

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 42
5541397

BETWEEN PHILIP JOHN BUDDING
Applicant

AND AgRESEARCH LIMITED
Respondent

Member of Authority: Trish MacKinnon

Representatives: Jeremy McGuire, Counsel for Applicant
Fiona McMillan, Counsel for Respondent

Investigation Meeting: 28 and 29 October 2015 at Palmerston North

Submissions Received: 12 November and 2 December 2015, from the Applicant
27 November and 7 December 2015, from the
Respondent

Determination: 8 April 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Philip Budding worked as a technician for AgResearch Limited (AgResearch), and for the government department that preceded it, at the Grasslands campus in Palmerston North for more than 36 years. His employment was terminated for redundancy in December 2014. Mr Budding has raised a personal grievance for unjustifiable dismissal.

[2] He questions whether his redundancy was for genuine economic and operational reasons and claims his employer did not follow a fair procedure. Mr Budding says AgResearch failed to consult fully with him and failed to disclose all information relevant to his continued employment. He says he was not given proper opportunity to comment about his redundancy before it was effected. Mr Budding

further says he was not given a real opportunity to apply, and be considered, for one of the five technician positions that were available as a result of the restructuring.

[3] Counsel for Mr Budding acknowledged in the course of the investigation that a further personal grievance for unjustified disadvantage had not been raised within the statutory 90 day period.¹ An additional/alternative claim that his employer breached good faith in failing to treat him fairly will be considered.

[4] AgResearch is a Crown Research Institute (CRI) which, according to its website, plays a key role in New Zealand in delivering new knowledge and technologies that underpin the pastoral, agri-food and agri-technology value chains. Before its formation in 1992 much of the pastoral agricultural research it undertakes was carried out by the now-defunct Department of Scientific and Industrial Research (DSIR) at the Grasslands campus.

[5] AgResearch organises its work into six science groups. Within each of these are varying numbers of science teams. At the time Mr Budding's employment was terminated he was a Senior Field Technician in the Sustainable Land Use and Global Change (SLUGC) team of the Land and Environment Science Group.

[6] AgResearch denies Mr Budding's allegations and says it followed a fair and reasonable procedure before terminating his employment on the grounds of redundancy for genuine business reasons. It says Mr Budding's dismissal for redundancy was justified in all the circumstances. If the Authority finds otherwise, AgResearch seeks the repayment of the redundancy compensation of \$60,821.54 (gross) it paid to Mr Budding.

[7] AgResearch also denies the breach of good faith alleged by Mr Budding and says it was responsive and communicative throughout the process which led to the termination of his employment for redundancy.

Issues

[8] The issues for determination are:

- a. Whether Mr Budding's redundancy was genuine;

¹ Section 114 Employment Relations Act 2000

- b. Whether AgResearch conducted a fair and reasonable procedure that gave Mr Budding a real opportunity for consideration for one of the available positions;
- c. Whether AgResearch breached its obligations of good faith to Mr Budding in the process that led to the termination of his employment;
- d. If Mr Budding was dismissed unjustifiably, whether he should repay the redundancy compensation he received from AgResearch.

Employment Agreement

[9] Mr Budding was employed on an individual employment agreement the terms and conditions of which were based on those of the July 2001 Collective Agreement between AgResearch and the New Zealand Public Service Association Inc. (the PSA). Section 3 of the collective agreement concerns *Processes for Change* and begins with the following *Intention* clause:

The parties to this agreement recognise that we operate in a changing environment. Management of these changes will be enhanced by an open and consultative employment relationship. We undertake to work with each other when appropriate on employment matters of common interest.

[10] The section also includes the following clause headed *Restructuring Process*:

AgResearch has a responsibility to ensure that the company maintains long-term viability for its stakeholders including employees and shareholders. As a result of a change in government policy or business focus, or for other commercial reasons, it may be necessary to review the structure of work groups or other areas of the organisation.

