New Zealand Employment Relations Authority Decisions

Graf v Westaff Pty Limited CA143/10 (Christchurch) [2010] NZERA 629 (8 July 2010)

Last Updated: 5 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

CA 143/10 5274421

BETWEEN VICKI GRAF

Applicant

A N D WESTAFF PTY LIMITED

Respondent

Member of Authority: Representatives:

Investigation Meeting: Determination:

James Crichton

Janet Marquet, Counsel for Applicant No appearance for Respondent

5 July 2010 at Dunedin

8 July 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Graf) alleges that she was unjustifiably dismissed by the respondent (I-Kapita) on 16 April 2009. That claim is resisted by I-Kapita a Westaff group company.

[2] The process of getting the matter before the Authority has been a tortured one. The matter was filed in the Authority on 24 July 2009 and originally dealt with by another Member. A telephone conference with the parties on 10 September 2009 resulted in an agreement that the parties would attend mediation. I-Kapita was represented at that initial telephone conference by its national HR officer, Amanda Daniel who is based in Australia. However, numerous attempts by the Mediation Service at Dunedin to engage with I-Kapita and get a commitment to a fixture for mediation were unsuccessful and in the result, the matter was referred back to the Authority.

[3] When that happened, the matter came onto my list and I promptly ordered a further telephone conference at which I-Kapita was not a participant. I am satisfied that I-Kapita knew about the second telephone conference and simply chose not to participate. That second telephone conference resulted in a direction from me that there would be an investigation meeting in Dunedin on 5 July 2010 at which I would investigate the matter. In order to reduce costs to both parties, I directed that there was to be as little formality as possible and in particular no briefs of evidence were to be filed and served. The notice of direction and notice of hearing which resulted from that telephone conference were served on I-Kapita by email and I am satisfied from the electronic record on the Authority file that Amanda Daniel read the notice of hearing on Tuesday, 27 April 2010.

[4] At the appointed time for the commencement of the investigation meeting, there was no representative present from I-Kapita and, in case that representative had been delayed unavoidably, I deferred the start time for a short period but then elected to proceed. I am satisfied that the Authority's support staff have taken all reasonable steps to ensure that I-Kapita participated in the Authority's process and that the failure of I-Kapita to do so was a function of a conscious decision on its part rather than any failing of the Authority.

[5] Ms Graf told me that she had been employed by I-Kapita from 4 November 2008 as a recruiter. Essentially, her duties involved first obtaining client employers who sought labour for various purposes and, then having signed them up, her job was then to fill their vacancy with an appropriate employee. Ms Graf was particularly involved initially in recruitment for permanent staff but she told me that towards the end of her employment with I-Kapita she became more and more involved with temporary staff. She had a selling background and had long been interested in getting a role like this.

[6] For a period before her dismissal, Ms Graf had noticed things getting a little quieter and accordingly she worked harder at signing up employers and actually found that she was busier than she had previously been, particularly because she was recruiting more for temporary employment rather than for permanent employment.

[7] Ms Graf was adamant that there had been no discussion of any sort about a restructure, no information about a downturn affecting the structure of the business, no intimation from her manager of any difficulties on the horizon, indeed nothing whatever to suggest that a restructuring was even in contemplation.

[8] Yet that is the basis on which I-Kapita claims that Ms Graf was dismissed. The statement in reply which was filed by I-Kapita clearly proceeds on the basis that there was a restructure and that Ms Graf's position became surplus to requirements. It claims that consideration was given to redeployment but I am satisfied on the evidence before the Authority that I-Kapita made no effort whatever to engage with Ms Graf about this alleged redundancy and indeed there was nothing apart from I-Kapita's statement in reply to suggest it was a redundancy situation.

[9] Ms Graf gave evidence (which I accept) that on the day that she was dismissed for redundancy she had earlier told her manager that she would be seeking employment elsewhere because she was fed up with her manager's mood swings. No doubt that message may not have been easy for her manager to hear. It is difficult to escape the conclusion that the reason Ms Graf was handed a letter of dismissal alleging her position was redundant that same day, was in retaliation for her remark about seeking alternative employment. Certainly, with the exception of the employer's claim, there is not a shred of evidence that this was a redundancy at all. There was no redundancy process. There was no consultation. There was no information provided which would enable an affected employee to engage. The context which one would normally look for in a redundancy situation simply does not exist in the present case.

[10] The factual position was that, having made this remark about seeking alternative opportunities elsewhere at 8.30 on the morning of 16 April 2009, Ms Graf was then summoned to her manager's office at 4.30pm the same day and handed a letter of dismissal alleging it was grounded on redundancy. Ms Graf told me and I accept that, in handing over the letter, her manager was grinning at her. Ms Graf was given no opportunity to respond, comment or quarrel with the decision which was presented (as indeed it was) as a fait accompli. Ms Graf was told that she must leave immediately and was not even allowed to tell her colleagues that she had been dismissed. Ms Graf then described being *frogmarched* out of the office.

Determination

[11] I am satisfied that Ms Graf has proved her allegation of unjustified dismissal and that she has a personal grievance in consequence. I have considered whether she contributed in any way to the circumstances giving rise to that dismissal and I am satisfied that she did not: s.124 Employment Relations Act 2000 applied. Ms Graf is entitled to remedies.

[12] Ms Graf seeks compensation, lost wages and costs. Before considering the appropriate package of remedies to deal with her personal grievance, I need to be clear that the basis of my finding is this was not a genuine redundancy at all. The juxtaposition between the announcement by Ms Graf that she was departing because of her frustration at the behaviour of her manager, and the so-called redundancy letter being handed to her that same day, is so strong a connection as to defy coincidence. I conclude that the dismissal was simply a retaliatory dismissal by a vindictive employer rather than the measured and reflective decision of an employer that has reluctantly had to make changes to an organisation's structure as a redundancy process should be. It follows that this is simply a dismissal without any shred of justification and a dismissal that is completely devoid of process.

[13] I direct that Westaff Pty Limited is to pay to Ms Graf the following sums to remedy her personal grievance for unjustified dismissal:

(a) Compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of $7,000 net;
(b) Unpaid mileage claim in the sum of $100 net;
(c) A contribution to wages lost as a consequence of the unjustified dismissal in the sum of $5,600 gross.

Costs

[14] I have been asked to fix costs in this matter at this stage and Ms Marquet has helpfully indicated to me the extent of the costs charged to Ms Graf. In the particular circumstances of this case and given the flagrant nature of the employer's neglect of its obligations in dealing with this employment relationship problem, I think it appropriate that the employer pay costs on a solicitor/client basis. Accordingly, I fix costs at $2,500 and direct that that sum also is to be paid to Ms Graf by Westaff Pty Limited.

James Crichton

Member of the Employment Relations Authority
