IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 406
5298004

	BETWEEN	FLEUR BOARD Applicant
	AND	ADECCO NZ LTD Respondent

Member of Authority:	Yvonne Oldfield
Representatives:	Ms Board in person Kathryn Beck for respondent
Investigation meeting	21 June 2011
Submissions:	5 July 2011, 22 July 2011 for Applicant 19 July 2011 for Respondent
Determination:	19 September 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In a determination dated 19 January 2011 I accepted that Ms Board had commenced a personal grievance action within the three year timeframe set out in s.114 (6) of the Employment Relations Act. The substantive employment relationship problem now falls to be determined.

[2] In March 2007, after eighteen years of employment with the Adecco group of companies ("*Adecco*"), the last four as CEO of Adecco NZ Limited, Ms Board was told that her position was being disestablished. Redeployment was briefly discussed but no suitable role could be identified and Ms Board's employment was terminated with six months' pay in lieu of notice. The respondent says that it acted as a fair and reasonable employer would have done in all the circumstances.

[3] Ms Board disputes the genuineness of the redundancy and says that her dismissal cannot be shown to be justified. She claims compensation and remuneration lost as a result of the grievance. In a separate claim she also alleges that holiday pay remains outstanding.

Issues

[4] The issues for determination are:

i. whether Ms Board's position was disestablished for genuine commercial reasons;

ii. whether the respondent acted as a fair and reasonable employer would in all the circumstances and in particular whether it met its obligations to consult and to explore redeployment options;

iii. if not, what remedies are in order, and

iv. whether holiday pay remains outstanding.

(i) Genuineness of the redundancy

[5] It is the respondent's position that it had genuine commercial reasons for disestablishing the CEO role in New Zealand. In the latter part of 2006 changes to the structure of the international Adecco group meant that where there had been a senior role with responsibility for NZ, Australia, and Japan (held by Mr Mark du Ree) a senior manager was now to look after Australia, New Zealand and South East Asia. Mr du Ree would remain involved in Japan with someone else taking the other role. Within a few months the appointee to that role (Ray Roe) decided to bring the NZ operation within that of Australia. At the same time he disestablished the CEO roles which had previously existed in those two countries and in South East Asia.

[6] Mr du Ree is still with the Adecco group and is still based in Japan. He told the Authority that New Zealand had reported directly to Australia at different times over the years – largely because of the perception within the highest levels of the

company (in Europe and the US) that it was part of Australia. When it was decided to take Japan away from what had been his job the possibility of returning to that approach "*went up a notch.*" This was partly just because a new manager often seeks to make changes but primarily because the territory would be smaller (Japan being a much bigger market for the Adecco group than South East Asia) and the senior manager would have scope to take on a more active role in respect of NZ. When it turned out to be Mr Roe who got that role it became even more likely that NZ would once more report to Australia because Mr Roe was well known within Adecco as someone who believed NZ should not be a stand alone operation.

[7] Mr du Ree said that in this way, while he was not the maker of the relevant decisions, they came as no surprise to him. He maintained that they should not have come as any surprise to Ms Board either. He noted that the possibility of the CEO role being disestablished at some point was raised as an issue by her prior to her accepting the position in September 2002. To provide for the contingency that the New Zealand operation might be subsumed into that of Australia special redundancy provisions were incorporated into her employment agreement. (The provision did not however survive subsequent re-negotiation of the agreement.)

[8] Ms Board did not dispute what Mr du Ree told the Authority about Adecco's recent history in the region, about Mr Roe's views, or about previous discussions about whether NZ might once more report to Australia. She agreed that (in her words) "*change is constant is the message*."

[9] Ms Board's essential argument is that Ms Storey and Mr du Ree manufactured, or at the very least exploited, the restructure and the shift in the reporting and strategic responsibility for the purpose of getting rid of her. The circumstances that gave rise to Ms Board's doubts about the genuineness of her redundancy can be traced back to mid 2006, when the New Zealand operation was not performing as well as was desired, and Ms Board reported to Mark du Ree in his role of "County Manager, Japan, Australia and New Zealand."

[10] As noted already, the greater part of his responsibilities lay in Japan and he was concerned that he was unable to give New Zealand the attention it required. He therefore arranged for a former CEO of New Zealand, Roselyn Storey, to take up a

part time role in the NZ head office where she was charged with giving Ms Board such guidance and support as needed to turn the NZ operation around. The arrangement was that Ms Board remained in overall charge of the NZ operation but was expected to report to Ms Storey on matters relating to strategic direction.

