IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 14/08
5074952

	BETWEEN	MELANIE MCWILLIAMS Applicant
	AND	SPECTRUM CARE TRUST BOARD Respondent

Member of Authority:	Robin Arthur
Representatives:	Lynda McGregor, Advocate for Applicant Catherine Goode, Counsel for Respondent
Investigation Meeting:	12 October 2007 at Auckland
Determination:	17 January 2008

DETERMINATION OF THE AUTHORITY

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[1] The Applicant initially challenged the genuineness of the Respondent's decision to make redundant her position as a Senior Property Co-ordinator ("SPC"). However during the investigation meeting the Applicant accepted that, by August 2006, the position was no longer needed by the Respondent and the business reason for the decision to disestablish that position was not really in dispute. Rather, the issue for determination was whether the consequences of that decision, including the subsequent process of appointment to a vacant position as Property Manager ("PM"), were fairly implemented, particularly in terms of its effect on the Applicant and the eventual termination of her employment on 8 November 2007.

[2] The crux of the Applicant's argument is that she had effectively already been performing the PM role, vacant from May 2006, and should have been redeployed to that role. Instead, she considers she was misled about the consequences of the removal of the SPC role and the prospects for her future employment with the

Respondent. When the PM position was advertised externally and an 'outsider' appointed, she says she suffered distress and humiliation, for which she seeks compensation.

[3] In reply the Respondent says it fairly carried out the process of restructuring its property management department. While some of the Applicant's duties as SPC had overlapped with those of the PM, the latter role had significant additional duties that justified considering external applicants rather than offering it directly to the Applicant. The Respondent says it fairly considered the prospect of appointing the Applicant as PM but was entitled to appoint a more skilled external applicant. Consequently it says it met its contractual and statutory obligations of fairness and good faith to the Applicant and is not liable to compensate her for the consequences of the redundancy of her position.

[4] The parties had not resolved this matter in prior mediation. For the purposes of the Authority investigation, written witness statements were lodged by the Applicant and the Respondent's General Manager of Business Services Kim Casey, General Manager of Organisational Development Brett Marsh and Human Resources Manager Simon Dunn, along with background correspondence and documents. At the investigation meeting each witness answered questions and the parties' representatives provided oral closing arguments.

Background

[5] The Respondent is a charitable trust whose services include providing supported residential homes for people with intellectual disabilities or autism-related disorders. For this purpose it has purchased and maintains a significant portfolio of residential houses throughout the greater Auckland and Waikato regions. The Applicant was one of three employed to work in the Respondent's property department, comprising a Property Co-ordinator and the SPC and PM roles.

[6] The Applicant had a property management background and was employed as SPC in April 2004. The PM left in May 2006 and was not replaced. The Applicant took on some of the duties of that position while Ms Casey took responsibility for reporting to the Respondent's board and overseeing financial approvals and budgets.

The Applicant reported to Ms Casey.

[7] In August 2006 Ms Casey and Mr Marsh began a review of the property department functions and staffing. This included meeting with the Applicant and the other property staff member on 3 August 2006. At this meeting there was initial agreement that the department could continue to operate with two rather than three staff. A meeting note, accepted as accurate, records that the Applicant and her junior colleague "*both felt that with some reallocation of workload, Property can comfortably operate with 2 instead of 3 FTEs*".

[8] A further meeting one week later discussed the need to update the job descriptions of the Applicant and her colleague as they both had identified "*areas that they are working on that are not in their job description*". Mr Marsh was to update and present revised job descriptions at the next meeting.

[9] At that meeting a week later Mr Marsh presented a revised version of the PM job description along with an unchanged description for the Property Co-ordinator role. Meeting notes record that a proposed structure for the Property Department was discussed. This was to comprise two full-time roles – a PM and a Property Coordinator. The Applicant and her colleague are recorded as agreeing that this was "*the logical structure as the job description of the [SPC] is the same as the PM*". It was also noted that the Respondent's chief executive would be presented with a proposal recommending a "*restructure to 2 FTEs, making the [SPC] position redundant*".

[10] The Applicant was however unhappy with an explanation from Mr Marsh that the PM role would be advertised both internally and externally as there was a "*need for a transparent contestable process in the appointment*". The Applicant was encouraged to apply for the PM role but was told there would be "*a subsequent process should an external candidate be selected*".

[11] She asked to speak to Mr Dunn and subsequently did so to query why the PM role was being advertised externally. Mr Dunn confirmed that the Respondent's policy was to advertise all vacancies internally but advised that it could also choose to advertise externally.

[12] The decision to advertise externally for applications for the PM role was made by the Respondent's chief executive at the time.

[13] On 26 August 2006 the PM position was advertised in the *New Zealand Herald* and in an internal staff newsletter.

[14] On 28 August 2008 the Applicant was formally advertised of the outcome of the Property Department restructuring by way of a letter from Mr Marsh. He stated that:

> *It is clear that the position of [SPC] is redundant to requirements with the tasks of that position and that of the [PM] being largely duplicated.* …
>
> *As indicated to you at our last meeting on 17th August 2006, the organizational intention is to disestablish the position of [SPC] currently filled by you and to advertise internally and externally to fill the [PM] position.*
>
> *The [SPC] position will therefore be disestablished with four weeks notice, from the date of appointment of the Property Manager.* …
>
> *Of specific note to you, is the issue of redundancy should you not apply for, or be appointed to, the [PM] position.*

[15] The Applicant did apply for the PM role and was part of a "short list" of two candidates, the other being one of four external applicants also interviewed. She was interviewed on 14 September by Mr Marsh and Ms Casey and was told another candidate was also being considered. A week later she asked Ms Casey whether her references were being checked and was told that there was no need for this.

[16] On 27 September the Applicant happened to walk past a meeting room and see the Respondent's chief executive at that time and Ms Casey were interviewing a person who the Applicant believed to be the other candidate.

[17] The Applicant was concerned that she had not been involved in what appeared to be a 'second interview' involving the chief executive. Around this time she was also told by Mr Marsh that he was no longer involved in the appointment process as it was being handled by Ms Casey and the chief executive.

[18] Ms Casey's evidence was that the chief executive met with the other candidate "*to clarify some points in his CV*" but did not ask to meet with the Applicant "*as her work and performance was already well known in the organisation*".

[19] On 2 October the Applicant withdrew her application for the PM role, stating in a letter to Ms Casey that the restructuring process had been "*poorly conducted*" and caused her "*an enormous amount of anxiety and disappointment*".

[20] The Applicant met with Ms Casey and Mr March on 9 October to discuss her concerns. She told them that she had sought advice and believed that she should be "*direct matched*" to the PM job because she was doing most of it already.

[21] On 10 October the Applicant was advised that another person was to be appointed to the PM role. In a letter from Ms Casey dated 11 October the Applicant was given "*some feedback on why the external candidate was selected*". This acknowledged "*some duplications*" between the SPC and PM roles but stated there was "*also material differences between the positions*". These differences were described as being the higher level of the position in the Respondent's management structure along with responsibilities for staff, reporting to the board, financial management and strategic planning and implementation.

[22] The 11 October letter advised that the Applicant was entering a redundancy process. This process included exploring the prospect of redeployment and retraining for other positions within the Respondent's organisation. If no other position was available, the Applicant's employment was to end on 30 November 2006. She was encouraged to continue with a Certificate in Applied Leadership course that she had started with the Respondent's support, was offered paid time off to attend job interviews and was reminded that counselling support was available.

[23] The Applicant finished working for the Respondent on 8 November 2006.

The law

[24] The Applicant's individual employment agreement included an undertaking by the Respondent "*to act as a good Employer in respect of the Employee, providing fair*

and proper treatment in all aspects of the employment relationship" (clause 7.1)

[25] The agreement defined redundancy as "*a situation where an employee is, or will be, no longer required by his or her employer to perform the work or part of the work, performed by the* employee".

[26] Under s103A of the Employment Relations Act 2000 ("the Act"), the Respondent's decision to make the Applicant's position redundant, and how it went about dealing with her over any proposal, decision and consequences of redundancy, is justifiable if its actions were what a fair and reasonable employer would have done in all the circumstances at the time of the decision and dealings around it.

[27] The application of s103A to personal grievances involving redundancy was described in this way in *Simpsons Farms Ltd v Aberhart* [2006] 1 ERNZ 825 (EC):

> *[65] … the statutory obligations of good faith dealing and, in particular, those under s4(1A)(c) inform the decision under s103A about how the employer acted. A fair and reasonable employer must, if challenged, be able to establish that he or she or it has complied with the statutory obligations of good faith dealing in s4 including as to consultation because a fair and reasonable employer will comply with the law.*
> …
>
> *[67] … so long as an employer acts genuinely and not out of ulterior motives, a business decision to make positions or employees redundant is for the employer to make and not for the Authority or the Court, even under s103A.*

[28] The Authority must be satisfied on two general points – whether the business decision to make a position redundant was made genuinely and not for ulterior motives; and whether the Respondent acted in a fair and open way in carrying out that decision – particularly did it consult properly about the proposal to make the applicant's position redundant and otherwise act in a way that was not likely to mislead or deceive her, that is in good faith?

[29] The Authority does not substitute its judgment for that of an employer as to whether there are genuine commercial reasons for a redundancy. As stated by the Court of Appeal in *GNH Hale & Sons Ltd v Wellington Caretakers and Cleaners Union* [1990] 2 NZILR 1079:

> *An employer is entitled to make his business more efficient, as for example by automation, abandonment of unprofitable activities,*

> *reorganisation or other cost saving steps, no matter whether or not the business would otherwise go to the wall. A worker does not have the right to continued employment if the business can be run more efficiently without him. The personal grievance provisions … should not be treated as derogating from the rights of employers to make management decisions genuinely on such grounds.*

[30] Rather, as stated by the Court of Appeal in *Aoraki Corporation Ltd v McGavin* [1998] 1 ERNZ 601:

> *Where it is decided as a matter of commercial judgement that there are too many employees in the particular area or overall, it is for the employer as a matter of business judgement to decide on the strategy to be adopted in the restructuring exercise and what position or positions should be dispensed with in the implementation of that strategy. …*

[31] However, as explained by the Court in *Russell Harris v Charter Trucks Limited* (unreported EC, CC16/07, 11 September 2007, Judge Couch) at [105]:

> *In many cases, an unfair process leading to a dismissal for redundancy will result in an award of compensation for the distress caused by the process but not to remedies for loss of the job. This is because it can properly be said that the redundancy was genuine and that the employee would inevitably have been dismissed for redundancy even if an appropriate process had been followed.*

[32] A just employer – observing its obligations of confidence, trust and fair dealing and the statutory duty of good faith – will consult on a redundancy proposal and implement any redundancy decision in a fair and sensitive way. Fair treatment may call for counselling, career and financial advice, retraining and related financial support.[1] This requires more than "going through the motions" and will not justify a course of conduct carried out in a way that bruises rather than reasonably minimises the impact on the employee.[2]

[33] The good faith obligations of the Act required the Respondent to be active and constructive, responsive and communicative in consulting the Applicant about changes to the business and proposals which might impact on her, including redundancy: s4, s4(1A) and s4(4). This included providing access to relevant information and an opportunity to comment of the information before the redundancy

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[1] *Aoraki Corporation Ltd v McGavin* [1998] 1 ERNZ 601, at 619 and 631 (CA).
[2] *Coutts Cars Ltd v Baguley* [2001] 1 ERNZ 660, 673 (CA).

decision was made: s4(1A)(c).

[34] Inadequate consultation and inadequate exploration of redeployment possibilities may cast doubt on the genuineness of an alleged redundancy.[3] However the genuineness of the redundancy of a position once established cannot be negated by a failure to offer a different position.[4]

Determination

[35] While this determination does not record or summarise all the evidence of the witnesses and documents provided, I have, in coming to the conclusions expressed considered all the material available at the investigation meeting.

[36] For reasons already explained, and consistent with the law as outlined above, the genuineness of the business reasons for the disestablishment of the SPC role are not at issue. However I am satisfied from the totality of the evidence that the process of the restructuring and how the Respondent went about appointing a new PM was flawed to an extent that some of its actions in respect of the Applicant were not what a fair and reasonable employer would have done in all the circumstances. To that extent the Applicant suffered an unjustified disadvantage. I come to that conclusion for the following reasons.

[37] It is clear from the evidence of the Applicant, Mr Marsh and Ms Casey that the restructuring proposal discussed in early August essentially comprised the department continuing with only two full-time positions on the same or very similar basis to its then-current operation. From those discussions the Applicant had the reasonable expectation that while her formal position as SPC would disappear, the role she was then actually performing would continue, and that was, in large part, the PM job. And she held that view because – as Mr Marsh's meeting notes made at the time record – the roles were the same or similar.

[38] That, at least initially, was most likely also the view of Ms Casey and Mr Marsh but if it were not, their good faith obligation would have been to more actively

[3] *Aoraki*, above, at 618; *NZ Fasteners Stainless Ltd v Thwaites* [2000] 1 ERNZ 739, 747 (CA).
[4] *NZ Fasteners*, above, at 747-8.

communicate any different analysis to the Applicant so that she was not likely to be misled. They did not.

