

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 17
5351273

BETWEEN NICHOLAS BAIN
Applicant

A N D NATIONAL INSTITUTE OF
WATER & ATMOSPHERIC
RESEARCH LIMITED
Respondent

Member of Authority: K J Anderson

Representatives: Nicholas Bain (the Applicant) in person
Penny Shaw, Counsel for Respondent

Investigation Meeting: 26 July 2012 at Auckland

Submissions Received: 3 September 2012 from Respondent
10 September 2012 from Applicant

Date of Determination: 17 January 2013

DETERMINATION OF THE AUTHORITY

Introduction

[1] The applicant, Mr Nicholas Bain, claims that he was unjustifiably dismissed effective from 7 July 2011. Mr Bain asks the Authority to find that he has a personal grievance and award him the remedies of reimbursement of wages for six months and compensation for humiliation, loss of dignity and injury to feelings in the sum of \$35,000. Mr Bain also claims that he is entitled to be paid a bonus payment of \$15,000 under the terms of his individual employment agreement.

[2] Conversely, the respondent, the National Institute of Water & Atmospheric Research Limited (NIWA), says that the dismissal of Mr Bain was justifiable due to the genuine redundancy of his position. NIWA also denies that Mr Bain has an entitlement to any bonus payment.

[3] The Authority received comprehensive evidence and submissions from Mr Bain and evidence for him from Ms Carolyn Cox, Dr Kristian Slack and Mr Peter Carroll. Evidence for NIWA was received from Dr Bryce Cooper, Dr Mary-Anne Dehar, Mr John Morgan, Mr Robin Murdoch and Ms Kate Thompson. The Authority has also received a substantial number of documents relevant to the matters at issue; and closing submissions have been received from both parties. All of the material and evidence provided by both parties has been closely examined by the Authority, albeit it may not be referred to specifically in this determination.

Background

[4] Mr Bain was employed by NIWA as the Manager – Commercialisation. He commenced his employment in 2004. Mr Bain held a relatively senior management role and reported to Dr Bryce Cooper, the General Manager – Strategy; who in turn reported to the Chief Executive Officer of NIWA, Mr John Morgan.

[5] NIWA is a Crown Research Institute (CRI) incorporated as a company in 1992. Ownership of the company is held equally between two shareholding Cabinet Ministers and the government appoints a board of directors to govern the company: it is expected to be financially viable.

[6] In late 2009, the Minister of Research, Science and Technology established a CRI Taskforce. The Taskforce was asked to recommend ways to position the CRIs so that they could respond strategically to the needs of their users and drive future economic growth. The Taskforce released its report and recommendations to the government in February 2010.

[7] The evidence of Mr John Morgan, the CEO of NIWA, is that the recommendations made by the Taskforce included a reference to “Technology Transfer” in that technology transfer was to be a core responsibility and a greater focus for CRIs. And the government was to discourage CRIs from investing in commercialisation activities “just for their own profit maximising purposes.”

[8] The further evidence of Mr Morgan is that during 2010, NIWA was experiencing tougher times financially and by the fourth quarter of the year, the import of the global financial crisis (GFC) was becoming more significant. It became clear that key clients were cutting back on spending. Consideration of the budgets for

2011 revealed a \$10m drop in revenue and a conclusion was reached that the financial situation was likely to be relatively long term.

[9] Mr Morgan says that an effort was made to decrease costs across the organisation and the Executive Management Team was asked to conduct a review of NIWA's personnel capability, compared with revenue opportunities, and identify where the organisation had, or was likely to have, surplus capacity. Also there was a requirement to look at everything the business was doing and assess if it was being done in the most efficient and effective way; given the impact of the GFC and the recommendations of the CRI Taskforce.

[10] The evidence of Mr Morgan is that the Executive Team members were left to make appropriate decisions about reviewing their respective teams with the most important issue being that the cost structure, capability and capacity for the future was consistent with income opportunities.

[11] On 17 February 2011, there was a manager briefing session conducted by Dr Mary-Anne Dehar, the General Manager – Human Resources. Due to another commitment, Mr Bain was unable to attend. Mr Bain says that he was expecting to receive a briefing later from Ms Dehar but this did not occur. Nonetheless, it seems that Mr Bain soon became aware of the general nature of what was discussed at the briefing session.

The review of Mr Bain's position

[12] By an email dated 21 February 2011, Mr Morgan informed all NIWA staff of the operational review that was to take place. Upon viewing the content of Mr Morgan's email, Mr Bain phoned Dr Cooper and inquired if his position was subject to the review. Dr Cooper responded that at that point, he did not know if Mr Bain's role would be reviewed as he had not discussed the matter with Mr Morgan.

[13] On 23 February 2011, Dr Cooper phoned Mr Bain and advised that Mr Bain's role was to be part of the NIWA operational review and that redundancy was a possible outcome, with a consultation document being available the following week.

The evidence of Mr Bain is that Dr Cooper was at the Auckland office on 25 February 2011 but there was no contact between the two men.¹

[14] The evidence of Mr Bain is that by 1 March 2011, he had not heard anything further about the review of his position and he sent an email to Dr Cooper asking for written advice as to what was going to happen regarding the review of his role within NIWA. Dr Cooper responded the same day:

Dear Nick,

As I outlined to you in our telephone conversation on February 23, NIWA is currently undertaking an operational review to ensure that our internal capacity aligns with future science delivery requirements and business processes. We are reviewing a number of positions across both Science and Support to determine whether the position is still required, or whether that area of work should be handled differently in future.

Your position of Manager – Commercialisation is affected by the review, and I would like to meet with you to provide you with the review proposal and talk through this, in order to gain your feedback and input before any decisions are made. I would like to meet with you in Auckland on Friday 4 March at 1.30pm in the Executive Meeting Room.

The purpose of the meeting would be for me to talk through what is proposed, for us to discuss the proposal and its implications, and you would then have the following two weeks to think it through and give your views on what should happen. Based on our consideration of the feedback received about the review proposal, a decision would then be made on the position moving forward. We anticipate being able to advise you of the outcome on or around March 28.

In considering changes of this nature, NIWA endeavours to ensure that employees are fully informed, understand the rationale for and form of the proposed change, have the opportunity to provide input to decisions about the change, are treated fairly, and that their employment security is protected to the extent possible.

The meeting will be attended by myself and Dr Mary-Anne Dehar, General Manager – Human Resources. You are very welcome to bring a representative or support person with you to the meeting, which can be any individual of your choosing. Please advise if you have any difficulties with the proposed meeting date or time.

Yours sincerely,
Dr Bryce Cooper
General Manager – Strategy

¹ Dr Cooper is based in Hamilton.

Meeting 4 March 2011

[15] On 4 March 2011, Mr Bain and his support person met with Dr Cooper and Dr Dehar. The main purpose of the meeting was for Dr Cooper to present to Mr Bain a document (proposal) that Dr Cooper had prepared; entitled *Consultation Document Review of Manager – Commercialisation Position*. The proposal first set out some background whereby:

NIWA has identified the need to undertake a review to ensure that the organisation structure, skill mix and staffing levels are aligned with market demand going forward, and allow us to remain competitive. A number of positions are being reviewed across both Science and Support to determine whether the position is still needed in our structure, or whether that area of work should be handled differently in future. Your position is one of those being reviewed. This consultation document outlines the proposed disestablishment of the position of Manager – Commercialisation and use of external resource to fulfil some of the duties currently performed by that position and ceasing others.

[16] It was proposed that the position of Manager – Commercialisation would be disestablished; effective from 28 June 2011. Mr Bain was informed that:

The rationale for this proposal is that we expect the organisation's commercialisation activities will significantly diminish to remain aligned with the expectations by government on how we interact and add-value to the economy and individual businesses.

The emphasis has shifted and is continuing to shift, away from commercialisation by CRIs to knowledge and technology transfer by CRIs to businesses. This shift was signalled by the Shareholder in accepting the recommendations contained in the Report of the Crown Research Institute Taskforce February 2010. The Taskforce Report recommended that CRIs be required to "move intellectual property from their balance sheet into the private sector as soon as possible". Also, since that time, the government has moved to establish a National Network of Commercialisation Centres with the express purpose of better linking resource organisations with business to enable this to happen.

[17] Mr Bain was also informed that:

Our proposal is to disestablish the position of Manager, Commercialisation, significantly reducing commercialisation activities and engage external resources to carry out any remaining activities. These will include:

- Assessment of business opportunities that may arise from our scientific research;

- Use of specialist expertise and industry itself to recommend the best pathway for transferring these opportunities to the business sector.

[18] A timeline was provided with Mr Bain being required to give feedback to the proposal by 18 March 2011.

Mr Bain's feedback to the proposal

[19] In a *Feedback Document* dated 25 March 2011, Mr Bain provided a very comprehensive response to the proposal to disestablish his position. Mr Bain commented in considerable detail on the proposal contained in the consultation document given to him on 4 March 2011. He also discussed CRI Taskforce matters, knowledge transfer, National Networks of Commercialisation Centres and a number of other matters; including the NIWA review process and the terms of his individual employment agreement relating to the notice period. In regard to the latter issue, Mr Bain observed that the employment agreement that he entered into in June 2010 reduced the notice period in his earlier agreement (2007) from six months to three months. Mr Bain suggested that the reduced notice period was due to NIWA anticipating that restructuring was to occur, but this appears to be somewhat speculative.

[20] At a meeting held on 25 March 2011, Mr Bain presented his feedback document to Dr Cooper and Dr Dehar. Mr Bain was represented by an experienced employment lawyer. The outcome of the meeting was that Dr Cooper indicated that Mr Bain's feedback document would require close consideration before a response could be given.

[21] Via a letter dated 28 March 2011, Mr Bain's lawyer placed "on record" Mr Bain's concerns and expanded upon the feedback document.

Response to Mr Bain's feedback document

[22] Via a letter dated 1 April 2011, Dr Cooper responded to Mr Bain's feedback document. In summary, Dr Cooper conveyed that:

After careful consideration of the feedback provided, the decision has been made to proceed with the review proposal, including the disestablishment of your position of Manager – Commercialisation effective from July 7 2011. We would have preferred to convey this decision in a face-to-face meeting with you, but note your request at

our earlier meeting of March 25 that you did not wish to attend a further meeting, and that the decision should be conveyed to you in writing.

[23] The letter informed Mr Bain that, having made the decision to disestablish his position, under the terms of Mr Bain's employment agreement, NIWA would consult with him in regard to possible alternative employment options. While Dr Cooper informed that NIWA had not identified any suitable alternative positions or arrangements, Mr Bain was encouraged to review current vacancies on the NIWA careers website and present any suitable alternatives for due consideration by 6 April 2011. In the event that Mr Bain was unable to identify an alternative employment option, three months' notice of the termination of his employment would commence on 7 April 2011. Mr Bain was also informed of his redundancy compensation entitlements and the availability of EAP services.

[24] Subsequently, Mr Bain requested early departure from NIWA rather than working out the notice period and he was paid three months' pay in lieu of notice and redundancy compensation of \$54,514.

The claim of unjustifiable dismissal

[25] In the statement of problem filed with the Authority, Mr Bain claims that the termination of his employment by reason of the redundancy of his position was unjustifiable; procedurally and substantively. In regard to the reasons for his claims, Mr Bain refers the Authority to a letter dated 5 July 2011. This letter was presented by Mr Bain's lawyer (at that time) and raised a personal grievance. In summary, the grounds for the grievance are:

- (a) Mr Bain believes that NIWA was simply "going through the motions" in regard to the reasons for the redundancy of his position and that there was no substantive justification for the disestablishment of his role;
- (b) NIWA failed to put forward any business case that identified how the business could operate more efficiently without Mr Bain's role in its structure. Further, there was not a genuine business case for disestablishing the specialist key role of Mr Bain;

- (c) Mr Bain's feedback regarding the proposal to disestablish his position clearly demonstrated that, contrary to NIWA's rationale, the company's commercialisation activities were very strongly aligned with the government's expectations, and the disestablishment of Mr Bain's role would have the opposite result. And rather than engage with Mr Bain over this "critical" point, NIWA possibly failed to address it at all;
- (d) Consultation and good faith requires more than receipt and acknowledgment of feedback and NIWA failed to properly consider, analyse or clarify the feedback that Mr Bain provided; with an open mind;
- (e) NIWA's business planning and board decisions show that NIWA intended to continue investing in and researching significant existing and new commercialisation opportunities in the future. An example was given of NIWA exploring the possibility of commercialising its farmed hapuka intellectual property;
- (f) Evidence of the predetermination of Mr Bain's redundancy exists in regard to the attitude of his superiors towards him from the time that the proposal to disestablish his position was announced. For example:
 - (i) Dr Cooper avoided direct contact with Mr Bain from the time that the proposal was announced until just a few days before Mr Bain left NIWA;
 - (ii) The Chief Executive of NIWA, Mr Morgan, "studiously" avoided any contact with Mr Bain that could involve Mr Morgan discussing NIWA's proposal with him during the consultation process. Nor did Mr Morgan acknowledge to Mr Bain that NIWA was proposing to disestablish his position even though Mr Bain was a member of the Senior Management Team.

[26] Finally, it was submitted for Mr Bain that:

In light of the above, and the matters set out in Mr Bain's more detailed report, there can be no doubt that the decision to make Mr Bain redundant was predetermined, inconsistent with government expectations and was implemented without consultation and good faith. In these circumstances it is clear that he has a personal grievance for unjustified dismissal, on both procedural and substantive grounds, and accordingly that he is entitled to remedies.

[27] In his evidence and submissions to the Authority, Mr Bain expanded upon his views in regard to commercial opportunities for NIWA and the commercialisation of intellectual property. Mr Bain is especially critical in regard to the failure of NIWA to provide him with information pertaining to any cost/benefit analysis that may have been conducted by NIWA during an assessment of the economic viability of using external consultants rather than retaining the role of Manager – Commercialisation.

[28] Mr Bain submits that NIWA has not demonstrated that there has been any significant reduction in its commercialisation activities, or any scaling back of science activities with commercialisation possibilities.

Analysis and conclusions

[29] As with any dismissal, the test the Authority must apply is whether the decision to dismiss Mr Bain on the ground of redundancy was what a fair and reasonable employer would have done in the circumstances².

[30] And then, as was held by the Employment Court in *Simpsons Farms Ltd v. Aberhart*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 and not for the Authority or the Court, even under s.103A.

[31] The above statement from the Employment Court is consistent with the findings of the Court of Appeal in *GN Hale & Son Ltd v. Wellington etc Caretakers etc IUOW*⁴ where the Court held that:

An employer is entitled to make his business more efficient, as for example by automation, abandonment of unprofitable activities, reorganisation or other cost saving steps, no matter whether or not the business would go to the wall. A worker does not have a right to

² Section 103A, Employment Relations Act 2000 as it was then.

³ [2006] ERNZ 825

⁴ [1990] 2 NZLR 1079

continued employment if the business can be run more efficiently without him.⁵

[32] Further:

When a dismissal is based on redundancy, it is the good faith of that basis and the fairness of the procedure followed that may fall to be examined on a complaint of unjustified dismissal.

[33] Then, in a discussion about the statutory concept of unjustified dismissal, Richardson J. stated that:

The statutory concept of unjustified dismissal is concerned with both the reason for the dismissal and the manner in which it was handled; with the substantive justification and with procedural fairness.

Application of the law to the circumstances of Mr Bain

[34] As set out above, the inquiry of the Authority is into the substantive justification of the dismissal of Mr Bain and with procedural fairness.

The genuineness of the redundancy

[35] The essence of Mr Bain's argument largely challenges the substantive justification of the decision made by NIWA to make the position of Manager – Commercialisation redundant. As outlined earlier in this determination, Mr Bain presented a comprehensive response to the initial proposal to make his position redundant. And while the response from Dr Cooper did not canvass all of the submissions made by Mr Bain, Dr Cooper did respond to the main issues raised; in addition to referring Mr Bain back to the consultation document and the Taskforce Report.

[36] Clearly, Mr Bain disagrees with NIWA's assessment of commercialisation projects and opportunities for the business and/or how they should be managed. Mr Bain's views are supported to some extent by the evidence of Dr Slack and Mr Carroll; witnesses for Mr Bain. The professional expertise of these two gentlemen (and of course that of Mr Bain) has not been questioned. It is possible that their views of the matters at issue are entirely valid and that the effluxion of time may prove Mr Bain to be correct in his response to the NIWA decision to make his position redundant.

⁵ Cooke P, delivering the leading judgment.

[37] However, as set out in the judgments of the Employment Court and the Court of Appeal (*Simpsons Farms Ltd* and *GN Hale & Sons Ltd*), providing the employer acts genuinely and not out of ulterior motives, a business decision to make the position of an employee redundant is for the employer to make; not for others, including the Authority or the Courts.

[38] An analysis of the overall evidence does not raise any suggestion that the decision by NIWA to make Mr Bain's position redundant was other than genuine. I conclude that this was a business decision that a fair and reasonable employer was entitled make, given the overall circumstances.

The procedure adopted by NIWA

[39] Mr Bain is critical of the "attitude" adopted by NIWA during the consultation process. Mr Bain says that he expected that Dr Cooper would have personally met with him earlier to advise of the revision of the role of Manager – Commercialisation, rather than communicate in the manner that occurred. Mr Bain is also critical of Mr Morgan not acknowledging that NIWA was proposing to make Mr Bain's position redundant; particularly given that Mr Bain had been a part of the Senior Management Team since 2008; and that Mr Morgan's office was very close to his. While it may be true that there could have been a more sensitive approach adopted by Dr Cooper and Mr Morgan toward Mr Bain, pertaining to the loss of his position, I do not find that there was anything unfair or unreasonable in regard to the procedure adopted by NIWA; including the consultation/feedback process.

[40] Of particular concern to Mr Bain is that NIWA failed to give him a written reference. Indeed, Mr Bain goes further than that and he alleges that during a meeting with Dr Cooper on 30 March 2011, he was advised by Dr Cooper that he should withdraw his "legal position"⁶ as it would not look good from a potential employer's perspective. Mr Bain says that Dr Cooper told him that if he did not withdraw his legal position, NIWA would not give him a reference.

[41] Dr Cooper acknowledges his discussions with Mr Bain on 30 March 2011 and accepts some of Mr Bain's account of what was discussed. However, in regard to the provision of a reference, Dr Cooper attests that when Mr Bain asked him if he would

⁶ Being an apparent reference to the letter dated 28 March 2011 from the lawyer engaged by Mr Bain at the time.

provide a written reference, he informed Mr Bain that the policy of NIWA was not to provide written references but he was happy to act as a verbal referee in the event of an approach from a prospective employer. [The NIWA policy regarding references was also confirmed by Dr Dehar.]

[42] Mr Cooper does not accept that he made the comment attributed to him by Mr Bain in regard to Mr Bain's legal position, but he accepts that he did indicate that pursuing legal action would be "stressful" for Mr Bain. However, I do not accept that there was any proven malice intended towards Mr Bain.

Determination

[43] On the basis of the overall evidence presented to the Authority, while I conclude that the overall circumstances pertaining to the redundancy of Mr Bain's position could have been handled in a more sensitive manner, I find that the decision to make Mr Bain's position redundant and the manner in which it proceeded was not unfair or unreasonable. It follows that I find that the dismissal of Mr Bain on the ground of redundancy was not unjustifiable and that his claims are not successful.

The bonus claim

[44] Mr Bain claims that he was entitled to be paid a \$15,000 bonus that was due to be paid after 30 June 2011. As I understand it, this claim relates to an "at risk" performance incentive provided for within clause 14 of Mr Bain's employment agreement:

14. Performance Management

- 14.1 A Performance and Development Review meeting will be held between you and your manager after completion of the financial year. The purpose of this meeting is to discuss and evaluate your achievements in terms of both work performance, and the development activities undertaken over the previous 12 months, and to set new performance and development objectives for the next 12 months.
- 14.2 On completion of the review, NIWA shall determine the proportion of 'at risk' performance incentive, if any, that shall be paid to you as a lump sum in respect of the preceding year or part year.
- 14.3 A six month Progress Review meeting will occur mid-way through the financial year, to discuss progress made on performance and development objectives, and amend these where relevant.

- 14.4 In addition to the annual performance and development review meeting and six month progress review meeting, your manager is expected to provide feedback, coaching and support in relation to your performance and development on an ongoing basis throughout the year.

[45] Mr Bain submits that NIWA failed to adhere to clause 14.3 (above) in that the six month review did not occur. While this may be so, Mr Bain has not produced any evidence that substantiates his claim that he should have been paid a bonus of \$15,000. Nor is there any evidence about how this sum was calculated; hence the claim cannot succeed due to a lack of tangible evidence to support it.

Costs

[46] Costs are reserved. The parties are invited to resolve this issue if they can. In the event that a resolution cannot be reached, NIWA has 28 days from the date of this determination to file and serve submissions. Mr Bain has a further 14 days to respond.

K J Anderson
Member of the Employment Relations Authority