

[2] Mr Barrett says that the disadvantage consists in his being demoted when he was offered the position of Leader Clonal Research. Mr Barrett also says that he was not properly consulted regarding the restructuring.

[3] Mr Barrett seeks payment of a company bonus. The respondent says the payment of the bonus is discretionary and that for the year 2006 several employees received no bonus at all and there was no company performance component to the bonuses which were paid.

[4] Mr Barrett says the respondent did not act in good faith and that he was bullied and intimidated.

[5] Although the dismissal claim is a constructive dismissal one the respondent does not deny that it dismissed Mr Barrett. There was an actual dismissal, not a constructive dismissal. The constructive dismissal claim arises from Mr Barrett's feeling that the company was endeavouring to make his working life so difficult that he would have to resign

Background

[6] The respondent is a producer of forestry planting stock and was formed in April 2004 after a merger between Trees & Technology Ltd and Carter Holt Harvey Forest Genetics. The company carries out research into and development of propagation methods both in the laboratory and nursery environments.

[7] Mr Barrett is a scientist. Mr Barrett was recruited in July 2001 by Trees & Technology from Canada and in December 2002 went to work for Carter Holt Harvey Forest Genetics.

[8] After the creation of the respondent Mr Barrett was appointed as Leader Clonal Research and Production and Mr Andrew Rodwell, who had also previously worked at Trees & Technology, was appointed CEO.

[9] Ms Judith Redington, the Manager of Advanced Genetics Production, said that initially Mr Barrett's position was quite heavily weighted towards staff management (referred to as "production") as the company was taking on new technology from Carter Holt Harvey Forest Genetics and a number of employees required training in the new technology. Over time, as staff became more skilled, this decreased and by 2005 the emphasis of Mr Barrett's work had shifted heavily towards research.

Variation

[10] In February 2006 Mr Barrett sought permission to reduce his work hours in order to spend more time with his children. The company agreed to a variation to Mr Barrett's contract whereby he would work reduced hours (80% FTE) and work from home for some of the time provided that certain conditions were met. This variation was to be for a six month period from 1 March 2006 until 31 August 2006. It was also agreed that responsibility for administration would be relinquished and the primary focus of his work would be research. There was a concomitant reduction in salary. These arrangements were confirmed in a letter dated 27 February 2006. Ms Redington said that when Mr Barrett made this request it was relatively easy for his production duties to be removed as it was a natural progression regarding the direction of his position.

[11] Mr Barrett himself said in an email dated 28 February 2006: "I also ask that Horizon2 acknowledge this shift will be in the best interests of Horizon2 as this will best use my skills and time in the current year.i.e we believe this shift to be a sound business decision".

Restructuring

[12] In May 2006, during the variation period, the company restructured. One of the positions affected was Mr Barrett's. Mr Rodwell said the company wanted to create a clear divide between the treestock production group and the research and development group.

[13] A consultation process was undertaken. Employees were advised of the proposal, given a draft organisational structure and draft job outlines. The initial job description provided to Mr Barrett was a position titled Leader Advanced Genetics Production Systems. Mr Barrett said he believed this job description was the job he was being given to work in and that Horizon2 gave no indication over the following weeks that the final structure would be different. After staff had been given the proposed restructure and the proposed job descriptions feedback was sought and then considered. I find it was clear that the job descriptions were proposals only. A final structure was presented to staff in August 2006.

[14] Mr Rodwell said that the initial proposal regarding Mr Barrett's was to keep it the same, although Mr Barrett regarded the first job description as a promotion. However, after considering feedback the decision was made to remove the production function from his role, which he had not been performing since the start of the variation. The proposal then was that he be confirmed into the position of Leader Clonal Research and Mr Rodwell said this reflected the reality of what he had been doing prior to the restructure.

Mr Barrett's responses to the restructuring

[15] As the variation was due to expire on 31 August on 1 August Ms Redington first spoke to and then emailed Mr Barrett asking that he meet with her to discuss future arrangements. Mr Barrett did not do so.

[16] On 23 August 2006 Mr Rodwell wrote to Mr Barrett offering him ongoing employment in the position of Leader Clonal Research. A job description was attached and Mr Barrett was asked to sign that he accepted the position.

[17] On 28 August Mr Barrett wrote to Mr Rodwell saying that in his view the proposed changes amounted to a significant change from his existing role and that he would only accept the role of Leader Clonal Research at 20 hours per week at \$60,000 per annum or on a contractor basis of \$90 per hour.

[18] Mr Rodwell replied on 29 August stating that the role offered was not materially different from his current role and that as the variation was due to expire shortly if he failed to respond to Ms Reddington's request for a meeting to discuss the matter his employment arrangements would revert to full time and he would have to work on site. Mr Rodwell said that the company was happy to consider his personal situation and continue to accommodate him.

[19] On 1 September Mr Barrett replied. He refused to attend a meeting because of the uncertainty surrounding the restructure. He proposed carrying out his existing role at nearly double the remuneration, or as a contractor. Mr Rodwell responded that this increased cost was totally unacceptable to the company.

[20] On 16 November Mr Rodwell wrote to Mr Barrett asking whether he was accepting the Leader Clonal Research position. He also advised that the company would be willing to extend the terms of the variation until 31 March 2007 or he could return to work on a full time basis.

[21] On 1 December Mr Rodwell wrote to Mr Barrett again and said that if a response was not received by 5 December it would be assumed that he had resigned. Mr Barrett replied the same day saying he would continue his research work as a consultant until the end of 2007. Mr Barrett requested a meeting.

[22] Following discussion with Ms Karetai, Mr Barrett's partner, and Mr Barrett it was agreed that Mr Barrett would submit a proposal to provide services as a contractor.

[23] On 9 January 2007 Mr Barrett proposed that he offer services at the rate of \$90 per hour. Mr Rodwell said he was perturbed by this as he thought he had made it clear that the company would only entertain a contractor arrangement if the cost was no more than that of his being an employee. On 12 January Mr Rodwell wrote rejecting the proposal and reiterating that it had to be at no extra cost.

[24] On 25 January Ms Karetai emailed Mr Rodwell suggesting the company should put forward a contractor proposal. He emailed back saying that it was up to

Mr Barrett as he was the one seeking to vary the arrangement. Ms Karetai responded on 7 February saying that as they could not reach an agreement the parties should attend mediation.

[25] On 8 February Mr Rodwell advised that no material changes had been made to Mr Barrett's job and that the company would continue the variation if he so wished. That offer was to stand until 5pm 12 February at which stage it would expire and Mr Barrett was to attend work full time at the Te Teko site. Mr Rodwell said he did not believe there was any matter needing mediation. For some reason there appears to have been a delay in Mr Barrett's receiving this email. He did not receive it until 19 February by which time the 12 February date had lapsed.

[26] Mr Barrett said he did not know what his actual job role was and what job he was supposed to be returning to on a full time basis. Mr Barrett was clearly being asked to return to the position of Leader Clonal Research into which he had earlier been confirmed.

[27] Having received no reply, on 19 February Mr Rodwell emailed Mr Barrett saying the company had serious concerns regarding his employment and asked that Mr Barrett attend a meeting on 22 February.

[28] Mr Barrett replied saying he had not received the earlier 8 February email. Mr Barrett said he would not attend a meeting and asked that Mr Rodwell outline the company's concerns.

[29] Mr Rodwell ascertained that the 8 February email had gone to the correct address. However, he decided to proceed on the basis that Mr Barrett had not received it.

[30] On 20 February Mr Barrett alleged the company was trying to constructively dismiss him. Mr Rodwell emailed confirming the company's concerns and asked for a meeting on 22 February. At this stage the variation had expired and Mr Barrett had not indicated that he wished to extend it although he had continued to work at home after 31 August.

[31] Ms Karetai asked for a meeting on 1 March. Mr Rodwell said she appeared to assume that the disciplinary matters had been abandoned. He replied saying the disciplinary process was continuing.

[32] The disciplinary meeting took place on 22 February Mr Rodwell set out his concerns, told Mr Barrett that he was very concerned about the employment relationship and believed it had broken down.

[33] On 26 February Ms Karetai replied and asked for a meeting on 1 March. Mr Rodwell asked her to tell him what they wished to discuss. She replied that it was to discuss the company's concerns.

[34] On 27 February Mr Barrett filed a personal grievance in the Authority.

[35] Mr Rodwell again instructed Mr Barrett to return to work full time on 1 March and confirmed that the variation had expired. Mr Barrett refused to do so, alleging there had been no consultation. He said he was willing to work according to the variation until the ERA hearing and asked that they meet if that was not acceptable.

[36] Mr Rodwell did not accept this and the parties met on 5 March. Mr Barrett was advised that an investigatory process was taking place regarding his non compliance with the reasonable instruction to return to work. Ms Karetai said he would not go back to work because of his children, that the company was bullying them and that every letter was an ultimatum. Mr Rodwell said that although Ms Karetai had said he could not come back to work because of his children in an earlier meeting Mr Barrett had said he would return if he "got his old job back".

[37] Mr Rodwell did not hear anything for a week and finally emailed Mr Barrett on 9 March stating that if he continued to ignore the instruction to return to work on a full time basis from 12 March his employment would be in jeopardy and he would be dismissed, although that was an outcome Mr Rodwell hoped to avoid.

[38] Mr Barrett replied on 13 March saying he would not return to work full time to a role that did not exist that is, the position of Leader Clonal Research and Production.

[39] On 14 March Ms Karetai sought confirmation that Mr Barrett had been dismissed. Mr Drake, acting for the company, wrote stating that the company would give Mr Barrett a final opportunity to explain and make a submission on penalty if he wished before a final decision was made.

[40] Ms Karetai replied saying she believed the decision to dismiss Mr Barrett had already been made. Mr Drake said no decision had been communicated to Mr Barrett and the company wished to extend a final opportunity to him before a decision was made. Mr Drake also asked why Mr Barrett could not return to work.

[41] On 15 March the company proposed to suspend Mr Barrett without pay and gave him the opportunity to comment on the proposal. On 16 March the company suspended Mr Barrett.

[42] On 29 March the parties attended mediation which was unsuccessful.

[43] On 2 April the company informed Mr Barrett that it had found that he had refused to return to work on a full time basis and had not followed a lawful and reasonable instruction. He was advised that dismissal was being considered and was asked for a response regarding penalty. He was asked to attend a meeting on 5 April.

[44] A meeting was held on 12 April and the company made a decision to dismiss Mr Barrett. Mr Rodwell said he believed the employment relationship had broken down. Mr Barrett would not follow instructions and would not engage with the company.

Breach of Good Faith, Bullying, Intimidation

[45] Mr Barrett characterised a number of events and much of the correspondence as threatening and intimidating. An example is the formation of a company called AIMS Ltd and Mr Barrett's hiring of labour for Horizon2 through his company. In

July 2006 Mr Barrett formed a company called AIMS Limited of which he was a director. In July he brought in employees of AIMS Ltd to perform work for Horizon2 and then invoiced Horizon2 for this work. No approval to do this was obtained from his manager

[46] Ms Redington said that Mr Barrett had not consulted her about this matter. When she asked him how he intended paying the workers he told her he would furnish an invoice to Horizon2. On further investigation she found that he had tried to cover his tracks by writing out a purchase order on behalf of Horizon2 to AIMS and then placing pressure on another staff member to sign the purchase order. This had been done without his declaring his interest in the company. When the staff member refused he signed the purchase order himself and tried to put it through the accounts system so that Ms Redington would not notice it.

[47] Mr Rodwell said that this incident created a clear conflict of interest and was a breach of the Code of Conduct. He wrote to Mr Barrett on 9 August 2006 expressing his concerns. Ms Karetai replied to Mr Rodwell saying his letter was intimidatory. Mr Barrett and Ms Karetai trace much of what happened back to this incident. I am satisfied that there is no connection. Mr Rodwell was obliged to bring the matter to Mr Barrett's attention. It was a perfectly legitimate action by Mr Rodwell. No disciplinary proceedings were initiated whereas they certainly could have been. The decision to restructure has no connection with this. While I accept that Ms Karetai felt the letter was intimidatory, an objective reading does not bear this out.

[48] Mr Barrett said Mr Rodwell tried to coerce him into accepting the research position and that because Mr Barrett would not accept it Mr Rodwell started sending letters saying he would have to work full time. Mr Barrett said Mr Rodwell knew this was not a reasonable request and did it in the hope that Mr Barrett would resign.

[49] Mr Barrett ignores the fact that the variation expired at the end of August. He also ignores the fact that offers to continue the variation were made to him. What Mr Rodwell wanted was to clarify the situation regarding Mr Barrett's employment. There is no evidence that Mr Rodwell wanted Mr Barrett to resign. The evidence is

quite contrary to that. Mr Rodwell said he genuinely hoped a dismissal situation could be avoided and I accept that evidence.

[50] The letters that Mr Barrett was sent did give him options and/or ultimatums. Given the context and the circumstances, there was nothing illegitimate or untoward about this. An employee has to be told what the employer wants and what the consequences of particular courses may be. Mr Barrett was not following instructions and was continuing to work according to an expired variation.

Restructuring

[51] The company was clearly entitled to restructure its business. There was no underhand motive either for the restructuring or for the position that was ultimately offered to Mr Barrett. The first position proposed was withdrawn after staff feedback was taken into account. Mr Barrett himself provided feedback saying he was not happy with the proposal and that all clonal production should be managed by one person, himself. The company however decided the focus should be on research. Mr Barrett accepted during the investigation meeting that he had been given the opportunity to comment on the changes.

[52] Mr Barrett was, he confirmed during the investigation meeting, concerned that funding for the Leader Clonal Research position would run out at the end of 2007 and he would then have no job. Mr Rodwell said that while the funding from Technology New Zealand would expire then it was expected that other sources of funding would fully support the research programme.

[53] I accept the respondent's position that this was not a demotion. There was no decrease in salary. I accept that the position had some changes, namely reporting positions and removal of production duties. Mr Barrett believes that there were substantial changes as his management and production duties were removed. Mr Barrett based this largely on his performance plans, which are not job descriptions but plans for preferred outcomes and may focus on any particular aspect of the job description.

[54] The company says the focus of the Leader Clonal Research position was on propagation and production process optimisation and that therefore there was no significant loss of production function. I accept this analysis.

[55] The job descriptions show that the number of direct reports reduced from two to nil, the management of the clonal production team was removed as was the requirement to meet annual lab production plans to ensure future production requirements were met. Added were a requirement to manage the TBG1 and TBG2 initiatives and lead research related to PDP propagation initiatives.

[56] The employment agreement expressly states that an employee cannot expect that his or her duties will remain unchanged throughout the course of employment and that the company reserved the right to use employees' skills to their best advantage. It also provides that consultation will take place regarding any proposed change in duties and that appropriate training will be provided.

[57] The company says that the work proposed was of a scientific nature and not different in content or character to the position of Leader Clonal Production and Research. Mr Barrett's duties were not being discontinued and his skills and services were still required.

[58] In NZPSA v Land Corporation Ltd [1991] 1 ERNZ 741 at 759 the Court noted that no employee has the right to insist on being made redundant. Redundancy is a misfortune, not a privilege. It was for the employer to decide whether a redundancy situation existed.

[59] In Nelson Timber etc IUOW v Nelson Pine Forest Ltd [1989] 1 NZILR 451 the Court held that it was difficult to describe a worker as redundant when he still had his job even though the content may have varied.

[60] If an employer alters an employee's job description then it will be a matter of degree whether the alteration is simply that – an alteration – or so significant that the employee's job has disappeared and a different job has come into existence.

[61] Mr Barrett's job description did alter. The employer impliedly recognised that by asking him to agree to the variation despite having confirmed him in the position. Mr Barrett did not agree. What then was the situation?

[62] In McCulloch v NZ Fire Services Commission [1998] 3 ERNZ 378 at 392 the Employment Court said:

The mix of activities making up the job content may alter but if the work is still there and needs to be done, it cannot be said that the incumbents are redundant.

[63] Clause 13 of the employment agreement deals with redundancy. It states:

...you shall not be entitled to redundancy compensation in the event that you are offered a suitable alternative position by the Company, or if you are offered employment on substantially similar terms by the Company....

A suitable alternative position is one which is either similar to your existing role or one which uses your skill-set, and provides generally no less favourable terms and conditions of employment.

[64] In Pilgrim v Director General of Health 1992(3) ERNZ 190 suitability was defined as matching individual skills with positions that required similar skills, notwithstanding that that might involve some training. The Court said that suitability must be determined objectively and was a question of fact and degree. Suitability was not determined by the subjective view of the employer or employee, but by the position a reasonable and disinterested, but not uninformed, person would take.

[65] In NZPSA v Land Corporation Ltd [1991] 1 ERNZ 741 at 760 the Court said that an employer's right to vary an employee's duties had often been upheld and that it was an important right and is not to be whittled away by the application of subtle technicalities. Managers in particular had to be prepared to be flexible and versatile according to the changing needs of their organisation. However, there were restrictions on that right. For example, it may not be competent for an employer to

require a worker, by way of variation of duties, to undertake work that is beyond the capacity of the worker, or that is more dangerous or more unpleasant or more arduous.

[66] If the position being offered to Mr Barrett constituted a variation but not one of such magnitude as to render the existing position (which was the position of Leader Clonal Research and Production before the reduction to 80% FTE and change of duties took place, the variation having been agreed to be temporary only) nonexistent then Mr Barrett had a choice: he could continue in the varied position or he could resign. Mr Barrett did not resign. Mr Barrett continued to work and to receive an income while protesting about the alteration and trying to negotiate a salary increase and/or a change to contractor status.

[67] If the position of Leader Clonal Research and Production had disappeared then the employer could, pursuant to clause 13, offer Mr Barrett a suitable alternative position. If this clause had been called into play, I have no doubt that the position of Leader Clonal Research would be a suitable alternative position. It was similar to the existing role and it used Mr Barrett's skill-set. Mr Barrett said it would not be a suitable alternative position because it did not use his skill set. It clearly did use his skill set.

[68] Mr Barrett's position had not altered to the extent where it could be said that the alterations were of such a magnitude that it had ceased to exist. The position was not redundant and Mr Barrett was not redundant.

Dismissal

[69] The variation had expired and Mr Barrett refused to return to work on a full time basis to the altered position. The company endeavoured to accommodate Mr Barrett although I doubt that he will agree with this assessment. Offers were made to extend the period of the variation. Discussions were had regarding his becoming a contractor. Had Mr Barrett made a reasonable financial proposal this personal grievance may well never have arisen. I do understand that the concern about the level of income, whether he was to be a contractor or to remain as an employee in the Leader Clonal Research position, was motivated by anxiety about the possibility of

the funding running out and the position disappearing. However, even if his position had been redundant he would not have been entitled to refuse to take up the proffered position on that basis. A similar situation arose in Pilgrim (supra). One of the plaintiffs had been offered a position with the DSIR, but declined due to his concern about future restructuring of the DSIR. The Court found that he was not entitled to decline the alternative position he had been offered.

[70] Mr Barrett's position continued to exist, albeit in an altered form. The variation had expired. The company could therefore direct Mr Barrett to return to work in the altered position on a full time basis. This was a reasonable and lawful instruction. Mr Barrett chose not to return to work and was dismissed. He was given opportunities to comment and the parties had by that stage mediated. The company was entitled to dismiss him.

[71] Had I found that the position of Leader Clonal Production and Research had disappeared it would not have fundamentally assisted Mr Barrett with his claims. As I have already stated, pursuant to the redundancy clause I would have found the position of Leader Clonal Research was a suitable alternative position. Mr Barrett, therefore, while entitled not to accept it and to resign, would not have been eligible for payment of redundancy compensation. Further, if the position was redundant Mr Barrett would not have a position to work in and there would have been no entitlement to loss of wages because the job would not have been there for him to do.

[72] Mr Barrett sought reinstatement. Had I found he had been unjustifiably dismissed I would not have ordered reinstatement. I discussed with Mr Barrett during the hearing the issue of what position he was to be reinstated into. If the Leader Clonal Production and Research position was redundant he could not be reinstated into that position. The Employment Relations Act 2000 provides at s123 (1) (a) that an employee is to be reinstated into the employee's former position or a position no less advantageous. However, Mr Barrett has maintained that the other position is not substantially similar and is less advantageous.

[73] The other reason reinstatement would not have been practicable is that it was very clear that the employment relationship had broken down. Mr Barrett was deeply

suspicious of Ms Redington and Mr Rodwell and made a number of unsubstantiated accusations about the company. There could not be a viable working relationship because the trust and confidence required to underpin it had gone.

[74] Mr Barrett sought punitive damages which the Authority does not have jurisdiction to award.

Bonus

[75] Ms Redington said Mr Barrett scored 22nd out of 27 individual scores in the company. Some people who scored higher than he did only achieved 50% payment of their individual bonus entitlement because there were limited funds to share between all employees who rated highly enough to receive a payment. Ms Redington identified a number of difficulties with Mr Barrett's performance and decided that while his research outputs were reasonable his personal attitude was extremely poor and that consequently a bonus was not appropriate. I cannot find that Ms Redington exercised her discretion improperly.

Summary

- Mr Barrett was not unjustifiably dismissed.
- Mr Barrett was not unjustifiably disadvantaged.
- There was no breach of good faith by the respondent.
- The respondent did not subject Mr Barrett to intimidating and bullying behaviour.
- The respondent did not attempt to induce Mr Barrett to resign.
- Proper consultation took place.
- Mr Barrett's position was not redundant.
- Mr Barrett was not redundant.
- Mr Barrett is not entitled to redundancy compensation, compensation for humiliation and distress, punitive damages or loss of income.
- Mr Barrett is not entitled to a bonus.

Costs

[76] Costs were reserved. The parties should endeavour to resolve the matter of costs. Should that be unsuccessful the respondent should file a memorandum within 28 days of the date of this determination. The applicant should file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King

Member of the Employment Relations Authority