where a fair procedure has been followed, an employee will not have a personal grievance, as dismissal will be justifiable under the test of s 103A of the Employment Relations Act 2000.

[5] Counter to Oracle's explanation for his dismissal and its defence of the claim, Mr Khan has alleged that his dismissal resulted not from genuine redundancy but because he had complained about company manuals describing employees who are Indian as "Indians" and had complained about the conduct of other employees towards him as being discriminatory because he is Indian. He has partly attributed his dismissal to an adverse view he claims was taken of him after he had made suggestions in writing and in confidence to an Oracle international Vice President about how the company's business could be improved. Also considered by Mr Kahn to be closely linked to his redundancy is a complaint by him and investigation of it by Oracle in April 2010 about "retaliation" from management. After Mr Khan made a further complaint in September 2010 he sought to exercise some control over the way Oracle investigated, including its selection of investigator. The company concluded there was no substance to his complaints.

[6] Oracle has opposed Mr Khan raising any of these matters as personal grievance claims for determination. It contends that only an unjustified dismissal grievance was raised by him within the statutory time limit of 90 days and that his claims relating to equal opportunities, racial harassment and retaliation for making

work improvement suggestions to his employer, were not made within the required period so as to allow the Authority to investigate and determine them. Oracle has declined to waive the statutory time limit and Mr Khan has not applied under the Act for leave from the Authority to bring any grievance claim out of time on the grounds of exceptional circumstances.

[7] Following his dismissal in February 2011, some 7 weeks later Mr Khan applied to the Authority for interim reinstatement. He had not previously raised a grievance about dismissal. In a determination dated 2 May 2011 the Authority declined the interim reinstatement application and scheduled an investigation meeting to be held on 3 June 2011, or as soon after as the parties were ready. Mr Khan and Oracle returned to mediation. Some time later Mr Khan advised the Authority that the matter had not been resolved and at the beginning of March 2012 the investigation meeting proceeded to consider the substantive claims.

[8] Over two days the Authority heard extensive evidence from Mr Khan and several Oracle senior managers. Counsel for Oracle, Mr Blake, cross examined Mr Khan, who exercised the same right in respect of the Oracle witnesses, with extensive questioning in some cases. A considerable volume of documentary evidence was also supplied to the Authority by the parties. This included a number of emails sent and received around the time events claimed to be material to this case occurred. The contemporaneity of those communications gives them some value when assessing the significance or importance of events that occurred prior to the dismissal and which were later claimed to have influenced the taking of that action by Oracle. Also in evidence was a recording Mr Khan made of a meeting he attended with Oracle management to discuss the restructuring of his position and the employer's proposal to disestablish it.

[9] The evidence given for Oracle, particularly by Mr Roger Hooper, Practice Manager, and in that role Mr Khan's Manager, was that due to the global and local economic downturn the company's consultancy business in New Zealand had steadily declined from mid 2009. Consequently there was a lack of suitable work in New Zealand for Mr Khan, who had not been able to be given any billable assignments for several months from the beginning of August 2009. After this the company secured project work in China which it considered suitable for Mr Khan to perform and which he commenced at the end of March. He was occupied in this work until the end of

January 2011 before returning to New Zealand in early February. Mr Khan was dismissed with effect from 9 February with one months' salary paid to him in lieu of notice.

[10] At that time Oracle, according to Mr Hooper's evidence, had on its books no further project work suitable for Mr Khan and his personal skill-set and experience. Such forward work as was available had been assigned to contractors or other employees on the basis that their particular skills and experience were the best fit for the job. Mr Hooper concluded that some restructuring or reorganisation of the business was required and began a full consultation process with Mr Khan about his position with the company.

[11] Mr Hooper has given persuasive evidence that redundancy was the reason for the decision he made to terminate Mr Khan's employment. I find his evidence is compelling that it was the only reason for that decision and that redundancy was not simply a pretext for severing an employment relationship with a disliked or difficult employee, or one regarded as a nuisance by his employer.

[12] Mr Khan I accept found it inexplicable that he could be made redundant, as Oracle is a large international company employing a number of consultants in Australia and New Zealand and had ongoing work for those employees and also for contractors engaged by the company. Mr Khan was confident of his assessment that the skills and abilities he had as a consultant suited him for redeployment to other positions within Oracle, or for appointment to project work that was available. His assessment differed from Mr Hooper's in that regard.

[13] Oracle was entitled to assess or evaluate the work skills and experience of its employees so that it could provide the best match for the requirements of particular projects or other work it could assign employees to perform. I consider that Oracle did have a right from time to time to select employees for assignment to any project work it had, particularly on the basis of a consultant's skills, expertise and experience relevant to the requirements of any project. On that basis I find that the allocation of a Housing New Zealand project to a particular consultant and not to Mr Khan around the time redundancy was under consideration, does not disclose any unfair or unreasonable treatment of him.

[14] With some degree of hindsight I consider, Mr Khan has linked his dismissal back to the equal opportunities or diversity issue he raised in October 2009, the breach of confidentiality issue he raised in March 2010 in relation to the Oracle Vice President passing on to others his suggested ideas and ways for improvement, and to the investigation he sought after complaining about retaliation in April 2010. In making this link I consider Mr Khan has elevated the importance and significance of those events above the level they had when they occurred, as can be seen from the communications and actions of the parties at that time. The communications suggest the events were not regarded by Mr Khan then as sufficiently serious enough to jeopardise his continued employment.

