

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 21/10
5244901

BETWEEN RAVI MANGER
 Applicant

AND SOUTH WAIRARAPA
 DISTRICT COUNCIL
 Respondent

Member of Authority: Philip Cheyne

Representatives: Michael O'Brien, Counsel for Applicant
 Michael Quigg, Counsel for Respondent

Investigation Meeting: 20 January 2010 at Wellington

Determination: 8 February 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] South Wairarapa District Council (SWDC) has undergone a restructuring exercise and will make a number of changes to its staffing including the establishment of a position called Group Manager Infrastructure and Services (GMIS) and two other Group Manager positions. The three GM positions will report to the Council's Chief Executive Officer (Dr Dowd). In line with a protocol agreed with a union on behalf of a number of staff (not including Mr Manger), some existing employees have been reconfirmed into lower positions in the new structure and other existing staff will be considered for redeployment. The three GM positions have been publicly advertised. SWDC intends to progress appointments to the GM positions during February 2010.

[2] Ravi Manger is employed by SWDC as its Manager, Works and Services (MWS), a position he has held since March 1995. That position reports to the CEO. Mr Manger says that the GMIS position is not substantially different from his current

position. He says that he has been unjustifiably disadvantaged as a result of SWDC's actions and he seeks a declaration, a compliance order, compensation and special damages.

[3] SWDC says that the GMIS position is a substantially different role from Mr Manger's current position. Unless SWDC can establish that Mr Manger's MWS role is substantially changed by the establishment of the GMIS role, it will not be able lawfully to terminate his employment for redundancy, given the wording in the individual employment agreement between the Council and Mr Manager.

[4] Despite mediation, the problem remains unresolved. Everyone's cooperation meant that the Authority was able to convene an investigation meeting quickly and counsels' endeavours produced order to a large number of documents and focus at the meeting.

[5] The essence of the problem is that Mr Manger claims that the GMIS position is not substantially changed as a result of the reorganisation or restructuring. Those words reflect the provision in his individual employment agreement. Supporting that argument, there are a number of complaints made about the consultation exercise that preceded SWDC's announcement to staff about the restructuring outcome. First, I will assess whether Mr Manger's position has been or will be substantially changed before returning to his other claims about unfair process and breach of good faith.

[6] I should start with Mr Manger's current position.

Mr Manger's current employment

[7] Mr Manger commenced his employment for the SWDC In 1995. The same written individual employment agreement remains current. Under it, Mr Manger is required to perform the duties set out in the position description and *such other duties ... as the employer shall from time to time assign* to him. The agreement permits SWDC to revise the position description after consultation with Mr Manger. Mr Manger's position reports to SWDC's *General Manager* but that position was replaced with a Chief Executive Officer many years ago. The original position description describes the responsibilities of the position as:

Primary responsibility:

The management of council assets in the areas of roads, water, sewerage, drainage, baths, parks, reserves, cemeteries, plantations, waste disposal and plant.

Secondary responsibility:

The management overview of council's business unit for professional services.

[8] The most recent iteration of Mr Manger's position description is dated May 2008. It describes the purpose of the position as:

The Manager Works and Services is responsible for the development, management, operations and review of council assets in the areas of roads and bridges, water, sewerage, drainage, baths, parks, reserves, cemeteries, plantations and waste disposal. The role manages asset management and service delivery functions. The Manager Works and Services is also responsible for professional engineering advice to other technical staff and planning and regulatory staff. The role manages the council's business unit for professional services.

[9] There is some dispute in the evidence about the extent of Mr Manger's current responsibilities especially regarding his responsibility for managing staff. There are five positions currently reporting directly to Mr Manger about which there is no disagreement. In addition to those five positions, Mr Manger says that two further positions also report to him, at least to some extent; the Emergency Management Officer and the Animal Control Officer. The job descriptions for those positions show that the positions formally report to the Chief Executive and I accept Dr Dowd's evidence that he has that responsibility in respect of these positions. However, it is also correct that Mr Manger has management responsibility for some of the work required of both these positions.

