

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 178
5427773

BETWEEN	DEBBIE BAKER Applicant
A N D	COUNSELLING SERVICES CENTRE Respondent

Member of Authority: K J Anderson

Representatives: A Singh, Counsel for Applicant
M Dearing, Counsel for Respondent

Investigation Meeting: 11 March 2014 at Auckland

Submissions Received: 14 March 2014 for the Applicant
19 March 2014 for the Respondent

Date of Determination: 9 May 2014

DETERMINATION OF THE AUTHORITY

Introduction

[1] The applicant, Ms Debbie Baker, claims that she was unjustifiably dismissed on 2 August 2013. Ms Baker asks the Authority to find that she has a personal grievance and award her various remedies.

[2] The respondent, Counselling Services Centre, rebuts the claims of Ms Baker and says that she was justifiably dismissed on the ground of redundancy.

Background

[3] Counselling Services Centre (CSC) provides counselling and crisis response services to victims of sexual assault. It is a small charitable organisation and is dependent on the funding it receives from various sources.

[4] The evidence of Ms Tania Blomfield, the manager of CSC, is that the organisation has a funding contract with the Counties Manukau District Health Board (the DHB) which is reviewed on an annual basis. The DHB contract provides partial funding for the 24 hours, 7 days a week, Crisis Intervention Team (the 24/7 Crisis Team) which provides for eight social workers (including Ms Baker) working on a part-time/on-call basis, with two workers being available at any one time.

[5] Until the restructure that resulted in the loss of Ms Baker's Day Team position, CSC had three part-time roles. Ms Baker fulfilled one of the roles working during the day for a maximum of 16 hours each week on Mondays and Tuesdays. The funding for the three part-time roles was not sourced from the DHB contract, but from grants received through other fundraising.

[6] The evidence of Ms Blomfield is that in June 2012 she was notified that the Community Response Fund (CRF) had been discontinued. The CRF was a contestable fund that had provided CSC with \$50,000 of funding during the last funding round. Ms Blomfield says that she had been using this fund to partially pay for the three part-time Day Team positions. Ms Blomfield attests that when the CRF ceased, more organisations were competing for available funds and successful fundraising was become increasingly difficult.

[7] The evidence of Ms Blomfield is that a situation developed whereby funding for CSC was reduced but the expenses for the organisation remained the same. Therefore she had to look at options to deal with a deteriorating financial situation. This included an assessment of what additional funding could be obtained from other sources; and whether reallocating resources within the organisation was a viable option. However, by mid May 2013, Ms Blomfield considered that a restructure of the three part-time Day Team positions might be required in order to reduce costs for the organisation.

Proposed restructuring

[8] Via a letter dated 10 June 2013, Ms Blomfield invited Ms Baker to attend a meeting to discuss a restructuring proposal. Ms Baker was informed that if it went ahead, the restructuring could result in the disestablishment of her position.

[9] On 11 June 2013, a meeting took place with Ms Baker. Also in attendance were the other two members of the Day Team, Ms Gurmetta Singh and Ms Cris Craft.¹ The notes of the meeting have been produced to the Authority. The impact of the loss of the CRF money was discussed. There was also another aspect to the matters that had to be discussed at the meeting. This was that the Board of CSC had introduced a professionalism policy that would apply to the 24/7 Crisis Team members.

[10] In regard to the impact of the loss of funding, the three employees were informed that because their positions had been primarily funded through the CRF, which had ceased, there was now a shortage of funds and that it was proposed to disestablish the three part-time roles and create one full-time role.

[11] The three employees were also advised by Ms Blomfield that with the introduction of the professionalism policy, this would mean that all employees would be required to hold a qualification relevant to their role, enabling them to apply for registration with a relevant professional body.

[12] The evidence of Ms Blomfield is that she reiterated to Ms Baker and the other two employees, that any restructuring was only a proposal at this point and there would be another meeting to seek their feedback and this would be considered before a final decision was made. It was explained that the potential disestablishment was only in relation to the Day Team work at CSC and not in regard to their work with the 24/7 Crisis Team.

[13] A further meeting took place on 24 June 2013. Ms Baker and Ms Singh proposed that their roles could continue and they could accommodate the changes required, by having the three roles amalgamated into one, and Ms Baker and Ms Singh could then job share the role; as Ms Craft was on a fixed term contract which was due to expire. Ms Blomfield says that she advised that she would not be able to unilaterally change the job descriptions of Ms Baker and Ms Singh to that extent and their current roles would have to be disestablished and a new job created, if that was going to happen. I have to say that this seems rather odd as it would not have been a unilateral change given that Ms Baker and Ms Singh were proposing it and hence, one would assume that a mutual agreement could have been arrived at.

¹ The three women agreed that they would all meet with Ms Blomfield as a group.

Meeting 1 July 2013

[14] The purpose of this meeting was to inform the affected employees, including Ms Baker of the final decision regarding the proposed restructure. Ms Blomfield advised that her decision was to disestablish the three part-time Day Team roles and create a single full-time role; working 40 hours each week.

[15] The evidence of Ms Blomfield is that she informed Ms Baker and Ms Singh that the job share option that they had put forward at the meeting on 24 June 2013, was “potentially an option”. But it would have to be on the basis that the 40 hours would be split between the two women. The evidence is inconclusive as to whether this would have been an even split (20 hours each) or whether some alternative would have been possible.

[16] The common evidence is that Ms Baker and Ms Singh were encouraged by Ms Blomfield to apply for the full-time position on a job share basis.

[17] Ms Blomfield then confirmed to Ms Baker that her position was disestablished as of 1 July 2013 and that her current role would cease on 2 August 2013. There was an option given as to whether Ms Baker wished to work out the notice or receive payment in lieu of such. The termination of Ms Baker’s employment in regard to the Day Team, was confirmed by a letter dated 1 July 2013, which also included an offer of assistance with CV preparation and other related matters, along with an offer of counselling services, if required.

The challenge to the termination

[18] Ms Baker says that her dismissal from the day team on the ground of redundancy was unjustifiable on several grounds. First, Ms Baker says that the termination of her employment was a breach of clause 13 of her employment agreement. This provides that:

13. REDUNDANCY

In the event that your position becomes surplus to the needs of the Employer, you shall be given notice of termination in accordance with the provision of the Termination clause above. In the event that a redundancy should occur the Employer will provide the Employee reasonable assistance and access in gaining new employment.

Due to the charitable status of Counselling Services Centre there is no provision for redundancy compensation.

[19] The termination clause provides for one month's written notice, among other things.

[20] Ms Baker says that her position had not become "surplus to the needs of the Employer" and hence a breach of clause 13 occurred. Therefore, the redundancy of her position was not genuine. But I do not accept that this is correct. The weight of the evidence is that due to a shortage of funding, it was necessary for CSC to reduce its costs. This does not appear to be disputed by Ms Baker, but she says that the proposal put forward by her and Ms Singh, to job share the newly created role was not given proper consideration. It is argued for Ms Baker that if the job share proposal had been given meaningful consideration by Ms Blomfield, it would not have been necessary for her to apply for the new position. This is because, if the job share proposal had been explored properly, an agreement could have been reached in regard to new employment agreements.

[21] The response for CSC is that the new role had some "substantial changes" as compared with the duties that Ms Baker was carrying out at the time, and because of this it was necessary for CSC to adopt a competitive appointment process. Nonetheless, it is acknowledged that Ms Baker and Ms Singh were given the opportunity to apply for the new role on a job share basis, and they were encouraged by Ms Blomfield to do so. Regrettably, Ms Baker (nor Ms Singh) chose not to apply for the new role.

Analysis and conclusions

[22] As with any dismissal that is challenged on the ground that it is unjustifiable, a termination of employment on the ground of redundancy requires the Authority to apply the test provided by s.103A(2) of the Employment Relations Act 2000 (the Act). This 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.

[23] At subsection 103A(3) there are various criteria set out, but these are not really relevant to this matter.

[24] However, at subsection 103A(4), the Authority may consider any other factors that it thinks are appropriate.

[25] In *Simpsons Farm Ltd v. Aberhart*² the Employment Court held that:

So long as an employer acts genuinely and not out of ulterior motives, a business decision to make positions or employees redundant is for the employer to make and not for the Authority or the Court, even under section 103A.

[26] Chief Judge Colgan presided in *Simpsons Farm*, and in *Rittson-Thomas trading as Totara Hills Farm v. Davidson*³ he explained in some detail what was intended by his *dicta* in the earlier case. Relevant to the facts of this matter is the following:

[53] Section 103A does require the Court [Authority] to inquire into a decision to declare an employee's position redundant and to either effect the holder of that position to his or her disadvantage or to dismiss that employee, if the personal grievance alleges that these acts by the employer were unjustified. The statutory mandate does not, however, go as far as the Labour Court did in *GN Hale*, that is to substitute the Court's (or the Authority's) own decision for that of the employer. Rather, the Court (or the Authority) must determine whether what was done and how it was done were what a fair and reasonable employer would (now could) have done in all the circumstances at the time. So the standard is not the Court's (or the Authority's) own assessment but, rather, its assessment of what a fair and reasonable employer would/could have done and how. Those are separate and distinct standards.

[54] It will be insufficient under section 103A, where an employer is challenged to justify a dismissal or disadvantage in employment for the employer simply to say that this was a genuine business decision and the Court (or the Authority) is not entitled to inquire into the merits of it. The Court (or the Authority) will need to do so to determine whether the decision, and how it was reached, were what a fair and reasonable employer would/could have done in all the relevant circumstances.

[27] The Court of Appeal and the Employment Court have made it clear that an employer is entitled to make their business more efficient by the introduction of cost saving steps, including reducing the number of employees engaged. But where, as in this matter, an employee challenges the justification for a dismissal, the law now requires the Authority to determine whether the decision was made and how it was reached, was what a fair and reasonable employer could have done in all the circumstances that existed at the time.

² [2006] ERNZ 825

³ [2013] NZEmpC 39

The circumstances that existed at the time

[28] As outlined in the background set out above, CSC was faced with having to reduce costs because of a shortage of funds. While Ms Baker says that the necessary funds would have been available if CSC had canvassed other avenues with more effort, there is no evidence to support this proposition.

[29] The Authority accepts that CSC had a genuine need to save costs and following appropriate consultation, a decision was made to disestablish the three part-time Day Team positions and replace them with one full-time role; working 40 hours each week. I conclude that this was a decision that CSC was entitled to make having reasonably consulted with the effected employees before deciding to implement the initial proposal.

[30] However, it seems to me that a fair and reasonable employer would not have required Ms Baker to engage in a competitive process for the new position. Rather, I conclude that given that Ms Baker and Ms Singh had jointly proposed that they would be prepared to job share the new role, further discussion about the practicality of this proposal should have been explored further with the possible intention of redeploying the two incumbents to the new role on a job share basis.

[31] While CSC says that the new role was substantially different in regard to the duties involved, there is no evidence before the Authority as to why CSC considered this to be so. Nor is there any evidence that this purported substantial difference between the new role and the role carried out by Ms Baker was ever really discussed. At the very least, pursuant to s.4 1A(c) of the Act, Ms Baker should have been provided with access to more information about the new role and there should have been a much better opportunity provided for her to comment on the totality of the information that was available, before simply presenting her with a *fait accompli* as to the termination of her employment.

[32] And while I accept that Ms Blomfield encouraged Ms Baker to apply for the new role on a job share basis, a matter I will return to, there has been no convincing reason put forward by CSC as to why a competitive process was required at all. It seems to be acknowledged by Ms Blomfield that Ms Baker had the necessary skills and experience to carry out the new full-time role, even if some further training may

have been necessary in order to meet the standards being introduced via the Board's professional requirements policy .

[33] I find that the dismissal of Ms Baker was premature and that she should have been given the opportunity to have a more meaningful discussion about the feasibility of redeploying her on a job share basis with Ms Singh, rather than having her employment terminated in the manner that occurred. I find that the dismissal of Ms Baker on the ground of redundancy was not what a fair and reasonable employer would have done in all the circumstances that existed at the time.

[34] It follows that the dismissal of Ms Baker was unjustified and she has a personal grievance.

Remedies

[35] Having found that Ms Baker has a personal grievance, the Authority may award remedies pursuant to s.123 of the Act.

[36] Ms Baker seeks to be awarded reimbursement of lost wages from 5 August 2013 to 18 December 2013, some four months. Under ss.123 and 128 of the Act, Ms Baker may be entitled to an award of three months wages and then there is a discretion for the Authority to award more than that.

[37] However, there is also an obligation on Ms Baker to mitigate her loss of income and there is no evidence that she has made any attempt to reduce the loss of wages incurred by the loss of her part time role. In *Allen v. Transpacific Industries Group Ltd (trading as Medismart Limited)*⁴ Chief Judge Colgan explained the obligations of a dismissed employee in relation to a loss of earnings claim, thus:

[78] Dismissed employees are not only under an obligation to mitigate loss but to establish this in evidence if called upon. This will require, in practice, a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like. If alternative employment is obtained details of this will also need to be retained for the hearing including dates of employment, amounts paid and reasons for ceasing employment.

[38] No such evidence has been produced by Ms Baker and it is up to her in relation to her unjustified dismissal claims to produce the evidence to prove any loss

⁴ (2009) 6 NZELA 530 (EmpC)

of income. The same applies in relation to the obligation to mitigate loss. The Authority should not be left to speculate or guess.⁵

[39] Furthermore, Ms Baker had a realistic opportunity to maintain her income by applying for the new role within CSC, on a job share basis. Indeed, she was encouraged by Ms Blomfield to do so. But Ms Baker did not apply for the new role and she has not given any satisfactory explanation as to why she chose not to.

[40] Therefore, because Ms Baker has failed to make any attempt to mitigate her loss of wages attributed to the loss of her position, I decline to make any award.

[41] Ms Baker seeks an award of distress compensation under s.123(1)(c)(i) of the Act in the sum of \$7,000, but she has provided no evidence at all as to why an award should be made. Indeed, apart from there being no mention of any hurt or humiliation in her written brief of evidence, Ms Baker gave no indication at all at the investigation meeting of any distress being incurred, even to a degree that might have warranted a minimal award of compensation.

[42] Therefore, in the absence of even a sliver of evidence that would warrant an award of distress compensation, I decline to make such.

Determination

[43] For the reasons set out above, I find that the dismissal of Ms Baker on the ground of redundancy was unjustifiable but I decline to award any remedies.

Costs

[44] Costs are reserved. The parties are invited to resolve this matter if they can. In the event that this is not possible the applicant has 28 days from the date of this determination to file and serve costs submissions. The respondent has a further 21 days to respond.

K J Anderson
Member of the Employment Relations Authority

⁵ *Radius Residential Care Ltd v. McLeay* [2010] NZEmpC 149