

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Karen Evans (Applicant)
AND Gen-i Limited (Respondent)
REPRESENTATIVES Dean Organ, Advocate for Applicant
Emma Huston, Counsel for Respondent
MEMBER OF AUTHORITY Dzintra King
INVESTIGATION MEETING 1 August 2005
DATE OF DETERMINATION 29 August 2005

DETERMINATION OF THE AUTHORITY

The applicant, Ms Karen Evans, says she has been unjustifiably dismissed and that her terms and conditions have been affected to her disadvantage by the respondent, Gen-i Limited. The respondent denies the allegations.

Ms Evans was employed by Gen-i in September 2003 as a Team Analyst in the Service Management Team and in August 2004 she was appointed to the position of Senior Team Analyst at a salary of \$61,500.

Mr Stephen Plank was appointed as Applications Manager in the first quarter of 2004. Ms Evans encountered difficulties in working with Mr Plank and claims that he has bullied her. On 28 June a new Team Analyst, Ms Chen, was appointed. Ms Evans experienced some difficulties in dealing with Ms Chen.

Restructuring

Mr Plank had a very large number of direct reports and after discussions with Ms Sharon Spence, the Human Resources Manager, it was decided to restructure the Service Management Team so that there would be a new role of Team Leader, to whom the members of the Service Management Team would report. This would decrease the number of direct reports Mr Plank had. The result of the restructure was that Ms Evans' position of Senior Team Analyst was made redundant.

Job Descriptions

The crux of this case is whether or not the positions of Team Leader ("TL") and Senior Team Analyst ("STA") are sufficiently different for the respondent to have been justified in disestablishing the position of STA.

The primary purpose of the TL's position is to "provide focus and leadership for the Service management team" while the STA's is "to monitor incoming service requests from clients in the Auckland region and coordinate the use of service delivery staff in a manner that supports the achievement of agreed service level targets and client expectations". The TL's position has a heading "Leadership and overall management of Service management". The STA's job description says "The following responsibilities are required as part of Senior Team Analyst role" and the responsibilities listed are identical with those listed in the TL's position description. This clearly indicates that the leadership and management duties did not change. What did change was that the TL had accountability for the management of 3 people, in the area of relationships the TL was to have an "ability to motivate and lead the team" and under the performance measure criteria the TL position included "development of staff career plans, mentoring and direction of day-to-day activities. Staff retention". The qualifications for the positions were the same as was the experience, skills and knowledge with the single exception of "previous experience managing onsite support teams" being included in the "preferred" rather than the "essential" category for the TL's position.

Having looked at the job descriptions, heard Ms Evans' and Mr Plank's evidence, and having considered the individual feedback report carried out by Mr Plank on Ms Evans in April 2004, which includes categories such as "Productive Leadership" and makes reference to being straightforward when confronting people about poor performance, I am of the view that the TL's position was substantially similar to the STA's position; and that Ms Evans had been carrying out managerial responsibilities, albeit not having the requirement to performance manage staff.

Ulterior Motive

Ms Evans contended that there was an ulterior motive for her termination. This was linked to the allegations of bullying by Mr Plank. While it is possible that Mr Plank, faced with a difficult situation between two staff reporting to him, decided to solve the problem by making one of them redundant, I do not think this is probable. I think Mr Plank believed that the two positions were sufficiently different for him to declare the STA's position redundant. If Mr Plank had wanted Ms Evans to go he could simply have accepted her resignation when it was proffered when she became upset during the meeting on 27 September. He did not do so.

I accept that Ms Evans felt very upset and distressed by her encounters with Mr Plank and I accept that she felt bullied. At the meeting on 13 August 2004 Ms Evans said she was given no opportunity to answer questions and was seriously attacked and humiliated and reduced to tears and took a day's sick leave. The other incident relates to a meeting Mr Plank organised with Ms Chen and Ms Evans. He said he wanted them to sort out their differences and told both of them they would be given the opportunity to speak uninterrupted at the meeting. Ms Evans denied that she had been told that and when Ms Chen made a number of criticisms of her she was very upset.

Before any judgment can be made about whether or not Ms Evans was bullied, it is necessary to define "bullying". As with many concepts, this is not easy as even a quick examination of the literature shows. Dan Olweus Bullying at School, Cambridge, MA : Blackwell, 1993, defined it as "negative behaviour" intended to inflict "injury or discomfort" and that it was likely to occur in situations where there was an imbalance of power. The English criminologist, David Farrington, "Understanding and preventing bullying" in Crime and Justice, Vol 17, Chicago : University of Chicago Press, 1993 said it was "repeated oppression, psychological or physical, of a less powerful person by a more powerful person". All behaviour needs to be looked at in the social context in which it occurs and the motivation for the behaviour is also relevant. A vulnerable person may perceive criticism of his or her work as bullying, regardless of how the criticism is couched. Bullying may be seen as something that someone repeatedly does or says to gain power and

dominance over another, including any action or implied action, such as threats, intended to cause fear and distress. The behaviour has to be repeated on more than one occasion and there must be evidence that those involved intended or felt fear.

I do not think Mr Plank's behaviour, while undoubtedly upsetting to Ms Evans, was intimidating, malicious or insulting behaviour, an abuse or misuse of power through means intended to undermine, humiliate, denigrate or injure her. There was no attempt to deliberately undermine Ms Evans or to induce fear in her.

Ms Evans was unjustifiably dismissed in that her position did not disappear as the degree of variation was not sufficiently great for it to be classified as a new and different position.

Sale of Shares to the Telecom Group

When the shares were sold Mr Chris Quinn, Group General Manager, sent an email stating:

Every Gen-I employee will be offered a new contract by the Telecom group. No employees will be made redundant as part of this process.

Ms Evans contends that she was made redundant of part of that process and that was contrary to the promise that had been made. The redundancy was not due to the share sale; it was quite separate from that.

Remedies

Ms Evans has successfully and commendably mitigated her losses and does not seek reimbursement. She does, however, seek compensation for humiliation and distress of \$20,000. Ms Evans gave evidence about her distress and I accept that evidence. Some of the evidence related to the allegations of bullying and I must set that aside. She deposed to the deleterious effects on her self-esteem and social life. The respondent is to pay Ms Evans \$6,000 pursuant to s.123 (c) (i) Employment Relations Act 2000.

Costs

Costs were reserved. Should the parties be unable to agree the issue of costs, the applicant should file a memorandum within 28 days of the date of this determination. The respondent should then file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King
Member of Employment Relations Authority