

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 209
5360690

BETWEEN SHEILA MARY DIXON
Applicant

A N D MARLBOROUGH
KINDERGARTEN
ASSOCIATION INC
Respondent

Member of Authority: M B Loftus

Representatives: Murray Hunt, Counsel for the Applicant
Maree Kirk, Counsel for the Respondent

Investigation Meeting 15 November 2011 at Blenheim

Submissions Received: At the investigation meeting

Date of Determination: 22 December 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mrs Sheila Dixon, seeks an injunction prohibiting the respondent, Marlborough Kindergarten Association Inc (MKA) from proceeding with a proposed restructure that would see her current position disestablished and, in all probability, her subsequent dismissal by reason of redundancy.

[2] MKA resists the application and wishes to proceed with implementing the proposed structure.

Background

[3] Mrs Dixon is currently employed by MKA as its Executive Officer and has been in that role since March 2007. Mrs Dixon portrays her role as that of Senior Administration Officer (see 4 below) and, in that capacity, she is tasked with a

number of functions crucial to the Association successfully operating from day-to-day.

[4] It would appear from both Mrs Dixon's evidence and that of Emma Bond, one of two co-chairs of the Association's Board, that there was some tension concerning an overlap between the roles of the Executive Officer and the Board. Mrs Dixon says:

There were some frustrations within the role including successive Boards willingness to be involved in basic management tasks rather than delegating those functions. It seems to me ironic that one of the Boards current goals has been to be less involved in management yet even things such as leave requests were handled by Board members even though it would have made more sense for me to deal with them as the Senior Administration Officer.

[5] Ms Bond says:

The role of Co-Chair, during my term, has been very difficult and time consuming. It has not just been a matter of attending Board meetings and dealing with governance issues. In addition, we as Co-Chairs have needed to be involved in management matters...

[6] Around the middle of 2010 these tensions resulted in the commencement of discussions about ways in which the Board's operation, and the functions of those involved, might be better arranged.

[7] At the time the MKA's management team comprised three individuals. Officially two, the Executive Officer and Senior Teacher, answered to the Board while the third, the Office Manager, reported to the Executive Officer. Unofficially, and in practice, the Board considered all three reported directly

[8] By memo dated 5 August 2010, the Board's Co-Chairs advised the management team that:

As Co Chairs, we have become increasingly concerned about the amount of management rather than strictly governance we need to be involved with. Currently the responsibilities and time commitment is proving to be too onerous.

We believe that the work load for you three as the management team is too heavy and that is why we need to be involved. But the effect is that we have all three of you reporting to us.

The structure of the management team has changed little and yet we now have 7 kindergartens and 28 - 30 staff and 6 relievers to manage.

We are concerned that the work load levels are unequal each of you has too much to do and too little support and guidance in meeting your responsibilities.

We have to consider how to address these problems and work within the budget cuts that are beyond our control.

We see the current structure as being too flat and we are considering whether we need another level of Management between you three and the Board.

At this stage we are just carrying out an informal review to get your ideas. We plan to act on your feedback with a restructuring proposal in October, when Liana [one of the three members of the management team] is back and can take part in the consultation process.

For the present we do want your ideas and we want to discuss what interim steps we can put in place to ease the burden on us, the co chairs, until we can implement more permanent changes after October.

[9] Notwithstanding the goal of a change that year, it would appear that discussions remained relatively informal. In all probability this is as, in the words of Ms Bond, the plan to reorganise seemed to have caused some stress and anxiety, leading her to consider that the Board *may have been rushing into things*. She concluded that *we should take a step back, get through the year and revisit the structure in 2011*.

[10] A further meeting, characterised as informal, took place on 6 April 2011 and an e-mail followed on 14 April 2011 which reiterated what had been said. It reads:

When we spoke to you recently we told you that we believed that we needed a restructuring of the Management Team and put to you informally the idea we had that we should appoint a General Manager. We have asked you to give this some thought and come back to us with some feedback. We would like it if you could get your feedback to us in writing, if you have any ideas, by the end of the holidays (by 2 May 2011). Our plan is that if we are all in agreement that the appointment of a General Manager is a good idea, then we will be able to just go ahead with it.

If you don't agree, or your feedback points us in other directions, then we will have to consider your suggestions. However, we will need at that point to start a formal restructuring process. Just what form the reorganisation or restructuring proposal will take will depend on what feedback you have given us because you may have some ideas for restructuring that are better than our idea of appointing a General Manager ...

We just wanted to let you know that if we do need to go down the formal restructuring process route, then we would be considering appointing an outside consultant to run the process for us as we have other commitments and cannot give it the time necessary. If it went

this way and we appointed an independent consultant to run the process, they would conclude the consultation and consideration of the feedback with recommendations to us, the Board. We would be the final decision makers ...

[11] Mrs Dixon forwarded a written response, on behalf of all three members of the Management Team, in early May. In essence, it suggested that MKA retains its present management team of three but that the other two report to the Board through Mrs Dixon as Executive Officer. It also contained a detailed breakdown of the tasks each envisaged she would perform.

[12] In the interim, advice had been received from the New Zealand Kindergarten Association that MKA's present management structure was antiquated and, without a manager, inconsistent with current needs and the practices of most associations.

[13] The two Co-Chairs met to discuss the response but, for reasons that have not been explained, decided against its adoption. They advised the three affected staff at a meeting on 8 June 2011. That was followed by a Board meeting on 23 June 2011 at which approval was given to appoint a business consultant to manage the reorganisation proposal. The consultant, Mr Tony Draijer, was appointed five days later (28 June 2011) and he met with the staff on 30 June.

[14] On 28 July, a document entitled *Management Team Organisational Change Proposal* was distributed to staff. It recommended that the position of Executive Officer be disestablished and replaced with a General Manager whose hours would be 40, as opposed to Mrs Dixon's 35. The additional time would be used for strategic functions which, in the Board's view, were wider than the administrative ones then performed by Mrs Dixon. The other two potentially affected positions (senior teacher and office manager) were to remain relatively unchanged. There was, obviously, a change in reporting lines and an increase in hours was envisaged for the Office Manager.

[15] The proposal was accompanied by a letter advising that its distribution signalled the commencement of a consultation period during which the Board sought ... *peoples' insight into the potential consequences of the proposed changes.*

[16] Also appended was a misdated letter to Mrs Dixon. It advises that the proposal, if implemented, would mean the disestablishment of her position of Executive Officer. She was advised that she would be welcome to apply for the

position of General Manager and *if successful would [be taking] on a significantly different role which would require you to take on considerably more responsibility and autonomy.*

[17] It also advises that should she not be successful, or not apply, she would become redundant and the applicable provisions of her employment agreement would apply.

[18] Mrs Dixon says:

I was very concerned about the implications of this proposal as it seemed to me to be fundamentally flawed. The main flaw which I perceived was that the so called new position of General Manager was not in my view a new position at all. The duties and responsibilities for the General Manager were to include those currently covered by the Executive Officer but with the addition of a higher level strategic planning, leadership and management. I knew my role was a busy and demanding one and the reality is that at least 80% or more of the new "General Manager" role will be identical to my current job.

[19] On 17 August, and after the initial two week consultation period had been extended, Mrs Dixon submitted an eight page written submission. It expands, in significant detail, on the approach outlined, in summation, in 16 above.

[20] The Board, having considered the feedback, decided to adopt the proposal in early September. This decision was advised to staff by memo on or about 8 September 2011. Contained therein is advice that:

We, the Board, are very clear that we do need to have a General Manager. This is the structure adopted by most other Kindergarten Associations. At the time of drafting the proposal, it did not seem to us to be viable to have an Executive Officer and a General Manager as well, and we remain of this view. Much of the responsibilities of the Executive Officer would be picked up by the General Manager. However, with the change in structure to a hierarchical one, we anticipate a more clear delineation of responsibility, and accordingly a clear separation between the governance and management responsibilities. We also want the General Manager to take more of a strategic and leadership focus, especially with regard to business development. There can be no question that we, the Board, need to be stepping back and dealing with governance matters only.

[21] The position was advertised on 30 September 2011 but, in the interim, and on 28 September, Mrs Dixon initiated a process aimed at preventing the disestablishment of her position and its replacement with that of General Manager.

Summation of positions

[22] Quoting directly from Mr Hunt's submission, the case for Mrs Dixon is, in simple terms, that:

- (a) *She has been given notice of her redundancy. The only issue is as to timing. On the evidence that timing is likely to be in the very near future. There is no attempt to suggest otherwise by the employer.*
- (b) *That the dismissal for redundancy is unjustified in a procedural and substantive sense. The procedural aspect relates to the failures to properly examine the existing roles, engage genuinely in consultation, in particular not [despite requests to do so see email 31 July] identifying the "issues" until filing an affidavit in response, and not giving any meaningful response/reasons to Sheila's submissions.*
- (c) *The substantive issues are that the roles [Executive Officer and General Manager] are the same and it is now transparent that the motivation was almost exclusively performance related...*
- (d) *There are a number of breaches of the obligations to act in good faith by MKA.*
- (e) *That the requirement that she wait to be actually terminated before resolving the issue of whether or not those substantive and procedural challenges have merit is unreasonable, arbitrary and entirely unnecessary.*
- (f) *She seeks orders retaining her in her current role pending a comprehensive examination of the justification and lawfulness of the dismissal for redundancy and/or unjustified disadvantage in relation that the selection for redundancy and the process to this point.*

[23] For the respondent, it is argued that the granting of interim relief would, in this instance, have the effect of a permanent injustice that would, in the Board's view, be totally inappropriate given that it would impede upon the Board's right to manage, especially as there are, in the Board's view, substantial differences between Mrs Dixon's role and that of General Manager along with serious issues of management/governance delineation that had to be addressed.

Determination

[24] The relevant law is clear and can be best summarised by quoting from each of the submissions. As Mr Hunt states:

The factors to be considered by the Authority in assessing the application for an interim injunction are well settled and require the Authority to consider the following questions.

- a) *Does the Applicant raise a serious issue to be tried;*
- b) *If so, is there an adequate alternative remedy available to the Applicant;*
- c) *If not, where does the balance of convenience lie;*
- d) *What is the overall justice of the case*

American Cyanamid Co v Ethicon Limited [1975] AC396 and Klissers Farmhouse Bakeries Limited v Harvest Bakeries Limited [1985] 2NZILR 129

[25] Ms Kirk also quotes *American Cyanamid Co v Ethicon Limited* when she says:

The grant of an interlocutory injunction is a temporary and discretionary remedy. Its purpose is to protect plaintiffs against injury by violation of their rights for which they could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in their favour at the trial.

[26] The question of whether or not Mrs Dixon has an arguable case is, in my view easily determined. The answer is yes.

[27] This is an interlocutory application. Evidence is therefore proffered through untested affidavits. The substantive issue underlying this application is Mrs Dixon's potential redundancy and the affidavits evidence a number of significant differences which confirm there would be a real contest, the outcome of which would be reliant on a stern test of conflicting evidence, should a substantive hearing ultimately occur. Examples include, but are definitely not limited to:

- a. The degree of overlap between the roles of Executive Officer and General Manager (which would go to the substantive justification of the redundancy should it occur);
- b. An apparent argument as to whether or not the outcome was preordained and the consultation effectively a sham; and
- c. Whether or not the restructure is, in reality, an artificiality to circumvent a performance issue without confronting and addressing it directly.

[28] That conclusion leads to a discussion about whether or not there is an adequate alternate remedy. What Mrs Dixon seeks through this application is the retention of her position with MKA and therein lies an issue. Should her fears be realised and she be dismissed, she can take a personal grievance. One of the remedies available through that process is reinstatement. Should that be sought and attained it would it would provide the relief Mrs Dixon seeks. That must be considered an adequate remedy.

[29] That raises a further issue and that is that this application seeks what is known as a *quia timet* injunction. Such an injunction does not deal with an invasion of rights already in progress but considers something threatened or about which there is good reason for apprehension. To obtain a *quia timet* injunction, the plaintiff has to establish that the actions it wants restrained are reasonably imminent (refer *Kumar v. Elizabeth Memorial Home Ltd* [1998] 2 ERNZ 61).

[30] The threat is dismissal and while Mrs Dixon has concluded that the outcome is a fait-accompli and her dismissal a given, I can not necessarily agree. There are a number of variables which may impact on the outcome such as the quality of the applicants and there is no evidence, other than Mrs Dixon's supposition, to confirm that the outcome she envisages will actually occur, let alone imminently.

[31] There is also a balance of convenience issue. It is clear that MKA is of the view there is a structural impediment to its efficient operation. MKA has a prerogative allowing it to address such issues provided it does so in a fair and proper manner (*GN Hale & Son Ltd v Wellington etc Caretakers etc IUOW* [1990] 2 NZILR 1079). It should, in my view, be allowed to exercise that prerogative when, as is the case here, Mrs Dixon has the ability to challenge both the outcome and the way in which the prerogative was exercised. On the other hand, and should the application be granted, MKA would be hamstrung and unable to address its concerns for some time, if not indefinitely. I make this last point as if the application were granted it could well have the effect of a permanent injunction. There may well be no cause of action to try through a personal grievance and therefore no substantive hearing. The balance of convenience would therefore appear to favour MKA.

[32] Therefore, and whilst it is clear that Mrs Dixon, should she be made redundant, will have an arguable case I have to conclude that the overall justice does not favour the granting of her application. There is an apparent and adequate remedy

available should she be dismissed and successfully challenge that outcome; there are doubts about whether or not the requirement of imminency is met and the balance of convenience would appear to favour MKA.

[33] For these reasons the application fails.

Costs

[34] I reserve the issue of costs. I ask that the parties try to resolve the issue but failing that, and in the event MKA wishes to seek costs, it is required to lodge and serve an application within 28 days of this determination. Mrs Dixon is to file any response within 14 days of the application.

M B Loftus
Member of the Employment Relations Authority