

Determination Number: WA 113/05

File Number: WEA 413/04

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Peter Lash (applicant)
AND	TelstraClear Limited (respondent)
REPRESENTATIVES	Michael Andrews for the applicant Ian Gordon for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Palmerston North, 30 March & 5 July 2005
DATE OF DETERMINATION	11 July 2005

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. Mr Peter Lash's claim is that he was subjected to an unjustified dismissal and/or action – statement of problem received on 10 November 2004. He seeks lost wages, compensation for humiliation, etc and costs.
2. The Company denies the allegations – statement in reply received on 26 November.

3. The parties underwent mediation on 26 June 2004 but the employment relationship problem remained unresolved.

Investigation

4. During a telephone conference held on 2 December parties agreed to a one-day investigation in Palmerston North commencing at 10.00 a.m. on Thursday 31 March 2005. Unfortunately, at late notice and because of circumstances beyond the respondent's control, it was unable to be present on that day and the Authority was able to meet only with the applicant. A report of that part of the investigation was communicated to the Company by letter dated 1 April: s. 173 (2) (b) of the Act applied. Agreement was later reached with the parties to complete the investigation on Tuesday, 5 July. By that time the parties had provided the Authority with witness statements and an agreed bundle.
5. Efforts by the parties during the investigation to settle this matter on their own terms were unsuccessful.

Background

6. From the statements provided by the parties and the evidence presented at the investigation, I am satisfied that key background details are as follows.
7. The Company is a well-known provider of telecommunication services.
8. Mr Lash was employed by one of the Company's predecessors, Clear Communications, as a Business Support Consultant in August 1992. From August of that year his position was Senior Business Support Consultant.
9. During 2001 the decision was taken to merge the businesses of Telstra Saturn and Clear Communications, as a result of the former's purchase of the latter. Staff of the two organisations, including Mr Lash, were advised of the pending restructure in an announcement during December 2001.

10. The purpose of the restructure was to establish *“one seamless organisation and to avoid double-ups where both businesses had people in the same or similar roles”* (par 7 of Emily Coffey’s, the respondent’s then Human Resources Consultant’s, witness statement).
11. The restructure was undertaken in two stages for the majority of the business. The first stage was announced on 23 January 2002 and was largely completed within a month. Whether staff were in positions that were affected or not they were provided with, or directed to, internet information about the first stage restructuring. This was done by audio/visual links and email.
12. Mr Lash’s position was not affected by the first stage restructuring.
13. The second stage restructuring was set to occur in March 2002 and had been clearly signalled during the first stage. Information about it was readily available at a website. The decision was taken that, before any of the presentations on the proposed restructure, the incumbents of any roles being proposed to be disestablished would receive prior warning and that a consultation process would follow to give them an opportunity to provide feed back and for those views to be taken into account. The project website set out the times lines and processes for providing feedback on the proposed restructure.
14. On 7 March 2002 Mr Lash was telephoned by Ms Coffey. The contents of their conversation is disputed. Mr Lash says she told him that the decision to make his position redundant had already been made. Ms Coffey denies that claim. She says instead that – consistent with the Company’s overall position and the ‘script’ developed to use as a guideline across all business units to ensure a consistent and fair process was employed in respect of all the affected employees – the applicant was briefed as to a proposal only and that no final decisions on the disestablishment of his position had been arrived at.
15. Mr Lash agrees that he spoke again to Ms Coffey on 8 March during which, he says, she *“qualified her earlier position by saying the restructuring”* was not finalised (par 7 of his statement). Ms Coffey says her advice to Mr Lash was always the same, that she was conveying details of a proposal only.

16. Mr Lash agrees he saw documents 1 & 2 of the agreed bundle at the time they were first distributed, and that he had every opportunity to provide feedback in respect of the proposals they contained. They are communications from the Company advising, amongst other things, of the positions to be made surplus including his own. He also accepts he knew of the opportunity to make submissions about the proposals and that the deadline for consultation was extended because of the extensive volume of feedback received by the Company. Mr Lash agrees he did not provide any feedback. He says he did not because he was upset *“as it seemed that the decision was made and I would have no input into it”* (par 10 of his statement).
17. By letter dated 2 April 2002 Mr Lash was advised of the decision to disestablish his position (document 6 in the agreed bundle). The letter also advised that,

Disestablishment of your role

Having considered the feedback, we can now confirm the new structure and I regret to advise you that your role will be disestablished.

This letter is to outline our proposals to address this situation. There may be other options that we have not considered and, if so, we would be happy to explore them with you.

I wish to emphasise that the process is ongoing and no final decisions about the impact on you will be made until you have had the opportunity to provide your feedback or suggestions.

You may want to consider the options I have outlined and come back to me in writing with your thoughts; ... you (or your representative) may want to contact myself to talk about the options further.

The options that we have considered are:

- ***Reassignment to another role ...***
- ***Apply for a new role ...***
- ***Redundancy ...***

- **Other** – *You may have some ideas about other options that we haven't considered.*

Next Steps

I would like you to consider what I have set out and provide any ideas/feedback that you have to me in writing within 3 working days of the date this letter.

...

I know that this is a difficult time and I appreciate your continued support of the business and our customers. Please feel free to contact your manager or HR Advisor/Manager at any time with any queries. ...

18. Notwithstanding his earlier view that a decision had already been made and he would have no input into it, Mr Lash felt able to respond to the 2 April advice by email dated 5 April. He asked, amongst other things,
- Why had he not been sent any work since 7 March?
 - Why was his position being disestablished but equivalent positions in Napier, Nelson, Hamilton, etc were not?
 - How was the Company going to service its customers not through his position but, as planned, from Wellington? And,
 - Was it true that, before the new structure was announced, there were talks between the Company and a local contractor about the latter taking over work in the area?

