

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 321  
5554125

BETWEEN                      JUSTIN ELLIS  
   Applicant

A N D                              SPORTS MARKETING  
   LIMITED t/a EXPERIENCE  
   GROUP  
   Respondent

Member of Authority:      Anna Fitzgibbon

Representatives:            James Rogers, Advocate for the Applicant  
   Stephen Langton, Counsel for the Respondent

Investigation Meeting:      4 and 14 September 2015 at Auckland

Submissions Received:      14 September 2015 from the Applicant  
   14 September 2015 from the Respondent

Date of Determination:      13 October 2015

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**DETERMINATION OF THE AUTHORITY**

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- A.    The decision to disestablish Mr Justin Ellis' position as Sales & Marketing Manager was for genuine reasons of redundancy.**
- B.    Sports Marketing Limited followed a fair and proper process when determining to make the position of Sales & Marketing Manager redundant including providing Mr Ellis with relevant information prior to the decision.**
- C.    The subsequent decision by Sports Marketing Limited to terminate the employment of Mr Ellis for redundancy was justified in circumstances in which he was not redeployed to either the General Manager, Marketing & Communications or Business Development Executive roles.**
- D.    Costs are reserved.**

## **Employment relationship problem**

[1] The applicant, Mr Justin Ellis, claims he was unjustifiably dismissed by the respondent, Sports Marketing Limited Trading As Experience Group (Sports Marketing) on 30 January 2015. Mr Ellis says he was involved in the set-up of, and was employed by Sports Marketing from 2007 in the role of General Manager. From July 2013, Mr Ellis was employed as Sales and Marketing Manager focusing on business development.

[2] Following a review and restructure of the business in 2014, the Sales and Marketing Manager position and a number of other positions were disestablished. Mr Ellis says there was not a genuine reason for disestablishing the Sales and Marketing Manager position, rather he says the position was disestablished in order to remove him.

[3] Mr Ellis also says that the process followed by Sports Marketing to make his position redundant was procedurally unfair. Mr Ellis says Sports Marketing failed to provide him with relevant information before it decided to make his position redundant. This failure Mr Ellis says meant he was unable to provide meaningful feedback about his impending redundancy.

[4] Mr Ellis says that the failure by Sports Marketing to redeploy him to the new position of Business Development Executive for which he was skilled and competent, or the role of General Manager, Marketing and Communications which he was able to perform with some further training, resulted in his dismissal being unjustified.

[5] Sports Marketing says its dismissal of Mr Ellis for redundancy was genuine. It says that following a review of the business by an external consultant, there was a genuine need for its reorganisation. The restructure resulted in a number of positions being disestablished, including the role of Sales and Marketing Manager, held by Mr Ellis.

[6] Sports Marketing says that there was a full consultation process and that relevant information required by Mr Ellis prior to the decision to disestablish his role, was provided to him. Further, Sports Marketing says that it had no obligation to redeploy Mr Ellis into either of the positions in the new structure. Sports Marketing states that Mr Ellis was given the opportunity to apply for either of the positions but chose not to.

[7] In the circumstances, Sports Marketing says its decision to make Mr Ellis' position redundant was a genuine one carried out in a procedurally fair manner.

[8] As permitted by s.174E of the Employment Relations Act 2000 (the Act), this determination has not recorded all evidence and submissions received but has made findings of fact and law, expressed conclusions on matters requiring determination and specified orders made.

### **Issues**

[9] The issues for determination by the Authority are as follows:

- (a) Was the decision to disestablish Mr Ellis' position as Sales and Marketing Manager, for genuine reasons of redundancy?
- (b) Did Sports Marketing follow a fair and proper process when determining to make the position of Sales and Marketing Manager redundant, including providing Mr Ellis with relevant information prior to the decision?
- (c) Was the subsequent decision by Sports Marketing to terminate the employment of Mr Ellis for redundancy justified in the circumstances, including in particular:
  - Whether Sports Marketing was justified in not offering to redeploy Mr Ellis to General Manager, Marketing and Communications role? and
  - Whether Sports Marketing was justified in not offering to redeploy Mr Ellis to the Business Development Executive role?
- (d) In the event that Mr Ellis's dismissal was unjustified, what remedies, if any, are available?

## **First Issue**

### **Was the decision to disestablish Mr Ellis's position as Sales and Marketing Manager for genuine reasons of redundancy?**

#### **Sports Marketing Limited**

[10] Sports Marketing operates a business providing specialist travel, event management and hospitality services to a wide range of clients.<sup>1</sup> The business is small and privately owned by Mr Warren Barclay and his brother Mr Greg Barclay. Mr Ellis has a 20% shareholding.

[11] At the time of Mr Ellis' dismissal for redundancy in January 2015, Sports Marketing employed eight permanent employees, five in Auckland and three in Christchurch.

#### **Mr Ellis's employment - Capital Events Limited**

[12] Mr Ellis was employed in August 2003 by Capital Events Limited, a company owned by Mr Barclay, his brother Greg and another business partner. Capital Events sold hospitality packages to sporting events and Mr Ellis was employed to sell such packages to corporate customers.

[13] In 2004, Capital Events was sold. Mr Barclay stayed on as CEO in order to transition the business to the new owner and to deliver the hospitality programme when the Lions Rugby Team toured New Zealand in June/July 2005. Mr Barclay left Capital Events in July 2005 following the Lions tour. Mr Ellis remained employed by Capital Events for a further period of time.

[14] Towards the end of 2006, Mr Barclay was approached by Auckland rugby and Wellington rugby to provide hospitality packages to rugby matches. Mr Barclay was subject to a restraint of trade and approached Mr Ellis to be involved with the set-up of, and to front a new company which would provide such services.

[15] Mr Ellis was keen to take up the opportunity. Mr Ellis and Mr Barclay agreed that Mr Ellis would be employed as general manager on a modest income of \$50,000 with a shareholding of 10% which would increase to 20% when the company was up and running.

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<sup>1</sup> [www.experiencegroup.co.nz](http://www.experiencegroup.co.nz)

## **Establishing Sports Marketing – January 2007**

[16] Sports Marketing was incorporated on 9 January 2007 and Mr Ellis was its sole director and shareholder. Mr Ellis resigned as director on 21 September 2007 when Mr Barclay became sole director. In April 2008, Mr Ellis transferred the shareholding of Sports Marketing to Mr Barclay's brother Greg and business partner, Mr John Seton and retained 10% of the shares for himself, as agreed. Mr Barclay and his wife Kirsty became shareholders in August 2014.

## **General Manager, Sports Marketing, 2007-2012**

[17] Mr Ellis undertook the role of General Manager of Sports Marketing from 2007 until 2012. Mr Ellis was primarily responsible for selling corporate hospitality packages. Mr Barclay's wife, Mrs Kirsty Barclay was also involved with the new company and Mr Barclay was actively involved behind the scenes and ran Sports Marketing.

[18] An individual employment agreement between Sports Marketing and Mr Ellis was prepared but does not appear to have been signed. The employment agreement provided to the Authority was not signed. This employment agreement is expressed to commence from 1 January 2007 and states that Mr Ellis is employed as "*General Manager*" reporting to the Board of Directors. Schedule B is the Job Description which states:

*Position Role: The General Manager of Sports Marketing is responsible for setting the strategic direction of the company and the results, goals and objectives which support that direction. The GM will manage the business, with particular focus on sales performance, creating (with the Board) the annual Business Plan and ensuring the achievement of set growth targets. The GM will have a key role in building and developing this business.*

*The role of the General Manager involves managing key day to day aspects of the Sports Marketing business. This means taking initial phone calls, dealing with client enquiries, answering questions, passing or sending specific information to these clients, relaying information, selling the benefits of hospitality or sponsorship and ensuring SML is providing service to clients.*

[19] Mr Barclay and Mr Ellis disagree on the level of Mr Ellis' involvement in strategy and business development for Sports Marketing.

[20] Mr Barclay says Mr Ellis' role was primarily a sales role, selling hospitality packages to clients on Sports Marketing's database and that his involvement with strategy was limited to implementing strategies devised by Mr Barclay.

[21] Mr Ellis says he significantly increased the annual revenue of Sports Marketing, increased staff, built and maintained the database and was involved in online and social media campaigns.

[22] Mr Barclay was satisfied with Mr Ellis and in January 2011 Mr Ellis was offered and accepted an extra 10% shareholding in Sports Marketing as had been originally agreed.

### **Operations Manager, 2012**

[23] In 2012, following the departure of the Events and Operations Manager, Mr Ellis' role changed to that of Operations Manager. The role of Operations Manager was a large one involving the delivery of the events organised and sold by Sports Marketing, for example, corporate events such as a Bledisloe Cup match.

[24] Mr Ellis found the role extremely demanding and that it impinged significantly on the time he had with his family.

[25] In approximately March 2013, Mr Ellis met with Mr Barclay and his wife, Kirsty and verbally resigned from his employment. Mr Ellis requested that he be able to remain employed by Sports Marketing until he found a new role and this was agreed to by Mr Barclay. Over a period of approximately 18 months, Mr Ellis unsuccessfully applied for approximately 12 positions. At the investigation meeting, Mr Ellis said if he had been successful in obtaining another job he would have left Sports Marketing. Mr Barclay described Mr Ellis during this time as unmotivated and disengaged.

### **Sales & Marketing Manager, 2013**

[26] As Mr Ellis did not find another role, a further meeting was held with Mr Barclay in July 2013 to discuss where things were at. Mr Ellis said he was not enjoying the operations work and was more interested in a "*client side role*" doing business development of customers as well as sales and marketing. Mr Barclay agreed to the creation of a new role Sales and Marketing Manager for Mr Ellis.

Mr Ellis and Mr Barclay agreed to a salary of \$105,000 for the role together with commission on the sale of different products, plus KiwiSaver and the use of a vehicle.

[27] Mr Barclay said although there was a business development component to Mr Ellis's new role, in reality for the following 12 months he was primarily selling products to data base clients. Mr Ellis says his efforts in not only sales but business development resulted in significant increases in sales revenue for Sports Marketing during 2013 and 2014.

### **Review of Sports Marketing, late 2013**

[28] Mr Barclay became concerned in late 2013 that even though the revenue for Sports Marketing had grown, its margins and profit were low. Mr Barclay began giving consideration to this situation and in early 2014 noted his thoughts down. Mr Barclay's notes were provided to the Authority and are headed up "*Business Objectives*" (the objectives). The objectives included the possibility of segmenting Sports Marketing into business units :

- *Corporate hospitality;*
- *Sports and events travel;*
- *Group travel;*
- *Leisure travel;*
- *Corporate travel;*
- *Event Management;*
- *Sports Marketing.*

[29] Mr Barclay also noted:

- *Restructure the business to better reflect the business units, and the management theory...*
- *Become a significantly profitable business in order to reinvest and be a cash flow positive business ...*

### **External Review of Sports Marketing**

[30] In approximately March 2014, Mr Peter Girven was invited to dinner by a colleague. Mr Barclay was also at the dinner. Mr Girven is an independent business consultant who has a number of large clients for whom he has undertaken long term strategy contracts. Over dinner, Mr Girven and Mr Barclay discussed Sports Marketing's business and why there was growth but low cashflow and profits.

## Engagement of Independent Consultant

[31] About 2 weeks after the dinner, Mr Barclay and Mr Girven met to discuss how the business could move forward in a “different way”. There was a discussion about “rebranding” and possible segmentation of the business into units, such as “travel”, “hospitality”, “events” as noted by Mr Barclay in the objectives. Mr Barclay provided Mr Girven with the objectives and it was agreed that Mr Girven would undertake a review of the business.

[32] On 17 March 2014, Mr Girven sent an email to Mr Barclay confirming their agreement. The email states:

*I think we agree that the way forward requires a considerable change in thinking (organisation wide), a managed strategic planning process, and implementation of an organisational development plan in order to achieve your mission and goals....*

*I can, and would love to help, and as an independent consultant, my job would be to help 'you' with achieving the way forward, the goals of the business, and ultimately a higher return on your investment.*

*How I see it happening is like this:*

- ✓ *I am appointed as an independent consultant on a 12 month renewable contract. Whilst a number of hours each week will be devoted to TEG, this won't be time bound and availability is each and every day (seven days of the week if necessary).*
- ✓ *My guidance will include getting the troops together for an initial strategic planning workshop, where they are introduced to the concept, and asked to participate in the design of the future – this engenders buy-in during implementation. I will scope, design, and facilitate this and I suggest this happens ASAP.*
- ✓ *A weekly onsite meeting with key staff will ensure the project is kept on track.*
- ✓ *I will also facilitate the drafting and implementation of the final strategic Tick Plan and any structural changes deemed to be required in the business, including HR and recruitment requirements. This will ensure NZ employment law requirements are met, avoiding hefty costs, and allowing you to devote your time at a more strategic level.*
- ✓ *...*

[33] The rest of the email dealt with Mr Girven's fee and what was included in the fee.

## **Engagement with staff**

[34] Following the email from Mr Girven to Mr Barclay, there were a number of meetings and discussions between them about the business. Mr Girven said that these were meetings to enable him to get a “*general feel for the business and its people*”. Mr Girven recalls Mr Barclay telling him about Mr Ellis’ resignation and subsequent employment into a new role. Mr Girven also recalls Mr Barclay’s comments that Mr Ellis had been somewhat disengaged during this time.

[35] Mr Barclay and Mr Girven discussed the fact that business was being “*product-driven*”, i.e. focussing on the sales of hospitality packages, and not “*market-led*.” In Mr Barclay’s words, the discussions “*explored the benefits of us being a business that customers would seek out, but that would require us to market ourselves to potential customers on the basis we would meet what they wanted to buy from us, rather than being so focused on selling ‘our products’ which gave them little choice*”.

[36] Mr Girven presented a staff workshop on 10 April 2014, to discuss these possible changes including that the business be “*market-led, not product-driven*”. Mr Ellis said he found the meeting “*very encouraging and positive*”.

## **Business Review Report, May 2014**

[37] Staff were able to provide feedback following the staff workshop and in May 2014, Mr Girven provided Mr Barclay with a business review report. The introduction to the report states:

*Warren Barclay of The Experience Group (TEG) contracted Peter Girven (PG) to assist with the reinvigoration of the TEG business. It appears that net profitability is all but non-existent, and that cashflow is also a problem. There were issues with staffing with respect to teamwork and the sales function was not operating satisfactorily. It also became evident that the sales methodology was outdated and in need of a “kick in the pants”. One sales employee in particular, who previously played a significant part of the business, had resigned only to retract and stay on. His contribution was now not of an acceptable standard, and it seemed that, restructure or not, a performance management process would need to be instigated.*

[38] Mr Ellis was the “*sales employee*” referred to above but was not the only person identified in the report by Mr Girven as not contributing. There was reference to the general manager not providing direction to the team and that leadership was lacking.

[39] At the investigation meeting, Mr Barclay stated that he was not concerned by Mr Ellis' performance. However he described Mr Ellis as being disengaged and negative in the business following his resignation in mid-2013.

[40] Mr Girven stated that the views expressed about Mr Ellis' performance in his report, above, were his personal opinions based on his own observations and discussions with staff.

[41] Mr Ellis was concerned that the subsequent restructure and disestablishment of his role was not for genuine reasons of redundancy but rather to remove him from the business.

[42] Mr Girven suggested in his report the need to firstly obtain feedback from staff. Feedback was to be followed by letters to staff outlining a proposed way forward. In concluding the report, Mr Girven says:

*The path ahead is relatively clear. This business has enormous potential and rivals that of a larger sporting franchise. There the possibilities are substantial with mergers, acquisitions, and share parcels sold to interested parties looking to invest capital. This in turn will help the growth of the business. ... The current structure and skills and experience in the business are almost a hindrance and not a help with the way forward. The development of a matrix structure with GM's appointed will reinvigorate the business and provide the structure required to deliver those strategic initiatives.*

[43] In approximately July 2014, Mr Ellis and Mr David Redmond, the account manager for The Experience Group, had a meeting with Mr Girven in a café to discuss their thoughts following the strategy day which had been held in April.

[44] Mr Ellis says at that meeting, after Mr Redmond left, he asked Mr Girven to give him reasons for Sports Marketing's poor cashflow and minimal profit. Mr Girven's recollection was that after Mr Redmond left, Mr Ellis told him he was concerned about the financial status of Sports Marketing. Mr Girven told him to speak directly with Mr Barclay about that. It was at about this time that Mr Ellis sought advice from his brother who was an accountant about reading financial reports.

### **Letters to staff regarding proposed restructure**

[45] On 7 September, Mr Barclay sent individual staff members, including Mr Ellis, a letter about the proposed restructure of Sports Marketing. Mr Ellis received a letter as did other staff. Mr Barclay recapped the process which had been undertaken

by Mr Girven including his view that the business was very “*product-driven*” and needed to develop around “*client needs and market expectations*”. Mr Barclay stated:

*Therefore, based on this review process and in order to move the business forward it is clear that we need to make changes to our direction, and subsequently our staffing structure, in order to deliver new products and new brands to existing and new markets which all contribute to revenue and profit growth. ... Based on this new strategy, I am considering introducing a new staffing structure. The proposed structure for the business is set out below. This shows a core Executive Management Team of a CEO, a general manager travel and operations, a general manager marketing and communications and a general manager finance.*

[46] Mr Barclay outlined the roles which would fall under each of the General Manager roles and listed roles to be disestablished if the restructure proceeded:

- Managing director;
- General manager;
- Sales manager;
- Sales and marketing manager;
- Business development manager;
- Account manager – sales;
- Account manager;
- South Island manager.

[47] The email stated that anyone whose role was disestablished would be given the opportunity to apply for the new roles and that “*any appointments to those roles will be made based on relevant experience, performance and qualifications*”. Staff members were invited to provide input and feedback in writing and in person at a meeting with him on 16 September 2014. The email provided a breakdown of the proposed new roles including the purpose of the new roles and their day-to-day functions.

[48] Mr Ellis responded by email on 9 September 2014, agreeing to meet. On 16 September 2014, Mr Ellis emailed Mr Barclay to say:

*... As you know I have been with Experience Group since day one and feel the proposal will reinvigorate not only the company but everyone within the organisation, including myself and reignite the passion I have for what I started.*

Mr Ellis also stated he would provide further feedback at the meeting on 16 September 2014.

#### **Meeting on 16 September 2014**

[49] On 16 September 2014, Mr Barclay and Mr Girven met with Mr Ellis. Mr Ellis took notes which were typed up after the meeting. Neither Mr Girven nor Mr Barclay can recall Mr Ellis taking notes. Mr Barclay says that he went through the proposed restructure in depth with Mr Ellis and that Mr Ellis liked the changes proposed. In the notes of the meeting provided to the Authority, Mr Ellis says:

*I confirmed I am on board and they asked me what roles I would consider ... I again confirmed I am on board and agree with the changes and definitely know the proposed changes are necessary.*

[50] Further comments were noted including that Mr Ellis was not sure which role out of the “*General Manager, Marketing and Communications and Business Development Executive*” role he would be looking at. Mr Ellis noted that Mr Barclay and Mr Girven asked for his feedback sooner rather than later as they wished the new plan to be “*in place before Christmas so that everyone concerned will return in the New Year ready to go*”.

[51] Mr Ellis provided feedback which was mainly positive in his email to Mr Barclay on 19 September 2014 and also asked for “*further relevant information*” in relation to two of the stated reasons for the proposed restructure, namely poor cashflow and minimal profit.

[52] On 14 October 2014, Mr Barclay sent an email to Mr Ellis and other staff confirming that the feedback and meetings process had concluded and setting out what the process of implementation was to be. Implementation was to involve:

1. *Further one-on-one meetings;*
2. *The disestablishment of current roles;*
3. *The establishment of new roles;*
4. *Advertising, recruitment and appointment of new roles; ...*

[53] A request was made in the email for a further meeting and Mr Ellis’ meeting was to be on 22 October 2014.

[54] A meeting was held on 22 October 2014 between Mr Ellis, Mr Barclay and Mr Girven at which time Mr Ellis was asked what roles in the restructured

organisation he would like to apply for. Mr Ellis was given the job descriptions for the General Manager Marketing and Communications and the Business Development Executive roles. Mr Ellis did not provide feedback in relation to the two roles and in his notes of the meeting on 22 October 2014 he states:

*In my eyes I could do the GM Marketing and Communications with some additional training in communications and social media – which I have actually addressed in July 2013 in an email to Warren. However currently I do the Business Development Executive role as part of my current position of Sales and Marketing.*

[55] Mr Ellis did not share his views about redeployment at the meeting. Mr Ellis informed Mr Barclay that if he had any further questions he would email him, which he did later on the same day. The questions related to the remuneration for each of the two roles of Business Development Executive and General Manager Marketing and Communications and there were questions about timeframes in which current employees were required to apply for new roles. Mr Ellis concluded by saying:

*Also can you please confirm that current employees are applying for the new roles and what are your expectations in our applications – CV, cover letter etc. I assume we apply for these roles once we have seen the job advert based on your example of David applying for the Product Development position?*

[56] Mr Barclay responded the next day setting out the ballpark figures he had in mind for the salaries of each of the positions. Mr Barclay informed Mr Ellis that there were no specific timeframes but said early interest in any of the roles would be appreciated and that he would expect anyone applying for the new roles to put their best efforts into presenting their credentials.

[57] On 16 November 2014, Mr Barclay wrote to staff, including Mr Ellis, confirming the decision to implement the new structure which meant the disestablishment of roles including his. Mr Barclay went on to explain that the General Manager, Marketing and Communications role was a materially new role and that:

*... it will require new and unique skills, experience and capabilities and these probably do not exist within the business; especially in the new areas of digital and social media marketing and strategy.*

[58] Mr Barclay attached the intended position description for the role. With regard to the Business Development Executive role, Mr Barclay stated that it was a new role and attached the intended position description for it. Mr Barclay stated:

*You probably would have the skills for this role, but to be frank, I have my reservations as to whether you would be interested in being considered for it given it is at a much lower level than your current role and the remuneration would be significantly less than your current role is paid. I think you might find it under-stimulating.*

[59] Mr Ellis stated at the Investigation Meeting that he was disillusioned by Mr Barclay's email and felt discouraged from applying for the roles.

[60] On 5 December 2014, Mr Ellis expressed his discontent with the process in an email to Mr Barclay. Mr Ellis complained about the length of time the company's restructure had taken which he felt was unfair and unreasonable. Mr Ellis also stated:

*I feel your email reply below is effectively discouraging me to apply for any of the new roles. I will not be applying for the Business Development Executive (BDE) role as I am not prepared to accept a package which is significantly reduced in comparison to my current remuneration. My current role already encompasses all aspects of the BDE role (and more) and is a role that you have acknowledged is within my capabilities and is one I should have been offered in good faith.*

[61] Mr Ellis goes on to state that with regard to the General Manager Marketing and Communications role he should have been offered redeployment into the position rather than being asked to apply for it. Mr Ellis confirms that there is some shortfall in his experience but that this could be dealt with by additional training.

[62] Mr Ellis concluded his email by stating that Mr Barclay did not wish him to remain with Experience Group, therefore he had no confidence in applying for any of the new roles and did not feel a fair process has been followed. Mr Ellis also complained that Sports Marketing had not acted in good faith and that the outcome of the process was predetermined. In conclusion, Mr Ellis stated:

*I believe I should have been offered the roles of BDE and General Manager Marketing and Communications, which are clearly within my capabilities, and I should not be required to apply for these roles. I consider that the company has breached terms and conditions and is clearly trying to achieve my exit from the business.*

[63] Mr Barclay responded on 15 December 2014 and in response to Mr Ellis' concern over the General Manager Marketing and Communications role he says:

*This role is materially different to your and any other roles in the business. You have the position description for the role. It will be responsible for formulating the business' new digital marketing strategy, and then leading and overseeing their implementation. The person appointed to this role will be the business' digital advocate*

*and lead us as we make fundamental changes in this area. ... This is not a skill set or experience that you currently have or that you can pick up by training and attendances at courses. It is derived from experience; a track record in marketing and digital marketing in particular, at a GM level. To date, I have been the architect of the business' marketing strategies, and you have implemented (some of) them. I don't have this new skill set either. To your point that I have discouraged you from applying for any of the roles, I have been very careful to be upfront with you and not to mislead you by telling you to apply for a role, without also telling you of my thoughts on your suitability and/or capabilities for that role. I believe that this was the "good faith" approach.*

[64] Mr Barclay asked at the conclusion of the letter for Mr Ellis to let him know by 19 December 2014 which roles he wished to be considered for and encouraged him to reconsider his position not to apply.

[65] Mr Ellis did not apply for either of the roles and his position was terminated on 30 January 2015. Mr Ellis was paid eight weeks' salary in lieu of notice. Mr Ellis obtained another position on 4 March 2015 and remained in that role until the business was sold in mid-April 2015.

### **The law**

[66] The Court of Appeal's statement of law regarding the genuineness of a redundancy in *GN Hale & Son Ltd v. Wellington Caretakers IUOW*<sup>2</sup> was 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 otherwise go to the wall. A worker does not have a right to continued employment if the business can be run more efficiently without him.*

[67] However, since *Hale* was decided, the test for justification for dismissal is now as stated in s.103A of the Act as being:

- (1) *For the purposes of s.103(1)(a) and (b), the question of whether dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- (2) *The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

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<sup>2</sup> [1991] 1 NZLR 151

[68] The test of justification requires that the employer act in a manner that is substantively and procedurally fair. An employer must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[69] It is my view that the decision to disestablish Mr Ellis' role was for genuine business reasons. Mr Ellis accepted that a review and restructure was necessary and that it would invigorate the business. The restructure was business-wide and affected a number of employees, not just Mr Ellis. Counsel for Sports Marketing referred the Authority to the Employment Court decision of *Rolls v. Wellington Gas Co*<sup>3</sup> in which Chief Judge Goddard stated at p.123/22:

*The case is about whether the reorganisation was a genuine one or whether it was a sham invented totally by the respondent and its advisers to get rid of the appellant. That is, for obvious reasons, a very difficult thing for an employee to prove. It is therefore all the more important, in the sense of being convincing, if the employer in such a situation can show a significant paper trail or other solid foundation of evidence demonstrating its consideration of a reorganisation.*

[70] In this case, Mr Barclay had been considering the business objectives for Sports Marketing in early 2014 as he had become concerned about the low revenue levels despite increased business growth. Mr Barclay engaged Mr Girven, an independent business consultant who undertook a review of the business. Staff, including Mr Ellis, were engaged in the process throughout.

[71] I cannot accept Mr Ellis' claim that Mr Barclay wished to remove him from the business. First, following Mr Ellis' resignation in July 2013, Mr Barclay had agreed that he remain in the business until he found another position. When after a lengthy period of time Mr Ellis was unable to find another role, Mr Barclay in discussion with Mr Ellis, created a new and more interesting position for Mr Ellis.

[72] Mr Ellis was encouraged by Mr Barclay to stay at Sports Marketing and was given a new position on favourable terms which he had requested of Mr Barclay. This does not impress me as the actions of an employer designing a redundancy to remove Mr Ellis from the business. If Mr Barclay had wished to remove Mr Ellis, he had the opportunity to do so in July 2013, when he resigned.

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<sup>3</sup> [1998] 3 ERNZ 116

[73] Further, the review of the business was undertaken by an independent consultant, was extensive and involved engagement with the staff. This seems at odds with a plan by Mr Barclay devised to remove Mr Ellis from the business. This claim is strenuously denied by Mr Barclay.

[74] It is my view that the restructure was a legitimate one to invigorate the business and address the issues identified by Mr Barclay and confirmed by the review including increased business growth without a comparable increase in revenues. A number of roles were disestablished, including that of Mr Ellis. New roles were created and Mr Ellis was invited to apply for those positions for which he may be suitable. Mr Ellis chose not to do so.

## **Second Issue**

### **Did Sports Marketing follow a fair and proper process when determining to make the position of Sales and Marketing Manager redundant, including providing Mr Ellis relevant information prior to the decision?**

[75] I do not accept Mr Ellis' criticisms of the process undertaken by Mr Barclay in reaching the decision to disestablish his position. I have already referred to the correspondence between Mr Ellis and Mr Barclay, the meetings attended to discuss the restructure, the feedback provided by Mr Ellis and the responses by Mr Barclay to the feedback.

[76] Mr Barclay was open about the reasons for the restructure, about the reasons for the disestablishment of roles and the need to recruit for new roles in the business. Mr Ellis was intimately involved throughout.

[77] Mr Barclay was honest with Mr Ellis about the proposed new roles and his suitability in respect of each of them. This in my view, was a necessary part of the consultation process.

[78] His Honour Judge Couch in *Jinkinson v. Oceana Gold (NZ) Ltd*<sup>4</sup> stated:

*In a redundancy situation a fair and reasonable employer must, if challenged, be able to establish that it has complied with the statutory obligations of good faith dealing in s.4 of the Act.*

[79] At para.[40], His Honour stated:

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<sup>4</sup> [2010] NZEmpC 102

*Sub-section (1A)(c) is particularly significant in cases involving restructuring such as this. It emphasises the need for full and open communication by the employer and the provision of a properly informed opportunity for the employee to participate in the process.*

[80] His Honour Chief Judge Colgan in *Simpsons Farms Ltd v. Aberhart*<sup>5</sup> noted that this compliance with good faith dealing includes consultation “*as the fair and reasonable employer will comply with the law*”.

[81] It is my view that Mr Ellis was offered the opportunity to participate fully in the process undertaken by Sports Marketing in restructuring the business. Sports Marketing followed a fair process before disestablishing Mr Ellis’ role.

### **Third issue**

**Was the subsequent decision to terminate the applicant’s employment substantively justified, in particular:**

**(a) Whether Sports Marketing was justified in not offering to redeploy Mr Ellis to General Manager Marketing and Communications role?**

[82] It seems from the evidence that Mr Ellis’ main issue is that he was not redeployed to the General Manager Marketing and Communications role. Therefore, Mr Ellis says his dismissal was substantively unjustified. Mr Ellis spoke frequently during the course of the investigation meeting of the advice that he received throughout the redundancy process including from his brother who is an accountant, from another family member who is a senior HR consultant and from a large law firm. The advice was that, given his skills, he should be redeployed into the position of General Manager Marketing and Communications and should not have to apply for the position. Further, Sports Marketing’s failure to redeploy him rendered his dismissal unjustified.

[83] Mr Ellis was of course wise to take advice throughout the process which led to his redundancy. However, it is my view that Mr Ellis took what seemed to be an intractable position following receipt of the advice which meant that he failed to fully engage in the process, including, among other things, deciding not to apply for the role of General Manager Marketing and Communications.

[84] Mr Ellis requested and was supplied with information about the new role. Mr Ellis was asked in late October 2014 to indicate his interest in either of the new roles

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<sup>5</sup> [2006] ERNZ 825

most suited to him. Advertising for the roles did not take place until 1 December 2014. On 5 December 2014, Mr Ellis confirmed in writing his decision not to apply for the role of General Manager Marketing and Communications. On 15 December 2014, Mr Barclay sent an email to Mr Ellis which stated:

*Moving forward, please let us know which of these roles you wish to be considered for. At this stage, unless I hear otherwise by Friday 19<sup>th</sup> December, I will proceed on the basis of your 5 December email, although I would encourage you to reconsider your position....My thinking at this stage is I would provide you with notice of termination in accordance with your employment agreement and if you were able to be redeployed in the meantime, that notice would lapse. Let me know your thoughts on that possibility when you come back to me on whether you wish to be considered for the two roles by Friday 19th December.*

## **Redeployment**

[85] Mr Ellis relied heavily on the Employment Court decisions of *Jinkinson*<sup>6</sup> and *Michael Rittson-Thomas trading as Totara Hills Farm v. Hamish Davison*<sup>7</sup> in support of his submission that he should have been redeployed into the General Manager Business and Communications role. In *Jinkinson*, the employee applied for but was not appointed to the newly established role. The non-appointment was because of her lack of team skills, she had the other attributes necessary for the position. The employee was not aware that “*her lack of team skills*” had been considered by her employer and she was not afforded a proper opportunity to respond.

[86] In *Totara Hills Farm*<sup>8</sup>, Mr Rittson-Thomas was asked to apply for the junior shepherd’s position, a position the Court held he had the skills and experience and would have been more than adequate for it.

[87] *Jinkinson* and *Totara Hills Farm* were both determined in accordance with the statutory personal grievance justification test under s103A of the Act when it was the “*would*” not the “*could*” test version as it now is.

[88] In any event, it is my view that *Jinkinson* and *Totara Hills Farm* are both distinguishable from the facts in the current case, in relation to the General Manager Business and Communications role. The General Manager Business and

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<sup>6</sup> Supra footnote

<sup>7</sup> [2013] NZEmpC 39

<sup>8</sup> Supra footnote 7

Communications role was materially different from the largely sales and marketing role Mr Ellis had performed. Mr Ellis acknowledged he did not have the necessary skills for the role, particularly in the area of digital marketing strategy. Mr Ellis felt he may be able to develop the necessary skills by attending a course or undertaking further training.

[89] Mr Barclay did not agree, his view was that the role required particular experience which neither he, nor Mr Ellis had. Mr Barclay's view was that this role was one that Mr Ellis was probably not suitably qualified for and this was discussed with Mr Ellis during the consultation process. In an email to Mr Ellis on 15 December 2014, Mr Barclay stated:

*This role is materially different to your and any other roles in the business. You have the position description for the role. It will be responsible for formulating the business' new digital marketing strategies, and then leading and overseeing their implementation. The person appointed to this role will be the business' digital advocate and lead us as we make fundamental changes in this area....This is not a skill set you currently have or that you can pick up by training and attendance at courses. It is derived from experience, a track record in marketing and digital marketing in particular at GM level.*

[90] Mr Ellis was given the opportunity to apply for the role to discuss his skills and suitability in an interview, but he chose not to do so.

[91] I accept the submission made by counsel for Sports Marketing that its "decision to invite [Mr Ellis] to apply for the role so that those reservations could be explored further with him, was one a fair and reasonable employer could have taken here". In *Rolls*<sup>9</sup> Goddard CJ stated:

*However, the respondent's conduct in offering the appellant a choice of the two new positions and giving him time to consider the matter and take advice was of a different character. It may be that it was as a result of legal advice the respondent had had but it was nonetheless real; it may also be that, because of the recent history, the respondent would have been reluctant to appoint the appellant to either of the positions on offer. However, the appellant never put the matter to the test and there really exists no basis for saying that the respondent would not have appointed him ...*

*It seems to me that the respondent established affirmatively to the Tribunal that the true reason for the termination of the appellant's employment lay not in his illness or non-performance but in a reorganisation of functions.*

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<sup>9</sup> Supra footnote 3

[92] Mr Ellis claimed that Mr Barclay had discouraged him from applying for the General Manager Marketing and Communications role. This was an assumption made by Mr Ellis and refuted by Mr Barclay. Mr Ellis could still have *tested* the matter by applying for the position, he refused to do so, despite being encouraged to by Mr Barclay. I do not accept the argument by Mr Ellis that as a fair and reasonable employer, Sports Marketing, should have redeployed him in to the role of General Manager Marketing and Communications. The role was a new and materially different role from the Sales and Marketing role and was a role designed to move Sports Marketing in a new direction. Mr Ellis acknowledged he was not suitably qualified for the role. I find Sports Marketing was justified in not offering to redeploy Mr Ellis to the General Manager Marketing and Communications role.

**(b) Whether Sports Marketing was justified in not offering to redeploy Mr Ellis to the Business Development Executive role?**

[93] Mr Barclay acknowledged that Mr Ellis probably had the skills to perform the Business Development Executive role. However, the role was at a junior level, the level of remuneration was significantly less (almost half of the salary Mr Ellis had enjoyed) and as Mr Barclay stated in his email to Mr Ellis on 15 December 2014 he had:

*...reservations and believe you need to know what they are. I would not necessarily want to put someone into a role that is beneath their own abilities or expectations, they will likely become bored and dissatisfied. However, you need to make a decision as to whether you want to be considered for the role, taking into account all of the information about it that I have provided to you. Then these issues around suitability can be explored as part of the recruitment process.*

[94] Mr Barclay made a decision to request Mr Ellis to apply for the role, rather than to redeploy him to it. I find this was a decision a fair and reasonable employer could make in the particular circumstances, of this case.

[95] In *Totara Hills Farm*<sup>10</sup>, the employer's evidence of justification for Mr Davidson's dismissal was "scant". This is in stark contrast to the employer's evidence of justification in the current case.

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<sup>10</sup> Supra footnote 7

[96] The Employment Court in *Wang v Hamilton Multicultural Services Trust*<sup>11</sup> considered the obligations on an employer in a redundancy setting, including to consider redeployment. This was another case in which the “would” not the “could” test was applicable. Judge Perkins at para [42] stated:

*Applying the reasoning adopted by Judge Couch in Jinkinson, the failure to consider redeployment in the context of the test of justification under s 103A of the Act leads to the conclusion that in this case the employer failed to act in a way that a fair and reasonable employer, judged objectively, would have done in all the circumstances at the time the dismissal occurred.*

[97] As mentioned above, the Business Development Executive role differed on a number of levels, to the Sales & Marketing role held by Mr Ellis. Mr Barclay acknowledged that Mr Ellis had the skills to perform the role but questioned his suitability. If Mr Ellis had been skilled and suitable to perform the role, then Mr Ellis’ claim that he should have been offered redeployment may have been valid. However, this was not the case. In any event, it is my view that Mr Barclay did consider redeploying Mr Ellis, in accordance with *Wang*.

[98] However, for the reasons set out in his email of 15 December 2014, Mr Barclay asked that Mr Ellis make a decision as to whether he wanted to be considered for the role, “*taking into account all the information about it*” and if he wished to do so, to apply for the role.

[99] Mr Ellis could have applied for the role and tested his suitability during the recruitment process- a matter flagged by Mr Barclay. He chose not to do so.<sup>12</sup>

[100] Accordingly, Mr Ellis’s personal grievance claims against Sports Marketing have not been established.

## **Remedies**

[101] Mr Ellis has not been successful and therefore the Authority is not required to consider remedies.

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<sup>11</sup> [2010] ERNZ 468

<sup>12</sup> Supra footnote 8

## **Costs**

[102] The parties are encouraged to discuss and agree costs between themselves. However, if they are unable to do so Sports Marketing has 14 days within which to file a memorandum as to costs and Mr Ellis has 14 days from receipt of the memorandum to file a memorandum of costs in reply.

**Anna Fitzgibbon**  
**Member of the Employment Relations Authority**