

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 87
5424345

BETWEEN JAMES ELLIOTT
Applicant

AND THE CHIEF EXECUTIVE OF THE
DEPARTMENT OF CORRECTIONS
Respondent

Member of Authority: P R Stapp

Representatives: James Elliott in person, In attendance Claire Alderton
support person
Peter Chemis and Andrea Pazin, Counsel for the
Respondent

Investigation Meeting: 8 and 9 July 2014 at Wellington

Submissions by: 24 July 2014

Determination: 2 September 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is an employment relationship problem about redundancy and the reason for the disestablishment of Mr Elliott's position in June 2012. Mr Elliott has claimed reinstatement (first claimed on 22 April 2014 in the statement of problem filed in the Authority), lost wages plus interest, and compensation. He is also seeking costs. The sums for his claims have been provided in a separate memorandum subsequent to the filing of the statement of problem and prior to the Authority's investigation meeting.

[2] The Department of Corrections (Corrections) has denied all Mr Elliott's claims. The Department of Corrections says that the decision to disestablish Mr Elliott's position of Chief Auditor was associated with a genuine restructuring. It denies any ulterior motive as claimed by Mr Elliott. He says for his employment

ended with Corrections due to his performance, the alleged bias of the decision makers and their negativity towards him.

The issues

[3] There are two primary issues in this matter. They are:

- (a) Whether the redundancy was genuine?
- (b) Whether the redundancy and reassignment processes were fair and reasonable?

[4] There are a number of secondary issues that arise from the nature of Mr Elliott's claims in his statement of problem which I will address as I need to in the facts and my determination as follows.

[5] There have been written submissions filed by both parties on their cases. Their submissions have been considered by me in detail, and pursuant to s 174 (b) of the Employment Relations Act 2000 I see no need to set out a record of all the evidence heard or received and to record or summarise the submissions made by the parties. The parties can be reassured I have read their comprehensive and full submissions and considered them in detail.

[6] The parties attended mediation, and it falls on the Authority to determine the matter to resolve the employment relationship problem.

The facts

[7] Mr Elliott was employed by Corrections in the position of Chief Auditor based in Wellington. The position was disestablished in June 2012 as part of a significant department-wide change process. Mr Elliott headed the internal audit team. This comprised ten positions where through the change process seven positions (including Mr Elliott's) were disestablished. The change process involved Corrections adopting what it has called a co-source model. This meant that the internal audit function was to be performed through a streamlined, centralised internal team working in partnership with an external audit provider with the appropriate expertise. Corrections engaged KPMG by tender to undertake the co-sourcing partnership.

[8] Mr Elliott was consulted in regard to the restructure. The restructuring involved a high level management group from within Corrections. The restructure was called “*Unifying our efforts*”. The subgroup of Corrections formed to govern the restructuring process involved Mr Ray Smith, the Chief Executive, Ms Christine Stevenson, Deputy Chief Executive, and Mr Vince Arbuckle, General Manager Human Resources. Mr Graham Carruthers, the General Manager Office of the Chief Executive (change of title to General Manager Governance and Assurance following the 2012 restructuring) was involved in the consultation, feedback and decision making process. Mr Elliott responded in the consultation and provided feedback.

[9] The meetings at the high level involved no records being kept of discussions, although under a request for information from Mr Elliott after the restructuring, a summary was provided to him of Corrections’ thinking.

[10] The details of the *Unifying our efforts* restructure proposal were included in documents with an impact assessment. It was proposed that the model would work best within a centralised team based at Corrections national office in Wellington so the proposal involved disestablishing three auditor positions based in Auckland and Christchurch and increasing the Wellington based auditor positions from three to six. The proposed model also involved decreasing the size of the team and accessing expertise and technical skills externally from one of the big four accounting firms. As a result the proposal reduced the size of the internal audit team to six positions. It was considered that the design of the model meant there was no necessity for a chief auditor role internally. The proposal was for the co-source partner to provide the management of the audit activity within the total assurance model and the appropriate delegations provided internally.

[11] The consultation involved Mr Carruthers meeting with the internal audit team as a group to discuss the restructuring proposal. He also had one-on-one meetings with each staff member, including Mr Elliott, and this appears to have occurred on or about 10 May 2012.

[12] There is one factual difference between Mr Elliott and Mr Carruthers in their evidence about whether or not Mr Carruthers said to Mr Elliott that the chief auditor role *no longer exists*. In this respect I have accepted Mr Carruthers’ evidence on the point, not because I disbelieve Mr Elliott, but I have considered that, first, the comment has to be considered in regard to the whole process and secondly it has to be

considered in the context in which the parties were discussing feedback and options on the arrangements. In any event it is common ground that the proposal included disestablishing the chief auditor role, although Mr Elliott disagreed with the proposal. This finding means that Mr Carruthers more likely than not had not predetermined an outcome before Mr Elliott's opportunity to have some input. In other words Mr Elliott has not established that Mr Carruthers was biased.

[13] It is common ground that Mr Elliott was supportive of the new model although he challenged the disestablishment of the chief auditor role. Mr Elliott provided written feedback about the proposal. Mr Carruthers confirmed that the high level group considered the feedback received, which was supported by a summary of feedback provided. The group was not persuaded by the feedback from Mr Elliott that the chief auditor role be retained. The group also decided to proceed with the proposed co-source arrangement.

[14] During this time Mr Elliott's performance was an issue with his managers and he now has an issue about one of his manager's behaviour towards him that he has described as bullying. A performance improvement plan was put into place, although initially it had been delayed. It is common ground that the issues with the audit function existed before Mr Elliott started in the audit team. Clearly, Mr Elliott had issues about his manager's involvement with him over various matters to do with the performance improvement plan and his work. Since Mr Elliott's performance was a consideration before any restructuring I do not accept that the decision to disestablish his position of chief auditor was related to his performance. The scope and nature of the restructuring was too extensive to support any ulterior motive as claimed by Mr Elliott.

[15] This conclusion is also supported by the following:

- a. Mr Elliott's manager was replaced by Ms Debra Butler, national Manager Risk and Assurance, who took over managing him in January 2011. Mr Elliott challenged his 2011 performance assessment and there was no change made following moderation. The performance improvement plan was subsequently put in place.
- b. An opportunity arose where Mr Elliott agreed to a secondment on a special project.

- c. Mr Elliott supported the model, but not the loss of the internal leader.

[16] Returning to the restructuring, Mr Elliott applied for reassignment to only one role and decided that other roles that were available were not suitable for him. Mr Elliott was not reassigned and in early August 2012 he challenged the decision. He requested, and received, the results of the panel deliberation. He met with the chair of the panel where he raised issues about the reassignment process in general and how he had been scored and why he had not been reassigned to the role. The chair of the panel recognised issues with some aspects of the proposal including some of the scoring, but was clear that the outcome would not have been a changed result.

[17] After that there was an independent external reviewer appointed. The reviewer spoke with Mr Elliott and the panel chair and revised the process and relevant information. A report was provided and it was confirmed that there were some shortcomings in the reassignment process related to Mr Elliott but *they were not of significant magnitude to have altered the final result*, having regard to the successful candidate's length of relevant operational experience.

[18] The decision not to reassign Mr Elliott was confirmed in August 2012. Mr Elliott's employment was terminated for redundancy on 30 August 2012. He was paid out and, at his request he did not work out his notice period. Ms Debra Butler National Risk and Assurance manager says she contacted KPMG about the possibility of taking on Mr Elliott without any documentation. She says KPMG declined and this was supported by an affidavit from Ms Souella Cumming a partner of KPMG.

Determination

[19] I hold that the restructuring was genuine. Further that there was no ulterior motive aimed at Mr Elliott personally, even though there were performance matters in the background and that these were being dealt with separately. There was a circuit breaker found for the performance issues and involved an agreement by both parties for a secondment before any restructuring.

[20] The extent, nature, size and rationale of the restructure do not make it likely that there was any ulterior motive to personally make Mr Elliott redundant when his position was disestablished for another arrangement. The evidence from Corrections does not support a conclusion that there was a linkage with performance and/or Mr Elliott's manager's behaviour as the cause for his dismissal. This was supported by

Mr Carruther's evidence. Mr Carruthers says he had the opportunity to do something new in Corrections given his experience and the highly sophisticated service line risk and assurance functions already in place. He says that the co-sourcing model would involve significant change to Correction's risk and assurance using external expertise and experience from a major accounting firm. This was supported by the engagement of one of the major external accounting firms as an audit partner. Corrections would have up to date knowledge and technical expertise, thought leadership and the development of an audit plan within a total assurance model, together with managing the internal audit function. The view was that this would lead to a better quality assurance operation to support Corrections. Essentially this involved outsourcing to a provider. I understand that Mr Elliott has his own genuine views about the proposal and in particular what has happened since. He claims that there has been very little change and now Corrections has reintegrated the function. I hold that Corrections has been able to support that there was a significant difference in the roles and that the co-source arrangement was put in place for a purpose. This involved a three year contract with KPMG. Since then the arrangement has undergone realignment. There has been regular training, reduced hours on audits, the number of audits have increased, improvements in the relationships with management, business improvements and a number of projects introduced to improve and streamline the audit process based on KPMG's expertise. Although Corrections did not provide me with the detail to support this information, I am satisfied of its veracity from Ms Butler's evidence. As such I am satisfied that Corrections has been able to show benefits that support the contention that the restructure was not aimed at Mr Elliott personally and to remove him.

[21] The process followed by Corrections in the restructuring and reassignment involved consultation on the proposal, including consultation on the fundamentals of the restructuring and the impact on Mr Elliott's position involving the disestablishment of the chief auditor role. He had the opportunity to provide feedback and that feedback was given consideration before the decision was made and finalised. Corrections acted fairly in the consideration of options in regard to Mr Elliott, including a preliminary result being provided and checking out the prospects in regard to employment protection.

[22] Mr Elliott's claims are dismissed.

Costs

[23] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority