

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

Determination Number:
WA 42/08
File Number: 5087589

BETWEEN

MARIE DONALD
Applicant

AND

ACCIDENT COMPENSATION
CORPORATION
Respondent

Member of Authority: P R Stapp

Representatives: Applicant in Person
Peter Churchman for Respondent

Investigation Meeting: Wellington 2 April 2008

Determination: 16 April 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Marie Donald claims she was unjustifiably disadvantaged in her employment, has a constructive dismissal and is entitled to redundancy. She is seeking redundancy compensation under her entitlement in her employment agreement and compensation of \$10,000 for stress, hurt and humiliation. The ACC denied Ms Donald's claims.

The Facts

[2] Marie Donald started her employment at ACC on 5 December 2005 as a Human Resource Account Manager (HRAM). There was an employment agreement and ACC's policies and general terms were referred to under clauses 11 and 13 of that agreement.

[3] A restructuring in ACC began in 2006 with workshop for brain storming on 4 July 2006 and a follow up meeting was held on 18 July 2006. Ms Donald was given prior notice of the restructuring in a letter dated 3 August 2006 from Denise Cosgrove, General Manager Human

Resources. Proposals were circulated to Ms Donald and other employees on 4 August 2006 by memorandum, including ACC's change management process, from the Chief Executive, Dr Jan White. Ms Donald and her HRAM colleagues had until 28 August 2006 to provide feedback.

[4] The change proposed different reporting lines. Ms Donald says she was initially a fourth tier manager. She reported to a manager, who in turn reported to the General Manager, but at the time of the restructuring she was reporting to the general manager. However, the change proposal was modified during the consultation process. Ms Donald says she was informed her position was to be disestablished at a meeting held by Denise Cosgrove and the proposal was put in writing in a letter from Ms Cosgrove dated 7 September.

[5] Ms Cosgrove says she informed Ms Donald and her colleagues that it was proposed the HRAM positions would be disestablished and a new and different role would be created called Relationship Manager. Ms Donald and her colleagues raised an issue about differentiation between the former role and the new role. A job description was provided for the new role, although Ms Donald says the job description had only two bullet points of job requirements specific to the role and parts of the HRAM role were omitted (SOP X & H). She says there was no remuneration information provided. The roles became a point of difference between the HRAMs and Ms Cosgrove.

[6] On 28 August 2006 Ms Cosgrove received from the HRAMs a signed document providing feedback on the restructuring proposal.

[7] A further meeting occurred, according to Ms Cosgrove, on or about 28 August, but Ms Donald says meetings were held on 7 & 8 September in regard to the feedback about the consultation document, confusion between the roles and that the decision had been made to disestablish the HRAM role. Ms Cosgrove agrees that she met the Applicant and her colleagues on 7 September and gave them more time until 13 September to respond. This was further extended until 9.00 am 14 September 2006.

[8] Ms Cosgrove denied that she told Ms Donald and her colleagues on 8 September that the HRAMs would continue doing exactly what they were doing now without the strategic element. Any such comment would have been inconsistent with the changes proposed I hold. She says her letter of 7 September added the differences in the job descriptions, and she orally described to them her view of the role explaining how the roles were different. Between 7 September and 13

September Ms Cosgrove says she received a draft job description from the HRAMs for the new Management Relationship role. She says this was essentially their existing HRAM job with some minor deletions. She sent an email on 11 September explaining that she would redraft the role from scratch and she provided further detail about the new role and an opportunity for comment.

[9] Ms Cosgrove denied the allegation there had not been any consultation with “key customers” about the proposed change and a breach of the change management process where other managers were allegedly not informed. Ms Cosgrove says she kept senior managers informed of the proposal.

[10] Ms Donald accepted that the HRAM team discussed the new role, worked on the two roles and sent an email with the proposed Relationship Management position description. She accepted receiving an email dated 11 September from Ms Cosgrove. However, she says on 12 September they asked for more time for further input and to provide feedback. She says Ms Cosgrove advised them she had determined the roles were different, the same change management process had been utilised for all staff and refused to discuss the matter further. Ms Cosgrove denied she breached the change management document by denying time for staff to discuss any proposal with managers.

[11] Allegations have been made that HRAMs only had 4 days to provide feedback whereas everyone else affected had been given three weeks and the HR team had 2 months to consider the wider proposal. Ms Cosgrove says that 5 days were provided but even with the difference the HRAMs understood the issue and the time was reasonable.

[12] Ms Cosgrove says she rang the Applicant on 14 September, but the Applicant was on sick leave. Ms Donald confirmed that a message was left on the answer phone and she called Ms Cosgrove back. Ms Cosgrove and Ms Donald agree that Ms Cosgrove wrote on 14 September confirming Ms Donald’s role would be disestablished as of 3 November 2006 (SOP K, N & W). Ms Donald says she expressed an interest in the Relationship Manager’s role, Programme Manager and ER & Performance Specialist (ERPS) roles with no order of preference. She says she was not interviewed for any role.

[13] Ms Donald received a letter (O) dated 3 October informing her that she had been matched to the ERPS role as a “*suitable alternative position*” in that “*it is in keeping with your skills and experience and is within your capability with some training or other development support if*

required". She was told there would be no other changes to her terms and conditions apart from the change in position.

[14] The correspondence shows that Ms Donald accepted the offer on 12 October 2006 (SOP Page 32) after she had raised some concerns and although she had issues with the salary range and that she understood there was more than 15% change to the role function. She believed that she was disadvantaged and she put this in writing on 12 October 2006. Further she says that the position was not comparable.

[15] On 3 November Mr Michael Nobelen became Ms Donald's line manager. She requested early maternity leave from him on the grounds she says that her midwife recommended she commence it early because of stress being caused because of the restructuring situation. She says he accepted the request and she commenced maternity leave from 23 November.

[16] Ms Donald says Mr Nobelen phoned her on 30 November and informed her that Ms Cosgrove would not accept the letter from her midwife and that Ms Donald had to get a medical certificate from her doctor and that ACC would pay. She obtained a medical certificate stating that she had to refrain from work due to stressors in the workplace. She supplied the documentation to Mr Nobelen on 1 December along with an email that ACC refrain from contacting her until after her baby was born. On 7 December 2006 she received an email from Mr Nobelen where he disputed accepting the midwife's medical certificate and that ordinarily the doctor's opinion would be subject to further investigation and additional information and seeking a second opinion and the matter would be addressed on her return to work (SOP AB).

[17] On 31 December 2006 Ms Donald raised a personal grievance that was emailed and dated 13 December 2006 to the Chief Executive on 31 December 2006. Ms Cosgrove did not receive it until her return from leave in early January. The Chief Executive replied in the meantime outlining to Ms Donald the dispute resolution options available to deal with the matter and that Ms Cosgrove would reply in more detail on the issues. Ms Cosgrove replied on 17 January 2007 refuting each of the issues and suggested a meeting in a month. Ms Donald and Ms Cosgrove met by mutual arrangement on 11 May 2007 without resolving the issues.

[18] From this time until Ms Donald resigned she did not pursue in writing any other details of her claims and what she wanted for remedies.

[19] The parties next met in mediation services provided by the Department of Labour on 21 June 2007 after which the matter still remained unresolved. Ms Donald then decided that further to her personal grievance and the failure to resolve the issues at mediation she had no choice but to resign and tendered her resignation on 26 June 2007 stating that:

- *“I could not afford to decrease my salary and my future earnings as the sole earner in my family*
- *I could not carry out a role which would not utilise my skills to full potential*
- *I could not carry out a role that was potentially only 15% of my previous role therefore with limited scope and variety*
- *All trust and confidence in my employer was eroded due to the treatment I had received during this process”*

[20] Ms Donald was offered another job at ESR on 11 May 2007 as a senior human resources advisor on a salary of \$78,000 and commenced work there on 2 July 2007. She accepted the offer on 16 May 2007.

The Issues

[21] Was Ms Donald disadvantaged by any unjustified action that she has raised in 90 days? Was Ms Donald constructively dismissed when she resigned on 26 June 2007? What were Ms Donald’s reasons for resigning? Is she entitled to any compensation?

Determination

[22] I have decided to dismiss the claim. Firstly, I am satisfied that Ms Donald’s resignation was neither foreseeable and was not as a result of any breach by ACC of her terms and conditions of employment. Her reason for resigning followed a mediation service provided by the Department of Labour and she had obtained another job during her parental leave. Thus it is open to conclude that her resignation related to reasons other than her claim, I hold.

[23] Ms Donald’s resignation as it related to her claim of constructive dismissal is affected by the fact that she had been offered another job and had accepted that job on 16 May 2007 with another employer before the mediation. Also, she was still on maternity leave. Ms Donald says she had no other option but to resign as the primary breadwinner. I do not agree that she did not have any other option in her employment with ACC. This is because the very issues she had about her new role were the subject of an employment relationship problem where her individual employment

agreement made provision for a dispute resolution process to be followed, including on any issue where there was any disagreement on an outcome on decisions made in the management of change process. I am satisfied she understood that process by purporting to raise a personal grievance. She had activated that course and the onus was on her to pursue it further in her employment, especially where she had accepted a new role, albeit she did not like it. She had accepted the new role and had raised her concerns to be addressed. ACC correctly responded and did so appropriately and properly on 7 & 17 January. Also, she had options to apply for other positions and the position was being held open for her during her parental leave where she had not given any notice of an early return to work.

[24] I accept that she says she took early maternity leave and sick leave because of stress and had a desire to concentrate on the birth of her baby that prevented her pursuing the matter. She did not put her employer on proper notice of the detail of the claims and any remedies. The claim of a lack of support was not detailed in her resignation letter.

[25] She withdrew her claim of disadvantage on a 2005/2006 performance review contained in her letter of 13 December 2006 during the Authority's investigation meeting. She could not identify any unjustified action on that claim, and in any event, I have my doubts that the claim, if it was the basis of a personal grievance in her SOP, was in the 90 days time frame required to raise a personal grievance under the Employment Relations Act.

[26] Secondly, I am not satisfied that Ms Donald was unjustly treated by ACC that disadvantaged her as she has claimed. My reasons are:

- The HRAMs were consulted including Ms Donald. The proposals were put to Ms Donald orally and in documents and letters.
- Time was provided for feedback. I agree that the shortened and targeted consultation time on the change of positions was shorter than desirable, but I find that the time available for feedback was not fatal given the restructuring background. Ms Donald was provided with a position that was consistent with the aim to preserve employment for affected employees under criteria that applied for a suitable alternative position. Her salary remained the same. It was not decreased.
- The failure of ACC to provide Ms Donald with the full information about the proposed new role in regard to the salary bands and any working documents on comparable positions was not fatal, I hold. This is because she was told her salary

would not change. Indeed it stayed the same. Also, Ms Cosgrove in working out the roles and making the decisions on the feedback received says she did not have access to any different information.

- A suitable alternative position does not preclude a change in salary band where the actual base salary stays the same but might change over time. That situation was protected by performance criteria, bonuses and promotions. As I said earlier any disadvantage was not as a result of any unjustified action, and both tests have to be satisfied for a personal grievance to exist. They have not been established.
- Her situation was different to her colleague, Clare Thomas where Ms Thomas's salary was different. Ms Thomas had a higher salary than the role and her salary was protected from an earlier arrangement, thus making her situation consistent with Ms Cosgrove's decision to apply the non suitable position designation and enable her to have redundancy.
- Ms Donald could not satisfactorily identify the actions she claims were unjustified. I have accepted Ms Cosgrove's evidence that she kept her Chief Executive informed, and Ms Cosgrove's proposal to change the roles was approved and enough information was put by her to the restructuring Steering Committee to satisfy me that she was acting within her authority and was not in breach of the process. There was no evidence to contradict this.
- I accept that the new role had differences and included a salary band that was different and that these differences had the potential to disadvantage Ms Donald over some time. However there was no change to her salary and certainly no deduction. I find as there is no unjustified action, there can not be a personal grievance.
- Ms Donald's claim in her letter of 13 December 2006, and her resignation letter of 24 June 2007, that she was not afforded any support during the process, has not been established. It lacked particularity and details. Indeed her evidence from the SOP and written replies and answers to my questions did not elaborate the claim any further. She acknowledged she had neglected it for the change process issue. Although she says she lost trust and confidence in her employer, unfortunately that was only raised after she had been successful in obtaining other employment. There were no particular details when she raised her employment relationship problem with ACC to make it foreseeable that she would resign.
- Ms Donald has not produced any independent evidence of the symptoms and cause of her stress and that her stress related to any breach by her employer of its responsibilities.

- Given the two sided nature of the issue that she raised about her new manager sending her an email after her midwife had asked ACC not to contact her during her pregnancy, and the issue about being required to provide a doctor's certificate, these were not enough to establish that there was a breach by her managers, or that their actions were unjustified to disadvantage her in her employment.

[27] For these reasons Ms Donald's claim must be dismissed. I have no doubt that the whole process was stressful, as restructurings and change management are, and made more difficult because of the timing and Ms Donald's personal circumstances. However, the formulation of her employment relationship problem has no basis for any cause of action to enable me to provide her any remedies.

[28] I now turn to costs. The risk exists for all litigants that there may be costs awarded against them if they are unsuccessful. In other words costs follow the event. There was nothing unusual about this matter for any claim for actual costs to be awarded. Indeed a modest amount has been claimed by ACC of about \$2,500 to contribute towards the costs incurred. I accept that this sum would not cover the actual costs incurred. It is within the Authority's one day investigation meeting range for preparation and attendance. It was entirely reasonable for ACC to engage legal counsel to assist in the preparation and to represent ACC at the Authority's investigation meeting. This is because of the nature of the claim, the amount of redundancy compensation and compensation for stress being sought and the principle of the matter in a corporate wide restructuring and change management process where others were also involved.

[29] I note Ms Donald is the primary breadwinner in her household. There is no evidence from her of any inability to pay some costs. Indeed I know nothing of her financial circumstances, except that she is sufficiently well paid in current employment to make some arrangement to pay for costs.

[30] Ms Donald is required to contribute towards the ACC's costs.

Orders of the Authority

[31] The Applicant's claims are dismissed. I award costs to the ACC. Ms Marie Donald is to pay ACC a contribution to its costs in the order of \$2,500.

P R Stapp
Member of the Employment Relations Authority