

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 317/09
5132001

BETWEEN ARNOLD ANINION
 Applicant

AND VODAFONE NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Maria Dew for Applicant
 Anthony Drake for Respondent

Investigation Meeting: 5 March 2009
 2 April 2009

Submissions Received: 2 and 6 April 2009

Determination: 4 September 2009

DETERMINATION OF THE AUTHORITY

[1] Mr Aninion was employed by Vodafone New Zealand Limited (“Vodafone”) from July 1999 until he resigned on 19 September 2008. Mr Aninion claims he was unjustifiably disadvantaged in his employment, constructively dismissed and Vodafone breached its obligations to act in good faith toward him.

[2] Mr Aninion seeks remedies including compensation for lost redundancy compensation or in the alternative, lost remuneration; compensation for loss of a performance bonus, interest on the lost remuneration; compensation for hurt and humiliation, a penalty for breach of good faith, and costs.

[3] Vodafone denies the claims.

[4] In reaching my conclusions in this matter I have considered firstly whether Mr Aninion was disadvantaged in his employment, secondly whether he was constructively dismissed and finally whether Vodafone has breached its obligations of good faith in its dealings with Mr Aninion.

Unjustified disadvantage

[5] I am required to examine Vodafone's actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The section states:

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[6] There is a two step test to establish a disadvantage grievance. Firstly, I must ascertain whether Vodafone's actions disadvantaged Mr Aninion in his employment, and secondly, whether that disadvantage has been shown to be justified or unjustified pursuant to section 103A of the Act.¹

[7] Disadvantage alone is not prohibited by law. It must be a disadvantage that is unjustified. If Vodafone establishes justification for its disadvantageous actions, there is no grievance.²

[8] Finally, disadvantage is not identified narrowly and solely in terms of wages and conditions of employment. Rather it broadly considers effects on the total environment of the employee's employment. A claim for disadvantage depends upon an act or omission by an employer causing disadvantageous consequences, not merely an employee's subjective dissatisfaction at their circumstances.³

[9] Mr Aninion says the following actions by Vodafone breached its duty towards him:

- Unfair treatment in relation to his performance rating and bonus payment;
- Material and unilateral changes occurred to his role from at least February 2008 until July 2008;

¹ *Mason v Health Waikato* [1998] 1 ERNZ 84

² *McCosh v National Bank*, unreported, AC49/04, 13 September 2004

³ *NZ Storeworkers IUW v South Pacific Tyres (NZ) Ltd* [1990] 3 NZILR 452; *Bilkey v Imagepac Partners*, unreported, AC65/02, 7 October 2000

- Vodafone failed, during this period, to formally consult with him about significant changes amounting to a disestablishment of his role or advise him to seek independent advice;
- Vodafone failed to formally confirm his role was materially changed to the extent that he was entitled to elect not to move into the “new” role;
- Vodafone failed to act in good faith in a meeting on 10 July when it retracted the statements made to him on 2 and 3 June, when his manager confirmed that there were significant changes made to his role.

Unfair treatment in relation to his performance rating and bonus payment

[10] Vodafone raised issues it had about Mr Aninion’s performance with him as early as February 2007. After meeting with him, Vodafone implemented informal counselling which consisted of one-on-one meetings between Mr Aninion and his manager. This process continued throughout 2007.

[11] Due to further issues being highlighted with respect to Mr Aninion’s performance a formal counselling session was held in February 2008 at which a performance improvement plan was agreed upon.

[12] In April each year Vodafone undertakes a formal performance assessment called a Performance Dialogue, with all its employees. The process requires employees to rate themselves against previously agreed goals and performance criteria. The Manager also rates the employee before the employee and his manager then meet together to discuss the rating and, hopefully, reach agreement on the rating.

[13] Once the ratings have been discussed and agreed with the employee the performance dialogue forms are subject to a calibration process whereby the Senior Management team consider all completed Performance Dialogue forms and individual ratings from all employees which are then calibrated to ensure consistency across the organisation. In some cases the rating for a particular employee may be reduced during the calibration process. The final rating of an employee will directly impact on the calculation of any bonus that may be payable to the employee.

[14] Mr Aninion had his annual Performance Dialogue on 12 March 2008. During his meeting with his manager it was agreed that Mr Aninion would be rated as “needs

improvement". This rating means that Mr Aninion would only receive 80% of his 2007/2008 bonus.

[15] Mr Aninion's Performance Dialogue form for 2007/2008 was sent to the senior leadership team for calibration against other employees within the sales division. The outcome of the calibration process was that Mr Aninion received a final rating of "poor". This final rating took into account the fact that Mr Aninion was subject to a performance improvement plan and that other employees subject to performance improvements plans were also rated as "poor". A rating of "poor" results in no bonus being paid.

[16] Mr Aninion objected to his "poor" rating and in April met with Ms Green and Mr Clementson, General Manager Media and Entertainment, to discuss the new rating. I find Mr Aninion had a full opportunity at this meeting to put forward his opinion about the rating he felt he should have achieved, and received a full explanation as to why he had received the final rating of poor.

[17] Mr Aninion claims his performance rating was not reflective of his actual performance. Mr Aninion's claim under this heading is that had he been rated "needs improvement" he would have received a bonus of \$3,000. As he had a rating of "poor" he received no bonus.

[18] On 21 April Mr Aninion, after once again disagreeing with his final rating, completed the paperwork to finalise his 2007/2008 performance review where he recorded his dissatisfaction with his final rating.

[19] I find Mr Aninion suffered a disadvantage by the action of Vodafone in reducing his performance rating from "needs improvement" to "poor". He was disadvantaged in that he received no bonus payment for the 2007/2008 year.

[20] Having found Mr Aninion suffered a disadvantage I must now consider whether that disadvantage was unjustified. I find it was not.

[21] The process of performance assessment used by Vodafone applies to all employees equally. Employees are provided with full opportunity to have input to their final ratings until the calibration process. Even following that stage, however, Mr Aninion did have the opportunity, and did raise issues with his final rating after calibration. A meeting took place where Mr Aninion's objections were listened to and

explanations on how the final rating was arrived were provided to him. This provided the opportunity for Mr Aninion to persuade his managers that a different rating ought to have been achieved.

[22] This approach was unsuccessful and Mr Aninion, while unhappy with the outcome accepted his final rating by signing off the paperwork on 21 April.

Material and unilateral changes occurred to his role from at least February 2008 until July 2008

[23] In April 2008 Ms Green and Mr Aninion met to discuss how to move forward given Mr Aninion's performance rating. Ms Green informed Mr Aninion that she would like to consider whether allowing Mr Aninion a higher level of involvement in tasks that were more suited to his strengths; over and above the functions required for his role, would provide him with more challenging opportunities.

[24] Mr Aninion agreed that he would value the opportunity to get more involved. It was agreed that any new tasks would be in addition to his role as Mobile Messaging Communications Operations Manager. At the end of the meeting Ms Green asked Mr Aninion to provide her with a list of development opportunities he would be interested in.

[25] On 2 May 2008 Mr Aninion and Ms Green conducted the first Performance Dialogue for the 2008/2009 year. Mr Aninion provided Ms Green with a list of tasks he would like to take on, in addition to his current role, in order to develop his career.

[26] Over the next few weeks Mr Aninion made a number of enquiries about opportunities that were outside the scope of his role and the needs of the team. Ms Green concluded that Mr Aninion was looking to move into other roles within the company rather than taking advantage of the development opportunities she had suggested to him.

[27] Ms Green suggested that Mr Aninion take over the V.Live! TSO process as a development opportunity. Mr Aninion agreed. In addition, Ms Green suggested Mr Aninion might like to explore whether Mr Reg Barrett (General Manager, Planning and Performance) would be prepared to mentor Mr Aninion and provide additional support.

[28] Within the first couple of days of June 2008 Mr Aninion met with his manager to discuss what he considered were the changes in his role. Mr Aninion says Ms Green confirmed that the team strategy had changed and that his function along with others had changed as a result. Mr Aninion relies on a diagram he says Ms Green drew where he says she indicated that Mr Aninion filled a particular role reporting to her and placed a circle with a “?” next to it which indicated that there was a question over what his role would actually look like in a restructured organisation.

[29] It was common ground that Ms Green used the analogy during their meeting that Mr Aninion “...was a square peg in a round hole.” Ms Green says she said this to demonstrate to Mr Aninion that he wanted to perform “square peg” functions while being employed to carry out a “round hole” role. Ms Green says she advised Mr Aninion that his role was one of operations, regardless of where his career aspirations were, but that as his manager she would continue to support him by looking for opportunities for him to develop.

[30] Mr Aninion followed their discussion up with an email in which he outlines his understanding of their conversation. In his email Mr Aninion refers to a new role. However, that is contrasted with his statement also, that he wanted to keep things in line with his job description and get value out of the action plans. It is as a result of the conversation and subsequent email on 4 June that Mr Aninion says his role had changed substantially.

[31] Ms Green says she was concerned when she saw the email with the circle and “?”, as the discussion she had with Mr Aninion had been about his core deliverables (which had not changed) and the additional tasks he had identified as being the extra areas he wanted to get involved in. Ms Green says her discussion with Mr Aninion led her to consider a rebranding of Mr Aninion’s role to take into account the core functions of his role and the additional development tasks.

[32] Ms Green, concerned about Mr Aninion’s understanding of what she had tried to convey to him, attempted, in an email dated 11 June 2008, to clarify that from all their discussions what seemed to be the best way forward was to rebrand his role. Mr Aninion told me at the investigation meeting that the way Ms Green explained the rebranded role in her email did not fit with his own personal goals.

[33] At a meeting on 20 June Mr Aninion raised for the first time with Ms Green that he considered all the changes she was making to his role would constitute a redundancy and he wished to invoke that clause from his employment agreement. Ms Green was taken aback by the request, but advised Mr Aninion to contact Human Resources.

[34] That same day Mr Aninion met with Ms Katrina Schmahl. He advised Ms Schmahl that he considered his role was redundant and wanted to have the option of redundancy compensation. Ms Schmahl in her oral evidence told the Authority that she was “*aghast at the suggestion that Mr Aninion was redundant*”. Ms Schmahl was not aware of any new role being created for Mr Aninion and did not feel equipped to answer Mr Aninion’s question on redundancy. She advised Mr Aninion she would need to speak with Ms Green.

[35] On 10 July 2008 Mr Aninion, met with Ms Green for the purpose of conducting the first quarter Performance Dialogue. Mr Aninion says that at that meeting Ms Green retracted her earlier statement that his role had changed and said she would reinstate his role.

[36] Ms Green says she conducted the first quarter Performance Dialogue with Mr Aninion and that during the meeting they discussed updating Mr Aninion’s role profile. The purpose of the profile update was to provide Mr Aninion with more clarity with regard to his duties and responsibilities and to update these as this not been done since August 2006 and some reporting lines had changed since then.

[37] It is common ground that Mr Aninion and Ms Green agreed to the following four updates being made to his role:

- Reflecting a change which had occurred 18 months earlier, the department would change from “sectors and partners” to “media and entertainment”;
- Mr Aninion’s working style would change from “homer” to “roamer”. (This means Mr Aninion wasn’t expected to be at his desk 100% of the time). This change was made at Mr Aninion’s request.
- Reflecting a change that occurred 12 months earlier, the reporting line would change from “head of mobile messaging communications” to “Media and Entertainment Operations Manager”;

- Reflecting a change that had occurred 18 months earlier direct reports would change from 1 to 0.

[38] Ms Green says that the meeting proceeded to discuss the performance standards for the next quarter. Mr Aninion then asked whether he would be provided with any training as part of his development. Ms Green says she advised Mr Aninion that he did not require any further training as he already possessed the relevant skill set to carry out the duties and responsibilities of his role.

[39] Mr Aninion also raised the topic of redundancy with Ms Green during that meeting. It was common ground that Ms Green advised Mr Aninion that redundancy was not an option as the role he performed was required by Vodafone and was certainly not redundant.

[40] The job profile form from Mr Aninion's initial engagement reflects that the nature of his job is one of providing support and technical assistance to Vodafone and its customers.

[41] I find Mr Aninion's core responsibilities did not change during 2008. Ms Green did have conversations with Mr Aninion where they discussed his core responsibilities and potential areas for personal development. In an effort to appease Mr Aninion and provide him with the opportunities he was seeking, Ms Green outlined what she believed was Mr Aninion's current role together with the areas of development he specifically requested as part of his own personal development. The email of 11 June demonstrates that the main focus of Mr Aninion's role continued to be in support and technical assistance.

[42] Mr Aninion says a number of functions of his role were unilaterally removed from him. By way of example Mr Aninion says that by email on 28 February 2008 Ms Green described his role in different terms to those set out in his job description. In her email Ms Green described Mr Aninion's role as being responsible for the day to day running of the MMC services plus specifically:

- Service mechanic consultation (e.g. do I need a longcode etc)
- Service approval and initial compliance management
- Commissions' queries
- Technical queries escalation point after job being logged with NMC (e.g. SMPP performance issues)

[43] Ms Green says the email was written to ensure that everyone was aware of the different areas of responsibility given that there had been a structural change affecting her tier of management, and a new Business Manager had been appointed to fill a vacancy following the departure of another employee, prior to Christmas 2007.

[44] Another aspect of his role which Mr Aninion says was altered unilaterally was concerned with ensuring all queries coming into Vodafone were addressed by the most suitable party. Where they were operational enquiries Mr Aninion would be the most suitable person. Mr Aninion highlighted several emails received by the MMC team but passed directly onto the Business Development Manager to support his claim.

[45] It was common ground that enquiries to do with capabilities roadmaps and commercial opportunities needed to be passed onto the Business Development manager as these often involved a presentation to corporate clients.

[46] Ms Green's uncontested evidence is that Mr Aninion would fail to pass on strategic and business development queries to the correct manager opting to involve himself in these, rather than focus on his core responsibilities.

[47] One of the difficulties Ms Green was attempting to address through the performance improvement plan was Mr Aninion's tendency to take on tasks outside his core area of responsibility. The fact that the email enquiries received by Vodafone and which were passed directly to the Business Development Manager did not constitute a change to Mr Aninion's role. I am satisfied the enquiries were properly the responsibility of the Business Development Manager and not Mr Aninion.

[48] Further, Mr Aninion says the JPRS project work that he had been working on was taken off him unilaterally. The JPRS project was not one of Mr Aninion's core responsibilities, and there had been a discussion with Mr Aninion that he needed to transition the project back to the correct business owner. Mr Aninion appears to have ignored that request and continued to be involved in discussions on the project. When those discussions came to Ms Green's attention she emailed the project team (including Mr Aninion) and advised them that Mr Aninion would no longer be the contact person as the project did not fit within their team.

[49] On its own the email appears to be removing a role from Mr Aninion without any recourse to him. However, in the context of how this email came about and in all

the circumstances of this case, I find Ms Green's communication to the project team to be reasonable.

[50] I am satisfied Mr Aninion's role was not unilaterally changed.

Vodafone failed, during this period, to formally consult with him about significant changes amounting to a disestablishment of his role or advise him to seek independent advice

[51] As I have found there were no unilateral changes to Mr Aninion's role, it follows there was no failure by Vodafone with regard to any requirement to consult with Mr Aninion.

[52] My conclusion under this heading is supported by Mr Aninion's oral evidence when he acknowledged at the investigation meeting that all the discussions he had with Ms Green with regard to changes to his role were undertaken to "keep him happy".

Vodafone failed to formally confirm his role was materially changed to the extent that he was entitled to elect not to move into the "new" role

[53] I have found there were no material changes to Mr Aninion's role. I also find that there was no "new role" for Mr Aninion.

Vodafone failed to act in good faith in a meeting on 10 July when it retracted the statements made to him on 2 and 3 June, when his manager confirmed that there were significant changes made to his role

[54] I find on the balance of probabilities it is more likely than not, that the discussions held between Mr Aninion and Ms Green were focussed on Mr Aninion's obligations to undertake his core responsibilities and those areas of interest which he wished to develop into. Mr Aninion made various enquiries with Ms Green about alternative roles within Vodafone that he could move into. Ms Green also made enquiries on Mr Aninion's behalf.

[55] I find there was no breach of good faith by Ms Green at the meeting on 10 July and am satisfied the meeting was to discuss and agree on any updates to Mr Aninion's job description and to agree goals for the following quarter.

Conclusion – unjustified disadvantage

[56] Mr Aninion struck me as an ambitious young man, keen to make his mark. However, it was common ground that he was failing to meet the basic core requirements of his role and it was for this reason that he was subject to a performance improvement process.

[57] The type of work Mr Aninion was engaged to perform was a supporting function with an operational focus. The focus of his core functions never altered, they were always of a servicing nature. Mr Aninion also had responsibility for aspects of specific projects, although these were allocated to him to support his personal development goals and were additional to the performance of his core responsibilities.

[58] I am satisfied that the actions taken by Vodafone and the way it acted throughout its dealings with Mr Aninion were what an employer acting fairly and reasonably in all the circumstances of this case would have done. Mr Aninion was not unjustifiably disadvantaged in his employment with Vodafone.

Constructive dismissal

[59] Mr Aninion has claimed that he was forced to resign from his employment. The basis for Mr Aninion's claim for constructive dismissal is that he left due to Vodafone acting with the deliberate and dominant purpose of coercing a resignation from him or that Vodafone breached its duty to him.

[60] The conduct amounting to a breach must impinge on the relationship in the sense that looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer.⁴

[61] In coming to my conclusions under this heading I must determine the following issues:

- did Mr Aninion leave his employment as a result of a breach of duty on the part of Vodafone? and
- if there was a breach, was it sufficiently serious to make it reasonably foreseeable that there was a substantial risk that Mr Gibson would leave his employment?⁵

⁴ *Malik v Bank of Credit and Commerce International SA (in liq)* [1998] AC 20; [1997] 2 All ER 1 (CA).

Was the resignation caused by a breach of duty on the part of the respondent?

[62] The breach of duty relied on by Mr Aninion relates to the claims he has made with respect to his unjustified disadvantage claim. I have found there was no unjustified disadvantage to Mr Aninion in his employment as a result of those claims. Likewise I find there has been no breach of duty on the part of Vodafone. Mr Aninion's claim for constructive dismissal therefore fails.

Breach of good faith

[63] Pursuant to section 4 of the Employment Relations Act parties in an employment relationship have a duty of good faith toward each other. Mr Aninion claims Vodafone has breached this obligation in that Vodafone:

- retracted the statement made to him by his manager on 4 June 2008 confirming that significant changes had been made to his role; and
- informing Mr Aninion that his role was now reinstated; and
- advising Mr Aninion that as Vodafone was now aware he wished to seek redundancy that he was not entitled to the usual employee benefits such as personal development and training; and
- failed to pay a bonus entitlement for 07/08 of \$3,000; and
- acted in bad faith in its dealings over the restructuring of Mr Aninion's role and by to force Mr Aninion's resignation without meeting redundancy compensation obligations.

Did Mr Aninion's manager retract a statement made to him by his manager on 4 June 2008 confirming that significant changes had been made to his role?

[64] I find the discussion between Mr Aninion and Ms Green in early June 2008 was misunderstood by Mr Aninion. I am satisfied from the evidence presented to the Authority that Ms Green was simply trying to find a way to ensure Mr Aninion

⁵ (*Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168).

completed his required core tasks in a proper way and to show that she had heard Mr Aninion with regard to the areas he wished to move into.

[65] To do this she considered rebranding his role, however, I find that rebranding exercise never eventuated. At their first quarter Performance Dialogue meeting on 10 July Mr Aninion and Ms Green agreed between them the changes to the job profile. Those changes simply reflected changes that had already occurred.

Did Ms Green advise Mr Aninion that as Vodafone was now aware he wished to seek redundancy that he was not entitled to the usual employee benefits such as personal development and training?

[66] I have preferred the evidence of Ms Green with respect to this conversation. I find that the discussion pertaining to Mr Aninion not receiving any personal development and training was with respect to the fact that his focus was to be on his core responsibilities and he did not require any further development or training in that regard.

Did Vodafone fail to pay a bonus entitlement for 2007/2008 of \$3,000?

[67] I have already found earlier that there was no breach of good faith with respect to the down grading of Mr Aninion's performance rating to "poor". Receiving a grading of "poor" means Mr Aninion was not entitled to the payment of any bonus for 2007/2008.

Did Vodafone act in bad faith in its dealings over the restructuring of Mr Aninion's role and by forcing Mr Aninion's resignation without meeting redundancy compensation obligations?

[68] In order for Mr Aninion to be eligible for redundancy he must show that his employment was terminated as a result of him being no longer required to fill his role. Mr Aninion does not have the right to insist on being made redundant. Redundancy is a misfortune not a privilege and it is for the employer to decide whether a redundancy situation exists.⁶

[69] Mr Aninion requested on more than one occasion for Vodafone to implement the redundancy provisions of his employment agreement. The response on each occasion was that Mr Aninion still had a role with Vodafone and was not redundant.

⁶ *New Zealand Public Service Association v the Land Corporation Ltd* [1991] 1 ERNZ 741 at 759.

[70] Further, I have found that Mr Aninion was not forced to end his employment with Vodafone, that Vodafone did not take any action or acted in any way that breached the employment agreement to the extent that Mr Aninion could claim the agreement had been repudiated by Vodafone.

[71] For the reasons set out above I find Mr Aninion claims for breach of good faith have not been made out.

Costs

[72] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, Vodafone may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority