

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 111
5396469

BETWEEN ANTHONY LOWE
 Applicant

A N D APERIO GROUP NEW
 ZEALAND LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Anne-Marie McNally, Counsel for Applicant
 Scott Wilson, Counsel for Respondent

Investigation Meeting: 01 March 2013 at Auckland

Date of Determination: 02 April 2013

DETERMINATION OF THE AUTHORITY

- A. Aperio Group New Zealand Limited (Aperio) unjustifiably disadvantaged Mr Lowe in his employment by failing to consult with him over redeployment opportunities before making him redundant.**
- B. Aperio is ordered to pay Mr Lowe \$4,000 distress compensation.**

Employment relationship problem

[1] Mr Lowe was employed by Aperio as a printer at its Mt Wellington site from August 1999 until he was made redundant on 01 June 2012.

[2] On 25 November 2011 Aperio wrote to all staff to advise it had decided to close the Mt Wellington site and that there may be opportunities for relocation for some employees to its Airport Oaks site. Aperio employed eight printers at its Mt

Wellington site, four of whom ended up being redeployed to the Airport Oaks site. The four remaining printers were made redundant.

[3] Aperio did not consider Mr Lowe for redeployment because it believed he wanted redundancy instead of redeployment. Mr Lowe says he did not want to be made redundant and would have preferred to have been redeployed. He claims Aperio's failure to consider him for redeployment unjustifiably disadvantaged him in his employment because it contributed to his selection for redundancy.

Issues

[4] The following issues require determination:

- (a) Did Aperio consult with Mr Lowe about redeployment opportunities?
- (b) If not, did that failure disadvantage Mr Lowe in his employment?
- (c) If so, was that disadvantage justified?
- (d) If not, what if any remedies should be awarded?

Did Aperio consult with Mr Lowe about redeployment opportunities?

[5] Aperio admits it did not have a formal consultation meeting with Mr Lowe about redeployment. However, it says it was entitled to conclude that Mr Lowe was not interested in redeployment because it raised it with him at the tail end of a meeting to discuss other issues it had with him in March 2012. It says Mr Lowe's response was that he not interested in a transfer and just wanted to get his redundancy compensation. Mr Lowe denies that.

[6] Mr Ken Johns, General Manager Wellington site, also claims that when he walked around the printing area Mr Lowe made numerous comments to him (in excess of 30) which indicated he was not interested in redeployment. Mr Lowe denies this. I find that the comments Mr Lowe allegedly made to Mr Johns (assuming for arguments sake they were made) did not amount to individual consultation by Aperio.

[7] I also find that the discussion which Aperio says occurred with Mr Lowe at a meeting in March was insufficient to discharge Aperio's obligation to individually consult with Mr Lowe about his redeployment opportunities and preferences.

[8] Mr Lowe was not given advance notice that the March meeting was intended to include his individual consultation about redeployment. He was not put on notice that his responses in the March meeting would affect whether or not he would be considered for redeployment, which would obviously affect his ongoing employment. Mr Lowe therefore was unable to prepare for the redeployment part of the meeting (because the issue came up unexpectedly) or to arrange to be accompanied by a representative or support person.

[9] I find that tagging a brief reference to redeployment at the tail end of another meeting did not meet the standard of individual consultation which Aperio had set itself in its communications with Mr Lowe. In particular, Aperio's letter to Mr Lowe dated 25 November 2011 advised it would be consulting with the staff about potential redeployment opportunities. Aperio stated:

“Decisions on redeployment will only be made once more detailed decisions around the timing of the Mt Wellington site closure have been made and once we have fully consulted with you.”

[10] The letter attached a *“Preliminary Feedback”* form which asked staff to tick a box about whether they preferred to relocate to the Airport Oaks site or to seek redundancy. Mr Lowe ticked both boxes to indicate that he was interested in redeployment and he sought redundancy.

[11] Mr Lowe's supervisor, Mr Jacques van der Merwe asked Mr Lowe why he had ticked both boxes and Mr Lowe responded he was unable to express a preference until he had seen a *“contract”* meaning the terms on offer at the Airport Oaks site. I consider this indicates Mr Lowe was expecting to be consulted about what redeployment opportunities were available.

[12] On 27 January 2012 during a staff meeting at the Mt Wellington site updating staff on the closure, Mr Michael Hogan, Human Resources Director, New Zealand for Amcor Flexible Asia Pacific presented a PowerPoint presentation to the meeting. This included the *“important note”* that:

“Each person will be communicated and consulted with individually as to their own situation at the appropriate time. “ [time of closure of their part of the site]

[13] It also contained a slide entitled *“Redeployment opportunities”* which set out that the two options facing staff were potential alternative employment at Airport

Oaks or redundancy. This slide recorded that “[T]he options available to each individual will be subject to individual consultation” and that each employee would be given a letter which confirmed that Aperio would “[...] be consulting with you about potential redeployment opportunities.”

[14] On 8 February 2012, a notice was displayed by Aperio which indicated that individual meetings would be held commencing the week of 13 February 2013. I consider Aperio set itself the standard of individual consultation so that is the standard it had to meet. I consider Aperio’s actions in respect of Mr Lowe fell short of fair, proper or adequate individual consultation about redeployment opportunities available to him.

Was Mr Lowe disadvantaged in his employment?

[15] I find Aperio’s failure to individually consult with Mr Lowe about redeployment options disadvantaged him in his employment because it meant he was not considered for redeployment to the Airport Oaks site, which contributed to his redundancy dismissal.

Was that disadvantage justified?

[16] Justification is to be determined in light of the justification test in s.103A of the Employment Relations Act 2000 (the Act). This requires the Authority to assess whether Aperio’s actions and how it acted where what a fair and reasonable employer could have done in all the circumstances¹.

[17] Aperio says it was justified in not considering Mr Lowe for redeployment because he had made it known he was not interested in transferring to Airport Oaks. Aperio relies on the meeting in March 2012, general comments it claims Mr Lowe made around the Mt Wellington workplace, and the comments it claims he made to Mr Johns asking when he was going to get his redundancy notice and money.

Comments at March meeting

[18] Mr Lowe says the issue of redeployment came up at the tail end of the March meeting because he asked why he had not been given a “contract” for the Airport

¹ Section 103A of the Act.

Oaks printing positions. Mr Johns says he told Mr Lowe he was happy to provide him with a copy of the proposed employment agreement² but then asked whether Mr Lowe was genuinely interested in redeployment given his previous requests about when he would be getting his redundancy notice and compensation.

[19] Mr Johns and Mr van der Merwe say Mr Lowe thought about it for a few moments and then said he was not interested and just wanted to get his money and move on. Mr Lowes denies saying that. He has a different version of events. He says Mr Johns told him that “*the contracts were coming in dribs and drabs*” and that “*there would be another round of contracts in a week or two.*” Mr Lowe claims this lead him to believe redeployment was still an option available to him.

[20] This conflict is to be resolved on the balance of probabilities. I have preferred Mr Johns and Mr van der Merwe’s evidence on the basis that they corroborate the others’ version of events.

Comments around workplace

[21] Mr Johns and Mr van der Merwe allege Mr Lowe made unspecified general comments in the workplace that he did not want to transfer but wanted the redundancy money instead. Mr Lowe explained some of these comments as being made to mask his embarrassment in the face of teasing from colleagues about why he was not going to Airport Oaks. Mr Lowe claims colleagues would say things to him like “*are you a crap printer?*” so he made a joke about wanting the redundancy money when what he says he really wanted to do was to transfer.

Comments to Mr Johns

[22] Mr Johns claims Mr Lowe made in excess of 30 comments to him when they passed each other on site which involved variations on the theme of “*when would he be getting his money, when would he be getting his “cheque”, and when would he get his notice.*” Mr Lowe denies making any such comments.

[23] Mr Johns claims it got to the point where he was so embarrassed by Mr Lowe’s insistent comments that he raised a concern about Mr Lowe’s continued

² The terms on offer at the Airport Oaks site differed from those enjoyed by printers at the Mt Wellington site.

questioning with the local EPMU delegate, Mr Simon Atkins. Mr Atkins recalls Mr Johns raising an issue about Mr Lowe but does not recall the specifics of it.

[24] The conflict over these comments is to be resolved on the balance of probabilities. I have preferred Mr Johns' evidence because it is supported in part by Mr Atkins who recalled an issue was raised. No other issues about Mr Lowe were raised, so I have concluded it was likely to have been the matter which Mr Johns gave evidence about.

Was Aperio justified in not considering Mr Lowe for redeployment because of the comments he made?

[25] I find that Aperio was not justified in concluding that Mr Lowe was not interested in redeployment without first fairly and properly consulting with him regarding his preferences as it had indicated it would do in its communications with him.

[26] Aperio's failure to consult with Mr Lowe regarding his redeployment preferences is not what a fair and reasonable employer could have done in all of the circumstances³.

[27] Aperio was not justified in acting on Mr Lowe's throwaway comments at the tail end of the March meeting, or banter in front of colleagues, or comments about money made to Mr Johns in passing as excluding him from consideration for redeployment.

