Desiring redundancy — when an employee wants to be made redundant, 28 January 2020

Click to open document in a browser

By Anthony Kamphorst, Solicitor, Kiely Thompson Caisley, a specialist employment law firm

At first glance the notion that an employee may want to be made redundant seems nonsensical. However the usual dynamics of a redundancy situation change when an employee has a sizeable redundancy compensation entitlement under their employment agreement. A recent decision of the Employment Court involves a personal grievance claim made by an employee for an employer's failure to make him redundant: *Johnston* v *The Fletcher Construction Company Limited* [2019] NZEmpC 178.

The decision involved a senior employee, who following a restructure was given the option to either accept a new role or to continue in ongoing employment in his existing role, opted to resign and claim he had been made redundant and/or constructively dismissed.

The judgment examines what constitutes a redundancy, and whether it necessarily follows from a restructure that staff must be surplus to requirements or that jobs have ceased to exist.

Factual Background

Mr Johnston was one of four senior accountants employed by The Fletcher Construction Company Limited (Fletcher Construction). The three other senior accountants had responsibilities for separate business units in the company. However, Mr Johnston's specific role (the company's Financial Controller — Group Services) was unique as he was responsible for providing a financial overview across the entire company.

In March 2016 Fletcher Construction announced proposed structural changes to its financial services. The proposal involved removing all four senior accounting positions and replacing them with seven new positions. The proposal contemplated a phased introduction of the new structure, contingent on the implementation of an enterprise resource planning system known as the JD Edwards (JDE) software system.

In June 2016 the company advised Mr Johnston of its decision to proceed with the proposal. He was advised his role as Financial Controller would continue until the JDE implementation affected his business unit, at which point a "transition to the new structure" would occur.

Fletcher Construction next advised Mr Johnston that JDE would "go live" in his business unit in early October 2016. The company also provided him with job descriptions for the new roles created by the restructuring and invited him to apply for any of them.

In July 2016 Mr Johnston successfully applied for one of the new roles, with the title Business Performance Manager — Constructive Division. However, Fletcher Construction did not take further steps to complete his appointment until 28 September 2016, when it provided him with a proposed employment agreement. The proposed employment agreement contemplated a commencement date of 3 October 2016.

Mr Johnston then received confirmation that JDE would "go live" on 1 October 2016. As that date was a Saturday, he treated the effective date for the software to be operative as the following Monday, 3 October 2016.

Mr Johnston was not satisfied with the proposed employment agreement for the new role of Business Performance Manager — Constructive Division for two main reasons. First, it did not provide for redundancy compensation. Under his existing employment agreement, he had an accrued entitlement of approximately 44 weeks' pay and wanted to preserve it. Second, the proposed employment agreement would not treat his service as continuous for the purpose of long service leave.

Mr Johnston met with his manager on 3 October 2016 and his manager subsequently raised these concerns with Fletcher Construction's HR department. While waiting for a response, Mr Johnston continued to perform his usual work as Financial Controller for a short time despite JDE becoming operative. He also agreed to a temporary secondment from 21 October 2016 to replace a previous manager who had been dismissed for redundancy following the introduction of JDE.

It was not until 1 December 2016 when HR met with Mr Johnston and provided him with a choice of two alternatives. The first option was for Mr Johnston to accept the new role, but with provision for redundancy compensation capped at 26 weeks and an increase in the proposed salary. The second option was for Mr Johnston to remain in his Financial Controller role without any changes to his terms and conditions of employment.

By 23 December 2016 Mr Johnston advised via his lawyer that he had rejected both alternatives. He raised a personal grievance for Fletcher Construction's alleged failure to comply with the existing employment agreement because it had not terminated his employment for redundancy when the role of Financial Controller became redundant, which was said to have occurred on 3 October 2016.

Following an extended period of sick leave, Mr Johnston resigned on 25 May 2017.

Was There a Redundancy?

The key issue in the case was whether Mr Johnston's Financial Controller role had been made redundant.

Mr Johnston claimed the role was made redundant, as it became surplus to Fletcher Construction's requirements from 3 October 2016 when JDE became operative. He claimed that many of the tasks formerly undertaken by him were allocated elsewhere, and there were material differences between the duties of the Financial Controller position and the new role of Business Performance Manager.

Mr Johnston further argued that the fact two of the four senior accountants were dismissed for redundancy illustrated the restructure had been given effect and could not be undone by Fletcher Construction. Additionally, he submitted his Financial Controller employment agreement did not provide Fletcher Construction with an ability to decline to end his employment just because another job was suitable and available for him, and that the company's desire to continue to employ him was irrelevant.

Fletcher Construction argued that there had been no redundancy, and therefore its contractual obligation to pay redundancy compensation was not engaged. The company submitted that, when viewed objectively, the differences between the old and new roles were not such that Mr Johnston's original position could be described as having disappeared or significantly changed to such a degree that it no longer existed.

Additionally, Fletcher Construction argued that Mr Johnston's application for the new role indicated his desire to remain employed and suggested that he considered the job was suitable to him. It also emphasised that during his secondment, the Financial Controller role was temporarily filled by a contractor and Mr Johnston returned to it until going on sick leave.

The Court accepted on the facts that:

> [46] The transition to the new structure, as it affected Mr Johnston, did not occur abruptly on 3 October 2016 and there was no indication in the correspondence with him that it would. He continued to work as Financial Controller, while negotiating the terms and conditions of the new job he was offered and before beginning the secondment in B+I ...

The Court also found at [47] that:

> … the positions of Financial Controller and Business Performance Manager were sufficiently similar that a conclusion could not reasonably be reached that Mr Johnston's original position had … disappeared or sufficiently diminished, or been altered, to such a degree that it no longer existed ...

The Court found the new role involved working in the same location, reporting to the same manager, holding the same status in the company, requiring the same skills and experience and performing similar tasks.

Finally, the Court concluded that the redundancy clause in Mr Johnston's Financial Controller employment agreement was not activated merely because he received notice that JDE would be operational from early October 2016. The Court stated "*[i]t does not automatically follow from a restructuring that staff must be surplus to requirements or that jobs have ceased to exist*".

Therefore the Court was satisfied that the Financial Controller role had not ceased to exist in October 2016 or before Mr Johnston resigned, and accordingly there had been no redundancy.

Was There a Constructive Dismissal?

Mr Johnston also claimed that he was constructively dismissed by Fletcher Construction's breaches of the employment agreement and the Employment Relations Act which were causative of his decision to resign and made his resignation foreseeable.

Mr Johnston alleged three breaches:

> (a) Fletcher Construction failing to comply with the redundancy and termination provisions in the employment agreement.
> (b) The company giving instructions that resulted in financial information being dealt with inappropriately, which was calculated or likely to destroy or seriously damage Mr Johnston's reputation.
> (c) The company breached the statutory duty of good faith, which had become an "incorporated term" of the employment agreement.

As the Court had already found Fletcher Construction had not failed to comply with the redundancy and termination provisions, it focused on allegations (b) and (c).

In the first instance, the Court accepted Mr Johnston's submission that a constructive dismissal might arise even if the employer was not seeking the employee's resignation and may want to retain that person's employment.

Regarding allegation (b), Mr Johnston claimed the offending instructions concerned recoding certain costs and expenses and providing overly optimistic forecasting and provisioning.

The Court was not convinced that either could have caused professional problems for Mr Johnston, as he acknowledged that recoding was an acceptable practice and the Court found the provisioning was for the purposes of internal financial reports (as opposed to published final accounts) until more work was completed to ascertain the company's correct position. Additionally, Mr Johnston had not raised these concerns with the company until after litigation had started and did not use the company's independent whistle-blower programme.

Regarding allegation (c), the Court did not accept there had been a breach of good faith. Judge Smith went on to state:

> [110] I have strong reservations that the significance of the duty of good faith in the Act translates into that duty being an incorporated term into an employment agreement so that a breach could give rise to damages. I consider it is unlikely Parliament intended to create a situation where damages for such a breach would be available to run in parallel with personal grievance claims, compliance orders and penalties.

As a result, the Court did not accept Mr Johnston's claim for constructive dismissal.

Comment

This judgment affirms that an employee's role is not automatically surplus to requirements or ceases to exist by mere fact of a restructure. The focus must be on whether there have been any substantive changes to the existing role. This will often require comparison of the existing role and the proposed role to determine whether the roles are sufficiently different so that the existing role has been altered to such an extent that it no longer exists.

This case is also a further instance of the Employment Court taking a dim view of the argument that the statutory duty of good faith is incorporated into an employment agreement. The Court also discussed this point earlier this year in *Kazemi* v *RightWay Ltd* [2019] NZEmpC 73, and reached the same view that it is unlikely Parliament intended to allow an employee to recover damages for breach of a good faith in addition to the remedies available under the Act.