

Employment relationship problem

[1] David Kreider was employed as General Counsel by Vodafone New Zealand Limited on 14 September 2004.

[2] On 30 October 2012 Vodafone acquired Telstra Clear Limited (TCL). It undertook a restructuring process resulting in disestablishment of Mr Kreider's position as General Counsel Vodafone and creation of the role of Legal Director. Mr Kreider was required to participate in a selection process for the new position of Legal Director. He was advised on 6 February 2013 he was unsuccessful and likely to be made redundant as a consequence.

[3] Mr Kreider submits he should not be made redundant because the position of Legal Director is the same as General Counsel Vodafone. He seeks orders appointing him to the Legal Director role. If the roles are different, he still seeks appointment with the opportunity to retrain.

[4] Vodafone disagrees. It submits the Legal Director position is substantially different to that of General Counsel Vodafone. Even if the roles were the same, it has concerns Mr Kreider is unable to fulfil the requirements of the role even with retraining. Therefore it is not required to offer the role to him.

Issues

[5] The parties agreed to resolve some of the issues by way of an interim determination. An agreed statement of issues was filed on 29 April 2013. The issues were:

- i. Is the Legal Director role the same as, or substantially different, to the applicant's role?
- ii. Should the applicant be confirmed in, or appointed to the Legal Director role?
- iii. Should the applicant be required to participate in a selection process?
- iv. Has the respondent maintained the status quo in relation to the applicant's role (pending an expedited determination of the preliminary issues identified in paragraphs 1-3 above)?

Legal Framework

[6] A decision to make staff redundant is part of management's prerogative. The Authority should not substitute its business judgement for that of an employer.¹

[7] It is insufficient for an employer to assert this was a genuine business decision and the Authority is not entitled to inquire into the merits of it. The Authority may review the business decision to determine whether the decision, and how it was reached, were what a fair and reasonable employer could have done in all the relevant circumstances.²

[8] The test whether a redundancy has arisen is would a reasonable person, taking into account the nature, terms and conditions of each position and the characteristics of the employee consider that there was sufficient difference to break the essential continuity of employment? The test is determined objectively. It is a matter of fact and degree.³

[9] A reasonable employer could conclude differences were, for a person of the characteristics of an employee, of a sufficient degree to break the essential continuity of employment and amount to a new type. Differences include loss of status, responsibility and interest in a new position and significant changes in the work environment.⁴

Is the Legal Director role the same as, or substantially different, to the applicant's role?

[10] Mr Kreider submits:

- a. The alleged differences in the size of team make no significant difference in the number of direct reports.
- b. The alleged difference in contract work and volume does not justify disestablishment of the general counsel role.

¹ *GN Hale & Son Ltd v Wellington etc Caretakers etc IUOW* [1991] 1 NZLR 151; (1990) ERNZ Sel CAS 843 (CA)

² *Ritson-Thomas v/a Totara Hills Farm v Davidson* [2013] NZEmpC 39 at [53]-[54]

³ *Auckland Regional Council v Sanson* [1999] 2 ERNZ 597 at [19] referring to *Carter Holt Harvey v Wallis* [1998] 3 ERNZ 984, 995.

⁴ *Carter Holt Harvey v Wallis* [1998] 3 ERNZ 984, 997.

- c. The leadership requirements are no different than in previous years which Mr Kreider has led a team satisfactory over the term of his employment.
- d. The requirement of being “wholly committed” is a person attribute rather than a material change to the role itself
- e. The purported differences between the roles have been added by the respondent as time goes on for the purposes of justifying its position in this proceeding.

[11] Vodafone disagrees. It submits:

- a. Mr Kreider’s position was disestablished as at 31 March 2013.
- b. The position of Legal Director is a substantially different position to the role of General Counsel.
- c. The key areas of difference between the roles are increase in scope, change of strategic focus of the business due to integration and amalgamation of Vodafone and Telstra Clear and a new operating model.
- d. There is a requirement for a strong leader, the need to be wholly committed to a greatly expanded business and the ability to lead the transformation of the entire business as a member of the new executive team.

What was Mr Kreiders role at Vodafone?

[12] Mr Kreider’s terms and conditions of employment were contained in his individual employment agreement dated 14 September 2004.⁵

[13] Mr Kreider’s deposed his “mandate” was to reduce and manage legal risk to the business and to protect the CEO (Russell Stanners), the Directors and Vodafone brand. He reported to the CEO and the Vodafone Group General Counsel in the UK, Rosemary Martin. He sat on the Executive Team on average about 1.5 days per week

⁵ Bundle of Documents (BoD) Tab 3

and managed the Legal Team which varied in numbers from 8 to 12 lawyers plus two support staff.⁶

[14] A job description for a General Manager, Legal was produced.⁷ Mr Kreider accepts the job description is broadly in line with what he understands his role as General Counsel was with some exceptions. The exceptions were no indirect reports and no fewer than ten direct reports; he initially reported to the Finance Director but latterly to the CEO; deleting reference to Vodafone Pacific, General Counsel Vodafone Australia, Vodafone Australia Legal Team; and there was no requirement of a qualification to practise law in New Zealand.⁸ He received remuneration of \$345,000 per annum plus cash and share bonuses averaging \$196,000. His level of remuneration and responsibility was assessed by Vodafone as Band E.

[15] During the period of his employment, Mr Kreider and Mr Stammers discussed his goals which appear to have been revised in 2008.⁹ Mr Kreider submits these included tasks he performed as General Counsel.

What is the Legal Directors role?

[16] The Legal Director's role was set out in a role profile drafted by Vodafone.¹⁰ The level of remuneration and responsibility was assessed by Vodafone as Band E.

[17] Vodafone disputes the role profile for the Legal Director's role sets out the tasks required to undertake that position. Mr Antony Welton, Vodafone's Human Resources Director, deposed at hearing the role was encompassed three previous roles namely General Counsel Vodafone, General Counsel Telstra Clear and the Head of Government Affairs, Regulatory and Ultra Fast Broadband (UFB). Vodafone submits the key differences between General Counsel Vodafone and the Legal Director role are:

- a. The change in scope, with a bigger legal team (10 to 15 lawyers picked from a current team of 22) and a greater volume and variety of legal work required in the context of the larger amalgamated business;

⁶ Amended Affidavit D Kreider sworn 22 February 2013 paragraph 11.

⁷ Bod Tab 1

⁸ Reply Statement of Evidence (SoE) D Kreider paragraphs 11 to 18.

⁹ Bod Tab 4 & 5

¹⁰ Bod Tab 10

- b. Changes in strategic focus arising from integration and amalgamation with TelstraClear meaning different legal skills and experience are required;
- c. The new requirement to be a strong leader with abilities and qualities to lead the legal team through a difficult period of change;
- d. The need to be wholly committed to the transition to the new operating model, so that the Legal Director can lead change within their team;
- e. The ability to lead the transformation of the entire business as a member of the executive team.¹¹

[18] Vodafone submits the specific skills and experience the Legal Director must possess are:¹²

- a. A demonstrated ability to negotiate, prepare and manage services agreements with large enterprise clients.
- b. Experience in managing complex legal issues relating to the Government's UFB initiative.
- c. A demonstrated ability to provide prompt and very efficient legal advice to the combined businesses. While efficiency is already a requirement for the current General Council role, this will become an even more important performance indicator given the volume of legal work will significantly increase in parallel with the 30% increase to the size of the business, but there will be a smaller total number of in-house lawyers in the combined legal team.
- d. Extensive experience in addressing the legal issues arising out of both mobile and fixed networks, and consumer and enterprise relationships.
- e. The ability to manage to ever tighter costs constraints.

¹¹ SOE ATJ Welton dated 22 February 2013 at paragraph 68; Respondent Submissions 29 April 2013 at paragraph 7

¹² SOE ATJ Welton dated 22 February 2013 at paragraph 70

- f. Strong leadership abilities developed through many years of managing significant change in a complex corporate environment. The Legal Director will need to lead this change in such a way as to ensure service levels, revenues, and staff engagement are maintained, despite the challenges that can arise during restructuring processes.
- g. Provide strategic input and direction as part of Vodafone's executive team.
- h. Transforming of the teams overall skill-set so that it reflects the full scope of the new business.

[19] The Legal Directors role has not as yet been filled by anyone. Vodafone have selected a prospective appointee for the role who is currently working elsewhere. The skills and experience required for the Legal Director's role are questions of fact yet to be determined by the Authority.

What are the differences between Mr Kreiders current role and the Legal Directors role?

[20] Historically Vodafone's business has evolved from mobile to broadband to fixed lines to pay TV. Change does appear to be constant at Vodafone. Organisational change does not necessarily mean a previous role within an organisation has become redundant.

[21] Comparing the General Counsel Vodafone job description (with Mr Kreider's exceptions) to the role profile for the Legal Director, there is little difference. Both documents describe the skills required to undertake the two roles. As a matter of fact and degree, the Authority determines the roles described within these documents are the same or very similar.

[22] Both roles have the same level of remuneration and responsibility. Vodafone assessed the "indicative size" of the Legal Director role as Band E using the Tower Watson single global branding model.¹³ Band E was also attributed to the General Counsel Vodafone role.

¹³ SoE ATJ Watson paragraph 46(e)

[23] None of the 'key differences' or the relevant skills and experience submitted by Vodafone were included in the Legal Director role profile. The additional skills and experience pertain primarily to the TelstraClear business from where the prospective appointee to the Legal Director role is drawn.

[24] The Authority turns to consider the relevant skills and experience alleged by Vodafone as essential to the role of Legal Director below.

[25] *Volume of work:* The parties experts agree that a change in the volume of work would not, by itself, be sufficient to indicate a substantial change to a position.¹⁴ This does not appear to be a difference between the role of Legal Director and General Counsel Vodafone.

[26] *Variety of work:* Vodafone offered many (if not all) of the same products as TelstraClear including fixed lines and managed contracts. The primary disagreement between the parties relates to the value of the work namely the multi-million dollar managed contracts and consequential liability and risk issues which arise. These are dealt with below. Given the similarity of products offered, variety of work does not appear to be a difference between the role of Legal Director and General Counsel Vodafone.

[27] *Size of legal team (10 to 15 lawyers):* General Counsel Vodafone was responsible for a legal team of 10 to 12 lawyers. The possible addition of 3 extra lawyers does not appear to be a significant difference between the roles.

[28] *Ability to negotiate, prepare and manage services agreements with large enterprise clients:* Catharina Maria Elizabeth (Liesbeth) Koomen gave oral and written evidence of her direct knowledge of some of the skills and experience Vodafone proposes as essential to the role of Legal Director. Ms Koomen was the Head of Government Affairs, Regulatory and Ultra Fast Broadband, and has been acting General Counsel TelstraClear for one month and the Ultra Fast Broadband Director (UFB Director).

[29] Ms Koomen deposed at hearing that her legal team negotiate, prepare and manage services agreements with large enterprise clients. General Counsel

¹⁴ BoE FJ Balchin, 5 April 2013 at para.77; BoE D Edwards. 24 April 2013 at para.48

TelstraClear was required to 'sign off' on the risk liability and profitability and may be brought in to resolve client disputes in conjunction with the legal team.

[30] Ms Koomen had not as yet been required to sign off on any of the managed enterprise contracts since her appointment in March 2013. Negotiations on these contracts may take up to 2 years or more. The frequency previous General Counsel TelstraClear was required to intervene in existing contracts is unknown. It is inferred there is some time for the Legal Director to become familiar with legal issues arising from these contracts.

[31] One of the primary purposes of the General Counsel Vodafone role is to *manage and lead the legal team to ... facilitate commercial transactions including a key responsibility to establish appropriate processes and quality standards for reviewing, drafting, and negotiating contracts (including advising on structure and risk and managing the out sourcing of legal services).*

[32] Assessment of risk was a key responsibility for General Counsel Vodafone. Although the risk may be greater than that previously dealt with by General Counsel Vodafone it does not mean the role is different from the Legal Directors role. That is an issue of personal skill, not role difference.

[33] *Complex legal issues relating to the Government's UFB initiative:* This work is being undertaken by two other solicitors with Ms Koomen managing their work. It is understood these solicitors will continue to undertake this work.

[34] Ms Koomen deposed at hearing the role of UFB Director was not intended to be part of the Legal Director role. If the UFB Director role continues after the Legal Director is appointed their expertise can be utilised to address any UFB legal issues as they arise. There seems less necessity for the Legal Director to possess a deep understanding or knowledge of UFB given the abundance of inhouse expertise. The Legal Director's role would more appropriately be to manage the provision of the legal advice utilising available resources. The job description for General Counsel Vodafone includes as a primary purpose management of the legal team to provide timely, accurate and practical advice. This skill does not appear to be a point of difference between the roles.

[35] *Demonstrated ability to provide prompt and very efficient legal advice to the combined businesses:* The ability to provide prompt and very efficient legal advice to

the combined businesses is reliant upon inhouse expertise and outsourcing. Ms Koomen attended Executive meetings with the previous General Counsel TelstraClear to provide her expertise on competition and regulatory matters. It is inferred the legal team solicitor with the required expertise would provide advice to the Executive not necessarily General Counsel. Ms Koomen deposed TelstraClear outsourced legal work where there was no inhouse expertise.

[36] The Legal Director's role appears to be identification of the relevant expertise internally or externally and bringing that expertise to the Executive. General Counsel Vodafone job description included a primary purpose of management of the legal team to provide timely, accurate and practical advice. This infers the above skill is not a point of difference between the roles.

[37] *Extensive experience in addressing the legal issues arising out of both mobile and fixed networks, and consumer and enterprise relationships:* This skill appears to be a combination of the matters addressed above.

[38] *Ability to manage to ever tighter costs constraints:* The job description for General Counsel Vodafone includes as a key measure *cost effective legal service and costs contained within budget.* The above skill is not a point of difference between the roles.

[39] *Strong leadership abilities developed through many years of managing significant change in a complex corporate environment:* The job description for General Counsel Vodafone includes as a primary purpose management of the legal team and a key result of *instil a sense of mission and service.* This infers leadership abilities were required for the role and is not a point of difference.

[40] *Provide strategic input and direction as part of Vodafone's executive team:* The job description for General Counsel Vodafone included the Vodafone directors as part of the key relationships. Mr Kreider also attended the executive team meetings. This infers provision of strategic input and direction to Vodafone's executive team.

[41] *Transforming of the teams overall skill-set so that it reflects the full scope of the new business:* The job description for General Counsel Vodafone includes as a key result *undertake recruitment, performance management, goal setting, training assessment and coaching as required.* The above skill would seem to be a part of the General Counsel Vodafone role.

[42] Having considered the evidence, the Authority determines the role of General Counsel Vodafone is the same or very similar in fact and degree to the role of Legal Director.

Should the applicant be confirmed in, or appointed to the legal director role?

[43] This issue is considered below.

Should the applicant be required to participate in a selection process?

[44] Vodafone further submits that it is not required to appoint Mr Kreider to the legal director position without conducting a selection process because:

- a. It was not satisfied Mr Kreider had the necessary skills, experience and attributes to fulfil the requirements in the new role; and
- b. There were two other candidates for the new position within its combined business.

[45] There are no copies of performance reviews evidencing previous complaint about performance. Given the above determination, it must be assumed he possesses the necessary skills, experience and attributes to undertake the Legal Director role.

[46] There is organisational change but no evidence of significant changes in Mr Kreider's work environment. Both roles are Band E in responsibility and remuneration. The proposed organisational model places the Legal Team as reporting to the CEO only.¹⁵ A reasonable employer could not conclude differences were of a sufficient degree to break the essential continuity of employment and amount to a new type due to Mr Kreider's personal characteristics.

[47] Given the determination General Counsel Vodafone was the same as the Legal Director's role, Mr Kreider is entitled to be appointed to it. Other candidates for the Legal Director role, does not affect the above determination. There is no surplus or basis for 'selection' because the General Counsel Vodafone role still exists.

[48] The Authority determines Mr Kreider should be confirmed in or appointed to the role of Legal Director and should not be required to participate in the selection process.

¹⁵

Has the respondent maintained the status quo in relation to the applicant's role (pending an expedited determination of the preliminary issues identified in paragraphs 1-3 above)?

[49] Mr Kreider submits Vodafone has breached an agreement to maintain the status quo and good faith by removing the applicant from the executive team and employing Ms Koomen to undertake aspects of his role and the role of UFB director.

[50] The Authority proposes allowing time for the parties to comply prior to issuing further orders. The breach of good faith may be pursued in the personal grievance matters at substantive hearing if not resolved sooner.

Determination

[51] The Authority makes the following determination and directions:

- A. A determination the General Counsel Vodafone role is the same as the Legal Director role.
- B. A determination Mr Kreider should be confirmed in or appointed to the Legal Director role and should not be required to participate in the selection process.
- C. By consent the non-publication order shall be set aside from 5 pm on the date of this determination.
- D. A direction for a teleconference for the purposes of setting down a hearing of the personal grievance matter and timetabling the receipt of any further evidence.
- E. Costs are reserved.



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Member of the Employment Relations Authority

