New Zealand Employment Relations Authority Decisions

Lambert v Ericsson Communications Ltd WA 113/06 (Wellington) [2006] NZERA 796 (9 August 2006)

Last Updated: 3 December 2021

Determination Number: WA 113/06
File Number: 5027328

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON OFFICE

BETWEEN Mark Lambert (Applicant)

AND Ericsson Communications Ltd (Respondent)

REPRESENTATIVES Gary Tayler for the Applicant

Graeme Norton for the Respondent

MEMBER OF AUTHORITY G J Wood

INVESTIGATION MEETING

SUBMISSIONS RECEIVED BY

DATE OF DETERMINATION

4 July 2006

7 August 2006

9 August 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

1. Mr Mark Lambert claims that he was unjustifiably dismissed by the respondent, Ericsson Communications Limited (Ericsson) because he was not given proper notice and his redundancy was otherwise not handled in a fair manner. He also claims that he was not paid sufficient redundancy compensation under his employment agreement or sufficient holiday pay. He further claims a penalty for a breach of good faith because he was misled about Ericsson's international assignment policies. Ericsson denies each and every one of these claims.

The Facts

2. Ericsson is a subsidiary of the multi-national Ericsson Communications. It is one company within a global group of companies that provide telecommunications equipment and related services. In New Zealand Ericsson operates in tandem with many major New Zealand telecommunication companies for the supply of equipment and services.
3. The applicant, Mr Mark Lambert, is an experienced information systems manager. He was employed by Ericsson in such a role between 1997 and 2002 in New Zealand. In December 2001, however, he was informed that due to restructuring, unless alternative employment could be found for him he would be made redundant. Fortunately, Ericsson chose to offer him an international assignment for a fixed term, in a project management role in Malaysia. He was later promoted to a more senior information systems role there in March 2003 and further promoted in September of that year. These fixed term appointments were all made as part of the international assignment regime operated by Ericsson world wide. The positions Mr Lambert held while on international assignment contracts were project management positions. He remained an employee of Ericsson Communications Limited, the respondent, throughout.
4. While Mr Lambert was in Malaysia Ericsson continued to scale down its operations in New Zealand. Its staff numbers reduced from some 300 to about 70. In particular, the information systems area, where Mr Lambert worked, was contracted out. This was the reason for his notice of potential redundancy in the first place. In fact the respondent moved in effect to being managed out of Australia, under an entity known as ENZA (Ericsson New Zealand Australia).
5. An Ericsson internal group directive explains the purpose and process for international transfers. Project assignments are the main category of long-term assignments. A project assignment is characterised by its temporary nature, for a fixed term, with the assignment to be terminated once the relevant know-how has been transferred or the project completed. The directive also notes that if a position

fails to meet the requirement of a long-term assignment, the employee is to take up local employment. This occurs where an individual employed by one of the Ericsson group of companies is moving to a new country to take up a new job with a new company that could be filled by a local employee. At this point the individual is required to become a local employee and the "host" organisation then bears the responsibility for his/her career management. An individual taking up local employment in these circumstances is not meant to be granted leave of absence and thus has to resign from his/her previous Ericsson employer. Furthermore, any employee who has been paid redundancy compensation by one Ericsson company is ineligible to be employed by any other for a period of two years.

6. Ericsson also has an Ericsson-wide internal strategy for repatriation for ENZA long- term outbound assignees, which states that ENZA would support assignments to meet requirements for knowledge and competence in the Ericsson group, to ensure that managers and specialists have broad international experience, to strengthen Ericsson and to enable employees to broaden their experience. It was implicit in the strategy that such assignees would return to their employer after some period.
7. An Ericsson wide internal instruction applies over accountabilities and processes for long term international assignments. Clause 2.2.1 states that regional HR and the appropriate Heads must jointly approve all international assignments. Clause 2.2.6 provides that if an assignee is asked by another host organisation to transfer directly to take up an assignment with that organisation, release approval has to be requested from the home company of the assignee. The home company may in such cases refuse release approval since it is not considered to be an extension of an assignment.
8. The repatriation process for Ericsson staff is dealt with by a published set of guidelines. Six months notice of recall of an assignment is part of the repatriation process. At that point the assignee is to confirm their intent to repatriate or seek approval for an assignment extension. Up to four months prior to the completion of the initial service abroad, if there is no job then the assignee is to be provided with written notice that they are officially placed on notice for redundancy and issued with a notice period in accordance with local guidelines. Redeployment opportunities are to be sought during the period up to four months prior to completion of initial period