[10] Mr Manger's evidence is that 15 contractors also report to him and he manages a number of consultants. That evidence is not in dispute. The breadth of Mr Manger's current portfolio also means that he sometimes works with Richard Airey who is a consultant engaged by the SWDC for property and leasing issues. However, I accept Dr Dowd's evidence that Mr Airey reports to him and works under his direction rather than that of Mr Manger.

[11] SWDC uses a firm of consultants to assist with sizing positions and assessing market remuneration for staff. I have been given some of the pay review reports produced by the consultants for the MWS position. The reports assess five factors (accountability, work complexity, responsibility for people, relating to others, and

expertise). On these factors, in 2001, 2007 and 2008 the consultants ranked Mr Manger's position at *grade 21* with no changes to the values given against each factor. The consultants have particular experience in the local government sector and the grading scale is a measure of job size for the purposes of assessing market remuneration. The information available to the Authority indicates that the two later pay review reports simply carried forward the job sizing exercise that appears to have been done last in 2001. Evidence provided by SWDC after the investigation meeting indicates that Mr Manger could have sought a job sizing review in subsequent years. However, he did not and I am left with the consultant's job size report from 2001.

The GMIS position

[12] On 27 November 2009, following a period of consultation, SWDC released to staff its decision about restructuring. The new structure has three Group Manager positions reporting to Dr Dowd as CEO. The rationale is that one group will provide outwards-looking functions to residents of the district (GMIS), one will provide inward-looking functions to Council administration and Council members (General Manager Corporate Support), and the third will support functions for the compliance activities within the district (General Manager Planning and Environment). There are job descriptions for the three GM roles and SWDC sought advice from its pay consultants as to the size of and remuneration for each position. Working from the job descriptions provided by SWDC, its consultant assessed the GMIS position at Grade 23, or two grades higher than Mr Manger's current position. That also has consequences for the market assessment of remuneration.

[13] There are several problems with accepting the job sizing (and therefore the remuneration) information at face value. The GMIS report is based on 10 factors rather than the five factors mentioned in the 2001 MWS report. Few of the headings in the 2001 report are replicated in the 2009 report and the descriptions given under each heading make it difficult to equate the two reports. That is one reason why the job sizing exercises are not directly comparable. The reports move from use of a number system to use of a letter system for the value assigned to each factor. There is no evidence to equate these scales. That creates a second problem. Mr Manger also makes the valid point that his actual job has grown since 2001 so the 2001 report is not an accurate assessment of his current role even using the less sophisticated five factor assessment. For these reasons, the change in grading from 21 to 23 and the

associated change in remuneration do not help much in determining whether Mr Manger's role is or will be substantially changed by the GMIS position.

[14] SWDC accepts that the GMIS position incorporates the role of MWS but Dr Dowd says that the span of control is significantly larger. It is this difference which leads SWDC to say that Mr Manger's position will be *substantially changed* as a result of the restructuring. I should now consider those changes.

[15] The GMIS role will have six direct reports and responsibility for 17 staff overall. There are features of the GMIS role that SWDC says make it substantially changed from that of MWS. First, a District Librarian will report directly to GMIS. That will include eight other staff as indirect reports to GMIS. Previously, library staff reported to the Chief Executive. On Mr Manger's evidence, the library function represents about 4% of the MWS budget responsibility. Mr Manger also says that since Dr Dowd reports only 3% of his time devoted to management of the library service, the time required in the GMIS role to manage the library responsibility will be at a similar level. Dr Dowd's evidence is that the library function requires more strategic management time than he has been able to devote to it. There is no reason to doubt Dr Dowd's evidence on this point. However, I also note that the restructuring includes a new position for a District Librarian. That role has responsibility for planning the strategic direction of the library service. Overall, I find that the addition of the library function is not as minimal as argued for by Mr Manger. It is a whole new function. It represents a 20% increase in the number of direct reports and a significant increase in the number of indirect reports even though the budget does not represent a large increase. The intention is for the GMIS to devote more time to the strategic management of the function than could Dr Dowd so the time requirement is likely to be greater than Dr Dowd's estimate of his time expenditure.

