IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 16
5405643

	BETWEEN	STEPHEN ROBERT WILLIAMS Applicant
	A N D	GEA NU-CON LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Garry Pollak, Counsel for Applicant Rebecca Rendle, Counsel for Respondent
Investigation Meeting:	14 October 2013 at Auckland
Date of Determination:	17 January 2014

DETERMINATION OF THE AUTHORITY

Preliminary matter

[1] This matter has already been the subject of a determination of the Authority issued as [2013] NZERA Auckland 522. In that determination, issued on 14 November 2013, Member Fitzgibbon dealt with two discrete issues relating to "without prejudice" communications touching on this matter. Both the "without prejudice" communications concerned the same factual matrix, in broad terms, but were separate in time.

[2] The first of the matters traversed in the Authority's earlier determination concerns the decision made by Member Fitzgibbon to exclude "without prejudice" correspondence from the file presented to the investigating member (Member Crichton). Member Fitzgibbon determined that her decision to exclude that material from the investigation file was not a "determination" within the meaning that term has in the Employment Relations Act 2000 (the Act).

[3] Of more significance for present purposes is the second issue dealt with in Member Fitzgibbon's determination. That decision was to withhold from the evidence before the Authority a without prejudice agreement which the applicant (Mr Williams) had referred to in his evidence to the Authority.

[4] As Member Fitzgibbon describes, this issue arose during the course of the investigation meeting. In para.(8)(h) of Mr Williams' brief of evidence he refers to a document he called a "without prejudice settlement agreement".

[5] In order to give the parties a proper opportunity to be heard on that aspect, the presiding Authority Member requested counsel to address the issue by way of memorandum.

[6] Member Fitzgibbon considered the memoranda filed by counsel and concluded that the document referred to by Mr Williams was privileged and therefore not admissible in evidence.

[7] It follows that a consideration of that document and any reference to it by Mr Williams will not form part of any of the Authority's determination of the substantive matter.

Employment relationship problem

[8] Mr Williams alleges that he has suffered an unjustified dismissal and an unjustified disadvantage. Those allegations are resisted by the respondent (GEA Nu-Con).

[9] In relation to the second grievance just referred to, GEA Nu-Con contends that the allegations relied on by Mr Williams all predate the justiciable period (90 days before the grievance was raised)and so leave would be required to enable the matter to proceed. Leave has not been sought and in a practical sense, the case proceeded with the matters previously identified as a separate disadvantage grievance, being used to support Mr Williams' central claim of unjustified dismissal. It follows that the disadvantage grievance is not further considered in this determination.

[10] Mr Williams commenced employment at Nu-Con Limited (which subsequently became part of the respondent employer) in February 1990 as a project engineer. Mr Williams worked in a number of different senior roles in the company,

both in project management and in sales, and it is common ground that he was well regarded and an effective and efficient senior employee.

[11] Nu-Con Limited was a multinational with subsidiaries operating overseas and Mr Williams worked extensively overseas as well as in New Zealand.

[12] In mid-2009, Mr Williams' role changed, by consent, to become purely a sales role.

[13] Mr Williams' evidence is that he was concerned about the lack of role specificity and that amongst other things, in January of 2011, he spoke to the then company chairman seeking to have the matter addressed. The company chairman declined to take any steps because the company was in the course of being sold at that point.

[14] In September 2011, Nu-Con Limited was purchased by GEA Process Engineering Limited and the new company became the respondent, GEA Nu-Con.

[15] Shortly after the sale and purchase became effective, GEA Nu-Con under took a review of its staffing resources. A memorandum dated 28 September 2011 from the new managing director to the sales team (including Mr Williams), proposed to disestablish *"as a minimum one of the 5 (five) positions"*.

[16] Mr Williams was invited to meet with the managing director and the human resources manager, Ms Smith, on 28 September 2011 and in that private meeting was advised of the restructuring plan.

[17] However, Mr Williams had booked annual leave commencing 1 October in which he planned to take his family for a holiday in Europe. That arrangement obviously clashed with GEA Nu-Con's restructuring proposals.

[18] Mr Williams' unchallenged evidence is that GEA Nu-Con offered him the option of the restructuring process being undertaken prior to his departure on annual leave or after his return. He chose the former.

[19] As a consequence, the restructuring proposal proceeded and a schedule of questions was provided to Mr Williams and his four sales colleagues. Those questions gave an insight into GEA Nu-Con's focus in the proposed restructure. It is

common ground that GEA Nu-Con sought to emphasise team skills as it worked through the process.

[20] An individual meeting between Mr Williams and GEA Nu-Con's managing director and human resources manager subsequently occurred. GEA Nu-Com's position is that Mr Williams did not interview well and that he appeared fixated on the alleged lack of role definition. Further, unlike some of the other interviewees, GEA Nu-Con thought Mr Williams was unprepared, did not advocate his case well, and by way of example, did not submit a written response to the employer's questions.

[21] GEA Nu-Con also assessed Mr Williams' teamwork and people management skills as less impressive than those of his colleagues.

[22] It is common ground that Mr Williams asked GEA Nu-Con to make and communicate its decision on the restructure prior to his departure on annual leave.

[23] Accordingly, GEA Nu-Con advised Mr Williams on 30 September 2011 of its decision, the effect of which was that Mr Williams' position had been declared surplus to requirements and accordingly Mr Williams was redundant. Another member of the sales team was made redundant at the same time as Mr Williams.

[24] Mr Williams' personal grievance was raised by email dated 5 December 2011.

Issues

[25] The only issue in the present case is whether Mr Williams has made out his claim that he was unjustifiably dismissed from his employment.

Was Mr Williams unjustifiably dismissed?

[26] Mr Williams' dismissal post-dated the change in the law effected by s.15 of the Employment Relations Amendment Act 2010 which substituted a new s.103A with effect from 1 April 2011. It follows that the test the Authority must apply for justification is whether a fair and reasonable employer **could** have reached the conclusion to dismiss at the time that the decision to dismiss was made.

[27] As has been made abundantly clear by, for instance, *Angus v. Ports of Auckland Ltd* [2011] NZEmpC 160, the law now is that so long as the employer's actions are one of the outcomes that a fair and reasonable employer could decide upon

in the particular circumstances of the case, then that outcome will be found to be justifiable.

[28] As the Full Court said in *Angus* at para.[23]:

> *The legislation contemplates that there may be more than one fair and reasonable response or other outcome that might justifiably be applied by a fair and reasonable employer in the circumstances.*

[29] It follows then that:

> *The effect of new s.103A is that so long as what happened (and how it happened) is one of those outcomes that a fair and reasonable employer in all the circumstances could have decided upon, then the Authority and the Court will find that justified: Angus para.37*

[30] Mr Williams claims that GEA Nu-Con's process was both substantively and procedurally flawed. Conversely, GEA Nu-Con maintained that this was a stock standard redundancy, activated for proper business purposes, after a full and fair consultation process. It should perhaps be added that the process and the timing of the process is perhaps the key element in the dispute between these parties.

[31] GEA Nu-Con says that the timing and the process it adopted was driven by Mr Williams' intention to take annual leave commencing on 1 October 2011. There is no criticism, express or implied, about his intention to take that leave. He was travelling to Europe with his family for an extended break and clearly those arrangements could not be disestablished.

[32] What GEA Nu-Con did (and this by common consent), was to offer Mr Williams the opportunity of dealing with the matter either before he left, or after he returned. Again by common consent, Mr Williams chose to have the matter dealt with in advance of his departure.

[33] That meant that the process had to be undertaken in a very short compass because the time window that was available from the date of the first intimation that there was to be a restructuring proposal consulted about (28 September 2011) to the date of Mr Williams' departure overseas (1 October 2011), was very short indeed.

[34] Mr Williams' evidence is that he was led to believe that whether he chose the process before his departure or after his return, the process would be the same. GEA Nu-Con accepts that statement as an accurate reflection of its position but absolutely

denies the inference Mr Williams then draws that the process would have taken the same length of time after his return from holiday, even although there would not then be any arbitrary end date as was the case before he went on leave.

[35] Mr Stannard, the managing director, made the point very strongly in his evidence to the Authority when he said:

> *… we told Steve* [Mr Williams] *that the process would be the same on his return meaning that there would be interviews and a selection process – not that it would be the same length of time. If* [Mr Williams] *had said that he needed further time to consider the proposal or prepare for the interviews he could have let us know and the process could have been conducted on his return to allow him more time.*

[36] In response to a series of questions from counsel for the respondent during the investigation meeting, Mr Williams confirmed that he raised no objection to the process, no objection to the timeframe, no objection to the information provided by the employer, no objection to the criteria used for selection and indeed made no complaints about the process at all until after the employer had decided that he was one of two sales staff whose positions would be disestablished.

[37] The Authority is not persuaded that the timeframe for the process of consultation would have been the same if the process had been deferred until Mr Williams' return from annual leave. Plainly, on Mr Stannard's evidence, if more time had been requested it would have been granted. The Authority finds no reason to not accept that evidence at face value. Mr Stannard was a credible witness.

[38] In fact, what the employer did was it acceded to Mr Williams' specific request that the matter be dealt with before he went on leave. Of necessity, that meant a truncated process in terms of time. The Authority understands Mr Stannard's frustration that, having agreed to truncate the process in order to fit it in within the very limited time available, Mr Williams then criticises GEA Nu-Con for the short timeframe. The Authority is satisfied the short timeframe was a consequence of GEA Nu-Con offering Mr Williams two options and him choosing the one that best suited him. It is not fair or reasonable for Mr Williams to now complain about the timeframe when he himself chose that timeframe.

[39] What is more, the legal position is clear enough that a short process will not necessarily invalidate the efficacy of the process legally. The issue must be whether the speed of the process produced unfairness to the affected employee and here there is simply no evidence of that.

[40] The Authority has been directed to two recent decisions in the Authority itself where a short timeframe for a consultation process did not invalidate the process: *Moore v. Carter Holt Harvey Ltd* [2013] NZERA Auckland 133; and *Hardikar v. Klein Ltd* [2013] NZERA Auckland 272.

[41] The Authority might well have concluded differently in the present case if Mr Williams had sought more time and that had been denied him or indeed if the evidence suggested that he had had the truncated timeframe imposed upon him. But the present case is an example where the truncated timeframe was a function of his choice and it cannot be fair and just to find the employer culpable for a shortened timeframe when that timeframe was specifically chosen by the affected employee.

[42] There are other factors which bear on the situation. First, and perhaps most importantly, the employer's business had just been through a sale and purchase process which had taken effect on 1 September 2011. The evidence is clear that by the end of that same month, Mr Stannard had formed a provisional view about the sales force of the combined business.

[43] Moreover, Mr Williams would have been aware from mid-June 2011 of the possible takeover of his then employer by a competitor business and on his own evidence, he was aware of the possibility of restructuring from that point.

[44] The Authority concludes then that while the timing of the consultation process was brisk, that was explicable first by the context, second by Mr Williams' explicit request that the matter be dealt with before he went on leave, and thirdly by Mr Williams' failure at the time to raise any protest, either about the timeliness of the consultation or indeed about anything else to do with the process. It follows that the Authority rejects the suggestion that the speed of the process of necessity invalidated the efficacy of it.

[45] The next issue to deal with in terms of the process adopted by the employer is the various criticisms made by Mr Williams about the selection process. On the face of it, the selection process was a straightforward one. It involved the dissemination

first of a broad statement of the proposal (the document dated 28 September 2011), a general meeting with the affected staff, the further dissemination of the questions which would inform the selection process, and then interviews with each of the affected employees, conducted by Ms Smith and Mr Stannard for the employer.

[46] The material referred to (the memo of 28 September 2011 and the subsequent questions), did not elicit any objection from any of the affected employees at the time, including Mr Williams.

[47] There was no suggestion for instance that the information provided was somehow inadequate or unsatisfactory despite Mr Williams' now claiming that he ought to have been provided with detailed financial information to support the case for change.

[48] Ms Smith makes two interesting observations in response in her evidence to the Authority. The first is to make the obvious rejoinder that the employer provided all the information it had. Ms Smith maintained (and the Authority accepts) that there was no other information. There was nothing held back by GEA Nu-Con from the consultation process.

[49] More interestingly, she maintained that there was a difference between a restructuring driven by the necessity to take cost out of the business (as where a business was in serious financial difficulty for example), and a restructuring *"where there was a new order of business (as was the case here)"*.

[50] Ms Smith maintained that if the primary driver of the restructure was the need to take cost out of the business, then there might well be a stronger argument for generating more financial material to justify potential cost savings. But she maintained that this was not such a case. Indeed, her contention was that this was a case where the employer was restructuring simply to improve the overall effectiveness and efficiency of its business because the effect of the reordered business on and from 1 September 2011 was to bring together two former competitors, each of which had sales teams working in many of the markets that both of the former entities traded in.

[51] Ms Smith was really making the point that it was simply business common sense to remove duplication so as to improve the efficiency of the new combined business.

[52] That view is supported by Mr Stannard, whose review it was. He described the rationale for the review as *"… to ensure we avoided any duplication of functions and that we reduced our total overheads in the company without compromising its operational efficiency"*.

[53] Later on in his evidence, he talked about the employer having *"a clear strategic advantage (when) the sales channels are in market"*. The Authority understands that passage to mean that it is more effective and efficient for a business such as GEA Nu-Con to have its salespeople based in the same geographical location as the people that they are selling to. This has benefits including operating within the same time zone, for instance.

[54] Mr Stannard also explained in his evidence the rationale for the questions posed to each of the affected staff and the underpinning principle that what the employer was looking for was the best fit from an organisational perspective. Accordingly, the candidates who would likely do best in the process would be those candidates who the employer decided, based on their responses to the questions asked, would best integrate into the new order of things.

[55] Mr Stannard emphasised in his evidence that there was no criticism whatever of Mr Williams' technical skills. Indeed he went further and said there was no criticism of any of the affected staff's technical skills. All of them were good at selling the various products that they sold. The issue for the company was, given a new owner, given a new structure, given the consequent rationalisation of that, which of those affected salespeople would fit best into the new arrangements.

[56] As is apparent, Mr Williams was one of the two employees chosen by GEA Nu-Con as being less able to adapt to the new environment than the three who were chosen to continue.

[57] Of course, this is an evaluative process. That is the whole purpose of it. Just as when several able outside applicants apply for one position and the prospective employer has to make a choice about which of those persons is to be employed and which not, so with a consultation process involving a possible restructure, the employer is left in the unenviable position of having to make evaluative decisions about existing staff members.

[58] As counsel for the respondent employer note in their closing submissions to the Authority, that is the very point that His Honour Judge Couch was addressing in *Bourne v. Real Journeys Ltd* [2012] NZEmpC 120.

[59] Counsel referred me to this passage from His Honour's judgment:

> *Every selection process will almost inevitably involve subjective assessment of the candidates by the members of the selection panel. In most cases, the impression made by the candidates, their ability to interact with others and the way they react to challenges will be entirely valid considerations. Even more concrete criteria such as the extent of an applicant's skill and experience will require assessment by the members of the selection panel and therefore reflect their subjective view. Accordingly, criteria requiring subjective assessment cannot be objectionable in themselves. In this case some of the criteria undoubtedly were of that nature but I find that was justifiable. It was what a fair and reasonable employer would have done in the circumstances.*

[60] Those helpful observations emphasise the point that it is difficult to imagine a selection process in the employment jurisdiction which does not involve some use of subjective assessment and as Judge Couch makes clear, the fact that the assessment is subjective cannot be objectionable in itself. In the instant case, the Authority is satisfied that a fair and reasonable employer could have used the assessment criteria that it did and could have concluded that Mr Williams was one of two candidates who fitted into the new organisation less well than three others.

[61] Having said that, the Authority needs also to emphasise that there is nothing objectionable about the process in itself. The Authority is satisfied that all of the material that the employer had about the proposal was made available, that the questions that were to be asked at the assessment interview were provided in advance and were provided to all the candidates at the same time, and that a fair and reasonable employer could have decided that those questions, with their underpinning principle of best fit for the new organisation going forward, was an appropriate criteria on which to make judgments about who should stay and who should go.

[62] Indeed, given Mr Stannard's evidence that all of the affected staff were able salespeople, the identification of *"best fit for the organisation"* seems a logical criteria for an employer to use in differentiating between staff. If the employer is already satisfied that all of them could do the job in a technical sense, the only other important aspect of any of them continuing in the employment was their ability to get on with other people and fit in with the new order of business.

[63] Next, Mr Williams is critical of the fact that he was judged negatively for his performance at interview. He was told, for instance, that some of the applicants provided written submissions and as he did not he was marked down for that. He complains that he was not asked for a written submission and had he been asked for one he would have provided it.

[64] But that of course misses the point. No one was asked for a written submission. Yet, some of the successful applicants chose to provide the employer with a written submission which emphasised presumably their good points and the reasons why they should be preferred over others. After all, this is a competitive process (five becomes three) and in such a process the sensible applicant seeks to make best use of the resources available. All GEA Nu-Con is saying in relation to Mr Williams is that he did not choose to be as effective in self-marketing as some of the other candidates.

[65] Moreover, GEA Nu-Con observes that Mr Williams seemed fixated about his belief that the alleged uncertainty about his role definition would somehow place him at a disadvantage.

[66] Both Mr Stannard and Ms Smith make the observation in the evidence they gave to the Authority that they tried to get Mr Williams off this subject matter and back to actually responding to the employer's pre-circulated questions, but only with limited success.

[67] In the result, GEA Nu-Con thought that Mr Williams had done less well than others in the evaluative process and, given that each of the affected staff were technically able, the Authority is persuaded that a fair and reasonable employer could have decided to make the choice it did using the criteria of best fit for the organisation going forward, and further that GEA Nu-Con could have decided that because other staff performed better in the interview, were more convincing in their self-marketing, and presumably answered the pre-circulated questions more ably, those staff who did not achieve those milestones (including Mr Williams) were the persons whose positions ultimately were disestablished.

[68] This is particularly so when the very clear evidence from Mr Stannard and Ms Smith on the performance of the three successful candidates is considered. Both of them told the Authority that three employees *"performed particularly strongly"*.

Given the Authority's acceptance that an evaluative process is not only appropriate but legally permissible, the Authority is persuaded that GEA Nu-Con could reach the conclusions it did to the disadvantage of Mr Williams.

[69] It follows from the foregoing analysis that the Authority has not been persuaded that there is any difficulty in the process adopted by the employer in consulting on the proposed restructure. However, that does not deal with Mr Williams' contention that this was not a genuine restructure at all.

[70] The law on this aspect is clear. The Authority is satisfied the well known passage from the Court of Appeal decision in *GN Hale & Son Ltd v. Wellington Caretakers IUOW* [1990] ERNZ SelCas 843 is still good law:

> *… an employer is entitled to make his business more efficient, as for example by automation, abandonment of unprofitable activities, reorganisation or other cost saving steps, no matter whether or not the business would otherwise go to the wall. A worker does not have a right to continued employment if the business can be run more efficiently without him.*

[71] In the instant case, the Authority is satisfied on the evidence it heard that Mr Stannard formed a provisional view that his newly enlarged business could be made more efficient by being reorganised in terms of its sales force, notwithstanding that that was not necessary to ensure the business's survival. Further, the fact that the consequence of such a decision, if implemented, would have been the loss of one or more positions, is not a reason for the business not to take that decision.

[72] As the Authority has already noted, Mr Stannard sought to marry the sales force to the geographical area in which that sales force was operational and to reduce duplication as a consequence of the amalgamated business.

[73] Looked at in the round then, the Authority finds nothing in the genuineness of the employer's decision that is able to be challenged on the evidence. What the Authority heard at the investigation meeting was that this was a business decision, made as a consequence of an amalgamation of two formerly competing business entities, that it was made after an investigation by the incoming managing director soon after the sale and purchase had taken effect and on any reasonable analysis, there is nothing in the evidence to suggest this was anything other than an ordinary business decision made for ordinary business reasons.

[74] Those conclusions of the Authority seem to be supported by the history of the matter since Mr Williams' position was disestablished. The business has run successfully without the staff who were let go in 2011 and an increase in sales staff now by one is entirely a consequence of a forthcoming retirement. The Authority accepts Ms Smith's evidence on that point.

[75] The Authority must also say that it is not attracted by Mr Williams' contention that there was an ulterior motive for his dismissal because there is simply no evidence to support that conclusion.

[76] Mr Williams maintains that his salary was a problem but the evidence the Authority heard is that his salary is within the band of salespeople employed by GEA Nu-Con and in any event it is difficult to understand why the employer would have increased his salary immediately before the purchase but with the full knowledge of the incoming management team, if there was a problem with the level of his salary.

[77] Mr Williams' other contention is that his allegedly *"uncertain and undefined"* job was also a problem, but again the evidence does not support that. Most persuasively from the Authority's perspective is the fact that it is apparent on the evidence that Mr Williams worked effectively for his old employer for fully two years prior to the purchase with his allegedly defective job description.

[78] Also relevant is the fact that Mr Stannard indicated that had Mr Williams been identified as one of the staff to remain in the employment, he would have worked with Mr Williams to craft an updated job description.

[79] But the short point is that neither of those factors were, on the evidence, factors that the employer considered. That is the evidence the Authority heard. Indeed, on the issue of the job description, the only person who seems to have been anxious about the apparently inadequate job description was Mr Williams himself. The employer's evidence was that Mr Williams was a valued employee who was working effectively and well in his role for two years prior to the sale and purchase taking effect and that the apparent inadequacies of the job description simply did not matter.

[80] It follows from the foregoing observations that the Authority is also not persuaded that GEA Nu-Con was activated by any improper ulterior motive. This was a genuine restructure for proper commercial reasons which resulted in the

disestablishment of Mr Williams' position and thus the termination of his employment.

[81] The final question the Authority must decide is whether there is any basis on which Mr Williams can look to obtain relief because of GEA Nu-Con's failure to redeploy him.

[82] It seems to be accepted that within the group of companies under the broad banner of GEA Nu-Con, there may have been positions to which Mr Williams could have aspired at some point after the redundancy declaration was made.

[83] But the legal position is clear. There is no obligation on an employer to redeploy an employee within a group of companies.

[84] Unless there is a contractual obligation to do so (and there is no such contractual obligation here), an employer is not under any obligation to offer redeployment to an employee in an entirely separate legal entity, at least in part because such entirely separate legal entities have no employment relationship with the affected employee and thus no employment obligations.

[85] So far as the Authority is concerned, that deals with the matter completely. There were no opportunities to redeploy within the employer and redeployment within another legal entity is not part of an employer's obligations.

[86] GEA Nu-Con argues in the alternative on this point and says that in any event, even if the Authority were not persuaded of the legal principle involved, as a matter of fact there were no positions available for Mr Williams at the time that the dismissal took effect. Mr Williams provided significant evidence of positions that he said would have been suitable for him within the wider GEA Nu-Con group of companies, but the evidence for GEA Nu-Con is that none of those positions were actually available at the time of the dismissal.

[87] That appears to be the factual position but Mr Williams argues that he should have been given the opportunity of being appointed into one of those roles when they subsequently became available after the date of his redundancy. Certainly, there is no legal basis on which the employer can be required to provide that sort of commitment and the Authority rejects the suggestion that there is a legal basis for that.

Determination

[88] For reasons already advanced, the Authority is not persuaded that Mr Williams has proved his personal grievance for allegedly unjustified dismissal and on that basis his various claims are dismissed.

Costs

[89] Costs are reserved. GEA Nu-Con as the successful party may make an application to the Authority to have costs fixed if it is not able to settle costs with Mr Williams and his representative. Mr Williams will have 14 days from the date GEA Nu-Con files its submissions to file his submissions in response.

James Crichton
Member of the Employment Relations Authority