When a review may lead to restructuring the following principles will be followed:

- All legal and contractual requirements will be met, including the requirements of AgResearch as a "Good Employer".
- Employees who may be affected and the NZPSA will be invited to participate in the review.
- Employees will be treated fairly – both parties recognise that employees have a right to information and support from their line manager, human resource staff, the Chief Executive Officer and the NZPSA.
- Should the situation arise where an employee's position is to be declared surplus to the company's requirements, consideration will be given to alternative employment options. Options to be explored

include (but should not be limited to) redeployment, retraining, job share, reduced hours, or any other solution that prevents valuable capability leaving the organisation. The company will provide outplacement assistance including counselling, preparation for job seeking and time off to seek alternative employment.

Relevant law

[11] Section 103A of the Employment Relations Act 2000 (the Act) provides that determination of whether a dismissal, or action, by an employer is justifiable is to be made on an objective basis by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred. This applies equally to a dismissal for redundancy as to any other form of dismissal.

[12] Section 4 of the Act provides that employers have a duty of good faith. This includes the requirement, where the employer is proposing to make a decision that will adversely impact on an employee's ongoing employment, to provide that employee with relevant information and an opportunity to comment on it before a final decision is made.² These statutory provisions are relevant to a consideration of AgResearch's actions in relation to Mr Budding's termination for redundancy.

Was the redundancy genuine?

[13] This requires consideration of the events leading up to the 11 September 2014 notification to Mr Budding that, unless an alternative position was found in the meantime, his employment would be terminated for redundancy on 12 December 2014.

[14] The Chief Executive (CE) of AgResearch, Dr Tom Richardson, emailed all staff in mid-July 2014 under the subject line "*Science Team Reviews*" to foreshadow a change process. He referred to the organisation continuing to "...*focus on positioning our science so it can more effectively deliver to our Statement of Corporate Intent and the needs of our sector*". He said this was in response to the CRI's need for "*growing areas where we see new opportunities*" and "*reducing areas where we see declining needs, in particular where activities have decreased*". Dr Richardson informed staff that each Science Group Leader and their Science Team Leaders would run a process

² Section 4(1A) of the Act

that was tailored to address the issues and opportunities for their Group. This was due to take place over the next six weeks.

[15] He estimated that approximately 22 full-time equivalent employees (FTEs) in areas of declining demand would be affected. Approximately 10 new FTEs would be required across the affected science groups to meet growing opportunities. To minimise the impact on areas with declining needs, vacant positions had not been filled, resulting in 11 existing vacancies.

[16] Dr Bram de Vos, Science Group Leader of the Land and Environment Group, followed up Dr Richardson's communication with an email on 22 July 2014 to all Land and Environment Science Group members. Dr de Vos expanded on the changes necessary in the Group, and asked its members to keep 4 August 2014 free as he intended sharing the proposed changes in the group with them on that date.

[17] On 4 August 2014 Land and Environment Group members, including Mr Budding, were given a PowerPoint presentation by video conferencing. The presentation explained the consultation process and informed employees about the establishment of a Change Management Team (CMT) for each affected Group. Dr de Vos, who was overseas at the time of the Authority's investigation meeting, fronted the video presentation and was at the Palmerston North work site to talk with employees the following day.

[18] Mr Budding was given a letter from Dr de Vos on the day of the presentation. This advised that his position was included in the review and he was one of the employees directly impacted by it. The letter informed him that the review process would be conducted in accordance with his employment agreement and AgResearch's Change Management Policy and its Change Management Procedure and Guidelines. Included with the letter was documentation setting out the background to the review and the rationale for the proposed changes.

[19] The documentation included revenue and staffing information, recording staff changes over the last year. It detailed the growth area in the Land and Environment Science Group and the area in which there was less demand. Experimental and field-related work was identified as being in the reduced demand area. This was the area in which Mr Budding mainly worked. The resulting proposal was to decrease staff in that area by reducing the number of Field Technicians from seven to five.

[20] Mr Budding says no detailed financial or economic information was provided to employees affected by the restructuring. The documentation AgResearch gave him provided, in his view, only general and macroeconomic revenue and costs information about Land and Environment. He queries the need for the restructuring, saying that *"If AgResearch was on the brink of financial ruin then naturally that would have been a different story. However there was no evidence or suggestion from management that AgResearch was going through anything like that"*.