[16] A further change arises from SWDC's decision to establish a new position for Properties and Facilities Officer. Previously SWDC used a consultant to deal with that work. Dr Dowd's evidence is that the consultant worked at his direction and reported to him. Mr Manger's evidence is that the consultant's work was within his area of responsibility. I find that Mr Manger's evidence overstates the position. Some of the consultant's work fell within and required liaison with or advice from the MWS but not in any reporting or direction sense. I accept Dr Dowd's evidence that the consultant worked at his direction. I also accept Dr Dowd's evidence that SWDC

wants more active management of its property portfolio. I note that the restructuring includes the establishment of a .75 FTE Properties and Facilities Officer who will report to the GMIS. The work area is not entirely new to Mr Manger and the management responsibility is no different from the existing MWS general management responsibility for staff.

[17] There are other reporting changes. The MWS role included reporting responsibility for the Environmental Health Officer (including an indirect report). That role will now report to one of the other general manager positions, in keeping with the rationale for the division of responsibilities between the general manager roles. Previously, the Civil Defence Officer reported to the CEO but will in the future report to the GMIS. Mr Manger's evidence is that this person did report to him as MWS but that evidence overstates the position. As MWS, Mr Manger had responsibility for some areas of the Civil Defence Officer's work but not managerial or reporting responsibility. There is also some adjustment because of realignment of responsibilities formerly within the Animal Control Officer's position. These reporting changes include the addition of and the removal of various portfolios.

[18] SWDC has decided to establish a new position of Utilities Manager. The existing Utilities Engineer will report to that manager who in turn will report to the GMIS role. Dr Dowd's evidence, which I accept, is that it is intended to devolve some of Mr Manger's current day-to-day responsibilities to the new position of Utilities Manager.

Substantially changed?

[19] It remains to be decided whether, taken together, these changes mean that the MWS position will be substantially changed so as to permit SWDC to invoke the redundancy provision in Mr Manger's employment agreement.

[20] I accept that the onus is on SWDC to establish that the positions are different to the required degree: see *Howard v. NZ Pastoral Agricultural Research Institute Ltd* [1999] 2 ERNZ 479. What needs to be established is whether there is sufficient difference between the two positions to break the essential continuity of employment: see *Carter Holt Harvey Ltd v. Wallis* [1998] 3 ERNZ 984. The degree of sufficiency in the present case is that the position must be *substantially changed* in accordance with Mr Manger's employment agreement.

[21] Next to the CEO, currently the MWS is the Council's most highly paid and senior employee by a wide margin. A raft of other positions currently report to the CEO but none of them are at the same level as Mr Manger. The restructuring will result in three Group Manager positions, one assessed at grade 23 and two at grade 22. They will comprise with Mr Dowd a senior management team so the MWS will have two colleagues of similar status in the organisation. That is a material change. The GMIS role has a significant increase in the number of direct and indirect reports; a whole new function; some reshuffling in other reports and functions; and a Utilities Manager to whom will be devolved some of the MWS day to day responsibilities. Overall, I conclude that Mr Manger's role will be substantially changed as a result of the GMIS position.

Consultation and good faith

[22] I am referred to *Howard* where the Court found that adequate consultation would have made a difference to the employer's decision about redundancy. Here, there are several complaints about consultation and good faith. However, I do not accept that, but for flaws in SWDC's consultation process, the Council might have decided that Mr Manger's position was not substantially changed by the restructuring.

[23] Other than expressing that conclusion, I make no further findings about this aspect of the problem. It would take a little time to set out in this determination what happened and whether Mr Manger has any legitimate complaints such as a personal grievance arising from the consultation process as a result. It is better not to delay advising the parties about the conclusions already reached on the essential issue. I will deal with the remaining aspects as soon as I can.

Conclusion

[24] Mr Manger's position as MWS will be substantially changed as a result of the GMIS position. He is not entitled to a declaration or a compliance order.

[25] Mr Manger's grievance about SWDC's consultation process concerning the restructuring will be the subject of a separate determination.

[26] Costs are reserved.

Final word

[27] As explained above, Mr Manger's view is that there is no substantial change. It might be that he reconsiders that view in light of this determination, that he is now prepared to put his name forward for the GMIS role and that Council is prepared to consider him as a candidate for the position. If so, counsel should let the Authority know.

Philip Cheyne
Member of the Employment Relations Authority