

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 262
5356173

BETWEEN SUE HUNT
 Applicant

A N D HILTON HAULAGE
 TRANSPORT LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Tim Jackson, Advocate for Applicant
 Amy Shakespeare, Counsel for Respondent

Investigation meeting: 2 and 3 October 2012 at Timaru

Date of Determination: 4 December 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Hunt) alleges that she was unjustifiably dismissed by the respondent (Hilton Haulage) and that Hilton Haulage breached its duty of good faith and various terms of the employment agreement between the parties. All those allegations are denied by Hilton Haulage who maintain that the correct position is that Ms Hunt resigned her employment on 2 September 2011 to take up alternative employment, that there are no breaches of its obligations by Hilton Haulage, and that Ms Hunt has suffered no disadvantage in respect to the employment.

[2] Ms Hunt had been employed with Hilton Haulage since 7 February 2003 and with effect from 16 July 2007 she had occupied the position of “Administration Support”. Ms Hunt describes that position as a “*general administration worker with wide ranging duties and ... considerable experience in all aspects of the businesses administration*”.

[3] An employment agreement signed on 30 July 2007 was operative. Amongst other things, that agreement provides for the situation where a restructuring results in a redundancy situation.

[4] On 4 July 2010 Ms Hunt's oldest son suffered a serious motor vehicle accident in Australia where he was living, and because he lived alone, Ms Hunt decided to go out to Australia and look after him as he recuperated from his injuries. She was away from 24 July 2010 down to 7 September 2010 with the blessing of Hilton Haulage.

[5] Then in late 2010, Ms Hunt was advised that she needed a back operation to deal with ongoing back pain. The operation was scheduled for 24 February 2011 but was postponed indefinitely as a consequence of the Christchurch earthquake on 22 February.

[6] Because of the ongoing pain, Ms Hunt and Hilton Haulage agreed that she would reduce her hours down to 32 hours over four days a week with a pro rata decrease in salary.

[7] The back surgery was rescheduled for 24 May 2011. Ms Hunt applied for sick leave for that purpose together with leave for a family holiday and some unpaid leave to enable her to attend some rugby world cup matches.

[8] Immediately before Ms Hunt's back surgery, Hilton Haulage approved the sick leave application and the rugby world cup absences, but not the family holiday because of "*our current workload and staff changes*".

[9] The surgery proceeded as scheduled but the post operative position was not as good as hoped and Ms Hunt was not cleared to return to work until 2 August. That day she contacted Hilton Haulage to indicate that she would return to duty on 8 August.

[10] On 8 August 2011, Ms Hunt commenced work at 8.30am and 15 minutes later, she was asked to attend a meeting with Hilton Haulage management where she was advised that there was to be a restructure of the office staff and that one of the potential consequences might be the disestablishment of her position. There is dispute between the parties as to whether Hilton Haulage said the position would be disestablished or might be disestablished. Either way a restructure was signalled.

[11] As she was entitled to do, Ms Hunt sought advice on the restructure and, through her advocate, raised a number of points in relation to the restructure, principally through correspondence.

[12] By letter dated 10 August 2011, Ms Hunt's advocate attacked the restructuring process and made a number of observations about its deficiencies, the vast bulk of which were not accepted by Hilton Haulage. That being the respondent's position, they wrote back to Ms Hunt's advocate the following day on 11 August, and set out in equally trenchant terms, their various responses to the points made on Ms Hunt's behalf.

[13] Ms Hunt's evidence is that she was distressed by the tone of Hilton Haulage's letter and, amongst other things, showed it to her husband who, that same evening (11 August), sent an intemperate text message to Ms Hunt's immediate manager at Hilton Haulage, using Hilton Haulage's cell phone.

[14] Hilton Haulage were concerned about the text message, considered that it contained an implied threat, felt they had to act to protect their staff, notwithstanding that it was clear the text message had been sent by Mr Hunt and not Ms Hunt, and the following day, on 12 August 2011, they convened a telephone conference with Ms Hunt and suspended her from duty.

