

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 56
5463581

BETWEEN OLWYN BOURNE
Applicant

A N D DIVERSEY NEW ZEALAND
LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Danny Gelb, Advocate for the Applicant
Lorne Campbell, Counsel for the Respondent

Investigation Meeting: 11 February 2015 at Auckland

Date of Determination: 23 February 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Bourne) alleges that she was unjustifiably dismissed from her employment and unjustifiably disadvantaged as well. The respondent (Diversey) resists all those allegations.

[2] The gravamen of Ms Bourne's employment relationship problem is a decision by Diversey to reorganise its affairs in Auckland, the effect of which was that Ms Bourne's position was relocated from Papatoetoe to Glendene, both areas being districts of Greater Auckland.

[3] Ms Bourne says that the effect of this decision rather than to relocate her was to disestablish her position and thus make her redundant.

[4] Diversey says that Ms Bourne's employment agreement allowed the relocation of Ms Bourne from one location to another provided there had been consultation prior to the relocation. It is common ground that there was consultation although

Ms Bourne claims that it was perfunctory at best; Diversey says that the consultation was full and fair although it acknowledges that no agreement was reached. It points out that agreement was not necessary before relocation was determined upon.

[5] When Ms Bourne declined to accept the company's decision to relocate her role, she resigned her employment claiming that she was in fact redundant and was therefore entitled to redundancy compensation in terms of the company's usual policies, and thus was constructively dismissed.

[6] Ms Bourne had been employed in a salaried role with Diversey and its predecessors since 11 November 1980. There was a written employment agreement dated 14 April 1997.

[7] From August 2013, Diversey had been considering business options in relation to the Papatoetoe site where Ms Bourne worked. On 29 April 2014, Diversey notified staff at the Papatoetoe site that it intended to close the Papatoetoe site and merge the functions performed there with the operations at the Glendene site, the transition to take place on 30 September 2014.

[8] That proposal was the subject of "*one-on-one*" consultation with Ms Bourne, first on 29 April 2014 (apparently immediately after the general meeting with staff when the proposal was first announced) and then again the following day on 30 April 2014 with the substantive decision being confirmed on 8 May 2014.

[9] It is common ground that during the two consultation meetings, Ms Bourne resisted the plans Diversey had to relocate her position to Glendene but notwithstanding that, the substantive decision to relocate all functions was made on 8 May 2014. In a letter to Ms Bourne dated 21 May 2014, Diversey proposed that Ms Bourne try the new site for a period and offered to discuss alterations to working hours or any other factor that would assist Ms Bourne in meeting the employer's needs.

[10] Ms Bourne's response was to dispute the extent of the dislocation the change would make (Ms Bourne's case was based on her living near the Papatoetoe site and having to travel significantly further to attend at the Glendene site), and Ms Bourne sought mediation. Mediation was agreed to and the parties attended mediation on 17 June 2014. Mediation was unsuccessful.

[11] Diversey sent a further letter to Ms Bourne dated 27 June 2014 offering to consider flexible working hours, reduced working hours with reduced income, and an ability to work from home for one hour per day during the transitional period.

[12] Ms Bourne suggested that she would work four days a week at home and one day a week in the new Glendene office. That proposal was declined by Diversey on 9 July 2014 and Diversey reiterated its willingness to consider “*any reasonable proposal*” about working hours or other terms and conditions of employment which would accommodate Ms Bourne’s transition to the new location.

[13] Ms Bourne made no further proposal thereafter but simply sought information about the last working day at the Papatoetoe site in order that she could give notice. Diversey indicated on 18 July 2014 that it was disappointed Ms Bourne had not “*consulted on a more constructive basis*”, that it did not expect that she would resign, that it did not want to lose her but that 20 August 2014 was the likely final date for the closure of the Papatoetoe site. Ms Bourne then resigned on 21 July 2014 effective 20 August 2014.

[14] A personal grievance was raised on 27 August 2014 and promptly replied to by Diversey.

Issues

[15] I am satisfied that I need to consider the following questions:

- (a) Did Ms Bourne resign or was she constructively dismissed;
- (b) Was Ms Bourne redundant;
- (c) What remedies, if any, are due?

Was Ms Bourne constructively dismissed or did she resign?

[16] The starting point for this inquiry must be the law on constructive dismissal. In the present case, it is apparent that the allegation on which Ms Bourne relies is that Diversey committed a breach or a series of breaches of its duty as a good and fair employer of sufficient seriousness to constitute a repudiation of the employment agreement and thus entitle her response by way of resignation. Moreover, the conduct in question of the employer must be of such seriousness as to make it reasonably

foreseeable, looked at from the employer's standpoint, that the employee would not tolerate the employer's conduct and would in fact resign.

[17] What then did the employer do? Diversey sought to relocate its employee from one site to another within Auckland. It took that step in reliance on the specific provision in the operative employment agreement. That provision is in the following terms:

Relocation

You may be required by the company to transfer to another location within DiverseyLever or Unilever after consultation between the company and yourself.

[18] Consultation is required, as the provision makes clear. Consultation at law is not agreement but nor is it mere notification. It requires a genuine engagement between the parties where there can be an exchange of views sufficient to enable the party proposing the change to hear argument that might encourage them to take a different view.

[19] If the consultation was simply the broadcast announcement to staff on 29 April 2014 and the two one-on-one meetings between Diversey and Ms Bourne a day apart on 29 and 30 April 2014, I might well have been persuaded that the consultation requirement had not been met.

[20] Ms Bourne made a number of valid criticisms of those meetings of which the most significant in my mind was the proximity of the first one-on-one meeting with the initial broadcast announcement to staff. As I have already noted, it appears to be accepted by both parties that Ms Bourne was the first member of staff spoken to by Diversey after the broadcast announcement and her one-on-one happened in consequence immediately after the broadcast announcement. She says with some justification I think, that the announcement had come as a shock to her, that she had no chance to prepare for the one-on-one meeting, had no chance to seek advice or counsel and so the prospect of that first consultation meeting being a genuine engagement between the parties seems to me to be really in question.

[21] Because the second consultation meeting happened literally the day after, I think the same criticism can be made about that meeting; in effect it was too soon after the first meeting, there was little if any time for an affected employee to consider alternative strategies and come up with some sort of plan.

[22] But Diversey did not cease its consultation there. Despite the short compass of the two one-on-one meetings which, as I indicate above, I am critical of, Diversey received and obviously considered the message it got from Ms Bourne to the effect that the proposed relocation did not suit her. So Diversey continued to consult and as its evidence made abundantly clear, and as I have already noted earlier in this determination, once the substantive decision was confirmed to close the Papatoetoe site, a decision made and announced on 8 May 2014, Diversey continued to engage with Ms Bourne, principally by letter. There were letters from Diversey on 21 May 2014, 27 May 2014, 9 July 2014, 18 July 2014 and 20 July 2014.

[23] Interspersed between some but not all of those letters were letters from Ms Bourne to Diversey wherein she doggedly pursued her position but, notwithstanding the various requests of Diversey for her to indicate what it might do to assist her to be reconciled with the change, she proposed only one solution of her own, namely that she work at home for four days a week and work in the new Glendene office for one day a week. Given that an employment relationship is a bilateral relationship which requires both parties to be open and communicative with the other, I must observe that Ms Bourne did herself little benefit by failing to properly and extensively explore with Diversey what it might do to help her reconcile herself to the change.

[24] In addition to the exchanges of correspondence which began on 21 May 2014 and continued until the day before Ms Bourne resigned her employment on 21 July 2014, a period of two calendar months, Diversey also accepted Ms Bourne's proposal that the parties attend mediation. It did this without apparent prevarication and difficulty as sometimes characterises the behaviour of employers in this sort of situation, but of course, as I have already noted, the mediation was not successful.

[25] I am satisfied on the basis of the extensive programme of consultation that Diversey undertook with Ms Bourne that it fulfilled its contractual obligations. In my view, Diversey has done everything it reasonably could to consult with Ms Bourne and seek to get her agreement on some basis or another, for the relocation to Glendene. Indeed arguably, Diversey has gone further than it needs to have done because its process looks more like an attempt to secure an agreement than to simply fulfil its legal obligations to consult. But that is as it should be; employers ought to

err on the side of caution in conducting consultations where the livelihood of their people is potentially at risk. That is what a good and fair employer would do.

[26] So having complied with the requirement to consult with Ms Bourne, Diversey is entitled to rely on the express words of the employment agreement which allows it to relocate Ms Bourne to another location. It seems to me completely implausible to contend that Diversey has committed a breach of its duty as employer by its simple reliance on an express provision in the operative employment agreement.

[27] Accordingly, I find that there has been no breach of duty by Diversey.

[28] Moreover, I also conclude that an employer party placing reliance on a provision in an operative employment agreement could not reasonably foresee that the other party to that agreement would resign her employment because the employer sought to rely on an express term in the agreement between them.

[29] It follows from those conclusions that I accept Diversey's submission that Ms Bourne resigned her employment voluntarily because she chose not to continue her employment on a new site as her employer was entitled to ask of her.

[30] I am satisfied then that there is no constructive dismissal and a simple resignation without more. It follows from that conclusion that Ms Bourne's application to the Authority must fail but for the avoidance of doubt, I address the redundancy issue as well.

Was Ms Bourne redundant?

[31] I am satisfied Ms Bourne was not redundant. Redundancy is a situation where a job disappears as a consequence of a restructure.

[32] The situation here is that Ms Bourne's job, far from being surplus to the employer's requirements, was simply removed from one site to another site, both those sites being in Auckland.

[33] Nothing that I heard in evidence supported the view that the position in Glendene was materially different from the position at Papatoetoe. Indeed, all the evidence I heard suggested the position was substantially the same; it was simply moving from one location to another. In respect to Ms Bourne's position, it was

neither a disestablishing of her position nor a situation where there were a number of staff competing for a reduced number of positions.

[34] What happened plainly was that the position Ms Bourne occupied at Papatoetoe was relocated to a new site in Glendene and I am satisfied that that constitutes the relocation of an existing role and not the disestablishment of a role with a consequent effect on the continued employment of the occupant of that role.

[35] Ms Bourne relies amongst other things on the case of *Tuilaepa v. Auckland Area Health Board* [1992] 2 ERNZ 114 which concerned the relocation of an employee from one of the then Auckland Area Health Board's sites to another. But that decision makes clear that the first question to consider is whether the employee "is genuinely redundant". Here I am satisfied that Ms Bourne is not genuinely redundant at all. Moreover, *Tuilaepa* concerned low paid wage workers whereas Ms Bourne is a salaried employee in receipt of above average remuneration and she is subject to an employment agreement which makes the usual requirement that a salaried employee is expected to, as it were, go the extra mile for the employer, without additional pay.

[36] A further basis on which *Tuilaepa* can be distinguished is that, in *Tuilaepa*, the employer was not offering any incentive to assist in the relocation whereas in the present case, Diversey made a genuine effort to try to engage with Ms Bourne but she effectively stonewalled and refused to negotiate with it.

[37] In *NZ Printing etc IUOW v Sigma Print Ltd* [1979] ACJ 297, the Court determined that the employer's decision to move the employment from Petone to Featherston was so radical a change as to effectively create the termination of one employment relationship and the offer of a fresh one in a new location. But again, that decision can be distinguished from the present case; moving an enterprise across metropolitan Auckland, a single labour market, is different in kind from the move contemplated in *Sigma*.

[38] Ms Bourne also relies on a line of authority which requires the consideration of the personal circumstances of the employee: cases such as *AMI Insurance v. Kirk* [1999] 1 ERNZ 301. In *Johnson v. Salamander Enterprises Ltd* (WA156/07), a decision of Authority Member Wood, the Authority decided that the personal circumstances of Mr Johnson were such as to preclude relocation from Miramar in

Wellington city to Upper Hutt. Member Wood did accept that the greater Wellington area comprising Wellington city, Lower Hutt city, Upper Hutt city and presumably Porirua city as well were “*one labour market for many workers*”. I accept that proposition in relation to the greater Auckland area where all the evidence suggests that one large labour market exists.

[39] Notwithstanding that conclusion, the Authority determined that Mr Johnson’s particular circumstances justified a conclusion that he was redundant rather than able to be relocated.

[40] Ms Bourne encourages me to apply similar considerations in the present case. This is because she participates in the care of her aged mother who lives in a rest home close to her home and to her former Papatoetoe workplace. Ms Bourne was in the habit of visiting her mother on at least five days a week and she maintained that that would be more difficult, if not impossible, if her work was relocated to Glendene.

[41] I do not accept that submission nor do I accept that cases such as *Johnson* can assist me in the present situation. This is because, on the face of it, there was no explicit contractual provision in *Johnson* which contemplated the relocation of Mr Johnson to another location. In the present case, I am satisfied that Diversey is entitled to rely on the express provision in the employment agreement which allows relocation subject to consultation.

[42] For the sake of completeness I also refer to the redundancy schedule which Ms Bourne relies upon. I am satisfied the redundancy schedule does not apply to Ms Bourne; on its face, it says that it applies to named employees covered by a particular collective agreement. Ms Bourne is not one of those named employees and in any event is not covered by a collective employment agreement but an individual employment agreement. She is a salaried employee and is not part of a collective so her reliance on this document is quite misplaced.

[43] Even if she were covered by it, it defines redundancy as “*a condition in which the employer has employees surplus to job requirements*”. Plainly that is not the situation here. There is no surplus either of positions or people; there is a relocation of positions from one site to another, a relocation which is expressly permitted by the employment agreement.

[44] Moreover, that redundancy schedule also contains a provision making it clear that an employee is not redundant “*until they have received individual written notice detailing a termination date ...*”.

[45] I am satisfied the redundancy schedule cannot apply to Ms Bourne for the reason that I have enunciated but even if it did apply, it relates to a factual situation which does not apply here (redundancy rather than relocation) and on the facts, Ms Bourne has never received written notice of redundancy so that is another reason for excluding the application of the schedule.

Is Ms Bourne entitled to any remedies?

[46] For reasons that I have already made clear, I am satisfied that Ms Bourne has no entitlement to remedies. She has no personal grievance. She resigned her position rather than accept a transfer of her position from one location to another, a transfer which I am satisfied Diversey had the right to demand once it had been through a consultation process with Ms Bourne. As I have already noted, that consultation process was more than thorough and evidenced a genuine desire on Diversey’s part to try to meet Ms Bourne’s needs but which she simply failed to engage on.

Determination

[47] I have not found that Ms Bourne has any personal grievance and she is therefore not entitled to any remedies.

Costs

[48] Costs are reserved.

James Crichton
Member of the Employment Relations Authority