[28] Mr Lowe was not making considered or informed comments in any of these instances. He had not been consulted about what opportunities existed, whether he was likely to be redeployed if he sought it, what terms were on offer if he transferred or what date that was likely to occur. He had not had time to prepare a considered response to the redeployment issue because he had never been given advance warning of an individual consultation meeting.

[29] Mr Lowe was never put on notice that if he did not indicate an interest in redeployment he would be made redundant without any consideration being given to transferring him to the Airport Oaks site.

³ Ibid 1

[30] A fair and reasonable employer in these circumstances could not have relied on the casual comments Mr Lowe made to exclude him from any consideration of redeployment. A fair and reasonable employer could not have made Mr Lowe redundant without first fulfilling the individual consultation obligations regarding redeployment that it had set itself.

[31] Mr Lowe was unjustifiably disadvantaged in his employment because Aperio failed to individually consult with him about redeployment opportunities. This meant that it unfairly and unjustifiably concluded he was not interested in transferring to the Airport Oaks site, which contributed to his selection for redundancy.

What, if any, remedies should be awarded?

Lost remuneration

[32] Mr Lowe received a final pay upon termination of \$46,860 which included holiday pay and unused sick leave entitlements plus generous redundancy compensation. Mr Lowe's claim for lost remuneration was withdrawn at the investigation meeting.

Lost opportunity

[33] Mr Lowe claimed unquantified compensation for the loss of opportunity to be redeployed to Airport Oaks.

[34] The difficulty with this claim is that there is insufficient evidence upon which to base an award of compensation. Although I was told Mr Lowe has obtained work as a contractor on a lesser rate of pay than he enjoyed with Aperio, no evidence of his total earnings post redundancy was supplied.

[35] I therefore do not have sufficient evidence from which to calculate what financial impact of his job loss has had on him since his dismissal so I am unable to adjust that to reflect other contingencies which may have resulted in his employment ending anyway, had he been consulted over redeployment. For example, there is a prospect that he may not have accepted the terms on offer at Airport Oaks so he may have preferred to have taken his substantial redundancy payout instead of the reduced terms on offer.

[36] There is also uncertainty over whether he would have been selected for redeployment had he expressed his interest. Aperio says it redeployed all four printers who had expressed an interest in redeployment so no selection process was undertaken. If Mr Lowe had sought redeployment there would have been one more printer than position available. It is speculative to determine what selection criteria may have been applied but, all things being equal, if the default contractual selection criteria of “first on last off” was applied Mr Lowe as the longest serving employee would have been likely to have been redeployed.

[37] Although I acknowledge that Mr Lowe lost the opportunity to be considered for redeployment, as a result of the evidential deficiencies with this aspect of his claim, I consider it more appropriate to compensate him for the loss of opportunity by reflecting that in the level of distress compensation awarded.

Distress compensation

[38] I accept Mr Lowe suffered hurt, humiliation and injury to his feelings as a result of being deprived of the opportunity to have a fair and proper individual consultation meeting to discuss his redeployment options before his employment was terminated on the grounds of redundancy.

[39] I consider \$4,000 is appropriate to compensate Mr Lowe for the distress that he suffered as a result of his unjustified disadvantage grievance.

Contribution

[40] Section 124 of the Act requires me to consider whether Mr Lowe contributed to the situation which gave rise to his disadvantage grievance and, if so, adjust remedies accordingly.

[41] I find that Mr Lowe did not contribute to the situation which gave rise to his grievance. He was under no obligation to identify redeployment preference on the staff redeployment form which was circulated in November 2011, nor was he ever instructed or required to do so. His comments while unwise and unhelpful to his subsequently stated view of wanting redeployment do not amount to blameworthy conduct which justifies a reduction in remedies.

[42] Mr Lowe's disadvantage grievance arose because Aperio did not comply with its legal obligations to hold an individual consultation meeting with him to discuss redeployment options. I find that Mr Lowe did not contribute to the situation which gave rise to his grievance because Mr Johns incorrectly inferred or assumed that Mr Lowe did not want to be redeployed in circumstances in which I have found it was unreasonable and unjustified for him to have reached that conclusion.

Costs

[43] Mr Lowe as the successful party is entitled to a contribution towards his actual legal costs. The parties are encouraged to resolve costs themselves. However, if that is not possible, then Mr Lowe has 14 days within which to file a costs memorandum and Aperio has 14 days within which to respond. This timetable will be strictly enforced and departure from it requires prior leave of the Authority.

[44] In order to assist the parties to resolve costs by agreement I can indicate that the Authority is likely to adopt its notional daily tariff based approach to costs. The parties are therefore invited to identify any factors which they say should result in an adjustment to the notional daily tariff.

Rachel Larmer
Member of the Employment Relations Authority