[15] I find particularly significant the evidence of Mr Hooper that from the time a redundancy process was commenced until after the decision was made by him to terminate the employment of Mr Khan, he was not aware of the issues or matters which had previously arisen and which Mr Khan later came to believe had tainted him in the eyes of his employer as a trouble maker and led it to dismiss him for that reason. Mr Hooper, I accept, only learned of these matters in about April 2011, while preparing to give evidence to the Authority after Mr Khan had lodged his application for interim reinstatement.

[16] It is also relevant in considering the reasons for the dismissal that Oracle had been a 'good' employer in relation to Mr Khan prior to the period when the company says it was faced with restructuring his position. Until then the employer had reported on Mr Khan's performance, favourably, and had made available to him opportunities to up-skill and undertake training. At the time of his redundancy the employer also made efforts to re-deploy him or seek out possible positions he could obtain with Oracle in Australia especially. This conduct does not suggest that Oracle management bore Mr Khan any grudge over his having raised the diversity, breach of confidentiality and retaliation issues.

[17] Although to Mr Khan those issues took on much greater significance at the time his employment was terminated, I find that standing back from the considerable detail he provided about them in his evidence, it can be seen that his views of Oracle and its reasons for dismissing him had no basis in fact. The overall picture is of an employee who was well reported upon, who was offered and took training opportunities and who had also been carried "on the bench", as it was described, or

had his position maintained, over significant periods when there was no billable work available for him to do and provide revenue for his employer.

[18] It is notable that Mr Khan in presenting his case has portrayed the opportunity of performing project work in China as an imposition rather than viewing it positively as a real and beneficial opportunity to continue his role and develop his skills and experience. The latter I find was the way he viewed it at the time it was offered and when he took up the offer and began to perform the work.

[19] Mr Khan has built his case by attempting to link to a decision made later to dismiss him, the relatively commonplace occurrence in employment relationships of issues having arisen that required communication and response between employer and employee for them to be resolved.

[20] Mr Khan has also made a serious allegation that a number of Oracle managers combined or joined together to concoct redundancy as a way of justifying his dismissal, when the true explanation lay in his personal conduct and behaviour. In this regard Mr Khan has made claims of impropriety or un-professional behaviour, including bad faith, against several senior managers of Oracle. His suspicion that an Oracle manager might falsify meeting minutes shows a high level of mistrust in Oracle management personnel, which the evidence satisfies me was unwarranted.

[21] Oracle has been careful and circumspect in dealing with Mr Khan, no doubt as a result of his baseless complaints made against management. He also made unreasonable requests of Oracle as to how it should investigate issues he had raised, and he has tried to use Oracle's responses against it to demonstrate that Oracle acted in bad faith towards him.

[22] The Authority has considered whether Oracle unreasonably compressed the timeframe for consultation with Mr Khan, particularly in circumstances where he needed time to travel back to New Zealand after a long term offshore assignment on project work in China. He was declined a two day extension of the consultation period. I consider that the time taken by Oracle was reasonable in the circumstances and Mr Khan was given adequate time to prepare and respond to the proposal to make his position redundant. He was given all information that was *relevant* to that exercise, as was his entitlement under s 4(1A) of the Employment Relations Act.

[23] It is only with hindsight that Mr Khan feels he should have had more time and been given access to a representative. Mr Khan I find had sufficient time to present his position and did so ably and persuasively, making his views about the restructuring proposal clearly known, particularly in relation to his suitability for other work that was available and for re-deployment. Oracle considered his feedback carefully and with an open mind, I find.

[24] The legal principles applying to redundancy dismissals have been set out by the Employment Court in its decision in *Simpson's Farms Ltd v Aberhart* [2006] ERNZ 825. They have been fully addressed by Mr Blake in written submissions, to which Mr Khan responded, also very fully. The issue in this case is not the principles but whether as a matter of fact this really was a redundancy situation at all, which I am satisfied it was. Oracle made a business decision to disestablish Mr Khan's position and in reaching it dealt with Mr Khan in good faith. In accordance with principle the decision was one to be made by Oracle, not Mr Khan or the Authority, and in making the decision Oracle did not act with ulterior motive or otherwise in bad faith.

[25] I find applying the test of s 103A of the Act that how Oracle acted and the actions of Oracle were what a fair and reasonable employer *would* have done in all the circumstances at the time the decision to dismiss was made (before the April 2011 amendment to the s 103A test of justification).

[26] In relation to the earlier events relied upon by Mr Khan as the reason for his dismissal I find, 1) they had no bearing on the way Oracle acted and how it reached the decision to terminate the employment of Mr Khan, and 2) the earlier events cannot be the subject of personal grievance claims able to be investigated and determined by the Authority, as grievances were not raised in respect of them within 90 days.

[27] For the above reasons I find that Oracle did not breach its obligations of good faith under the Employment Relations Act or the terms of the employment agreement it had with Mr Khan.

### **Determination**

[28] Mr Khan does not have a personal grievance, as his dismissal was justified. I consider that there is no basis for making any orders against Oracle or for providing

under the Employment Relations Act any remedy to Mr Khan for the situation that occurred, which I find was one of genuine redundancy.

### **Name suppression**

[29] Mr Khan has sought an order prohibiting the publication of his name. I decline that application as there are no special or personal reasons why suppression would be in the interests of justice in this case. Full publication of the determination is normal in cases of this kind determined by the Authority.

### **Costs**

[30] Costs are reserved.

A Dumbleton

**Member of the Employment Relations Authority**