

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 10
5373586

BETWEEN TONIA HANSON
 Applicant

AND IAN PARKER t/a PARKER
 MAZENGARB
 Respondent

Member of Authority: P R Stapp

Representatives: Len Arnott, Advocate for the Applicant
 Caryl Blomkvist, Counsel for the Respondent

Investigation Meeting: 1 November 2012 at Whanganui

Submissions by: 10 December 2012

Determination: 29 January 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is an employment relationship problem relating to the redundancy of Ms Hanson's position as office assistant in Mr Parker's legal office located in Wanganui. Prior to 25 November 2011, Mr Parker, Ms Hanson and Ruth Hills, the legal executive employed by Mr Parker, had some discussions in regard to a change in arrangements regarding their positions in Mr Parker's office. This came about when Mrs Hills decided to retire and the business was suffering financial hardship. Mr Parker decided to look at options in regard to his staffing arrangements because of the financial situation that his business was in. They had informal meetings about the situation and options.

[2] On 25 November 2011, Mr Parker wrote a letter to Ms Hanson, in effect terminating her employment from 23 December 2011 for the reason of redundancy.

He decided to advertise a role for a secretary/legal officer to replace Ms Hanson's and Ms Hill's roles and to combine their roles in one position. Ms Hanson did not apply for the new position, but instead considered that Mr Parker should have considered her for the role having regard to her willingness to work in a job share role and to up skill and undertake additional training. She accepted that she could not do the job at Ms Hill's level because Mrs Hills was a legal executive. When Mr Parker announced his decision as to the person he had decided to appoint, Ms Hanson became upset because she knew the person's background and understood that person would need up skilling and have to get additional training to do the new role.

[3] Ms Hanson's employment ended on 23 December 2011, as did that of Mrs Hills who retired. However, Mrs Hills needed to return in 2012 to provide additional training for the new person. This information has also made Ms Hanson angry that she was not appointed to the role; because she says she could have received training too.

Issues

[4] The issues for the Authority to determine are:

- (a) Could a fair and reasonable employer dismiss Ms Hanson on the grounds of redundancy;
- (b) Did Mr Parker follow a fair process, involving consultation with Ms Hanson;
- (c) What is the nature of the personal grievance raised by Ms Hanson having regard to a letter dated March 2012 (raising the personal grievance)?

The facts

[5] Mr Parker runs the Whanganui legal practice Parker Mazengarb. He is the sole principal in the firm, and he employed two people in the roles of secretary and legal executive until he combined the roles in to one position.

[6] Mr Parker held discussions with Ms Hanson and Mrs Hills in his office in late July 2011 and twice in August 2011. Then Mr Parker wrote to Ms Hanson in a letter dated 25 November 2011. The letter reads as follows:

EMPLOYMENT TERMINATION

1. *I confirm our discussions earlier this year concerning your position as Administration/Accounts Clerk for a minimum of 20 hours per week.*
2. *Those discussions were prompted by the ability to sustain a staff member at a minimum of 20 hours per week and the re-organisation necessary on the retirement of Mrs Hills.*
3. *We discussed that position on 2 August 2011 and again by reference to the individual employment agreement on file on 21 September 2011.*
4. *In our subsequent discussions we agreed that your employment would continue until Mrs Hills' retirement when the firm closed for the Christmas break on 22 December 2011.*
5. *I confirm our discussions on 23 and 25 November 2011 that your employment will terminate on 22 December 2011. You will then be entitled to unused annual leave and any statutory holidays included within that notional leave period. Currently that would be seven days annual leave and four days statutory holidays.*

Yours sincerely

[7] Mr Parker advertised the vacancy on or about 22 November 2011, which Ms Hanson knew about. There were a number of applications and Ms Hanson had the opportunity to look through them. She never applied for the position. I accept that she believed that she would not be able to meet the requirements for the new role. This is supported by the combining of the roles, Mrs Hills' qualifications and role and the job advertisement seeking a "Legal Secretary" in a full time role. Mr Parker never approached Ms Hanson to apply. He says, however, that later he did consider her, and the suggestion she had made in regard to job sharing. Job sharing was not an option for Mr Parker, because no one who had applied wanted to job share. Thus, he decided to appoint one person to fill the full time role.

[8] On 23 December 2011 Ms Hanson's position became redundant and her employment ended. Mrs Hills retired from her role on the same day.

[9] The parties attended mediation provided by the Ministry of Business, Innovation and Employment (MBIE). It now falls to the Authority to make a determination.

Determination

[10] The personal grievance raised by Ms Hanson on 12 March 2012 was that she had been “wrongly dismissed”. There were no claims to resolve the employment relationship problem, although Ms Hanson’s representative proposed a meeting and or mediation. Clarification was properly sought by Mr Parker on what it was that Ms Hanson was alleging (2 April 2012) concerning the nature of the grievance. In anticipation that it related to an unjustified dismissal claim the respondent properly accepted that the personal grievance for unjustified dismissal was within 90 days. However, later, more allegations relating to unjustified actions on separate grounds were raised (letter dated 11 May 2012) and have been opposed by the respondent as being out of time. In other words the respondent has not consented to the personal grievances being brought out of time. I have no hesitation in agreeing with the respondent that the separate matters raised by Mr Arnott in his 11 May 2012 letter are out of time. The separate matters are background though, since they were referred to in the raising of the personal grievance for “wrongful dismissal”.

[11] I hold that there was a genuine restructuring in the business, changing two roles in to one role. This is based on the evidence of the change and that the reasons for it, more likely than not, related to the business’s financial circumstances, operation and work. Given the size of the business there were informal discussions held between Ms Hanson, Mrs Hills and Mr Parker. I am satisfied that everyone knew what was happening. As such there was notice of the change to occur. Mr Parker was indecisive about the change until he decided to advertise the new combined job. The advertising of the role was accepted, including by Ms Hanson, because she later had an opportunity to go through the applications received. It was her choice that she did not apply, and naively believed that she would have been considered without applying. I hold that from this she accepted that there would be some change and because of the letter dated 25 November 2011 was on notice that her position would be made redundant.

[12] Ms Hanson’s real concern is that she should have been appointed to the job once she found out who had got the job, instead of the person who was appointed, and whom she considers has less skill for it than her. However, Ms Hanson’s problem is that she never applied for the job. At the time she decided not to apply that was

entirely understandable, as she herself reasonably concluded that she did not have the level of skill required.

[13] Ms Hanson also believed that Mr Parker should have appointed her to the role when the applicants for the vacancy did not meet the expectations. This is what makes this employment relationship problem unusual. First, Ms Hanson did not apply for the vacancy. Second, she did not even inform Mr Parker of any change in her expectations once she found the name of the person Mr Parker had decided to appoint, or even that she thought he would consider her without her applying. Third, Mr Parker did not discuss with Ms Hanson that he considered her and did not discuss with her the options that she might have considered, such as full time hours and/or the training required for the new position, as part of the whole process leading to the dismissal. As such both parties failed to communicate with each other sufficiently to be clear about their needs. The fact that Mr Parker did not discuss these matters with Ms Hanson, who was in his employment, as opposed to thinking about the matters, and giving consideration to such matters, was unfair. However, I am not satisfied that such unfairness rendered the dismissal unjustified. The outcome would not have been any different given that Ms Hanson had started looking for other work, had been given notice of her employment ending, and a new role had been created combining functions, duties and responsibilities that Ms Hanson had not previously been required to do and she accepted she did not have Ms Hills' skills. Indeed she has been able to find work, despite a difficult experience at the start of her job searching, and this is a testament to her skills, confidence and ability. The redundancy was no fault of hers.

[14] Moreover Ms Hanson was consulted, albeit she did not like the outcome. That is not sufficient to give rise to a personal grievance when the employer could justify on reasonable grounds the decision. Indeed Ms Hanson is not arguing about Mr Parker's need to restructure. The sufficiency of the consultation has been satisfied by Mr Parker. I hold that Ms Hanson knew what was happening. She was involved in the process and had insight as to who had applied, but never raised any concerns at the time with Mr Parker. Instead Mr Parker decided that whilst the calibre of the candidates was not ideal and best suited to the role he had to make do with what was there for a full time role. He was entitled to make that call, I hold. Ms Hanson had an opportunity for input and comment. She could have applied if she wanted to, but chose not to do so. That was a fatal mistake, I hold. It also meant that Mr Parker had

no obligation to her when he found out there was no prospect of job sharing involving the candidates who had applied.

[15] Ms Hanson does not have a personal grievance. Ms Hanson's claims are dismissed.

Costs

[16] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority