

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2018] NZERA Auckland 4
3017112**

BETWEEN SHANE MCKEOWN
Applicant

AND UNIVERSAL
COMMUNICATIONS GROUP
NZ LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Emma Moss, Advocate for Applicant
Blair Edwards/Anna Jackman, Counsel for Respondent

Investigation Meeting: 16 & 17 November 2017 at Auckland

Submissions received: 24 November 2017 from Applicant and from Respondent

Determination: 08 January 2018

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Shane McKeown claims that he was unjustifiably dismissed on 9 June 2017 by reason of redundancy from his employment with the Respondent, Universal Communications Group NZ Limited (UCG).

[2] Mr McKeown claims that UCG failed to meet its good faith obligations and failed to meet the requirements of a fair and reasonable process.

[3] UCG denies that Mr McKeown was unjustifiably dismissed and claims that he was justifiably dismissed by reason of redundancy and that UCG had genuine commercial reasons for the organisation restructure, and undertook a procedurally fair process.

Issues

[4] The issues for determination are whether or not Mr McKeown was unjustifiably dismissed by reason of redundancy by UCG.

Note

[5] At the Authority's investigation on 16 and 17 November 2017 the witnesses answered questions on the witness statements they had provided and – under oath or affirmation – answered questions from me and the parties' representatives. The representatives have also submitted closing submissions on the facts and law.

[6] I have considered those submissions and the evidence, including relevant documents provided by the parties, but, as permitted by s.174 of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received. Instead the determination has stated findings of fact and law, expressed a conclusion on the issue necessary to dispose of the matter, and specified orders made as a result

Background Facts

[7] UCG designs, provisions and constructs fibre networks for multi dwellings and complex units in New Zealand. It employs approximately 130 staff throughout New Zealand, with offices in Auckland, Wellington, Queenstown and Dunedin. Mr Paul Trotman is the General Manager of Operations for New Zealand, and the head office is in Brisbane, Australia.

[8] Mr McKeown commenced employment at UCG in September 2015 initially as a Senior Field Manager, and at the time of the restructure undertaken by UCG, his position was Regional Construction Manager – Auckland.

Complaint about Paul Trotman December 2016

[9] During December 2016 Mr McKeown raised a complaint with the Human Resource team in relation to the behaviour of Mr Trotman. The matter was investigated by Mr Corey McCarthy, the Group HR Manager, and a meeting was held on 5 December 2016 to discuss and address the complaint.

[10] The meeting held on 5 December 2016 was attended by Mr McCarthy (by telephone from Brisbane), Mr McKeown, Mr Trotman and Mr Etienne Lues, National Construction Manager MDU (Multi-Dwelling Units) and Mr McKeown's immediate manager.

[11] Mr McCarthy followed up the meeting with an email dated 6 December 2016 addressed to Mr McKeown and copied to all attendees of the meeting, and confirmed the following actions were to be conducted by Mr Trotman:

1. Expectations for your performance will be set and explained;
2. A coaching and supporting environment provided by Paul and Etienne, and results as expected ;
3. Lessons have been learned from last week.

I trust that moving forward the environment to work effectively will be provided. If you have renewed concerns in the future, have talks with Etienne or Paul or formally make use of the company's grievance procedure, as you did on this occasion.

[12] In response that same date, Mr McKeown replied:

... On a positive note it is nice to see such an immediate change in someone ... Hopefully this continues in a positive way. I do have faith in the HR process and understand no matter how uncomfortable it may be for individuals it still has to be followed.

[13] Mr Trotman said he believed that this meeting had resolved the matter and was unaware that Mr McKeown had any further concerns.

[14] Mr McKeown said that the change in Mr Trotman's behaviour towards him was relatively short-lived. However, when questioned at the Investigation Meeting he confirmed that he had not raised this matter again, nor had he contacted Mr McCarthy or utilised the UCG formal grievance procedure.

Complaint about Mr Lues

[15] Mr McKeown said that during late 2016 and early 2017 he also started to have challenges in his communication with Mr Lues and believed that the issues between himself and Mr Lues had been directed or instigated by Mr Trotman in retaliation for the complaint he had made about him. However, he confirmed during the Investigation Meeting that he had no evidence to support this view.

[16] In early March 2017 he raised his concerns about Mr Lues with Mr Hamish Whitworth, the Human Resources Advisor based in New Zealand, using the UCG formal grievance procedure.

[17] Mr Whitworth said he had liaised with Mr McKeown about the issues he had experienced with Mr Lues, and sent Mr McKeown an email confirming that there would be a meeting held with Mr Trotman, which he was also willing to attend.

[18] Mr Trotman said that he had been surprised when he heard that the complaint about Mr Lues had been raised, however he had listened to Mr McKeown's concerns as expressed at the meeting in early March 2017 and subsequently told Mr Lues that he had not shown acceptable behaviour and he needed to apologise.

[19] Following the meeting Mr McKeown confirmed that Mr Lues had apologised to him and other team members.

[20] Mr Whitworth said he had followed up on the matter with Mr McKeown after the meeting and he understood that the issues had been resolved.

Restructure proposal

[21] In April 2017 UCG proposed a restructure of its business operations. Mr Trotman explained that UCG had been through a growth stage and that management was looking to create efficiencies within the business; in particular, with respect to ensuring that resources were best aligned to meeting operational demands and that operations were streamlined, rather than working in 'silos' as had been the case. The intention in that respect was to bring the provisioning and build teams throughout New Zealand together which would then have one reporting line via the newly created position of National Operations Manager.

[22] The restructure proposal contemplated the disestablishment of some existing positions and establishing new positions. The affected positions were:

Disestablished positions

- (i) National Construction Manager Multi Dwelling Units (MDU);
- (ii) Regional Construction Manager – Auckland (Mr McKeown's position);
- (iii) National Provisioning Manager; and
- (iv) Provisional Team Leader;

New Positions:

- (i) National Operations Manager;
- (ii) Manager Field Services – Auckland; and
- (iii) Programme Manager – Provisioning.

Meeting 28 April 2017

[23] Mr McKeown said he had been invited to attend a meeting on 28 April 2017. This meeting was attended by Mr Trotman and Mr Whitworth and addressed the proposed restructure.

[24] During the meeting Mr McKeown was informed about the restructure proposal and that it involved the disestablishment of his own role of Regional Construction Manager-

Auckland and Mr Lues' role of National Construction Manager MDU, and the establishment of a new position of Manager Field Services – Auckland.

[25] Mr McKeown said he was provided with a copy of the proposed restructure document in the meeting, but said there was no real discussion of the other roles on the organisation chart, and no indication of what roles, if any, were to be contestable in the restructure.

[26] Mr Trotman and Mr Whitworth said the purpose of the meeting on 28 April 2017 was to provide Mr McKeown with initial notification of the proposal to restructure (the Restructuring Proposal), and the possible disestablishment of his role of Regional Construction Manager – Auckland.

[27] Mr Trotman said he had explained the Restructuring Proposal using a presentation document, and identified to Mr McKeown that:

- Ms Jane Sosene was in an acting position in the Program Manager Build area. That position was not a new position created by the Restructuring Proposal, but a vacant role at that time being covered by Ms Sosene on a temporary basis;
- Ms Sosene, as the only potentially affected employee in a position substantially similar to the new role of Program Manager – Build would be entitled to be redeployed to the new Program Manager – Build role if the Restructure Proposal proceeded.

[28] Mr Trotman said that he had advised Mr McKeown that any earlier issues between them were not relevant to the Restructuring Proposal.

[29] Mr McCarthy said it had been his advice to Mr Trotman to raise this matter in order to place Mr McKeown at ease and allay any concern that the complaint he had made about Mr Trotman might affect the Restructuring Proposal.

[30] Mr Trotman said he had made it clear to Mr McKeown during the meeting that no decision had been made, and that any decision to dis-establish his employment position and proceed with the Restructuring Proposal would only occur after the consideration of his feedback over the consultation period and completion of that period.

Feedback

[31] Mr McKeown was advised that he was not expected or required to provide feedback at the meeting on 28 April 2017, although he was welcome to provide any initial thoughts,

and it was made clear to him that he was entitled to have a support person or representative during all stages of the consultation period commencing after that meeting.

[32] Mr Trotman sent a letter to Mr McKeown dated 28 April 2017 to confirm what had been discussed at the meeting. The letter set out the background information and rationale for the Restructuring Proposal, the objectives of which were stated to be:

- (a) Develop an increased focus on achieving improved customer connections, irrespective of whether the connection relates to a build or provisional job.
- (b) Ensuring UCG is the right size for current demands, as well as being set up for future growth.
- (c) Developing unified structure and processes that will deliver improved outcomes and efficiency for UCG stakeholders.
- (d) An increased focus on building delivery partner relations through a single point of contact, rather than a partial project approach.

[33] The letter mentioned that UCG had reached a preliminary view that the position of Regional Construction Manager – Auckland might be surplus to the needs of UCG business. The letter concluded by outlining the next steps in the process as being the proposal that there was a further meeting the following week to continue the consultation. The letter concluded:

If you would like to provide any written feedback, either advance of, or at the meeting, please feel free to do so.

[34] The letter invited Mr McKeown to bring a support person or representative to the meeting and pointed out that he was entitled to take independent legal advice in regard to the issue. The letter concluded:

In the meantime, if you have any questions or if you require any further information to be able to provide your feedback, or require any other assistance, please let us know.

[35] Mr McKeown provided written feedback to Mr Whitworth by email on 5 May 2017. In the email Mr McKeown stated:

I can fully understand the need for change in the way that we (UCG) conduct our business and the drivers around 'Better Connection'.

As discussed with me at the meeting the only opportunity open for me would be to apply for the position of "Field Service Manager". As the "Program Manager Build" is to remain with Jane Sosene. ...

[36] Mr McKeown said his feedback was the result of an attitude of: "extreme pragmatism" but agreed when questioned at the Investigation Meeting that it would have been

reasonable for UCG to think from his feedback email that he had accepted the Restructuring Proposal.

Feedback Meeting 9 May 2017

[37] Mr McKeown met with Mr Trotman and Mr Whitworth on 9 May 2017. Although he had sought legal advice in advance of the meeting, he did not have a support person at the meeting.

[38] Mr McKeown said he had not raised any concerns about the restructuring process, either in the feedback email dated 5 May, or at the meeting held on 9 May 2017 as he had formed the view that the process would proceed irrespective of any views he held.

[39] Mr Whitworth said that during the meeting on 9 May 2017 Mr McKeown had told him and Mr Trotman that he agreed with the business rationale for the Restructuring Proposal and expressed an interest in the Manager Field Services – Auckland role. He had also told them that he was not interested in the role of National Operations Manager as he recognised it was beyond his capabilities.

[40] Although Mr McKeown's evidence was that he considered the role of Manager Field Services – Auckland to be substantially similar to the role he had been undertaking as Regional Construction Manager – Auckland with the only discernible difference being the wider leadership remit, he had not raised this with Mr Trotman and Mr Whitworth.

[41] At the conclusion of the meeting on 9 May 2017 Mr McKeown had been informed that the disestablishment of his position as Regional Construction Manager – Auckland would proceed.

[42] Although the original intention had been to wait until the National Operations Manager position had been filled before recruiting for the new role of Manager of Field Services – Auckland, Mr Trotman and Mr Whitworth said that at the request of both Mr McKeown and Mr Lues, the recruitment process for the new role had been speeded up.

Interview Process Manager of Field Services – Auckland 10 May 2017

[43] Mr McKeown and Mr Lues were interviewed on the morning of 10 May 2017. Both interviews were conducted by a panel consisting of Mr Trotman, Mr Whitworth and Mr Roger McArthur, the Chief Technology Officer and a shareholder, (the Panel).

[44] Mr Whitworth said that the focus of the questioning during the interview with Mr McKeown was on how he would perform in a role of higher responsibility with increased leadership expectations.

[45] Mr Trotman said there had been two questions asked of both Mr McKeown and Mr Lues: (i) *“What would you do differently”* and (ii) *“How do you manage going from managing a team of three to a team of twelve?”*.

[46] Mr McKeown denied that he had been asked two questions, saying that he had been asked only one question during the interview process which was: *“What would you do that was different”*. In response he had explained that he considered the Auckland operation was running well and that combining two departments was important.

[47] Mr Trotman said that Mr McKeown had not interviewed well, he had given similar answers to both questions to the effect that: *“he would have regular meetings and talk to the team every day”*. Although the Panel had tried to elicit further comment from him, he had added nothing further. By contrast Mr Lues had provided comprehensive answers to both the questions.

[48] Mr Lues confirmed that he had had a full opportunity to answer the questions asked, and had done so, adding that he had not hesitated to answer the questions at length.

[49] Mr McKeown in cross-examination confirmed that he believed prior to the interview that he would not be appointed to the role and had applied for alternative employment.

[50] At the conclusion of the meeting the Panel had decided that Mr Lues was the better candidate for the Manager of Field Services – Auckland position because:

- (i) He was the more qualified candidate because he would be stepping from a national role into a regional role and was the more experienced at managing larger teams; and
- (ii) Mr McKeown would have been stepping into a more challenging role as he would be responsible for the first time for the regional provisioning field operations in addition to his pre-existing build responsibilities.

[51] Mr Trotman had informed the two candidates of the Panel’s decision to appoint Mr Lues to the role immediately following the interviews.

[52] The decision to make his position redundant had been confirmed in writing to Mr McKeown by letter dated 15 May 2017 which also stated: *“... there are currently no alternative employment opportunities for you of equal status to your current role of Regional Construction Manager – Auckland”*.

[53] Mr McKeown said he had found the period between 10 May 2017 to his final day of employment to be stressful and humiliating.

[54] Mr Whitworth said that Mr Trotman had offered Mr McKeown a Field Manager role based in Wellington; however Mr McKeown had not been interested in relocating to Wellington.

[55] On 2 June 2017 Mr McKeown received a telephone call from Mr Trotman who advised him that there were no redeployment opportunities available for him at UCG.

[56] Mr Trotman said that whilst the main driver for the Restructuring Proposal and change had been unification of the operational teams, UCG had anticipated operational change savings as a result of implementation of the Restructure Process of approximately \$50,000.00 in salary requirements. The actual savings achieved by UCG had exceeded those anticipated being \$58,000.00 per annum.

Determination

Was Mr McKeown unjustifiably dismissed by reason of redundancy?

[57] Justification for dismissal is as stated in the Employment Relations Act 2000 (the Act), which at s 103A sets out the Test of Justification as being:

S103A Test of Justification

- i. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- ii. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[58] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. An employer must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

Was the Restructuring Proposal and redundancy genuine?

[59] There must be a substantive justification for dismissal, it must be based upon genuine grounds.

[60] In *Brake v Grace Team Accounting Limited* the Court of Appeal clearly stated that redundancy can arise in the situation in which an employee is superfluous to the needs of the business, which may arise from an employer's decision to make the business more efficient:¹

... This Court was clear that the Labour Court's restrictive interpretation was wrong: what was required was that the employee was superfluous to the needs of the business. This could arise where the employer sought to make the business more efficient.

[61] UCG's evidence was that the restructure of its business was undertaken for genuine commercial reasons to consolidate on growth and create efficiencies within the business, in addition to financial savings on salary requirements. As part of the Restructuring proposal, there would be new roles created and the disestablishment of some roles including that of Mr McKeown.

[62] Mr McKeown's evidence supported the UCG rationale for the Restructuring Proposal, and the evidence of UCG was that there had been salary requirement efficiency savings.

[63] I find that the reasons for the Restructuring Proposal and the disestablishment of Mr McKeown's role as Regional Construction Manager – Auckland were genuine.

Was the process followed by UCG procedurally fair?

[64] An employer who is proposing to restructure its business must not only have genuine reasons for undertaking the restructuring, but must follow a fair procedure in respect of affected employees.

[65] Provisions of the Act govern questions of justification for dismissal and, in particular, by reason of redundancy. Section 4 of the Act addresses the requirement for parties to the employment relationship to deal with each other in good faith. Section 4(1A)(c) in particular is relevant to a redundancy situation and requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of an employee to provide to the employee affected:

“(i) access to information, relevant to the continuation of the - employees' employment, about the decision; and

(ii) an opportunity to comment on the information to their employer before a decision is made.” s4 (1A)(i) and (ii).

¹ *Grace Team Accounting Ltd v Brake* [2014] NZCA 541 at [47]

Access to information

[66] The explanation and presentation on 28 April 2017 was followed by a detailed letter sent by Mr Trotman that same date which set out the background information and rationale for the Restructuring Proposal.

[67] The letter explained that UCG had reached a preliminary view that Mr McKeown's existing role of Regional Construction Manager – Auckland might be surplus to the needs of the business should the Restructuring Proposal proceed, advised of next steps including a further meeting, and invited Mr McKeown to provide written feedback if he wished to do so, and to contact Mr Trotman should he have any questions about the Restructuring Process or required further information.

[68] Mr McKeown did not ask any questions or request further information, but he did provide written feedback to Mr Whitworth that I find UCG was entitled to accept as indicating that he understood and accepted the rationale for the Restructuring Process.

[69] I find that Mr McKeown was provided with information relevant to the Restructuring Proposal.

Previous Issues

[70] Mr McKeown had made a complaint about Mr Trotman on December 2016, some 4 months prior to the Restructuring Process being undertaken by UCG.

[71] UCG believed that the complaint about Mr Trotman had been resolved. I find that it was entitled to do so because:

- Mr McKeown had responded positively to Mr McCarthy's confirmation of the actions agreed to be implemented following the meeting with Mr Trotman on 6 December 2016;
- Mr McCarthy had encouraged Mr McKeown to raise any concerns in the future;
- Mr McKeown noted in his response on 6 December 2016 that he had faith in the HR process; and
- He did not raise any further issues, concerns, or contact Mr McCarthy and/or use the HR process to raise any further issues.

[72] Whilst Mr Trotman raised the earlier issues at the meeting held on 28 April 2017, I find he did so on the recommendation of Mr McCarthy who had provided the advice as an HR professional. I find it was reasonable of Mr Trotman to accept that advice.

[73] I do not find any evidence that personal issues affected the Restructuring Proposal and disestablishment of Mr McKeown's position as Regional Construction Manager – Auckland.

Opportunity to comment

[74] Mr McKeown had provided written feedback on 5 May 2017, and was invited to attend a meeting on 9 May 2017 to discuss his feedback.

[75] Mr McKeown's evidence was that he had not raised concerns about the Restructuring Process either prior to or during the meeting on 9 May 2017 because he had formed the view that the Restructuring Process would proceed irrespective of his view.

[76] Whilst Mr McKeown may have held this view, I find that the feedback he provided to UCG was that he fully understood and accepted the rationale behind the Restructuring Proposal.

[77] The duty of good faith in s 4 of the Act imposes a duty on both parties to an employment relationship to deal with each other in good faith. Parties are to be: “*responsive and communicative*”. Mr McKeown was provided with an opportunity to seek further information or ask any questions about the Restructuring Proposal. He did not do so, and I find UCG was entitled to accept the feedback he provided as genuinely supportive of the Restructuring Proposal without any evidence to the contrary.

[78] I find that UCG acted in good faith by providing Mr McKeown with a genuine opportunity to not only to request further information on the Restructuring Process, but to provide feedback on the information provided before a decision to proceed with the Restructuring Process was made.

Should Mr McKeown have been redeployed into the Field Services Manager – Auckland role?

[79] An employer must consider redeployment options and offer redeployment, if a suitable redeployment opportunity exists.² In that respect an employer is entitled to determine

² *Jinkinson v Oceania Gold* [2010] NZEmpC 102, *Wang v Hamilton Multicultural Services Trust* [2010] NZEmpC 142

whether or not the applicant for redeployment has the requisite skills and experience for the role sought.

[80] The Restructuring Proposal contained three new roles: National Operations Manager, Manager Field Services – Auckland, and Program Manager Provisioning.

[81] The National Operations Manager role was a higher level of responsibility than the role held by Mr McKeown and he had advised UCG that he was not interested in being considered for that role.

[82] The role of Program Manager Provisioning had been available if Mr McKeown had wanted to apply for it, but he did not do so. I consider that this may have been because Mr McKeown's experience at UCG did not appear to align with the skills necessary to undertake the role.

[83] In respect of the Manager Field Services – Auckland role, the evidence of Mr Trotman was that the role would have meant a significant increase in responsibility for Mr McKeown because it combined regions provisioning field operations in addition to Mr McKeown's pre-existing build responsibilities.

[84] Conversely Mr Lues would be reducing his level of responsibility in that he would be leaving a national role in which he had experience of managing larger teams, for a regional Auckland role.

[85] Both Mr McKeown and Mr Lues were interviewed for the position of Manager Field Services – Auckland. The Panel included Mr McArthur as well as Mr Trotman and Mr Whitworth. Although no notes were taken at the meeting, which would have been preferable, the evidence supports the fact that Mr Lues engaged with the process providing detailed answers to the Panel's questions, to a much greater extent than of Mr McKeown.

[86] I find the evidence of Mr Trotman and Mr Whitworth that Mr McKeown had limited engagement with the interview process to be supported by Mr McKeown's own evidence that he had formed a pre-determined view prior to the interview that he would not be appointed to the role and had in fact applied for alternative employment.

[87] I find that Mr McKeown was provided with an opportunity to convince the Panel of his suitability for the Manager Field Services – Auckland role, but he did not convince the Panel that he had the requisite skill and ability to take on a role with more responsibility.

[88] Mr Lues had operated at a national level and the evidence is that the Panel concluded from his responses during the interview that he had the skills gained at a national role to operate at the regional level.

[89] There is no suggestion that Mr McKeown was not treated fairly, or given a full opportunity to address his leadership ability in the interview. The outcome, which in Mr McKeown's case was that he was not the preferred candidate, was the decision of the Panel. I find that the Panel, acting as a fair and reasonable employer, was entitled to reach this decision.

[90] I find that the restructuring and redundancy process followed by UCG was procedurally fair.

[91] I determine that Mr McKeown was not unjustifiably dismissed by UCG by reason of redundancy.

Costs

[92] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[93] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority