

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Pieter Tobias de Villiers (Applicant)
AND Fujitsu Australia and New Zealand Limited (Respondent)
REPRESENTATIVES Frances Lear and Maree Kirk for the Applicant
Peter Churchman for the Respondent
MEMBER OF AUTHORITY P R Stapp
INVESTIGATION MEETING Wellington, 12 April 2005
DATE OF DETERMINATION 20 April 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Pieter de Villiers joined Fujitsu Australia and New Zealand Limited in late 2003 as the Southern Sales Manager in New Zealand. His role changed on 13 April 2004 to National Sales Manager New Zealand.

[2] He had dual reporting lines to the General Manager Fujitsu New Zealand, Chris Brice and the Executive General Manager for Sales for Fujitsu Australia and New Zealand Limited in Australia, Howard Powell.

[3] The applicant's responsibility to report to these two managers continued in practice while in Australia there was a realignment of regional and geographical positions into one role. While this restructuring was underway the New Zealand situation was monitored because of the company's financial circumstances in this country.

[4] A performance improvement plan (PIP) was initiated for Mr. de Villiers by Mr. Brice and Mr. Brice put a deadline of 31 March on it. They could not agree on it.

[5] In the meantime the realignment review in Australia continued, - as did - in December 2004, January and February 2005 - continual monitoring of the financial situation in New Zealand. It is not necessary for me to include any detail in respect of the latter.

[6] Kay Berry the Executive General Manager Human Resources gave evidence of the Australia review process, the financial situation and the proposal to amalgamate the roles of the applicant and Chris Brice into one position in New Zealand. She started work with the company in January and involved herself with a change in the company's approach to the New Zealand operation that was being monitored. A proposal evolved to explore the possibility of restructuring senior management in New Zealand to conform to what was happening in Australia and thus make savings.

[7] There were no documents and written decisions involved and the proposal developed in meetings between the company's Chief Executive Officer, Mr. Powell and Ms Berry.

[8] There was a meeting in New Zealand on 15 March 2005 between Mr. de Villiers, Ms Berry, Mr. Powell and Mr Brice. Chris Brice had been told of the proposal beforehand: he decided to leave his employment early but was asked to attend the meeting to provide support since Ms Berry had never met Mr. de Villiers before. I am satisfied that there was nothing more than this in regard to Mr. Brice's attendance. Ms Berry says this meeting was the preliminary consultation opportunity, for Mr. de Villiers, to get support and digest the information. However, Mr. de Villiers did not give any substantive response and asked for more time. He was given a letter dated 15 March that outlined the proposal, his opportunity to consider it and provide feedback for consideration and a final decision (letter produced K).

[9] Mr de Villiers says he was being pressured to make a decision. He relies on the timing of the meetings, the announcement of Mr. Brice's redundancy and being given a "*tentative redundancy calculation*".

[10] Ms. Berry says she and Mr. Powell were the only ones with sufficient knowledge to assist Mr. de Villiers on any issues in regard to his consultation including their knowledge of the configuration of the new position that existed in their minds. There is no reason for me not to accept her evidence. Ms. Berry says that some indication of what a redundancy package might look like was given to Mr. de Villiers to be helpful. It was only prepared after the first meeting held on 15 March.

[11] The next meeting occurred on the morning of 16 March, without Mr. Brice. There was discussion about the impact of the proposal on Mr. de Villiers, with Ms Berry and Mr. Powell justifying the proposal. Mr. de Villiers says he was trying to digest the situation and he asked about the new position of General Manger sales and if he could apply. He says he was told he could not apply because he did not have the right attributes, he says.

[12] Ms Berry does not accept that the applicant was “*shell shocked*” and denies that Mr. Powell told the applicant he would not be able to apply for the new position. She says he was told he was welcome to apply for the new combined role “*but unless he was able to present us with information that we did not know about his skills and experience, he appeared to lack the skills and experience that we were looking for in the new role particularly to his management experience*”. (Berry: paragraph 21). The applicant’s statement of problem stated that “*he was told that while he could apply for the position it appeared unlikely that he would be assessed as having the suitable attributes for the role*”. (SOP: 2.17).

[13] Another meeting for Mr de Villiers was arranged for the afternoon on 16 March. Ms Berry says that *repeated justification* was required in response to Mr. de Villiers’ various questions “*challenging the justification*”. (Berry: paragraph 55). The applicant still believed he had not been given enough time to consider the proposal. During an adjournment the applicant made arrangements for his lawyer to be involved.

[14] The next meeting occurred on 17 March with the parties’ lawyers in attendance. I do not intend to pursue the issues in regard to that meeting because the parties were represented and it was agreed that the applicant’s lawyer would provide written feedback by 21 March via the company’s lawyer.

[15] Because of Mr. Brice’s early departure, Ms. Berry says that she organised an interim manager, who subsequently arrived on 21 March in New Zealand. The release of an email from Ms. Berry occurred on 17 March announcing what had happened to Mr. Brice, that there was a proposal to disestablish Mr. de Villiers’ position, that the consultation process was taking place and that an interim manager had been appointed. Ms Berry says that some communication needed to go to staff. There was also a release in the weekly newspaper, Computerworld, a trade paper, on 18 March that Ms. Berry says was leaked, and thus a statement had to be made, to control any damage. There does not appear to have been any consultation with Mr. de Villiers about this.

[16] The applicant's response was provided by his lawyer by raising a grievance (document 5, N).

[17] The respondent concluded that this did not provide any response on the proposal but focussed on complaints about the performance review process and a claim that the restructuring process had been predetermined. Upon considering the comments in the letter, and made at the previous meetings, Ms Berry, in consultation with the Chief Executive and Mr. Powell, decided to confirm the decision to proceed with the restructuring.

[18] Mr. de Villiers met with Joel O'Halloran, the interim manager, on 21 March 2005. Mr. de Villiers says he was told to hand in his access card and lap top and that Mr. O'Halloran seemed to be under the impression that he was going to be the general manager. Ms Berry says this is a misrepresentation. The real situation she says was outlined in the respondent's lawyer's letter dated 23 March (document O produced: SOP). Mr. O'Halloran denied giving any impression that he was going to be the general manager and denied the applicant was "*escorted*" out of the premises. Nothing turns on this issue because Mr de Villiers accepted in his interview with the Authority that another word such as "accompanied" would also have described the situation. I conclude that there was nothing more associated with his departure than a difficult situation for everyone concerned.

[19] The decision was conveyed to Mr. de Villiers on 22 March that he was redundant (document P).

The issues in this problem are:

- Was the redundancy genuine or a sham?
- Was Mr. de Villiers pressured into making a decision?
- Was the process fair?

Was the redundancy genuine or a sham?

[20] A feature of the employer's decision to restructure the two senior management positions in New Zealand was that it was done without recourse to writing, except for the proposal letter handed to Mr. de Villiers on 15 March 2005. The absence of a paper trail is not fatal. Instead the senior

managers in Australia, including Kay Berry, discussed the proposal and developed it orally. The proposal was supported by the financial considerations that the applicant accepted existed.

[21] Coincidentally, Mr. de Villiers was involved with one of his dual managers in a performance improvement plan (PIP). Mr. Brice copied responses on the issue to Kay Berry but she says she had no other involvement. Mr. de Villiers says that Mr. Powell had not raised any performance issues with him (document H: SOP). The applicant has not established any linkage between the PIP and the restructuring even using the timing of it as background. The restructuring proposal was credible because of the financial considerations, Mr. Brice's position being affected and Ms. Berry's involvement when she had nothing to do with the PIP. These are more significant evidence than Mr. De Villiers' evidence about his involvement with Mr. Brice on the PIP. It is not for me to interfere with a genuine decision based on commercial reasons.

[22] Mr. de Villiers added at the Authority's investigation meeting that he believed any changes would come about in the company's "*kick off*", that related to the implementation of the planned programme for the new financial year. Nothing turns on this because an employer is entitled to make its own commercial decisions and there was no contractual requirements preventing it from restructuring at the time. Ms Berry reiterated that it was desirable for the company to follow the Australia company structure in New Zealand. Nothing had happened earlier because the New Zealand situation was being monitored and because of the company's financial circumstances in New Zealand and in a separate country. A change of direction occurred with Ms Berry's involvement and the continuing financial considerations in New Zealand for the company in December 2004 and January and February 2005.

[23] The remaining evidence supporting my conclusion includes:

- The Chief Executive's letter of notice and consultation on a proposal.
- Kay Berry only prepared the "*indicative redundancy entitlement*" document after the meeting held on 15 March. That makes it more than likely she prepared it to assist in response to Mr. de Villiers' queries.
- Kay Berry only arranged for the interim manager when Mr. Brice decided to leave early.

[24] Ms Berry and Mr. Powell offered Mr. de Villiers an opinion of his ability to perform in the new position. Mr. de Villiers told me that he considered he had the skills for the role. His view of the role is different to the view that the employer envisaged for the role. There is nothing to prevent

an employer sharing an opinion. I am satisfied that Mr. de Villiers was not told that he could not apply, but rather he was informed of what he had to overcome given what Ms Berry and Mr. Powell say they had in mind for the new position.

Was Mr. de Villiers pressured to make a decision?

[25] I am satisfied that Mr. de Villiers was not pressured. I accept there was a tight timeframe but time was provided for him to respond. Mr. de Villiers was able to obtain the services of a representative. Meetings were adjourned. Both parties agreed that Mr. de Villiers' representative would respond in writing through his representative by an agreed time. The failure to provide a response on the proposal meant that the employer proceeded to make a decision in the full knowledge that Mr. de Villiers and his representative had raised a personal grievance.

[26] It was therefore fair and reasonable for the employer to proceed without a response to what it considered the issue was. Mr de Villiers was not required to work out any notice. The respondent has relied upon its discretion under the terms of the employment agreement to pay salary in lieu of notice. Mr. de Villiers has received outplacement services and was offered EAP and thus was not disadvantaged.

Was the process fair?

[27] Mr de Villiers reasonably could have expected to be consulted on the content of what Ms Berry had to say in managing the damage of a leak of information to the trade publication and the email sent to all staff. However, the information in the trade paper and email was factual and truthful about what was happening and did not misrepresent the situation. Mr. de Villiers was not disadvantaged.

[28] Ms. Berry told the Authority that redeployment was considered (Berry; paragraph 53), and although she could not provide any documents, there has been no evidence to contradict what she has said. Furthermore Mr. de Villiers has not raised an issue about this other than his wish to be considered for the new position.

Does Mr. de Villiers have a personal grievance?

[29] Mr. de Villiers' redundancy is justified on the grounds of a commercial decision. Although he was not consulted in regard to the management of a media leak and an email to all staff about what was happening, the lack of consultation did not disadvantage him in his employment, because the information was factually correct. The respondent was also acting under the terms of the employment agreement in regard to paying the notice arrangements.

[30] In the circumstances the respondent has supported its action as not being unreasonable, and the factors that I have referred to above, that a fair and reasonable employer would be expected to consider on an objective basis, have not disadvantaged Mr. de Villiers. Although the respondent has not followed a copy book process, and much of the development of the restructuring was not reduced to writing and there a very few documents, any shortcomings have not been fatal.

[31] I earlier concluded (paragraph 19) that there was nothing more associated with Mr. de Villiers' departure than a difficult situation for everyone concerned and it has affected his dignity in departing and been upsetting and stressful for him. This is not enough to give rise to a personal grievance in a redundancy setting.

The resolution of the employment relationship problem

[32] Since Mr. de Villiers does not have a personal grievance his claims are dismissed.

Costs

[33] Fujitsu Australia and New Zealand Limited is entitled to a contribution towards its costs for preparation and attendances in the Authority. Both parties have incurred costs of approximately \$15,000 each. My assessment for the investigation and preparation amounts to a contribution of \$2,000 for a one day investigation and not needing to deal with the interim application for reinstatement as originally sought and withdrawn because both parties acted on this application to go to mediation and pursue the substantive issues.

[34] Mr. de Villiers is required to pay \$2,000 contribution towards the respondent's costs.

P R Stapp
Member of the Authority