

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

WA 100/08
5125556

BETWEEN

ALAN STUART
Applicant

AND

THE CHIEF EXECUTIVE,
MUSEUM OF NEW
ZEALAND, TE PAPA
TONGAREWA
Respondent

Member of Authority: Yvonne Oldfield

Representatives: J. R Sumner for Applicant
Susan Hornsby-Geluk and Bridget Fleming for
Respondent

Investigation Meeting: 23 July 2008

Determination: 29 July 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This determination relates to an application for interim reinstatement. On 1 July, following a restructuring process which took place over the previous six to eight months, Mr Stuart's position (Manager, Risk Strategy) was disestablished and he was made redundant. He received one month's pay in lieu of notice and four months' redundancy compensation, consistent with the terms of his individual employment agreement.

[2] Although other staff members experienced changes to their job descriptions and reporting lines, Mr Stuart was the only person who lost his job as a result of this restructure. He alleges a personal grievance of unjustified dismissal, saying that the respondent failed to meet its good faith obligations during the restructuring process and did not properly consider redeployment options for him. He alleges that his

redundancy was a sham, and that the respondent went through the purported restructure with the predominant purpose of getting rid of him.

[3] Ultimately Mr Stuart wants his grievance remedied by permanent reinstatement. He says that the disestablishment of his old position cannot be justified and that he should be reinstated to that role. In the alternative, he says that a new position (“Assurance Advisor”) which has arisen as a result of the restructure, and remains vacant, is substantially similar to his old role. He says that he should have been re-assigned to this role and should now be reinstated to it. As a further alternative he seeks reinstatement to any other redeployment options that may exist.

[4] In the meantime he seeks interim reinstatement to the position he formerly occupied. (The representatives having agreed that while an order for interim reinstatement may be made subject to conditions, reinstatement to a “*substantially similar position*” is not available on an interim basis.) The issue for determination is therefore whether Mr Stuart should be reinstated on an interim basis to the position of Manager, Risk Strategy. In determining this question I must consider:

- i. whether he has an arguable case;
- ii. the availability and adequacy of other remedies;
- iii. where the balance of convenience lies, and
- iv. the overall justice of the case.

ARGUABLE CASE

[5] It is submitted for Mr Stuart that he has a strongly arguable case both in relation to his assertion that his dismissal was unjustified and in relation to the claim for permanent reinstatement. The applicant says that since the restructure was a sham, the entire process should be unwound and he should be given his old job back on a permanent basis. Alternatively, if this proves impracticable he says the new role that has arisen as a result of the restructure is within his capabilities. The applicant asserts that no consideration was given to his suitability for it.

[6] Noting that the threshold for what constitutes an arguable case is not high, Counsel for the respondent concedes that it has been met in relation to the procedural issues raised by the applicant. However the respondent disputes that there is an arguable case that the redundancy was a sham. It says that Mr Stuart was a valued employee of long standing and that an external (Audit New Zealand) report was a principal driver of the restructure. On related grounds the respondent says that there is no arguable case for permanent reinstatement. It submits that the restructure was a proper exercise of managerial prerogative and that it is not practicable to reinstate to a non-existent position.

[7] As for the new job, it is argued that it is a different role to that of Manager, Risk Strategy and requires a more specialised skill set. The respondent notes that Mr Stuart has never expressed any interest in applying for that position and that he acknowledged in evidence before the Authority that he would require some retraining to be able to do it. Finally the respondent says that the only other possible redeployment option (a position of Security Manager) was not considered suitable by Mr Stuart himself and has since been filled.

Determination

[8] It is accepted that the applicant has an arguable case in relation to its allegations that the respondent's consultation process was inadequate. The same goes for the assertions that redeployment options generally (not limited to the role of Assurance Advisor) should have been more fully explored. Insofar as failure to explore redundancy options can lead to a finding that a termination is not genuinely for redundancy, I also accept that there is an arguable case that the redundancy was not genuine. It follows that an order for permanent reinstatement remains a potential remedy for Mr Stuart. Given these findings it is not necessary for me to decide whether there is an arguable case that the redundancy is a sham.

THE AVAILABILITY AND ADEQUACY OF OTHER REMEDIES

[9] It was acknowledged by the applicant that financial hardship is not for him the critical issue in this case. The notice and redundancy payments that Mr Stuart has

received will take him to the end of November by which time the substantive employment relationship problem will have been determined. Indeed, he has given an undertaking that in the event that an order for interim reinstatement is granted, he will place his redundancy payment into his solicitor's trust account.

[10] However Mr Stuart says that subsequent permanent reinstatement and damages would not compensate for his dislocation from the institution. After many years with the respondent he says he has developed a specialised skill set which can only be maintained and developed in the respondent's employment, and to find alternative work would be difficult at his age (61.) He also believes that returning him to the workplace will allow the respondent to reconsider the option of redeployment, and that being on the spot could assist him in any candidacy for the newly created Assurance Advisor role, in respect of which the recruitment process is still in its early stages.

[11] The respondent argues that it would now be very difficult, and very disruptive for other staff, to attempt to unwind the restructure to recreate the old job. If it were not recreated, however, there would be very little for Mr Stuart to do and no real benefit to him in returning to the workplace. It says doing so can make no difference to Mr Stuart's chances of appointment to the new role of Assurance Advisor since the process for appointment to the new role is in the hands of external recruitment consultants.

[12] The respondent also notes that it was prepared to make itself available for an early substantive investigation (proposed for two days in late August) however the applicant declined on the view that the time available would not be sufficient.

[13] Finally the respondent notes that the likely term of any interim order is three to four months and argues that an absence of this length will not adversely affect Mr Stuart's career progression.

Determination

[14] There is no financial advantage to Mr Stuart in interim reinstatement and I am not convinced that returning to the workplace will assist him in any application he

may make for the Assurance Advisor role. The only potential benefit Mr Stuart might obtain from interim reinstatement (over and above any substantive remedies he might receive later) would be the opportunity to explore other redeployment options which might arise in the meantime. However I heard nothing to suggest that any particular options are in fact coming up during the period in question.

[15] The reasons given by Mr Stuart for seeking interim reinstatement are underpinned by a view that he will be better placed to discuss his future with the respondent in the organisation rather than out of it. Generally I would be inclined to agree with the commonsense of this argument. However in this case the parties have already had ample opportunity to talk over the issues between themselves. The restructuring process took place over many months. During the latter part of that time Mr Stuart was professionally represented in his dealings with his employer. Indeed, as we have seen, the grievance was raised well before the employment ended. In these circumstances, I consider nothing more will be achieved by putting him back in to the workplace temporarily.

[16] I conclude that nothing will be achieved by an interim order that cannot be addressed by remedies in relation to the substantive matter.

THE BALANCE OF CONVENIENCE

[17] The applicant says that the balance of convenience favours him because he has not been able to find work and will suffer irreparable loss of career in the interim. He says that his old job is not superfluous to the respondent's needs and that any inconvenience his reinstatement might cause the respondent would be minor. Set against this he sees advantages to the respondent in regaining the benefit of his skills and experience.

[18] In relation to this issue the respondent reiterates that the position has gone and that there is very little Mr Stuart could do. It notes that the duties of his old role (including staff management responsibilities) are now split between various positions with only one part of the job being carried forward to the proposed new role. Up to twelve other staff were affected by the restructure with reporting lines having changed

in some cases. The respondent says its responsibilities to these other staff would be compromised by any attempt to unwind the process.

[19] The respondent also notes that the restructure was prompted by a perceived need to strengthen its financial auditing capacity. That was why the new role (which has an emphasis in that area) was created. To achieve the objectives of the restructure it needs to progress an appointment to that role. However the respondent says that there will be serious financial impacts (associated with carrying two salaries) if Mr Stuart were to return to the Risk Manager's job and a new Assurance Advisor were appointed meanwhile.

Determination

[20] I accept that for all the reasons the respondent has set out, particularly the disruption to the organisation and to other staff, the balance of convenience favours the respondent.

THE OVERALL JUSTICE OF THE CASE

[21] In relation to overall justice the applicant says his case is strong. He argues that reinstatement would not be impracticable since there is no indication that it would result in the termination of someone else's employment, and that given the short timeframe since the restructure was effected on 1 July other employees will not find it difficult to re-adjust if previous arrangements (reporting lines and so forth) are put back in place.

[22] In addition Mr Sumner notes that the respondent was put on notice of the applicant's intentions when the grievance was raised in May. Finally he says that if interim reinstatement is not granted it may have an adverse effect on Mr Stuart's application for permanent reinstatement.

[23] For its part the respondent argues that it believes it has the stronger case. Whilst acknowledging that procedural issues will need to be explored fully it submits that it remains the prerogative of an employer to restructure its business in the way it

considers most appropriate and that it is open to the Authority to form a strong preliminary view that the challenge to genuineness is baseless.

[24] The respondent also says that interim reinstatement should not be granted because permanent reinstatement is now unlikely. It says Mr Stuart's old job has gone and he failed to follow up a redeployment opportunity by electing not to apply for the role of Manager, Security Services (which has since been filled.) As for the Assurance Advisor role, the respondent says that it is clear from the evidence the Authority has already heard that the role is not substantially similar to that of Manager, Risk Strategy. The new job was created with the express purpose of meeting Audit New Zealand's requirement that the respondent strengthen its financial auditing capacity. While it would encompass some aspects of Mr Stuart's old job the primary emphasis of the new role would be financial auditing. Suitable candidates would be accountants with strong auditing backgrounds. At the investigation meeting, Mr Stuart confirmed that he is not an accountant; his skills and experience are in the more general area of risk management.¹ Acknowledging that he would require retraining in order to do the Assurance Advisor's job, he said he was still considering whether he would even want it.

[25] The respondent also accepts that if it proceeds to appoint an Assurance Advisor pending the hearing of the substantive matter it does so at its own risk.

[26] Finally the respondent referred me to correspondence indicating that Mr Stuart himself asked for his severance date to be brought forward, behaviour which it says is not consistent with his current quest for interim reinstatement.

Determination

[27] The primacy of reinstatement as a remedy means that (if sought) it will usually be the likely outcome where a personal grievance of unjustified dismissal has been established. In a case involving a purported redundancy however, where a position has ceased to exist, the situation will be less certain. In support of his argument that it is open to the Authority to order that the entire restructure be "rewound" to re-create Mr Stuart's old job, Mr Sumner has referred me to *Panoho & The Vice-Chancellor of*

¹ His professional qualification is "Associate of Chartered Insurance Institute, U.K."

The University of Auckland (AA153/08, 24 April 2008.) However in that case, unlike the present, a particular position had not been identified as redundant; paragraph [58]:

“The Vice Chancellor required two full time positions to be made redundant. He did not identify particular positions as redundant but instead applied a process to select persons to be made redundant. Dr Panoho was one of them.”

[28] It is of course the respondent’s managerial prerogative to decide that a position (as opposed to a person) is redundant. In order for Mr Stuart to be reinstated to his former position, the entire redundancy will need to be found a sham. It is not appropriate for me to express a preliminary view on that issue when it has not been properly investigated, but it can be said that the respondent has put forward what appears on its face to be a genuine business reason for disestablishing the Risk Manager’s position. That is the need to move its resources into strengthening its financial auditing capacity. To establish that the redundancy was a sham the applicant will need to prove that there was another, different reason, and the pleadings have not disclosed any such reason.

[29] If he cannot, permanent reinstatement may remain available as a remedy, because it may be established that redeployment alternatives were not fully explored. Reinstatement will however depend not just on whether Mr Stuart has a personal grievance but on whether there is a substantially similar job for him to go to, and the issue of practicability will become critical.

[30] In short, the respondent’s arguments in relation to the likelihood of reinstatement have considerable weight, particularly given Mr Stuart’s evidence that he is not sure if he wants the Assurance Advisor role. Even if a personal grievance is established, the nature of Mr Stuart’s case is such that reinstatement is not as likely as it would be in most cases of unjustified dismissal.

[31] To summarise my key conclusions so far: Mr Stuart will not be irrevocably disadvantaged by waiting for relief until the substantive matter is heard. He is already, financially, in the position of someone on “garden leave.” Because of the difficulties of “unwinding” the restructure, the balance of convenience favours the respondent. Finally, because this is a purported redundancy situation which has involved the

disestablishment of a position which is unique in the respondent organisation, the likelihood of reinstatement is not as high as it would be in other unjustified dismissal cases.

[32] **Taking all these factors into consideration, I decline the application for interim reinstatement.**

[33] The issue of costs is reserved at this point.

Yvonne Oldfield

Member of the Employment Relations Authority