[15] Hilton Haulage contemplated that they would conduct a disciplinary investigation in relation to the text incident and contemporaneously complete the consultation process in respect to the restructure.

[16] On 23 August 2011, Hilton Haulage decided no further action need be taken in relation to the text incident, and the following day Ms Hunt emailed Hilton Haulage claiming that she had been dismissed on 12 August 2011 (the date of the telephone conference between her and Hilton Haulage concerning the text incident).

[17] On 29 August 2011, the parties finally met face-to-face to discuss the restructuring proposal. In correspondence received that same day, Ms Hunt again claimed, although in rather opaque terms, that she had already been dismissed. On 2 September 2011, Ms Hunt wrote to Hilton Haulage indicating her intention to treat the employment as at an end, but threatening constructive dismissal as well. That view was confirmed in subsequent correspondence from the applicant dated 6 September 2011.

[18] Hilton Haulage subsequently became aware that Ms Hunt had commenced new employment on 5 September 2011.

[19] The particulars of Ms Hunt's claim are that she seeks a determination from the Authority confirming either that she was unjustifiably dismissed "on or about 12 August 2011" or in the alternative, that her employment was effected to her disadvantage by the respondent's unjustifiable action in threatening and intimidating her on 12 August 2011 so that she was unable to continue in the employment, or in the alternative, that she was unjustifiably dismissed on or about 23 August 2011 when it is alleged that Hilton Haulage confirmed its restructure proposal which it is alleged was not genuine and was allegedly carried out in an unfair way.

[20] In addition, Ms Hunt alleges that because of what happened on 12 August 2011, she was unable to effectively participate in the redundancy process and unable to see the process as fair, objective or unbiased.

Issues

[21] The determination of this employment relationship problem rests squarely on an assessment of the factual matrix. As a consequence, the Authority proposes to address the matter under the following heads:

- (a) Was the initiation of the restructuring process appropriate?
- (b) Was the text message issue dealt with properly?
- (c) Did proper consultation take place in regard to the restructure?
- (d) Was the outcome of both processes appropriate?

Was the initiation of the restructure appropriate?

[22] Ms Hunt is roundly critical of Hilton Haulage's decision to notify her of the restructure within 15 minutes of her return to the office after a lengthy period of sick leave. The criticism is, in the Authority's view, a good example of the employer being "dammed if they do and dammed if they don't".

[23] If the employer had allowed Ms Hunt to settle in, as it were, work away diligently and then confront her with the restructure some way down the track,

arguably they might be accused of keeping things from her when she was entitled to know at the earliest date.

[24] Conversely, being confronted with a restructure so soon after returning to the office does seem harsh and unfeeling.

[25] The Authority wanted to know from Hilton Haulage whether they had given any thought to alerting Ms Hunt to the restructure while she was recuperating from her back surgery. After all, there was nothing wrong with her mind and it might have given her less of a shock if she had had time to digest the news during her recuperation from back surgery.

[26] However, Hilton Haulage, while acknowledging that they had told Ms Hunt that there was a management restructure under way, thought that if they went further and told her about the possible impact of the wider changes on her area of work, they would be criticised for breaking into her sick leave with information which, on its face, might be seen by most people as stressful and difficult to absorb.

[27] Certainly, the evidence suggests that when she was confronted with it on her first day back at work, after a long period of sick leave, Ms Hunt had great difficulty in absorbing the information and it is plain from what the Authority heard in the evidence, that she reacted very badly to the information. Indeed, the Authority considers the best descriptor of Ms Hunt's response to the proposed restructure was a sense of betrayal. She felt, after many years of loyal service, in a variety of roles, often under some pressure, that she had been "singled out" and that that was absolutely unfair.

[28] But Hilton Haulage say they have an obligation to ensure the financial integrity of their business, that restructure was necessary, and that it followed on from a wider and more dramatic reorganisation within the senior management team and at director level. Hilton Haulage point out to the Authority that they have a legal right to make changes to the structure of their business, which of course the Authority acknowledges, and that they were doing nothing more than that, using a stock standard process, having waited a significant period while Ms Hunt was on sick leave before embarking on the process.

[29] In all the circumstances, the Authority is not minded to conclude that Hilton Haulage have failed in their obligations. It is correct that Hilton Haulage are entitled

to restructure their business to meet business objectives but that they are required to do that using a fair and just process informed by the obligation of good faith.

[30] But the decision to engage with Ms Hunt immediately on her return from a long period of sick leave, while appearing to be harsh, is, as the Authority has already observed, one of those decision points that the employer is likely to be criticised for, whatever it does.

[31] Contacting Ms Hunt while she was on sick leave would have been open to the criticism that she was not receiving the clear time she required to recuperate from her operation and was being worried by a restructure which she could not properly address until she returned to the workplace in any event.

[32] Similarly, proceeding with the restructure while Ms Hunt was on sick leave (without involving her) would be equally open to criticism and in the result, the option which Hilton Haulage took was probably the lesser of several evils. Perhaps the only thing they could have done to ameliorate the shock of the announcement would have been to be clear with Ms Hunt as soon as she had her medical clearance (which was a week before she actually returned to work) that she would have to face a restructuring proposal when she actually attended at the office.

[33] While Hilton Haulage say that they made some observation about a reorganisation when Ms Hunt rang on 2 August, it is clear from Ms Hunt's evidence that she did not take that observation on board and even on Hilton Haulage's evidence, it was hardly fulsome.

[34] In any event, the Authority is not disposed to make a negative finding against Hilton Haulage in relation to their failure to put Ms Hunt on notice that she would have to face a restructure proposal on her return; while, in the Authority's view, that would be preferable to the situation as it actually played out. The Authority is not persuaded that the way in which Hilton Haulage attended to the matter was against the law.

[35] Certainly there is nothing in the way in which the matter itself was announced on 8 August 2011 which failed to meet the standards of good employment law practice. Ms Hunt maintains that what she was told at the 8 August meeting was that her position was disestablished; that view is denied by both of the other participants and the Authority prefers their evidence on this point. Further, Hilton Haulage's oral

evidence is supported by the documentary evidence before the Authority which clearly casts the change as a proposal throughout the document styled “administration department review – July/August 2011”. A document entitled “Proposed New Structure” was provided to Ms Hunt and under the heading “Commentary” is the following sentence: *It is proposed that both part time administration support positions be disestablished and one new role created* A final page refers to Ms Hunt’s position in a table and under the heading “Proposed Change” is the legend “role to be disestablished”.

[36] All of this suggests to me that Hilton Haulage were very clear that the proposal involved the disestablishment of Ms Hunt’s role but that it had not yet made that decision and was seeking to engage with her in relation to that. Of course, Ms Hunt characterises the change as being simply a way by which Hilton Haulage could save money. That, of course, is usually why restructuring proposals are launched. In the particular circumstances of this case, Ms Hunt complains that what Hilton Haulage sought to do was to effectively “dumb down” the position that she had previously occupied by making it available to a person at office junior level rather than a senior person such as Ms Hunt herself.

[37] But the flaw in that thesis is that if Ms Hunt had told the employer that she was interested in taking up the new role (which was an amalgamation of her old position and another part time position doing similar but more junior work) then Hilton Haulage might well have jumped at the opportunity to have her working full time. It will be remembered that the position that she had been working in from 14 March 2011 was a position involving only four days work per week rather than five. That change was made to accommodate her pain thresholds because of her back problem. By the time she returned to duty, she had, of course, had her back operated on and presumably, as a consequence, had pain levels dealt with.

[38] In any event, the Authority is satisfied that the initiation of the restructure was a proper one in all the circumstances and that Hilton Haulage met all of their legal obligations in crystallising the proposal for Ms Hunt and seeking her engagement.