[39] And the reason for this is that a different intention was injected into the restructuring process a little later in the piece by a requirement unexpectedly made of Mr Marsh and Ms Casey by the Respondent's then chief executive that the position be externally advertised. While the Respondent was free to take that decision, there was no evidence that before doing so it considered whether the Applicant was already doing so much of the PM role that she could not be said to redundant for the purposes of the relevant clause in her employment agreement.

[40] That lack of consideration – or at least lack of evidence of it – was repeated later in the process of considering appointments to the PM role. The Respondent does not seem to have given any real consideration to the prospect that any gaps in the Applicant's skills or experience could have been met by training or managerial supervision. It cannot say the gap was too large because there is no real evidence that it made any objective assessment at the time. The Respondent accepted in its later letter advising the Applicant of her redundancy that it had an obligation to consider redeployment and retraining to other positions within its organisation but did not earlier address what may have been the same obligations in respect of the one position directly related to property management and in which the Applicant was already doing many of the tasks.

[41] How the Applicant measured up to the duties in the job description for the PM position cannot even now be accurately assessed. While there was extensive evidence on the content of the PM job description, it emerged during the investigation meeting that the copies of that document provided were of earlier versions and the Respondent was not able to locate the current version that is supposedly "significantly different" from the role that the Applicant performed as SPC. In short, there was a lack in the evidence on whether the work actually done by the Applicant was really different from that now required by the Respondent in its revised job description for the PM role. Neither did the Applicant have the opportunity, either in the investigation or during her own earlier interview for the role, to properly address whether she could or could not meet those requirements because she does not appear to have been provided, then or since, with the final version of the revised PM job description.

[42] Other inconsistencies in the interview process also support the conclusion that the Applicant was subject to unjustified disadvantage. She was interviewed by Ms Casey and Ms Marsh but later learned that it was Ms Casey and the Respondent's chief executive at the time who were making the decision. She was not offered the opportunity for a 'second interview' with the chief executive – a chance already enjoyed by the subsequently successful external candidate – until after she had withdrawn from what she had come to see as a fatally skewed process. By not being provided an interview with the chief executive, the Applicant was denied the opportunity to directly address whatever shortcomings were perceived in her application compared with the application of the shortlisted external candidate. Her references – because they were not checked – were also, arguably, given less weight than those of the other shortlisted candidate.

[43] That the subsequently successful external candidate had some additional building industry qualifications that were doubtlessly useful in the role does not negate the Respondent's prior obligations of fair treatment and proper process for an existing employee, as the Applicant then was.

[44] Consistent with the principle identified in the *Thwaites* case cited above, the unjustified disadvantage suffered by the Applicant is not the failure of the Respondent to offer her the PM position but rather how it came to the decision not to do so, which was because of flaws in its own processes rather than any lack of genuineness in the business reasons for the restructuring from which it arose.

Remedies

[45] Having found there was an unjustified disadvantage, the Applicant has a personal grievance that requires a remedy.

[46] As the Respondent's decision on redundancy of the SPC role was for genuine business reasons, the Applicant's earlier claim for lost earnings fails. She is however entitled to consideration of an award for distress and humiliation arising from the Respondent's flawed process in carrying out the redundancy and appointing a new PM.

[47] Such compensation cannot be awarded for the loss of the job itself. Rather it addresses the distress and anxiety caused to the Applicant by the Respondent failing to take proper measures to minimise the impact of the decision on her.

[48] I accept the Applicant's evidence that she felt humiliated and distressed by her treatment by the Respondent and the effects of this included reducing her confidence in seeking other positions. In the particular circumstances of this case, and in light of the range of awards in similar cases, I consider an award of $5000 under s123(1)(c)(i) of the Act is the appropriate level of compensation for the loss of dignity and injury to feelings of the Applicant arising from the Respondent's unjustified actions.

[49] No reduction to that remedy is required under s124 of the Act as the evidence does not suggest that the Applicant's actions contributed to the situation giving rise to her grievance.

Costs

[50] The Applicant seeks costs. The parties are encouraged to resolve costs between themselves. If they are unable to do so, the Applicant may apply within 28 days of the date of this determination for the Authority to determine costs. The Respondent may reply to any such application within 14 days from when it is lodged.

Robin Arthur
Member of the Employment Relations Authority