

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 154
3039311

BETWEEN JOHN SCOTT
Applicant

AND OJI FIBRE SOLUTIONS (NZ)
LIMITED
Respondent

Member of Authority: Nicola Craig

Representatives: Simon Mitchell, Counsel for the Applicant
David France, Counsel for the Respondent

Investigation Meeting: 3 December 2018 at Tauranga

Submissions received: 10 December 2018 from the Applicant
17 December 2018 from the Respondent

Date of determination: 18 March 2019

DETERMINATION OF THE AUTHORITY

- A. OJI Fibre Solutions (NZ) Limited did not breach John Scott's employment agreement.**
- B. A timetable is set for submissions on costs, in the event that the parties are not able to resolve the issue themselves.**

Employment relationship problem

[1] John Scott works for OJI Fibre Solutions (NZ) Limited (OJI or the company) at its Tasman Mill in Kawerau. His work is primarily involved with a large project referred to as CSUP; control systems upgrade. Mr Scott's job title is Electrical and Instrumentation (E & I) Project Engineer Tasman.

[2] OJI was previously known as Carter Holt Harvey Pulp & Paper Limited.

[3] Mr Scott claims during his period of employment OJI breached his employment agreement by changing his position, removing some of his duties (particularly project management) and making the role a less senior one. He says the breach is on-going. OJI replies that it still employs Mr Scott within his original job description and has not breached his employment agreement. The parties agree that there was no disciplinary process nor decision that Mr Scott's position was redundant with him then being redeployed.

[4] An investigation meeting was held on 3 December 2018 at Tauranga. I heard from Mr Scott and OJI's Derrick Hope (Engineering Manager).

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

[6] The issues for determination are:

- (a) Is OJI breaching Mr Scott's employment agreement by not allowing him to undertake his role reporting to the engineering manager and with the purposes, accountability, performance indicators, competencies, authorities and relationships set out in the position description?
- (b) If it is, should a compliance order be issued?
- (c) If OJI breached the contract, should a penalty be imposed on it?

[7] OJI raises an issue regarding whether the penalty is being sought out of time.

[8] Mr Scott did not pursue a personal grievance claim through this proceeding.

Mr Scott's appointment process

[9] Mr Scott's background is in control systems and includes project management roles. Broadly speaking control systems are the systems which manage, direct or monitor devices, in this case industrial equipment.

[10] In December 2013 OJI advertised on Trade Me for an E & I Project Engineer:

You will be joining an international manufacturing organisation who is the market leader in a truly challenging and rewarding role. Working alongside experienced professionals you are coming on board as planned upgrades are commencing across multi-sites in NZ. You will be working alongside experienced professionals using the latest in technology.

This is a unique role that will evolve with the projects you will lead. Working on a planned process automation upgrade you will develop:

- DCS¹ and HMI² standards
- Perform DCS upgrading projects from concept design to detail design FAT³
- Commissioning and hand over.

From this point your role will develop into Project Management and open up challenges and skills. You will also ensure the plant functions on a day to day basis.

[11] There were two vacant roles but Mr Hope decided to place just one ad and not refer to two possible roles. They were hoping that they could find at least one potential employee with control system, or control system upgrade, experience. Had there been a supply of good candidates two appointments may have been made with the same job title.

[12] My impression is that OJI had found it difficult to find an employee who could manage the CSUP project and were hoping that they attracted someone, but if not there were other things for an engineer to be undertaking. Otherwise they would have to contract in external expertise, which in the end, is what happened in 2016.

[13] Mr Scott was not aware that there were two vacancies, not recalling any discussion at the interview about that. He does recall discussion about managing the project.

¹ DCS – distributed controlled system

² HMI – human/machine interface

³ FAT – factory acceptance testing

[14] Prior to being interviewed Mr Scott received the position description. The position description is standard to all E & I engineers for OJI. The purpose of the position is set out in four points as follows:

- To provide the mill with expertise in process control systems, communication, and systems' architecture and associated hardware
- To develop process control systems on a new DCS operation platform as part of a scheduled upgrade programme
- To deliver best practice and identify new developments in control technology
- To provide engineering skill in the Business' drive to meet its production, cost, quality and environmental improvement targets.

[15] The position had no direct or indirect reports. One of the key performance indicators is delivery of strategic project outcomes. The seven primary competencies include technical expertise and project management.

[16] Mr Hope and others interviewed Mr Scott. He was also taken on a site tour. Mr Scott's impression from the interview and tour was that OJI staff were very keen to get the project initiated. He understood that they had tried unsuccessfully to find people with the right project management experience previously. Mr Scott brought project management as well as control systems experience.

[17] Mr Scott's impression was that the intention of the job was to manage the CSUP project. However, he accepts that he was told that he may have to other work. Mr Hope accepted that the project was discussed.

[18] OJI sent Mr Scott a letter on 20 January 2014 which encompassed an individual employment agreement. The letter stated that he would report to the Engineering Manager. On 21 January 2014 Mr Scott signed the letter as understanding and accepting the conditions of employment, having had the opportunity to seek independent advice.

[19] The employment agreement has a broad duties clause, identifying a full time commitment required, reporting to the engineering manager and complying with all necessary directions. The position was identified as being based at Kawerau but performing duties elsewhere from time to time.

[20] Mr Hope's evidence was that all project engineers reporting to him could be responsible for project management generally associated with capital and/or strategic maintenance expenditure. The project engineers may be project engineers on some tasks and project managers on others, subject to skills, experience, work load, fit and capability. Mr Hope distinguished between an engineer's position, such as E & I Project Engineer, and the role on a particular project, such as project manager.

[21] Mr Hope accepted that sometimes OJI had employed people exclusively to manage projects but they were brought in on a contract basis, rather than as employees. Projects had a finite life whereas the engineering roles continued.

[22] Mr Hope says that a new E & I project engineer role was not created for the purposes of the CSUP project. The expectation was that there would also be other projects which would require a control system engineer.

[23] Mr Hope accepted that it was expected that Mr Scott would have project manager responsibilities for the CSUP project, whether it ended up being for selected phases only or for the entire project.

Mr Scott's initial period of work

[24] Mr Scott began work in February 2014. The bulk of his work until March 2016 was as the project manager for CSUP. The CSUP project was a multi-million dollar development of control systems for the steam plant and then the recovery plant of the mill. Mr Scott regarded the role as a senior one.

[25] Mr Scott says that he was concerned as soon as he took responsibility for the project that a large amount of money had been invested in a solution which had not been installed in industry elsewhere.

[26] Mr Scott did some work not related to CSUP, although he regarded this as more limited than Mr Hope did.

[27] In 2015 Mr Scott as project manager lead had funding for the steam plant re-budgeted at a substantially increased level. He signed off capital expenditure documents as the project manager. He used the description of himself as Control Systems (or CS) Project Manager on emails at times if needed.

[28] In December 2015 key performance activities were discussed with him by Mr Hope. In the key accountabilities document Mr Scott changed the title to record himself as Senior Control Systems Project Manager. Mr Hope made handwritten notes on the document after Mr Scott had changed the title but did not amend that title.

[29] Mr Scott pursued a formal change of title for his role. He did not consider that the title E & I Project Engineer fitted the role as it was operating. Mr Scott regards the position description as not being true reflection of what he was doing although noting that there are aspects of it which were in keeping. Mr Scott regards his salary as a little low for a project manager role of a project the size of CSUP.

[30] Mr Scott raised the issue of a title change with Mr Hope, who appeared to be at least amenable to considering a change. Mr Hope talked to OJI human resources about that issue. As a large organisation, there was a process to be gone through in order for a role title to change. Mr Hope's evidence was that the company only had two categories of engineers⁴ reporting to him and no employee positions entitled project managers. Mr Hope decided not to go through the process to establish a new category and change Mr Scott's title over.

[31] Mr Scott arranged for a project office in a different area to where he had worked initially. He had spent about eight months working in the remote project management office.

[32] Mr Scott began questioning the work of a vendor to the CSUP project and also a consultancy firm that was reporting to OJI.

The project health check report

[33] Early in 2016 OJI sought a project health report from a consultancy firm. Mr Hope describes there being serious concerns about the progress of the project.

[34] The report recommended a number of steps including changing the leadership of the project and put in place an individual with a project management focus. OJI decided as a first step to put the CSUP project on hold immediately whilst it undertook an assessment of what was required and needed to provide the organisation

⁴ E & I project engineers and mechanical engineers

with the confidence that the project could meet its cost, performance and delivery targets.

[35] Mr Scott was invited to a meeting on 7 March 2016 for a project health check review, with Mr Hope and the site human resources manager. The meeting invitation suggested that Mr Scott might like to bring a support person to the meeting, without any explanation as to why. A more senior OJI engineering manager was listed on the invite but did not attend.

[36] At the meeting Mr Scott was given a copy of the 26 page health check report without being given an opportunity to read or comment on it. It was presented as final. He had not had any previous opportunity to comment on a draft version. There was little discussion about the report's contents.

[37] Mr Scott believes the report to contain many factual errors and use emotional and inflammatory language. He considers that the primary author lacked relevant experience.

[38] On the other hand Mr Hope considers that the report contained a fair assessment of where there had been difficulties, including the issue with a vendor. Mr Hope did not consider that punitive action against Mr Scott was the best approach as Mr Scott had skills and experience which the business could still utilise.

Changes implemented

[39] Mr Scott was given an email printout of tasks and priorities. He was informed that he needed to put the project immediately on hold and to return from the project office to his earlier workspace in the engineering office.

[40] An external consultant was placed in the CSUP project manager role in April 2016, reporting directly to Mr Hope as regards the project. By letter of 1 April 2016 Mr Scott's role was documented as being to support and report to the consultant. The letter acknowledges the significant efforts which Mr Scott had made to raise the profile of the project across the business. He was asked to continue to provide this level of support to the new project manager. An update sent out by the mill manager made a similar acknowledgement.

[41] Mr Scott was called to another meeting in May 2016. The consultant project manager and Mr Hope attended. Mr Scott was provided with a document describing his modified role as E & I engineer. The tasks allocated to Mr Scott were of a technical nature.

[42] Mr Scott says that he did not accept the changes. However, he continued to try to work on the changed tasks as best he could.

[43] An OJI chart for the CSUP team structure Phase 1 shows Mr Scott, as E & I Engineer Systems Support, reporting to a CSUP project lead engineer who in turn reports to the consultant project manager, who reported to Mr Hope. Mr Scott was within the area shaded to indicate the CSUP project team. He also had a technical interface link to vendors.

[44] Mr Scott understood that OJI were considering returning him to the CSUP project manager role after the consultant left. However, Mr Hope was non-committal. Then another consultant took over the project manager role in November 2016.

[45] From late March 2016 Mr Scott performed the tasks allocated to him, which did not involve him being the project manager of CSUP. When questioned why he did not challenge these changes during 2016 or 2017 he said that he did not have support from the company to challenge them and found it hard to raise issues. Mr Scott says that he raised the issue about his skills now not being well used by OJI at key accountabilities meetings.

Events in 2018

[46] There was little evidence regarding events in 2017. However, in February 2018 Mr Scott emailed his concerns to OJI Chief Executive Officer Jon Ryder. At this point the capital expenditure budget for the next phase of the project was awaiting final sign off. The concerns outlined relate to the project itself rather than Mr Scott's role in it. Mr Hope says that Mr Scott's concerns are not shared by the business.

[47] In June 2018 Mr Hope called Mr Scott to a meeting to discuss his new role in the project, which was focused on writing software. Mr Scott describes this as his third move; from project manager to project engineer solely working on technical engineering, to being positioned under a lead software engineer. Mr Scott notes that

three of the five engineers on that part of the project are titled either Lead or Manager. Only Mr Scott and a graduate are not.

[48] The CSUP team structure chart for phases 2 and 3 show Mr Scott reporting to the lead software engineer who reports to the project manager who reports to Mr Hope. OJI's staff structure chart still shows Mr Scott reporting to Mr Hope, along with the other E & I engineers and others.

[49] In late July 2018 the previous project manager of the CSUP project left to work overseas and another consultant was appointed to that role.

[50] Mr Scott's work at the time of the investigation meeting involved him working as a technical engineer writing software. He is working on the CSUP project but with little project management involved. Mr Hope accepts that Mr Scott's only project management work since April 2016 is that immediately associated with his sphere of delegated project responsibilities. Mr Scott has limited contact with vendors, who are external to the business and with senior management at OJI.

[51] Mr Hope accepted that the scope of Mr Scott's current work is quite different to the project manager role currently undertaken by a consultant. However, he maintains that it is consistent with Mr Scott's position description and with OJI's project responsibilities list for a CSUP E & I engineer, support systems.

Compliance order sought

[52] Mr Scott wishes to complete the job for which he says he was employed. He regards what had happened to him as humiliating as well as damaging to his reputation and career. He is willing to work with OJI as needed to restore his career and enable him to move forward.

[53] Mr Hope accepted that the person currently operating in the project management role could be replaced at any time as she is not an employee.

[54] There is a two-step process. Firstly, to identify whether there is or was a breach of Mr Scott's employment agreement by OJI. Then if there was to consider whether a compliance order should be imposed.

Was there a breach of the employment agreement?

[55] I now consider whether OJI breached its agreement with Mr Scott. He says that the removal of functions, including reporting to the engineering manager, has made the position no longer a senior one which is what he agreed to.

[56] The job advertisement paints a positive picture of the role, including referring to it as unique. Submissions for Mr Scott accept that the job advertisement does not have contractual force. The employment agreement includes a provision specifying that the employment agreement is a full record of the agreement between the parties. The job advertisement can be examined as background.

[57] The employment agreement does not specify what duties are to be performed although the role is identified as Electrical & Instrumental Project Engineer, Tasman. The agreement does identify that Mr Scott will report to the engineering manager (Mr Hope). It does not refer to Mr Scott being employed as a CSUP project manager whose duties and responsibilities were to project manage that project.

[58] For OJI, Mr France submits that the original position description is incorporated in the employment agreement. I accept that. Mr Scott's attempts prior to March 2016 to get the position description and his job title changed were unsuccessful.

Seniority of role

[59] It is submitted for Mr Scott that he was employed to a senior or very senior role. There is a lead E & I project engineer who also reports to Mr Hope. However, it is not suggested for Mr Scott that that is the senior role he was employed into.

[60] The position description was described by Mr Mitchell as specifying accountabilities at a very high (senior) level. However, the evidence did not support that being the case. The position description is a standard one used for all E & I project engineers, of which there are four. OJI uses a broad position description, which can cover people being involved in a number of different projects.

[61] I accept OJI's submission that an E & I project engineer role is not a role that has seniority from a management perspective. The role does not have staff reporting to it. Mr Scott had the same position description as other E & I project engineers.

[62] Mr Mitchell argues that Mr Scott has been demoted. A personal grievance claim may have dealt with this issue in a different manner. However, his pay remains the same, and he still has the title set out in his position description. I will deal with the issue of duties and reporting relationships below.

Duties and responsibilities

[63] Since April 2016 Mr Scott has not had significant project management functions in his role. He no longer deals regularly with business unit managers or operational managers. The tasks which the company requires of Mr Scott are set out in the May 2016 project responsibilities document. Mr Scott gave evidence that the duties and responsibilities he currently has are within those described in his position description. What is currently being required of him is consistent with his position description.

[64] Mr Scott was questioned about various of the key accountabilities in relation to performing achievement targets. He accepted that he was doing work which was consistent with many of those duties.

[65] The employment agreement and position description does not mention project management of the CSUP project. For Mr Scott it is accepted that, whilst he is entitled to a senior role, he is not necessarily entitled to the CSUP project manager position, as the employment agreement is generic.

[66] I conclude that Mr Scott continues to perform tasks and duties provided for in his position description.

Reporting to engineering manager

[67] In terms of his employment issues, such as performance assessment and approval of leave, Mr Scott still reports to Mr Hope as the engineering manager. This is reflected in the Oji FS organisational chart. However, on particular projects he reports into the project manager in relation to the particular tasks he is responsible for. Project charts may change during phases of a project.

[68] It is not a breach of his employment agreement for Mr Scott to report to people other than Mr Hope on projects.

How the changes were untaken

[69] Mr Mitchell submits that there is significant dispute as to whether OJI's decision that Mr Scott was no longer going to be CSUP project manager was reached fairly and whether he was given the opportunity to be heard. However, this is not a personal grievance claim or an allegation of a breach of good faith. It is solely a claim that OJI breached Mr Scott's employment agreement.

[70] Even if I did find there to be a breach of a duty of fair and reasonable treatment it is hard to see how that, particularly at this point in time, could lead to a compliance order which effectively seeks to have Mr Scott returned to a major project management role, which it appears can only be the CSUP project. Similarly a breach of the duty of good faith may have given Mr Scott a basis for a compliance order regarding an improved process or a penalty for breach, had the claim been brought in time.

Conclusion on breach issue

[71] I accept that there have been changes to Mr Scott's work which he finds less satisfying, but am unable to conclude that there was a breach of his employment agreement with OJI.

Costs

[72] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so OJI shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Mr Scott shall have a further 14 days in which to file and serve a memorandum in reply. All submissions seeking costs must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Nicola Craig

Member of the Employment Relations Authority