

- Was the disestablishment of Mr Nicholls position the result of a genuine redundancy and did Redeal Limited follow a fair process with respect to the restructuring?
- Was Mr Nicholls constructively dismissed?

Unjustified disadvantage

[4] Mr Nicholls claims he was disadvantaged in his employment due to the non-payment of an incentive bonus and the disestablishment of his position as branch manager.

[5] I am required to examine Redeal Limited's actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The section states:

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 considering 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 the dismissal or action occurred.

[6] There is a two step test to establish a disadvantage grievance. Firstly, I must ascertain whether Redeal Limited's actions disadvantaged Mr Nicholls in his employment, and secondly, whether that disadvantage has been shown to be justified or unjustified pursuant to section 103A of the Act.¹

[7] Disadvantage alone is not prohibited by law. It must be a disadvantage that is unjustified. If Redeal Limited establishes justification for a disadvantageous action, there is no grievance.²

[8] Finally, disadvantage is not identified narrowly and solely in terms of wages and conditions of employment. Rather it broadly considers effects on the total environment of the employee's employment. A claim for disadvantage depends upon an act or omission by an employer causing disadvantageous consequences, not merely an employee's subjective dissatisfaction at their circumstances.³

Was Mr Nicholls entitled to a bonus?

¹ *Mason v Health Waikato* [1998] 1 ERNZ 84

² *McCosh v National Bank*, unreported, AC49/04, 13 September 2004

³ *NZ Storeworkers IUW v South Pacific Tyres (NZ) Ltd* [1990] 3 NZILR 452; *Bilkey v Imagepac Partners*, unreported, AC65/02, 7 October 2000

[9] Clause 4.4 of the Individual Employment Agreement between Mr Nicholls and Redeal Limited provides for Mr Nicholls to participate in the company's incentive scheme. The agreement provides Redeal with the discretion to review the scheme each financial year. It was common ground that the scheme for 2008 was outlined in a document which was presented to all branch managers at the 2008 national conference. The 2008 scheme required branch managers to achieve 100% of their budget before any bonus payment would be payable.

[10] On 16 March 2009 Mr Nicholls was one of about three branch managers mistakenly advised that they would receive a bonus payment for the 2008 year. Mr Nicholls was advised that the total incentive payment for his branch was \$4,847.00. On 17 March Mr Kevin Pollock, general manager of Ideal realised a mistake had been made and immediately contacted Mr Nicholls, and the other branch managers affected, and advised them of the error. Mr Nicholls was told that his branch had not achieved the required targets and therefore no bonus would be payable. Mr Pollock apologised to Mr Nicholls for the mistake.

[11] Mr Pollock says Mr Nicholls told him during the telephone call on 17 March that he was not expecting a bonus. At the investigation meeting Mr Nicholls told the Authority he expected to receive something for meeting his own KPI's based on inventories.

[12] I accept the evidence of Mr Pollock that Mr Nicholls did not expect to receive a bonus payment. This evidence is consistent with Mr Nicholls own conduct following notification. The bonus system allowed branch managers to share their bonus with branch employees at their discretion. The letter received by Mr Nicholls on 16 March asked him to complete a section of the notification letter identifying any employees who would be sharing in the branch bonus. Mr Nicholls did not complete this form.

[13] Further, Mr Nicholls was aware that the payment of all bonuses was to be made on 31 March 2009. It was not until late April, and after Redeal Limited had commenced a consultation process at the end of April with respect to its restructuring, that Mr Nicholls raised any concerns over not receiving the bonus payment. Finally, Mr Nicholls acknowledged in evidence that he knew the branch was down 20% and that the branch was not achieving its sales targets.

[14] I am not satisfied that Mr Nicholls employment or any of the terms or conditions of his employment have been affected to his disadvantage by the error of advising Mr Nicholls initially that a bonus payment would be paid, and immediately advising him of the error.

The Redundancy

[15] Again, the Authority is required to scrutinise Redeal Limited's actions in accordance section 103A of the Employment Relations Act as set out in paragraph [5] above. The test of justification does not change the longstanding principles about justification for redundancy⁴.

[16] The Authority must be satisfied on two general points – that the business decision to make a position redundant was made genuinely and not for ulterior motives; and that the respondent acted in a fair and open way in carrying out that decision – particularly, did it consult properly about the proposal to make Mr Nicholls redundant and otherwise act in a way that was not likely to mislead or deceive them, that is, in good faith?

[17] The relevant provision from the employment agreement recognises that redundancy is a possibility where the Company has staff surplus to its requirements. For the purposes of this matter, the agreement specifies that such a situation may arise as a result of a re-organisation which requires a permanent reduction in the number of employees. The agreement requires one month's notice in writing of the termination of employment on the grounds of redundancy, or payment in lieu of such notice.

Was the disestablishment of Mr Nicholls position the result of a genuine redundancy?

[18] The Court of Appeal in *GN Hale & Son Ltd v Wellington Caretakers IUOW*⁵, cemented an employers right to:

...make his business more efficient, as for example by automation, abandonment of unprofitable activities, re-organisation or other cost-saving steps, no matter whether or not the business would otherwise go to the wall. A worker does not have the right to continued employment if the business could be run more efficiently without him.

[19] Further, the Employment Court in *Simpsons Farms*⁶ reiterated the right of an employer to make genuine commercial decisions relating to how its business

⁴ *Simpson Farms v Aberhart*, unreported, Employment Court, Colgan CJ, [2006] 1 ERNZ 825.

⁵ [1991] 1 NZLR 151.

operations will function including decisions to make positions or employees redundant. A genuine redundancy is determined in relation to the position, not the incumbent⁷.

[20] Mr Nicholls contends his redundancy was not genuine because the tasks the branch manager performed still needed to be done. He also says the redundancy was used to get rid of him as he did not see eye to eye with Mr Braniff.

[21] Mr Nicholls and Mr Braniff were both invited to a meeting on Monday 27 April where Ms Maryanne Burns, Human Resources Manager and Mr Pollcok discussed a proposal that would see the Area Manager role absorb the functions and responsibilities of the branch manager's role.

[22] Between May and November 2008 Redeal Limited closed down four branches throughout New Zealand resulting in six redundancies and six employees being redeployed. The closures were the result of a significant reduction in business following the downturn in construction activities throughout New Zealand.

[23] Mr Nicholls acknowledged at the investigation meeting that the industry was hit heavily by the downturn in construction and that the Hamilton branch was affected. Mr Nicholls gave evidence that as branch manager, in late 2008 he himself was required to reduce staff numbers in the branch by one by reason of redundancy, as a result of turnover having dropped significantly.

[24] Mr Nicholls says the relationship between he and Mr Braniff was also a reason why his role was to be disestablished. In September 2008 Mr Nicholls advised Redeal Limited of problems he was having with Mr Braniff. During a telephone conversation with Mr Nicholls, Ms Burns offered to mediate between the two and asked Mr Nicholls to provide her with his issues in writing.

[25] Mr Nicholls did not send through his concerns, despite Ms Burns following up with him. Mr Nicholls advised Ms Burns that he had decided not to proceed with a facilitated meeting. Ms Burns, concerned to resolve any relationship problems between the area manager and the branch manager, contacted Mr Nicholls who told

⁶ Supra n 1.

⁷ *NZ Fasteners Stainless Ltd v Thwaites* [2000] 1 ERNZ 739.

her he preferred to talk with Mr Braniff one on one and admitted he was also at fault for issues arising in the workplace. Mr Nicholls also advised Ms Burns that he would seek further training from Mr Brett Rampton, an employee with Redeal Limited who had already provided Mr Nicholls with training and support.

[26] I find that any relationship issues between Mr Nicholls and Mr Braniff were not a factor in his role being disestablished. As far as Ms Burns was aware, all the issues raised by Mr Nicholls in September 2008 had been resolved or were no longer of concern.

[27] Mr Nicholls also says the branch manager role was to be re-established within six months of his termination. I am satisfied the evidence available to the Authority shows that the branch manager position has not been re-established and that the structure put in place in May 2009 continues.

[28] I find the disestablishment of Mr Nicholls role was for genuine commercial reasons.

Did Redeal Limited follow a fair process with respect to the restructuring?

[29] Section 4 of the Employment Relations Act 2000 requires Redeal Limited to deal with Mr Nicholls in good faith. This duty is to be exercised not only generally but in specific situations including redundancy.

[30] The duty of good faith set out in the Act requires an employer who is proposing to make a decision that will have an adverse affect on the continuation of employment of an employee to provide to that employee, access to information relevant to the continuation of the employee's employment, about the decision, and an opportunity to comment on the information before the decision is made.

[31] In *Communication & Energy Workers Union Inc v Telecom NZ Ltd*⁸, the Court discussed the meaning of consultation in the context of redundancy and listed a series of propositions extracted from the Court of Appeal's decision in *Wellington International Airport Ltd v Air NZ*⁹. In particular, the Court noted:

- (a) Consultation requires more than mere notification and must be allowed sufficient time. It is to be a reality, not a charade. Consultation is never to be treated perfunctorily or as a mere formality.

⁸ [1993] 2 ERNZ 429.

⁹ [1993] 1 NZLR 671 (CA).

- (b) If consultation must precede change, a proposal must not be acted on until after consultation. Employees must know what is proposed before they can be expected to give their views.
- (c) Sufficiently precise information must be given to enable the employees to state a view, together with a reasonable opportunity to do so. This may include an opportunity to state views in writing or orally.
- (d) Genuine efforts must be made to accommodate the views of the employees. It follows from consultation that there should be a tendency to at least seek consensus. Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses and then deciding what will be done.
- (e) The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change or even start anew.

[32] The integrity of a restructuring scheme, even where motivated by genuine operational requirements, may be compromised by its application to particular individuals for reasons other than that their jobs have gone. Where the selection of an employee for redundancy is "...tainted by some inappropriate motive..." and the redundancy is "...masking another and different reason..." the worker will have a valid grievance¹⁰.

[33] On Monday 27 April, Mr Braniff and Mr Nicholls met with Ms Burns and Mr Pollock who advised them of the proposed restructure. Mr Pollock had sent an email the previous Friday advising both men that the meeting was to discuss the current market conditions and an appropriate way forward.

[34] At the meeting Mr Pollock and Ms Burns outlined their proposals and provided Mr Nicholls and Mr Braniff with an opportunity to go away from the meeting and consider the proposal and to provide feedback the following Friday, 1 May.

[35] At the end of the meeting Mr Nicholls requested a private meeting where he advanced a proposition for an exit package. This proposal was rejected by Redeal Limited. Mr Nicholls was advised that the restructuring proposal was just that and that no decision had been made about whether it would be implemented in its current form. He was told it was not an appropriate time to have discussions about exit packages and reminded of the opportunity for him to provide feedback regarding the proposal to restructure.

[36] Mr Nicholls says the notification of the meeting did not indicate that redundancy was to be discussed, nor was he provided with an opportunity to have a representative with him at the meeting. I am satisfied Mr Nicholls was not disadvantaged by either of the concerns he raises with respect to the process. At the

¹⁰ *Savage v Unlimited Architecture Ltd* [1999] 2 ERNZ 40.

investigation meeting Mr Nicholls told the Authority that if he had been aware of what the meeting was to discuss he could have done some preparation to justify his job.

[37] I am satisfied Mr Nicholls was given adequate time to do as much preparation as he needed following the meeting and to make submissions on the proposal. When he had failed to provide any feedback by 1 May, Mr Nicholls was provided with an extension to 4 May to do so.

[38] Mr Nicholls did not use the opportunity he had to provide feedback which could have included justifications for keeping his role. He simply advised Redeal Limited of his view that the proposal was a fait accompli.

