

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 265  
3028115

BETWEEN            AMAL JAMES  
                                 Applicant

A N D                VODAFONE NEW ZEALAND  
                                 LIMITED  
                                 Respondent

Member of Authority:    Anna Fitzgibbon

Representatives:        Greg Bennett, advocate for Applicant  
                                 Astrid Sandberg, counsel for Respondent

Investigation Meeting:    On the papers

Submissions Received:    8 June 2018 from the Applicant  
                                 29 June 2018 from the Respondent

Date of Determination:    21 August 2018

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**DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY  
ON A PRELIMINARY MATTER**

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**Employment Relationship Problem**

[1]    A dispute has arisen between the applicant, Mr Amal James and the respondent Vodafone New Zealand Limited (“Vodafone”). The dispute is whether the withdrawal by Vodafone of an offer made to Mr Amal James of appointment to the role of Sale Force Product Analyst constituted a dismissal for redundancy, for which Mr James was entitled to redundancy compensation.

[2] The parties have agreed that this is an issue which the Authority can determine on the papers. Each party filed affidavits setting out evidence in respect of the matter for determination.

### **Mr James' claims**

[3] Mr James claims that he accepted the new role of Sales Force Product Analyst (Analyst role) offered to him on 15 December 2017 and had a valid employment agreement with Vodafone. Mr James says at that time he had two roles with Vodafone. Mr James says the decision by Vodafone not to proceed with the Analyst role triggered the "restructuring clause" in his employment agreement and amounted to a termination of his employment for which he is entitled to redundancy.

[4] Mr James seeks payment of one month's notice, totalling \$7,114 gross, compensation for hurt and humiliation under s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act), disbursements and legal costs.

### **Vodafone's response**

[5] Vodafone says there was never two employment agreements with Mr James. Mr James was employed by Vodafone and remains employed by Vodafone. The appointment to the Analyst role was a promotion and when the promotion could not proceed, for genuine business reasons, Mr James remained in his previous role with Vodafone. Accordingly, Vodafone says there was never a termination of Mr James' employment for redundancy and accordingly no redundancy compensation is payable to him.

### **Background facts**

[6] Mr James commenced employment with Vodafone on 1 July 2013 as a customer care representative. Mr James signed an individual employment agreement on 8 July 2013 (employment agreement). Kelly Moore signed the agreement for Vodafone on 21 June 2013. The employment agreement included the terms and conditions of Mr James' employment by Vodafone including a redundancy clause (clause 22) in the event that Mr James' employment was terminated by reason of redundancy. A Personal Employment Statement (PES) accompanied the employment agreement and included details of salary and benefits for the role.

[7] During 2017, Mr Matthew Sharp, Enterprise Systems Manager of Vodafone was involved in the development of the Configure Price Quote and Lifecycle Management Project (“CPQ/CLM Project”). In his affidavit, Mr Sharp says that in the latter stages of the CPQ/CLM Project it was envisaged that the Analyst would be required to be involved and to administer the CPQ/CLM product.

[8] The Analyst role was advertised, Mr James applied for the role and was interviewed by Mr Sharp on 13 November 2017.

### **Offer of Sales Force Product Analyst role**

[9] On 15 December 2017, Mr James was offered and accepted the Analyst role with a starting date on 31 January 2018. A new PES was signed by the parties with details of the remuneration and benefits for the Analyst role.

[10] On Thursday 21 December 2017, Mr Philip Molony, Manager, Sales Operations and Mr Sharp met with Mr James to inform him that there was a possible delay in the CPQ/CLM project. On 23 January 2017, Mr James received a letter from Mr Sharp informing him that the CPQ/CLM project was not going to be continued at that time. In the letter Mr Sharp states “Vodafone intends to explore alternative options to proceed with the CPQ/CLM project, however there is uncertainty about the timeframe and the potential form of any future CPQ/CLM project, which would be influenced by the choice of a new vendor.”

[11] Mr Sharp stated in the letter that as a result of Vodafone’s decision not to continue with the CPQ/CLM project, Vodafone proposed that the Analyst role would not proceed and that Mr James would remain in his current role of Account Manager. Further, if there was a need for an analyst position for a future CPQ/CLM project, then Mr James would be welcome to reapply if interested. Mr James was invited to provide his feedback and to attend a meeting with Mr Sharp on 25 January 2018 to discuss any feedback he may have.

[12] Mr James provided feedback to Mr Sharp in a letter dated 25 January 2017. Mr James expressed his disappointment that the analyst role was not going to proceed and that Vodafone’s decision disregarded “the contract between myself and Vodafone for the product analyst role...” Mr James posed that question that if he was an external candidate would the solution proposed by Vodafone of going back to his former role

be acceptable? For various reasons, Mr James expressed his discomfort at returning to his previous role and requested that Vodafone assist to place him in a comparable role.

[13] In a letter dated 31 January 2017 from Mr Sharp to Mr James, the decision by Vodafone was confirmed that the analyst role would not be proceeding and that Mr James would be remaining in his current account manager role. Offers of support were provided by Vodafone to Mr James.

[14] In his affidavit, Mr James says that he was of the view that Vodafone was unjustifiably dismissing him from his analyst role and there was a significant disadvantage to him, financially, mentally and career wise. In a letter from Mr James dated 9 February 2018 to the human resources department of Vodafone, Mr James informed Vodafone he did not accept the decision that he remain in the account management role and was of the view that his role had been disestablished.

[15] The parties were unable to resolve their differences. Following an unsuccessful mediation, an application was filed in the Authority by Mr James requesting the Authority to make a determination that he had a valid employment agreement with Vodafone commencing on 31 January 2018 and its decision to cancel the employment agreement amounted to an unjustifiable dismissal. Mr James seeks compensation under the Act and other entitlements.

## **Determination**

[16] The employment agreement entered into between the parties in July 2013 includes the following provision:

### **2. TERM, POSITION AND PERFORMANCE MEASURES**

Your employment begins on the date set out in your Personal Employment Statement and continues until renegotiated or terminated in accordance with this agreement.

Your Role Title is listed on your personal employment statement.

Details of your position are outlined in your Role Profile. This may be modified and updated by us from time to time following consultation with you. In addition you may be

required to carry out duties not specified in your Role Profile but which are consistent with your position.

[18] Clause 22 of the employment agreement states:

**22. REDUNDANCY**

In the event that your employment is to be terminated by reason of redundancy, you shall be provided with notice in writing (as per the notice period set out in your Personal Employment Statement).

There then follows details about applicable redundancy compensation. The clause goes on to state:

You will not be entitled to redundancy compensation or notice if:

- Vodafone offers you a suitable alternative position (or any other permanent position which you are willing to accept); or
- At your own initiative you are successful in obtaining permanent employment with Vodafone Group where your service is recognised as continuous.

...

[19] Clause 20 deals with the obligations on each party in the event that Mr James leaves Vodafone.

[20] The Employment Court decision of *St Kentigern Teachers Association Inc. v St Kentigern Trust Board*<sup>1</sup> is relevant. In that decision, the Trust Board had a number of management positions within the school for allocation to appropriately qualified and suitable teachers. The Trust Board wished to make some of the promotions to those roles temporary, at the end of which time a further temporary promotion would be offered either to the incumbent or another member of the teaching staff. If the incumbent was not successful, he or she would return to his or her previous position as a teacher without the additional responsibilities and remuneration of a management role.

The current situation between Mr James and Vodafone is similar in my view, to that in the *St Kentigern* case.

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<sup>1</sup> *St Kentigern Teachers Association Inc. v St Kentigern Trust Board* (2006) 7 NZELC 98, 069.

[21] In the *St Kentigern* case, the decision focused on s.66 of the Act and “fixed term employment agreements”.

[22] Section 66 of the Act is as follows:

**66. Fixed term employment**

- (1) An employee and an employer may agree that the employment of the employee will end—
  - (a) at the close of a specified date or period; or
  - (b) on the occurrence of a specified event; or
  - (c) at the conclusion of a specified project.
- (2) Before an employee and employer agree that the employment of the employee will end in a way specified in subsection (1), the employer must—
  - (a) have genuine reasons based on reasonable grounds for specifying that the employment of the employee is to end in that way; and
  - (b) advise the employee of when or how his or her employment will end and the reasons for his or her employment ending in that way.
- (3) The following reasons are not genuine reasons for the purposes of subsection (2)(a):
  - (a) to exclude or limit the rights of the employee under this Act;
  - (b) to establish the suitability of the employee for permanent employment;
  - (c) to exclude or limit the rights of an employee under the Holidays Act 2003.
- (4) If an employee and an employer agree that the employment of the employee will end in a way specified in subsection (1), the employee’s employment agreement must state in writing—
  - (a) the way in which the employment will end; and
  - (b) the reasons for ending the employment in that way.
- (5) Failure to comply with subsection (4), including failure to comply because the reasons for ending the employment are not genuine

reasons based on reasonable grounds, does not affect the validity of the employment agreement between the employee and the employer.

- (6) However, if the employer does not comply with subsection (4), the employer may not rely on any term agreed under subsection (1)—
- (a) to end the employee's employment if the employee elects, at any time, to treat that term as ineffective; or
  - (b) as having been effective to end the employee's employment, if the former employee elects to treat that term as ineffective.

[23] The Association argues that at the conclusion of the temporary promotion to a managerial position, the employment of the employee would come to an end. The Trust Board disagreed, stating that the employment of the teacher would continue and that s.66 did not apply.

[24] At paragraph [21] of the decision, Judge Colgan (as he then was) held:

I find that the employees and their employer have not agreed that the employment of the employees will end in any one of the three circumstances described in s 66(1). Such teachers will continue to be employed by the college. A broad, rather than a narrow, concept of "employment" was intended by Parliament so that s 66 addresses situation where, at the end of a specified period or after a specified event, or at the conclusion of a specified project, an employee would no longer be employed by the employer. Here, that will not be so. I do not accept the plaintiff's argument that the head of house position is the employment contemplated by s 66. I agree with the Employment Relations Authority and the defendant that the "employment" is employment as a teacher with additional temporary managerial responsibilities. It follows that s 66 is not applicable to the circumstances of this case.

[25] I accept the submission made by counsel for Vodafone that when the Analyst role did not proceed Mr James remained in his role of Account Manager. Mr James' employment continued, in the role of Account Manager. Vodafone did not terminate Mr James' employment agreement on the grounds of redundancy. Rather, it varied his role as Account Manager to that of Analyst, offered him an increase in salary and benefits. When that role did not proceed, Mr James' employment did not come to an end, rather he remained in his current role.

[26] I also agree with the submissions that even if I am incorrect and Mr James' employment was terminated on the grounds of redundancy, he would not be entitled to redundancy as he remains employed in a permanent position which would disentitle

him from any redundancy payments pursuant to clause 22 of the employment agreement.

[27] Accordingly, Mr James does not have an employment relationship problem.

**Costs**

[28] Costs are reserved. Vodafone has 14 days within which to file its submission as to costs. Mr James has 14 days in which to reply to the submission as to costs.

**Anna Fitzgibbon**  
**Member of the Employment Relations Authority**