

[4] It is clear to me that the matters pertaining to the disadvantage claim were not raised as personal grievances by the applicant within the requisite 90 day time period. The employer was not put on notice that the matters constituted a personal grievance. I therefore do not intend to deal with the disadvantage claim. Suffice it, however, to say that had I found that they had been properly filed, I would have found that no disadvantage had taken place.

Background

[5] Aerocool provides post-harvest services within the Bay of Plenty region to the horticultural industry. In 2005 the company engaged consultants to examine how it could improve its efficiency. The Aerocool Board of Directors decided that it was an appropriate time to identify changes to its staffing structures and responsibilities. The company formulated a proposed structural reorganisation and compiled proposed new position descriptions and job functions for a number of new positions. There were also changes to some existing roles. The process was initiated early in November 2005 and the company hoped that it would be able to start the 2006 year with the changes in place.

[6] In November 2005 an announcement was made to the company that there would be a staff meeting to update staff on Aerocool's proposals on Friday, 11 November 2005. A proposed reorganised structure was made available to staff on 11 November. Job descriptions and accountabilities were made available to staff the following week.

[7] The company received a number of responses on the reorganisation proposals, and as a result of that, it was decided that some changes would need to be made to the proposed job descriptions. Mr Daryl Richardson, the General Manager of Aerocool, met with Ms Coates on 28 November and told her that as a result of staff feedback he had reviewed the existing proposals and indicated that if the new proposals were finally accepted her existing position as financial officer would be made redundant.

[8] Ms Coates replied to this as follows on 30 November:

To Daryl,

Thank you for the new job description. I note that the key accountabilities practically map over to my current job description.

As I already have an employment agreement with Aerocool Limited, with acceptable terms and conditions, I will continue to work as finance officer.

Any deviations, please give them to me in writing.

*Yours faithfully
L A Coates*

[9] Unsurprisingly, Mr Richardson did not find this response satisfactory and wrote to her on 1 December saying that if the changes were accepted then the position she currently held would become superfluous to Aerocool's business requirements. He said it was Aerocool's intention to disestablish her present position and to give her one month's notice of termination by reason of redundancy. However, before making a final decision and giving formal notice the company would give her a further opportunity to respond to the current proposal which she was invited to do by the close of business Monday, 5 December 2005. Mr Richardson further stated that if that was unsatisfactory to her or her representative, then he could be contacted to arrange a suitable time. Mr Richardson also noted that in the proposed structure the position of administration assistant at the Te Puke site seemed to closely accord with her existing position although the salary was lower than the one she presently held. He indicated that the company was prepared to give her preference for appointment to that position if she wished to apply for it. He noted that the company would be prepared to continue her current salary rate for twelve months if that was the position she wanted.

[10] A meeting was held with Ms Coates and her representative on 12 December. On 14 December Mr Richardson wrote saying that the company did not accept her view that her current duties matched those of the proposed assistant accountant position. He went on to ask whether she was interested in the position at Te Puke and asked her to let him know no later than Friday, 16 December. He also said "*I will make a final decision concerning your redundancy by close of business Friday, 16 December.*" Ms Coates did not respond to Mr Richardson and he did not make a decision regarding redundancy.

[11] On 19 December, having had no response, Mr Richardson approached Ms Coates to ascertain what her views were. Ms Coates told him that her representative,

Ms Webb, had drafted a response and Mr Richardson asked for a copy of that response. In her letter of 19 December Ms Webb wrote:

Ms Coates accepts that redundancy is unavoidable. Ms Coates also accepts your letter of 14 December 2005 acts as notice and that her last day of duty with Aerocool will be 14 January 2006. Negotiation of redundancy compensation is appropriate under these circumstances and we request that we meet to discuss this right further.

Given that the contract did not provide for redundancy compensation this was misguided.

[12] On 21 December Mr Jacobson, acting for Aerocool, wrote to Ms Webb saying that Aerocool had decided to put on hold the implementation of the new positions of assistant accountant and of administrative assistant at Te Puke. Once the new position of financial controller had been filled, Aerocool would then further consider implementing any changes that might affect Ms Coates' position. In the meantime Ms Coates would not be given notice of redundancy and would be retained in her current position under her existing terms and conditions of employment. Mr Jacobson also noted that that would remain the case until such time as Aerocool reactivated its proposals.

[13] In response to this Ms Webb faxed the company stating:

*My client reaffirms that she believes Aerocool is acting in an unreasonable and procedurally unfair way towards her, your letter of 21 December 2005 is further evidence of this.
It is not tolerable to Ms Coates that her employment status be held in abeyance until the commencement of the financial controller.
As previously stated, her last day of duty with Aerocool will be 14 January 2006.*

[14] Mr Jacobson replied on 23 December reiterating that there would be no changes to Ms Coates' terms or conditions of employment at present and that Aerocool had not given notice of redundancy. He said if she wanted to end her employment on 14 January 2006 it would be as a result of her resignation and entirely of her own free will. He asked that Ms Webb clarify whether she had intended to communicate a resignation by Ms Coates.

[15] On 9 January Ms Webb sent a fax to Mr Jacobson. She stated that as Aerocool had not definitively told Ms Coates her current position was secure, or given Ms Coates notice of redundancy, Ms Coates felt that under the circumstances she had no choice but to terminate her employment under the claim of unfair dismissal. She would have preferred to terminate her employment immediately, but would be prepared to stay on until 14 January.

Did the resignation constitute a dismissal?

[16] In a claim for constructive dismissal the questions to be answered are:

1. Did the employee resign?
2. Was the resignation caused by a breach of duty on the employer's part?
3. If so, whether the substantial risk of resignation was reasonably foreseeable by the employer having regard to the seriousness of the breach.

[17] I accept Mr Jacobson's submission that there is a considerable degree of uncertainty as to what the applicant regards as alleged breaches of duty by the respondent. Ms Coates was involved in a reorganisation process and found the lack of certainty regarding her employment distressing. She suggested that the respondent breached its duty to her by doing nothing to reassure her that her existing position was stable. The respondent attempted to accommodate Ms Coates and made efforts to avoid a redundancy. This extended to the situation where it agreed to maintain Ms Coates' existing position pending the appointment of the financial controller at which stage it hoped to be better able to ascertain what effect that appointment might have on Ms Coates' position.

[18] The respondent referred me to *Snod v Ecolent Systems Developments Ltd*, AEC72/99, 20 July 2000, EC, Auckland, Travis J. In that case it was claimed by the employee that the employer had breached its duty by offering staff affected by a business amalgamation various options concerning future employment. The applicant claimed that the employer had acted in a manner likely to destroy the relationship of trust and confidence in that she had been placed under pressure regarding what had been offered to her. The Court considered that the employer's actions provided evidence of a willingness to negotiate and that there had been ample consultation,

negotiation, full disclosure and no letter of resignation expressing the employee's concerns.

[19] Aerocool followed a fair and proper consultation process and did not single the applicant out for unfair treatment. Ms Coates resigned. The resignation was not caused by any breach of duty on the part of the employer. The employer attempted to accommodate Ms Coates and to offer her an alternative position. It then delayed the redundancy. Despite Ms Coates' feelings to the contrary the delay was not because of anything other than a desire to keep Ms Coates in employment until the situation was clearer.

[20] Ms Coates was not constructively dismissed and does not have a personal grievance.

Costs

[21] If parties are unable to resolve the issue of costs, the respondent should file a memorandum within 28 days of the receipt of this determination. The applicant should then file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King
Member of the Employment Relations Authority