

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2012] NZERA Auckland 174
5359058**

BETWEEN PAUL VLUG
 Applicant

AND ASNET LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in person
 Michael Quigg, Counsel for Respondent

Investigation Meeting: 9 April 2012 at Auckland

Submissions received: 23 April 2012 from Applicant and Respondent

Determination: 22 May 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Paul Vlug, claims that he was unjustifiably dismissed by the Respondent, Asnet Limited (Asnet). Mr Vlug claims that the restructuring under which his position was disestablished was not a genuine restructuring exercise and was unjustifiable.

[2] Specifically Mr Vlug claims that:

- The restructuring exercise under which his position as Sales Executive was disestablished was not genuine.
- The position held by him as Sales Executive was the same as the new position of Business Development Manager; and
- The restructuring was an exercise manufactured in order to enable Mr Harrington to make the lucrative Vodafone account a House account managed by himself.
- The restructuring exercise undertaken by Asnet was not a fair and reasonable process.

[3] Asnet deny that Mr Vlug was unjustifiably dismissed and claim that Mr Vlug's employment was justifiably terminated as a result of his position being disestablished following a fair process.

Issues

[4] The following issues require determination, whether:

- a. Mr Vlug's position was disestablished as a result of a genuine restructuring exercise.
- b. The position held by Mr Vlug as Sales Executive was the same as, or substantially similar to, the new position of Business Development Manager.
- c. The restructuring was an exercise manufactured in order to enable Mr Harrington to make the lucrative Vodafone account a House account managed by himself.
- d. Asnet followed a fair procedure in disestablishing Mr Vlug's position of Sales Executive.

Background Facts

[5] Asnet is a provider of security and networking infrastructure with offices in Wellington and Auckland.

[6] Mr Vlug commenced employment with Asnet on 24 April 2006 in the position of Sales Executive for Auckland, reporting to Mr Steve Harrington, the Managing Director and major shareholder of Asnet.

[7] Mr Vlug was provided with, and signed, a written employment agreement under which he received a base salary and commission payments in accordance with a formula based on the sales he had achieved.

Events pre-June 2011 restructuring

[8] Mr Vlug said that in July 2008 he had been aware that the sales operation in Auckland was not performing well and he had consequently initiated a restructuring of his remuneration with Mr Harrington. As a result, the salary element of his remuneration package had decreased and his commission entitlements had been increased.

[9] Mr Vlug stated that the purpose behind the change in his remuneration package was to allow for the creation of an additional position in Auckland which would focus on developing new business and management for smaller Auckland based accounts, thus allowing Mr Vlug to concentrate on the larger client accounts. The appointment of the additional person took place in early 2009.

[10] Mr Vlug said that he had been in complete agreement with the proposal for recruiting an additional employee in Auckland, and that he had been satisfied with the level of his remuneration after the changes made in July 2008.

Restructuring 2011

[11] Mr Harrington said that the possibility of a restructuring had been raised at the Asnet monthly staff meeting which had been held on 5 April 2011. Mr Vlug confirmed that he had been present at that meeting.

[12] On 13 June 2011 Mr Harrington distributed a memorandum to all employees which stated that Asnet needed to adapt to the changing IT market and move away from its then current business model. In the memorandum Mr Harrington advised he would be in Auckland on 15 August 2011 to present a restructuring proposal.

[13] Mr Harrington said he had set out the reasons for the restructuring proposal in a presentation which he had made to the employees on 15 June 2011. Hard copies of the presentation were available for those employees who requested one a day or two later.

[14] The proposed presentation set out that four new positions were to be established: Managing Director Non Executive, General Manager of Operations, Associated Technical Director Auckland, and New Service Business Development Manager, this latter position title being subsequently altered to Business Development Manager.

[15] Mr Vlug's position as Sales Executive and the positions of some other employees would be affected by the proposed changes. Mr Harrington advised at the meeting that there would be 1:1 discussions with the affected employees, at which they could have representation present.

[16] Mr Harrington advised that if, after due consideration of any feedback, any positions were to change, there would be further discussion with those employees affected. Mr Harrington said he had again advised that employees would be entitled to representation at these discussions.

[17] Additionally Mr Harrington had advised that if new positions were created, these would be advertised internally and externally, and the job descriptions and remuneration details would be supplied to any interested employees.

[18] Mr Vlug said that he alone had disagreed with the proposal, and he had made this clear prior to leaving the meeting.

[19] On 16 June 2011 when Mr Harrington and Mr Vlug met for a 1:1 discussion, Mr Vlug said he had not given any thought to the proposed restructuring proposal made the previous day, and he requested more time to consider it. Mr Harrington said he had agreed to this request.

[20] On 24 June 2011 Mr Harrington said that he had sent an email to all employees asking that they let him have any feedback or questions on the proposal by 30 June 2011.

[21] Mr Harrington said Mr Vlug had responded by email requesting further time, and a copy of the presentation document. Mr Harrington said he had replied by email on 27 June 2011 advising Mr Vlug that he had until 7 July 2011 to respond, and attaching a copy of the presentation document.

[22] On 7 July 2011 Mr Vlug emailed Mr Harrington clarifying that he had identified the issues he wished to raise at a 1:1 discussion and confirming that he would like to have a representative present.

[23] On 7 July 2011 Mr Harrington emailed confirming that he would be in Auckland on 14 July and would be available for a 1:1 with Mr Vlug at 1 p.m.

[24] At 9.47 a.m. on 14 July 2011 Mr Vlug said he had emailed Mr Harrington to advise that his support person would not be available until the following day.

[25] On 15 July 2011 the 1:1 discussion took place with Mr Vlug and his support person. Mr Harrington said that Mr Vlug had made it clear in this meeting that he would not be applying for any of the proposed new positions created in the restructuring, and that he wanted his existing position to continue unaffected.

[26] Mr Harrington said that on 20 July 2011 he had written to Mr Vlug thanking him for his feedback, and advising that Asnet had decided to proceed with the proposed restructuring and as a consequence Mr Vlug's position would be disestablished with effect from 22 August 2011.

[27] As a result of Mr Vlug's advice that he would not be applying for any of the newly created positions, Mr Harrington said that he had been unable to identify any suitable alternative redeployment opportunities for him, which was the reason for advising Mr Vlug that his employment would terminate on 22 August 2011.

[28] Mr Vlug said he had sent Mr Harrington an email on 25 July 2011 asking for a copy of the job description for the Business Development Manager role. Mr Harrington said he had provided this on 26 July.

[29] Mr Harrington said he had received an email from Mr Vlug on 27 July 2011 informing him that he had taken legal advice and his lawyer had procedural issues with the redundancy process which had been followed by Asnet. Mr Harrington said that Mr Vlug had also advised him that all he needed to do in order to secure a new position for himself was to contact a competing company who had MSA's (Master Services Agreements) with Vodafone. Mr Harrington said he had viewed this as a threat by Mr Vlug.

[30] Mr Vlug said he had received an email from Mr Harrington on 22 July 2011 advising him that all his contractual and statutory entitlements had been paid.

[31] Mr Harrington said that on 26 July 2011 he had instructed Absolute IT, an IT recruitment company, to find candidates for the positions of General Manager Operations and Business Development Manager.

[32] The position of General Manager Operations had been filled by an internal candidate, but an external candidate had subsequently been appointed to the position of Business Development Manager.

[33] On 5 October 2011 Mr Vlug filed a personal grievance claim in the Employment Relations Authority.

Determination

Was the position of Mr Vlug disestablished as a result of a genuine restructuring exercise?

[34] The Court of Appeal in *GN Hale & Son Ltd v Wellington Caretakers IUOW*¹ clarified that:

¹ [1991] 1 NZLR 151

An employer is entitled 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 a right to continued employment if the business can be run more efficiently without him.

[35] The onus of proving that there were genuine commercial grounds for redundancy rests upon the employer.

[36] The presentation made to the employees on 15 June 2011 listed 9 separate reasons for the change. Most significant of these were that Asnet needed to increase the efficiency of the business and to strengthen its presence in the area of higher margin professional services including 'cloud related offerings'.

[37] Mr Harrington had explained in the presentation that the Asnet existing service division was not geared for existing or new customers, and that it was necessary to increase resources to deal with 24x7, multi-technology platform support. In order to do this, it was necessary to protect and grow opportunities by placing key technical specialists in key accounts, which would impact upon the existing day-to-day account management.

[38] It was also a factor in the restructuring that Mr Harrington wished to reduce his day-to-day involvement as the current Managing Director and to reduce his working week to 4 days.

[39] I find that the existing positions affected, and the new positions created as a result of the restructuring process, were based on what Asnet perceived were the requirements for the efficient running of the business as it adapted to a changing IT market.

[40] I determine that Asnet had genuine commercial reasons for undertaking a restructuring exercise.

Was the position held by Mr Vluc as Sales Executive the same as, or substantially similar to, the new position of Business Development Manager?

[41] Mr Vluc claims that the position of Business Development Manager was the same or substantively the same as his position as Sales Executive.

[42] Mr Vlug's job description as Sales Executive had as the primary focus of the role the provision of sales and account management.

[43] It is clear from Mr Vlug's evidence that the Vodafone account for which he had been responsible had been a lucrative account for him to manage in terms of his commission payments. In fact managing his existing accounts had ensured that Mr Vlug's commission payments had been consistently high, which had been the reason why he had been prepared to accept the change in his remuneration package in July 2008 and to continue with the arrangement thereafter.

[44] The job description for the Business Development Manager makes to clear that the primary focus of the new position was "*To create economic value for Asnet Limited through managing the companies' business development function in the Auckland area.*", i.e. it was to focus on bringing in new accounts.

[45] When he had been asked at the Investigation Meeting why he had not applied for the Business Development Manager position, Mr Vlug had explained that it was a "*death*" position, and had referred to the previous new business development position created in early 2009 as "*an epic fail by new people doing new business*".

[46] Under the proposed restructuring the new position of Business Development Manager would not be primarily responsible for the Vodafone account, which was to be split between the new General Manager of Operations position and the Associate Technical Director position.

[47] I find that the position of Business Development Manager was not the same as, or substantially similar to, that of Sales Executive, and additionally that Mr Vlug perceived it as a difficult position in which to succeed.

[48] More significantly, the Business Development Manager position would not retain management of the Vodafone account, and I consider that this was the reason why Mr Vlug wanted the position of Sales Executive to continue unchanged.

[49] I determine that the position of Business Development Manager was not the same as, or substantially similar to, that of the position of Sales Executive

Was the restructuring an exercise manufactured in order to enable Mr Harrington to make the lucrative Vodafone account a House account managed by himself?

[50] Mr Vlug claims that the value of business he achieved at Vodafone was massive; in particular Mr Vlug claims that for the next 5 years there is a significant amount of income forecast which will be derived from contracts which he had secured on behalf of Asnet.

[51] Mr Vlug also claims that the restructuring was contrived to ensure that the Vodafone account became a house account which Mr Harrington would manage.

[52] It is clear that Mr Vlug derived a high level of commission as a result of his management of the Vodafone account, and that he wished to retain this, as evidenced by his admission at the Investigation Meeting that he had purposely delayed the consultation process in order to try and maximise his Vodafone commission.

[53] As outlined in paragraph 46 above, the evidence provided showed that following the restructuring Mr Harrington did not manage the Vodafone account, but rather that the Vodafone account responsibilities were to be split between the new General Manager of Operations position and the Associate Technical Director position.

[54] The Employment Court in *Simpsons Farms Limited v Aberhart*² observed that:³

So long as an employer acts genuinely and not out of ulterior motives, a business decision to make positions or employees redundant is for the employer to make ...

[55] I have already found that Asnet had genuine commercial reasons for undertaking a restructuring exercise, and I also find that the restructuring of the management of the Vodafone account was an integral part of the restructuring exercise and not an exercise manufactured in order to enable Mr Harrington to make the lucrative Vodafone account a House account managed by himself

[56] I determine that the restructuring an exercise was not manufactured in order to enable Mr Harrington to make the lucrative Vodafone account a House account managed by himself.

² [2006] ERNZ 825

³ Ibid at para [67]

Did Asnet follow a fair procedure in disestablishing Mr Vlug's position?

[57] Section 103A of the Act, as amended, sets out the test of justification:

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] Other 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).

[59] In a redundancy situation a fair and reasonable employer must, if challenged, be able to establish that he or she has complied with the statutory obligations of good faith dealing in s4 of the Act. His Honour Chief Judge Colgan in *Simpsons Farms Limited v Aberhart*⁴ noted that this compliance with good faith dealing includes consultation *“as the fair and reasonable employer will comply with the law”*⁵

[60] I find that Asnet provided Mr Vlug with ample time for providing any feedback, and advised Mr Vlug of his right to representation at the 16 June presentation, adjourning the scheduled meeting on 14 July 2011 at very short notice in order to accommodate Mr Vlug's representative

⁴ [2006] ERNZ 825

⁵ Ibid at para [40]

[61] I find the reasons for the restructuring were discussed with Mr Pettigrew and there was ample opportunity for him to ask questions and seek further information. Asnet had met with Mr Vlug and his representative for consultation purposes on 15 July 2011.

[62] Following the meeting on 15 July 2011 when Mr Vlug had made it clear that he would not be applying for any of the new positions, he had requested a copy of the Business Development Manager role which had been supplied to him. Mr Harrington said that he would have viewed Mr Vlug as a strong contender for the position had he proceeded with an application, however Mr Vlug had not done so and an external candidate had subsequently been appointed..

[63] I find that Asnet followed a fair procedure in disestablishing Mr Vlug's position.

[64] I determine that Mr Vlug was not unjustifiably dismissed by Asnet.

Costs

[65] 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.

Eleanor Robinson
Member of the Employment Relations Authority