

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2017] NZERA Auckland 312  
3014432

BETWEEN MALITH BALASOORIYA  
Applicant  
AND NEW ZEALAND TERTIARY  
COLLEGE LIMITED  
Respondent

Member of Authority: Robin Arthur  
Representatives: Danny Gelb, Advocate for the Applicant  
Julie Hardaker, Counsel for the Respondent  
Investigation Meeting: 6 October 2017  
Oral determination: 6 October 2017  
Written record issued: 9 October 2017

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Malith Balasooriya was dismissed on the grounds of redundancy in February 2017 from his role as an intermediate applications developer for New Zealand Tertiary College Limited. He raised a personal grievance about that decision and how it was made. He said NZTC had failed to properly consult him about its proposals that could result in the redundancy of his position. He said NZTC had not disclosed that the full extent of changes it was considering could include outsourcing all the software application development work done in his team. He also said that once NZTC had decided to disestablish positions, his was unfairly selected. He alleged NZTC's decisions were not made for genuine financial or operational reasons but were for an ulterior purpose. He said this was really because NZTC was dissatisfied with him and the senior applications developer over some earlier work and staffing issues. And, according to Mr Balasooriya, this was also the reason that NZTC had not fairly considered him for an alternative position that became available soon after his position was declared redundant.

[2] NZTC denied all those allegations. It said the redundancy of Mr Balasooriya's position, along with the roles of other developers, was necessary for its business, and decided through a fair process. It said Mr Balasooriya was not suitable for an alternative position that became available due to an unexpected resignation. It also said he was not interested in the position because he knew about it and had not applied for it.

[3] The Authority had to determine whether NZTC had reached the statutory standard of justification for its actions.<sup>1</sup> This considers what NZTC did, why it did it, and how it did it. If some or all of those actions were found to not be what a fair and reasonable employer could have done in all the circumstances at the time, an assessment of remedies would be needed. The issues of fact and law to be determined, put plainly, were:

- (i) Had Mr Balasooriya established NZTC's decision was made for an ulterior purpose?
- (ii) Was NZTC's decision about his position made for genuine business reasons?
- (iii) Was Mr Balasooriya adequately consulted about NZTC's proposals before any final decisions were made?
- (iv) Was the selection of the position Mr Balasooriya unfairly made?
- (v) Was he unfairly denied an alternative position or the opportunity to apply for it?
- (vi) If what NZTC did, or how it did it, unjustifiably disadvantaged Mr Balasooriya or made his dismissal unjustified, what remedies were due?
- (vii) Should any remedies granted be reduced due to any blameworthy conduct by Mr Balasooriya that contributed to the situation?
- (viii) Should either party contribute to the costs of representation of the other party?

### **The Authority's investigation**

[4] Sworn or affirmed written and oral evidence for the Authority's investigation was given by:

- Mr Balasooriya;

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<sup>1</sup> Employment Relations Act 2000, s 103A.

- Asitha Gunaratne, the senior applications developer whose position was also made redundant in February 2017;
- NZTC's IT operations manager Brent Simpson;
- NZTC's general manager James Ward and
- NZTC's former human resources advisor Lane Ford.

[5] Mr Ford, who now lives in Christchurch, attended by an audio-visual link from the Authority's offices there in response to a witness summons. Other witnesses attended the Authority's investigation meeting in Auckland.

[6] As permitted by s174A and s174E of the Employment Relations Act 2000 (the Act) this oral determination given at the conclusion of the investigation meeting has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

#### **An ulterior purpose?**

[7] Having asserted NZTC's decision about his position was made for an ulterior purpose, Mr Balasooriya bore the burden of establishing that was the predominant reason for what NZTC did.

[8] The evidence of Mr Balasooriya and Mr Gunaratne pointed to two instances they said supported that proposition and were the real reasons for NZTC's decision to disestablish both their positions.

[9] The first concerned the project manager appointed during 2016. They said they had resisted requests from her to do things they did not consider were correct. One example concerned the interview and appointment of an intermediate developer. They said the developer was appointed without undergoing a proper technical test and later proved unable to perform the job satisfactorily.

[10] The second instance concerned a meeting they were called to attend on 14 November with Mr Ward and Mr Simpson. They said Mr Ward was angry at delays in completing a project and had shouted at Mr Gunaratne.

[11] Neither instance was compelling evidence that NZTC's review of whether its in-house arrangements for software development still met its business needs was really carried out for the predominant purpose of removing Mr Balasooriya and Mr Gunaratne.

**Were there genuine business reasons for redundancy of the position?**

[12] During 2016 NZTC commissioned two external development businesses to do work on particular projects. It then asked one of those businesses, called Augen, to carry out a review of its existing software processes and architecture of ecelearn, the learning management system NZTC used for the courses it provided to students. Augen's report was very critical of how development work on the ecelearn system was done. It said out-dated, non-standard technologies were used that were difficult to adapt, expensive to enhance and difficult to test. It also criticised the ecelearn development team, which included Mr Balasooriya. It said the team lacked experience to address the issues, had low productivity and (referring to how it carried out its work) had "immature practices".

[13] It was clear from the Augen report that NZTC faced investment decisions if it wanted to improve delivery of projects for its ecelearn system. Although not referred to in the report those options included retaining in-house capacity, through its employed developers, and spending more on the resources they needed; moving to a mix of projects completed by some in-house developers and external service providers; or to move to a fully outsourced approach, retaining internal staff only to commission necessary work and to test products provided. The latter option meant that more up-to-date technology used by external software providers could be used. There were clearly genuine business requirements for that latter option to at least be considered.

[14] It was an approach open to an employer, provided it acted lawfully in consulting existing employees about the proposal and fairly carried out any changes affecting them.<sup>2</sup>

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<sup>2</sup> *Grace Team Accounting Limited v Brake* [2014] NZCA 541 at [85].

### **Was Mr Balasooriya fairly consulted?**

[15] Mr Balasooriya was involved in two meetings in December 2016 that discussed the Augen review and he provided some information requested for it. However NZTC's evidence did not convincingly establish he was properly advised of the real scope of that review or its potential outcomes. In a meeting on 16 January 2017 Mr Ward told Mr Balasooriya redundancy of ecelearn development roles "was a possible result". On 18 January Mr Balasooriya was given a letter summarising the Augen review findings and advising that the review may result in his role becoming redundant. The letter called him to a meeting on 20 January. Before attending the meeting he and Mr Gunaratne wrote a response to the review. They said the criticisms of their skills made in the report were unfair and said the project manager had caused problems with processes. At the 20 January meeting Mr Balasooriya complained that comments had been made about his skills without the Augen reviewers talking directly to him. Mr Ward, according to notes Mr Ford made, told Mr Balasooriya the issue was not his skills or performance but "how we structure the ecelearn team in the future". The meeting ended with Mr Ward reminding Mr Balasooriya that his role might be made redundant.

[16] NZTC then sent Mr Balasooriya a full copy of the Augen report and called him to a further meeting on 27 January, reminding him again that his role could be made redundant. At the further meeting Mr Ward said no final decision had been made but Mr Balasooriya said he did not accept the process being undertaken was genuine. He said there was no point continuing with an unfair process.

[17] On 3 February Mr Ward sent a letter advising Mr Balasooriya NZTC had "decided to outsource the software development of ecelearn for the foreseeable future". Mr Balasooriya was told that his role was redundant and ceased from that date. He was told he would be paid four weeks' notice so his "final day of work" was to be 3 March. He was not required to attend work for those four weeks. He was told he could use that paid time to seek alternative employment.

[18] From 16 January NZTC had followed a formal process of holding meetings said to be for the purpose of consulting Mr Balasooriya about its plans. And from that day it had warned him of the prospect of redundancy. However the crux of his argument was that it was not until 3 February that he was advised of the extent of

NZTC's proposal. While he knew some work had already been outsourced, he said he did not know until then that NZTC was considering having all ecelearn work done externally.

[19] NZTC, through the evidence of Mr Ward and Mr Simpson, said it had not reached any view on outsourcing all development work until after the 27 January meeting with Mr Balasooriya. However, as a matter of likelihood on the balance of probabilities, it was a prospect being considered from the time of commissioning the review by Augen. It was certainly an option that NZTC's senior managers thought had to be considered once it got the report on 17 January.

[20] The statutory duty of good faith required NZTC to give Mr Balasooriya information relevant to continuation of his employment, and an opportunity to comment on it, before a decision was made. This duty applies to all proposals likely to adversely affect an employee's ongoing employment.<sup>3</sup>

[21] The Augen review report, NZTC's correspondence to Mr Balasooriya and its notes of meetings with him did not establish that the extent of NZTC's plans had ever been squarely put to him. At best he was aware some work might be outsourced, as it had been in recent months. However he was not fully informed that NZTC had begun contemplating closing down all existing in-house ecelearn development roles. As a result he was not given a real opportunity to comment on that proposal before it was made. He was treated unfairly by that failure by NZTC to meet its statutory good faith obligations.

[22] Mr Balasooriya did not participate fully in the meetings NZTC held with him on 20 and 27 July, supposedly to consult him about possible restructuring, because he believed the real purpose was to end his employment over performance issues. If NZTC had provided him with proper information about the options it was considering and some financial analysis of those prospects, he may have seen more purpose in contributing. The fault lay, however, with NZTC, for not meeting its basic statutory obligations.

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<sup>3</sup> Employment Relations Act 2000, s 4(1A)(c).

### **Was the selection of Mr Balasooriya's position unfairly made?**

[23] Mr Balasooriya said he was not consulted on how three of the six team members, including him, were selected for dismissal. He suggested NZTC chose him and two others because they were only Sri Lankans in the team. However two other more recently-employed developers were also dismissed, by use of 90-day trial periods in their employment agreements. Two other team members remained in their jobs as testers, not developers, because NZTC decided their skills needed to be retained in-house. In the context of NZTC's decision that it no longer needed developers, the selection of Mr Balasooriya for redundancy was not unfair.

