

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 106
5336530

BETWEEN BRENT WARD
 Applicant

AND DOWNER EDI
 ENGINEERING LTD
 Respondent

Member of Authority: P R Stapp

Representatives: M E Gould, Counsel for the Applicant
 A Russell, Counsel for the Respondent

Investigation Meeting: 14 April 2011 at Wellington

Determination: 16 June 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This employment relationship problem is about Mr Ward's termination of employment for redundancy.

[2] Mr Ward claimed that he was a permanent draughtsperson employed by Downer EDI Engineering Limited, but seconded to the design team as a designer in August 2010.

[3] Downer EDI claims that Mr Ward held a permanent designer position. It accepted there was no documentation completed in regard to the change. Mr Ward's salary increased in September 2010 to \$53,000 pa following a realignment/review.

[4] Other than one of the other Downer EDI witnesses saying that this realignment was to take into account Mr Ward's position as a designer, there was no detail able to be produced as to the consideration given to the salary review. Mr Ward claims that he understood his salary review related to being aligned with another person's

position, but this reply was provided for the first time at the Authority's investigation meeting.

[5] For commercial reasons Downer EDI was required to consider a restructure of the design team. This involved seven designers, including Mr Ward. The background to the need for a restructure was provided to each of the designers for any feedback and input. Once the decision to restructure was made Mr Ward was interviewed for selection. All other designers in the team were also interviewed. It is common ground that Mr Ward and the other designers were not provided with the questions that would be asked by the panel and none of them were provided with the generic criteria to be applied.

[6] In Mr Ward's case Downer EDI relied on him knowing from a previous interview what the focus of the format for the assessment would be. Mr Ward has complained that he was not provided with this information in advance of the selection interview. He claimed this was a breach of good faith by Downer EDI.

[7] In addition, Mr Ward says that when Downer EDI assessed him with the lowest ranking it should have provided him with further consideration relating to his principal training experience as a draughtsperson. Mr Ward claimed that Downer EDI had a duty to explore the possibility of him returning to a draughtsperson's role, but it failed to do that.

[8] Mr Ward was made redundant. Arising from that decision this personal grievance claim has come before the Authority. Both parties have attended mediation.

The issues

[9] The first issue is whether or not Mr Ward was a permanent draughtsperson and whether he was on secondment in the designer role?

[10] Secondly if he was permanently appointed to the designer role (not on secondment) would a fair and reasonable employer have considered him for an alternative position as a draughtsperson instead of including him in the design team restructuring?

[11] Thirdly would a fair and reasonable employer not have provided the questions to be used at the interviews of all designers? Was it the action of a fair and reasonable employer to presume that Mr Ward would have known about the interview format, including the selection criteria that were not explicitly disclosed?

[12] Mr Ward is keen to be reinstated. This is opposed by the respondent on the grounds that there is no role for him following the restructuring. Mr Ward is also seeking lost wages and compensation. The respondent has opposed these remedies also, on the grounds that Mr Ward does not have a personal grievance, the redundancy means he would not be entitled to lost wages, and that contribution needs to be taken into account for any compensation.

[13] Both parties have claimed costs.

The facts

[14] Mr Ward started his employment at Downer EDI as a draughtsperson. There was a written employment agreement for the role. He unsuccessfully applied for a role in the design team during his employment. This involved an interview that followed the standard Downer EDI format. Later he was approached in regard to a role that had become available in the design team. He agreed to take on the role from 30 August 2010. This involved no change to his terms and conditions. He remained at the same desk in the same premises. There was no change of employment agreement and nothing else new put in place. There was no other documentation of the change. However, the signature Mr Ward used on his email referred to him as a Network Designer. Downer EDI says that the premises Mr Ward was located at were primarily the base for the designers at Downer EDI. Through the restructuring Mr Ward never raised that he was on secondment. He did request consideration be given to returning to a draughtsperson role at his restructuring interview. Mr Ward's previous position had been filled on a permanent basis.

[15] Mr Ward's salary was reviewed in September 2010 by his manager, and according to the manager, the adjustment took into account Mr Ward's new role as a designer. There is no documentation about the details of the realignment.

[16] In November 2010 a decision was made to relocate Thailand drafting work to Auckland and staff numbers were reduced from 25 to 8. Also in November 2010

interviews were held for a Wellington drafting position. An offer was made and the person appointed commenced work in January 2011.

[17] The restructuring was announced in January 2011 relating to copper designers in Wellington. The decision was made to proceed with restructuring and a reduction of one copper designer role in the Wellington office. This group included Mr Ward. He completed an expression of interest. Downer EDI's format for interviews was based on the questions being confidential for all applicants. The questions were chosen from a template of questions under generic headings for consideration. Downer EDI says that Mr Ward would have had some idea about the generic headings from his previous experience having had an interview only recently for a designer position. Mr Ward claimed that he was not told of the criteria, and claimed that a fair and reasonable employer would have informed him, because the interviews were about him trying to keep his job. Downer EDI accepts that it did not disclose the generic headings to Mr Ward and that in any case the headings were not disclosed to anyone involved. There were six other designers involved in the restructuring.

[18] The interview panel comprised 3 managers. They each made their own assessments of each candidate by taking written notes recorded in the interview guides. Mr Ward was the first interviewed. The panel had a brief discussion at the conclusion of each interview, tallied the scores and the senior manager put the 3 interview guide forms away to one side so that they could not be seen. At the end of all of the interviews held on the same day the panel then had a discussion on the results and the senior manager added up the combined scores for each candidate and averaged them. Mr Ward had the lowest score. He was closely followed by one other person. Since he had the lowest score Mr Ward was selected for redundancy. Once the decision had been made there were 2 options for other roles put to Mr Ward, which were a role in Christchurch or to sub contract if any work eventuated.

[19] The decision was formalised in writing. Mr Ward was provided with 4 weeks' notice and he left Downer EDI on 24 February 2011, but was paid up to 25 February 2011 to fulfil his entitlements.

Determination

[20] Mr Ward's role at Downer EDI had changed to a designer. It was not formalised in writing although his terms and conditions remained the same. I

conclude he was a designer because he had agreed to work in that position and his salary increase reflected a designation of Senior Draughtsperson/Designer 2. He has not been able to satisfy me that he was on secondment because there is an absence of any documentation to support that. Also the Downer EDI managers were adamant that the change was permanent and no reason was advanced for me to disregard their evidence as being unreliable or without veracity.

[21] There were genuine commercial reasons associated with the need for a restructuring. There is common ground between the parties on this.

[22] I am satisfied that Downer EDI did consult and provide an opportunity for feedback and input before the decision was made to proceed and downsize the number in the design team. This led to the decision to restructure.

[23] I hold that it was not fatal to the process that Downer EDI did not tell Mr Ward, and anyone else, as to what the questions were. In this case they were the same questions used in each interview and recorded in the interview guide.

[24] However, Downer EDI did not act as a fair and reasonable employer when it did not disclose the criteria to be used for selection. My reasons are as follows:

- a. It is not enough for an employer to rely on an employee to presume what the format would be in the selection. This is important because all applicants were endeavouring to keep their jobs and as such are entitled to information likely to impact on their employment and to enable them to properly prepare for an interview. In this case it so happens that as no one was given the information there would not usually be any disadvantage and unfairness, but that does not mitigate the obligation for the employer to provide such information because it was relevant and related to Mr Ward's employment in a closely competitive contest for a job.
- b. The closeness of the scoring between the lowest two ranked employees (Mr Ward was one of these) may have made a difference if the affected employees had the information and were able to prepare, reply and respond fully with the knowledge of what the criteria involved. I also add that Downer EDI did not breach any specific term of employment in the employment agreement not to disclose this information because the employment agreement was silent on the selection criteria to apply.

[25] Mr Ward never protested that when he was included in the number of affected employees that he should have been treated differently. The issue around his role has only emerged in the employment relationship problem filed in the Authority. He provided an expression of interest for the role. He was interviewed. An assessment was made fairly on the basis that the same questions were put to each candidate and that the same criteria applied, except that Mr Ward had no certainty and clarity about the criteria to be applied because he had no involvement in it being finalised. He was not given the criteria and it was expected he should have known the format from previous experience. It is therefore open to conclude that Downer EDI's omission led to a loss of chance given that Mr Ward was competing to keep his job.

[26] The next issue is whether or not Downer EDI would have treated Mr Ward as a draughtsperson, and to open up the restructuring for him. I hold that Downer EDI treated Mr Ward in the group of designers because that was the position he held. That was the affected area and it was within Downer EDI's managerial prerogative as to the scope and size of the restructure. A fair and reasonable employer would not have been expected to treat Mr Ward differently because he had been in that position for 5 months and there was the genuine belief held by the managers that his role in the team was a permanent arrangement, I hold. The restructuring related to the design team and not draughtspersons. Mr Ward's reliance now on changes involving Downer EDI draughtspersons arriving from Thailand does not help him because these people were affected by the impact of commercial circumstances in regard to their work and location, and included a downsize in numbers too. Also, his reliance on another position being filled for a draughtsperson role in Wellington was able to be explained as a specialist position and designed for another employee of another entity and based on commercial grounds. Both instances occurred before the restructuring of the design team.

[27] Options for deployment were considered by Downer EDI. This involved the Christchurch offer, and sub contracting if work was to eventuate. They were both declined by Mr Ward. There were no other possibilities.

[28] I hold that Mr Ward has a personal grievance because the respondent omitted to provide the selection criteria to Mr Ward that a fair and reasonable employer would have provided. Mr Ward was prevented from preparing for an interview with the full knowledge of the criteria being used for him to keep his job, and because of the

closeness of the final scores for him and the second lowest person having knowledge of the criteria may have made a difference, but not necessarily in his favour as all the affected staff would have had to be given the information. However the conclusion I reach is that the respondent's omission led to a loss of chance.

[29] It follows that as the personal grievance relates to a procedural defect any compensation must relate to that. This is not a situation for reinstatement because it would not be practicable given the downsizing and there being no position for Mr Ward and where there has been a genuine redundancy for commercial reasons. Also there has been no loss of wages relating to redundancy. These two claims are dismissed.

[30] Finally, the claim for compensation has to be at the lower end of the scale because of the failure of the respondent to provide relevant information and any impact on Mr Ward relating to this. I assess his compensation at \$3,000 for hurt and humiliation. Mr Ward can not be blamed for the employer's failure to provide the information. There is no contribution on Mr Ward's part, and thus no reduction, I hold.

[31] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority