

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 461
5416443

BETWEEN ANGELIQUE MERLE
 STEVENS
 Applicant

A N D HAPAG LLOYD (NZ)
 LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Eska Hartdegen, Counsel for Applicant
 Peter Kiely with Matthew Piper, Counsel for Respondent

Investigation Meeting: 21 and 22 August 2013 at Auckland

Date of Determination: 9 October 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Stevens) alleges that she has been unjustifiably dismissed from her employment “*without due process or for any valid reason*” and that in declaring Ms Stevens’ position redundant to its requirements, the respondent (Hapag Lloyd) breached Ms Stevens’ employment agreement by failing to pay her redundancy compensation when she “*exercised my right to refuse a substantially different role*”.

[2] Ms Stevens also alleges that Hapag Lloyd failed to fulfil its legal obligations by offering her a substantially similar role and that the terms and conditions of her employment (and especially certain clauses in her employment agreement), were oppressive or misleading or both. She alleges bad faith and seeks penalties.

[3] Finally, Ms Stevens refers the Authority to clause 8 of her operative employment agreement which she says is relevant to the employment relationship problem and which she alleges Hapag Lloyd failed to comply with.

[4] Hapag Lloyd resists all of Ms Stevens' allegations, maintaining that the redundancy was a genuine one in a legal sense, was undertaken in accordance with the obligations of good faith in the law, that the restructuring was effected fairly, that Ms Stevens was offered a substantially similar role and that by her failure to accept that role, she waived any right to redundancy compensation and was thus deemed to have resigned her employment. The allegation of an absence of good faith is also denied, as is the request for penalties to apply.

[5] Ms Stevens was employed by Hapag Lloyd as Imports Manager with Hapag Lloyd's New Zealand operation. She had been employed by Hapag Lloyd since 1 July 2006 and it is common ground that Hapag Lloyd thought highly of her.

[6] At the end of calendar 2012, it became clear that Hapag Lloyd Oceania (of which Hapag Lloyd NZ was a part) would be exploring the prospect of taking some cost out of the New Zealand operation by consolidating certain functions in India.

[7] About a week after the New Zealand Managing Director (Mr Carter) became aware of what the Authority referred to as the Indian solution, Ms Stevens was involved in the first of a number of meetings within Hapag Lloyd NZ to scope the project.

[8] By a meeting on 28 February 2013, the practical effect of the Indian solution was apparent. Mr Carter, for Hapag Lloyd, met with Ms Stevens on that day and, inter alia, confirmed that the effect of the implementation of the Indian solution was a reduction in the imports team at Hapag Lloyd NZ from four positions to two positions.

[9] Consequent upon the meetings between staff and Hapag Lloyd management on 28 February 2013, an email exchange developed between affected staff and Hapag Lloyd management. In particular, in an email sent by Ms Stevens on 4 March 2013, she made this observation to Hapag Lloyd management:

Verbally I was told that under the new structure there will only be two import coordinators ... this therefore means that one import coordinator and the import manager [Ms Stevens' own position] are

redundant. ... Please confirm that the import manager role, and one import coordinator role will be redundant as per verbal communication.

[10] That view was confirmed by Mr Carter for Hapag Lloyd in the context of emphasising that redeployment of affected staff was Hapag Lloyd's primary goal.

[11] On 19 March 2013, Hapag Lloyd confirmed that the restructuring proposal would proceed and the following day offered Ms Stevens the position of Sales Support Manager. While Ms Stevens claims that she did not understand the 19 March 2013 announcement to specify which positions would be disestablished (only that there would be two positions left from a total of four), that view is disputed by Hapag Lloyd which makes clear that the 19 March 2013 announcement must be seen in the context of the restructuring proposal which had been under consideration since the end of calendar 2012 and that during that process, Hapag Lloyd had clarified that the manager position occupied by Ms Stevens was potentially to be disestablished.

[12] In any event, if Ms Stevens was in any doubt about the matter on 19 March 2013, that doubt must have evaporated the following day when she was offered an alternative role. That letter of offer dated 20 March 2013 is important because it sets out for the first time Hapag Lloyd's constant theme throughout these proceedings that in making the offer it did, the firm was complying with its contractual obligations.

[13] The relevant provision is in the penultimate paragraph of the letter and reads as follows:

We would also like to confirm that we consider this offer to service our contractual obligations under clause 7(b) of your IEA (individual employment agreement). Accordingly, should you choose not to accept it, you will not be eligible for Redundancy Compensation as detailed under clause 7.

[14] The Authority notes that that provision was included in three subsequent letters dated respectively 12 April 2013, 18 April 2013 and 22 April 2013. The burden of that message is simply that Hapag Lloyd regarded the offer of the sales support manager role as being in fulfilment of its legal obligations in terms of the operative employment agreement and a failure by Ms Stevens to accept the proffered role would result in her employment coming to an end but without any entitlement to redundancy compensation.

[15] A personal grievance was raised on Ms Stevens' behalf on 25 March 2013 and by letter dated 10 April 2013, Hapag Lloyd sought to point up the effect of what it had stated in the 20 March 2013 letter of offer by emphasising that if Ms Stevens did not accept the proffered role, "*she will in effect be resigning*".

[16] Immediately prior to the quoted passage, Mr Carter for Hapag Lloyd endeavoured to address Ms Stevens' contention that she was "*redundant*" and therefore, by implication, entitled as of right to redundancy compensation.

[17] In the Authority's view, that dispute, about whether Ms Stevens was redundant or resigned her employment, does nothing other than confuse the issue. As a matter of law, Ms Stevens' position had been disestablished and that fact is unassailable. From Hapag Lloyd's position, Ms Stevens herself was not redundant because it sought to redeploy her; conversely, Ms Stevens' view was that because the position to which she was to be redeployed was not, in her judgment, sufficiently similar to the one that she had previously occupied, she was actually redundant. As the Authority has just observed, it considers it best to focus on the evidence as to what happened rather than quarrel about the labels that parties might put on the position.

[18] On 17 April 2013, Ms Stevens wrote to Mr Carter for Hapag Lloyd and amongst other things had this to say:

Once my role is disestablished at the end of April, I consider that I am redundant and am entitled to be paid my redundancy compensation.

[19] The Authority observes that that statement at least makes the proper distinction between the position and the occupant of that position, recording that it was the position that had been disestablished but making the claim that the occupant of the position was herself redundant because the position had disappeared.

[20] That letter provoked a further response from Hapag Lloyd again repeating its view that a failure by Ms Stevens to pick up the role that was offered in substitution for the disestablished role would mean that, on a proper construction of her employment agreement, she was not entitled to redundancy compensation. The following day Ms Stevens formally advised Hapag Lloyd she would not be accepting the alternative role and on 22 April 2013, Ms Stevens was given one month's notice of the termination of her employment.

Issues

[21] The gravamen of the employment relationship problem between these parties turns on the interpretation to be applied to two clauses in the operative employment agreement. These clauses determine the obligations of the parties to each other in the event of a restructuring and it is a construction of these clauses that will fundamentally decide the outcome of this matter.

[22] However, the Authority must also decide whether this was a genuine restructure, whether Hapag Lloyd adopted a proper process in effecting the restructure and in particular whether it consulted appropriately with the affected employees including Ms Stevens and whether there were other steps that Hapag Lloyd ought to have taken instead of the restructuring proposal that it actually adopted.

[23] Accordingly, the Authority proposes to consider the following questions:

- (a) Was the redundancy a genuine one;
- (b) Did Hapag Lloyd follow a proper process;
- (c) Was there some other proposal that Hapag Lloyd ought to have promoted;
- (d) Has Hapag Lloyd fulfilled its obligations pursuant to contract?

Was the redundancy a genuine one?

[24] As Hapag Lloyd's submissions make plain, the starting point for any discussion about the genuineness of a redundancy must be the Court of Appeal decision in *GN Hale & Son Ltd v. Wellington Caretakers etc IUOW* [1990] 2 NZILR 1079.

[25] Two central propositions can be drawn from that leading case. The first is that an employer is entitled to make its business more efficient, including by taking costs out of the business, and an employee does not have the right to continuity of employment if the business is capable of operating more efficiently without him or her.

[26] A further proposition usually derived from *Hale* is that it is not for the Court or the Tribunal to substitute its view about how a business should be operated; that is

a matter for the management of the business and the Authority ought not to interfere with that decision provided it is made for “*genuine commercial reasons*”.

[27] The continuity of that last mentioned proposition as good law, despite the change in the statutory enactment (s.103A of the Employment Relations Act 2000), was confirmed by the Employment Court decision in *Simpsons Farms Ltd v. Aberhart* [2006] ERNZ 825.

[28] The Authority heard evidence from Mr Carter for Hapag Lloyd that the respondent was part of a global shipping operation based in Germany and that the shipping industry worldwide was a “*highly competitive industry which is subject to regular change and rationalisation*”.

[29] In that context, Hapag Lloyd’s parent told Hapag Lloyd that the Indian solution might enable it to take costs out of its business. Mr Carter’s direct superior instructed him to evaluate the efficacy of the Indian solution. The timeline in which that process was undertaken has already been briefly sketched by the Authority. It is sufficient to observe here that the exercise was managed by Ms Stevens’ employer, Hapag Lloyd NZ, that Ms Stevens was involved in the scoping exercise as part of her managerial responsibilities, and that the decision to go with the proposed Indian solution was made in New Zealand by the respondent, Hapag Lloyd.

[30] As the Authority has already noted, the effect of the proposal was to reduce the “head count” in the imports section of Hapag Lloyd NZ from four staff to two staff with the two positions to be disestablished being the manager position (held by Ms Stevens) and one of the import coordinator roles.

[31] On the face of it then, this is a stock standard restructuring designed exclusively to take cost out of the business. There is no evidence before the Authority of any mixed motive for the redundancy or indeed of any improper motive of any description activating Hapag Lloyd’s adoption of the Indian solution.

[32] In particular, the Authority heard ample evidence that Ms Stevens was well regarded by Hapag Lloyd and that it sought to retain her in the business because of her skills and expertise. There is no evidence that the Authority heard that Hapag Lloyd set about disestablishing Ms Stevens’ role in order to get rid of her, for instance. Indeed, the reverse is the position. It is apparent on the facts that Hapag Lloyd extended various deadlines throughout the consultation process with a view to

doing its level best to retain Ms Stevens in the employment. Whatever else is true, those steps are inconsistent with a finding that the restructuring was anything other than a genuine process.

[33] Accordingly, the Authority concludes that this was a genuine restructure, activated by proper motives, that its purpose was to take cost out of the business and that, as a matter of law, it was available to Hapag Lloyd to disestablish Ms Stevens' role (and one other) in order to achieve that business objective. There is no evidence before the Authority which would suggest any proper basis on which the Authority can interfere with that appropriate exercise of managerial prerogative.

Did Hapag Lloyd follow a proper process?

[34] The Authority has already sketched the procedure followed by Hapag Lloyd once the proposed Indian solution was raised. On the evidence, it is apparent that Ms Stevens knew about the proposal within a week or so of Mr Carter being advised, from his superior, of the proposal. It is also clear that Ms Stevens was involved intimately in the scoping of the possible restructure from that very first engagement right up until Hapag Lloyd made the decision that it was going to implement the proposal.

[35] As counsel for Hapag Lloyd correctly opines:

The key element of procedural fairness in the context of a proposed redundancy is to actively consult with affected employees prior to making a final decision.

[36] The Authority is satisfied that not only did Hapag Lloyd do that, but it even involved Ms Stevens in the scoping exercise which led to Hapag Lloyd's adoption of the restructuring proposal. So she was not only consulted about the proposal once it had been decided upon, but she was also actively engaged in the process that led Hapag Lloyd to decide on the proposal.

[37] Having resolved to implement the Indian solution, the evidence is that Hapag Lloyd advised Ms Stevens of that and within 24 hours offered her a new role in the organisation consequent upon the disestablishment of her existing role.

[38] Quite simply, there is a wealth of evidence of the exchange of views between the protagonists about how Hapag Lloyd ought to deal with the matter. It is important to note, in this connection, that Hapag Lloyd had obligations not just to Ms Stevens

but also to her subordinates who were all of them as intimately involved in the restructure as she was.

[39] The evidence is that Hapag Lloyd engaged indiscriminately with all of the affected staff, that it did not give any priority to any particular view, and that it readily accepted feedback and considered alternatives.

[40] An example of this last point is that, unlike some of her subordinates, Ms Stevens never provided Hapag Lloyd with any view about whether affected staff should be simply appointed to new roles or given the opportunity to apply for new roles, on a competitive basis. Ms Stevens' subordinates had given Hapag Lloyd their view about that (which was that affected staff should be appointed directly into a new role rather than have to go through a selection process), and despite Hapag Lloyd extending the deadline for Ms Stevens to comment on that aspect, she never did.

[41] In the result, and presumably relying on the views advanced by Ms Stevens' subordinates, Hapag Lloyd offered Ms Stevens the new role of Sales Support Manager.

[42] The Authority's analysis of the position is that, in effect, the offer of the position of Sales Support Manager brought an almost immediate response from Ms Stevens raising a personal grievance. The offer of the new position was made on 20 March 2013 and the personal grievance was raised on 25 March 2013 and it proceeded, inter alia, on the basis that the position offered was not "*substantially similar*" to the position being vacated.

[43] In the Authority's view, a less persistent employer might have been inclined to stop trying to engage with the employee at that point, but in fact after the raising of the personal grievance, there was still a ready willingness on the part of Hapag Lloyd to try to meet Ms Stevens' needs and to try to retain her in the business.

[44] It was not until Ms Stevens definitively indicated that she would not accept the proposed new role (which happened on 19 April 2013) that Hapag Lloyd had to conclude that the relationship was ending.

[45] Counsel for Ms Stevens maintained in her closing submissions that at the point at which Ms Stevens had refused to accept the proffered position, Hapag Lloyd ought to have engaged with her anew. But what more could it have done? Hapag Lloyd had

continued to try to interest Ms Stevens in the role it had identified for her, tried to explain to her the consequences of her refusal to accept it, but it was never clear to Hapag Lloyd in the early stages of the process that Ms Stevens was completely disinterested in the sales role. That was evident from her evidence to the Authority at the investigation meeting but Mr Carter told the Authority that he was simply oblivious of her view much before that. Clearly, if, as appears to be the case now, Ms Stevens had a firm view that a sales role was not for her, and that is certainly the conclusion the Authority would draw from the evidence she gave at the Authority's investigation meeting, then it is difficult to understand why she did not tell her employer that during the consultation process.

[46] Ms Stevens met with her immediate superior, Ms O'Brien, at Ms Stevens' home on 8 March 2013. The Authority does not think it wrong to characterise Ms O'Brien's approach as effectively trying to talk Ms Stevens into accepting the new role. An email was generated by Ms Stevens after the meeting. That email seeks further and better particulars of the proposed new role. There is simply nothing in the email which would not encourage a reasonable person to conclude that this was a prospective applicant seeking further information about a proposed new role. Nowhere is there any suggestion that acceptance of the role was out of the question.

[47] Furthermore, Ms O'Brien gave very clear evidence to the Authority that she felt close to Ms Stevens, regarded her positively, and thought that if she had anything meaningful to say, she would say it to Ms O'Brien. The words used by Ms O'Brien, in her oral evidence, are quite graphic. She told the Authority:

If she was going to confide in anyone I would have expected her to confide in me. But she didn't. She never told me that she simply would not accept the job because she wasn't interested in doing sales.

[48] It is a truism that the obligation of good faith applies both ways and it is difficult to see why Ms Stevens did not tell the employer while it was trying to consult with her, that there was no way she was ever going to accept a sales role. Above all else, that is fundamental information which she withheld until it was too late.

[49] Whether there are other matters that Hapag Lloyd ought to have considered will be dealt with in the next section of this determination, in particular the proposal that Hapag Lloyd ought to have disestablished another role as well and made both that role and the import roles contestable.

[50] The Authority's conclusion then in relation to this area of the evidence is that Hapag Lloyd fulfilled its obligations to consult with Ms Stevens, first by having her actively engaged in the scoping for the Indian solution, second by seeking her feedback and the feedback of other affected staff once the decision to proceed with the Indian solution had been made, and third by responding appropriately to the feedback that she provided.

[51] If Ms Stevens had provided more fulsome feedback to the consultation, the results might well have been different. In particular, if she had told Hapag Lloyd at an early stage that she was completely disinterested in the sales role and that there were no circumstances in which she would entertain that option, there might well have been a different conversation.

[52] The obligation on an employer is to provide a forum in which it allows its affected staff in a restructuring to engage with it and to ensure that whatever feedback is provided by staff is properly responded to and properly considered. The employer cannot be responsible for the adequacy of the communication provided by the employee and if there are significant matters which the employee omits to disclose (as seems to be the case here), then that cannot be sheeted home to the employer.

[53] The Authority is satisfied that the employer provided the appropriate framework for consultation, considered what feedback it was given, and responded appropriately. It is idle to speculate on what Hapag Lloyd might have done if it had understood at an appropriate time that Ms Stevens was never going to accept the role it offered her.

Was there some other proposal that Hapag Lloyd ought to have promoted?

[54] In submissions on Ms Stevens' behalf, it is suggested that Hapag Lloyd ought to have disestablished the role of Documentation Manager as well. This role was held by Ms Davina Kemp.

[55] This particular suggestion, of disestablishing Ms Kemp's role as well, was allegedly raised by Ms Stevens in her meeting on 8 March 2013 with Ms Sharon O'Brien, who was Ms Stevens' direct manager. Ms Stevens says that she proposed this suggestion by indicating that she should have been given the opportunity to effectively compete for Ms Kemp's role rather than the alternate role that Hapag Lloyd had suggested.

[56] Ms Stevens' evidence on the point is not accepted by Ms O'Brien. Ms O'Brien's evidence is that there was discussion about Ms Kemp but she did "*not recall any specific question regarding the documentation manager role*".

[57] What is more, the email traffic generated by that particular meeting, which the Authority has already referred to, does not refer to the Documentation Manager role either. Ms Stevens wrote an email to Ms O'Brien effectively thanking her for the meeting and seeking further particulars about the Sales Support Manager position.

[58] However, Ms Stevens did raise the matter of the Davina Kemp position again in her 17 April 2013 letter to Hapag Lloyd. Hapag Lloyd's response the following day was to reject the reference to the Davina Kemp position, essentially on the footing that that position was not being disestablished.

[59] Again, the Authority is forced to conclude that Ms Stevens has, as it were, "*missed a trick*". If she wanted to raise an issue about the disestablishing of Ms Kemp's position along with her own, the time to do that was when the employer was looking at the new structure and not after it had been determined. After all, as the Authority has already made clear, the structure was set by decision announced on 19 March 2013 and to raise the matter fully a month later invites the response that Hapag Lloyd made.

[60] In all the circumstances then, the Authority is not persuaded that the suggestion of disestablishing the Documentation Manager's position has any force because it was made after the structure was determined by Hapag Lloyd. Had it been made in a timely manner, Hapag Lloyd could have considered it as an alternative but it was not given that opportunity.

[61] In the circumstances, the Authority does not feel that that particular suggestion can be taken any further. Moreover, there is nothing else before the Authority by way of an alternative strategy which was put to Hapag Lloyd within time and which it might have considered.

Has Hapag Lloyd fulfilled its obligations pursuant to contract?

[62] There are two provisions which the Authority must consider to answer this question. The first is clause 7(b) which is in the following terms:

Notwithstanding the foregoing, you shall not be entitled to redundancy compensation in the event that you are offered reasonable and alternative employment on substantially the same terms and conditions ...

[63] It has been the position adopted by Hapag Lloyd throughout this dispute that it has fulfilled its obligations in terms of that provision.

[64] Hapag Lloyd says that by offering Ms Stevens the position of Sales Support Manager, it was in fact offering her reasonable and alternative employment on substantially the same terms and conditions.

[65] It says that because the Import Manager and the Sales Support Manager are on the same grade in its management structure (Grade 5(b)), and as a consequence each has the same salary band and the same terms and conditions of employment.

[66] While Ms Stevens accepts that that is the factual position, she denies that the actual roles are similar because the content of the work required of her in her former role of Import Manager is, in her terms, fundamentally different from the content of the role in the proposed new position of Sales Support Manager.

[67] The Authority accepts that there is some difference in the detail of each role because the job content is different. Put at its simplest, the obligations of the sales support area are different from the obligations of the import area.

[68] But Hapag Lloyd counters by saying that the two subject positions are both management roles and that each of them has as its fundamental requirement the need for the incumbent to manage a group of staff. Hapag Lloyd says that these are generic management roles and Ms Stevens, as a capable and effective manager in the role of Import Manager, could equally be a capable and effective management in the Sales Support Manager role.

[69] But Ms Stevens counters by pointing to the “*hands on*” tasks that she performed as Import Manager which were fundamentally different from the hands on tasks that she would expect to perform as a Sales Support Manager. What she told the Authority at the investigation meeting was that each role, as well as requiring general management experience “*needed a specialised area of expertise as well*”. Further, she told the Authority that the “*majority of my time*” was doing the hands on work, not the management work.

[70] That view is challenged by Hapag Lloyd which maintained in its evidence that it was never aware that the majority of Ms Stevens' time was spent in "*hands on*" specialised work. Indeed, it simply doubts that that is the case. Furthermore, Hapag Lloyd points to the similarity between the job descriptions for the two roles and, not surprisingly, the evidence before the Authority from the employer was that it knew its business and was able to identify, in effect, who was doing what.

[71] In cross-examination from counsel for Ms Stevens, Mr Carter acknowledged that Ms Stevens did not presently have all the skill set necessary for the Sales Support Manager, but he pointed out first that Hapag Lloyd was proposing an extensive training regime which would provide Ms Stevens with the necessary expertise and second his evidence was that the "*transport process*" was not complex and that Ms Stevens "*would have been broadly aware of the transport chain*".

[72] Moreover, Ms O'Neil, Ms Stevens' direct manager, gave evidence to the Authority that the only hands on work that Ms Stevens regularly performed was to look after a particular shipping service provided by Hapag Lloyd but that that particular service was both infrequent and low volume and was therefore simply not on all fours with the work done by the import coordinators who reported to Ms Stevens. It followed that, from the employer's perspective, Ms Stevens' primary role was as a generic manager and there was no reason why she could not distinguish herself in the new role as she had in the former.

[73] In the end, the Authority must decide whether the positions were in fact substantially similar or not. In *Carter Holt Harvey Ltd v. Winston Wallis* (CC40/98) the Employment Court held that the test was an objective one requiring the Tribunal to ask whether a reasonable person would consider there was a sufficient difference between the two roles to break the continuity of employment, having regard both to the characteristics of the employee and of the two positions.

[74] This was a case where, like the present situation the "*employee wanted to be made redundant and his employer refused to oblige him....*" The point to emphasize in the test postulated by the Court in *Wallis* is that the distinction between redeployment and an entirely new employment is a fine one, to use the phrase adopted by the Employment Tribunal at first instance in *Wallis*. As Chief Judge Horn put it in *Group Rentals NZ Ltd v. Canterbury Clerical Workers IUOW* [1987] NZILR 255: *Did*

this proposed redeployment amount to a fundamental alteration in the nature of her employment?

[75] Furthermore, submissions for Hapag Lloyd refer the Authority to the Authority's own decision in *Green v. Enviro Waste Services Ltd* [2012] NZERA Christchurch 117 where the Authority opined that the phrase "*substantially similar*" in relation to two positions referred both to the terms and conditions of the two positions and the duties.

[76] Looked at practically it is apparent on the evidence in this case that the terms and conditions of the employment offered, as against the former position, are in fact the same. There can be no objective basis on which any other finding is possible. The positions are on the same grade, have the same terms and conditions, require work in the same location, are both managerial and require the direction of a small team, are in the same industry and it is difficult to see how they could require a different skill set.

[77] The only potential area of difference is in the actual work of each department, the work that Ms Stevens referred to as "*hands on*" work. But on the facts before the Authority, even if the hands on work in the two roles was quite different, that difference of itself does not sway the Authority to a conclusion that these roles were fundamentally different.

[78] As the Authority has just observed, the terms and conditions of employment are in fact the same and the Authority is satisfied on the evidence that the managerial responsibilities are the same or so similar as to make it impossible to draw any distinction which means that the only area of potential difference is in any hands on tasks that might be provided.

[79] In that respect, it seems to the Authority correct to assume that there are differences. Hapag Lloyd would not have contemplated a training package for Ms Stevens if it was not satisfied that she needed to be trained in the new role and if she needed to be trained in the new role then there must be skills that she does not have.

[80] But the Authority's conclusion is that the difference in the hands on portion of the two roles is the only difference and as that, on the evidence the Authority heard, is a very small part of the job content, the Authority is not persuaded that the jobs in fact

are substantially dissimilar, particularly as the Authority has already satisfied itself that the terms and conditions of the two positions are exactly the same.

[81] It follows from those observations that the Authority is satisfied on the balance of probabilities that the two positions are substantially similar. Thus, in offering Ms Stevens the position of Sales Support Manager in replacement of the position lost in the restructuring, Hapag Lloyd was fulfilling its contractual obligations pursuant to clause 7(b) of the operative employment agreement.

[82] Consequently, by refusing to accept that position, Ms Stevens placed herself in the position of falling within the terms of clause 7(b) of the employment agreement and ensuring that she had no entitlement to redundancy compensation as a consequence.

[83] In the Authority's considered opinion then, applying Chief Judge Horn's test in *Group Rentals* there is no sense in which this redeployment would have amounted to a fundamental alteration in the nature of Ms Stevens' employment. Nor could it be said that there was sufficient difference between the two positions so as to break the essential continuity of the employment, having regard both to the nature of the two positions and the characteristics of Ms Stevens, so far as the Authority can discern it: *Wallis* applied.

[84] The next issue the Authority must determine is whether Ms Stevens was properly and adequately advised of the consequences of her decision. The Authority has already noted that on no less than four occasions, Hapag Lloyd set out in writing what it considered was the consequence of Ms Stevens failing to accept the proffered position. No doubt those observations were repeated in meetings as well, as Mr Carter's evidence to the Authority suggests.

[85] In those circumstances, it is difficult to see how Ms Stevens can reasonably maintain that she did not understand the consequences of the decision she was making. She had persisted throughout the consultation process with the view that she was being made redundant and was therefore entitled to redundancy compensation while the employer had, correctly in the Authority's view, referred to clause 7(b) of the operative employment agreement, the effect of which was that if Ms Stevens was offered a position that was substantially similar to the one she had previously held, she was not entitled to redundancy compensation if she refused the proffered position.

That is precisely what happened and that is why Ms Stevens was not paid redundancy compensation.

[86] Ms Stevens appears to have formed the view that there was a necessary and complete relationship between the disestablishment of her position and her entitlement to redundancy compensation. Put simplistically, she maintained that because she was redundant it necessarily followed that she would have her position terminated for redundancy and be entitled to the redundancy compensation contemplated by the operative employment agreement.

[87] But as Hapag Lloyd has been at pains to point out, that analysis fundamentally misunderstands the position. First, Hapag Lloyd stoutly maintains that while Ms Stevens' position has been disestablished, she herself is not redundant to the business because Hapag Lloyd has sought to retain her services.

[88] Indeed, Hapag Lloyd has maintained throughout this dispute that it has an obligation to redeploy Ms Stevens and that it has done its best to do that.

[89] Ms Stevens counters with the allegation that the thrust of Hapag Lloyd's policy was simply to avoid paying her any compensation and the emphasis on redeployment was just a ruse. Ms Stevens also points out that there is nothing in the employment agreement that refers to the primacy of redeployment.

[90] That observation is true as far as it goes, but when the issue was put to Mr Carter in evidence, his response was to say that Hapag Lloyd felt it had an obligation to find any option short of dismissal for redundancy and it did its best to achieve that whenever possible.

[91] However, he made the point that it was not the case that Hapag Lloyd always redeployed in restructuring situations which was the effect of what Ms Stevens was saying. In fact he pointed to previous instances where Hapag Lloyd had dismissed for redundancy after a restructure.

[92] Accordingly, the Authority is satisfied that this is not an example where two parties to a dispute see the matter differently and each may have some logic on their side. This is a situation where, sadly, Ms Stevens fundamentally misunderstood the position. Her analysis, in the Authority's considered view, simply overlooked the effect of clause 7(b) of the operative employment agreement. As the Authority has

been at pains to emphasise, that clause gave Hapag Lloyd the opportunity of offering Ms Stevens a substantially similar position when her position became surplus to requirements, and if she failed to take the offer, then she had no entitlement to redundancy compensation. That is what the clause says and that is its inexorable effect. To repeat Chief Judge Goddard's observation in *Westpac Banking Corp. v. Stephen* [2000] 1 ERNZ 566: "*The contract made its own rules. The (employer) took advantage of them, as was his right.*"

[93] Ms Stevens, through her representative, maintained that this provision was "*harsh and oppressive*". For instance, during the course of cross-examination of Mr Carter, counsel for Ms Stevens suggested that Hapag Lloyd's proposal that Ms Stevens take a job she did not want or miss out entirely on the redundancy compensation to which she was entitled, puts the position quite graphically.

[94] But it begs more questions than it answers. First, Hapag Lloyd did not know that Ms Stevens would never have considered that position, or at least it did not know that that was her stance until it was far too late. Second, that is what the employment agreement says and Hapag Lloyd is entitled, as a party to the agreement, to rely on its terms.

[95] Ms Stevens went further with this argument and maintained that Hapag Lloyd's behaviour was itself was also misleading and/or deceptive. As Hapag Lloyd correctly maintained, none of those allegations were made during the course of the consultation process when Ms Stevens was still in its employment but all were advanced during the Authority's investigation meeting.

[96] The Authority rejects these allegations out of hand. There was no evidence to support them and they were not put to the employer during the employment.

[97] The provision in question in the Authority's judgment attempts a balance between the interests of the employee and the interests of the employer. It seeks to encourage the employer to retain staff after a restructure rather than adopt the easy option of dismissal for redundancy. Conversely, it seeks to encourage the employee to remain in the employment and not to lose the employment even where they lose the role.

[98] The Authority heard no evidence whatever that the clause was bargained for unreasonably or unjustly or that it was imposed on Ms Stevens against her wishes or

even that she complained about it during the negotiation of the employment agreement. All that seemed to be happening was that Ms Stevens was protesting about the effect of the clause once Hapag Lloyd sought to rely upon it.

[99] The Authority is not persuaded the clause is harsh and oppressive or that Hapag Lloyd was misleading and deceptive in relation to the provision either. Hapag Lloyd made it perfectly clear from the outset that it sought to rely on this clause. The very first letter it wrote to Ms Stevens offering the new role referred to clause 7(b) of the operative employment agreement and made it clear that Hapag Lloyd was relying on it. It is difficult to see how that could be either misleading or deceptive. This is particularly so when it is recalled that Hapag Lloyd persisted with its reliance on that clause and persistently referred to it in three subsequent written communications which are before the Authority, and presumably in the oral discussions as well.

[100] Ms Stevens was either represented by counsel or at least properly advised throughout the process so the Authority is not satisfied that there was any power imbalance between the parties.

[101] The final issue under this general head of the determination relates to the provisions of clause 8. Clause 8 of the operative employment agreement is an employee protection provision. The effect of the clause is to require a particular process where a restructuring “*as defined in the Employment Relations Act 2000*” happens.

[102] The requirements are that the employer will negotiate with the new employer to establish if the employee will be required by the new employer and if not will then “*discuss with you any entitlements to notice and/or compensation you may have under clause & above.*”

[103] Clearly, all this does is refer the parties back to clause 7 for any entitlements the employee may have pursuant to that clause. If, as in the present case, there are no entitlements because of the conclusions the Authority has reached about the application of Clause 7 b) that concludes the process. There is no mandatory entitlement to redundancy compensation in clause 8. All that clause 8 does is refer the parties back to Clause 7, which remains the operative clause.

[104] Clause 8 would create an obligation on Hapag Lloyd to negotiate with any entity taking over the work previously performed by Ms Stevens if that entity was

performing the work through contractors rather than with employed staff. But as the Authority understood the evidence that was not the position; staff in India were to be employees rather than contractors.

[105] But even if the Authority is mistaken about that circumstance, default by Hapag Lloyd does not change the position concerning the payment of redundancy compensation which derives from Clause 7, with its qualifications and limitations, not from Clause 8.

[106] For those reasons then, the Authority rejects the contention made on Ms Stevens' behalf that clause 8 can apply to the present fact situation.

Determination

[107] The Authority is satisfied that Ms Stevens has no viable personal grievance and therefore has no entitlement to remedies.

[108] For reasons traversed in the determination, the Authority is not persuaded that there has been bad faith by Hapag Lloyd nor any behaviour justifying the awarding of a penalty.

Costs

[109] Costs are reserved.

James Crichton
Member of the Employment Relations Authority