[11] Although Ms Board has not disputed that the NZ operation had some issues at this time, she nonetheless resented Ms Storey's involvement. Ms Board told the Authority that Ms Storey "insinuated" herself as her boss however email exchanges between Mr du Ree and Ms Board show that Ms Storey was brought in at his instigation and that he had explained his reasons to Ms Board.

[12] One of the practical problems in the New Zealand organisation was that Ms Board felt she had too many direct reports (18 in all.) Ms Storey agreed. In the latter part of 2006 Mr du Ree accepted a recommendation from Ms Board and Ms Storey that a new position (National Operations Manager) should be created within the New Zealand organisation. This role was to take some day to day management responsibilities off the CEO thereby freeing the CEO to concentrate on strategic development.

[13] The salary package for the role at its inception was only a little over half that of Ms Board's total remuneration as CEO. The person who got that job is still in the most senior role in the respondent. In the intervening five years the role has been altered somewhat and now carries more responsibility then the original National Operations Manager role. I was told that as at June 2011 the remuneration for the role is still below what the CEO received in 2006.

[14] It is now Ms Board's view that this role was created as part of a succession plan that would strengthen the management team so that there would be someone to run the country after Ms Board was pushed out. Ms Board told the Authority she felt she was "bullied into" accepting this role.

[15] Ms Storey vigorously disputed this evidence. She said that if anything, the initiative for this role came from Ms Board. She said that her preferred solution would have been to create two new regional manager roles reporting to Ms Board but she

believed it was Ms Board's preference to have a National Operations Manager position.

[16] This difference in perception was, in my assessment, an indirect consequence of Ms Board's resistance to, and mistrust of, Ms Storey's involvement in the New Zealand operation. Ms Board was not open and honest with Ms Storey about the new role or about other matters. An example of her attitude can be seen in the following comment about the new role which was contained in Ms Board's witness statement:

> *"I did not overtly object but nor did I agree with it and therefore delayed recruitment activity."*

[17] Whatever Ms Board's private thoughts were about the new role, I am not satisfied that she was clear about them to Ms Storey. I accept that Ms Storey went on to advocate the creation of the new position in the belief that that the New Zealand operation required additional resource and that Ms Board supported the proposal. I also accept that Mr du Ree signed off on it for the same reasons.

[18] Ms Board told me she believed Ms Storey was motivated by self interest in that she wanted more work with the respondent herself. At the time of these events Ms Storey had left full time work with Adecco after taking voluntary redundancy. She told me that although she had agreed to consult for Adecco on a temporary basis her priority was to concentrate on her own business interests. She said she was not interested in full time or long term work with the respondent or any other part of Adecco. She continued part-time consulting for the respondent for a few months after Ms Board left but this ended by late 2007.

[19] As for Mr du Ree, he was in the process of relinquishing responsibility for NZ/Australia when Ms Board was made redundant. Although he implemented the decision about her role (as discussed below) he was emphatic that the decision was made by Ray Roe. There was no evidence to counter this assertion and indeed no evidence to suggest that Mr du Ree or Ms Storey had any input into the decisions relating to the restructure.

[20] Mr Roe did not give evidence himself. Ms Board's opportunities to influence his thinking appear to have been limited to one main meeting on 12 February 2007.

On this date Ms Storey and Ms Board travelled to Melbourne to give a presentation to Mr Roe on the New Zealand business and the strategy for its future. They had worked on it together and both participated in the briefing. Although Ms Board felt the presentation itself went well she nonetheless suspected Ms Storey of undermining her to Mr Roe. It was after having heard the presentation that Mr Roe proceeded to make his decision that the role of NZ CEO was no longer needed.

[21] Ms Board agreed that Mr du Ree and Ms Storey were unlikely to have had much influence on higher level decisions regarding the structure of the region as a whole. Although (as she pointed out) they were in a position to have had some influence on Mr Roe's thinking, she acknowledged that each of them had always subscribed to NZ being a stand alone operation.

[22] It has not been established that Mr du Ree and Ms Storey had the motivation or the influence to engineer the series of steps that led to the disestablishment of the NZ CEO position. I am satisfied that the decision was the consequence of actions within the wider Adecco group, actions which were not about Ms Board at all.

[23] I accept therefore that the disestablishment of the position was for genuine commercial reasons.

(ii) The process: consultation and consideration of redeployment

[24] Employer obligations to consult have a statutory basis in the good faith provisions of s. 4 of the Employment Relations Act. It sets out a number of responsibilities which apply in redundancy situations or situations where an employer is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment. The parties are to be responsive and communicative and employers are to provide access to relevant information and an opportunity to comment before any decision is made.

[25] In submissions for the respondent it is asserted that the essence of consultation is that the employee has a chance to be heard before a decision is made. It says that Ms Board had long been aware of the risk of being subsumed into Australia and met with Mr Roe on 12 February 2007 in full knowledge that the risk had been increasing

since the restructure was signalled in October 2006. In submissions the respondent describes the purpose of the meeting as being to: "*put New Zealand's (and by implication , her) case"*

[26] There was no real evidence to suggest that the meeting was intended to be Ms Board's opportunity to give feedback on whether the CEO position should be retained, but even if it was, it would not be satisfactory for that purpose to be conveyed "*by implication*." Consistent with the requirements of s.4 the respondent in this case needed to put Ms Board properly on notice of the fact that the disestablishment of her position was in contemplation, and provide her with an opportunity to address that specific point (as distinct from the performance of the New Zealand operation in general.)

[27] There is no evidence to suggest that anything of this sort happened. The meeting of 12 February cannot by any stretch be construed as part of a consultation process with regard to a potential redundancy.

[28] What the respondent calls the second meeting to discuss the restructure occurred on 1 March 2007 when Mr du Ree arrived in New Zealand to talk to Ms Board about the disestablishment of her role. He did not give her advance notice that this was the purpose of the meeting but as it turned out, Ms Board heard that he was coming and asked Ms Storey the reason for the visit, whereupon Ms Storey confirmed that it was to do with Ms Board's employment.

[29] The determination of 19 January 2011 sets out, in the following terms, what happened after that.

> *"[8] Ms Board spent much of 1 and 2 March with Mark du Ree, whose principal purpose in visiting New Zealand at that time was to meet with her. The first of the meetings began with Ms Board being handed a letter telling her that her position was to be disestablished immediately. Redeployment was then discussed. Since Adecco is a large international group it was possible that there could be opportunities for her to move into a comparable role offshore, however Ms Board did not speak any language other than English which restricted the roles she was in a position to consider. Ms Board also indicated that she would not go to the UK.*
>
> *[9] Mr du Ree went off and checked what vacancies were current. He established that there were no suitable positions available in Australia or the US. He returned to Ms Board with that news and asked if she wished him to look at what there might be in the UK. When she confirmed that she did not want this he told her: "I guess we have*

> *to have the discussion about redundancy then." Negotiations for a redundancy package began and continued through the day.*
>
> *[10] The discussions of 1 March concluded with Mr du Ree showing Ms Board (as a courtesy) the draft of a statement he proposed to issue to inform her staff that she was leaving. Ms Board then went home to consider, overnight, Mr du Ree's final offer which was conditional on her agreeing that it be a full and final settlement of all employment related matters.*
>
> *[11] Ms Board and Mr du Ree met again on Friday to continue their negotiations. Ms Board reiterated a counter offer but no agreement was reached. Ms Board's departure was announced to other staff in an email on the afternoon of Friday 2 March. Her final pay (consisting of her contractual entitlements only) went into her bank account that night and written confirmation of her dismissal was couriered to her the next day."*

[30] There is essentially no dispute that the decision to disestablish the CEO position was presented to Ms Board (on 1 March) as a fait accompli. Mr du Ree simply handed her a letter which contained the bad news, and they moved on to look at redeployment options.

[31] It follows therefore that there was no consultation with Ms Board about changes with the potential to end her employment before those changes occurred. In this regard the respondent failed to act as a fair and reasonable employer would.

[32] As for redeployment, Mr du Ree told the Authority that the Adecco group were retrenching at that time which limited the number of roles available at Ms Board's level. He also said that by restricting the options to the US and Australia she had made it more difficult for him to find her a suitable role.

[33] I have had the opportunity of referring to a transcript of the meetings (taken from a recording by Ms Board.) This evidence, taken together with what I heard directly from Mr du Ree himself, satisfied me that Mr du Ree engaged in the meetings of 1 and 2 March in good faith. He did not relish the unpleasant task of being the bearer of the bad news and on a personal level attempted to assist Ms Board insofar as he could.

[34] Ms Board has subsequently suggested that because the disestablishment of her role was already a possibility when the National Operations Manager was being recruited in late 2006, the respondent should have held that job open for her. When it was put to her that the difference in the salaries was too great for it to have been

credible for the respondent to think she would take it, she said she felt it would have been reasonable for the role to have been offered to her at a salary part way between her own and that of the National Operations Manager.

[35] I accept (as argued for the respondent) that this was not a reasonable expectation on her part.

[36] I am satisfied that the respondent met its obligations in respect of the exploration of redeployment options.

Remedies

[37] It has been established that Ms Board's employment was terminated for genuine commercial reasons. I am also satisfied that the one failure of process (inadequate consultation) was not sufficiently serious to call into question the justification for terminating the employment. It follows that there can be no question of an award for remuneration lost as a result of the grievance.

[38] Ms Board is however entitled to compensation for hurt and humiliation arising out of the inadequate consultation. Ms Board was deeply aggrieved by the termination of her employment and it had serious and long term effects for her. A better and more measured process would not have changed the outcome but it would have assisted Ms Board in preparing for, and coming to terms with, what happened to her. I am satisfied that in all the circumstances an award of $10,000.00 is appropriate.

Holiday pay

[39] Ms Board claims that bonuses received for the 2003 and 2004 years were wrongly excluded from the assessment of average weekly earnings when her holiday pay was calculated. The respondent concedes the point in respect of the 2003 year but says that the bonus for the 2004 year was discretionary and should not be included for the purposes of establishing the average weekly wage.

[40] Section 21(2)(b) of the Holidays Act 2003 provides that the rate of payment for an employee's annual holiday entitlement is to be calculated on the following basis:

> *"…at the rate that is based on the greater of*
>
> (i) *The employee's ordinary weekly pay at the beginning of the annual holiday; or*
>
> (ii) *The employee's average weekly earnings for the 12 months immediately before the end of the last pay period before the annual holiday."*

[41] Section 24 (2) sets out the equivalent provision with regard to entitlements not taken at the time the employment comes to an end.

[42] Section 8 provides:

> (1) *In this Act, unless the context otherwise requires,* ***ordinary weekly pay****, for the purposes of calculating annual holiday pay,—*
>
> *(c) excludes—*
>
> *(i) productivity or incentive-based payments that are not a regular part of the employee's pay…*
>
> …
>
> *(iii) any one-off or exceptional payments:*
>
> *(iv) any discretionary payments that the employer is not bound, under the terms of the employee's employment agreement, to pay the* ***[****employee:****]***

[43] Section 14 provides that "gross earnings" also excludes any payments (including discretionary payments) that the employer is not bound, by the terms of the employee's employment agreement, to pay the employee.

[44] As the respondent has noted the only reference to a bonus in Ms Boards employment agreement was a single line under the heading "Benefits" in Schedule 1 which reads "*An annual bonus based on the Country Managers Bonus Plan then in effect."*

[45] In her evidence to the Authority the respondent's current Finance Manager stated that each year a standard form of letter was provided to Ms Board setting out

the details of bonus that could be awarded in that year and how it would be calculated. On 18 August 2004 Ms Board received a letter which set out her base salary and bonus plan "*from 1 January 2004*." After setting out the details of the bonus it noted:

> "*The details of this bonus scheme may be varied at the sole discretion of the company.*"

[46] The respondent argues that it is clear from the bonus letter dated 18 August 2004 that the 2004 bonus payment was a discretionary payment. It says also that the fact that the bonus was contained in a separate Country Managers' Bonus Plan rather than being incorporated into the terms of the agreement itself is consistent with the terms of any bonus arrangement not forming an enforceable term of the employment agreement.

[47] I do not accept that the provisions in Schedule 1 and the letter of 18 August read together can be construed in the way that the respondent asserts. I construe the terms as follows. That the "*details of the 2004 bonus scheme could be varied at the sole discretion of the employer*" meant that the respondent was not bound to offer the same bonus scheme for 2005 as it had for 2004 (or indeed any particular scheme.) However, once a bonus plan was "*in effect*" for a particular year it became part of the terms and conditions of employment for that year, so that an "*annual bonus*" based on that plan was not itself discretionary.

[48] It follows that the 2004 bonus should have been taken into account in calculating Ms Board's entitlement to holiday pay.

[49] The respondent's finance manager has set out the holiday pay which would be owed in the event the Authority should find that both bonuses should have been included in the calculations. I am satisfied that her calculations are reliable and accept that the figure provided ($17,060.95 gross in total) is correct.

[50] In the course of checking Ms Board's wage and time records the finance manager also established that a further $2,526.59 was owed by way of underpayment of final pay.

Summary of orders

[51] The respondent, Adecco NZ Ltd is ordered to pay to the applicant Fleur Board the following sums:

i. $10,000.00 compensation for hurt and humiliation;

ii. $17,060.95 gross holiday pay, and

iii. $2,526.59 arrears of wages.

Costs

[52] Any application for costs or disbursements should be made within 28 days of the date of this determination.

Yvonne Oldfield
Member of the Employment Relations Authority