

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA102/10
5116045

BETWEEN JULIAN BEAVIS
 Applicant

AND TERADATA (NZ)
 CORPORATION LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Michael Quigg and Simon Martin for Applicant
 Peter Kiely for Respondent

Investigation Meetings: 19 and 20 March, 9 April and 26 August 2009

Determination: 4 March 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Julian Beavis was employed until the end of 2006 as South Pacific-Asia area leader of the Teradata division of NCR, a United States-based international corporation dealing in the sale and support of specialised information technology products. For simplicity's sake I will refer to his employer as Teradata. Based in Auckland Mr Beavis was responsible for the overall management of more than 100 staff working in various sales, consultancy, service and administrative roles for the Australian and New Zealand subsidiaries of the corporation.

[2] On 19 October 2006 Mr Beavis was told Teradata had decided to make his position redundant. His employment formally ceased on 31 December 2006. It brought to an end a career with the corporation spanning 22 years.

[3] His personal grievance application alleged the redundancy was not for genuine commercial reasons as his former role has since been re-established. He says

Teradata failed to properly consult him about the redundancy of the position and failed to properly consider opportunities to redeploy him. He also says Teradata failed to properly respond to his requests for documents relating to his employment and redundancy.

[4] The company replies that the redundancy was decided for operational reasons of efficiency and carried out fairly and sensitively.

Issues

- [5] The issues for determination by the Authority are whether:
- a. The redundancy of Mr Beavis position was for genuine commercial reasons; and
 - b. The redundancy was decided and carried out fairly – that is not pre-determined, after consulting Mr Beavis and fairly considering his responses, and with opportunities for re-deployment properly considered; and
 - c. If not, what remedies are due to Mr Beavis; and
 - d. Teradata should pay a penalty for alleged failure to provide documents.

The investigation

[6] The following witnesses provided evidence, under oath or affirmation, to the Authority's investigation: Mr Beavis, his wife Serena Blumann, Teradata Asia-Pacific regional vice-president Peter Hand, Teradata's Asia-Pacific human resources director LaTasha West-Bey, Teradata senior vice-president Mike Koehler, Teradata South Pacific human resources manager Melanie Dooney and human resources consultant Heather Braden. Each witness answered questions from the Authority and counsel. Four witnesses gave their evidence by telephone: Mr Koehler and Ms West-Bey from the United States and Ms Dooney and Ms Braden from Australia.

[7] I regret the demands of other Authority business have delayed the issuing of this determination. The patience of the parties is appreciated.

[8] In preparing this determination I have reviewed and taken account of the confirmed written statements of witnesses, their answers to the extensive questioning during investigation meetings held over four days, the available documents and the closing submissions of counsel. In accordance with s174 of the Employment Relations Act 2000 (the Act) I need not set out a record of all evidence received or the submissions. Rather this determination sets out findings on facts and legal issues and the Authority's conclusion on matters for determination.

The redundancy decision

[9] On 27 September 2006 Mr Beavis met with Mr Hand and Ms West-Bey. He expected to hear from Mr Hand about a recent conference of Teradata senior executives in the United States. Mr Beavis was surprised by Mr Hand saying he was considering a proposal to disestablish the area leader role held by Mr Beavis and to set up a position as general manager of sales based in Sydney.

[10] Mr Hand's evidence was that he developed this proposal through planning discussions with Mr Koehler and Teradata's chief financial officer Bob Young at the recent US conference.

[11] Mr Beavis and Mr Hand differ in their accounts of how much Mr Hand explained that day about his reasoning for the proposal. What is clear is that on the following day Mr Beavis telephoned Mr Hand and asked for written notes about the meeting and asked for more time to respond with feedback. Mr Hand agreed to those requests.

[12] In an email on 5 October Mr Hand provided a summary of "*several options*" being considered for Teradata's plans in 2007. Those options included a sales general manager role based in Australia or having the area leader role based in Australia, or keeping the status quo. He said no decisions had been made but Teradata was "*looking for ways to improve efficiency and effectiveness of our business*". He identified more than 90 per cent of existing customers, resources, revenue and new business opportunities as being based in Australia. Mr Beavis was asked to provide feedback in writing to be followed by a meeting "*to discuss and progress*".

[13] Mr Beavis responded on 10 October with a 13-page discussion paper attaching some related background documents. He noted Mr Hand had told him the proposals for change to the management structure were “*not about my personal performance*”. After commenting on suggested changes to roles of two other managers, Mr Beavis described the notion of replacing his role with a Sydney-based sales manager as “*a bad move*”. On the option of shifting the area leader role to Australia Mr Beavis said he “*would not discount relocating to Australia out of hand but it would represent a material change in the terms of my employment*”. He was prepared to “*consider carefully*” such a change if it were offered to him.

[14] In the detailed analysis of the business and the area leader’s role, Mr Beavis also set out information about other companies’ structures and the prospect for costs savings from changes to Teradata’s management structure. He also challenged whether having an area leader living in New Zealand was a problem and doubted relocation of that role would help business growth. He noted that he had “*stayed put*” in Auckland because Mr Hand was “*happy with it*” and Mr Beavis had “*never been made an offer to move*”.

[15] On 11 October Mr Beavis and Mr Hand had a telephone conference and discussed the proposal. Ms West-Bey also attended the conference and took notes. These notes say the call lasted for more than one hour with Mr Hand telling Mr Beavis that he would “*share his feedback with [Mr Koehler] and they would take that into consideration – weigh the options and make a decision*”. Mr Hand also said his next meeting with Mr Beavis would be face-to-face at a date yet to be set.

[16] The next day Mr Beavis sent Mr Hand a follow-up email setting out his “*short version*” of his thoughts. He said sticking with an area leader was the best option which left the question of where the role was to be located. He thought a better way of getting business growth would be to employ more sales people rather than incurring costs in relocating his role.

[17] Mr Hand acknowledged the comments of Mr Beavis in a reply email five days later. He said he planned “*to submit my recommendation before the end of the week*” and “*let [Mr Beavis] know the decision by the end of the week*”.

[18] The two men, again with Ms West-Bey in attendance, met in Sydney on 19 October. In a meeting lasting around half an hour Mr Hand told Mr Beavis that the area leader role would be made redundant and a sales manager position would be established in Sydney.

[19] During a further discussion with Mr Hand later that day Mr Beavis asked for the date of redundancy of his position to be set as 31 December 2006. That date would allow him to get remuneration related to business revenue for the fourth quarter of the year, the period when most revenue was recognised.

[20] Mr Beavis also told Mr Hand he did not agree with the decision but did not want to “*burn any bridges*” and made arrangements about how staff would be told of the changes.

[21] In an email of 21 October Mr Hand confirmed the redundancy decision and a termination date of 31 December. Mr Beavis was not expected to report to the office after 30 November.

[22] In the following weeks arrangements were made to confirm the final pay for Mr Beavis. This included more than \$400,000 (gross) in redundancy compensation and more than \$150,000 in accrued leave entitlements.

[23] On 5 December Mr Beavis saw an internal email advertising the position of General Sales Manager-ANZ to be located in Sydney. Applications for that position closed on 11 December. On 18 December a position as Sales Manager-NZ was also advertised internally with applications closing on 25 December.

[24] On 21 March 2007 Mr Beavis, through counsel, raised a personal grievance with Teradata saying the redundancy process was a sham and “*predetermined*” with no consideration given to redeploying him to the Sydney manager position or offering him the opportunity to be considered for it.

[25] In bringing his case to the Authority Mr Beavis also says Teradata has, after ending his employment, recreated the area leader role earlier declared redundant. He says this demonstrates a lack of genuine commercial reasons for his redundancy.

Was the redundancy for genuine commercial reasons?

[26] Mr Beavis submits Teradata failed to give an adequate commercial reason for the redundancy decision and there was no supporting documentation for the “operational efficiency” reason given.

[27] An employer is entitled to make its business more efficient by reorganisation or other cost-saving steps.¹ Such business decisions – if made genuinely and not for predominantly ulterior motives – are for the employer to make, not the Authority.²

[28] Teradata’s commercial reasons were apparent and given at the time of meeting with Mr Beavis to discuss the future function and location of area management. Mr Hand’s email of 5 October summarised those reasons – describing them as “key drivers” – and the responding paper of 10 October prepared by Mr Beavis analysed those reasons in some detail. In light of the ‘drivers’ Teradata considered important, it was entitled to make its decision to have some of the area leader role taken over by the regional manager and for a new position of sales general manager to be located in Sydney. And it was entitled to make that decision whether or not the changes were ultimately as successful as Teradata might have hoped.

[29] From the evidence of Mr Hand and Mr Beavis there appears to have been discussion at various levels for some time about whether the area leader should be based in New Zealand. Following a visit to Australia in 2005 NCR president Mark Hurd had expressed some reservations about the arrangement. Mr Hurd had discussed this with Mr Beavis, Mr Koehler and Mr Hand. At that time Mr Hand was content for Mr Beavis to do his job by frequently flying from Auckland to Australia. However questions over that arrangement appear to have resurfaced in planning discussions between Mr Koehler, Mr Young and Mr Hand during the US conference referred to earlier. There is nothing necessarily improper in this, whatever views Mr Beavis might have had about being able to satisfactorily attend to the bulk of Teradata’s business in Australia by regular travel. Teradata was entitled to take the view it wanted senior managers based closer to the 90 per cent of its customers in Australia.

¹ *G N Hale and Son Ltd v Wellington Caretakers IUOW* (1990) ERNZ Sel Cas 843, 849 (CA).

² *Simpsons Farms Ltd v Aberhart* [2006] 1 ERNZ 825 at [67].

[30] Significantly Mr Beavis himself acknowledged in his 11 October discussion with Mr Hand that if Teradata were to “*start with a clean piece of paper*”, the area leader role would most likely be based in either in Sydney or Melbourne.

[31] I find the genuineness of Teradata’s decision at that time – which is the point at which it is to be assessed – may not now be impugned by subsequent changes in management roles. Teradata, in its closing submissions, acknowledged the business had by early February 2008 returned to a structure including an area leader role similar to the one previously held by Mr Beavis and disestablished late in 2006. However I accept the evidence of Mr Hand that this resulted from four factors not foreseen or known at the time of the decision to disestablish the role held by Mr Beavis. These factors were the ‘spin off’ of Teradata from NCR announced in January 2007, the transfer of Mr Hand to Tokyo in March 2007, a change of role for another manager who wanted to stay in Sydney for family reasons, and the departure of another manager who was dissatisfied about not receiving an appointment to a particular role.

Was the redundancy carried out fairly?

[32] The fairness of how Teradata decided on the redundancy of the position held by Mr Beavis and to terminate his employment may be considered in response to these questions:

- a. Was Mr Beavis properly informed about how the decision would be made and by whom?
- b. Was the decision about redundancy of his position made before he was consulted?
- c. Was the possibility of redeployment properly raised and considered?

Who made the decision and how?

[33] Mr Beavis submits he was not properly provided with information about the prospect of redundancy and the opportunity to comment on it in a manner consistent with Teradata’s obligation under s4(1A)(c) of the Act. He says he was also entitled to

have access to the decision-maker which he suggests was not Mr Hand but Mr Koehler.

[34] I find there was an adequate opportunity for Mr Beavis to comment on the prospective redundancy. Mr Hand met and explained the proposal and arranged a subsequent meeting. Meanwhile Mr Hand had provided an email summarising the options being considered – which included the status quo – and Mr Beavis was able to provide a detailed and thoughtful 13-page written response. That response was discussed in a subsequent meeting. The meeting was by telephone conference but that is not unusual in an international business. A subsequent email from Mr Hand to Mr Beavis dated 17 October indicated he was considering factors raised by Mr Beavis among other elements. The fact Mr Beavis did not agree with Mr Hand’s subsequent decision about that input does not make the consultation inadequate.

[35] I accept that Mr Hand – as he acknowledged in his evidence – was unclear in what he told Mr Beavis about who would make the final decision on those options. Ms West-Bey’s notes of the 11 October telephone conference record Mr Hand as saying he would “*share*” the feedback from Mr Beavis with Mr Koehler and “*they would take that into consideration – weigh the options and make a decision*”. Mr Hand also sent Mr Beavis an email describing the decision as being a recommendation that he would “*submit*”. He also referred to letting Mr Beavis know about “*the decision*” – using the definite article. He did not, to put it in grammatical terms, use a possessive pronoun or determiner and write “*my decision*”. This gave Mr Beavis the impression that Mr Koehler was to have a role in the decision, not just Mr Hand alone.

[36] However it is apparent from the evidence of Mr Hand and Mr Koehler – which I prefer on this point as the most likely – that the decision to proceed with the redundancy of the Auckland-based area leader role was one made by Mr Hand. That prospect was canvassed by Mr Hand and Mr Koehler during a discussion at the US conference but it was Mr Hand who had to make the final call on it as a matter of management in the Asia Pacific region for which he was responsible. Mr Hand advised Mr Koehler of his conclusion in a telephone call but was not seeking permission or a decision from Mr Koehler. Mr Hand’s earlier references to a recommendation and not referring to the decision as his alone, again most likely,

arose from an element of embarrassment about having to make a management decision about the career future of someone with whom he had worked with as a fellow senior manager, colleague and friend for some years. It was clumsy but Mr Beavis was not denied access to the actual decision-maker, in this case, Mr Hand.

Was the decision made before consulting Mr Beavis?

[37] Mr Beavis submits consultation with him about the future management structure was merely a “charade” as Teradata had already made the decision to make his position redundant. Two elements of evidence were said to support this proposition: (i) a failure of Mr Hand to prepare a written ‘business case’ for prior approval by Mr Koehler before telling Mr Beavis about the redundancy proposal; and (ii) Ms Braden saying Ms West-Bey and Ms Dooney told her on 27 September that the role of Mr Beavis would be made redundant.

[38] The evidence of Mr Beavis and Ms Braden was that Teradata had a standard process for prior approval from senior management of any proposal for the redundancy of positions within the business. However even if that were the case, and it were routinely followed, I am not satisfied that this evidence establishes it should have been followed in making the decision about the area leader position held by Mr Beavis. The examples given by Mr Beavis and Ms Braden concerned staff rather than the type of senior executive position held by Mr Beavis. There is, as a well-known matter of commercial practice, less rigidity in how decisions about a single senior executive role might be made. Such practice is not inherently unfair provided the affected executive has a reasonable opportunity for input which is then properly considered before a decision is made. I have already found it was in this case.

[39] I was not convinced by the evidence of Ms Braden that the prospects for Mr Beavis’ position were stated as baldly as she suggests by Ms West-Bey and Ms Dooney. Rather, having heard from all three women, I find it more likely Ms Braden misunderstood the discussion as being about a decision rather than an option. I accept the evidence of the two more senior human resource practitioners that Teradata’s purpose in consulting with Mr Beavis, as discussed with Ms Braden, was to consider the options.

Was redeployment properly considered?

[40] Mr Beavis submits Teradata failed to meet its duty to consider constructive alternatives to redundancy,³ particularly whether he should have been redeployed to a Sydney-based role – either as area leader or as general manager for sales.

[41] His evidence was that he was prepared to move to Sydney, had indicated to Mr Hand and other Teradata executives a willingness to do so, and had confirmed this in his written feedback on the proposals for change. He says he was neither offered the role in Sydney nor even a chance to compete for it. I have not considered the issue in relation to the New Zealand sales manager role because Mr Beavis accepted in evidence that he would probably not have wanted such a role because of its reduced scope and opportunity.

[42] In his evidence Mr Hand accepted that had Mr Beavis applied for the Sydney-based sales general manager role when it was advertised within Teradata from 5 December 2006, his prospects for appointment would have been “*very high*”.

[43] There is a conflict of evidence between Mr Hand and Mr Beavis on the content of a conversation which is important to deciding this point. Mr Hand says he had informal discussions with Mr Beavis about the prospect of transferring to Sydney. He recalls Mr Beavis saying something like “*you could not afford me*”.

[44] In his written witness statement Mr Beavis said he did not apply for the Sydney job because he was told he would not be considered. Mr Hand’s evidence was that Mr Beavis asked during the consultation process whether he could apply for the Sydney role and was told he could. Asked about that evidence during the Authority’s investigation, Mr Beavis said Mr Hand “*may well have said that*” but could not recall. Mr Beavis said he was “*strongly of the opinion, perhaps erroneously, that I would not be seriously considered*”.

[45] Mr Beavis had indicated as early as his discussion paper of 10 October that he was open to moving to Sydney but was equivocal about the prospect. He wrote that he would not discount it “*out of hand*” but would consider it carefully if offered the

³ *G N Hale & Sons Ltd v Wellington Caretakers IUOW* (1990) ERNZ Sel Cas 843, 849 (CA).

role of area leader relocated to Sydney. He also indicated that it would come at a cost as “*a material change in my terms of employment*”.

[46] However, once Mr Hand had decided that the role of area leader was to be disestablished, Mr Beavis did nothing to indicate an interest in the new sales general manager role in Sydney. I find Mr Hand did talk with Mr Beavis about that prospect but Mr Hand was not required to do more because Mr Beavis clearly indicated he was not interested in the job. Rather, in the time from being advised of the redundancy on 19 October until his employment ended on 31 December, Mr Beavis showed no desire to remain with the business in any capacity. His evidence was that, while initially shocked by the redundancy decision, this had “*worn off a bit*” after three weeks and he considered taking the Sydney sales role would be seen as “*a demotion to a second level job*”.

[47] In all those circumstances I find no failure by Teradata of its duty to Mr Beavis to constructively consider alternatives to ending his employment by reason of redundancy.

Were requests for documents properly dealt with?

[48] A considerable amount of time was spent during the Authority’s investigation in questioning Teradata witnesses over whether particular documents were or were not prepared and whether and when documents should have been provided to Mr Beavis and his counsel.

[49] Mr Beavis submits he should have been provided with prompter access to documents held by Teradata about him and his employment, particularly in relation to the ‘business case’ for the redundancy of his position, any FAS 112 documentation prepared by Teradata, and notes prepared by Ms West-Bey of meetings with him.

[50] I do not accept the evidence has established that some of the documents sought ever existed. The availability of others was complicated by three factors: the relocation of Mr Hand from Australia to Japan in March 2007; Ms West-Bey shifting from Australia to the United States; and the ‘spin off’ of Teradata from NCR announced early in 2007 and effective before this matter came to the Authority.

[51] I accept Teradata was tardy in providing the typewritten notes prepared by Ms West-Bey, which were provided after a direction by the Authority in October 2008 but not in response to a request by Mr Beavis' solicitors made one year earlier. I might take that point further had it not emerged in the opening minutes of the Authority's first investigation meeting that Mr Beavis had prepared his evidence relying on handwritten notes he had made in the meetings with Mr Hand in September and October 2006. Copies of those notes had not been provided to the Authority or Teradata and arrangements were promptly made to have them produced later that day. Given the hot contest over the content of those conversations, the contemporaneous notes made by Mr Beavis were additional relevant documents and should have been provided earlier under the terms of the Authority's directions for the investigation.

Determination

[52] For the reasons given I find the disestablishment of the position held by Mr Beavis was for genuine reasons and the termination of his employment for redundancy was fairly carried out. His personal grievance application is dismissed.

Costs

[53] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so, Teradata may lodge and serve a memorandum as to costs by no later than 28 days after the date of this determination. Mr Beavis would then have 14 days from the date of service of that memorandum to lodge a reply before the Authority considers and determines costs. No application for costs will be considered outside this timeframe without prior leave.

Robin Arthur
Member of the Employment Relations Authority