

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 144
5399247

BETWEEN

NEEL GUPTA
Applicant

AND

INFOSYS TECHNOLOGIES
(AUSTRALIA) PTY LIMITED
Respondent

Member of Authority: G J Wood

Representatives: Leo Watson for the Applicant
John Rooney for the Respondent

Investigation Meeting: 16 November 2012 at Wellington

Submissions Received: 16 November 2012

Determination: 22 November 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Neel Gupta, seeks reinstatement on an interim basis to his employment with the respondent, Infosys Technologies (Australia) Pty Limited (“Infosys Technologies”). Infosys Technologies resists the claim, in particular because it no longer has any employees and because of delays by Mr Gupta in bringing his claim for interim reinstatement.

[2] In an application for interim reinstatement the following issues must be addressed:

- (a) Does the applicant have an arguable case, including an arguable case for permanent reinstatement?
- (b) If so, are damages an adequate alternative remedy for the applicant?

- (c) If not, where does the balance of convenience lie?
- (d) Where does the overall justice of the case lie?

Factual discussion

[3] After extensive pre-employment discussions Mr Gupta was hired from India, under a work visa, to act as a senior project manager for Infosys Technologies. Infosys Technologies is a fully owned subsidiary of Infosys Limited, a large multi-national company based in India, providing business consulting, technology, engineering and out-sourcing services.

[4] Mr Gupta was employed in the Wellington branch of Infosys Technologies to work on the Telecom account in Wellington. His employment agreement did not limit him to work solely on that account, however. Rather he was a permanent member of staff whose job purpose was:

*To take end to end bottom line responsibility for a project, participate and ensure proposal, estimation and scope for project is completed; build the project team, schedule assignments, monitor and review and report project status, manage project risks, ensure successful delivery and implementation, take complete ownership of people and their performance management in the project **WITH** the objective of ensuring the highest levels of service offerings to customers within their domain, service and technology area **WITHIN** the guidelines, policies and norms of Infosys Technologies.*

[5] Clause 14 of the parties' employment agreement provided for the required employee protection process in the event of redundancy. It states, amongst other things:

This clause applies in a restructuring ... and therefore will apply where the company has entered into a contract or arrangement under which its business (or part of it) is to be undertaken by another person or entity, or where the company's business (or part of it) is to be sold or transferred to another person or entity.

In the event of such restructuring affecting your position, the company will, as soon as is reasonably practicable, taking into account the commercial and confidentiality requirements of the business, commence negotiations with the other party involved in the restructuring (other party) concerning the impact of the restructuring on you. ...

In negotiations with the other party, the company will, subject to any statutory, commercial confidence or privacy issues, provide the other party with all information about the employees who will be affected

by the restructuring (including you), including all details of their terms and conditions of employment, and it will encourage the other party to offer all affected employees, employment on the same or generally no less favourable terms and conditions of employment than they currently enjoy with the company.

Whether the other party offers you ongoing employment and on what terms and conditions, will ultimately be the decision of that other party.

If you are not offered employment with the other party, the company will meet with you to discuss:

- *whether there are any options available for you to remain in employment with the company; and/or*
- *your redundancy entitlements (if any) under this agreement and what this could mean for you, including notice arrangements.*

[6] On 15 September 2011 Mr Gupta commenced in his position, working on the Telecom account. However, on 3 October 2011 Mr Gupta was released from the Telecom project, because Telecom advised Infosys Technologies it no longer wanted him working on its account.

[7] Between October 2011 and January 2012 Mr Gupta did not work in any other firm as a project manager earning income for Infosys Technologies, but did look for such work within Infosys Technologies and undertook some background work to assist tendering for work.

[8] After a meeting about his probationary period Infosys Technologies determined to extend Mr Gupta's probationary period until 15 February 2012. The extension was as a result of concerns about Mr Gupta's performance, including him being taken off the Telecom project. Mr Gupta promptly objected to this decision and raised it at the highest level in Infosys Technologies.

[9] On 29 February 2012 Infosys Technologies' Chief Executive Officer, Ms Jackie Korhonen, wrote to all staff about major changes affecting staff of Infosys Technologies, based on the parent company Infosys Limited's decision to simplify its businesses. The decision had been made, following consultation lasting around a year, that *effective 1st April 2012 Infosys Australia and New Zealand will be integrated with Infosys Limited.*

[10] Under a heading *What Does This Mean For You?* it was stated:

- *Current employees will be transitioned to become direct employees of Infosys Limited and you will receive a new employment contract to formalise this change.*
- ...

Other aspects such as those listed below remain unchanged:

- *Your role and location;*
- *Current leadership/management reporting lines;*
- *In flight projects and delivery to clients will continue uninterrupted.*

[11] Ms Korhonen was to continue to serve as head of Infosys in Australia and New Zealand after 1 April 2012. These issues were confirmed in a staff meeting a week later.

[12] Subsequently, Mr Gupta raised a personal grievance about his concerns about the trial period, and other issues in his employment. In its response on 28 March 2012, Mr Richard Logo, Associate Vice President, HOD of Infosys Limited, informed Mr Gupta of the following:

As you are well aware, Infosys Technologies is to be voluntarily wound up, effective 31 March 2012. The company will cease to operate at this time, although you will continue to receive your salary for April 2012.

As you will also be aware, Infosys Limited will operate in place of Infosys Technologies moving forward. Where there are positions available, Infosys Technologies' employees are being offered the opportunity to transfer to Infosys Limited.

Infosys Limited has not identified a role in New Zealand which fits your skills, experience and job level. However, Infosys Limited has identified a role in India which would be suitable for you.

Attached with this email are the details pertaining to the role and the related employment information.

Please note that the concerns about your performance set out in our letter of 15 February 2012 will need to be addressed at the appropriate time if you accept the offer of the role with Infosys Limited. The offer of employment from Infosys Limited will remain open until 10 April 2012, at which point it will lapse.

If you do not wish to accept the offer from Infosys Limited we will need to meet with you to discuss the implications for your employment given that Infosys Technologies will be ceasing to operate.

[13] The key concern for Mr Gupta (who had just emigrated to New Zealand) about the new job he was being offered was that it was based in India and therefore could not be described as having the same location as the job he held. Similarly it was not employment on the same or generally no less favourable terms and conditions of employment. This is clear, despite the fact that the Infosys Technologies' HR team claimed, on 10 April, that it was on comparable terms and conditions.

[14] Mr Gupta responded on 11 April seeking Infosys Technologies' *co-operation further as I weigh the merits in this regard and weigh my options*. I note that the initial offer gave him only four working days within which to respond.

[15] On 23 May 2012 Infosys Technologies wrote back to Mr Gupta requiring him to make a response, because none had been received in the ensuing 42 days. The letter stated, amongst other things:

... there is no ongoing role available within the company and it is therefore our intention to terminate your employment in accordance with the notice provisions in your employment agreement. Before we do this, we are happy to consider any feedback or comments you may have by no later than 25th May 2012. ...

If we do not hear from you by the time stated above, we will provide you with formal notice of the termination of your employment.

[16] On 25 May Mr Gupta wrote back, stating that he had intended to respond earlier but:

...I have been hindered by lawyers being on vacation ... As stated earlier it is important that I take a correct decision further in this regard. I would certainly reach out to your kind self the moment I have further information.

I request your co-operation further in this regard.

[17] The response received on 29 May was one of termination of employment, given the time that had elapsed and the lack of a substantive response. Mr Gupta was told:

It is neither practical nor preferable for the company to allow the present situation to continue. As previously advised, due to the winding up, there is no ongoing role available for you with the company. Therefore, we write to provide you with formal notice of the termination of your employment.

[18] Mr Gupta then contacted his present solicitor in June 2012. However it was not until 1 August 2012 that Mr Gupta raised a personal grievance and sought interim reinstatement, seeking a response by 10 August 2012. Infosys Technologies did not respond until 6 September, refusing interim reinstatement and mediation.

[19] It was not until 24 October 2012 that the Authority received this application for interim reinstatement, including the required undertaking as to damages. A conference call was held on 29 October. The parties were directed to mediation and an interim investigation meeting agreed to for 16 November 2012. The substantive investigation is set down for 6/7 March 2013. Infosys Technologies has also provided an undertaking as to damages.

Arguable case

[20] There is no doubt that Mr Gupta has an arguable case for unjustified dismissal. This can be clearly seen when contrasting that on 29 February he was informed that he would be transitioned to become a direct employee of Infosys Limited with the news on 28 March that the only suitable position for him would be on in India. This is particularly so as Mr Gupta appears to be the only employee of Infosys Technologies not transitioned to Infosys Limited. Furthermore, in its evidence, Infosys Technologies claim that it is so large it was not possible for it to consult with all its employees, which does not appear consistent with its obligations under the Act.

[21] On the one hand, in effect, what has really happened here is that, for the purposes of commercial clarity, Infosys Limited has brought back a number of its subsidiaries into the fold, and this was the only real change that was taking place in its business. It therefore certainly bears close scrutiny that under this restructuring or integration, all other members of staff in New Zealand other than Mr Gupta appear to have been offered employment on basically the same terms and conditions of employment, and in the same location. On the other hand there are two reasons, set out below, why Mr Gupta's prospects of permanent reinstatement do not appear strong.

Damages in the alternative/balance of convenience

[22] The balance of convenience favours Infosys Technologies, even although I accept that damages would not be an adequate remedy for Mr Gupta, as he genuinely wants to remain in New Zealand and be working for the Infosys group of companies.

[23] In *Port of Wellington v. Longwith* [1995] 1 ERNZ 87 the Court of Appeal made it clear that where an employee is surplus to requirements that is an important factor that is likely to lead to interim reinstatement being declined. Here Infosys Technologies has no employees and is effectively a shell company. It would therefore be of great inconvenience for it to have to take on one sole staff member, namely Mr Gupta, for an interim period. It would also appear to be impracticable and/or unreasonable to require it to do so on a permanent basis. In this regard I note that Infosys Limited is not a party to these proceedings.

[24] Even if Infosys Technologies was required to re-employ Mr Gupta to work on projects where other staff are working for Infosys Limited, the evidence of Infosys Limited's staff was such that it was clear, because of the poor state of the technology servicing sector in New Zealand, that there is no position for Mr Gupta to fill. To the contrary, the evidence was that Infosys Limited has reduced its staff numbers in New Zealand. While there may be positions in Australia, Mr Gupta does not have a work permit to work in Australia, only in New Zealand. Furthermore, Mr Gupta had not generated any revenue for Infosys Technologies in the last seven of his eight months employment with it.

[25] While I accept that Mr Gupta will suffer greatly financially over the next four months or so while his case is determined, he must take some responsibility for that himself, because of delays in bringing this application. Mr Gupta has been aware that he was likely to have lost his position from the end of March at the latest. He knew that he had lost his position for certain from 29 May. Even although he engaged Mr Watson in June there was a delay of two months before he raised a personal grievance. Had Mr Gupta come to the Authority in June after he had lost his job, he could have had a substantive investigation and determination before he had even raised his grievance on 1 August.

[26] Furthermore, there was another delay of almost three months during which Mr Gupta could have claimed interim reinstatement. Again there would have been

sufficient time within this period for the Authority to have fully investigated and determined the matter. Even although I accept that an employee is entitled to take some time to consider his or her position and seek advice, in this case this would not cover the vast majority of the period involved. Given that Infosys Technologies was not responsible to any degree for any of the delays it would thus be inappropriate to grant Mr Gupta the benefit of an equitable remedy such as interim reinstatement.

Overall justice

[27] There are no new significant factors to address here. The overall justice similarly favours Infosys Technologies, for all the reasons given above.

Determination

[28] Given the conclusions I have drawn above the application for interim reinstatement is dismissed.

Costs

[29] Costs are reserved.

G J Wood
Member of the Employment Relations Authority