[21] AgResearch says the financial information shared with Mr Budding and other affected employees showed that for the 2013-2014 financial year the nett revenue of the Land and Environment Group was \$3.5 million less than projected in the Group's Business Plan. Science staff were allocated chargeable hours to various projects and the number of those allocated hours was 14% lower than foreseen in the Business Plan for the year.

[22] In Mr Budding's view, even if there was a case for restructuring or disestablishing field technicians' positions, there was no case for disestablishing his specific role. He claims he received no specific information about whether his employment was economically and operationally sustainable. Mr Budding summonsed Dr Alec Mackay to give evidence to the Authority's investigation. Dr Mackay has held the role of Principal Scientist with AgResearch and its predecessor since 1985. Mr Budding said Dr Mackay had been his main supervising scientist and had plenty of research field work for him to do when he was made redundant.

[23] While Dr Mackay's evidence was complimentary about Mr Budding's technical skills, and conveyed disappointment that his employment had ended, it was not particularly helpful to Mr Budding's claims overall. It was Dr Mackay's evidence that the field work Mr Budding had been undertaking for him had come to an end in 2014. He also said the amount of time Mr Budding had spent on work for him had diminished over the last year or more of his employment.

[24] Professor Warren McNabb, Research Director at AgResearch, Palmerston North, gave evidence about the strategic and financial situation at AgResearch that led to the review. He said AgResearch had obligations as a CRI to be a financially viable entity focussed on increasing wealth for New Zealand from the pastoral sector. It was dependent on the level of research grants provided by outside funders from year to year. This required constant reviewing of the relevance, capability, and capacity of its

staff and the research and development in which they were involved. Changes in expertise requirements, funding, and contract sources required AgResearch to tailor its capacity, capability and recruitment to ensure its work remained relevant to the needs of stakeholders.

[25] Mr McGuire submitted, on behalf of Mr Budding, that AgResearch provided no credible and convincing evidence that it could not afford to retain Mr Budding's employment. His submissions also referred to the employer's evidence not showing that it was fiscally impossible for it to continue employing Mr Budding.

[26] I do not accept that AgResearch had to provide such evidence. Nor do I accept Mr Budding's perspective that AgResearch had to be "*on the brink of financial ruin*" before it could justifiably decide to decrease the number of its technical staff in a particular area of its work that was in decline at that time. It is not a requirement in law that an employer must reach that state before making decisions about redundancy. The more pertinent question in this regard is whether AgResearch's decision to make Mr Budding redundant was genuine, in the sense of being based on business requirements, rather than being made for some other motive.

[27] Mr Budding said he thought he had been selected for redundancy because of his longevity of service. He believed the decision was not a genuine operational one, but was a targeting of older employees who were more expensive for AgResearch.

[28] Mr Budding had no evidence to support this belief and I do not find it credible. The unchallenged evidence from an HR Advisor based at AgResearch's Ruakura site, Kitty Burton, was that most of the people in the SLUGC team had considerable years of service with AgResearch and its predecessor. She also said that four of Mr Budding's technician colleagues in the SLUGC team each had more than thirty years' service. That suggests there would have been little reason to select Mr Budding for redundancy rather than any other of those four colleagues if the decision had been purely based on cost.

[29] I am satisfied from the evidence presented by Professor McNabb and other witnesses that AgResearch made its decision to reduce the SLUGC team's technical complement by two FTEs on genuine business grounds relating to the changing needs of the CRI in response to shifts in funding, contracts and research priorities. I note also that this was consistent with the principle stated in its Change Management

policy under the heading "*Business Requirements*" that "*commercial viability is central to AgResearch's strategic direction*". I find no evidence that Mr Budding was specifically targeted for redundancy on the basis of his longevity of service.

[30] Whether or not it was reasonable for AgResearch to decide that Mr Budding, rather than any other SLUGC team member, should lose his position will be considered in following parts of this determination.

Was a fair and reasonable procedure followed?

[31] Section 103A of the Act, which I have referred to earlier, provides that the justifiability of a dismissal or other action by an employer is to be determined objectively against the standard of what a notional fair and reasonable employer could have done in all the circumstances at the time. The Act provides that, in applying that test, certain mandatory considerations must be taken into account. Those considerations are set out in section 103A(3) (a-d) as follows:

- (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
- (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
- (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
- (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[32] Additionally, section 103A(4) provides that any other factors the Authority thinks appropriate may be considered.

