

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 110  
5396448

BETWEEN MARK VAN DER ROSS  
Applicant

A N D APERIO GROUP NEW  
ZEALAND LIMITED  
Respondent

Member of Authority: Rachel Larmer

Representatives: Anne-Marie McNally, Counsel for Applicant  
Scott Wilson, Counsel for Respondent

Investigation Meeting: 01 March 2013 at Auckland

Date of Determination: 02 April 2013

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**DETERMINATION OF THE AUTHORITY**

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- A. Aperio Group New Zealand Limited (Aperio) unjustifiably disadvantaged Mr van der Ross in his employment because it did not consult with him over possible redeployment opportunities before it made him redundant.**
- B. Aperio is ordered to pay him \$4,000 distress compensation.**

**Employment relationship problem**

[1] Mr van der Ross was employed by Aperio as one of eight printers at its Mt Wellington site. Aperio closed the Mt Wellington site in stages during 2012. When Mr van der Ross was made redundant Aperio simultaneously redeployed four printers to its Airport Oaks site. Aperio did not consider Mr van der Ross for the Airport Oaks positions because it believed he was not interested in redeployment.

[2] Mr van der Ross says he did want to transfer to Airport Oaks but redeployment was never discussed with him. He claims Aperio's failure to consult with him about redeployment opportunities unjustifiably disadvantaged him in his employment. He seeks unspecified damages for the loss of the opportunity to be considered for a transfer to Airport Oaks together with \$10,000 distress compensation.

### **Issues**

[3] The following issues are to be determined:

- a. Did Aperio consult with Mr van der Ross about redeployment opportunities?
- b. If not, did that failure disadvantage Mr Van der Ross in his employment?
- c. If so, was that disadvantage justified?
- d. If not, what if any remedies should be awarded?

### **Did Aperio consult with Mr van der Ross about redeployment opportunities?**

[4] Aperio admits it did not have any formal consultation meetings with Mr van der Ross to discuss redeployment opportunities. However, Aperio says it was entitled to conclude that Mr van der Ross was not interested in redeployment and had elected to take redundancy instead of transferring to Airport Oaks because he had made that known during informal discussions with his supervisor Mr Jacques van der Merwe and in a casual conversation with Mr Ken Johns, General Manager of the Mt Wellington site.

[5] I find that any informal discussions which may have occurred did not amount to fair, proper or adequate consultation. Mr van der Ross was unaware of the significance any informal discussions or casual workplace chatter would have had on his ongoing employment because Aperio had lead him to believe it would individually consult with him about his redeployment preferences and opportunities.

[6] Aperio wrote to Mr van der Ross (and other staff) on 25 November 2011 advising that the Mt Wellington site would be closing in stages and that the next stage

of its process involved finalising the timing of the site closure and “*consulting with staff about potential redeployment opportunities.*”

[7] Staff were provided with a form and asked to indicate their preliminary preferences for possible redeployment. They were advised that doing so did not involve making a commitment and that they would be able to change their choice when the final decision regarding redeployment had to be made. Mr van der Ross did not complete the form because staff were not required to do so.

[8] During the Authority’s investigation meeting Mr Johns gave evidence that Aperio first approached the people who had indicated a preference to transfer to Airport Oaks and only if that did not fill the vacancies did it then go on to talk to other staff who had not indicated a preference for redeployment in order to fill any vacancies.

[9] Aperio never informed its employees that it would be approaching redeployment in such a manner. I find that omission was unfair and contrary to how a fair and reasonable employer could act. It meant Mr van der Ross was unaware of the adverse consequences his failure to complete the preference form could have on his redeployment opportunities.

[10] In November 2011 Aperio presented a power point presentation to staff which told them they would be “*communicated and consulted with individually*” about their own situation at the appropriate time. The presentation identified that staff would be redeployed if needed and that opportunities at other work sites would be considered.

[11] The presentation identified the two potential options available as (1) alternative employment at Airport Oaks or (2) redundancy and expressly stated that these two options “*would be subject to individual consultation*”. It also recorded that Aperio would be consulting with staff about potential redeployment opportunities.

[12] I find Aperio set itself the standard of “*individual consultation with staff over redeployment*” so that is the standard it had to meet. The ‘casual corridor conversations’ Aperio relied on as meeting its obligations to consult with Mr van der Ross did not do so.

### **Was Mr van der Ross disadvantaged in his employment?**

[13] Mr van der Ross says if he had been consulted he would have expressed a preference for redeployment over redundancy. Because Aperio did not consult with Mr van der Ross it concluded he was not interested in transferring so it failed to consider him for redeployment. That failure resulted in Mr van der Ross' employment ending because he was selected for redundancy.

[14] I find Aperio's failure to consult with Mr van der Ross about redeployment disadvantaged him in his employment because it contributed to him losing his job.

### **Was the disadvantage to Mr van der Ross justified?**

[15] Justification is to be determined in light of the s.103A justification test in the Employment Relations Act 2000 (the Act). This requires the Authority to assess whether Aperio's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances.<sup>1</sup>

[16] Aperio say it was justified in not individually consulting with, or considering, Mr van der Ross for redeployment because he had made it known he was not interested in redeployment. In support of that view Aperio relies on an admittedly casual chat Mr van der Ross had with Mr Johns outside after a smoko break together with Mr van der Werne's information that Mr van der Ross did not want redeployment.

[17] Mr Johns concluded Mr van der Ross did not want to be redeployed after a casual conversation they had about their families which occurred outside after a smoko break. Mr Johns alleges Mr van der Ross told him he wanted to take redundancy so that he could spend time at home with his daughter who suffered from a particular disability. Mr van der Ross denies he ever indicated a wish to take redundancy. He says his child does not have or need a full time caregiver and attends school and is treated in every way as a normal child.

[18] In resolving this conflict I have preferred Mr van der Ross' evidence. Mr Johns made a mistake about the sex of Mr van der Ross' child and about the nature of the disability, which I consider has undermined his version of events.

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<sup>1</sup> Section 103A ERA

[19] I also find Mr van der Ross was not on notice that any comments he made about redundancy or redeployment would determine whether or not he would be considered for redeployment. It was therefore unfair for Mr Johns to put that interpretation on any comments that Mr van der Ross did make.

[20] Aperio also relies on information Mr Johns says he obtained from Mr Jacque van der Merwe, (Mr van der Ross' supervisor) who allegedly reported Mr van der Ross was not interested in transferring. I find that information was unreliable and should not have been relied on by Aperio.

[21] Mr van der Merwe's casual conversations with Mr van der Ross occurred while both were at the printing machines and whilst the latter was running the printing presses. The discussions consisted of general workplace banter and casual chit chat only. Mr van der Merwe accepts he never specifically asked Mr van der Ross whether he wanted to be considered for redeployment, nor did he signal that any comments made by Mr van der Ross would be determinative of whether or not he would be considered for redeployment.

[22] Mr van der Merwe also accepts Mr van der Ross had never expressly stated he did not want to be considered for redeployment. That was an impression Mr van der Merwe had formed in response to Mr van der Ross commenting that he had seen other companies advertising for printers. Mr van der Merwe assumed from that comment that Mr van der Ross was applying for or had applied for a job or jobs elsewhere and therefore did not want redeployment. That was an unfair and unjustified conclusion and it should not have been conveyed back to Mr Johns as if Mr van der Ross' had expressed a preference to take redundancy.

[23] I accept Mr van der Ross' evidence that he had not applied for any other jobs but had discussed in general terms with other staff external advertisements for printers he had seen. Such discussions were to be expected within the context of a site closure and looming redundancies.

[24] Aperio is unable to satisfy me that its actions and how it acted met the requirements of the s.103A justification test in the Act.

[25] I consider Aperio's actions in failing to consulting with Mr van der Ross about redeployment were unjustified. Aperio lead him to believe in its November letter, two PowerPoint presentations, and in a notice to staff in February 2012 as well as in Mr

van der Ross' discussions with his supervisor, Mr Jacque van der Merwe that it would be individually consulting with him about redeployment. However, it did not do so.

[26] Aperio was also unjustified in concluding Mr van der Ross did not want to transfer to Airport Oaks. I do not accept Mr van der Ross made it clear to Aperio he did not want to transfer to the Airport Oaks site. Even if Mr van der Ross had made the comments Aperio claims he did (and he strongly denies that), it was still not justified in concluding from any such comments that Mr van der Ross did not want to be considered for redeployment.

[27] I find that the circumstances of such alleged comments made them unreliable and therefore unsafe for Aperio to rely on without having individually consulted with Mr van der Ross to clarify his position on redeployment.

[28] I find that a fair and reasonable employer could not have concluded in all of the circumstances that Mr van der Ross did not want to be considered for redeployment. Aperio had indicated to Mr van der Ross on a number of occasions that it would have individual consultation with him about his redeployment opportunities, so I find that Aperio was obliged to do so. Its failure to do so was unjustified.

[29] I also find that Mr van der Ross did make inquiries of Mr van der Merwe about why he had not had his meeting to discuss redeployment and that Mr van der Ross had asked Mr van der Merwe more than once where his "*contract*" (i.e. offer of redeployment to the Airport Oaks site) was. Mr van der Ross asked Mr van der Merwe to raise concerns about his situation with Mr Johns. Mr van der Merwe did so and reported back to Mr van der Ross that Mr Johns said that there was "*nothing at the moment but [he] may be in the next round of negotiations*".

[30] When Mr van der Ross was given his notice of redundancy on 7 May he says he immediately asked why he had not had an opportunity to talk about redeployment. Mr van der Ross claims that Mr Johns told him he was "*just following instructions*" and also said "*I can't tell you something I don't know*".

[31] Mr Johns denies that, but I have preferred Mr van der Ross' evidence on the balance of probabilities. Mr Johns was handling the redundancy and redeployment process involving approximately 90 staff. He was having meetings with almost all staff and sometimes more than one meeting with staff. He was also having regular

meetings with supervisors, managers and others in the hierarchy who were based in Australia.

[32] I consider that Mr van der Ross is likely to have a better recollection of events given that this was an intensely personal matter to him and that he was upset and surprised that he had not been given the opportunity to talk about redeployment before being given notice of redundancy.

### **What, if any, remedies should be awarded?**

#### *Lost remuneration*

[33] Mr van der Ross does not claim lost remuneration,<sup>2</sup> as he received approximately two months' redundancy compensation and was paid out accrued sick leave and holiday pay.

#### *Lost opportunity*

[34] Mr van der Ross seeks unquantified compensation for the opportunity he lost to be considered for redeployment.

[35] The difficulty with this claim is that there is insufficient evidence upon which to base an award of compensation. Although I was told Mr van der Ross obtained casual work no evidence of his earnings was supplied. I was told in closing submissions that Mr van der Ross is currently on a 90 day trial period for a printer job that pays \$20 per hour for 40 hours work per week, but I do not know when he obtained that position.

[36] I therefore do not have sufficient evidence from which to calculate what the financial impact of his job loss has had on him since his dismissal so I am unable to adjust that to reflect other contingencies which may have resulted in his employment ending anyway had he been consulted over redeployment. For example, all things being equal, under the default contractual selection criteria "*wherever possible the Company will observe the principle of last on, first off in selecting employees to be made redundant*".<sup>3</sup>

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<sup>2</sup> This claim was withdrawn at the IM.

<sup>3</sup> Clause 29.6.1 of the expired collective agreement upon which Mr van der Ross' individual employment agreement was based.

[37] Mr van der Ross was the last person to be employed, so I consider he was at high risk of redundancy if there were more printers seeking redeployment than positions available. Because of the evidential deficiencies with this aspect of the remedies claimed I consider it more appropriate to compensate Mr van der Ross for his disadvantage grievance under s.123(1)(c)(i) of the Act by setting that amount at a level which reflects his loss of opportunity to be considered for redeployment.

#### *Distress compensation*

[38] I accept Mr van der Ross suffered hurt, humiliation and injury to feelings as a result of being deprived of the opportunity to discuss redeployment options before being given notice of redundancy. He also suffered distress as a result of losing the security of well paid permanent employment and from the associated stresses and financial strains that flow from that.

[39] I consider that \$4,000 is appropriate to compensate Mr van der Ross for the hurt, humiliation and injury to feelings he suffered as a result of his unjustified disadvantage grievance.

#### *Contribution*

[40] Section 124 of the Act requires me to consider whether Mr van der Ross contributed to the situation which gave rise to his disadvantage grievance and, if so, adjust remedies accordingly.

[41] I do not consider Mr van der Ross contributed to the situation which gave rise to his grievance. He was under no obligation to identify a redeployment preference on the staff preference form and he was never instructed to do so. He made inquiries with his supervisor on more than one occasion to ascertain why he had not had his redeployment meeting and why he had not been given a “*contract*.”

[42] I consider that the disadvantage grievance arose because Mr Johns incorrectly inferred or assumed that Mr van der Ross did not want redeployment in circumstances where I have concluded it was unreasonable and unjustified for him to have reached that view. I find that Mr van der Ross cannot be said to have engaged in blameworthy conduct which would justify a reduction in remedies.

## **Costs**

[43] Mr van der Ross as the successful party is entitled to a contribution towards his actual costs.<sup>4</sup> The parties are encouraged to resolve costs themselves. However, if that is not possible then Mr van der Ross has 14 days within which to file his costs memorandum, Aperio has 14 days within which to respond. This timetable will be strictly enforced and departure from it requires the prior leave of the Authority.

[44] In order to assist the parties to resolve costs by agreement, the Authority is likely to adopt its usual notional daily tariff based approach to costs. The parties are invited to identify any factors they consider should warrant an adjustment to the notional daily tariff.

**Rachel Lamer**  
**Member of the Employment Relations Authority**

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<sup>4</sup> Proof that he has actually incurred legal costs will be required.