### **Was an alternative position fairly considered?**

[24] On 7 February a developer unexpectedly resigned from a different team in the IT department. It looked after NZTC's student management system, referred to as Rito. The position was advertised on 10 February. Mr Balasooriya said he met some of the requirements of that position and could have refreshed or developed the skills or knowledge needed for other parts of it. He said NZTC should have offered him that role.

[25] NZTC advanced two contradictory ripostes to that proposition. Firstly it said Mr Balasooriya's employment had ended on 3 February so it was not obliged to consider him for that position that only became available on 7 February. This was plainly incorrect. The letter giving him notice clearly stated he was on paid notice until 3 March as said that was his last day of work. NZTC remained his employer until then. Its second response, set out in its statement in reply, said Mr Balasooriya lacked the necessary skills, would not have accepted the job as it was offered at a lower salary level and, although he saw the advertisement around the time it was posted, had never applied for the job.

[26] Mr Balasooriya had told NZTC in the meeting on 27 January that he was not interested in other roles. However at that time the roles being referred to were elsewhere in NZTC, not in its IT department.

[27] Mr Ward said, in his witness statement for the Authority investigation, that Mr Balasooriya had been considered for the Rito developer role that became available from 7 February. However Mr Balasooriya was discounted because he did not have

recent experience in the required software environment and would require further training.

[28] While it may be correct that Mr Balasooriya would not have accepted the role if offered the opportunity, NZTC had an obligation to talk with him about the prospects of being successfully redeployed to such an alternative role. He may have been able to satisfy it, on discussion, that he could adequately perform it (even if it required NZTC picking up the cost and delay of providing some extra training) and may have chosen to make a salary compromise to secure ongoing employment. NZTC acted unfairly in not giving him, at least, that opportunity when it had such a role and he remained, formally at least, its employee until 3 March.

### **Unjustified actions**

[29] NZTC's failures in consultation and consideration of alternatives were outside the range of what a fair and reasonable employer could have done in carrying out a restructuring of its business that resulted in redundancies. Those failures were not minor and they resulted in Mr Balasooriya being treated unfairly. His dismissal in those circumstances was unjustified. An assessment of remedies was required.

### **Remedies**

#### *Lost wages*

[30] Mr Balasooriya's employment with NZTC ended on 3 March 2017. He began new employment elsewhere on 20 March, in a job with a slightly better annual salary than what he got at NZTC. His lost wages claim, for the intervening two weeks, was \$3123.08.

[31] Although NZTC failed to act justifiably in consulting him and considering alternatives, it was unlikely that a better-conducted process would have resulted in a different decision about the position Mr Balasooriya had held or in him taking up an alternative position on a much lower salary. His employment by NZTC would have come to an end in any event, so the wages were not lost as a result of his grievance. No award of lost wages was required.

*Compensation for humiliation, loss of dignity, injury to feelings*

[32] Mr Balasooriya had however suffered upset and distress through NZTC's flawed process. He experienced sleeplessness and described himself as "not in a proper mental condition since I got their first letter". He also described experiencing a crisis of self-confidence in his skills and knowledge that continued to affect him in his current work.

[33] Considering the range of awards in similar cases of disadvantage during a redundancy process that lead to dismissal, the sum of \$7000 was the appropriate amount to compensate Mr Balasooriya for humiliation, loss of dignity and injury to feelings he experienced.<sup>4</sup>

*Any reduction for contribution?*

[34] Under s 124 of the Act the Authority must, when determining remedies, consider whether any actions of Mr Balasooriya contributed towards the situation giving rise to his grievance. If they did, his actions may require a reduction of remedies that would otherwise be awarded.

[35] Mr Balasooriya had not participated fully in the meetings NZTC held to consult him about the process. However, in declining to do so, he had identified that he did not have all the relevant information and was not being treated fairly as a result. In the light of the outcome reached in this determination, his conduct in that respect could not be said to be so blameworthy as to require a reduction in the remedy awarded.

**Costs**

[36] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[37] If they are not able to do so and an Authority determination on costs is needed Mr Balasooriya may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum NZTC would then have 14 days to lodge any reply

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<sup>4</sup> Employment Relations Act 2000, s 123(1)(c)(i).

memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[38] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>5</sup>

### **Summary and orders**

[39] NZTC failed to act fairly in deciding and carrying out its decisions to disestablish Mr Balasooriya's position and dismiss him for redundancy. This made his dismissal unjustified. In compensation for those unjustified actions NZTC must pay Mr Balasooriya the sum of \$7000 within 28 days of the date that the written record of this determination was issued. Costs are reserved with a timetable set for memoranda to be lodged if an Authority determination of that issue is needed.

Robin Arthur  
Member of the Employment Relations Authority

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<sup>5</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].