[33] The language in subsection (3) appears more appropriate to performance or disciplinary matters than redundancy. However, guidance given by a full Court of the Employment Court³, whose approach was subsequently endorsed by the Court of Appeal⁴, makes it incumbent on the Authority to "*try to give a sensible interpretation*" to the requirements of the subsection.

³ *Angus v Ports of Auckland* [2011] NZEmpC 160, [2011] ERNZ 266 at [46]

⁴ *Grace Team Accounting Ltd v Brake* [2014] NZCA 54 at [77]

[34] I have already found that AgResearch's decision to reduce the technical complement of the SLUGC team by two was made for genuine business reasons. An examination of whether it followed a fair and reasonable procedure in arriving at that decision is now required. Also required is an examination into AgResearch's subsequent decision not to appoint Mr Budding to one of the reduced number of technical roles in the team.

[35] Factors such as the adequacy of consultation with Mr Budding before the decision was made to implement the proposal to reduce the number of technical positions in his science team are relevant. Whether Mr Budding had sufficient opportunity to be heard on the matter before his employer took that decision is also pertinent. The question of whether he had adequate opportunity to make his views known regarding appointment to one of the remaining positions, and whether he was accorded consideration before the decision was made, are also factors that need to be considered under s. 103A(3).

A The decision to reduce the number of field technicians

[36] Michael Dodd, who was Mr Budding's Science Team Leader, gave evidence that he provided a monthly update to the SLUGC team regarding their individual time allocation to individual projects and their percentage utilisation. He said that staff utilisation had, for a number of years, been regarded as a key business performance statistic. In his view all staff were aware of its significance in an environment where funding priorities were subject to change.

[37] In June 2014 Dr Dodd had met with the SLUGC team, including Mr Budding, and presented them with copies of a spreadsheet summary showing that the team as a whole, comprising 21 FTE's, was 5 FTE under-allocated to known funded projects for the 2013-2014 financial year. He said he explained to the team that this was a result of a decline in revenue to the research group as a whole and to the field-based projects that involved the SLUGC team in particular. Dr Dodd said he advised team members at this meeting that there was likely to be a review in the new financial year (commencing 1 July 2014) and that, given the information known about projected demand, the review was likely to focus on technical capacity.

[38] Approximately one month later, in mid July 2014, all AgResearch employees received the email of 22 July from Dr Richardson advising them of the review of

science groups that was to occur. I have already outlined in the previous section of this determination the procedure AgResearch followed and will not repeat it.

[39] Further and more tailored information was provided to Mr Budding and other Land and Environment Group members by Dr de Vos by letter and enclosed documentation of 4 August 2014, and by PowerPoint presentation. Mr Budding was provided with information about the process that his employer intended to follow in carrying out the review, and how he could contribute his views to it.

[40] The Land and Environment CMT, to which I have already referred, was chaired by Dr de Vos and had five other members. These included a Science Team Leader, an HR Advisor, a PSA representative and two employee representatives, one from AgResearch's Ruakura (Hamilton) site and one from the Grasslands campus in Palmerston North. Employees in positions identified as affected by the review, including Mr Budding, nominated the latter two representatives.

[41] Mr Budding had the opportunity to make both an individual submission regarding the proposed changes, and to be part of a SLUGC team submission to the CMT on the changes. He chose only to join the team submission. In his written evidence to the Authority Mr Budding claimed that the CMT did not consider the submission he had helped to craft.

[42] That was strongly denied by Ms Burton, who was the HR member for the Land and Environment Group CMT. She said all the submissions were carefully considered by the CMT before it reported to Professor McNabb, the review's sponsor. Mr Budding acknowledged during the investigation meeting that the CMT's report included a summary of each submissions made to it, which included that of the SLUGC team. In relation to each submission the CMT had identified the key concerns and its response to the concern. It was clear from the CMT report that it had indeed given solid consideration to each of the submissions it had received.

[43] Having considered and discussed the submissions, the CMT recommended to Professor McNabb that the proposals as presented, which included the reduction of two technical positions, be approved. Professor McNabb gave evidence that he had considered the feedback from staff through the CMT report and decided to proceed with what he referred to as the "*repositioning*". He explained in oral evidence that

this encompassed the whole process of recruiting into new roles where demand was growing as well as the process of reducing capacity in areas that were declining.

[44] Professor McNabb said no alternative solutions had been put forward through the feedback process that assisted in resolving the key issue of acceptable financial performance. His decision to proceed with the proposals was based on having to make the cost savings that were required and to shift resources from declining areas of work to growth areas to ensure that the work of Land and Environment remained relevant and cost effective.

[45] I find on the basis of the evidence before me that sufficient information was provided for Mr Budding to make a meaningful submission to the CMT. It was clear that he could have chosen to make an individual submission in addition to taking part in a team submission but he chose to do so only as part of the team. It was also clear from the evidence that no restrictions were placed on the breadth of any submissions that affected employees were invited to make. I accept that the CMT gave serious consideration to the team submission in which Mr Budding participated. I also accept Professor McNabb's evidence that he gave consideration to the submission before deciding to proceed with the proposals.

[46] I note that employees were informed from the outset of the process that they could raise any concerns with a range of managers and HR staff and were also informed of their entitlement to legal representation. The process was in accordance with that outlined in AgResearch's Change Management policy and there was no conflict with the provisions of Mr Budding's employment agreement. Standing back and considering the process followed by the employer up to the point of determining that it would reduce by two the number of technicians in the SLUGC team, I am satisfied that AgResearch followed a fair and reasonable procedure.

B Selection for available positions

[47] It was clarified in the 4 August 2014 documentation that the consultation over the proposal to reduce the number of technicians from seven to five would not involve looking at which individual "*may or may not get any particular position*". That was to be the subject of a further process once a decision had been made on whether the reduction in Field Technician numbers would proceed.

[48] The documentation provided with Dr de Vos's 4 August letter notified Mr Budding and other affected employees that, where a position was disestablished, the individuals would be informed of this and told they were at risk of redundancy, if no alternative role could be found for them. If there was more than one suitable person for a position, a selection process would be undertaken to determine which person was confirmed into the available position. It was stated that this would occur after the review process. A list of five proposed selection criteria was included in the documentation and the employees' feedback on the criteria was invited.

[49] Mr Budding and the other affected employees were informed of the outcome of the review on 28 August 2014. According to Ms Burton, this was done by video conference with the SLUGC team, attended also by her, Dr de Vos and one other HR advisor. Members of the team each received a copy of the CMT report, which itemised all submissions and how the CMT had taken them into account. Mr Budding and his colleagues received individual letters from Dr de Vos advising that, as it had been determined that there were currently more FTEs than the organisation needed or could support, they were at risk of redundancy.

[50] Dr de Vos's letter to each employee, which was accompanied by a Personal Proposal form that they were invited to complete, informed them of the process for implementing a reduction of two FTEs in the team. The letter stated that there was no requirement to submit a Personal Proposal and that no undertaking was given that any or all proposals would be accepted. Dr de Vos informed Mr Budding and his colleagues that, once he had considered the individual proposals with Science Team Leaders, he would be able to advise whether a selection process for the reduced number of technical positions would be required.

[51] Ms Burton's evidence was that the Personal Proposal form was in response to a request from the CMT, based on submissions from staff, that AgResearch should minimise the impact on staff and allow them to express an interest in redundancy where possible. The Personal Proposal form contained an introduction section and four options. The introduction stated that the form's purpose was to enable those employees at risk of redundancy to make a personal proposal regarding their own circumstances prior to a selection process taking place.

[52] The four options were:

1. *I am interested in retaining my current or similar position at Grasslands.*
2. *I would like to work permanently reduced hours of XX per week and be paid a partial redundancy.*
3. *I would like to be considered for redundancy.*
4. *Other proposal.*

[53] The first three options had "Yes / No" for the employee to indicate interest or lack of interest.

[54] Mr Budding circled "Yes" for the first option, after crossing out the words "*or similar position*". This made it clear that he wished only to retain his present position. He put diagonal lines through the second and fourth options, which he also initialled, and circled "No" for them both. He also circled "No" for the third option.

[55] As none of the SLUGC team had opted for full redundancy, Dr de Vos informed affected employees, including Mr Budding, that a selection process was required for the contestable roles. He said the selection would be based on the information the employees provided, through self-assessments, and on information known to their Science Team Leader, Dr Dodd, through performance reviews and knowledge of team contribution and delivery.

[56] Dr Dodd sent the self-assessment forms to Mr Budding and his colleagues on 3 September asking each one to return the completed form to him by 8 September. He noted that the self-assessments, plus his own assessment using the same categories, would be used in the selection process which he and Dr de Vos would undertake with assistance from Ms Burton.

[57] The self-assessment forms required input from each employee under five focus areas: capabilities, technical delivery, research and development delivery, management and AgResearch support. A description of the selection criteria for each of the focus areas was provided. In an email exchange initiated by one of the employees, which was copied to them all, Dr Dodd said some of the selection criteria had been incorporated as a result of submissions to the CMT. As noted earlier, proposed criteria had been included for comment in the initial consultation process.

Mr Budding completed his self-assessment form with, he said, the assistance of Dr Mackay.

[58] Ms Burton gave evidence that she, Dr de Vos and Dr Dodd noted that two employees had signalled their interest in working reduced hours on their Personal Proposal forms. They took into account the CMT's suggestion that consideration be given to minimising the impact on employees as much as possible. As a result she, Dr de Vos and Dr Dodd proposed to Professor McNabb that the reduction in the SLUGC team be 1.4 FTE instead of 2. That proposal was approved.

[59] Dr Dodd gave evidence of the deliberations that took place over the filling of the technician positions. This was in accordance with the selection criteria, as amended through the consultation with affected employees and also entailed identifying the roles most necessary for business continuity. I am satisfied from his evidence, both written and oral, that full and proper consideration was given to Mr Budding before the decision was made that he would not be selected for one of the contestable roles.

[60] The process AgResearch followed had been made known in advance to Mr Budding and the other affected employees once it became clear that a selection process was required. That process did not entail holding interviews with the employees. None of the employees raised a query or concern about this at the time.

[61] Mr Budding expressed concern over his employer's failure to conduct interviews for the reduced number of technicians' positions only after the event. I note that he had the opportunity at all stages in the process to raise any issues of concern about the process with his Science Team Leader, the Science Group Leader, the Research Director or HR.

[62] Overall I find the selection process to have been a fair one. While AgResearch could have conducted interviews with affected employees, I do not find it was necessary in the circumstances. It may well have been different if this was a situation where new positions had been created by the review. That was not the situation in AgResearch where existing positions were being reduced in number.

Breach of good faith

[63] This claim relates both to Mr Budding's claim to have been provided with insufficient information during the review and selection process and generally to his treatment throughout the process that led to the termination of his employment.

A Information

[64] I have already made findings regarding the adequacy of information provided to Mr Budding during the initial consultation phase. I make similar findings about the information provided to him during the second phase, the selection process.

[65] Information was provided regarding the process that would be followed and the criteria to be applied. Mr Budding was copied into one of his colleagues' queries about the process and into the response. If he had had any queries or concerns himself, he had the opportunity to raise these with any one of a number of people in a position to respond, including Dr Dodd, Dr de Vos and Professor McNabb.

B Treatment during the process

[66] Mr Budding referred in his statement of problem to a review process he had been through in 2004. The process had resulted in his successful redeployment into a newly created position for which he had been formally interviewed. Mr Budding claims this gave rise to a legitimate expectation that he would be treated similarly in the 2014 process.

[67] He contrasts the 2004 restructuring, which he recalls as being transparent and during which he says he felt well-advised and informed throughout, with his 2014 experience of restructuring in which he says he felt isolated and excluded from having any meaningful say in his future with AgResearch. He expressed his belief that there was no regard paid to his longevity of service with AgResearch and its predecessor, DSIR.

[68] In Mr Budding's view his employer should have realised that, at his age, he was particularly vulnerable as it was too late for him to establish a career elsewhere. He believed this entitled him to some "*special care*" that he did not receive during the restructuring process.

[69] The duty of good faith requires parties to be active and constructive, responsive and communicative, and not to do anything that will, or is likely to, mislead or deceive each other.⁵ Additionally there are obligations regarding the provision of information which I have already made findings about.

[70] I am not persuaded that AgResearch owed some greater duty to Mr Budding or that it should have treated him with any more care, respect or attention than any other of its employees, many of whom have similarly long service. Nor am I persuaded that, because Mr Budding was interviewed for a newly created position in the 2004 restructuring, he had an entitlement to be interviewed for an existing, but reduced in numbers, position in 2014.

[71] AgResearch informed Mr Budding at the outset of its review process that it would be conducted in accordance with his employment agreement and the organisation's change management policy, procedures and guidelines. I have found no evidence to suggest it did not do so.

[72] In relation to his claim not to have been treated in good faith Mr Budding also referred to the events following the notification to him of the decision not to appoint him to one of the reduced number of technician positions. He complains of not being offered an alternative position and of being required to work out his notice period.

[73] Mr Budding was informed by Dr de Vos that his employment was "*at risk*" by letter of 11 September 2014. He had already been informed by Dr Dodd that he had not been selected for one of the available technician positions. The letter informed him that his last day of employment would be on 12 December 2014 in the absence of an alternative position being found in the meantime. It stated that during his notice period he was expected, in agreement with his manager, to complete outstanding projects, hand over work, and continue training and mentoring other staff.

[74] Enclosed with Dr de Vos's letter was a Restructuring Preference Questionnaire which he asked Mr Budding to complete and return to one of the on-site HR advisors or to bring it to a meeting she would invite him to early the next week. Dr de Vos explained that the questionnaire would be used to help identify options available to Mr Budding. The introduction to the questionnaire included the statement that:

⁵ s. 4 of the Act

"We need to explore all avenues available to you within AgResearch. Therefore it is important that we understand your personal aspirations and requirements so that we can progress through the options for you in the most useful way."

[75] A copy of Mr Budding's completed questionnaire was attached to his statement of problem. As Ms Burton noted in her evidence, he answered "no" to every question. These included questions asking whether he would consider other positions at the same, or other, AgResearch locations; whether he would consider working reduced hours; and whether he would consider a lower range/paid position.

[76] He also answered "no" to every question regarding assistance or support that AgResearch could offer him. Ms Burton noted that Mr Budding had declined the offer to meet the on-site HR Advisor to discuss his responses in the questionnaire. In light of Mr Budding's clearly stated preference not to explore continued employment with AgResearch in any capacity, I find he had no grounds for complaining that his employer failed to offer him any other roles.

[77] Mr Budding's other criticism regarding the latter stages of his employment is that he had agreed with Dr Dodd that he could be paid out his notice period and AgResearch reneged on that agreement. Dr Dodd's evidence differs. He says that when he met Mr Budding on 16 September 2014, Mr Budding asked if his last day on site could be 24 September. They discussed the science project tasks that needed to be completed and Mr Budding undertook to complete those tasks. Dr Dodd says on that basis he verbally agreed to Mr Budding's request but they had no discussion about whether the notice period would be paid in lieu.

[78] Dr Dodd was then made aware by his Science Group Leader and HR Advisor that decisions on redundancy conditions, including final date, leave, and salary payout was not within his delegated authority. Discussions with Mr Budding followed resulting eventually in agreement over the notice period, part of which Mr Budding worked, taking a mixture of sick and annual leave for the remainder.

[79] I do not find any breach of good faith in the situation leading to this agreement. Mr Budding's employment agreement did not provide the right to elect payment in lieu of the notice period: that was specified to be at the discretion of the employer. It was unfortunate that Dr Dodd came to a verbal agreement with him over his last day on site without realising he did not have the authority to do so, and without discussing implications for paying out the notice period. However, I accept

this was a genuine error on Dr Dodd's part and did not demonstrate bad faith on the part of AgResearch.

Determination

[80] Mr Budding's employment was terminated justifiably on the basis of redundancy. His claim to have a personal grievance is dismissed.

[81] AgResearch did not breach its obligation of good faith to Mr Budding by its treatment of him during the restructuring process.

Costs

[82] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority