

[5] During this second period of parental leave, Ms Robbins discovered that there was a restructure underway, the effect of which was that all project managers (including her role) were moved within the business group and reported to a new manager based in Auckland.

[6] Ms Robbins' evidence is that she had no opportunity to comment on that restructure.

[7] When Ms Robbins returned to work in July 2006 after her second period of parental leave, she had insufficient work to keep her busy. She says she complained about this regularly, but on her evidence the matter remained unresolved.

[8] On 28 November 2006 Ms Robbins wrote to her manager requesting that her position be disestablished for redundancy.

[9] She was told that that request was refused and she resigned on 19 January 2007.

[10] After her resignation, TelstraClear required her to pay back a percentage of the parental leave lump sum payment which it had made to her pursuant to its parental leave policy.

[11] Ms Robbins asked TelstraClear to use its discretion, which she believed the policy allowed, not to require repayment of the partial payment. TelstraClear refused.

Issues

[12] It will be helpful to analyse the differences between the parties by reference to the various matters on which there is disputation between them. On that basis then I propose to consider in turn the following matters:

- The restructuring;
- The availability of work;
- The redundancy;
- The parental leave payment.

The restructuring

[13] While she was on parental leave having her second child, Ms Robbins became aware of a restructure at TelstraClear. Ms Robbins evidence which on this point I accept was that she was called at home by a colleague and told about the restructuring which "had occurred". She says she then spoke to another colleague who told her that Mr Dave Schroder had been appointed to a new

position and would be Ms Robbins' manager. Ms Robbins goes on to say that her team structure and reporting lines had been changed by the restructuring and that her team had been merged with another team.

[14] Ms Robbins' evidence is unequivocal that the changes made by TelstraClear in this restructure were fundamental and impacted directly on her. I quote directly from her brief of evidence where she attempts to summarise the differences from her perspective:

... I went from being a busy project director in a small management team, to being one of a pool of 40 project managers, most of whom are based in Auckland, one level further removed from the senior leadership team and being managed by a new manager based in Auckland who was from a different department and who did not know me.

[15] It is clear from the evidence that TelstraClear made no contact with Ms Robbins during her parental leave to explain to her the nature of the restructure and any impact it might have on her. In fact, it is accepted that Ms Robbins found about the restructure after it had happened.

[16] TelstraClear say they had no obligation to engage with Ms Robbins because she was not directly affected by the restructure.

[17] For instance, Mr Schroder in his brief of evidence confirmed that the restructuring was implemented on 15 December 2005 (during Ms Robbins second period of parental leave). On TelstraClear's obligation to consult, Mr Schroder had this to say:

As this review did not adversely impact on Ms Robbins' position in any way, she was not initially consulted in relation to the proposed changes.

[18] Mr Schroder goes on to say that he understood Ms Robbins was given the opportunity to review written material relating to the changes by remote access to the intranet. This is true but that opportunity was only provided after Ms Robbins found out about the restructure from the conversation with her colleague that I refer to above and then took the matter up with TelstraClear's Human Resources department seeking to establish what exactly was going on.

[19] Ms Robbins' evidence is that she had no real opportunity to have input into the restructure because it was in effect a fait accompli by the time she found out about it. I accept that that is a reasonable judgment in all the circumstances. The evidence is clear; Mr Schroder says the restructure was implemented on 15 December 2005 and Mr Andrew Crabb, TelstraClear's Chief Information Officer gave evidence that he had had a telephone conversation with Ms Robbins about the time that he commenced his role (28 November 2005); in his oral evidence at the Authority's

investigation meeting, Mr Crabb indicated that the telephone discussion took place because he was aware that Ms Robbins was “anxious” about the restructure.

[20] Clearly these dates confirm Ms Robbins found out about the restructure at the very eleventh hour and any input she might have had would have been very much a last minute thing.

[21] There is clearly a gulf between Ms Robbins and TelstraClear on whether she was affected adversely by their restructure or not. On balance, I think the evidence supports the view that she was affected adversely by the restructure and that TelstraClear made an error of judgment in failing to consult with her while she was at home on parental leave. It is difficult to see how the change in reporting lines, change in the person of the reporting manager, change in the level in the organisation, and change in the very structure of the team is not sufficient of a collection of changes which would impel a fair and reasonable employer to consult with an employee clearly involved in all those changes, notwithstanding that she happened to be on parental leave.

