

**Attention is drawn to the
order prohibiting publication
of certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 206
3016571

BETWEEN MARK ELIOTT
 Applicant

A N D COOKIE TIME LIMITED
 Respondent

Member of Authority: David Appleton

Representatives: Peter Maciaszek, Counsel for Applicant
 Robert Thompson, Advocate for Respondent

Investigation Meeting: 1 & 20 November 2017 at Christchurch

Submissions Received: 20 November 2017 from Applicant
 20 November 2017 from Respondent

Date of Determination: 28 November 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. The applicant was not unjustifiably dismissed and did not suffer an unjustified disadvantage in his employment.**
- B. Costs are reserved.**

Prohibition from publication order

[1] During the Authority's investigation meeting evidence was given of the remuneration of certain individuals currently working within the respondent company. This information is personal to those individuals, who were not parties to the proceedings. I therefore prohibit publication of the details of their remuneration, save as set out in this determination.

Employment Relationship Problem

[2] Mr Elliott claims that he was unjustifiably dismissed from his employment. He also claims that he has suffered an unjustifiable disadvantage in his employment arising from a failure of the respondent to redeploy him into a newly created position of Chief Financial Officer (CFO). The respondent denies that Mr Elliott was unjustifiably dismissed asserting that Mr Elliott's role was justifiably disestablished and that he was considered for redeployment into the CFO position but was unsuitable.

Brief account of events leading to the dismissal

[3] Mr Elliott was employed pursuant to an individual employment agreement as the financial controller of the respondent company. Up to the point of his dismissal he had been employed in this position for around 5 ½ years. Mr Elliott has many years of experience working at the level of financial controller for large companies.

[4] On 9 November 2016 Mr Elliott received a letter from the general manager of the respondent company which set out a proposal for restructuring and the potential for the redundancy of Mr Elliott's position. Material passages from this letter read as follows:

Dear Mark,

Potential for Redundancy

The purpose of this correspondence is to present you with some proposed changes to the current structure of the Finance/IT/Operations/ Supply Chain area of the business. The reason behind the proposed changes relates to our growth aspirations and the need for stronger data analysis and bolster the leadership particularly in the areas of Supply Chain/Logistics/IT/SOP¹/3rd Party Manufacturing/ Strategic financial thinking/Data management and analysis. The success of these areas in particular is essential as we look to move volume, more frequently throughout more channels/markets and further embrace third party manufacturing partners.

The initial thought is to restructure and to disestablish both the Finance Manager and Operations Manager positions to create a new CFO position responsible for the Finance/IT/Supply Chain/Data Management and Logistics functions of the business. To support this role and the day-to-day finance/manufacturing production metrics/data analysis/month end requirements a newly created position of Management Accountant is earmarked, therefore leaving the CFO to strategically lead each of the business units. A Health and Safety/HR administrator is likely to be appointed and will support the Processing Manager, this will alleviate the administrative load and allow him to focus on consumer intimacy/operational excellence within the factory environment.

¹ Sales and Operations Planning.

Proposal

We propose making some important structural changes to these areas of the business. The current financial structure is as follows:

Finance Structure – CURRENT
Financial Controller
Mark Elliott

Accounts Accounts Accounts Accountant
Administrator Administrator Administrator²

[There then followed an organisational chart for the Operations Structure]

The proposed new structure is as follows:

Finance / Supply Chain / Logistics / IT Team – PROPOSED Structure

[Then followed an organisational chart which showed the proposed “CFO Finance Director” position being responsible for three teams, the first headed up by the Management Accountant, the second by the Supply Chain Manager and the third by the IT Manager.

Underneath these three team leader positions were a total of eleven posts including: accounts administration, accountant, communications manager, a planner/buyer, logistics coordinator, and a systems administrator.]

Consideration

In relation to the proposed structural changes, 2 roles within the organisation would be at risk: the Operation Manager’s position and the Financial Controller’s position. There will also be some reporting line changes and some possible managerial changes. In addition there is likely to be some new appointments if the proposal occurs.

No decisions have been made and we are open to all ideas. We understand that you have a unique perspective, different to ours, and we would like to hear from you.

Ideally, we would like to meet with you face to face on Friday 18th of November, at 330pm to discuss the proposal. Any outcome from this process may impact on your employment with us, therefore you are advised of your right to have a support person or representative during this process. Please let me know in advance if you are bringing a representative.

What happens next?

We anticipate that we will be able to meet and discuss this proposal on the 18th of November, after which, all ideas will be considered and evaluated before a decision is made. Possible decisions from this stage are:

- No action to be taken
- Possible changes made to the proposal based on the feedback/ideas we receive.
- The proposal goes ahead as stated above.

² The names of the post-holders have been omitted.

Once a decision has been made we will let you all know what is to happen next in the process, if anything. It may well be that you require additional information once you have considered the proposal, we believe that there is no relevant information to provide you, but you are welcome to make any requests if this will assist you in providing a reply. We ask that all requests for information be placed in writing prior to any meeting.

We look forward to hearing from you and thank you for your patience as we work through this difficult time.

Regards.

Lincoln Booth.

[5] After the meeting on 9 November 2016 in which the proposal for change letter was given to Mr Elliott, the position descriptions for the proposed CFO and Management Accountant roles were provided on 2 December.

[6] On 9 December Mr Elliott provided a detailed five page document giving his feedback on the proposal and suggesting an alternative proposal to that which had been presented by the company. He also stated “[t]he proposed CFO role is one in which I would be very much interested and should be an automatic selection for, given my experience to date. That experience includes having had responsibility for multiple departments performing a variety of functions, including Finance & Accounting (including sales analysis), IT, Purchasing, Logistics, HR and Health & Safety. This broader management experience has been gained in 2 prior companies, over a period of 10 years”.

[7] Mr Elliott and Mr Booth met on 12 December to discuss the respondent’s proposed changes and Mr Elliott’s written feedback. In his document Mr Elliott had suggested a number of changes to the company’s proposal, and many of them were adopted by the respondent, although these were mainly the correction of errors and omissions in the position descriptions. One major proposed change suggested by Mr Elliott (that the Supply Chain Manager would report directly to the General Manager rather than to the CFO) was not adopted by the company.

[8] Mr Booth wrote to Mr Elliott on 16 December in which he explained that some amendments had been made to the position descriptions to reflect Mr Elliott’s comments and recommendations but that his alternative structure was not to be implemented as it did not achieve what the company wished. Mr Booth stated:

We are eager to capture the strategic data analysis and leadership across the business with particular emphasis on Finance, ICT³, Supply Chain and Logistics. This will enable stronger business insight/improvement across these business functions with a focus on operational excellence and consumer intimacy.

[9] Mr Booth stated in the letter that the company had decided to continue with the disestablishment of Mr Elliott's position as Financial Controller with effect from Friday, 3 March 2017. He stated that the new CFO position was being advertised in the New Year and that Mr Elliott was welcome to apply. Mr Booth stated that, between 16 December and 3 March the intention was "to work alongside you corroboratively and productively and assuming key milestones are being met throughout this period we will enter into a conversation that may result in a review of the redundancy provision. Furthermore, there may be an opportunity beyond the 3rd of March to contract yourself to CTL as we transition into the new structure".

[10] On 27 January 2017 Mr Maciaszek on behalf of Mr Elliott wrote to Mr Booth stating that the process leading to the giving of notice to Mr Elliott to terminate his employment was flawed in a number of respects. He stated that Mr Elliott should be appointed to the position of CFO on the basis that he is an existing employee in a role of Financial Controller. He stated that Mr Elliott had performed most of the duties required for the CFO role in the past five years of employment and also has skills from previous employment to perform the additional duties which have not been part of his present role.

[11] Mr Maciaszek also stated that there were a number of matters which led him to form the view that the decision to disestablish his position had been pre-determined. He referred to six issues which may be briefly summarised as follows:

- (1) Mr Elliott had never received a performance appraisal throughout his employment;
- (2) On 4 December 2015 Mr Booth had humiliated Mr Elliott in front of the senior leadership team in relation to a systems failure that Mr Elliott had previously reported;
- (3) Mr Booth had said to Mr Elliott on one occasion that they had a broken relationship which needed to be fixed but that "This may have to result in a parting of the ways". Mr Elliott had subsequently asked whether there

³ Information and Communications Technology

should be mediation between him and Mr Booth but that had not been addressed by the company.

- (4) At an annual planning session in April 2016 a director of the company (Guy Pope-Mayell) stated that the current senior management team did not match the demographic which suited the business and stated “Rest assured – if any of you leave you will be replaced by someone younger, probably female”.
- (5) Mr Elliott was excluded from the strategic leadership team 100-day planning sessions that took place in June and October 2016.
- (6) Although he had received bonuses in 2014 and 2015, in the 2016 year he did not receive one, even though he had continued to perform at at least the same standard as had earned him the bonuses in the previous two years.

[12] On 10 February 2017 Mr Thompson on behalf of the respondent replied to Mr Maciaszek in which he stated that the respondent was of the view that the new position required a substantial level of skill and that the essential elements of the proposed new role went beyond that of Mr Elliott’s current role. Mr Thompson set out nine requirements in the letter, including

- a. “strong extroverted leadership”,
- b. “ability to manage a wide data centric brief in a dynamic growth environment (30%+topline growth),
- c. “ability to manage and grow a strong middle management of very different personalities and skills”,
- d. “ability to communicate passionately across the entire business via Workplace and other communication platforms on a timely basis”,
- e. “ability to arrange and deliver inspiring and informative presentations”,
- f. “24/7 availability”,
- g. “intellectual property and commercial law experience”.

[13] Mr Thompson stated that the respondent wished to discuss with Mr Elliott the specific elements of the role to gain a greater understanding of his skill set and capabilities. Mr Thompson also wrote that the respondent had some areas of concern about Mr Elliott's suitability for the CFO role which included:

[The] ability to support any financial documents prepared with a narrative that reflects a deep understanding of the company's operation and strategy;

Full working knowledge of all existing ICT platforms and infrastructure, including Workplace, Hubspot, Google, WooCommerce, Line, [X]ero – that cross over CTL/CTIL/CTJ⁴ group;

Ability to identify new ICT platforms to support the growth aspirations of the business;

Ability to communicate from a base of IT knowledge with IT professionals such that value can be added to any conversation without the need for pause;

Ability to identify and implement new supply chain processes that reflect the multi production, multi 3PL⁵, multiple country future;

Ability to understand procurement needs and negotiate at top level for industry best pricing across the business;

Ability to analyse data and deliver insights from marketing, sales, creative and operations; and

The ability to proactively manage and grow the group Intellectual Property portfolio.

[14] Mr Elliott, accompanied by his wife, met with Mr Booth and Mr Pope-Mayell on 14 February 2017, and Mr Elliott provided a document which set out his work history. This included his roles as Financial Controller of two companies in one of which he had managed the implementation of an ERP system⁶ and managed an IT manager, and an accountant. In his other role he had had reporting to him a purchasing officer, logistics department and a HR officer as well as leading the finance function and oversight of IT. In this latter role Mr Elliott had been responsible for sales analysis and overseeing production forecasting models. Mr Elliott read this document out to the meeting.

[15] On 27 February 2017 Mr Thompson wrote to Mr Maciaszek in reference to the meeting on 14 February in which the following was stated:

It is our client's assessment that your client's skills and capabilities are below what is required for the role [of CFO]. The parties communicated significantly regarding the type of duties and responsibilities that needed

⁴ Cookie Time Limited/Cookie Time International Limited/Cookie Time Japan

⁵ Third party logistics

⁶ Enterprise Resource Planning system

to be performed and it was identified that your client does not have the essential elements that would sustain this position.

The parties discussed that the new role is fundamental to the organisation for direction and growth and that this is an ICT based role not finance based. It is focused on data and communication across the entire business. It became very clear to our client that during these discussions your client did not possess the skills necessary to be able to perform the ICT components of the role. Our client spent a considerable amount of time emphasising the key functions surrounding the ICT requirements and how this role will require a significant element of skill and leadership. It will require boots on the ground across the entire business and the company requires the person to be able to fulfil that job proficiently without a long lead in time. When our client asked Mark where he felt his skillset was lacking he responded within the ICT area.

We note that your client turned up with no information regarding additional training or support in terms of the new position. Our client can instruct that it has no resources for in-house training or micromanaging of the duties. Our client has considered whether or not additional training could be provided, but appears [sic] that the essential element for the role will be experience rather than additional education. Our client is of the view that your client does not hold the experience and/or level of skill that will allow him to perform the role on an immediate basis at a high level.

Our client does note that during the meeting your client was asked as to whether or not he wanted to undertake the new management accountant role. This was declined by your client and we have subsequently taken steps to fill that role.

Accordingly, your client has instructed us to advise on their behalf that your client, Mark Elliott, will not be appointed to the role. We confirm that unless there are any alternatives to redundancy your client's position will end on Friday 3 March 2017, however a temporary contract is available from Monday 6 March 2017 through to Friday 31 March 2017, if your client wishes to accept this offer.

[16] By way of a letter dated 9 March 2017 Mr Maciaszek raised a personal grievance on behalf of Mr Elliott. The basis of the personal grievance was that Mr Elliott should have been offered the position of CFO and that no proper process for redeployment had been undertaken. Mr Maciaszek also stated that the termination was predetermined.

[17] Mr Maciaszek also stated that Mr Elliott had not conceded that he was lacking a skill set within the ICT area, and that he only acknowledged the lack of direct experience on the particular communications platforms discussed. He also stated that, during the meeting, Mr Pope-Mayell described the CFO role as being more like "Chief Data Officer", which appeared to be intended to redefine the position in a manner which the company could then argue was beyond the skill base of Mr Elliott.

[18] Mr Maciaszek also stated that the company had placed an advertisement for the Management Accountant role four or five weeks prior to the meeting contrary to what was implied by Mr Elliott being offered the role at the meeting.

The issues

[19] The Authority must determine the following issues:

- (1) Whether Mr Elliott was unjustifiably dismissed from his employment; and
- (2) Whether Mr Elliott was unjustifiably disadvantaged in his employment.

Was Mr Elliott unjustifiably dismissed?

[20] To answer this question requires considering the following sub-issues:

- (1) Whether the consultation process followed by the respondent was procedurally justified;
- (2) Whether the disestablishment of Mr Elliott's role was substantively justified;
- (3) Whether the respondent was justified in concluding that Mr Elliott did not have the skillset to redeploy him into the CFO role.

Was the consultation process undertaken by the respondent procedurally justified?

[21] I shall start with a brief overview of the legal principles relating to a fair redundancy consultation process. Section 4 of the Employment Relations Act 2000 (the Act) defines the concept of good faith, and says, at s 4(1A):

- (1A) The duty of good faith in subsection (1)—
- (a) is wider in scope than the implied mutual obligations of trust and confidence; and
 - (b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and
 - (c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—
 - (i) access to information, relevant to the continuation of the employees' employment, about the decision; and
 - (ii) an opportunity to comment on the information to their employer before the decision is made.

[22] In *Simpson Farms v Aberhart*⁷ the Employment Court summarised the fundamental elements of consultation required by s 4⁸. These are:

- Consultation requires more than a mere prior notification and must be allowed sufficient time. It is to be a reality, not a charade. Consultation is never to be treated perfunctorily or as a mere formality.
- If consultation must precede change, a proposal must not be acted on until after consultation. Employees must know what is proposed before they can be expected to give their view.
- Sufficient precise information must be given to enable the employees to state a view, together with a reasonable opportunity to do so. This may include an opportunity to state views in writing or orally.
- Genuine efforts must be made to accommodate the views of the employees. It follows from consultation that there should be a tendency to at least seek consensus. Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and then deciding what will be done.
- The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and even start anew.

[23] The consent of the persons consulted is not necessary following proper consultation and there need not be an agreement.⁹

[24] Mr Maciaszek stated at the start of the investigation meeting that Mr Elliott did not contend that the process of consultation followed was unjustified. However, it did emerge during the first day of the investigation meeting that one of Mr Elliott's contentions is that there was a fundamental change in the way that the proposed CFO position was presented over the period of the consultation, with it starting out as a fairly classic CFO position, save for the supply chain/logistics element, and it ending up as a Chief Data Officer (CDO) role. I shall treat this complaint as a complaint about the process followed.

[25] The starting point is that an employer is entitled to evolve in its thinking over the period of a consultation for change process, provided that the affected employees have a fair chance to comment on each stage of the evolution, in so far as any changes could potentially affect them.

[26] Information was provided to Mr Elliott in several stages. The first was on 9 November 2016, when Mr Booth stated that the reason behind the proposed changes relates to "our growth aspirations and the need for stronger data analysis and [to] bolster the leadership particularly in the areas of Supply Chain/Logistics/IT/SOP/3rd Party

⁷ [2006] ERNZ 825 (EmpC)

⁸ At [62].

⁹ *Ibid.*, at [63].

Manufacturing Strategic financial thinking/Data management and analysis”. The letter otherwise gave little hint that the role would be “data centric” as was stated by Mr Pope-Mayell in his evidence to the Authority.

[27] The next piece of information given was the first version of the CFO position description, provided on 2 December 2016. This stated:

The CFO is a key role within the Senior Leadership Team and will provide a strong and strategic voice across the business via the accounting, finance, supply chain, logistics, ICT, 3rd Party manufacturing and commercial functions of the business. The CFO will deliver and continually evolve high quality financial recording, strategic data analysis and business insight/improvement, cost management, and other requirements in pursuit of operational excellence. Understanding the business model so as to build greater customer value and better operational metrics is essential.

[28] The position description also referred to the role being responsible for, inter alia, management information systems, strategic planning, and the “development and evolution of world-class data and communication systems and the leadership of these across supply chain, logistics, ICT and commercial functions to ensure optimal performance”. It also stated, under the heading “system leadership/future technologies” that the role holder was to “keep up-to-date with, and provide strategic advice on the development of financial systems and ICT services and technology”.

[29] Under the heading of “ICT: Information Communication Technology”, which featured last in the list of the major functions of the proposed role, it stated that the role required the post holder to “build world-class data platforms to support a high growth business”. Apart from that generic statement, there was no mention of the need for the post holder to have a detailed knowledge of the specific data platforms in the list of tasks under the ICT heading. However, under “technical skills” there was mention of “sound understanding of ICT solutions for the business”. Under “personal attributes” there was mentioned the need for “A Leader, Motivator, Strategic thinker” and “Excellent skills in communicating information, both verbally and in writing”.

[30] The next version of the CFO job description was presented to Mr Elliott on or around the day he was advised that his role for Financial Controller was being disestablished (16 December 2016) and that he was welcome to apply for the new role. This position description had a number of changes, including placing the delivery of strategic data analysis before the delivery of financial recording, graphically dividing the role into three equal parts (System leadership/future technologies/ICT; Accounting

Functions/Financial Compliance/Control/Reporting and Logistics/Supply Chain). It also stated first (instead of second, as previously) that the role was responsible for the “development and evolution of world class data and communication systems and the leadership of these across ICT, supply chain, logistics and commercial functions to ensure optimal performance”.

[31] This position description also changed the position of the “ICT” section to follow directly under the “system leadership/future technologies” so that it preceded the other sections. Under “technical skills” had been added “sound understanding and passion of ICT solutions for the business” and “information systems special interest or more”.

[32] The next written communication with Mr Elliott about the role was contained in Mr Thompson’s letter dated 10 February. This set out the requirements of the role and the concerns about Mr Elliott’s suitability, as set out in paragraphs [12] and [13] above. By now, the data centric emphasis of the role was made clear, and the requirement of a full working knowledge of all existing ICT platforms (with six being expressly named) was stated.

[33] Whilst it is clear that the focus on the stated requirements of the CFO role did evolve over time, between 9 November 2016 and 10 February 2017, Mr Elliott was kept abreast of that refocussing, and was given an opportunity to address the respondent’s concerns about his perceived weaknesses in relation to the role. I am satisfied that, by 10 February, there was no doubt at all about the data centric nature of the role.

[34] Mr Elliott attended the meeting on 14 February having had the benefit of Mr Thompson’s letter of 10 February and did explain his work experience and history. In addition, Mr Pope-Mayell reiterated to him in detail what the company was looking for in the post holder, in terms of the depth of knowledge of ICT and data. Mr Pope-Mayell described that part of the meeting as a bit of a monologue, because Mr Elliott was unable to speak about how he could provide the ICT and data management knowledge and experience required. Mr Elliott read out his statement of experience, and did not say much more according to Mr Pope-Mayell.

[35] Mr Elliott says that Mr Pope-Mayell started to call the role a Chief Data Officer role in the 14 February meeting. The role is now, in November 2017, formally called Chief Data Officer. Mr Pope-Mayell does not deny he called the role a Chief Data Officer role in the meeting, and explained that this was how he had always envisaged the

role. The CFO title had been attributed to the role by Mr Booth, who had written the position description and led the consultation process.

[36] Having considered the evolution of the CFO job description, I believe that the focus of the description of the role did shift, from a finance centric role to a data centric role. However, a need for ICT and data management knowledge had always been in the position description, from the beginning. This was a brand new role and the company was creating it to address the needs of its projected significant growth and changes in customer demand. Its vision was that ICT and data management was central to facilitate that growth and change.

[37] In these circumstances, it was not, in my view, unreasonable for the focus of proposed role to have evolved over time. What is important is that Mr Elliott was kept up to date with the evolution, and that he was allowed to address the last iteration of the envisaged role. I am satisfied that he was in both cases. Indeed, I am satisfied that he was given a full opportunity to address the respondent about his skill set and its suitability for the role in the meeting of 14 February.

Predetermination

[38] Another allegation of Mr Elliott is that the evolution in the job description was adopted deliberately in order to prevent Mr Elliott from being able to fulfil the role, once the company realised that he was interested in it. I shall treat this as an allegation of predetermination. I am satisfied that this was not the case. My primary reason for concluding this is that the eventual post holder was someone who has a very different work background and history to Mr Elliott. The new post holder worked for a major retailer for 20 years as a direct marketing manager, an IT manager, a general manager – Finance, and as a Chief Information Officer. If Mr Elliott's suspicion was well founded, one would have expected the post holder to have been a chartered accountant or financial controller like himself. However, the post holder is someone with a clear history of working in ICT and high level data management.

[39] In addition, the new role is remunerated with a base salary which is 52% higher than that which Mr Elliott was paid, with the potential to increase the base salary by up to a further 25%.

[40] Mr Maciaszek argued strongly in his submissions that I am not permitted to take into account what eventually happened with the role, and who filled it, including the

salary paid to the eventual post holder. He submits that I may only take into account the circumstances (referred to in the s 103A test) that prevailed up to 14 February when the meeting between Mr Elliott and Mr Pope-Mayell occurred. He is right in the sense that events that occurred post termination clearly cannot be taken into account in deciding whether a dismissal was justified. That is trite law. However, I can take into account post termination events when assessing the credibility of evidence relied on to argue that there was predetermination.

[41] If Mr Elliott is correct, the logical corollary of his thesis is that the respondent started out with a cynical determination to make the CFO role more and more difficult for Mr Elliott to do, so that it ended up being (falsely) called and presented as a CDO role, but once it had then dismissed Mr Elliott, it decided that this falsely described role actually suited the respondent, and appointed a person who was perfect for it, and paid him significantly more than they could have got away with if they were only seeking another financial specialist. This is not credible.

[42] In addition, if the company had been intending for many months to dismiss Mr Elliott, or even had been intent on a journey of change which they did not want Mr Elliott to travel with them on, they would not have created a job description for a role that, according to Mr Elliott, he could plainly do, and then change it incrementally until he could not. It is more likely that the respondent would have started out with a job description which he could not have been able to have done from the very start. Mr Maciaszek submits that it was Mr Elliot signalling his interest for the role on 9 December that triggered the ‘morphing’ of the role, as he put it, but the data centric nature of the role were evident in the first job description; it had just not been highlighted.

[43] Was it unreasonable for the respondent to have highlighted the data centric nature of the role once the respondent knew that Mr Elliot believed he could carry out the role? I believe not, as the respondent was entitled to ensure that Mr Elliot understood exactly what the role entailed. It was also entitled to have a preliminary view as to Mr Elliot’s suitability for the role, provided they explored that view with him.

[44] I also respectfully disagree with Mr Maciaszek when he says that it strains credibility that the first job description was not well drafted, implying that it was changed deliberately to disadvantage Mr Elliot, rather than to correct errors and reemphasise aspects of the role. It was the first draft and it was rewritten when Mr Elliot pointed out errors in it.

[45] In addition, the examples of detrimental treatment cited by Mr Elliott as evidence of predetermination, replicated in paragraph [11] above, were largely explained by the respondent. I shall address these briefly:

Mr Elliott had never received a performance appraisal throughout his employment

[46] This was not denied by Mr Booth or Mr Pope-Mayell, but they explained that the respondent preferred not to have formal annual performance reviews, but addressed issues as and when they arose. I accept this evidence.

Mr Booth had humiliated Mr Elliott in front of the senior leadership team

[47] Mr Booth did not give evidence about this allegation, but I note that it is alleged to have occurred in December 2015. That was nearly a year before the proposal for restructuring was presented to Mr Elliott. I find it unlikely that a plan to dismiss Mr Elliott would have taken that long to come to fruition. Even if the humiliation had occurred as Mr Elliott asserts, it does not follow necessarily, or even on a balance of probabilities, that Mr Booth wanted to dismiss Mr Elliott once the company had decided to disestablish the financial controller role.

Mr Booth had said to Mr Elliott that they had a broken relationship which needed to be fixed but that "This may have to result in a parting of the ways".

[48] Again, Mr Booth did not give evidence about this allegation, but I understand it to have also occurred in or around December 2015. Again, I find it unlikely that a plan to dismiss Mr Elliott would have taken over a year to come to fruition. In addition, both Mr Booth and Mr Pope-Mayell gave evidence that was very positive about Mr Elliott in respect of his performance of his duties as a Financial Controller. It is also clear from the evidence of Mr Pope-Mayell in particular that the respondent operates a management style which challenges its senior staff. It is therefore likely that Mr Elliott was challenged about an issue, rather than being targeted.

Mr Pope-Mayell stated that the current senior management team did not match the demographic which suited the business.

[49] Mr Pope-Mayell explained very credibly that this statement was made in response to some reactions which male members of his senior team had demonstrated towards a female senior manager which Mr Pope-Mayell had found disrespectful. Despite the

evidence of another former senior manager who had been at that meeting, I accept Mr Pope-Mayell's evidence.

Mr Elliott was excluded from the strategic leadership team 100-day planning sessions in June and October 2016.

[50] I infer from Mr Booth's evidence that these two sessions were held to discuss strategic changes that were to lead to the proposal to disestablish the two roles, including Mr Elliott's role. For that reason, it would not have been unreasonable to have not wanted Mr Elliott to have attended. That does not necessarily mean that a decision to dismiss him had been made before the dismissal. As was stated in *Aberhart*, an employer is entitled to have a working plan in mind.

No bonus received in 2016

[51] Mr Elliott and the other staff member whose position was disestablished did not receive bonuses in 2016, which Mr Elliott suggests is evidence that the decision had already been made to disestablish his role. Mr Booth said in evidence that bonus payments are limited to a small number of management staff, and are made on an individual basis in accordance with his discretion as general manager. Mr Booth said that, when he is exercising his discretion, he considers the financial position of the company, the efforts the employee has made outside of 'business as usual' requirements, and what key projects have been led and executed successfully.

[52] Mr Booth said that Mr Elliott did not get a bonus in 2016 because he met his day to day requirements but did not lead any significant projects in the period in question that warranted special recognition. In 2013/14 Mr Elliott had scoped and commissioned the new ERP system. He had also maintained core processes during that time and had activated the Aged Trial Balance for the franchisees. In the following year, he was still working on elements of the ERP implementation which, Mr Booth said, justified another bonus.

[53] Mr Elliott says that, whilst he had achieved a bonus in 2014 following his work implementing the ERP, the implementation was pretty much finished by the following year, and that he got a bonus in 2015 simply due to his KPIs being met and his achieving all his objectives for the year. He says he had done the same the following year, without getting a bonus. He says that Mr Booth told him in August 2016 that the threshold was higher that year.

[54] My conclusion is that the respondent's evidence is not wholly credible in this respect, and that there may well be more to the story than Mr Booth was telling in his evidence. However, this alone is not enough to convince me that the decision had been made well in advance of the decision to dismiss Mr Elliott, in the face of the evidence that suggests otherwise, traversed above.

Was the decision to disestablish Mr Elliott's role substantively justified?

[55] Mr Elliott has not challenged the rationale for the underlying decision. Indeed, his five page feedback document embraces the concept of a restructure, even though he saw the restructure in a slightly different way. I also accept that it was substantively justified.

Was the respondent justified in concluding that Mr Elliott lacked the skillset to redeploy him to the new CFO role?

[56] This is an argument by Mr Elliott that the respondent did not properly consider redeployment. He says that he demonstrated that he did have the skill set to do the CFO role. His argument in particular was that, where he lacked detailed knowledge of an area, such as ICT, he would receive the support of the staff below him. This has been the case in his previous roles.

[57] The evidence of Mr Booth is that the rationale behind the structural change was that the respondent wanted to double the size of the organisation and so required a significant investment in people resource, infrastructure, brand health and new product creation. He said that the industry is dynamic and fast-paced which, coupled with external rapid changes in their environment, meant that they needed a strategic leader as a CFO operating at a similar level to his general manager position.

[58] Mr Booth said that the role required someone with insight, and who was forward thinking, data centric and completely comfortable with future technologies. He said that understanding, finding and creating new ICT solutions was fundamental for the role and that 33% of the role was earmarked for ICT/systems/future technology leadership.

[59] Mr Booth also said that logistics and supply chain was at the heart of the organisation and that strong leadership and ownership was necessary in that area as the company built its framework to meet its volume needs.

[60] Mr Booth said that the management accountant role that was being proposed to be created required an experienced management accountant who could perform core day-to-day functions, compliance and reporting duties. He said that he believed that the new management accountant role would encompass around 12 out of the 16 tasks that Mr Elliott had carried out in his role as Financial Controller.

[61] Mr Pope-Mayell gave a lot of evidence about the data centric emphasis of the new role, and why it was needed. He spoke about specific ICT platforms that the company was using, and how the CFO role needed to thoroughly understand them, and future technologies, so they could be utilised. He said that it was not enough for the CFO to have to rely on the staff under them, as the role was to challenge them and to work at a high strategic level.

[62] It is well accepted that an employer must consider redeploying into other roles an employee whose position is to be made redundant. It is not enough to simply advertise a new role and invite the employee to apply for it, even if the role is at a substantially higher salary.¹⁰ However, the Court in *Wang* makes clear that the respondent in that case accepted that “with up-skilling Mr Wang would easily be able to perform the new role”.¹¹

[63] Mr Booth had been Mr Elliott’s line manager for over five years. Mr Pope-Mayell was also obviously familiar with Mr Elliott’s skill set, to a lesser degree. They both reached the conclusion at the 14 February meeting that he was lacking in a detailed knowledge of the ICT platforms that the company needed to utilise. They also believed that he did not have the skills to be a strategic thinker, or an effective oral communicator. Mr Elliott accepted in his oral evidence that he was not extroverted and that he communicated more effectively in writing than orally.

[64] It is not for the Authority to substitute its views for that of the employer. The Authority must consider whether the actions of the employer were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred¹². I have already found that there was no predetermination in the decision to disestablish Mr Elliott’s role. I found the evidence of Mr Booth, and of Mr Pope-Mayell in particular, to be cogent and compelling. I heard nothing which can reasonably persuade me on balance that their conclusion that Mr Elliott lacked fundamental skills

¹⁰ I refer to *Wang v Hamilton Multicultural Services Trust* [2010] NZEmpC 142, at [43].

¹¹ *Ibid.*, [43]

¹² Section 103A(2) of the Act.

required for the new role was one which no fair and reasonable employer could have reached.

[65] Mr Maciaszek pointed out that the respondent did not approach Mr Elliot's former employers to gauge the level of his skill set. However, I see no reason for them to have done that when they had given Mr Elliot a chance to have explained his suitability for the new post, but had failed to persuade the respondent that he had the necessary skills, or that he could learn the skills sufficiently quickly and easily. I am persuaded that the new role required someone with a very different set of skills to those that Mr Elliot possessed.

[66] That is to say, I do not find that the respondent acted unjustifiably in not redeploying Mr Elliott into the CFO role.

[67] Turning to the Management Accountant role, Mr Elliott was clear that he did not want that role. It was "clearly a diminished role" he said in his evidence, even if it contained many of his tasks as a financial controller. He suggested that it had been "designed to be unattractive". I do not believe that this was the case. The role clearly supports the financial portion of the CFO role, and has been designed to do that, so that the CFO role can concentrate more on data analysis and strategy.

[68] There was a disagreement as to whether the role had been offered to Mr Elliott or not. My conclusion is that, at the 14 February 2017 meeting Mr Pope-Mayell said words to the effect of "You are not interested in the Management Accountant role are you?" Mr Elliott said, "no". I do not believe that the way the question was framed caused a disadvantage to Mr Elliott. He was clearly capable of saying yes, if he had been interested in it. He saw it as an inferior role, and did not want it.

Conclusion

[69] My conclusion is that the decision to dismiss Mr Elliott was both procedurally and substantively justified. The dismissal was therefore justified.

Did Mr Elliott suffer an unjustified disadvantage in his employment?

[70] Mr Maciaszek said that the unjustified disadvantage claim stemmed from the allegedly flawed restructure. I have found that the restructure was not flawed. I therefore dismiss the disadvantage claim.

Costs

[71] I reserve costs. The parties are to seek to agree costs between them. However, if they are unable to do so within 14 days of the date of this determination, if the respondent seeks a contribution to their costs from Mr Elliott, Mr Thompson should serve and lodge a memorandum setting out what contribution it seeks, and the basis for it, within a further 14 days. Mr Maciaszek will then have a further 14 days within which to serve and lodge a reply. The matter will then be determined on the papers.

David Appleton
Member of the Employment Relations Authority