(document 7)

19. It can be seen from the above that, sometime after the earlier and primary opportunity to do so, Mr Lash was challenging the decision to make his position surplus, and was not pursuing concerns about reassignment, a new role or redundancy.

20. I am satisfied that all of the concerns set out in Mr Lash's email were matters he could have addressed before the extended consultation deadline, had he elected to do so.
21. Mr Lash received no answer to his inquiry or to a subsequent follow-up email dated 10 April (document 8).
22. By letter dated 12 April the Company informed the applicant that it had considered all options outlined to him and that no suitable alternatives to redundancy had been identified. Mr Lash was advised his last working day would be Friday 19 April 2002. He was paid redundancy compensation calculated in accordance with his employment agreement as well as payment in lieu of notice.
23. Having been on light duties while working for the Company, because of a spinal injury in 2001, Mr Lash went on to ACC following his redundancy. He received weekly compensation through to 15 September 2004.

The Applicant's Position

24. Mr Lash's claim is summarised at par 24 of his statement: he says that on 7 March 2002 he was told his position had gone. He says from that date there was no real communication with him and all of his work was taken away. Finally, he says that despite a promise to enter into discussion there was no response to his efforts to do so. He says he was upset and devastated by the undignified end to his employment, particularly as there was no farewell function after almost ten years of working for the respondent.

Discussion and Findings

25. Mr Lash seeks compensation under s. 123 (1) (c) (i) because – he says – he was unjustifiably dismissed and/or subjected to an unjustified action. I find against both claims for the following reasons.

Unjustifiably Dismissed: Predetermination

26. The basis of his claim for unjustified dismissal is that the Company predetermined the decision to make his position redundant, as evidenced by – the applicant claims – Ms Coffey’s telephoned advice on 7 March and, in support of that claim, that from that date there was no real communication and his work dried up.
27. Ms Coffey disputes the claims made by the applicant in respect of their telephone conversation on 7 March. I find in favour of her version of that conversation because:
- There is no evidence of any other employees being singled out by way of predetermined decisions,
 - By way of a balance of probabilities finding, it is likely the Company adopted a consistent approach to all affected staff,
 - Mr Lash accepts he was assured by Ms Coffey only a day later, on 8 April, that the announcement of the previous day was no more than a proposal,
 - There was ongoing communication from the Company to Mr Lash, as he acknowledged, that consistently stressed that it was a proposed restructure and that he had an opportunity to respond,
 - The evidence produced by both parties does not support the applicant’s claim his work dried up from 7 March (refer to the applicant’s chart of the contractor’s invoices and list of monthly totals and an agreed second bundle),
 - The uncontested evidence produced by Ms Renée Urlich, a Company Implementation Manager, responsible for distributing work to the applicant and others, that she did not receive or know of an instruction to not allocate work to Mr Lash or to redirect it to a contractor, and
 - The credibility of Mr Lash’s claim that he declined the opportunity to put his concerns to the Company because the decision was predetermined is undermined by decision to forward his emails of 5 and 10 April, when he clearly felt able to seek answers.

28. All of this evidence points to Mr Lash's position being made redundant for genuine commercial reasons, in the context of proposals affecting scores of other employees (the applicant was one of 33 members of a central region team to be made redundant – see par 13 of his then manager's, Richard Purdie's, statement), and by way of an equally genuine communication process that gave Mr Lash an extended (because the initial deadline for feedback was moved) opportunity to enjoy real consultation in respect of his future should he have chosen to exercise it.
29. I am satisfied that any change in Mr Lash's work pattern can be accounted for by progress made by the Company in undertaking its equipment and services roll-out and connection activities, the ongoing use of local contractors to increasingly undertake this work and the general turmoil that inevitably characterises major restructuring, and not by a decision to take work from him.

Unjustified Action: Failure to Respond

30. Section 103 (1) of the Act sets out a definition of personal grievance: it requires the employee's employment to be affected to that employee's disadvantage by some unjustifiable action by the employer. The Company accepts it did not reply to Mr Lash's emails of 5 & 10 April 2002. Did that failure amount to an unjustified action? And was Mr Lash disadvantaged by it? I do not think so. I reach this conclusion for the following reasons. Had the Company promised by its letter of 2 April 2002 to address the concerns set out in Mr Lash's emails? The Company cannot account for its failure. It says it more than likely failed to answer because it regarded the period for consultation as having closed on 22 March. In other words, while the letter does not expressly say so, its invitation "*to contact your manager ... **at any time with any queries***" (document 6 - my emphasis) was intended by the Company to apply only to matters arising out of the decision to make Mr Lash's position redundant. Mr Lash took it to mean he had another opportunity to address the substantive decision to make his position redundant.
31. I find in favour of the Company's interpretation: the letter provided for an opportunity to raise matters only in respect of, as its heading makes clear, the disestablishment of Mr Lash's position. He neglected to take the opportunity of consultation before the decision was reached to make his position redundant. I am satisfied therefore that,

while the Company failed to acknowledge his concerns at all, it could have regarded them as out of time and relied on the process to date to adhere to its decision. The thrust of Mr Lash's concern was, as he saw it, a predetermined decision to make his position surplus. The Company's failure to answer reinforced the applicant's view. I am satisfied, however, that Mr Lash is wrong in that regard. The decision to make his position redundant was genuine, and implemented by way of a fair process: it was not predetermined. His feedback was out of time and could be ignored by the respondent. He has not been disadvantaged by some unjustifiable action.

Determination

32. For the reasons set out above I find against all of the claims brought by the applicant, Peter Lash, in respect of the respondent, TelstraClear Limited.

33. At the request of the parties costs are reserved.

Denis Asher
Member of Employment Relations Authority