The availability of work

[22] Ms Robbins’ evidence on this matter is essentially that, from the point that she returned to duty on 4 July 2006, she was short of work except perhaps for the first few weeks after her return from parental leave.

[23] The evidence of TelstraClear, given through, for instance, Mr Schroder, is that Ms Robbins had enough to do and that she herself would have understood that there were normal business fluctuations which would account for some of down time.

[24] Ms Robbins says that she spoke to Mr Schroder weekly about her shortage of work, a view that Mr Schroder does not accept. He accepts that there was weekly contact between them but he denies that on each of those occasions when there was contact, Ms Robbins raised issues about her lack of work.

[25] In her brief of evidence, Ms Robbins refers to the percentages that she thought applied to various types of work that was available to her during the period immediately after her return from the second parental leave break. She confirmed in answer to a question from me during the investigation meeting that she had not made those percentages known to TelstraClear. Mr Schroder, in his oral evidence, confirmed to me that he had no idea those percentages were reflective of Ms Robbins actual access to work and had those percentage figures been given to him at the time, he said that he *would have acted sooner*.

[26] During August 2006, Ms Robbins applied for a position as general manager programme office with TelstraClear but was unsuccessful. Ms Robbins evidence is that she applied for this role because she did not have enough to do; Mr Schroder's evidence is that the application for the new role was incidental to the alleged shortage of work.

[27] Then Ms Robbins sent Mr Schroder an email on 4 September 2006 in which she told him that she *had time to spare*. Mr Schroder said that he endeavoured to find additional work for Ms Robbins but he accepted in oral evidence before the Authority that TelstraClear did not go ... *through the list of contractors to see if any work could have been taken off a contractor and given to Janine (Ms Robbins)*.

[28] Indeed, Mr Schroder confirmed to me at the investigation meeting that *he could have gone through the list of contractors with Janine (Ms Robbins) and generated work for her*.

[29] Although work was assigned to Ms Robbins from time to time during this period, her evidence is that at most she was fully engaged for 50% of her time.

[30] I am satisfied on the basis of the evidence I heard that Ms Robbins took all reasonable steps to advise TelstraClear that she had a shortage of work although it is plain that the quantifying of just how little work she had was not done with any degree of accuracy. I accept TelstraClear's evidence that had they known how little work she had in percentage terms, they might well have taken more significant steps.

[31] However, TelstraClear witnesses admit that they were told that Ms Robbins had limited work available to her and that there was never any attempt made to see if work done by contractors could be performed instead by Ms Robbins.

[32] On the face of it, that would have been something that a good and fair employer activated by good faith would have done in support of a permanent, albeit part time employee.

The redundancy

[33] On 28 November 2006, Ms Robbins sent an email to Mr Schroder asking that her position be declared redundant. The email reads in part:

... I have once again found myself in a situation where I have nothing much to do.

It appears that due to a number of changes in the company structure while I was away on parental leave, the bulk of projects are now being run out of the Auckland office. You have commented previously that my being based in Wellington along with the fact that I work part time makes it difficult for you to find work to assign to me ...

It is my view based on the above that the role of a part time Project Director based in Wellington is not a viable role and as I do not wish to work full time I believe the best solution would be for the role to be made redundant potentially enabling you to replace it with an Auckland based or a full time role more suited to the current business needs. ...

[34] This email clearly puts Ms Robbins position fairly before the employer. She notes that she has little to do, makes the claim that her role has changed dramatically since she returned from parental leave, suggests that TelstraClear may welcome the flexibility of being able to appoint either a full time person or an Auckland based person to the business and then proposes that her role be declared surplus to requirements.

[35] Ms Robbins email was sent to Mr Schroder at 11.37 and within less than two hours of that time Mr Crabb, TelstraClear's chief information officer had rejected the idea of redundancy in a return email to Mr Schroder. Part of Mr Crabb's email to Mr Schroder is as follows:

Dave,

Cannot contemplate redundancy.

This means I lose the position and this is something we cannot afford, evidenced by the number of contractors on board.

Surely we can load her up with project work and remove some contractors.

Re the part time status, why can't this work? With proper planning etc. it should not impact.

[36] Mr Schroder subsequently contacted Ms Robbins by telephone and indicated to her that the redundancy suggestion was not accepted by TelstraClear and that he (Mr Schroder) would find Ms Robbins some more work to do. This initiative appears to have resulted in a small increase in Ms Robbins' access to work but only for a short period and by the time she returned to work on 15 January 2007 after a short period of annual leave over the Christmas period, the new work that she had been allocated was suspended.

[37] Her oral evidence before the Authority was that she waited a week for the situation to improve and when it did not, she tendered her resignation on 19 January 2007.

[38] The issue for determination here is whether it is available to the Authority to reach the conclusion that, in all the circumstances, Ms Robbins' job had in fact disappeared and accordingly a fair and reasonable employer, acting in good faith, would declare the position surplus to requirements.

[39] It is very clear from the email traffic around Ms Robbins' request for consideration of the redundancy option, that TelstraClear through Mr Crabb, made its decision not to contemplate redundancy very quickly and there can be no sense in which it considered the issue in a reflective way. In his evidence, Mr Crabb makes clear that he did not regard Ms Robbins' position as being redundant. Indeed, Mr Crabb's view, expressed in his email of 28 November and reiterated in his brief of evidence, is that staff should be used in preference to contractors.

[40] The factual reality is otherwise, however. The evidence before the Authority suggests that there were certainly no fewer contractors employed by TelstraClear at the end of Ms Robbins' employment as there were when she came back from parental leave and it is absolutely plain that, despite Mr Crabb's view, no effort whatever was made to assess whether some contractors could be dispensed with to enable their work to be transferred to Ms Robbins.

[41] Mr Crabb also makes the observation that Ms Robbins did not help herself by being proactive in the pursuit of the projects that she did have work with. However, given that nobody ever spoke to Ms Robbins about her performance or indeed accused her of being reactive rather than proactive, that view of Mr Crabb's might be seen as a little ungenerous.

[42] In summary then, the Authority's view is that there is no evidence to support the contention that TelstraClear favoured Ms Robbins at the expense of contractors; indeed quite the reverse appears to be the case. The evidence also supports the conclusion that TelstraClear made what amounted to a "knee jerk" response to the request from Ms Robbins that redundancy be considered. Further, and finally, the basis on which the prospect of redundancy was rejected was at least in part a function of the conviction that the organisation *cannot afford to lose the position*. However, Ms Robbins' evidence suggests that, while the position itself may not have been surplus to requirements in an abstract sense, the fact that she was part time and based in Wellington made it less attractive to and appropriate for TelstraClear's purposes.

[43] In the final analysis, Ms Robbins resigned her position on 19 January 2007 because from the point at which she returned to duty on 15 January 2007 she had, by her calculations, *work to occupy me for 10% of the time*. Faced with that situation, she waited a short period and then tendered her resignation when no further work was provided, notwithstanding her request.

[44] I am satisfied on the balance of probabilities that a fair and reasonable employer activated by good faith, would be more proactive in finding work for a senior employee. I am not persuaded that TelstraClear did enough to source work opportunities for Ms Robbins and, in those circumstances, her request that the disestablishing of her position he considered is an entirely proper and reasonable suggestion.

[45] That such a suggestion should be dismissed so quickly by TelstraClear in the circumstances does them little credit, but it does seem to me, it is a decision that is available to the employer to make. I am loathe to interfere in that decision by impliedly determining that Ms Robbins' position had become surplus to requirements but I do think that the actions of TelstraClear ought to sound in compensation in respect of Ms Robbins' claim that she has been disadvantaged by the actions of TelstraClear.

The parental leave repayment

[46] Ms Robbins says that before resigning, she reviewed the parental leave policy on Telstr Clear's intranet. She says the intranet indicated that TelstraClear had a discretion about insisting on repayment of parental leave sums where an employee departed its service within 12 months of returning to work.

[47] TelstraClear, for their part, say that Ms Robbins was provided with a letter setting out the company's policy in relation to parental leave payments, on each occasion when she took parental leave. On the second occasion the letter did not refer to a discretion whereby TelstraClear could forgive repayment of parental leave payments. Ms Robbins's evidence, which I accept, is that she did not refer to the letter in making her decision to resign when she did, but did refer to the intranet which, at the time she referred to it, I accept, used the word *may* in respect to whether repayment was required or not.

[48] What is equally clear is that the very reason that Ms Robbins brought the claim at all is because TelstraClear insisted on repayment of the parental leave sum. Had they not done that, Ms Robbins would simply have left the organisation and got on with other things. But she regarded TelstraClear as having *put the boot in* in its requirement that this sum be repaid.

[49] Even on the basis of the policy that Ms Robbins refers to as being in place at the time that she made the decision to resign, it is clear that TelstraClear has a discretion to insist on repayment or not. As a matter of fact, through Mr Schroder's intervention, the full entitlement which TelstraClear could have insisted upon was not required to be repaid.

[50] It follows that Ms Robbins' claim against TelstraClear in respect to the parental leave payment must fail. TelstraClear say that the policy had changed and that the company's policy now (that is when Ms Robbins took her second period of parental leave) was that these sums were to be repaid whatever the circumstances. The letter that Ms Robbins received at the time she took parental leave is consistent with that interpretation of the policy.

[51] But even if Ms Robbins' evidence about the intranet description of the policy is correct, the employer has a discretion and there is no evidence before the Authority that the employer exercised that discretion in an improper way. Indeed, as I have made clear, Mr Schroder encouraged the company to not require repayment of the total amount it might have been entitled to under the policy.

[52] It follows that that part of Ms Robbins' claim must fail.

Determination

[53] I am satisfied on the evidence I have heard that Ms Robbins has made out her claim that she has been disadvantaged by the unjustifiable actions of her employer TelstraClear.

[54] I find two heads of disadvantage and I have referred to them in detail in this determination. They are:

- The failure of TelstraClear to engage with Ms Robbins in relation to the restructuring while she was on parental leave notwithstanding that she plainly was affected by the restructure;
- TelstraClear's failure to provide Ms Robbins with an appropriate quantity of work after her numerous requests for that to be provided and in particular the failure of TelstraClear to rebate the work of contractors in order to provide more work for Ms Robbins.

[55] While I understand Ms Robbins' argument in favour of a declaration of redundancy in relation to her position, I prefer to deal with the matter on the footing of an unjustified disadvantage rather than a declaration of redundancy effectively imposed by the Authority.

[56] I am not attracted by Ms Robbins' argument in relation to the parental leave payment; I accept the argument advanced by TelstraClear that even on Ms Robbins' analysis, TelstraClear has a discretion and they are entitled to exercise that discretion and, as a matter of fact, have done so including, in part, in Ms Robbins' favour.

[57] Ms Robbins seeks compensation under a number of separate heads together with lost wages.

[58] I am satisfied that Ms Robbins resigned her employment, no doubt in frustration at the work flow issue, but nonetheless that this was in truth a resignation and not a constructive dismissal.

[59] Equally clearly, I am satisfied that Ms Robbins, by resigning her employment prevented any prospect of her position being redundant because it is clear law that redundancy requires a termination of a worker's employment by the employer: *Christchurch Golf Club Inc v. Wood* (25 August 1999, Shaw J, CC28/99).

[60] In the absence of a finding that the employment has come to an end as a consequence of action of the employer, it is difficult to make an award of wages. However, plainly in the Authority's judgement, Ms Robbins has suffered disadvantage at the hands of TelstraClear by reason of their unjustified actions, as detailed above, and, that being the position, a global award of compensation under s.123(1)(c)(i) is appropriate. I direct that TelstraClear is to pay to Ms Robbins the sum of \$7,500.

[61] The Authority is required to consider whether, in the circumstances such as this, Ms Robbins has contributed in any way to the wrong that she has suffered. I have reflected on that and I am satisfied that nothing Ms Robbins did could be seen to have contributed in any way to the existence of her personal grievance. Indeed, I think it fair to say that Ms Robbins took all prudent steps to address the deficits of the employer during the course of the employment relationship and that there was nothing more that she could have done.

Costs

[62] Costs are reserved.

James Crichton
Member of the Employment Relations Authority