

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 425
5456959

BETWEEN JENNY LOWE
 Applicant

 A N D AHI ROOFING LIMITED t/a
 FLETCHER BUILDING
 ROOFING TILE GROUP
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Garry Pollak, Counsel for Applicant
 Penny Swarbrick, Counsel for Respondent

Investigation Meeting: 16 September 2014 at Auckland

Submissions Received: 18 September 2014 from Applicant
 19 September 2014 from Respondent

Date of Determination: 15 October 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Applicant, Ms Jenny Lowe, claims that the Respondent, Fletcher Building Roofing Tile Group (RTG), has breached the terms of her employment agreement. Ms Lowe, who was offered a fixed term position with RTG, claims that RTG is required to pay her either the outstanding balance of her fixed term period of employment, or alternatively a redundancy payment.

[2] RTG denies that Ms Lowe is entitled to either of the sums of monies claimed.

[3] The issues for determination are whether or not:

- Ms Lowe resigned from EQR
- RTG breached the terms of Ms Lowe's employment;
- Ms Lowe should be paid for the remainder part of the fixed term agreement with RTG; alternatively whether



- Ms Lowe should be paid a redundancy payment based on clause 8 of the EQR IEA
- Ms Lowe has been unjustifiably dismissed
- Ms Lowe has received disparate treatment

Background facts

[4] Fletcher Building (FB) is a leading infrastructure and building materials manufacturer, employing more than 18,000 people across 40 countries in many business units. The business units fall within one of the five operating divisions: (i) Infrastructure Products, (ii) Building Products, (iii) Laminates and Panels, (iv) Distribution, and (v) Construction. Each operating division has its own Chief Executive and management structure, and makes autonomous decisions in respect of employment issues.

[5] There are also five group/corporate divisions which provide support and services to the operating divisions and individual business units: (i) Business Strategy & Performance, (ii) Finance, (iii) Company Secretarial & Legal, (iv) Corporate Services, and (v) Information Communications & Technology. The Group HR team is part of Corporate Services and provides specialist HR services including recruitment, to the operating division business units. Most, if not all, of the business units have a dedicated HR team.

[6] Ms Lowe commenced employment as Executive Assistant (EA) with Firth Industries, a business unit owned by FB, on 17 October 2005. In that role Ms Lowe undertook the usual functions of an EA for the then General Manager. Mr David Peterson was subsequently appointed as the Firth Industries General Manager in 2006 and Ms Lowe continued performing the role of EA to Mr Peterson.

[7] In 2011 Mr Peterson was offered and commenced a new role as General Manager for FB Earthquake Recovery Division (EQR), a project specific division of FB established specifically for the repair of residential homes damaged by the earthquakes in Christchurch.

Transfer to Christchurch

[8] The EQR General Manager role was based in Christchurch, and as Mr Peterson had a need for an EA, there was extensive internal and external recruitment undertaken. Ms Lowe, who applied for the role when it was advertised on the FB recruitment website, was successful in her application and was appointed to the role in September 2011.

[9] Ms Lowe's appointment was subsequently treated as an inter-company transfer from Firth Industries to EQR. Upon her transfer to Christchurch, Ms Lowe said her sick leave, long service leave, and annual leave were transferred seamlessly from Firth Industries to EQR. However it was noted in clause 1.1 of the EQR IEA that: "*You will at no time be, or be considered, an employee of any other company in the Fletcher Building group.*"

[10] Ms Lowe said she was advised to consider and seek advice on a new proposed written Individual Employment Agreement (the EQR IEA). She agreed to the proposed EQR IEA but only after a clause which mirrored a redundancy provision which had been included in her original employment agreement with Firth Industries was included. This was agreed and was included in the EQR IEA as clause 8.2 which stated

If the Company gives you notice of termination of your employment on grounds of redundancy, the company will pay you redundancy compensation of 6 weeks' base salary for your first complete year of service plus 2 weeks' base salary for each additional complete year of services up to a maximum of 26 weeks base salary in total. Payment for an incomplete year of service will be pro-rated by calculating the number of completed weeks of service.

[11] Following her transfer to EQR Ms Lowe's salary had been \$79,500.00 per annum.

[12] In September 2013 Mr Peterson applied for and was offered the role of General Manager for FB Roof Tile Group (RTG). RTG manufactures and sells stone-coated metal roof tiles. It is a small global business with approximately 400 employees, based in New Zealand, Malaysia, Philippines, Japan, North America and throughout Europe. There are approximately 100 employees based in New Zealand

[13] RTG is structured into 4 regions. Each headed by a Regional General Manager. The global leadership team comprises the RTG General Manager, four Regional General Managers and leaders of the group functions of finance, technical, HR and supply chain.

[14] During September and October 2013 Mr Peterson was in America undertaking various courses and it was during this time that his appointment to the RTG General Manager role was finalised and announced.

Ms Lowe's Resignation

[15] Mr Peterson said he returned to New Zealand in late September and upon his return Ms Lowe had come to his office and handed him a letter of resignation. He said at that time

Ms Lowe had told him that she was resigning because she intended to move to Auckland to live with her fiancé. She had handed him a letter of resignation which stated:

Dear David,

It is with regret and sadness that I write this letter of resignation to you, effective 22 November 2013. ...

I have thoroughly enjoyed my role, the challenges and the people at Fletcher EQR and it has been an extremely difficult decision for me to do.

On a personal note, I would like to thank you for all your support, assistance, mentoring and for being my boss and a friend for the last eight years. I can never thank you enough for all you have done over the years even when going through difficult times.

I am happy to assist in any way for a smooth transition to occur in regards to my replacement.

[16] Mr Peterson said his response to Ms Lowe's resignation had been to suggest to her that there was no point in her leaving her employment at EQR until she had a new job to go to. He said he had advised her to move her date of termination until after the Christmas break so that she could get the statutory holiday payment and give herself time to find alternative employment.

[17] At the Investigation Meeting Ms Lowe confirmed that she had resigned from her employment at RTG, but attributed the reason to an issue with the lease expiry on a property she had been leasing in Christchurch. She said that Mr Peterson had resolved this issue for her, and she had subsequently withdrawn her resignation.

[18] Ms Lowe denied that she had told Mr Peterson that she was moving back to Auckland to get married because her fiancée's divorce had not been finalised. Ms Lowe said that she had rescinded the notice and the HR department for EQR had ceased recruitment for a replacement for her.

[19] Mr Peterson agreed that he had authorised the underwriting of part of the lease on the property Ms Lowe was leasing in Christchurch. However Ms Lowe did subsequently tell him that she would wait to leave EQR until she found another job. He stated that her resignation was not withdrawn; it was simply in abeyance pending confirmation of the leaving date. He stated that he had no doubt that Ms Lowe was leaving EQR to move to Auckland; it was simply a matter of timing.

[20] He further stated that at that time there had been no suggestion of any role being available for Ms Lowe at RTG.

[21] Ms Lowe said she had no prior knowledge of Mr Peterson's appointment to the position of RTG General Manager, which was based in Auckland, until the second week of November 2013 when he had accepted the role. Shortly after this Mr Peterson departed for Japan. Whilst he was overseas Ms Lowe said that she had to liaise with RTG and EQR IT departments to set up Mr Peterson's new email address and mailbox at RTG and that she had also assisted in booking flights for him to Japan and other travel arrangements as part of the RTG work. Ms Lowe also organised the transfer of Mr Peterson's belongings from Christchurch to RTG in Auckland.

RTG Restructure and Project Administrator role

[22] In December 2013 Mr Peterson visited Auckland and spent some time at RTG for familiarisation purposes. He explained that a key role of his new position as RTG General Manager was to review the location of the RTG global executive team. It had been determined that to do so effectively, a team should be set up to undertake a project (subsequently named Project Skyline by the RTG Chief Executive) for the relocation of the RTG head office function to the USA. The intention was that Mr Peterson would then relocate to the USA himself. The timeframe for the project was within a year.

[23] While Mr Peterson was in Auckland he met Ms Pauline Chong who was the EA to the RTG General Manager. As a result of what he had learned whilst at RTG during that week, Mr Peterson said he began to form the view that with Project Skyline as a key focus, and his proposed departure to the USA, he had little requirement for an EA, however he perceived a requirement for a project administrator during the relocation period. Whilst he did not know whether Ms Chong had the requisite project administrative skills to undertake that role, he knew that Ms Lowe did do so.

[24] Mr Peterson said he emailed the RTG Chief Executive and advised him of the changes that he wanted to make and that he was seeking approval to put in Mr Dan Mulvagh, a consultant who had previously worked at Firth Industries, as the Interim Global HR Manager to assist him with Project Skyline and the relocation of the project to Cincinnati. The appointment of Mr Mulvagh was to be for a period of up to eight months.

[25] Ms Lowe said she received a text message from Mr Peterson on 2 January 2014 asking if she would be interested in an eight month fixed term contract working for him at RTG and asking when she could start. Ms Lowe said that Mr Peterson did not make any mention to her of a particular project in the emails.

[26] In an email sent by Mr Peterson dated 2 January 2014, he stated:

Hi Jenny, Happy new year. Hope you had fun with your celebrations. Can I ask you when you told Michele you were leaving and would you be interested in an eight month contract working for me in RTG. If so, when could you start?

[27] Ms Lowe had responded in a text message saying:

Hi, David. Happy new yr to you and yr family too. Hope u had a grt holiday. Yes wld be extremely happy working for u at RTG and with 8 mth contract. Didnt tell Michele when leaving however she new I wld be leaving. Wld giv 4 wks notice from 13 or is it too cheeky to resign from 6 Jan. I wld need 4.5 wks before starting. Th u J.

[28] Mr Peterson responded:

In my view you resigned a while back and all we didn't do was agree a final date. I've told Michele you had resigned and that she would need a new assistant. Its reasonable to tell Michelle that you have been working out your notice and the last day is 24 Jan. I can let her know if you like? Start with RTG week of 27 Jan? We can confirm everything on week of 13th. You will be doing some work with Dan as I have him on a temp as a ??? Manager. ... Best we keep confidential as Pauline doesn't know.

[29] Ms Lowe explained that Michele Creagh was the incoming EQR General Manager. Ms Creagh's appointment was to be effective approximately in mid-January 2014, however she had visited EQR on 20 December 2013.

[30] Ms Lowe said she was happy with the suggested arrangements and emailed Ms Creagh on 8 January 2014 advising:

Further to my notice I gave to David late last year, ... I have been offered a position by David in Auckland and will be resigning from my role in Christchurch. My last working day will be 24 January. ...

[31] Mr Peterson said that on 8 January 2014, he had also emailed Ms Creagh stating:

Hi Michele,

... Thought I should let you know that Jenny has extended her notice and now confirmed her last day at EQR as Friday 24th Jan ...

She will be working for me on an 8 month contract at EQR after that

...

[32] Mr Peterson also emailed Ms Ruth Knewstubb, at that time HR Manager for EQR, to advise her that Ms Lowe's last day at EQR would be 24 January 2014 and stating:

... I've got a temp role for Jenny at RTG and she has accepted the offer for an 8 month contract. ...

As the offer at this stage is for a fixed term agreement, I assume that leave etc gets paid out?

[33] In that email Mr Peterson referred to Ms Lowe's accrued leave being paid out on termination with EQR because she had resigned, and also because the role he was creating for her was fixed term employment which would have different entitlements to that of permanent employment.

[34] Ms Knewstubb confirmed to him that accrued leave would be paid out to Ms Lowe, and Mr Peterson said this action made it clear to him that Ms Knewstubb knew that Ms Lowe's departure from EQR was to be treated as a termination of her employment and not an internal transfer.

[35] Ms Knewstubb had not finalised the termination arrangements for Ms Lowe due to her own employment at EQR ceasing in late January 2014.

[36] On 15 January 2014 Ms Lowe received an email from Mr Peterson telling her that he was waiting for the "final okay" and that an agreement would be sent to her as soon as approval was received from Mr Tim Richards, the RTG Chief Executive.

[37] On 17 January 2014 Mr Peterson emailed Ms Lowe and confirmed that as he now had formal approval from Mr Richards for her position, the new IEA confirming the fixed term nature of her appointment would be sent to her: "*Hi Jenny, Approval received from Tim so we will get the documents to you next week*". He copied this email to Mr Mulvagh and Ms Kylie Dale, at that time HR Manager for RTG.

[38] Mr Peterson confirmed that, other than the eight month fixed term nature of the appointment, he and Ms Lowe had not discussed the terms and conditions of the new appointment.

[39] Ms Lowe said she had not asked why the appointment was to be only for an eight month period as she had assumed that there would be on-going employment thereafter. She had also assumed that the role she had been offered was that of EA to Mr Peterson as the RTG General Manager.

[40] Mr Mulvagh said that he had not been directly involved in any discussions with Ms Lowe about her move to RTG, however he had been aware early in his period of employment that Mr Peterson considered that he did not require an EA, but that Project Skyline would require a Project Administrator. As he knew Ms Lowe from his previous employment at Firth Industries, he had agreed with Mr Peterson that she would be an ideal appointment as Project Administrator.

[41] Mr Mulvagh said that he had also been aware that Ms Lowe was leaving EQR as she had become engaged and was intending to move to Auckland to be with her fiancé, and his understanding had been that they were getting married.

[42] Ms Dale said that Mr Peterson had advised her that Ms Lowe was fully qualified to undertake the Project Administrator role, and that she had resigned from EQR to move to Auckland to be with her fiancé.

[43] After Mr Peterson had received notification of Mr Richards' online authorisation, he had emailed Mr Mulvagh and asked him to draft up an IEA (the RTG IEA) for Ms Lowe to sign. Mr Mulvagh said that the terms of the RTG IEA were advised by Mr Peterson to be for a fixed term period of eight months at a salary of \$78,000.00 per annum. Mr Mulvagh said it had been very clear from his discussion with Mr Peterson that the Project Administrator role was to be a 'new start' arrangement and that there would be no continuity of employment from Ms Lowe's EQR employment.

[44] Ms Dale said Mr Mulvagh had passed this task on to her and confirmed that her instructions were that it was to be new employment, not a transfer. There was no approval for anything other than the basic terms and Ms Lowe's previous service with FB would not count in the new role.

[45] Ms Dale said she had already prepared the Project Administrator position description for the consultation process with Ms Chong about the proposed restructure and disestablishment of her role as EA to the RTG General Manager. Mr Mulvagh had signed off on the position description, and Ms Dale had also used the standard RTG fixed term employment agreement format to create the RTG IEA for Ms Lowe, incorporating the position, term and salary details as advised to her by Mr Peterson and confirmed by Mr Mulvagh.

[46] During the week commencing 3 February 2014, Mr Peterson flew to Sydney for an executive meeting and did not have time to review or sign any documentation before he left. Ms Dale said that she had prepared and left the documentation which included the RTG IEA on Mr Peterson's desk for his attention on his return to RTG.

[47] However, Mr Peterson had not returned to RTG following the trip to Sydney and his employment had suddenly been terminated, with his resignation effective from 14 February 2014.

[48] Ms Lowe said that on 13 February 2014 she had checked with Human Resources and had been advised that her personnel file would be transferred to RTG and all her outstanding annual leave, sick leave, and long service leave entitlements would be transferred. She had also been informed that she would not be receiving any final wages due to the transfer and that she did not need to have an exit interview, which was standard for all departing EQR employees, because she was transferring employment within FB.

Events on and post- 14 February 2014

[49] Ms Dale said that with Mr Peterson's sudden departure from RTG she was concerned about how it would affect Ms Lowe who had not received a RTG IEA but who was expecting to commence employment at RTG on Monday 17 February 2014. She had spoken of her concerns to Mr Mulvagh who had said that he would telephone Ms Lowe and tell me not to come to work at RTG until the situation was clearer.

[50] Mr Mulvagh said that he had a telephone conversation with Ms Lowe on Friday 14 February 2014, the day that Mr Peterson's resignation was announced to the business. Mr Mulvagh said he had made it clear to Ms Lowe that he did not know what would happen with her employment and that she should not come in to RTG on Monday 17 February 2014, or at all, until they had some clarity about her situation.

[51] Ms Lowe said that during the telephone conversation Mr Mulvagh had said to her quite frankly that he: "*couldn't tell whether she had a job or not*", but he had asked her not to come into work on Monday 17 February 2014 and he said he had been told this by Mr Murray Adams, the RTG Acting General Manager.

[52] Ms Lowe said she had asked Mr Mulvagh whether she needed to seek legal advice and he had advised her to do so, telling her that from a legal point of view she: "*had a job though I had no employment agreement*".

[53] Ms Lowe said she had asked Mr Mulvagh if he could email Mr Adams to ask for a communication about her position and he had agreed to do so. Mr Mulvagh said he had emailed Mr Adams on 14 February, that same day. In the email he said:

Murray, I have spoken to her, as you would expect she is very upset.

She has asked if you could call her to explain the situation as you are the decision maker and she would appreciate some instruction in writing requesting her not to attend work on Monday.

[54] Mr Adams had emailed Ms Lowe on 18 February 2014 apologising for not being in contact sooner and advising her that either himself or Mr Mulvagh would be in contact the next day to set up a time for a meeting.

[55] Ms Lowe said that following the telephone conversation with Mr Mulvagh on 14 February 2014 she had contacted Mr Pollock. She had also spoken to Ms Creagh at EQR in Christchurch who had spoken to Mr Adams on her behalf. Later that day Ms Creagh confirmed to Ms Lowe that she had spoken to Mr Adams and that RTG needed a few days to finalise matters.

[56] Ms Lowe said that on 17 February 2014 she had arisen early and got ready to go to work and then waited at home, which was something that she did over the next few weeks. Mr Mulvagh and Ms Dale both said that Ms Lowe had been advised not to present for work on 17 February 2014 or thereafter pending resolution of the situation.

[57] On 17 February 2014 Ms Lowe said she had seen a news release regarding redundancies at Fletchers Pacific Steel business which said:

Staff who are not offered employment will remain employees of FB to operate the steel mills at Otahuhu until it is decommissioned, following which they will be given the opportunity to retrain and move to other groups within the FB group.

[58] Ms Lowe said that in her experience this opportunity to retrain and move to other groups did occur within FB and she took this as confirmation that if there was no role for her at RTG, there would be other roles within FB.

[59] Mr Mulvagh had written to Ms Lowe on 19 February 2014. He explained that because there was no IEA and because Mr Peterson was not there to tell them what, if anything, had been agreed, he felt that he and Ms Dale needed to meet with Ms Lowe to ascertain what her expectations were, and to talk to her about her employment status.

[60] By letter dated 19 February 2014 Mr Mulvagh had written to Ms Lowe stating in the body of the letter:

We appreciate you had had verbal conversations and exchanged email correspondence with David Peterson relating to a fixed term position as project administrator on Project Skyline (the global restructuring project that David was going to undertake in his

capacity as GM RTG). Although no employment documents (ie a fixed term individual employment agreement) had been offered, we understand that you had an expectation that you would be commencing employment with RTG on 17 February 2014.

We accept that you have an expectation of employment on a salary of \$6,500 per month with an end date of September 2014 and we understand your concern that you were advised not to commence on the day previously discussed with Mr Peterson. Therefore in good faith we would like to meet with you to discuss your expectation of employment. Regretfully, given the circumstances of senior management and the need to review the business strategy and resourcing requirements, there is a possibility that the fixed term position of Project Administrator may be deferred or disestablished.

[61] The letter also confirmed that a meeting would be held on 21 February 2014.

Meeting held on 21 February 2014

[62] Ms Lowe said she had been concerned on receiving the letter from Mr Mulvagh to be informed of a salary which was less than what she had been paid at EQR and that there was an indication that the end date would be September 2014. It was the first time she had been aware of 'Project Skyline' or of the Project Administrator position. She had been alarmed at the suggestion that the purpose of the meeting was to discuss in more detail the reasons why her position may be disestablished. She considered that, in this situation, she would be entitled to the balance of her fixed term agreement or to a redundancy payment.

[63] The meeting held on 21 February 2014 was attended by Ms Lowe and her father as Mr Pollock was not available. Mr Mulvagh and Ms Dale were present at the meeting.

[64] Ms Dale said that her understanding of the purpose of the meeting on 21 February 2014 was to hear Ms Lowe's view of the terms that had been offered to her in relation to the role with RTG, and to discuss with her the RTG operational changes. However it had become apparent during the meeting that Ms Lowe expected that an alternative job within FB would be made available to her, and that that was all she was prepared to discuss.

[65] Mr Mulvagh said that by the time of the meeting on 21 February 2014 he knew that Project Skyline had been put on indefinite hold and had been informed that his services were no longer required, but to continue in the role at RTG pending Ms Knewstubb's arrival. He had thought it was an opportunity to resolve the issues with Ms Lowe whilst he was still employed.

[66] However, during the meeting on 21 February 2014 Ms Lowe had been reluctant to talk about any options other than redeployment. He had told her that it was possible to arrange some form of financial package for her.

[67] Ms Lowe said that she had been shocked at the meeting on 21 February 2014 to hear that with Mr Peterson's departure the role that she had come to Auckland to fulfil and the employment opportunity in RTG no longer existed, and she realised that she had in fact been made redundant before the engagement had even started.

[68] Mr Mulvagh had advised her that there were two options, a financial payment or finding another role within FB, saying that a financial payment would be the easiest option.

[69] Ms Lowe said that the meeting had been cordial, however, the view had been reached that there was no point in continuing with the meeting and therefore agreement was reached to have another meeting with a view to exploring with her either a suitable alternative role or a financial settlement.

Letter dated 23 February 2014

[70] Mr Mulvagh said he received an email from Mr Pollak on 23 February 2014 setting out Ms Lowe's view that she had agreed to an eight month employment position in Auckland with an expectation of on-going employment. In reliance on the discussions she had had with Mr Peterson, she had relocated to Auckland; she was a FB employee, and wished to remain so. After stating that FB had: "*a very clear obligation to redeploy Jenny to a suitable position*", the email concluded: "*We do not accept Jenny's role as a Fletcher's "EA" is redundant, especially considering a former employee was just given a role she was imminently capable and qualified to do ...*".

[71] Mr Mulvagh said it had been obvious to him that RTG had a markedly different view to Ms Lowe as to her status. As far as RTG was concerned, Ms Lowe was to be a Project Administrator and the fixed term was to be treated as a totally new engagement given that she had resigned from EQU some months previously, and not a transfer.

[72] Ms Dale said that on the afternoon of 19 February 2014, she had received an email from payroll at Fletcher Building Shared Services asking her to send through some paperwork for an inter-company transfer for Ms Lowe.

[73] She had responded by saying that it should not be treated as an inter-company transfer as Ms Lowe had resigned from EQR and was going to start a period of fixed term employment with RTG as a new period of employment. Ms Dale said she had not been surprised that there appeared to some confusion on the part of the EQR HR department as not

only did EQR have a new General Manager, who had only been appointed a short time earlier, but also Ms Knewstubb had left and a new HR Manager had just commenced employment.

[74] After sending her email, Ms Dale said she had become aware that a search of the EQR files had been undertaken. A termination form prepared by Ms Knewstubb had been located but it had not been submitted, which she had assumed was because Ms Lowe's leaving date had changed a number of times. She said the termination form confirmed that it was a termination and not a transfer of Ms Lowe's employment.

Meeting held on 26 February 2014

[75] On 26 February 2014, Ms Lowe said she had attended a second meeting with Mr Mulvagh and Ms Dale accompanied by Mr Pollak. At the meeting, Mr Pollak had advised on her behalf that she wished to remain an employee of FB and that she was willing to undertake any type of administration role and retraining. He advised them of three administrative roles of which he had been aware within FB.

[76] Mr Pollak had clarified that Ms Lowe had not moved to Auckland to get married as suggested by Ms Dale and Mr Mulvagh, and he mentioned that that information had been a surprise to her father at the previous meeting.

[77] Ms Dale said the purpose of the 26 February 2014 meeting had been to discuss a formal restructuring proposal as confirmed in a formal letter sent to Ms Lowe. During the meeting, Ms Dale said that the aim was to attempt to reach a common understanding of Ms Lowe's employment terms as it had been suggested from Ms Lowe's communications to RTG that her view of what had been established as the employment terms and RTG's views were different, to give and receive feedback about the proposal to disestablish the role, and to try to resolve the employment relationship problem which had become apparent.

[78] Ms Dale said that the draft RTG IEA she had drawn up and the position description for the Project Administrator role had been presented to Ms Lowe at the meeting. She had also drawn up a consultation document and the discussion points contained therein had been discussed at the meeting.

[79] The draft RTG IEA was entitled: "***FIXED-TERM INDIVIDUAL EMPLOYMENT AGREEMENT***" and stated that it was to commence on 17 February 2014 and end on 26 September 2014 unless terminated earlier. The salary was confirmed as \$78,000.00 per annum and clauses 6.1 and 7.1 referred to redundancy:

6.1 As this agreement is for a fixed term period, it may only be terminated prior to the Expiry Date by the Company for serious misconduct ... medical incapacity or redundancy.

7.1 If the Company gives notice of termination of your employment before the Expiry Date on the grounds of redundancy, the Company will give you at least one month's notice or payment in lieu thereof. No redundancy compensation will be payable..

[80] Ms Dale said it had been clear from the discussion that there was no real alternative to disestablishing the Project Administrator role. This had not been challenged by either Ms Lowe or Mr Pollak and the focus had been on finding some other role for Ms Lowe within FB. Ms Dale said there was no suitable role available within RTG but she had made inquiries and found that there were two positions being advertised within FB which might have been suitable for Ms Lowe and for which she could apply.

[81] Ms Dale said it had been made apparent to Ms Lowe that RTG was not in a position to instruct other FB business units to employ her as this was not standard practice within the FB group in which each business units operated on an autonomous basis regarding recruitment, however, she had said she would do what she could to persuade other FB business units to offer Ms Lowe a suitable role.

[82] Ms Lowe said that at the meeting on 26 February 2013, she had been presented with a new proposed draft RTG IEA and she had been surprised by the contents. It had been dated 7 February 2014, the payment cited in it was incorrect and the role was incorrect. There was no redundancy provision. She said she had never been asked to agree to the draft RTG IEA.

[83] She confirmed that it had been agreed at the meeting that the priority was locating another position within FB for her. She said nothing had been discussed about a severance or redundancy payment at the meeting and the subject never arose at this time.

Letter dated 27 February 2014

[84] Mr Mulvagh wrote to Ms Lowe on 27 February 2014 and formally advised her of one month's notice of redundancy. He reiterated RTG's commitment to assist her to secure a suitable alternative position within another FB business unit. He said he had made it clear that RTG could not direct another business unit to employ Ms Lowe and that she would have to compete for roles with other applicants.

[85] In the letter dated 27 February 2014, it was stated:

... As discussed during the meeting (and also provided in a discussion document for your records), due to changes within our business and the review of the global restructuring strategy (Project Skyline) there is no longer a resource requirement for the intended new position of Project Administrator – Project Skyline. As a result, we formally give you one month's notice of redundancy effective Wednesday 26 February 2014.

We confirm our commitment to assist to secure a suitable alternative position within another Fletcher Building company. Unfortunately as our span of influence and authority falls short of being able to direct another Fletcher Building company to appoint employees it is likely that you will have to participate in a competitive recruitment process. To facilitate your redeployment we will proactively work with FB Recruitment to make introductions and endorse your employment applications. To further assist you we will be happy to provide career transition support sessions with Kaye Avery a career transition coach.

...

For clarity, unless a suitable redeployment opportunity is secured prior to 27 March 2014 we confirm your employment with AHI Roofing Limited, known as Fletcher Building Roof Tile Group ("the company") will terminate. ...

The commencement date of your employment with the company was agreed as 17 February 2014. Therefore, we will engage you on the intended terms that were verbally discussed by David Peterson with you. To ensure both parties have a common understanding of the contractual terms and conditions a copy of the fixed term individual employment agreement (which was prepared prior to David Peterson's departure from the business) was given to you at the meeting yesterday.

As the company does not have meaningful work for you to do currently, we do not require you to come into the workplace. However we will pay you from 17 February 2014.

[86] Ms Lowe said that she had been upset by the letter because she had never agreed:

- to be a project administrator;
- to accept a salary reduction;
- to give up her redundancy entitlement which had increased over many years of employment with FB;
- to sign the draft RTG IEA or agreed to the terms contained therein; or
- to accept the reduced salary level detailed in the RTG IEA which subsequently formed the basis of her final pay, including notice and holiday pay.

[87] The only condition that Ms Lowe said she was in agreement with was that the appointment with RTG was for an eight month fixed term.

[88] Following the meeting on 26 February 2014 Ms Lowe had been entered onto the FB payroll. On 4 March 2014, Ms Lowe said she had expressed her concern that she had not received any payment from FB as a result of which Ms Dale telephoned her on 5 March 2014 and told her that she had to complete some paperwork associated with new employees. The paperwork, which was identified as FB Payroll Shared Services and headed: "*New Employee Remuneration & Position Form*" was completed by Ms Lowe, who was then entered on to the FB payroll.

[89] Ms Dale also advised that she had instructed EQR to pay her (Ms Lowe) her holiday pay entitlement which had been backdated in accordance with her employment having ended when she left Christchurch.

Alternative Recruitment Efforts

[90] Following the meeting held on 26 February 2014, Ms Lowe said she received an email from Ms Dale regarding setting up a meeting with Ms Tina Yakas, FB Recruitment, for the afternoon of 27 February 2014. Ms Yakas oversaw the recruitment activity of the recruitment business partners who dealt with all recruitment in FB. Ms Dale said she had told Ms Yakas that it was very important to RTG to find a role for Ms Lowe and highlighted her experience and abilities in the hope that Ms Yakas would be able to influence recruitment decisions.

[91] Ms Dale said that because Ms Lowe's salary was rather high for EAs within FB, any available role was unlikely to match the salary Ms Lowe had been receiving when she left her employment at EQR, so she had told Ms Yakas that RTG would be receptive to a request from an employing business unit within FB to subsidise Ms Lowe's salary for a time.

[92] Mr Mulvagh said that he had authorised the offer to underwrite Ms Lowe's salary as RTG felt some responsibility for Ms Lowe and the situation in which she found herself and they had agreed to boost up any shortfall in salary differential.

[93] Ms Lowe said that she believed that Ms Dale had made only cursory efforts to redeploy her.

[94] Ms Dale said that other than the initial contact with Ms Yakas, she had also sent emails to the General Managers of the different FB Divisions, encouraging them to let her know of suitable positions for Ms Lowe in their business units and also to let her know if there were any impending vacancies. She had set out Ms Lowe's capabilities in the

applications and had also sent a similar email to all her HR contacts in the Building Products Division asking for their assistance.

[95] As time continued and Ms Lowe was still not successful in securing a role, Ms Dale said she had followed up again with Ms Yakas and also escalated the issue to her manager, the GM for Recruitment, Mr Keith Muirhead.

[96] Ms Lowe said that as the role of EA to the RTG General Manager still existed, which she regarded as the role she had been offered by Mr Peterson, there had been no redundancy situation affecting her continued employment.

[97] Ms Dale explained that as Project Skyline was not proceeding, there was no role for a Project Administrator which was the role Mr Peterson had advised her had been accepted by Ms Lowe. She explained that as regards the EA position, the redundancy consultation process with Ms Chong had not been completed, and as Ms Chong's existing role as EA to the RTG General Manager was no longer going to be disestablished, the redundancy consultation process had been halted and Ms Chong had continued in her role as EA to the RTG General Manager.

[98] On 6 March 2014, Ms Lowe said she had emailed Ms Yakas to follow up on their meeting the previous week as she had been aware that there were EA roles within FB and she was interested in applying for these roles. However, she had not heard from Ms Yakas further, nor had she received any feedback as to why she was not obtaining interviews for the advertised roles which she had found very humiliating and distressing.

[99] On 10 March 2014, Ms Lowe received her holiday pay from EQR which was administratively backdated.

[100] On 12 March 2014, Ms Lowe said Ms Dale emailed her to advise her that she had followed up with Ms Yakas about potential roles and would make further contact with Ms Yakas and also mentioned that RTG did not have a copy of her CV. She made it clear that she had required it to see if she could find some short term work in other FB business units.

[101] On 14 March 2014, Ms Lowe said she received an email advising her that she had been paid from RTG, the first payment having been with effect from 17 February 2014.

[102] FB Recruitment contacted Ms Lowe on 20 March 2014 advising her to apply for the role of EA for Mr Richards, the Chief Executive in the Building Products Division of which RTG was part, and she sent her CV through to it. Ms Lowe said she did not hear anything further.

[103] On 25 March 2014, Ms Dale telephoned Ms Lowe and advised her that she had nothing to report and that she would follow up regarding the several EA roles that were being advertised. Ms Dale had told her that if no positions became available that there would be another meeting. Ms Dale had also advised Ms Lowe that Mr Mulvagh had now left RTG.

[104] On 31 March 2014, Ms Lowe said she received a telephone call from Ms Dale advising her that RTG had progressed to the next stage and that they wanted to schedule a meeting to conclude the redundancy process with her.

[105] Ms Dale said that although she had made numerous calls and sent many emails on Ms Lowe's behalf, she had had no success in finding alternative roles for her.

[106] Ms Lowe said she had believed by this time that she was being associated with Mr Peterson and that this was being held against her.

2 April 2014 Meeting

[107] On 2 April 2014, Ms Lowe said she attended a third meeting accompanied by Mr Pollak. The meeting was held with Ms Dale. At the meeting Ms Lowe said Ms Dale had advised her that she was dismissed from the position of Project Administrator for reasons of redundancy.

[108] Ms Lowe said that Ms Dale had advised her that she had not been successful for the EA role to Mr Richards as she had no international board experience even though this had not been cited as a prerequisite for the job. Ms Lowe said she had pointed out that she did in fact have international board experience from the previous role but had not been asked about it and that if this was an issue then she would have explained her involvement and experience. However Ms Dale said the fact that Ms Lowe stated she had international board experience had not been reflected in her CV and therefore she had not been aware of this.

[109] Ms Lowe said that Mr Pollak pointed out on her behalf that there were a number of roles within FB for which Ms Lowe was qualified and ready to undertake but she had not been redeployed. Ms Dale had explained that within every business unit each position was open to all applicants and Mr Pollak stated that that was unreasonable because Ms Lowe was an existing employee and should be redeployed to one of these roles. Ms Dale had explained that they were different divisions.

[110] On 14 April 2014, Ms Lowe said she had received her final pay from RTG. In that final pay, her wages were based on the draft RTG IEA which had been given to her at the meeting on 26 February 2014. She had been offered no redundancy payment.

[111] Ms Lowe said she had obtained alternative employment in the second week of April 2014, however this was at a lower salary than she had been earning at EQR.

Determination

Did Ms Lowe resign from her employment at EQR?

[112] Ms Lowe provided a letter of resignation dated 23 September 2013 to Mr Peterson upon his return from overseas in September 2013. That letter stated a leaving date of 22 November 2013.

[113] Ms Lowe states that she withdrew this resignation after Mr Peterson suggested that she wait until she had found alternative employment.

[114] The agreement of the employer to such unilateral notice is not required; the employee responsible for the unilateral act, in this case resignation, is simply telling the employer what is going to happen. There is no formal letter of withdrawal, nor a letter confirming that EQR accepted such a withdrawal of her notice. As observed by Goddard CJ in *Stiffe v Wilson & Horton*:¹

Where either party to an employment agreement gives notice, it is well settled that the contract will terminate according to the tenor of that notice. It is not open to either party to withdraw or vary that notice without the consent of the other.

[115] Mr Peterson stated that he regarded the resignation as in abeyance, not withdrawn, with only the leaving date remaining to be confirmed. I find that the text messages sent between him and Ms Lowe confirm his understanding that no withdrawal of notice had taken place, specifically his reference in the text sent on 2 January 2014 in which Mr Peterson texts: “*Can I ask you when you told Michele you were leaving*”.

[116] In her response text Ms Lowe does not refute the statement that she was leaving, but responds: “*Didn’t tell Michele when leaving however she knew I wld be leaving*” to which Mr Peterson in turn responds: “*In my view you resigned a while back and all we didn’t do was agree a final date*”.

[117] I find that Ms Lowe confirmed Mr Peterson’s view that the resignation was in place in her email to Ms Creagh dated 8 January 2014 in which she stated: “*Further to my notice I gave to David late last year, ...* “. There is no mention in that email to a withdrawal of the

¹ 5/12/00 AC 94/100, AEC 106/00 at para 21

notice, or to the fact that a withdrawal of her notice had been accepted, rather the email continues to confirm that: *“My last working day will be 24 January”*.

[118] It is clear that due to the changing nature of Ms Lowe’s leaving date, and the change in personnel at EQR with the appointment of Ms Creagh and departure of Ms Knewstubb, there had been confusion about the administration connected with the processing of Ms Lowe’s final payments from EQR. However I do not accept that the late payments of the final monies owed to her on the conclusion of her employment at EQR invalidated the resignation.

[119] I determine that Ms Lowe resigned from her employment at EQR.

Did RTG breach the terms of Ms Lowe’s employment?

[120] Ms Lowe was not provided with a copy of the RTG IEA until the meeting held on 26 February 2014. Prior to this date her evidence was that she was aware that she had been offered eight month fixed term employment with RTG, and that she would continue to work for Mr Peterson.

[121] She stated that no terms of employment had been discussed with her, the role she was to undertake had not been discussed with her, and she had not been provided with a position description. There had been no discussion of the appropriate salary for the new position.

[122] As a result, she had assumed that the eight month role referred to by Mr Peterson would be that of EA to the RTG General Manager, her salary level would remain at the level she had previously received at EQR, being \$79,500.00 per annum, and her employment would be transferred to RTG with the same terms and conditions as in the EQR IEA, including the redundancy provision, applying to the new position.

[123] I have determined that Ms Lowe had resigned from EQR and consequently the EQR IEA therefore ceased to apply to Ms Lowe’s employment upon the termination date.

[124] Despite clause 1.1 of the EQR IEA which stated that she would not be considered as an employee of another FB company, Ms Lowe had assumed that her employment would be transferred from EQR to RTG, another FB company.

[125] I observe in this context that Ms Lowe, whilst employed by Firth Industries had had to compete competitively for the position of EA to the EQR General Manager, and she had to negotiate for the redundancy clause which the Firth Industries employment agreement had contained to be included in the EQR IEA.

[126] Considering these factors, while Ms Lowe said she had relied completely on Mr Peterson whom she trusted to ensure she received the same terms and conditions as she had at EQR, I find this not to have been a reasonable reliance in the circumstances of her evidence at the Investigation Meeting that it had been Mr Peterson who signed the offer of employment at EQR which did not contain the redundancy provision for which she had had to negotiate and which subsequently became clause 8 of the EQR IEA.

[127] Regarding the terms of Ms Lowe's employment at RTG I consider it necessary to consider the sequence of events from a contractual viewpoint to examine when an employment agreement came into existence and what constituted the terms of it before determining whether RTG breached such terms.

[128] The six essential elements for a valid and enforceable contract are: (i) Offer, (ii) Acceptance, (iii) Consideration, (iv) Intention by the parties to create legal relations, (v) Capacity, and (vi) Legality.

[129] Regarding the sequence of events at RTG, I find that Mr Peterson had explored whether or not Ms Lowe might be receptive to an offer of employment at RTG in the text messages on 2 and 3 January 2014, the terms of which at that stage were indicated as no more than of employment for an eight month duration.

[130] An offer must be made with sufficient certainty as to the identity of the contracting parties and the proposed essential terms otherwise it constitutes an 'invitation to treat':²

... in determining whether a statement amounts to an offer or an invitation to treat, the court must consider whether there is both an indication of a willingness to undertake legal liability on defined terms and a sufficiently clear indication of the terms of the prospective conduct. In the absence of either, a statement is an indication to treat and not an offer.

[131] At the time of sending the text message on 2 January 2014 Mr Peterson had accepted an offer of employment as RTG General Manager, but had not assumed the position.

[132] On 15 January 2014 Ms Lowe had been advised by Mr Peterson that he was awaiting approval for the discussed position for her from Mr Richards, and it was not until 17 January 2014 that he confirmed that he had approval and that the documents would be sent to her during the following week.

² Law of Contract in New Zealand, 4th Edition, Burrows Finn & Todd pg 43-44

[133] At this stage I find that there were no defined terms of the offer of employment, only an indication that documents containing an offer of employment would be forwarded to Ms Lowe. Until such time as Ms Lowe received these documents, I find that there were no defined terms upon which she could discern an offer and make acceptance of it.

[134] Although Ms Dale prepared the documents, including the RTG IEA and the Project Administrator position description, these had not been approved by Mr Peterson due to the circumstances of his abrupt departure from RTG, and had not been forwarded to Ms Lowe. As a consequence I find that there was no offer of which Ms Lowe could make acceptance as at 14 February 2014.

[135] At the meeting held on 26 February 2014 Ms Lowe was presented with a draft RTG IEA. The terms and conditions contained in it did not accord with the expectations which had arisen from the assumptions she had made concerning the prospective employment at RTG, especially in regard to the salary level, the position, and the absence of continuity and redundancy provisions.

[136] Mr Mulvagh and Ms Dale's evidence was that they were implementing the terms of employment as advised and authorised by Mr Peterson. They were clear, as was Mr Peterson in his evidence, that what was envisaged was a new period of employment following Ms Lowe's resignation from EQR.

[137] In this situation I find that there was no acceptance by Ms Lowe of the defined terms contained in the draft RTG IEA presented to her.

[138] Despite there having been no certainty of terms, no acceptance of the terms offered in the draft RTG IEA, and only expectations on the part of Ms Lowe, Mr Mulvagh and Ms Dale recognised Ms Lowe's expectation as to a fixed term period of employment and regarded that as an obligation on the part of RTG, accordingly placing Ms Lowe on the FB payroll.

[139] Ms Lowe was placed as a new employee on the FB payroll with payment being made to her with effect from 17 February 2014 (subsequently back-dated to that date), the necessary paperwork having been completed by her.

[140] There is no evidence that Ms Lowe was offered a transfer from EQR to RTG such that the previous terms and conditions of employment as contained in the EQR IEA would be transferred with her. Rather I find that what was offered was a new employment agreement, consistent with which both she and Ms Dale had completed the FB Payroll Shared Services documentation applying to new employees.

[141] In that situation I find that the only terms applying to Ms Lowe's employment at RTG are those contained in the draft RTG IEA provided to her at the meeting held on 26 February 2014, of which there was no breach.

[142] I determine that RTG did not breach the terms of Ms Lowe's employment.

Should Ms Lowe be paid for the remainder part of the fixed term agreement with RTG?

[143] Following the decision not to proceed with Project Skyline, there was no longer a requirement for a Project Administrator. Whilst Ms Lowe said that she understood that her position with RTG was to be that of EA to the RTG General Manager, I have found that this was only an assumption on her part.

[144] The position which was pertinent to her employment with RTG was that of Project Administrator, and that position was no longer a requirement such that, with the demise of Project Skyline, it had become surplus to RTG's requirements.

[145] In that situation I find that clause 6.1 of the draft RTG IEA applied which provided that RTG could give notice prior to the Expiry Date of the fixed term agreement in the event of certain situations arising. One such situation was stated to be a redundancy situation.

[146] In that eventuality clause 7.1 applied which stated that if notice was provided on the basis of redundancy there would be entitlement to: "*one month's notice or payment in lieu thereof*".

[147] RTG complied with this contractual obligation, and Ms Lowe received one month's notice of redundancy effective from 26 February 2014.

[148] In this situation, I determine that Ms Lowe is not entitled to be paid the remainder part of the fixed term agreement with RTG. .

Should Ms Lowe be paid a redundancy payment based on clause 8 of the EQR IEA?

[149] Having determined that Ms Lowe resigned from her employment at EQR, and there was no transfer of employment, it follows that the relevant redundancy clause is not clause 8 of the EQR IEA but clause 7.1 of the draft RTG IEA.

[150] As stated above, in that situation Ms Lowe was entitled only to either: "*one month's notice or payment in lieu thereof*". She was provided with the contractual one month's notice in accordance with clause 7.1 of the RTG IEA.

[151] I determine that Ms Lowe should not be paid a redundancy payment based on clause 8 of the EQR IEA

Has Ms Lowe been unjustifiably dismissed?

[152] Ms Lowe voluntarily resigned from EQR and I have found that her resignation had not been withdrawn. Ms Lowe was employed at RTG with effect from 17 February 2014. I have found there to be have been a genuine redundancy situation affecting Ms Lowe's anticipated position as Project Administrator in circumstances in which Project Skyline had been discontinued. A redundancy decision must not only be genuine, it must be implemented by virtue of a fair and reasonable process.

[153] A dismissal by reason of redundancy must be one that a fair and reasonable employer could have made in the circumstances at the relevant time.³ Other provisions of the Employment Relations Act 2000 (the Act) govern questions of justification for dismissal and, in particular, by reason of redundancy. Section 4 of the Act addresses the requirement for parties to the employment relationship to deal with each other in good faith.

[154] Section 4(1A)(c) of the Act in particular is relevant to a redundancy situation and requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of an employee, to provide to the employee affected:

“(i) access to information, relevant to the continuation of the employees' employment, about the decision; and

(ii) an opportunity to comment on the information to their employer before a decision is made.” s4 (1A)(i) and (ii).

[155] I find that Mr Mulvagh and Ms Dale did adopt a fair procedure in the difficult situation which had arisen following Mr Peterson's departure. They had met with Ms Lowe and her representatives, discussed the situation with her and the reasons why it had arisen, and gave her an opportunity to comment on the situation.

[156] Ms Lowe considered that her position had not been redundant on the basis that the position of EA to the RTG General Manager still existed post the discontinuance of Project Skyline, and that she rather than Ms Chong should have been offered that position.

³ S 103A (2) Employment Relations Act 2000

[157] I make two observations, the first being that Ms Lowe's belief that the EA position was the position which she had been offered at RTG by Mr Peterson was erroneous; it was based on an assumption only and not on fact.

[158] Secondly the position of EA to the RTG General Manager had continued to be held by Ms Chong whose tenure of it predated the discussion of employment at RTG with Ms Lowe. The requirements of that role being unchanged in light of the discontinuance of Project Skyline, the redundancy consultation situation commenced with Ms Chong had also discontinued as a consequence, and I find there was no basis on which Ms Lowe could or should have been appointed to that role in place of Ms Chong.

[159] I determine that Ms Lowe had not been unjustifiably dismissed by RTG.

Ms Lowe has received disparate treatment?

[160] Ms Lowe quoted from the news release regarding redundancies at Fletchers Pacific Steel business which discussed retraining and redeploying redundant employees as the basis on which she contends she should have been provided with an alternative position at FB.

[161] It is evident from the evidence that there was no basis on which RTG could compel another FB business unit to employ Ms Lowe given the autonomous nature of employment issues decision making. I observe that Ms Lowe herself had to apply on a competitive basis for the position of EA to the EQR General Manager, despite having worked previously for Mr Peterson.

[162] The situation at Fletchers Pacific Steel had arisen in a specific situation and was a departure from the accepted rule regarding the recruitment process within FB.

[163] I find that Ms Dale made strenuous efforts to find Ms Peterson alternative roles, utilising professional contacts within other divisions at the highest level.

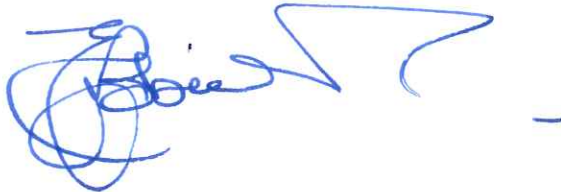
[164] In addition, having reached the view that Ms Lowe's previous salary level and expectation might be a barrier to other opportunities within FB, I note that RTG in good faith offered to underwrite Ms Lowe's salary for a period of time to try to alleviate this situation.

[165] I do not find that Ms Lowe suffered disparate treatment in that RTG acted in the good faith to obtain her alternative employment within FB.

[166] I determine that Ms Lowe did not receive disparate treatment.

Costs

[167] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.



Eleanor Robinson
Member of the Employment Relations Authority



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