[39] I am satisfied Redeal was acting in good faith in its desire to receive feedback from Mr Nicholls. At the investigation meeting Mr Pollock used the Thames branch as an example to demonstrate the company's genuine desire for feedback and where feedback has resulted in changes to an initial proposal.

[40] Concurrently with the discussions Redeal Limited was having with Mr Braniff and Mr Nicholls, a proposal to close down the Thames branch was being discussed with the Thames branch manager. Following feedback from the branch manager no further action was taken to implement the proposal and the branch remained open. As branch manager in Hamilton, Mr Nicholls was in a very strong position to be able to put forward ideas and alternatives to redundancy as had occurred in Thames.

[41] Mr Nicholls next complaint is that there was no selection process with regard to whether it was he or Mr Braniff who was appointed to the new role. Mr Braniff was the area manager and had previously been the Hamilton branch manager. The proposal to restructure would see the area manager role absorb the duties and responsibilities of the branch manager role. This was not a case where a completely new and separate role was established. A current role was to absorb a subordinate role. Neither is this a case where two similar positions existed and one disestablished, thereby requiring decisions as to which one of two employees would remain. I am satisfied that in the circumstances of this matter no selection process was necessary.

[42] I find Redeal Limited has acted in the circumstances of this case as a fair and reasonable employer would act. Mr Nicholls has not suffered a disadvantage in his employment as a result of any unjustifiable action by Redeal Limited when it restructured its business and disestablished Mr Nicholls role.

Was Mr Nicholls constructively dismissed?

[43] Mr Nicholls was provided with two months written notice of his redundancy. In its letter dated 4 May advising Mr Nicholls of his redundancy, Redeal Limited advised him that if he wished to terminate his employment earlier than 3 July, the company had the discretion to pay him in lieu of notice. Mr Nicholls did not take up the opportunity to negotiate an earlier leaving date. Rather, on 15 May Mr Nicholls resigned without notice. Mr Nicholls says his resignation was in fact a dismissal and claims remedies for an unjustified constructive dismissal.

[44] To be successful in his claim Mr Nicholls must establish that Redeal Limited conducted itself in a way that would amount to a breach of the employment agreement. Such breach must impinge on the relationship in the sense that looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer.¹¹

[45] In coming to conclusions under this heading the Authority must determine the following issues:

- did Mr Nicholls leave his employment as a result of a breach of duty on the part of Redeal? and
- if there was a breach, was it sufficiently serious to make it reasonably foreseeable that there was a substantial risk that Mr Nicholls would leave his employment?¹²

[46] I have earlier found that the disestablishment of Mr Nicholls role was genuine, and his subsequent notice of redundancy was handled in a fair and reasonable manner.

¹¹ *Malik v Bank of Credit and Commerce International SA (in liq)* [1998] AC 20; [1997] 2 All ER 1 (CA).

¹² (*Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168).

There is no evidence to support a claim that Redeal Limited has breached its obligations to Mr Nicholls with respect to the restructuring.

[47] I have considered whether the relationship between Mr Nicholls and Mr Braniff could have impacted on Mr Nicholls decision to resign and be said to have forced him to resign. However, I am satisfied the evidence does not support such a finding.

[48] I find there was no breach by Redeal Limited that would make Mr Nicholls resignation reasonably foreseeable.

Summary of findings

- Mr Nicholls was not entitled to be paid a bonus for the performance of the Hamilton branch for 2008;
- Mr Nicholls employment or one or more conditions of his employment were not affected to his disadvantage by any unjustifiable actions of Redeal Limited.
- The disestablishment of Mr Nicholls role was genuine and undertaken in a fair and reasonable way.
- Mr Nicholls was not constructively dismissed.

Costs

[49] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, Redeal Limited may lodge and serve a memorandum as to costs within 28 days of the date of this determination with any submissions in reply to be lodged with 14 days of receipt. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority