IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012]NZERA Auckland 144
5357452

	BETWEEN	JOHN BOURKE Applicant
	A N D	KOHLER NEW ZEALAND LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Greg Bennett, Advocate for Applicant Stephen Langton with Nikki Dines, Counsel for Respondent
Investigation meeting:	20 February 2012 at Auckland
Date of Determination:	27 April 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Bourke) alleges that he was either unjustifiably disadvantaged or unjustifiably dismissed or both by the process undertaken by the respondent employer (Kohler) in its Australasian business. Kohler resists those claims, contending that Mr Bourke resigned his position and that there was no redundancy as Mr Bourke contends.

[2] The matter took some little time to bring to hearing because of a continuing delay in having Kohler respond to Mr Bourke's statement of problem. In the result, the Authority set a deadline for the statement in reply to be received, and that deadline itself was breached by some seven days. When setting the deadline, the Authority directed that any failure by the respondent to file within that deadline would require it to apply for leave to file out of time.

[3] When the statement in reply was eventually received (albeit seven days later than the Authority had directed), the Authority used its discretion to not require a formal application on the footing that that would simply delay the proceedings further and not contribute to doing justice between the parties. Mr Bennett for the applicant protested that decision, pointing out the Authority had issued a direction requiring an application for leave if the filing was further delayed.

[4] The Authority considered Mr Bennett's submissions but took the view that the interests of the parties were best served by the matter proceeding to hearing without a further delay occasioned by the need to argue the question of leave. However, in varying its original direction, the Authority reserved the right of Mr Bourke's representative to be heard on the issue of prejudice to him in respect of the additional delay.

[5] Submissions filed on Mr Bourke's behalf do not address the issue of prejudice to him at all and simply repeat the argument that it is not available to the Authority to vary its own decision. Of course, it is available to the Authority to vary its own directions as it sees fit. The Authority thought, in the particular circumstances of this case, that the statement in reply, although filed seven days after the final date the Authority said the document should be filed by, constituted substantial compliance with the Authority's original direction and, in consequence, it would be a waste of the Authority's time and the time of the parties in allowing argument over the filing of the statement in reply.

[6] There is ample authority for the proposition that proceedings in the Authority are relatively informal. The Authority is not a court of record; indeed, it is not a Court at all, and the guiding principle for the Authority's operations must be taken from s.157(1) of the Employment Relations Act 2000 which provides:

> *The Authority is an investigative body but has the role of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities.*

[7] In the Authority's judgment, the best interests of the parties was served by proceeding to hearing of the substantive issue rather than allocating scarce hearing time to an argument about whether or not leave should be granted, notwithstanding the earlier direction. Furthermore, there is no penalty in the statute for the failure to file a statement in reply on time and the Authority considered that by reserving rights

for Mr Bourke to identify how he was prejudiced by the late filing, the Authority was protecting his rights and interests. In the result, Mr Bourke chose not to make any submissions in that regard at all and simply reiterated his objection in principle.

[8] Even if the Authority were to accept Mr Bourke's proposition and reject Kohler's statement in reply, that would be without force or effect because, in order for Mr Bourke's personal grievance to be considered in any way, the Authority had to receive evidence from Kohler such that Mr Bourke's claims could be evaluated.

[9] In all the circumstances, the Authority is not minded to strike-out the statement in reply for the foregoing reasons.

[10] Mr Bourke was employed by Kohler as Managing Director of its Australasian business. As such, he was employed pursuant to an individual employment agreement dated 31 May 2006. It is common ground that Mr Bourke's principal focus was, to use Mr Bennett's phrase, *"on bringing the business back into profitability"*.

[11] Mr Bourke, in conjunction with his immediate superior, developed a strategy which was implemented in 2009 to achieve the return to profitability. However, one of the consequences of that strategy was a diminution in the size of Mr Bourke's own role. He said that the strategy effectively took the business from being a $42m business down to a $20m business and that he lost control of manufacturing and marketing as a consequence of the implementation of the strategy.

[12] There was a critical meeting between Mr Bourke and his new manager, Mr Bernhard Langel, who had taken over managing Mr Bourke in April 2010. Mr Langel's evidence is that, from the point that he assumed responsibility for Mr Bourke's operations, he started to become concerned about some issues around Mr Bourke's management style and he sought to address those concerns with Mr Bourke at the 4 April 2011 meeting.

[13] A particular concern for Mr Langel was negative comments received about Mr Bourke's management style in respect of the marketing people who were working for Kohler at the time. Mr Langel in his evidence to the Authority made clear that he was concerned about the possibility that new marketing people joining Kohler might be adversely affected by Mr Bourke's style which he described as *"micromanaging"*. Accordingly, what he proposed in the 4 April 2011 meeting was the implementation of a new regime, the general thrust of which was that the marketing people would

cease reporting to Mr Bourke and report to another senior officer in Kohler, at least until they were fully trained in Kohler systems. This reflected Mr Langel's anxiety about the fragility of those employment relationships and also the fact that Kohler had recently invested money in new marketing personnel within Mr Bourke's area and it wanted, if possible, to retain those new people into the future.

[14] Mr Bourke's take on this particular aspect is that this decision to remove marketing from his aegis was foisted on him and was a unilateral decision made by Mr Langel, which he was simply told about.

[15] Further on in this same meeting, it is common ground that the parties began to talk about Mr Bourke's future in the company. Mr Langel says this was the first occasion that he was aware of when Mr Bourke indicated his unhappiness about continuing while Mr Bourke says that he had raised it previously with Mr Langel at a meeting the two men had had in the Mico board room in Sydney.

[16] In any event, whether it was raised earlier or not, it is common ground that there was a discussion at the meeting on 4 April 2011 about Mr Bourke's future. He said he was not happy with his role. He said that his role had reduced and that Kohler was paying him too much for what he was now doing and he asked Mr Langel if Kohler would make the role redundant.

[17] Mr Langel's evidence is that he agreed to discuss the proposal with Mr Jim Westdorp, the Group President – Kitchen and Bath of Kohler. Conversely, Mr Bourke says that Mr Langel agreed to make his role redundant. That claim is vociferously denied by Mr Langel who says both that he did not say that and secondly that he would have no authority to say it even if he did.

[18] In any event, after the meeting, Mr Langel sent Mr Bourke an email dated 15 April 2011 in which the former summarised the 4 April discussion. Mr Bourke's impression from reading this document was that various decisions had already been made about the future direction of his part of Kohler and that he had no right of reply. The second paragraph of that email refers to Kohler's intention to

> *… integrate Kohler Australasia back into the Kohler Asia Pacific organisation. … It is also our intention to separate the New Zealand and Australian business into two separate, but related, entities reporting separately into the Kohler Asia Pacific organisation.*

[19] The email (which is a lengthy one) then goes on to discuss the implementation of the change in reporting lines for the marketing people (which the Authority referred to earlier) and then concludes with Mr Langel's acknowledgment that Mr Bourke had told him that he was no longer happy and satisfied with the role. The penultimate sentence of the email reads as follows:

> *In your opinion Kohler ANZ no longer requires a managing director with your background and capabilities and that it might be appropriate to make your position redundant. I will address this matter with Jim Westdorp separately.*

[20] Mr Bourke considers the observations in the second paragraph of the email as being, in effect, a restructure by stealth and argues that those remarks made by Mr Langel about the integration of Kohler Australasia back into the Kohler Asia Pacific organisation and then further down the disaggregation of Australia and New Zealand operation, are evidence for that. This passage is a fundamental building block in Mr Bourke's claim that his position as managing director for Kohler Australasia was being disestablished. Mr Bourke told the Authority that, by taking away marketing and then breaking up the region as the 15 April 2011 email provides, Kohler was effectively disestablishing the Australasian managing director's position.

[21] But that is not Kohler's position at all. It points to the penultimate sentence in the email from Mr Langel in which he deliberately (and correctly) records that it was Mr Bourke's opinion that Kohler no longer required a managing director for the Australasian region. In fact, Mr Langel said in his brief of evidence:

> *The proposal to separate the Australia and New Zealand reporting lines and to bolster the Australian operations did not mean that we would not need John's role of managing director – New Zealand and Australia.*
>
> *At the time I emailed John* [Mr Bourke] *on 15 April 2011, we had not made any decision about what, if any, impact the separation of the Australia and New Zealand operations would have on John's role. … no decision had been made to disestablish John's role, and I was not aware of any discussions about John's role having taken place at the senior executive level. I was also aware that Jim Westdorp regarded John very highly and that he saw his role in the business as being an ongoing one.*
>
> *From my perspective, even if the proposal proceeded, I saw the need for a common reference point between the New Zealand and Australia markets i.e. a managing director responsible for both markets.*

[22] The Authority accepts Mr Langel's evidence at face value. Mr Bourke is mistaken in his conclusion that the 15 April 2011 email foreshadows the demise of his position. It may well indicate that that is a possible outcome for the future, but the Authority is satisfied on the evidence it heard, that no decision had been taken on the future of the position held by Mr Bourke at the point at which the 15 April 2011 email was written.

[23] In his brief of evidence to the Authority, Mr Westdorp confirms Mr Langel's evidence and adds his own personal view that he thought highly of Mr Bourke (as Mr Langel had indicated), and was anxious to retain him in the business. Like Mr Langel, Mr Westdorp reiterated the position that even if Australia and New Zealand were separated as business units, *"I saw John's* [Mr Bourke's] *role as being an ongoing one …"*.

[24] There were then further email exchanges between Mr Bourke on the one hand and both Mr Langel and Mr Westdorp on the other and in the result, Mr Bourke spoke with Mr Westdorp on 29 April 2011, essentially to discuss Mr Bourke's redundancy proposal. The essence of Mr Westdorp's evidence to the Authority is that, in this conversation, he tried to talk Mr Bourke out of his conclusion that his role was redundant and indeed went so far as to say that he wanted Mr Bourke to continue in the role. According to Mr Westdorp, he told Mr Bourke that he had no intention of making Mr Bourke's role redundant so if Mr Bourke wanted to leave he would need to resign.

[25] It is common ground that Mr Bourke then indicated that he would resign although he says that Kohler had left him with no alternative but to resign. There was a discussion around a possible financial package and Mr Westdorp is adamant that as he did not want Mr Bourke to leave, it would certainly not be commercially sensible for him to make a payment to Mr Bourke to facilitate his departure and that he did not agree to such an arrangement.

[26] Although Mr Bourke commenced his proceedings with the claim that Mr Westdorp had promised a payment, when pressed during the investigation meeting, he *"… agreed he may have been at crossed purposes with Jim* [Mr Westdorp] *and that the latter 'may not have promised money'"*. The claim that Mr Westdorp had promised a financial settlement is made first in an email from Mr Bourke to Kohler on 3 May 2011. Mr Westdorp responded promptly to that email

confirming that there was no agreement to make a payment and then in response, Mr Bourke confirmed his resignation by email dated 13 May 2011.

Issues

[27] It will be useful if the Authority considers the following questions:

(a) How did Mr Bourke's employment relationship come to an end; and

(b) Was Mr Bourke's role redundant?

How did Mr Bourke's employment relationship come to an end?

[28] The Authority is satisfied on the evidence it heard that Mr Bourke's role came to an end as a consequence of his resignation voluntarily given. Mr Bourke formed the view that he had no choice but to resign his employment and that in consequence, he was, he says , constructively dismissed. But the evidence for that view is not strong. Indeed, there are a number of aspects which tend to support the conclusion that Mr Bourke's resignation was just that.

[29] First is the evidence that Mr Bourke received a job offer in late June 2011 which of course is after his resignation was notified to Kohler, but it seems that he was approached about his new role around the time that he resigned. What is more, his own evidence was that he had been headhunted for two other roles, one in January 2011 and one in May 2011 which he took no further. While the nexus between the offer of the role that he was in when the Authority conducted its investigation meeting and the resignation is not direct, this bundle of evidence does suggest that Mr Bourke would have been well aware that his skills were in high demand and that, were he to leave Kohler, he would be able to find a new role quickly.

[30] Next, the overwhelming weight of the evidence is that Kohler wanted Mr Bourke to remain in his present role notwithstanding the changes proposed. Mr Westdorp, the more senior of the two American executives who gave evidence to the Authority via video link, was particularly keen to retain Mr Bourke's skills and the Authority is satisfied that his evidence on the point was absolutely genuine. Even Mr Langel, who seemed to have a more distant relationship with Mr Bourke, notwithstanding the direct reporting lines, was very clear that there was no enthusiasm to see him leave the business.

[31] Further, given that all of the initiative for making his position redundant came from Mr Bourke himself and not from Kohler, it seems more likely than not that, having failed to persuade Kohler to make his position redundant when he wanted to leave the position, Mr Bourke took the other obvious course and simply resigned his employment.

[32] In the end, the law requires a constructive dismissal to be proved by the party claiming it and in order to succeed, Mr Bourke has to satisfy the Authority that the initiative for bringing the relationship to an end came from Kohler rather than from him. Given the Authority is satisfied on the evidence that Mr Westdorp and Mr Langel were both genuine in their wish to retain Mr Bourke and there was absolutely no enthusiasm from either for the facilitation of his departure, it seems more likely than not that this was not a constructive dismissal.

[33] Even on the footing that Mr Bourke presumably relies upon, namely the contention that Kohler has been guilty of a breach of duty such as to allow a repudiation, there is little to suggest either causation or foreseeability: *Auckland Electric Power Board v. Auckland District Local Authorities Officers IOUW* [1994] 1 ERNZ 168. The breach presumably relied upon by Mr Bourke is that Kohler failed to deal properly with his claim that he was redundant. In order for Kohler to have so breached its obligations as to cause the resignation, there would need to be evidence before the Authority sufficient to justify that nexus, and there is not. As Kohler makes clear in its submissions, the most that could be alleged is that some future conduct or series of acts of Kohler might be causative of the resignation, but of course that is not enough to satisfy the law. In *Business Distributors Ltd v. Patel* [2001] ERNZ 124, the Court of Appeal made clear that an employee could not treat himself as constructively dismissed by repudiating an employment agreement in anticipation of some future contingent risk in his employment.