of service abroad and one month of the notice period is to take place whilst the assignee is in Australia (or as both parties agreed, New Zealand). The assignee needs to physically repatriate in order to be eligible for redundancy. At this stage confirmation is also required in writing from the assignee that they are not seeking alternative local employment with any other global Ericsson company. One month prior to repatriation the human resources manager is to ensure that the assignee is reactivated on to the payroll system. This is because the direct costs of employment for an assignee are met by the host company.

9. Mr Lambert was aware from an early stage that as of August 2005, his most recent project role would end. On 3 February 2005 Mr Lambert was given six months notice of termination of his long-term assignment abroad. The assignment was therefore to end on 14 August.
10. Given that it was highly unlikely that there would be any positions for him in New Zealand, Mr Lambert, quite rightly, sought opportunities within the global Ericsson group of companies. Because of his senior role in information systems, Mr Lambert had good contacts in the Swedish Head Office, which had maintained its information systems

responsibilities, despite them being contracted out in many other parts of the world.

11. Mr Lambert entered into discussions with senior staff there, who considered that a role could be made available to him in Sweden. This was particularly attractive as discussions within Australasia had confirmed to him that there was little or not prospect of employment back in New Zealand. In fact, Mr Lambert travelled to Sweden to both hand over his project role and to discuss further opportunities in Sweden.
12. Over the next few months Mr Lambert had a number of discussions with Ericsson staff about his options, including a number of people in human resources, as well as his Ericsson manager, Mr Paul Copeland. The focus was on the potential role in Sweden. Ericsson Sweden would not offer Mr Lambert a position on long-term assignment, unless Ericsson NZ, the respondent company, agreed to extend his international assignment, or Mr Lambert was prepared to take up the position as a

local hire. Mr Copeland gave evidence, which I accept, about raising the potential for a further assignment with his boss, who stated that it would not be granted in circumstances such as this. Mr Copeland emailed Mr Lambert on 6 April accordingly, stating the following:

"The release letter is a problem. ENZA will not agree to extension of your long-term ex pat contract. Essentially if you are to take a new assignment in Stockholm ENZA would require you to go onto a local contract and resign from ENZ.

I am sorry Mark, but the ENZA policy is strict in this sense – we can discuss further next week or give me a call to discuss in the meantime."

13. During the course of this period, Mr Copeland and Mr Lambert did not meet. However, they did discuss matters by email and by phone on several occasions. Such a discussion was held on 5 July by phone. Notes of the meeting indicate that Mr Lambert was preparing to return to New Zealand, effective 14 August, even although the likelihood of a position there was not high, because the Swedish job was not as yet confirmed. It was by then clear that Mr Lambert's only option for employment within the Ericsson group would be to resign and join Ericsson Sweden as a local hire, as if he accepted redundancy he would be ineligible for any jobs in the Ericsson group for two years, in accordance with Ericsson policy. Mr Lambert was not prepared to take up a job as a local hire because that would jeopardise his redundancy pay (set by Ericsson policy on a 2+2 formula) and stock options.
14. Mr Copeland explained that Mr Lambert's salary on return would likely be what it was before he left, plus the average increase in salaries since that time. It was decided that 25 July would be a decision point, and that if no options had surfaced by then, notice of redundancy would be given.
15. Mr Copeland and Mr Lambert were still unable to meet, partly because Mr Lambert had other commitments. On 19 July Mr Lambert was informed that his notional home salary would be NZ$97,500, based on his previous salary before leaving New Zealand, and adjusted by average increases over the previous two years.
16. On 21 July Mr Lambert wrote to human resources, copied to Mr Copeland, stating that he had had to extend his leave and that he was unlikely to make it to Melbourne that week. He appreciated that a meeting was required, but given that they could not

meet until 1 August, he questioned whether a meeting might be deferred until he was back in New Zealand.

17. On 25 July, as planned, the parties had another telephone discussion. Previous discussions were reviewed and it was concluded that no suitable roles could be identified for Mr Lambert. Therefore, he was given formal notice of termination that day. The effect of the notice was that on 15 August a four week notice period would be paid out in lieu, together with his redundancy compensation. That compensation was based on his gross salary as recently assessed by Ericsson.
18. It was agreed during the Authority's investigation that the employment agreement provides for no specific period of notice for termination by redundancy and does not provide for payment in lieu of notice. Mr Lambert was told, however, that he would be paid in lieu of notice, and did not raise any objection. There was no job for him to go to in New Zealand to work out his notice, in any event. Mr Copeland was told by his boss to pay Mr Lambert's notice in lieu as Ericsson would not expect to him to work at a non-existent job in Wellington and thus he could immediately relocate to Napier, the residence of his choice.
19. In fact, Mr Lambert did not leave Malaysia until 13 August and only arrived in New Zealand on 17 August. He was paid redundancy and holiday pay on the basis of the gross salary determined by Ericsson.
20. Despite mediation and discussions between the parties at the investigation meeting, none of Mr Lambert's claims have been able to be remedied. It therefore falls to the Authority to make a determination.

The Law

21. Under the duty of good faith, parties are required to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.

Furthermore, it is clear that no party must directly or indirectly do anything to mislead or deceive each other or that is likely to mislead or deceive each other (s.4).

22. Penalties apply where there has been a failure to comply with the duty of good faith and the failure was deliberate, serious and sustained, or intended to undermine the employment relationship (s.4A).
23. In making a decision to make employees redundant, employers are required to provide any employee affected with access to information, relevant to the continuation of their employment, about the decision; and an opportunity to comment on the information to their employer before the decision is made (s.4(1A)). Furthermore, in any claim for unjustified dismissal/disadvantage, the Authority must determine, on an objective basis, whether the employer's actions and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time.
24. As the Court of Appeal made clear in *Coutts Cars Ltd v. Bagley* [2001] NZCA 382; [2001] ERNZ 660, good faith is promoted through openness on the part of both parties. More particularly, the provision of information concerning decisions affecting the employee is an implicit part of the duty of good faith.
25. The Holidays Act 2003 requires that holiday pay be based on average weekly earnings during the 12 months immediately before the end of the employee's employment, taking into account bonuses and accommodation subsidies (s.24(2)(b)).

Determination

26. In this case, Ericsson did provide Mr Lambert with information throughout the process, albeit that it was information that he would rather not have heard in some instances. While it would have been better had the parties met, I find that this was neither party's fault and that the email and phone contact was sufficient in the circumstances. It was clearly open to Ericsson to decline to agree to the new international assignment proposed, for the reasons given below. It was this decision that caused Mr Lambert the greatest difficulty, because he was required to choose between two much less palatable alternatives to a fresh international assignment.
27. I therefore conclude that, subject to the issues of notice addressed below, Ericsson treated Mr Lambert as a fair and reasonable employer would while effecting his

dismissal for redundancy, remembering that redundancy is a form of termination where the employee has done no wrong.

28. Proper notice must be determined first by recourse to the parties' employment agreement. Such notice may only be paid in lieu where the contract allows for that. In this case I find that reasonable notice should have been two months, in the absence of a specific contractual provision, in which case Mr Lambert should have been paid up until 25 September, rather than 15 September. I so conclude by balancing the usual practice of Ericsson and the judgement in *Aoraki Corporation Ltd v McGavin* [1998] NZCA 88; [1998] 1 ERNZ 601 (CA) with Ericsson's guidelines. The guidelines imply a notice period of two to four months and state that one month of the notice period is to be whilst the assignee is in Australia, neither of which occurred. By way of contrast, Ericsson's practice has been to give one months notice, which is consistent with the period specified in *Aoraki* as generally applicable.
29. It was also not open to Ericsson to pay Mr Lambert in lieu of notice, because there was no contractual provision that allowed for it. Neither of the above actions was therefore justifiable. This then results in an issue as to whether this problem is one of arrears or personal grievance (see for example *Unkovich v Air New Zealand* [1993] 1 ERNZ 531). In this case, however, I do not accept that Mr Lambert was hurt in any particular way by these failures on Ericsson's part, other than through lost remuneration, for which he will be compensated. This is because his redundancy was inevitable and the payment in lieu did not impact negatively on him. As there was no position for him to return to Mr Lambert did not suffer from any loss of a "right to work". In fact Ericsson's decision allowed him to return to Napier, his residence of choice, earlier than might otherwise have occurred.
30. I do not accept that Mr Lambert was misled by Mr Copeland over Ericsson's policy on repatriation, or that his statements were likely to mislead. Ericsson was clearly able to decline Mr Lambert's request for an extension. Given that Mr Lambert was highly unlikely to have a future role with it, there was nothing for it to gain in agreeing to Mr Lambert's request. While it was not strictly necessary for Mr Copeland to state that the policy was "strict", what that did underline for Mr Lambert was that the decision was not one which would change and in this sense was not

misleading. In any event, any such breach of good faith as could be claimed was not sustained or intended to undermine the parties' employment agreement and therefore no penalty would be applicable.

31. I accept that it was open to Ericsson to set Mr Lambert's salary, upon repatriation, at the level it did, in effect for the purpose of termination for redundancy. I note, for instance, that if, as Mr Lambert now claims, he would be entitled throughout to redundancy compensation based on his assignment terms and conditions (which were in effect a fixed term agreement anyway), then Ericsson would almost certainly have never agreed to him taking up an international assignment in the first place, as he was already under threat of redundancy at that time.
32. Both parties clearly understood that at the end of the fixed term international assignment the employee would return to

New Zealand and the assignment guidelines provide that even an employee returning to face redundancy will be reactivated onto the payroll system one month out. Furthermore, both parties also understood that as the assignment was over, so were the terms and conditions associated with it, to be substituted with terms that accorded with local conditions, such as general remuneration levels and other conditions.

33. It could in fact be argued that Ericsson could have set Mr Lambert's salary at the level it was when he left. In this sense it is clear from the long term assignment process that a person in Mr Lambert's situation would return to their old position, or a new one as negotiated. Unfortunately, as was clear even before Mr Lambert went on assignment, there was no position for him to return to. At best, Mr Lambert may have had an expectation that, had a position been available, he may have negotiated an improved salary to reflect the skills and experience he had gathered in the senior project roles he had undertaken in Malaysia. In a redundancy situation, however, that was rather academic. Ericsson's decision to place Mr Lambert back at a salary level based on his old position, but improved to reflect subsequent general movements in salary levels, was what a fair and reasonable employer would, on the balance of probabilities, have done, I conclude.

34. The situation is different, however, with respect to the calculation of Mr Lambert's holiday pay. Section 24(2)(b) of the Holidays Act makes it clear that it is Mr Lambert's Malaysian salary that must be used for the calculation here. Mr Lambert is therefore owed the difference between those earnings and the amount he was paid.

Conclusion

35. I have found that Mr Lambert was paid insufficient notice and should not have been paid in lieu of notice. I have also found that he was not paid sufficient holiday pay. I therefore order the respondent, Ericsson Communications Limited, to pay to the applicant ten days pay, plus the difference between his holiday pay as paid and as earned by him in his last twelve months of employment, together with interest at the rate of 6% on both sums from 25 September 2005. Leave is reserved for the parties to revert to the Authority if agreement can not be reached. All other claims are dismissed.

Costs

36. Costs are reserved.

G J Wood

Member of Employment Relations Authority
