

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2016] NZERA Wellington 69  
5551402

BETWEEN            RAJEEV SUNDER  
                                 Applicant

AND                    VASONA NETWORKS INC  
                                 Respondent

Member of Authority:    Trish MacKinnon

Representatives:        Megan Richards and Alice Chote, Counsel for Applicant  
                                 Giles Brant, Counsel for Respondent

Investigation Meeting:    8 and 9 March 2016 at Wellington

Submissions Received:    23 March and 15 April 2016 from the Applicant  
                                 8 April 2016 from the Respondent

Determination:            16 June 2016

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     Rajeev Sunder was employed by Vasona Networks Inc. as head of its Asia Pacific (APAC) operations from 10 April 2013 to 14 November 2014 when his employment was terminated for redundancy. Mr Sunder claims the termination of his employment was both procedurally and substantively unjustified. Additionally, he says Vasona breached its good faith obligations to him under s.4 of the Employment Relations Act 2000 (the Act).

[2]     Mr Sunder seeks reinstatement to his position, or to one no less advantageous to him, as well as a number of financial remedies.

[3]     Vasona Networks Inc. (Vasona) is a start-up company with its head office based in Silicon Valley in the United States, where it is registered. It operates in the

telecommunications industry and it develops and markets technology. Vasona denies Mr Sunder's claims and says his employment was terminated on notice after a fair procedure following the company's lack of success in achieving sales throughout the APAC region. Vasona says Mr Sunder was experienced in the start-up technology sector and knew from the outset it was a very high risk business.

[4] The parties agree New Zealand is the appropriate jurisdiction for this matter.

### **The Authority's investigation**

[5] The investigation meeting took place over two days. Evidence for the applicant was given by Mr Sunder, Ms Punam Rekhraj, and Mr Adam Bryant who attended by video link from Sydney. Evidence for Vasona Networks Inc was given by three witnesses. These were Mr Biren Sood, who is a founder, director and the Chief Executive of the company; Mr Paul Magelli II, an independent director of Vasona, who attended by video link from Chicago; and by an expert witness, Professor Stuart Locke. In accordance with s.174E(b)(i) of the Act, I will not set out a record of all the evidence heard.

### **Issues**

[6] The issues for determination are:

- a. Whether Mr Sunder's termination of employment for redundancy was justifiable; and, if it was not:
- b. Whether reinstatement is an appropriate remedy.
- c. Whether Vasona breached its statutory obligations of good faith in its dealings with Mr Sunder.

### **Relevant law**

[7] The onus for establishing justification for Mr Sunder's dismissal lies with Vasona. The applicable test is that of s.103A of the Act. Accordingly, Vasona must establish that Mr Sunder's dismissal for redundancy, and how it went about that dismissal, were what a fair and reasonable employer could have done in all the relevant circumstances at the time.

[8] As noted by the Chief Judge in *Rittson-Thomas v. Davidson*<sup>1</sup>:

*[54] It will be insufficient under s.103A, where an employer is challenged to justify a dismissal ..., for the employer simply to say that this was a genuine business decision and the Court (or the Authority) is not entitled to inquire into the merits of it. The Court (or the Authority) will need to do so to determine whether the decision, and how it was reached, were what a fair and reasonable employer ... could have done in all the relevant circumstances.*

[9] If it is determined that Mr Sunder's dismissal was unjustifiable, his request for reinstatement to his employment will be considered under ss.125 and 126 of the Act. Those sections provide that reinstatement is a discretionary remedy which may be provided by the Authority if it is practicable and reasonable to do so. Where reinstatement is provided, it is to occur immediately or on a date specified by the Authority.

[10] Mr Sunder's claim that Vasona breached its obligations of good faith to him fall to be examined under the provisions of s.4 of the Act. Broadly, the statutory good faith provisions require the parties to an employment relationship not to do anything that will (or is likely to) mislead or deceive each other. The provisions place a positive requirement on the parties to be active and constructive in establishing and maintaining a productive employment relationship and to be responsive and communicative to achieve that aim.

[11] Where an employer is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of an employee's employment, the employer is required to provide the employee with access to relevant information and give the employee the time to comment on the information before the decision is made.<sup>2</sup>

### **Background to Mr Sunder's employment and claims of misrepresentation**

[12] Mr Sunder had previously worked for two successful start-up companies, one for ten years and the other for eight years. Through that work he met Paul Magelli II, an independent director of, and investor in, Vasona. In August 2012 Mr Magelli introduced Mr Sunder to Biren Sood, Chief Executive, Director and one of the founders of Vasona. The introduction was effected by email in which Mr Magelli

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<sup>1</sup> [2013] NZEmpC 39

<sup>2</sup> S.4(1A) of the Act

described Vasona as "*hot*" and Mr Sunder as "*having done hundreds of deals across the (Asia Pacific) region and (as being) well known and respected by operator executive teams*".

[13] Over the next several months Mr Sunder, Mr Sood and, to a lesser extent, Mr Magelli corresponded by email from time to time during which Mr Sunder received further information about the company, its investor support, and its market prospects. Their emails explored the possibility of Mr Sunder taking up a senior position with Vasona.

[14] Mr Sunder acknowledged that, with his experience of start-up companies, he was well aware of the risks and of the failure of many such companies within their first two years of operation. He also knew that it could take three years to achieve a sale for a new technology product. His cautious approach to joining Vasona was informed by this knowledge.

[15] A theme running through much of Mr Sunder's evidence was that he had been misled by Vasona over various matters such as the state of readiness of its product and over the prospect of achieving a sale to the telecommunications company (the telcom) that had been identified as the major prospect for Vasona in the Asia Pacific region. When asked for specific examples of pre-employment misrepresentations Mr Sunder referred to an email exchange he had with Mr Sood in mid-November 2012.

[16] Mr Sunder initiated the email exchange, asking how the trial with the telcom had gone and informing Mr Sood that both he and Adam Bryant, another potential employee of Vasona, were interested but wanted "*to better understand the plan/strategy, and expectations accordingly*". Mr Sood's response was that "*The trial is proceeding quite well*" and, after talking about technical aspects concluded his comments on the trial with "*Overall good and steady progress and we are encouraged with the initial results*".

[17] When difficulties arose in the trial in March 2013, Mr Sood informed Mr Sunder the company had hit a *significant speed bump* with the telcom which might slow matters down. Mr Sunder suggested his employment with Vasona could be deferred. Alternatively he proposed joining the company on a reduced salary or on a no-salary basis for a period.

[18] Mr Sunder had not signed an employment agreement at that time and was not receiving remuneration from Vasona. Nor was he employed elsewhere. He could have chosen to walk away from the company. Although he had spent some months considering whether to take the opportunity of working with Vasona, this was not out of the ordinary for Mr Sunder. He gave evidence of always being cautious before accepting employment and had taken 18 months before deciding to accept a previous start-up opportunity.

[19] Mr Sood could not be described as overselling the product or its prospects for sale when he informed Mr Sunder in November 2012 that the trial with the telcom was proceeding "*quite well*". Nor did he minimise the difficulties in March 2013 when the trial experienced difficulties although he was optimistic about overcoming them. Having heard and reviewed evidence from both parties I find no basis to Mr Sunder's claims of misrepresentation about the product or its prospects.

[20] Mr Sunder also said when he made the decision to join Vasona it was on the basis of a long-term commitment from the company to the APAC region. He said he thought Mr Sood understood this. I am not persuaded by the evidence any such commitment was given to him.

[21] A further matter over which Mr Sunder claimed to have been misled was that of his authority in the APAC region. He said that, within a month of commencing employment on 10 April 2013, he realised he had been misled and that matters were not as they had been portrayed to him before his employment.

[22] Mr Sunder noted in particular the understanding he had been given before he signed his employment agreement that he would be in charge of the entire Asia Pacific region. That did not happen. After he joined Vasona Mr Sood advised that an employee who was already working to achieve sales in China (whom I will refer to as Mr A), and the two employees who reported to that person, would not be reporting to Mr Sunder.

[23] Mr Sood confirmed this had occurred. He said, although it had been his intention for Mr Sunder to lead the entire APAC team, he had been forced to change that once Mr A advised his intention to resign if he were made to report to Mr Sunder. Mr Sood was unwilling to take the risk of losing Mr A if the company required him to report to Mr Sunder. I accept Mr Sood's evidence of his intention before Mr Sunder

was employed, and the reason he gave for his change of mind, and do not find this to have been a misrepresentation.

### **Events leading to Mr Sunder's termination of employment for redundancy**

[24] On 9 April 2013 Mr Sunder signed his employment agreement with Vasona and commenced his employment with the company the following day. His evidence is that the failures of the product made him realise extensive development and testing was still required for it to be ready for implementation. He said he became concerned about Vasona's financial position in view of the funding that would be required to achieve this and spoke to a number of people about his concerns.

[25] Among them were Mr Magelli and the Chief Financial Officer (CFO) of Vasona. His evidence is that Mr Magelli, in May 2013, reaffirmed the investors' commitment to the company and the lack of any issue with its financial position. Several months later Mr Sunder again spoke with Mr Magelli and says he remained positive about Vasona's potential and the investors' commitment to it.

[26] Mr Magelli confirmed he had been contacted by Mr Sunder approximately three times while Mr Sunder was employed by Vasona, with requests for information about the position of the company. Mr Magelli said, as an independent director, he got some insight into how the investors viewed the business and, if a Vasona employee inquired, he would give a very general indication of what the investors were thinking, without breaching confidences. He did this with Mr Sunder, and told him the company had investor support. Mr Magelli was clear that any such comments were in relation to the company as a whole and not to any particular part of it.

[27] Mr Sunder said the CFO, who did not give evidence, reassured him in May 2014 the investors knew further funding would be required in the future for product development and regional investment and were committed to the company. It was Mr Sunder's evidence these and other conversations with senior company representatives gave him an assurance the company was in a strong financial position.

[28] While Mr Sunder clearly took comfort about Vasona's financial position from these conversations, there is no evidence he was given any guarantees investor support would continue indefinitely.

[29] Mr Sood gave evidence the APAC region was well resourced. He said, however, there were challenges with the product and despite Mr Sunder's endeavours no purchase orders were in place, or in sight, 16 months after he had commenced employment with Vasona. Mr Sood was aware the company's cash position needed to be addressed and said the Board delegated him the responsibility for deciding the best opportunities for the product and how to trim costs.

[30] He assessed the APAC region as less likely to achieve sales than other regions of the world in which Vasona operated. Mr Sood said he came to that conclusion without analysing the "*the matter...to the nth degree*" or putting a plan or proposal in writing. He relied on his business judgement and the Board reports that indicated the general direction of the regions. Closing the company's operation in the APAC region was partly to extend the available funds as far as possible and partly to demonstrate to investors the company was lean and focused on getting its product to market.

[31] Mr Sood said he made a telephone call to Mr Sunder on 9 August 2014 with the primary purpose of advising Mr Sunder of the company's financial position and what he was proposing. He said he had not at that time made the decision to close down the APAC region but conveyed it as a proposal. He needed to save approximately one million (US) dollars but was unsure whether he had mentioned that to Mr Sunder in the course of the phone call.

[32] Mr Sunder's account of the telephone conversation was that Mr Sood told him he had no choice but to shut down Vasona's operations in the APAC region and this meant Mr Sunder would be made redundant. The reason he gave was the lack of funding to continue operating in a region in which no sales had been made. Mr Sunder said he had no indication his employment was at risk until he received that telephone call from Mr Sood.

[33] Ms Rekhraj, who is married to Mr Sunder, gave evidence of overhearing much of the conversation as it was on speaker phone. She started listening once she saw Mr Sunder looking shocked and troubled. Under cross examination Ms Rekhraj acknowledged she had not heard all the conversation and was unsure whether parts she recalled were from the 9 August telephone call or from a later one on 14 August. She did not recall hearing Mr Sood refer to financial difficulties but said he may have done so.

[34] Having heard from Mr Sunder, Ms Rekhraj and Mr Sood I find Mr Sood's recollection of referring to a proposal to close down the APAC region is more likely to be accurate. In preferring Mr Sood's evidence on this matter, over that of Mr Sunder and Ms Rekhraj, both of whom I found to be honest and credible witnesses, I have taken the following factors into account. Mr Sunder was shocked by receiving unexpected and unwelcome news and is likely to have focussed on the prospect of closure of the company's operation in the region rather than the words in which this was couched. Ms Rekhraj's focus was on Mr Sunder and his reactions more than on the words spoken by Mr Sood. Mr Sunder's written brief of evidence in reply refers to Mr Sood's telephone "*confirmation*" on 14 August of his decision to close the APAC region. It would have been unnecessary for Mr Sood to confirm the decision unless it had been conveyed as a proposed decision when first communicated.

[35] I have also taken into account that, before making the telephone call on 9 August, Mr Sood had obtained advice from a human resources (HR) consultant about the obligations employers have under New Zealand employment legislation in potential redundancy situations. It is likely he followed that advice in his telephone call to Mr Sunder by couching the closing of Vasona's operation in the APAC region as a proposal rather than a decision that had been made.

[36] Mr Sood said he raised the possibility with Mr Sunder of going from salaried remuneration to a commission only basis and concluded the 9 August telephone call by advising Mr Sunder to think about what he had said, saying he would call him back in a few days. Mr Sunder denied commission only remuneration had been discussed and said he would have been interested in such a proposal had it been made.

[37] He and Mr Sood spoke again by telephone on 11 August. In the course of that conversation Mr Sunder proposed taking a reduced salary as an alternative to redundancy. He said Mr Sood rejected the proposal immediately and laughed off the suggestion any costs savings could be made in other areas of the business. Mr Sood's evidence was that he considered, and rejected Mr Sunder's proposal as it would not achieve the required objective of slowing the "*cash burn rate*"<sup>3</sup> and demonstrating to investors that costs were being kept in check in regions with no sales or low prospects of sales.

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<sup>3</sup> This was explained by Professor Locke as the amount of cash being spent on a (generally) monthly basis.

[38] From the evidence before me I am satisfied that some consultation took place between 9 and 14 August 2014, when Mr Sood confirmed by telephone the proposal to close down Vasona's operations in the APAC region and to make Mr Sunder redundant. However, the process was rushed, and Mr Sunder was given insufficient information to allow him to make meaningful submissions that might sway his employer's thinking. He was not given any detailed or written information during this period and nor was he referred by Mr Sood to any documentation.

[39] It was Mr Sood's view that Mr Sunder was fully aware of Vasona's financial situation, and the proposed closure of the company's operations in the APAC region should not have come as a surprise to him. He said Mr Sunder received an information pack containing updated financial reports before each (two monthly) Board meeting, which he attended, and these documents showed the company was running out of cash. Mr Sunder was aware no sales had been achieved in the APAC region over the last 16 months and had understood the context when Mr Sood had referred to Vasona's financial difficulties in the telephone call of 9 August 2014.

[40] Mr Sunder disagreed. He said he attended Board meetings from 2014 but stayed only for the portion of the meetings that were relevant to the APAC region. The meetings were convened in the United States and attended by telephone from other regions. While he was welcome to attend the entire Board meetings, they frequently began at 3am NZ time which explained why he attended for only a part of each meeting.

[41] Mr Sunder said he received the final versions of information packs before each Board meeting but said this meant he had access to the limited summary of financial information they contained. He said he was not ever provided with any other financial information. The Board packs comprised comprehensive information regarding the financial state of the company, its forecast sales, and its actual sales position. Mr Sunder's evidence is that he did not read the Board packs in any detail, although he may have skimmed over the financial data. He prepared information for inclusion in each Board pack relevant to the APAC region.

[42] I accept Mr Sunder's evidence and am not satisfied his employer provided him with all relevant information as it was required to, where it was proposing to make a decision that would adversely affect the continuation of his employment. A fair and reasonable employer could not have relied on Mr Sunder's knowledge of financial

statements included in Board information packs to which his attention had not been specifically drawn. Mr Sunder was not provided with specific information relevant to the decision Mr Sood had reached that APAC was the least likely region to achieve sales. This breached Vasona's obligation of good faith under s4(1A) of the Act.

[43] Additionally, Mr Sunder was led to believe by Mr Sood that Vasona would close its entire APAC operation. This is not what happened as two employees were redeployed which Mr Sunder later discovered. One technical employee was transferred to India to work in Vasona's EMEA team<sup>4</sup> while another employee was retained for a specific purpose until early 2015 when his position was made redundant. Mr Sunder was offered no opportunity for deployment to a different role or region or informed that others in the APAC region may have such opportunities offered to them.

[44] In light of the above, I find Mr Sunder's dismissal for redundancy to have been unjustifiable on procedural grounds. I accept there were genuine reasons for closing Vasona's presence in the APAC region based on the cost of maintaining the operation against the lack of sales. As head of the region, and its most expensive employee in APAC, it was inevitable Mr Sunder's position would be chosen for redundancy.

### **Remedies**

[45] Mr Sunder seeks reinstatement to his position or to one substantially similar. That is not practicable in circumstances where the company currently has no presence in the APAC region where Mr Sunder's experience has been mainly gathered and where many of his business relationships, which were valued by Vasona, were forged. Nor is reinstatement reasonable where the company, by the evidence of Mr Magelli and Mr Sood, is still to make a profit.

[46] As I have accepted there were substantive grounds for the termination of Mr Sunder's employment, he is not eligible for an award of lost wages or for other financial remedies relating to benefits lost as a result of the loss of his employment. The only remedies available to him are those relating to compensation for the hurt and humiliation he experienced from the manner in which he was dismissed. I accept he was upset and distressed over the loss of his employment. However it was clear from Mr Sunder's evidence that he was also distressed over the reputational damage he

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<sup>4</sup> Europe, the Middle East and Africa

believed he had sustained from the failure of his employer's product in relation to a particular mobile communications provider. The business opportunity with that provider had arisen from Mr Sunder's contacts and personal relationships. I am unable to award compensation to him for a matter that is related to product failure and not to the termination of his employment.

[47] In the circumstances I find an award of \$10,000 to be appropriate. There is no question of Mr Sunder contributing to the situation that gave rise to his personal grievance, and accordingly no issue as to a reduction of that remedy.

### **Determination**

[48] Mr Sunder's termination of employment for redundancy was procedurally unjustifiable. Vasona Networks Limited is ordered to pay Mr Sunder the sum of \$10,000 without deduction under s.123(1)(c)(1) of the Employment Relations Act.

### **Costs**

[49] The issue of costs is reserved.

**Trish MacKinnon**  
**Member of the Employment Relations Authority**