[34] *Patel* is directly on point here. The only basis on which Mr Bourke can possibly contend that the employer's behaviour may entitle him to repudiate is some expectation of future conduct. Nothing in what has happened up to the point at which Mr Bourke tendered his resignation can ground a breach of duty claim. It is apparent from the 15 April 2011 email from Mr Langel that Mr Bourke's proposal around redundancy was still being considered. What is more, that proposal remained in consideration until Mr Westdorp indicated to Mr Bourke that it was no longer in play

and at that point Mr Bourke resigned his employment. That suggests a direct nexus between the employer's turning down Mr Bourke's proposal as to redundancy and the resignation itself which all rather confirms the Authority's conclusion that the initiative for the termination of the employment came from Mr Bourke and not from Kohler. At best, all Mr Bourke can point to in terms of satisfying the breach of duty claim is the contention that at some point in the future Kohler might not fulfil the obligations of a good and fair employer, but that is no more than a contingent liability and cannot ground a constructive dismissal claim in consequence.

[35] Causation not being established for the resignation, the question of whether the resignation was reasonably foreseeable need not be addressed: *Auckland Electric Power Board supra,* applied.

[36] The Authority concludes then that Mr Bourke resigned his position of his own motion, having failed to obtain the consent of Kohler to his position being declared redundant and therefore having failed to obtain redundancy compensation from his then employer.

Was Mr Bourke's role redundant?

[37] The Authority is not persuaded that Mr Bourke's role was redundant at the time that he resigned nor subsequently. Certainly it is clear that there was never a redundancy declared. That is self-evident from the evidence the Authority heard. Indeed, the only suggestion the position was in fact redundant came from Mr Bourke himself and not from Kohler. He put that proposal up and it rejected it and, having rejected it, Mr Bourke then resigned his employment.

[38] However, redundancy can be created by stealth rather than by the deliberate action of an employer and it is presumably on this footing that Mr Bourke maintains his role was redundant. Again, the evidence for this contention is not strong. Both of the witnesses for Kohler were very clear that they wished Mr Bourke to remain in the employment and that they saw the role continuing on into the future notwithstanding the restructure that was proposed. Each of Mr Langel and Mr Westdorp gave evidence on the point from their own perspective and each satisfied the Authority that their evidence was credible and believable.

[39] Furthermore, Kohler's evidence was that not only was the role still required at the point at which Mr Bourke tendered his resignation, but that it was required on into

the future thereafter, so much so that the evidence the Authority heard was that Kohler was continuing to seek a replacement for Mr Bourke at the time the investigation meeting proceeded.

[40] Mr Bourke's evidence to the Authority was at best sketchy, but his contention was that he was being *"kept until the end of 2011 for the purposes of Kohler and that … I was dispensable to them (thereafter)"*. But there was no evidence to support that contention. The evidence is otherwise. Just because Mr Bourke maintains that his position has gone does not make it so. Kohler was equally clear that the role continued, that it sought to retain Mr Bourke in it but given his intention to leave the company it sought to recruit somebody else to that role and, up to the point of the investigation meeting, was still intent upon that endeavour.

[41] Nothing in the evidence the Authority heard suggested that the continuum in which the subject position must remain in, was somehow broken by any action or lack of action by Kohler. Indeed the reverse was the case.

[42] The standard legal test of whether the position has or will become superfluous to the needs of the employer is simply not met in the present case. There is nothing to suggest that the position is superfluous nor any indication that "*the work performed by the position has disappeared without the initiative of either party*": *Wellington Clerical IUOW v. Greenwich* (1983) ERNZ SelCas 95 at 109.

[43] The only basis on which Mr Bourke might conceivably contend that his role was redundant is on the footing that it had *"substantially changed"* but if that is to be established then there would need to be a break in the continuity of employment which the Authority referred to above. No such evidence of a break is apparent. Whatever else is true, the Authority feels able to state that at the point at which Mr Bourke resigned, he was not redundant and indeed there was no substantial change to his role during the employment which would justify the conclusion that the essential continuity of the employment had been broken.

Determination

[44] The Authority is satisfied on the evidence it heard that Mr Bourke resigned his employment of his own motion and that, at the time of his resignation and thereafter, his position was not redundant. It follows from the foregoing conclusions that Mr Bourke's claim fails in its entirety.

Costs

[45] Costs are reserved.

James Crichton
Member of the Employment Relations Authority