[39] A final observation needs to be made in respect to the involvement of Ms Alison Laing who had recently been appointed by Hilton Haulage as general manager human resources. Ms Laing was appointed while Ms Hunt was on sick leave and so the two had never met. Ms Laing had to participate in the 8 August meeting

and so one of Ms Hunt's complaints about the meeting became Ms Laing's involvement and the fact that the two of them had no pre-existing relationship. This complaint, in the Authority's view, has to be seen in the same terms as the complaint about the timing of the meeting. It is unfortunate that Ms Laing and Ms Hunt had no prior relationship; but for reasons similar to the ones the Authority advanced in relation to the question of whether to defer the notification of the restructure, the Authority is satisfied that Hilton Haulage were perfectly entitled to proceed with their notification of a restructure with Ms Laing as a participant. She was, after all, the new general manager human resources and it would have made no sense for a restructuring initiation to commence without her involvement even although she personally had had no previous association with Ms Hunt. It is regrettable that that lack of personal history might have made things more difficult for Ms Hunt than they would otherwise be, but the Authority is not persuaded that Hilton Haulage has breached any of its legal obligations by having Ms Laing involved.

Was the text message issue dealt with properly?

[40] It is appropriate first to put this aspect into context. Once the initiation of the restructure had been undertaken at the meeting on 8 August 2011, Ms Hunt quite properly sought legal advice. Her advocate wrote to Hilton Haulage by letter dated 10 August 2011 and that was responded to by Ms Laing on behalf of Hilton Haulage on 11 August 2011. The Authority observes that both of those letters were written in a reasonably straightforward fashion with Ms Hunt's letter being roundly critical of the employer's proposal, alleging bad faith and lack of genuineness, while the employer's response was written in the same bracing terms.

[41] Given that presumably Ms Hunt approved the tone and extent of the letter from her advocate to Hilton Haulage on 10 August, it is a little difficult to see why she should be so offended by the like tone of the response from Hilton Haulage the following day. Normal human interchanges suggest that communications would generally be responded to in the same tone they are received, insofar as that is possible, and given that Ms Hunt's advocate's letter to Hilton Haulage suggested or implied bad faith and lack of genuineness in their restructure and made a number of other trenchant criticisms of their whole process, it is difficult to see why she was so taken aback by the tone of the Hilton Haulage response, which, as the Authority has already noted, was written in the same straightforward fashion.

[42] In any event, the effect of the 11 August response from Hilton Haulage was to upset Ms Hunt, who showed the letter to her husband who in turn was upset by it. He then sent a text message, using Ms Hunt's work cellphone, to Ms Hunt's manager, Ms Emma Gilkison. It was Ms Gilkison who had taken the 8 August 2011 meeting with Ms Laing on behalf of Hilton Haulage.

[43] The text message is as follows:

Emma this is Jeff Hunt not Sue. I have just read Alles (Ms Laing) letter to Tim (Ms Hunt's advocate). I hope you sleep well at night – ever heard of karma? This is not deserved.

[44] It is plain on the evidence the Authority heard that Ms Hunt did not send the message, did not approve the message, and indeed had nothing whatever to do with it. She was told by her husband that he had sent the message but only after it had been sent and her evidence to the Authority was that she thought her husband was simply trying to protect her, given that she was so upset by the Hilton Haulage letter received that day.

[45] In her evidence to the Authority, Ms Hunt is at pains to explain her husband's text. She indicated he was simply endeavouring to convey to Ms Gilkison *how unhappy he was at the treatment of me by Hilton Haulage*. Ms Hunt was adamant that her husband meant no harm to Ms Gilkison and in particular was not foreshadowing violence directed at Ms Gilkison.

[46] Ms Gilkison was extremely distressed by the receipt of the text message. Her evidence was that she thought the text message *was meant to be intimidating and threatening*. She also thought the comment was uncalled for as she was simply doing her job, a statement it is difficult to quarrel with. Ms Gilkison remained concerned about the text message and forwarded it to Mr Crampton, the chief executive officer and to Ms Laing. Both Mr Crampton and Ms Laing telephoned Ms Gilkison that evening to make sure that she was alright and to reassure her that she could put the matter in the hands of the Police if she chose, but that Hilton Haulage would be seeking an explanation from Ms Hunt as it was a disciplinary matter.

[47] Ms Gilkison's evidence is that she was afraid that Mr Hunt would take matters further and might, for instance, call at her home to confront her.

[48] Mr Crampton and Ms Laing arranged to speak by telephone with Ms Hunt the following morning, 12 August 2011. Mr Crampton's evidence to the Authority was that his response to the text message was driven by Ms Gilkison's concern rather than by any judgements he made about the seriousness of the text message, or otherwise. He said that he had obligations to protect Ms Gilkison and that as she was highly anxious about the matter, he, as chief executive officer, was forced to treat the matter in the same light.

[49] Mr Crampton indicated to the Authority that the matter was disciplinary because of the nature of the message which Hilton Haulage considered was a threat of violence and because the message, although not from a staff member, was made on a company phone from the staff member's spouse.

[50] Ms Laing's evidence on the matter was that it was not clear to Hilton Haulage whether this was going to be a one-off incident or if the text messages might escalate and of course, the employer was concerned that further messages would further upset Ms Gilkison. Prior to engaging with Ms Hunt in the telephone discussion on 12 August, it was unclear to Hilton Haulage just how much involvement Ms Hunt had herself in the incident, but that the short point was that the text message was sent from a company phone in the possession of a company employee and therefore the employee whose phone it was, was at least partially responsible for the texting.

[51] Both Mr Crampton and Ms Laing were involved in the telephone call to Ms Hunt to seek further and better particulars about the texting incident. Ms Hunt told the Authority that she was *very very scared* during the conversation and that she was *intimidated and frightened by both the confrontational and aggressive approach of Mr Crampton and the expectation I would hear from the Police about the matter*. The latter reference is to a suggestion that Ms Hunt made that Mr Crampton had threatened to refer the matter to Police.

[52] Mr Crampton denies any such thing and says that the reference to Police in the telephone discussion was in the context of them being an arbiter of whether in fact the message was threatening or not, Ms Hunt having maintained apparently that the message was not threatening at all.

[53] Mr Crampton also denied being aggressive or intimidating. He says that he has a loud voice and that he is frequently remonstrated with by his staff for that fact.

[54] Mr Crampton made two key points in explaining Hilton Haulage's behaviour during the 12 August telephone conference. The first was that he was unable to get any sense from Ms Hunt that she was responsible for what happened on the telephone because it was a work phone allocated to her. His evidence, confirmed to some extent by her own evidence, is that she minimised the seriousness of the text message and did not accept any personal responsibility for what her husband had done.

[55] Further, Mr Crampton said that he was unable to get from Ms Hunt any sense that she understood why the text message would be distressing for Ms Gilkison, and in effect she alleged that Ms Gilkison was simply overreacting. Again, that impression seems to be confirmed from Ms Hunt's own evidence to the Authority.

[56] Ms Hunt, in commenting on the nature of the text message, makes a number of observations that are relevant to the matters just referred to by the Authority. In relation to her husband's culpability (and not hers) she says for instance *it was a personal message from him to Emma (Ms Gilkison) ... I can understand his frustration ... but his actions are not mine and that is all I can say about it. ... I had said I did not send the message and that I did not know about it until afterwards.*

[57] It seems that the proximate cause for the decision Hilton Haulage took to suspend Ms Hunt was her failure to appreciate that the text message could have been distressing to Ms Gilkison. Ms Hunt's own evidence while not conceding that point is full of her sense of betrayal by Ms Gilkison and it seems apparent to the Authority from Ms Hunt's evidence that there was a complete absence of any empathy for Ms Gilkison's position as the responsible line manager for a restructure, a difficult task for any manager but one which was hardly going to be assisted by intemperate text messages from the spouses of affected staff.

[58] In the result, Hilton Haulage determined to suspend Ms Hunt from duty, and remove her access keys and cellphone. All of these decisions were taken by Hilton Haulage, according to their evidence, to protect Ms Gilkison from the prospect that either Mr or Ms Hunt would confront her about the restructure or send further inappropriate text messages.

[59] When pushed by the Authority to justify the decision the company had taken, Mr Crampton denied that the actions he authorised were *an overreaction*. He said that he felt that each of the elements, the removal of the phone, the removal of the access

keys and the suspension were all required to protect Ms Gilkison. Mr Crampton denied putting too much weight on the protection of Ms Gilkison and not enough weight on looking after Ms Hunt's interests. He also rejected the Authority's suggestion that the two women might have been brought together in a secure environment to try and resolve matters given that they were previously friendly. He said that that was not available because Ms Gilkison had specifically rejected that possibility.

[60] In all the circumstances, Hilton Haulage have obligations as a good and fair employer to protect their employees from serious harm under the Health and Safety in Employment Act and while the text message might have been read in a number of ways, Hilton Haulage were entitled to take their meaning of it from the complainant staff member, Ms Gilkison. Whatever the robustness of the individual, a text message of the sort under discussion, received in the dead of night without warning, would unnerve many. In any event, the egg shell skull principle would seem to apply; Ms Gilkison was the complainant, she was unnerved by the receipt of the text message and Hilton Haulage had an obligation to respond appropriately to protect her from further unpleasant experiences of that sort.

[61] No doubt the situation could have been handled differently; for instance, if Ms Hunt had accepted responsibility for the text message having been sent from her phone, immediately empathised with Ms Gilkison and apologised for the hurt, an entirely different approach from Hilton Haulage would have been likely. But none of that happened and the clear evidence before the Authority is that Hilton Haulage's response to the incident was driven, to a very large extent, by Ms Hunt's refusal to take responsibility for the fact of the message having been sent from her phone, and her refusal to empathise with Ms Gilkison's anxiety.

[62] The Authority is satisfied then that the suspension and the associated actions taken by Hilton Haulage was a justified action having regard to the test for justification set out in s.103A of the Employment Relations Act 2000 (the Act) the effect of which is that the Authority concludes that Hilton Haulage could have reached the decision after the inquiries made during the telephone discussion on 12 August 2011 that it could suspend Ms Hunt in order to protect against the prospect that Ms Gilkison would be further upset by subsequent like behaviour.

Did proper consultation take place in regard to the restructure?

[63] The Authority is satisfied that Hilton Haulage undertook a straightforward restructuring proposal flagging the intention on 8 August 2011 to consider the changes proposed, and then seeking consultation thereafter. There is an argument that there was limited consultation because virtually all of the exchanges between the parties were contained in exchanges of correspondence, the tone of which simply ensured that there was less and less opportunity for any collaborative engagement.

[64] More important though than the tone of the correspondence is the fact that arguably it does not cover the sort of material that would normally be covered during a consultation process in a restructure. Much of the correspondence seems, on the Authority's view of it, to be concerned with whether the legal fundamentals of the proposed restructure are *bona fide* or not rather than whether there are, for instance, any practical alternatives to the proposed restructure which might meet Hilton Haulage's needs on the one hand and Ms Hunt's on the other.

[65] The short point is that Hilton Haulage say that by reason of Ms Hunt's apparent unwillingness to meet with them face to face, all they were left with by way of consultation was a correspondence trail with Ms Hunt's advocate, which they say generated more heat than light.

[66] However, as the Authority remarked during the investigation meeting, Ms Hunt's advocate was doing his job of raising questions about whether the restructure was indeed a genuine one or not. What is more, all of the letters from Ms Hunt's advocate make clear that face to face meetings are not opposed *per se* and indeed some of them make specific proposals around such meetings.

[67] This was a restructuring which was undertaken with virtually no face to face engagement at all. The initial meeting on 8 August 2011 notified the affected staff member about the proposal, there was then a telephone conference between the parties about the text message incident (and really unrelated to the consultation around the restructure) and finally, there was a face to face meeting on 29 August 2011, but that meeting proceeded on a "without prejudice" basis, according to Hilton Haulage, at the request of Ms Hunt. It follows then that in reality there was almost no face to face consultation about the employer's process. The only consultation that did take place was via correspondence. Nonetheless, the Authority is satisfied that the employer has

done what was required of it; it has offered the opportunity for consultation, offered the opportunity for meetings, and in lieu of those meetings taking place, has dutifully considered the employee's written observations (through her representative) and used that material to inform its process. Although that is an unusual form of consultation, it does not make it a bad one or an inappropriate one. In the particular circumstances of this case, it may have best met the parties' needs. The evidence before the Authority does not suggest any failure on Hilton Haulage's part to meet its obligation to consult because of the unusual nature of that actual process.

Was the outcome of both processes appropriate?

[68] There were of course two processes in play simultaneously. The first, and the most straightforward to deal with, is the disciplinary process. Ms Hunt was suspended on 12 August 2011 to enable the employer to protect its other staff member Ms Gilkison. During the suspension, the employer considered its position and in the result decided to take no further action in relation to the inappropriate text message. That decision was conveyed to Ms Hunt on 23 August 2011. There were no disciplinary consequences. The matter rested there. Given the absence of any negative consequence for Ms Hunt, it is difficult to see how any case could be made of disadvantage to her in respect to the conclusion of the matter. The Authority has already determined that the initiation of the suspension was an action that was available to Hilton Haulage at the time.

[69] In relation to the wider issue of the restructure, in the same letter that conveyed Hilton Haulage's decision not to take the disciplinary issue any further, further feedback was sought on the proposed new structure. This elicited an immediate response from Ms Hunt in which she indicated that she was *dismissed last week during the phone conference of 12 August 2011 ... the phone conference was aggressive and intimidating. I believe this caused irrevocable damage to the employment relationship.*

[70] In the same email Ms Hunt suggests the time and date for the final meeting between the parties on Monday 29 August 2011.

[71] When that meeting actually took place, it seems that Ms Hunt had nothing further to say in respect to her position. While the employer was still considering the final shape of the restructure, there were various communications from Ms Hunt

indicating that she would treat the employment as having come to an end on and from 12 August.

[72] Subsequently, it became evident that Ms Hunt had secured fresh employment. She told the Authority that she had been interviewed for a new post on 25 August, had been offered the job on the afternoon of 29 August, had accepted it on 2 September and started on 5 September.

[73] Of course, Hilton Haulage say that all of this simply goes to confirm Ms Hunt's lack of transparency in relation to the ending of the employment relationship with Hilton Haulage.

[74] But the question for the Authority is whether Ms Hunt can properly claim (as she does) that the 12 August telephone conference effectively either brought her employment to an end by way of actual dismissal, or brought her employment to an end by way of constructive dismissal. A further question for the Authority to determine is whether the restructuring process was a genuine one or not and whether the process the employer undertook in implementing that restructure was a proper one in all the circumstances.

[75] Dealing first with the question of whether there was an actual or constructive dismissal on 12 August, the Authority's considered view is that none of the evidence supports any such conclusion in respect to either kind of dismissal. First, it is common ground that the word "dismissal" was never used by Hilton Haulage personnel during the telephone discussion on 12 August, nor was any other word used which might reasonably be interpreted as being in the nature of a dismissal or a "sending away". All there was was a suspension and the Authority has already determined that that suspension was a suspension implemented on a proper basis and for proper purposes.

[76] Ms Hunt refers to the telephone conference as *aggressive and intimidating*, complains about Mr Crampton speaking loudly, complains about the reference to Police and so on.

[77] But even if the nature and extent of the telephone conference on 12 August 2011 was completely inappropriate (and the Authority does not accept that view at all) it still does not, from an evidentiary point of view, go close to forming the basis for a termination of the employment. There are a number of reasons for that conclusion.

The first is that for part of the period after the telephone conference, Ms Hunt remained on pay. It is difficult to understand why Hilton Haulage would pay her if she had been dismissed. Further, whenever there was a claim made by Ms Hunt (or her representative) that she had been dismissed on 12 August, that view as quarrelled with by Hilton Haulage who made clear that that was not their view.

[78] Thirdly, and finally, and most importantly of all, if Hilton Haulage had it in their minds to bring the employment relationship to an end or, in the alternative, sought to use the 12 August telephone conference as a basis for forcing Ms Hunt out of the employment, it is difficult to see why they would have bothered to continue to spend so much management time and energy trying to get Ms Hunt to engage with them in respect to the restructure. There would be no point whatever in doing that if the relationship had already come to its end.

[79] All of the normal incidents of employment continued. The parties continue to engage with each other after 12 August. The outcome of the text message incident was determined after that date and advised to Ms Hunt. She was offered EAP assistance in respect to the restructure after 12 August. She was paid after 12 August. There was a meeting with her on 29 August, a meeting which she had initiated. There were continuing communications between Hilton Haulage and Ms Hunt after 12 August. There was an attempt by the employer to arrange a mediation with Ms Hunt because the employment relationship was *a continuing one*.

[80] The Authority is satisfied on the balance of probabilities that there was no sending away. As member Loftus remarked in *Rathnayaka v. Lab Tests Auckland Ltd*, 26 August 2010 AA 334A/10: *A dismissal is an ending – it is a sending away and an absolute ending of the employment relationship* (para 47).

[81] Nothing in the present case fulfils that set of criteria. For instance, there was no language that can be pointed to from the 12 August telephone conference that would evidence a sending away and the outcome of the meeting was explained as a suspension and not a dismissal. When Ms Hunt persisted in arguing that she had been dismissed, Hilton Haulage persisted in explaining the outcome of the meeting as a suspension and the reasons for it. Hilton Haulage also confirmed each time the issue was raised that there had been no dismissal. Both parties continued to behave as if they were still in an employment relationship.

[82] The Authority concludes there has been no sending away. Similarly, the Authority concludes that there has been no constructive dismissal either. If there had been a constructive dismissal then one of the questions that would need to be answered is when Ms Hunt resigned her position. That is not an easy question to answer in the present case. Indeed, as Hilton Haulage observe in their closing submissions, Ms Hunt's communications are more consistent with the claim that she was actually dismissed on 12 August, a view that the Authority has already rejected as not in accord with the evidence. If Ms Hunt did resign, the question remains when that happened. When asked the straightforward question whether she had resigned, Ms Hunt refused to do so and if this particular line is to be pursued, the only conclusion the Authority can properly reach is that she resigned on 2 September, the point at which she indicated that she would treat the employment *as at an end*.

[83] If that is right, then the next question is what prompted the resignation, and the only plausible answer to that question is that the resignation was prompted by Ms Hunt securing a new position. The evidence from Ms Hunt herself is that her resignation (if that is what the 2 September communication can be treated as) was motivated exclusively by her desire to conclude one employment relationship before she started the next. That, in so many words, is what her evidence to the Authority said.

[84] The Authority is satisfied that there was no actual dismissal on 12 August 2011, nor could Ms Hunt reasonably rely on the events of that telephone conference to ground a constructive dismissal allegation. The evidence for their being a resignation of any sort is slim indeed, but if there were a resignation on 2 September 2011, the only reason for that resignation that is consistent with the evidence, is that Ms Hunt gave up her employment relationship with Hilton Haulage in order to take up her new role which she was offered some days previously.

[85] It follows from the foregoing conclusions that the Authority need not consider further the propriety of Hilton Haulage's actions.

[86] The only other matter the Authority needs to deal with is the question of whether the redundancy meets the tests of the law. The Authority is satisfied it does. The Authority is absolutely confident that the restructure was undertaken to meet proper commercial needs and was, as a consequence, a genuine restructure brought about by commercial imperatives and undertaken with pure motives.

[87] The process that Hilton Haulage entered into in order to complete its consultation was an unusual one because of Ms Hunt's apparent reliance on written communication rather than personal contact, but not inappropriate for all that. Hilton Haulage took all proper steps to undertake consultation on its proposal and it considered all of the material that was put in front of it by Ms Hunt.

Determination

[88] For reasons enunciated in the body of this determination, the Authority is not persuaded that Ms Hunt has any justiciable cause of action. Nothing in the evidence before the Authority suggests the existence of a viable personal grievance of either kind or a breach of either the terms of the employment agreement or a breach of the obligation to act in good faith.

Costs

[89] Costs are reserved.

James Crichton
Member of the Employment Relations Authority