

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2021] NZERA 23  
3086832

BETWEEN            BRENDON GLASGOW  
Applicant  
  
AND                    AMP SERVICES (NZ) LIMITED  
Respondent

Member of Authority:    Geoff O’Sullivan  
  
Representatives:         Simon Rees-Thomas, counsel for the Applicant  
Chris Baldock, counsel for the Respondent  
  
Investigation Meeting:    21 September 2020  
  
Submissions [and further    24 and 29 September 2020 from the Applicant  
Information] Received:    24 and 29 September 2020 from the Respondent  
  
Date of Determination    21 January 2021

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]    Brendon Glasgow had been employed by the respondent AMP Services (NZ) Limited (AMP) for some 29 years until he resigned and left his employment on 31 October 2019. Mr Glasgow says his resignation was forced on him and accordingly he was constructively dismissed.

[2]    Mr Glasgow’s current terms and conditions of employment were contained in an employment agreement he signed on 26 October 1999. In or about May 2019 AMP commenced a restructure and as a result of that restructure disestablished Mr Glasgow’s position as Project Manager. Mr Glasgow says that on 28 May 2019 AMP unilaterally deployed him into a new role of “Agile Coach/Scrum Coach”. He states that his employment

agreement only allowed him to be redeployed (unless he agreed otherwise) to a role which was “directly comparable” to his old role. He says the new role was not directly comparable, and he did not agree to be redeployed.

[3] Mr Glasgow says AMP’s refusal to accept the role he was being asked to undertake was not directly comparable, coupled with consultation failures, left him with no option but to give notice of his resignation which under the circumstances constituted a constructive dismissal. Mr Glasgow seeks:

- (a) A determination that his redeployment was unlawful and he was therefore unjustifiably constructively dismissed.
- (b) A determination he is entitled to full redundancy compensation under his employment agreement as a result.
- (c) Long service leave.
- (d) Compensation of \$40,000 for the significant stress, anxiety, hurt and humiliation he has suffered as a result of AMP’s actions.
- (e) Costs.

[4] AMP refutes Mr Glasgow’s claims. It says that following the proposed sale of AMP’s wealth protection and mature business to Resolution Life New Zealand Limited, which had a significant impact on its business, it restructured its operation after following a full and fair consultation process. Indeed, it says this process was still ongoing at the date of Mr Glasgow’s resignation. It says he was offered redeployment into a directly comparable role which he refused to take. It says it continued consulting and negotiating with Mr Glasgow for approximately three months but he refused to accept any offer, and then resigned. AMP says in any event, in terms of the employment agreement, Mr Glasgow would not be entitled to redundancy compensation but points out it did not terminate his employment. It reiterates that Mr Glasgow is not entitled to any of the remedies he seeks.

### **Issues for determination**

[5] The following issues are to be determined:

- (a) Was the process followed by AMP which led to the disestablishment of Mr Glasgow’s position fair and reasonable?

- (b) Was the subsequent position offered to Mr Glasgow “directly comparable” to his position?
- (c) If it wasn’t, were AMP’s actions in the way it conducted the restructure and the offer of the position to Mr Glasgow such a fundamental breach of the employment agreement that it was reasonably foreseeable that he would resign and was thus constructively dismissed?
- (d) If the position offered to Mr Glasgow was not directly comparable, is Mr Glasgow entitled to redundancy compensation?
- (e) If Mr Glasgow resigned, would he be entitled to redundancy in terms of his employment agreement?
- (f) Is Mr Glasgow entitled to long service leave?
- (g) What are the appropriate remedies if any?

[6] In the course of its investigation, the Authority heard from three witnesses, namely Mr Glasgow, Campbell Rutherford, AMP’s Employee Experience partner, and Dhaya Sivakumar, AMP’s Chief Operating Officer.

[7] In the main, the evidence of all witnesses was consistent although there was disagreement in respect of cause and effect, and perception.

## **Background**

[8] Mr Glasgow commenced employment with AMP as a full-time permanent employee on 8 January 1990. His terms and conditions of employment were contained in an individual employment agreement signed by the parties on 26 October 1999. Clause 18 of the agreement dealt with redundancy and redeployment. Clause 18 provided as follows:

### **18. Redundancy**

- (a) Definitions:
  - (i) “Redundancy” means a situation where the employee’s employment is terminated by AMP, the termination being attributed wholly or mainly to the fact that the position filled by that employee is, or will become, superfluous to the needs of AMP.
  - (ii) “One Weeks’ salary” shall be defined as fifty percent of the fortnightly salary (which excludes other allowance or payments).

- (iii) “A directly comparable position” shall mean a position that is in the same location or at another location, within reasonable commuting distance of the employees place of residence. A directly comparable position will involve duties which would not be an unreasonable change in duties in the circumstance of that employees skills and abilities or employment history, or the specialist nature of work for which the employee was employed and was, until redeployment, principally engaged in.

[9] The agreement further provided:

## 18. Redeployment

### (c) Redeployment:

- (i) Where the employee’s position has or will become surplus to AMP’s requirements, the employee shall be entitled to the following provisions in respect of redeployment.
- (ii) Before the employee is made redundant, AMP undertakes to examine all alternative job options and to make every reasonable endeavour to identify a suitable job option.
- (iii) Any alternative job option offer shall be in writing and shall include information on the location, and hours of work, principle duties and responsibilities of the job, actual salary, 100 percent median salary and, if required, details of transfer according to clause 18(c)(vii).
- (iv) Where the employee receives and offer of redeployment which requires a change of residence, he/she shall be given 14 days to decide upon the offer. For any offer not involving a change of residence, the period shall be seven days.
- (v) If the employee declines an offer of a directly comparable position he/she may be made redundant but will not be entitled to any of the compensation provisions of clause 18(v). As an alternative to redundancy AMP may offer the option of continued employment in a lower evaluated position on the following basis:
  - (A) The offer is an alternative to redundancy with the objective of allowing the employee to continue in employment.
  - (B) The employee shall remain on his/her current salary applicable to his/her previous position for two years.
  - (C) The employee may choose to accept the lower evaluated position or take redundancy.
- (vi) Where an alternative job option is offered to the employee which is not a directly comparable position the employee shall be entitled to decline that offer without forfeiting his or her entitlement to redundancy compensation provisions.

...

[10] In early November 2018, Mr Glasgow took up a temporary secondment to the role of Portfolio Capability Lead. The details of the secondment were contained in a letter dated 30 October 2018 (Tab 3 of the agreed bundle of documents (ABD)). Mr Glasgow accepted the

secondment. The secondment letter provided (paragraph 6) that when the secondment was completed, Mr Glasgow would return to his current role at his current job level. By 15 May 2019, AMP was considering proposed changes to its financial services. The proposal outlined a number of changes to positions AMP was considering. In so far as Mr Glasgow was concerned, AMP proposed redeploying him into a new position of Portfolio Capability Manager. The proposal seemingly ignored the fact that Mr Glasgow was in a seconded role of Portfolio Capability Lead at the time. His existing permanent position was that of Project Manager.

[11] Mr Glasgow felt he was being unilaterally redeployed and made his views felt. He made it clear that he felt at this early stage that the proposed Portfolio Capability Manager role, was not a role that was directly comparable to his Project Manager role as required by his employment agreement.

[12] In early 2018, AMP Group announced that another company, Resolution Life New Zealand Limited, was proposing to buy AMP's wealth protection and mature business. This was followed up in AMP's letter of 15 March 2019 (Tab 5 page 164 of the ABD). In that letter AMP explained that it was divesting its Australian and New Zealand wealth protection and mature businesses through a sale to Resolution Life New Zealand Limited. The letter further provided:

...

this will be carried out by creating an entity called AMP Life Services NZ Limited, which would then be acquired by Resolution on the date of completion of the sale process.

...

Subsequently AMP Services NZ Limited is also reviewing the needs of its remaining wealth management and advice business, given the change of size and scope, to ensure it is structured appropriately to deliver on the new strategy.

...

And further:

As the proposal outlined, if the changes were implemented, your position of Portfolio Capability Manager would have a minor change with a change of reporting line to the Head of Development and Delivery.

...

[13] Mr Glasgow replied by email on 21 May 2019 advising:

Thanks for the proposal document, I've reviewed this and my initial thoughts are that the structure appears to be well thought through and is likely to be the first step on an interesting journey. I've included feedback on the change for myself, that the Portfolio Capability Manager role, and a potential gap in the platforms and operations team.

...

[14] Mr Glasgow also noted:

The permanent role that had been created in this structure appears an evolution of the role I am seconded to until 31 December 2019; Portfolio Capability Lead. Based on the proposal as it stands, my "home" role as project manager has been disestablished, I believe that the pack should be updated to reflect this. The new role should be presented as an option through the normal process.

...

And further Mr Glasgow advised:

Thanks for the opportunity to feedback, I look forward to seeing the confirmed structure.

[15] On 28 May 2019 (Tab 18, page 389 ABD) AMP wrote to Mr Glasgow advising that it had considered feedback on the proposal and had decided that his position of "project manager" would be disestablished. The letter further provided:

Based on analysis of your current seconded position, we consider that the new position of Agile Coach/Scrum Coach will be directly comparable to your current position. You will be therefore directly appointed into this position. There is also a minor change in reporting line to the head of development and delivery.

This change is anticipated to be effective from 10 June 2019 and transition towards the new structure will take place over the coming months.

[16] The letter went on to provide that all other terms and conditions of employment would remain unchanged.

[17] On 1 October 2019 Mr Glasgow emailed Mr Sivakumar resigning from his position on one months' notice. His email complained that the decision to unilaterally appoint him to the new role was a breach of his employment agreement. He noted he had repeatedly raised his objection to the process which AMP followed but it had not been listened to. He stated:

I have therefore been left with no option but to resign and to seek redress from the Employment Relations Authority. My last day with AMP will be 31 October 2019.

## **The evidence**

### *Mr Glasgow*

[18] Mr Glasgow gave evidence that throughout the restructure he tried to work through the process. He felt that AMP had simply put a role in front of him that had nothing to do with his career. He accepted that there were a number of discussions with AMP and they were happy to “chop and change” the role for him. That did not give him confidence. When Mr Glasgow was asked why he felt he couldn’t stay, he replied that matters had got to the point where there was nothing more he could do at AMP.

[19] He said he had lost trust and the joy of going to work was long gone. He felt he needed to cut ties and move on. Mr Glasgow was then asked, what could AMP have done to get him to stay. His reply was that he wanted AMP to get the process right. He said if AMP acknowledged that the process was not correct, and apologised and made some monetary payment, he would have stayed. He felt AMP wanted him to stay at all costs. He noted it even went to the extent of asking him to write out what it was he wanted to do in terms of a position at AMP. He said he felt like he was playing a game of chess where AMP had all the pieces. He said he felt the previous role had a range of activities which the new role didn’t.

[20] He again noted that he felt bulldozed into the new position because it was already assigned to him. He said that in his previous role he didn’t have to check other project managers’ budgets, but in the new role he felt this was expected of him. He saw that as an unreasonable change to his duties. He however confirmed he had the skillset to do the role but might need to grow into it.

[21] Mr Glasgow said his main gripe was that he should not have received the 28 May 2019 letter stating that he would be directly appointed into the position. He felt a more formal offer should have been made rather than a unilateral redeployment. Whilst he accepted there had been consultation, he felt that because AMP couldn’t seem to be definite during the transition towards the new structure, that he was disadvantaged by not having a proper job description. He agreed however that with the ongoing discussions he was very familiar with what AMP wished him to do, and although there may not have been direct compliance with the employment agreement, he was fully aware of what the role entailed.

[22] Mr Glasgow said he was unhappy that consultation with AMP seemed to be about the company trying to make the role more attractive to him. He confirmed that the discussions

with AMP were continuing. He also confirmed that AMP made it clear to him that if at the end of the day he would not accept the role, he could be made redundant but would lose his entitlement to compensation.

[23] When asked what he could have done as an alternative to resigning, he reiterated that if AMP had made a retention payment and a salary increase, he would have stayed. He also accepted that he could have reserved his rights at the time and challenged AMP's interpretation of the employment agreement in respect of the definition of "a directly comparable position". He said, however, that at the time, this did not occur to him. He felt he had not been treated with respect but said staying was the easy option. He needed AMP to recognise they had made a mistake and because they would not do this, he felt it difficult to stay.

[24] Mr Glasgow also said that in the later stages he had already engaged with a lawyer. He opined that when he was discussing his issues with AMP, he didn't want to undermine anything that may have already been agreed to (or disagreed with) by his lawyers who he had engaged to assist him.. He did reiterate however, that at the heart of his dissatisfaction with AMP's process was that he felt he should have been offered a position and not appointed to one. This was despite his acknowledgement that AMP had explained to him that they felt the position was very closely aligned to one he had already taken and that they were prepared to modify the position, both in respect of the role and salary, in order to keep him. He categorised those negotiations/consultations as *"the role was chopping and changing with AMP moving chess pieces around the board. It was all about keeping me in the door and I was the whipping boy."*

[25] Mr Glasgow gave compelling evidence regarding hurt and humiliation. He stated he had spent some 30 years with AMP and had friends throughout AMP which he would now struggle to keep contact with. He stated that the matter had been very stressful. Working at AMP had become part of his life. He felt his confidence had been undermined and that his career had been taken away from him with a consequent loss of reputation. He also gave evidence regarding his salary loss.

#### *Campbell Rutherford*

[26] Campbell Rutherford, AMP's Employee Experience Partner confirmed that he along with Dhaya Sivakumar essentially carried out the restructure. He confirmed that the restructure was necessary as a result of Resolution Life New Zealand Limited purchasing AMP's wealth protection and mature business. This necessitated AMP splitting its wealth management and

life insurance businesses into two. AMP therefore created two new smaller businesses and the restructure was designed to ensure an appropriate distribution of skills and attributes each business would need going forward. He stated that the change process affected everyone from the leadership level down. He said hundreds of roles were affected as AMP was going from a 400-plus organisation to two much smaller sized businesses.

[27] Mr Rutherford recalled that when putting together the restructure proposal for the IT team, he discussed the need for project resourcing on both the AMP Life and AMP wealth sides of the business. Joy McDonald and Mr Glasgow were the two project managers of AMP. His view was that as Ms McDonald was working almost predominantly in the life space, under the restructure she would transfer to AMP Life and Mr Glasgow would remain at AMP in the wealth space. He acknowledged that as he saw this as obvious, there was little internal discussion.

[28] Mr Rutherford made the point that the restructure was not a downsizing project but was about retaining people under a new structure for the purposes of the sale. He saw the proposal as it related to Mr Glasgow, as a proposal to make Mr Glasgow's seconded role of portfolio capability lead permanent, although with a change in job title and a change in the reporting line to the head of development and delivery. Although Mr Rutherford was not directly involved with Mr Glasgow during the restructure consultation process, his evidence was that he had a number of conversations with Mr Sivakumar about Mr Glasgow and his role. The purpose was to have a number of regular check-ins with Mr Glasgow given the stressful nature of the process.

[29] Mr Rutherford says he considered Mr Glasgow's feedback and this resulted in a number of amendments to the proposal, including the acknowledgement of Mr Glasgow's role ceasing to exist. He felt redeployment into the role of scrum-master/agile coach (the same role noted in the original proposal but with a different job title) as a directly comparable role. He felt that Mr Glasgow's feedback was very high level and thus didn't really affect the proposed new structure in any material way. He also felt that the role of agile coach/scrum-master was effectively the role that Mr Glasgow had been seconded into, albeit with a change in title. He had reached this conclusion based on Mr Glasgow's feedback.

[30] Mr Rutherford claimed that although the restructure had been confirmed, he and Mr Sivakumar were open to continuing to consult with Mr Glasgow on the role and what it

might look like moving forward. He stated he wished to assure Mr Glasgow regarding the role and to do whatever it took to make it work for him. He confirmed that Mr Glasgow's complaint seemed to be about process. In answer to the question as to why a formal offer was not made, he stated ... "the roles were so similar to the proposed new role that it was unnecessary to undertake a full blown written role comparison at the time. There was simply no question that the confirmed role would be classed as directly comparable. In my view it didn't need a formal written comparison ..." (para 27 of Mr Rutherford's BOE).

[31] Mr Rutherford's evidence was that on 31 May 2019 Mr Glasgow requested a copy of a job description for the role. He confirmed he advised Mr Glasgow that one had not been drafted as a priority as it was largely the same role that Mr Glasgow had been performing prior to the restructuring proposal, i.e. the seconded position. He confirmed he had sent Mr Glasgow a copy of the job description for the portfolio capability lead role on the basis that the new role would be very similar to this (subject to ongoing negotiation). Mr Rutherford's view was that he had followed the procedure set out in clause 18 of Mr Glasgow's employment agreement. He stated that clause 18(a)(iii) means a directly comparable position is:

- (a) In the same location, or at another location, within reasonable commuting distance to the employee's place of residence; and
- (b) Involved duties which would not be an unreasonable change in duties in the circumstances of that employee's skills and abilities or employment history, or the specialist nature of the work for which the employee was employed and was, until redeployment, principally engaged in.

[32] He said the new role involved duties that Mr Glasgow could reasonably be expected to perform having regard to his skills, education, training and experience. Notwithstanding this, on 15 July 2020, he completed a formal role impact analysis (RIA). He undertook this because he said Mr Glasgow had started to claim he was entitled to redundancy compensation and that was not the view of AMP. They wished to retain Mr Glasgow and saw the new project capability lead role as directly comparable to Mr Glasgow's project manager role (ABD pages 17-22 and 260-263).

[33] Mr Rutherford said he was surprised when Mr Glasgow resigned by way of email on 1 October 2019. He stated AMP never wanted Mr Glasgow to resign and in fact the opposite was the case. He stated that they had listened to Mr Glasgow's feedback in relation to the new

role and had taken this into account, including changing the job title and increasing remuneration. He said AMP even went further, leaving the role open so that Mr Glasgow could return to work if he changed his mind. He stated this continued on until December 2019/January 2020 until they needed to fill the role and when it became very clear that Mr Glasgow had no intention of returning to AMP.

*Dhaya Sivakumar*

[34] Mr Sivakumar the Chief Operating Officer at AMP Services NZ Limited gave evidence of his involvement in the restructure proposal. He supported the evidence of Mr Rutherford in saying that the company wide restructure followed the sale of AMP Life Services NZ Limited to Resolution Life New Zealand limited. He said this affected the entire AMP organisation and was incredibly complex. His involvement in the restructure proposal and consultation process was limited to the IT team. He noted he had approximately 40 to 50 people which he needed to meet with and consult during the process.

[35] Mr Sivakumar gave evidence he recalled a brief internal discussion with the Executive Leadership Team regarding Joy McDonald and Mr Glasgow's positions. He noted they were both project managers, although Mr Glasgow was seconded to the role of portfolio capability lead at the time. Ms McDonald's work was focused on the life side of the business whereas Mr Glasgow's work was more involved with the wealth side. It was for these reasons that he felt it reasonable to propose that:

- (a) Ms McDonald be transferred to AMP Life in her existing role; and
- (b) Mr Glasgow remain at AMP in a position of portfolio capability lead (albeit with a change in reporting line, being the position he had been seconded to).

[36] Mr Sivakumar gave evidence regarding consultation, starting on 15 May 2019 when he presented the restructure proposal to Mr Glasgow and others. His evidence was Mr Glasgow did not say anything or challenge the proposal at the time. He says that Mr Glasgow was provided with a copy of the presentation and a personalised letter setting out the impact of the proposed changes on his role and was invited to provide feedback on the proposal (ABD pages 163-165).

[37] Mr Sivakumar says he received a phone call from Mr Glasgow on 16 May during which verbal feedback on the proposal was provided. Whilst parts of his recollection were unclear,

his evidence was that he could recall that he told Mr Glasgow that they were trying to align people and capability to roles within the organisation where they saw them the best.

[38] Mr Sivakumar noted that on 21 May 2019 Mr Glasgow sent him an email commenting that the proposal was well thought out. He noted that Mr Glasgow also commented that his permanent role in the proposed new restructure seemed to be an evolution of his seconded role, but did ask that the proposal be updated to reflect this (ABD pages 80-81 and 166-167).

[39] As evidence of further consultation, Mr Sivakumar said that sometime between 21 and 28 May 2019 he had a video conference call with Mr Glasgow. He says he took him through the proposal and his vision for the IT team. He felt Mr Glasgow was interested in the role to the extent that returning to a pure project manager type role (which was not available) seemed like a step backwards.

[40] Mr Sivakumar's evidence was that he then sat down with Mr Rutherford and considered feedback received from all staff in the IT team. Following Mr Glasgow's feedback, the proposal insofar as it affected him was amended and the proposal updated, providing that Mr Glasgow's old project manager role would be disestablished and he would be redeployed into the new role of agile coach/scrum master. He reiterated that that was essentially the same position as the seconded role of portfolio capability lead but with a change in job title and reporting lines. He noted that none of Mr Glasgow's feedback substantively affected the proposed new restructure, thus accordingly on 28 May he, along with Mr Rutherford, met with Mr Glasgow to communicate the decision on the restructure proposal. He noted that Mr Glasgow was not happy with the title of the role and wanted it to be adjusted.

[41] Mr Sivakumar recalled a discussion with Mr Glasgow who asked why Ms McDonald was being transferred to AMP Life and not him. The rationale behind this was explained, namely that as Ms McDonald's work was largely focused on the life side of the business and Mr Glasgow's work was not, it seemed appropriate that she would continue on in a similar role. Mr Sivakumar agreed to change the job title at Mr Glasgow's request and this was confirmed by email on 28 May 2019 (CBD 219-220).

[42] Mr Sivakumar confirmed that Mr Glasgow had not been provided with a position description for the new role at the time. He said this was for two main reasons, namely:

- (a) as the role was effectively the same as Mr Glasgow's seconded role, he didn't feel the need nor did he think it was a priority; and
- (b) the parties had talked about the new role in detail. Mr Glasgow had been asked what he wanted it to look like and it had been made clear to Mr Glasgow he had the ability to make the role reflect what he wanted. In other words, Mr Sivakumar was saying even at this stage the parties were in consultation, with AMP keen to retain Mr Glasgow and keen to tweak the role to suit what he was comfortable with at the time.

[43] Mr Sivakumar referred to the email received from Mr Glasgow on 10 July 2019 which raised a number of concerns regarding the restructure process. Mr Glasgow seemed concerned that AMP had used his seconded role as a comparator with the new role. He queried why the name of the lead role had evolved through the process and raised perceived inconsistencies between the way he had been treated and others (CBD 234-238). Mr Sivakumar responded saying AMP had used Mr Glasgow's home role (project role) as the comparator with the new project capability lead role, not the seconded role, although noted this had not been undertaken in a detailed way at that stage. He reminded Mr Glasgow that the changes to the title had occurred at his initiative and AMP wished to retain him.

[44] He says he further reminded Mr Glasgow that AMP needed the project capability lead role, which was the role Mr Glasgow had been undertaking on secondment and there could be no return into a re-established project manager position. He says the intent was to make sure Mr Glasgow could do the things he enjoyed doing at the salary level he already had, whilst also meeting AMP's needs. Mr Sivakumar rejected inconsistent treatment of employees, saying all had been treated consistently.

[45] Mr Sivakumar gave evidence that in order to keep Mr Glasgow, and in an attempt to ensure he was satisfied with the new arrangements, he sent him a letter dated 8 August 2019 (CBD 273-274) confirming that the temporary additional payments that he had received whilst on secondment would form part of the base salary in the new project capability lead role. He noted that this constituted a permanent pay increase of \$8,908.80 per annum. Following discussions with Mr Glasgow, Mr Sivakumar's evidence was that changes were made to the role to accommodate him. They had changed the job title, they had increased the salary, and had taken into account his feedback and requests every step of the way.

[46] Mr Sivakumar confirmed that on 1 October 2019 he received Mr Glasgow's resignation on notice. He says he responded to that resignation on 2 May by email, advising Mr Glasgow they would keep the position open, which they did for some three and a half months. The role was only filled once AMP reached the view that Mr Glasgow had no intention of returning to, are exceptional.

### **Analysis**

[47] This determination has been issued outside the timeframe set out at S.174C(3) of the Act in circumstances the chief has decided, as he is permitted by S174C(4) to do

[48] Pursuant to section 174E of the Act, I make findings of fact and law and outline conclusions but I do not record all evidence and submissions received. The discussion below and attributing recollections and assertions made by witnesses draws from their written statements, appearance at the investigation meeting and documentation provided.

[49] At the heart of Mr Glasgow's case are two propositions; first, the position he was asked to take was not directly comparable to his existing position and accordingly he was under no obligation to take it. Secondly, AMP's insistence that he do take it was such a fundamental breach of his employment agreement that it was entirely foreseeable that he would resign. Based on the above, Mr Glasgow's case is that not only does this mean he was constructively dismissed, but he is also entitled to his redundancy compensation.

[50] It is fair to say that this position does create some difficulty for Mr Glasgow. As he conceded in questioning,

[51] In terms of clause 18 of the employment agreement, in a circumstance where Mr Glasgow declines a position which was directly comparable, he would be redundant which would then bring into play the situation where he would not be entitled to redundancy compensation in terms of the employment agreement. However, whilst it may have been open to AMP to declare Mr Glasgow redundant without paying him compensation, if the terms and provisions of clause 18 of the employment agreement were satisfied, this did not occur. AMP did not make Mr Glasgow redundant. The opposite was true, it went out of its way to retain him. Accordingly, it seems to me Mr Glasgow's case for redundancy compensation is dependent entirely on whether or not he was unjustifiably dismissed (constructive or otherwise).

*Was the new position “directly comparable”?*

[52] In order to decide this question, I need to embark on a fact and degree approach as to whether or not the new position offered to Mr Glasgow was or was not a directly comparable position.

[53] As set out earlier in this determination, a directly comparable position is defined in clause 18(a)(iii) of the employment agreement. Essentially the position offered to Mr Glasgow was at the same location and involved duties which would not be an unreasonable change in duties in the circumstances of his skills, abilities, or employment history. In fact, the position utilised skills that Mr Glasgow acknowledged he had, and had undertaken for AMP. Mr Glasgow says that the new position was more directly comparable to his seconded position rather than his permanent position. The agreement refers, however, to the specialist nature of work for which the employee was employed and was, until redeployment, “principally engaged in”.

[54] In *Waikato District Health Board v Archibald*<sup>1</sup>, Chief Judge Ingles in discussing how to use an objective standpoint approaching a comparability dispute noted “I approach the issue on the following basis. Would a reasonable person, taking into account the nature, terms and conditions of each post and the characteristics of the affected employee, consider that there was sufficient difference to break the essential continuity of the employment?”<sup>2</sup> Each case is fact dependent. That means only limited assistance can be gained from references to earlier cases. In Mr Glasgow’s case, I find the new position offered to Mr Glasgow is directly comparable. It was in the same location, involved duties which would not be an unreasonable change in duties in the circumstance of Mr Glasgow’s skills, abilities or employment history and was in essence very similar to a role Mr Glasgow had not only undertaken before but was performing at the time of the restructure. This weakens Mr Glasgow’s claim that he was constructively dismissed.

*Constructive dismissal*

[55] Dealing first with Mr Glasgow’s claim of constructive dismissal, I do not consider that the grounds for this are made out. The tests for the establishment of a constructive dismissal are now well understood. Mr Glasgow, in order to succeed under this heading, would need to

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<sup>1</sup> *Waikato District Health Board v Archibald* [2017] NZEmpC 132 at [39].

<sup>2</sup> *Carter Holt Harvey Limited v Wallis* [1998] 3 ERNZ 984 (EmpC at 995).

show first that the position was not directly comparable and thus was a breach of his employment agreement, and secondly, this breach was so fundamental that it was foreseeable that he would not continue with his employment. With respect to Mr Glasgow, I do not see this as the position here. AMP wish to continue with Mr Glasgow's employment and the evidence from all parties, including Mr Glasgow, was that this was the case.

[56] The principles relating to constructive dismissal were considered at length in *Wellington, Taranaki and Marlborough Clerical IUOW v Greenwich t/a Greenwich and Associates Employment Agency and Complete Fitness Centre*:<sup>3</sup>

A constructive dismissal is one in which the employer's actions are equivalent to a dismissal, or the employer's conduct tantamount to a dismissal. ...

There is no substantial difference between the case of an employer who, intending to terminate the employment relationship, dismisses the employee and the case of the employer who, by conduct, compels the employee to leave the employment. This is a doctrine of constructive dismissal.

[57] Issues of causation and foreseeability are part of the consideration as to whether or not an employee can rely upon a constructive dismissal. In *Greenwich*, the Court noted: <sup>4</sup>

In identifying cases of constructive dismissal, and in separating them from cases of employee resignation, we suggest there is a useful insight to be gained from a consideration of the real or true source of the initiative for termination. If the real source of the initiative for termination is the employer, or the basis causation comes from the employer, then the case is one of constructive dismissal. ...

[58] In *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc*.<sup>5</sup>

In such a case as this we consider the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

<sup>3</sup> *Wellington, Taranaki and Marlborough Clerical IUOW v Greenwich t/a Greenwich and Associates Employment Agency and Complete Fitness Centre* (1983) ERNZ Sel Cas 95 at 104.

<sup>4</sup> At 104

<sup>5</sup> *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168 (CA) at [172]

[59] I agree with the submission on behalf of AMP to the extent there is no breach of the employment agreement which was of sufficient seriousness to make it reasonably foreseeable to AMP that Mr Glasgow would resign. Rather the opposite was true. Negotiations and consultation were continuing between the parties at the time of the resignation and AMP had already agreed to make changes to the position as part of its endeavours to retain Mr Glasgow's services. Mr Glasgow was well aware of that and all aspects of the new position as he confirmed in his evidence. Although all the details of the position may not have been provided in writing as required by clause 18(c)(v)(ii), the breach was not of sufficient seriousness to justify Mr Glasgow walking away from his employment. Likewise, it was clear that AMP were doing whatever they could to satisfy Mr Glasgow's concerns that the position was not "directly comparable". AMP was attempting to allay Mr Glasgow's concerns and accommodate them, right up until the time he resigned. There was certainly no repudiatory conduct on the part of AMP which would entitle Mr Glasgow to cancel the employment agreement.

[60] Clause 18 of the employment agreement, as set out earlier in this determination, sets out the requirements on the parties in a restructuring situation. Subclause (c)(i)(v) of the employment agreement provides that if Mr Glasgow declines an offer of a directly comparable position, he may be made redundant but would lose entitlement to any compensation provisions. The first provision provides that Mr Glasgow would not be entitled to redundancy compensation if he is made redundant having declined an offer of a directly comparable position. However, as I have pointed out earlier, Mr Glasgow resigned without AMP declaring him redundant.

[61] Accordingly, it is clear that the employment agreement required AMP to make a written offer including information on the location and hours of work, principal duties and responsibilities of the job, actual salary and if required, details of transfer according to clause 18(c)(vii). This was not done before Mr Glasgow resigned. In other words, there was always the possibility that any procedural defects could be addressed by AMP and the evidence was AMP was moving to remedy any complaints made by Mr Glasgow. The omissions were a technical breach and did not disadvantage Mr Glasgow or cause him loss. Because AMP did not declare Mr Glasgow redundant, it was not put in a position where it would ultimately have to consider Mr Glasgow's redundancy entitlements. Mr Glasgow absolved AMP from this

responsibility by resigning whilst discussion and negotiations were still continuing. It could not be said that his employment ended at the instigation of AMP.

### **Long service leave**

[62] It seems Mr Glasgow's claim that he is entitled to long service leave is based solely on the provisions contained in paragraph 18(f) of his employment agreement. This provision seems to only operate in circumstances where an employee has been made redundant. As that did not occur here, there is no further entitlement to long service leave.

### **Summary of findings**

[63] Throughout the investigation meeting, Mr Glasgow's evidence was consistent. His complaint was his belief that AMP had simply imposed the new position on him. He confirmed he was absolutely capable of undertaking the proposed role. He confirmed that AMP had made it clear that they would continue to discuss matters with him in an attempt to keep him happy and persuade him to take the role. He confirmed that they had even gone to the extent of changing the title and the pay rate.

[64] It is clear therefore, that despite the full job description not being in writing, Mr Glasgow was fully aware of what was entailed in the new role. I accept therefore, that any breach of clause 18c(ii) did not disadvantage Mr Glasgow because he knew precisely what the job entailed, what the salary was, and had in depth discussions regarding all matters relating to the role.

[65] Mr Glasgow resigned from his employment in circumstances where he knew AMP did not consider a redundancy situation existed. He resigned when there were ongoing discussions regarding "tweaking" of the role. The clear purpose of this was AMP's obvious desire to retain Mr Glasgow and to tailor the role as much as it could to satisfy any concerns he had. It seems however, Mr Glasgow could not see past what had happened initially, namely some confusion over aspects of his previous role and some procedural shortcomings on the part of AMP which at the end of the day did not disadvantage Mr Glasgow. I find:

- (a) Mr Glasgow had the opportunity to accept a directly comparable position and although the way AMP offered the position to Mr Glasgow did not strictly speaking conform with clause 18c(ii) of the IEA, this did not cause Mr Glasgow any disadvantage.

- (b) Mr Glasgow resigned from his employment with AMP prior to them making any final decision regarding the continuation of his employment. It could not be said that Mr Glasgow's resignation was at the instigation of AMP. AMP had continued throughout the process to take steps to try and prevent exactly that occurrence.
- (c) As Mr Glasgow was not dismissed but resigned in circumstances which do not amount to a constructive dismissal. He is not entitled to the remedies he seeks including redundancy compensation.

[66] Costs are reserved.

**Geoff O'Sullivan**  
**Member of the Employment Relations Authority**