

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 463  
5393847

BETWEEN                      NICOLA KATHERINE  
                                         MOORE  
                                         Applicant

A N D                              ELECTRIX LIMITED  
                                         Respondent

Member of Authority:      T G Tetitaha

Representatives:              P J Pa'u, Advocate for Applicant  
                                         C F Parkhill/J V R James, Council for Respondent

Investigation Meeting:      20-21 May 2013 at Auckland

Submissions Received:      21 May 2013

Date of Determination:      8 October 2013

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**DETERMINATION OF THE AUTHORITY**

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**Orders**

- A.      The implied term of fair and reasonable treatment was affected to Ms Moore's disadvantage by Electrix's unjustifiable action**
- B.      Electrix shall pay Ms Moore the sum of \$7,000 compensation for hurt and humiliation (s123(1)(c)(i))**
- C.      Costs are reserved. If costs are sought, submissions are to be filed within 14 days of the determination. The other party may file submissions in reply 14 days thereafter**

**Employment relationship problem**

[1] Nicola Katherine Moore was made redundant from her employment with Electrix Limited (Electrix) in July 2012. She alleges Electrix was motivated to dismiss her for redundancy due to her success against it in an Employment Relations

Authority decision<sup>1</sup> (the ERA decision) released on 31 May 2012. Even if the reasons for restructuring were genuine, she submits she was unjustifiably dismissed, unjustifiably disadvantaged and there was a breach of good faith in the process of selecting her for redundancy.

[2] Electrix disagrees. The restructuring of its business was to meet the changing business needs of a major client. The selection process was fair and reasonable including consultation prior to implementation of restructuring. The ERA decision was irrelevant.

### **Issues**

[3] The following issues arise:

- a) Was Ms Moore's position disestablished for genuine commercial reasons?
- b) Was the selection process employed by Electrix what a fair and reasonable employer could have done in the circumstances? Was there a breach of good faith?
- c) Was Ms Moore unfairly disadvantaged in her employment by Electrix's actions?
- d) What remedies (if any) should be awarded?

### **Legal Framework**

[4] A decision to make staff redundant is part of management's prerogative. The Authority should not substitute its business judgment for that of an employer<sup>2</sup>. Although an employer may assert this was a genuine business decision, the Authority may review the business decision to determine whether the decision, and how it was reached, were what a fair and reasonable employer could have done in all the relevant

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<sup>1</sup> *Moore v. Electrix Limited* [2012] NZERA Auckland 184

<sup>2</sup> *G N Hale & Son Limited v. Wellington etc. Caretakers etc. IUOW* [1991] 1 NZLR 151; (1990) ERNZ Sel CAS 843 (CA)

circumstances<sup>3</sup>. Generally, a redundancy will be genuine if it was made for valid commercial reasons.<sup>4</sup>

[5] The test whether a redundancy has arisen is would a reasonable person, taking into account the nature, terms and conditions of each position and the characteristics of the employee consider that there was sufficient difference to break the essential continuity of employment? The test is determined objectively. It is a matter of fact and degree.<sup>5</sup>

[6] A reasonable employer could conclude differences were, for a person of the characteristics of an employee, of a sufficient degree to break the essential continuity of employment and amount to a new type. Differences include loss of status, responsibility and interest in a new position and significant changes in the work environment.<sup>6</sup> If for genuine commercial reasons the employer concludes that a worker is surplus to its needs, it is not for the Authority to substitute their business judgment for the employer's.<sup>7</sup>

### **Was Ms Moore's position disestablished for genuine commercial reasons?**

[7] Ms Moore accepts there may have been commercial reasons for implementing the restructuring. However she submits her position was disestablished due to Electrix's negative attitude towards her following the ERA decision. She submits this is evidenced by the ERA decision, the involvement of Ranjit Manak who was involved in the ERA decision, lack of minutes of meetings about restructuring, the lack of external or internal advice regarding disestablishing her position, pre-determination her role was being disestablished during consultation, lack of notice about the first consultation meeting on 2 July, unfounded concerns she was unnecessarily delaying the process and the short period (3 days) taken to consider her submissions about redundancy.

[8] Electrix submits the restructuring of the Distribution Services Division (DSD) occurred because of the changing needs of a major client. It denies the motive for restructuring was to dismiss Ms Moore.

<sup>3</sup> *Rittson-Thomas T/A Totara Hills Farm v. Davidson* [2013] NZEmpC 39 at [53] – [54]

<sup>4</sup> *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825 (EmpC) at [67]

<sup>5</sup> *Auckland Regional Council v Sanson* [1999] 2 ERNZ 597 at [19] referring to *Carter Holt Harvey v. Wallis* [1998] 3 ERNZ 984, 995

<sup>6</sup> *Carter Holt Harvey v. Wallis* [1998] 3 ERNZ 984, 997

<sup>7</sup> *GN Hale & Son Ltd v Wellington etc Caretakers etc IUOW* [1991] 1 NZLR 151, (1990) ERNZ Sel Cas 843 (CA) per Richardson J at 157–158, 851

[9] Electrix's restructuring proposal refers to a major client withdrawing provision of in house training, and reducing work and income which could not be supplemented elsewhere. As a result the DSD failed to meet its budget and lost money. The restructuring was intended to improve commercial performance.<sup>8</sup>

[10] Three managers, Dohné Rudman, Ranjit Manak and Mornez Green, determined the new structure for the DSD. They proposed disestablishing seven positions and creating six new positions including a QSE and Training Manager to provide better management and leadership. The role had to be accommodated within the current staffing budget.<sup>9</sup>

[11] Mr Manak was not involved in identifying Ms Moore's position for disestablishment. At hearing Ms Rudman confirmed she and Mr Green identified a number of administration roles capable of being merged including Ms Moore's. She denied discussing Ms Moore or the ERA decision with Mr Manak. There was no evidence of collusion or conspiracy other than bare allegation. The DSD restructuring was later approved by Electrix's general manager, whose involvement was not alleged to be tainted. The lack of minutes from these meetings does not evidence Ms Moore was being targeted for dismissal by the restructuring.

[12] There was no internal or external advice on specifically disestablishing Ms Moore's role. This is consistent with the purpose of the DSD restructuring being to improve commercial performance. It is not evidence Ms Moore was being targeted for dismissal by the restructuring.

[13] The allegation of pre-determination regarding disestablishment of Ms Moore's position is speculative. Electrix was consulting upon a suggested structure where disestablishment of positions including Ms Moore's was proposed. This does not evidence predetermination. It evidences consultation.

[14] Consultation with Ms Moore was extensive. Leslie Black met with Ms Moore about the restructuring proposal on 2, 5 and 12 July 2012. She provided a copy of the restructure proposal document and job descriptions for the new positions. Ms Moore was offered the employee assistance programme (EAP) and granted leave. Ms

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<sup>8</sup> BoD pp77-86

<sup>9</sup> Witness Statement D E Rudman dated 10 December 2012 at paras.36 to 41

Moore's legal advocate attended the 12 July meeting and provided feedback.<sup>10</sup> Any late notice of the 2 July meeting was remedied by the subsequent consultation process. Even if there was any defect, it was minor and did not result in Ms Moore being treated unfairly (s103A(5)).

[15] There was evidence Ms Moore was delaying the process. A 10 July meeting was postponed to 12 July. Feedback was sought but not provided until 17 July. There was a basis for Electrix's concerns about delay.

[16] The three day period to consider Ms Moore's submissions about redundancy does not evidence pre-determination. Ms Moore was aware the primary reason for the redundancy. Her submissions did not substantively address this reason other than to dispute its genuineness. She did not offer alternatives except retention of her job.<sup>11</sup> The basis for Electrix to take a longer period to consider this submission is not evidenced.

[17] Under the restructuring Ms Moore's QSE & Training Administrator role had been merged with the HR Co-ordinator role to create a HR and Training Co-ordinator role. The merger was due to 'spare capacity' i.e. both roles being able to be undertaken by one person.

[18] The nature, terms and conditions of the new role and employee characteristics were of sufficient difference to break the essential continuity of employment. Ms Moore did not have human resource skills. The new role required human resource skills; had different internal and external contacts and accountabilities; greater job complexity; possession of a tertiary qualification in Business Management/Administration; and greater technical knowledge. These skills were not required in her previous role.

[19] There was a staff surplus created by the restructuring. Seven positions were being dis-established. Six new positions were being created.

[20] The ERA decision assisted Mr Manak's credibility. He conceded he had erred in his dealings with Ms Moore. The Authority held Mr Manak *was not motivated by bad faith and did not set out to mislead or deceive Ms Moore or to undermine the*

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<sup>10</sup> Witness statement L Black dated 10 December 2012 at paras. 16-21  
<sup>11</sup> Bundle of Documents (BoD) Document 43 pp119-125

*employment relationship*.<sup>12</sup> The ERA decision does not support an inference Mr Manak was later motivated to dismiss Ms Moore.

[21] Considering the evidence before it, the Authority determines there were genuine reasons and a fair and reasonable employer could have implemented a redundancy process, including disestablishment of Ms Moore's position.

**Was the selection process employed by Electrix what a fair and reasonable employer could have done in the circumstances? Was there a breach of good faith?**

[22] The findings of fact relevant to the personal grievance and breach of good faith are to be dealt with together to avoid duplication. Both actions rely upon the same facts.

[23] Ms Moore submits she was selected for redundancy due Electrix's negative attitude towards her following the ERA decision. She was suffering mentally and physically during the redundancy process and was treated with a lack of compassion and sensitivity by Electrix. She raised concerns during her interviews for the new positions about the manner and relevance of questioning by Hala Toubin. She states these evidence bad faith.

[24] Electrix submits it applied the selection process for redundancy fairly. It could not stop the redundancy process and believes it provided adequate support for Ms Moore.

[25] There is evidence Electrix offered Ms Moore leave and EAP.<sup>13</sup> She was given more time to submit job applications than other candidates and offered time off to work on them.<sup>14</sup> She did not request any further support.

[26] There was no evidence of collusion or conspiracy to prevent selection of Ms Moore between Mr Manak and the interviewers for the new roles. Ms Moore applied for three roles including HR and Training Co-ordinator. Two of the jobs she scored well below the successful candidates, both of whom had previous experience which she did not.<sup>15</sup> In respect of the position of HR and Training Co-ordinator job, she

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<sup>12</sup> ERA decision at [6] and [14]

<sup>13</sup> Witness Statement L Black paras. 17, 25-27

<sup>14</sup> Witness Statement L Black paras. 31-38

<sup>15</sup> Witness statement L Black paras. 39-42; Witness Statement DE Rudman paras. 45-52

scored 50%. The successful candidate scored 63% and had skills in human resources and training.<sup>16</sup> Ms Moore had no HR skills.

[27] It was inferred Electrix's attitude was exemplified by an allegedly confrontational interviewer, Hala Toubin. She asked more questions about her HR skills. The answers were not scored. Another interviewer, Lesley Black disputed Ms Toubin was confrontational. Ms Toubin was not summonsed to appear before the Authority. The similar scoring patterns, consistent comments in the interviewer's notes and evidence of two of the interviewers did not indicate partiality, bias or any other improper motive.

[28] Given the above evidence, the Authority determines the selection process employed by Electrix was what a fair and reasonable employer could have done in the circumstances. There was no breach of good faith in the conduct of the selection process. Ms Moore was justifiably dismissed for redundancy.

**Was Ms Moore unfairly disadvantaged in her employment by Electrix's actions?**

[29] Ms Moore referred to disadvantage arising from various actions of Electrix such as removal of responsibility for the company gym, criticism for writing up employee 'near misses' and exclusion from incident reporting training. She also referred to the handling of her termination.<sup>17</sup>

[30] The grievances (except termination) arose in May/June 2012 and were first raised with any specificity in her brief of evidence filed in November 2012. These grievances (except termination) are outside of the statutory 90 day time limit.<sup>18</sup> Leave to raise those grievances out of time has not been granted. The Authority has no jurisdiction to determine those grievances. The disadvantage grievance arising from the handling of her termination was raised within the statutory timeframe.

[31] The evidence supports a finding the handling of Ms Moore's termination was unfair. Ms Moore was known to be stressed and upset. Electrix had been dealing with her legal representative. The termination meeting was requested without notice. There was clearly misunderstanding about its purpose. Ms Black told Ms Moore she was *in a position to communicate the outcome of the restructure* and requested Ms

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<sup>16</sup> Witness statement L Black paras. 43-48

<sup>17</sup> Witness Statement N Moore paras 20-24

<sup>18</sup> S114 ERA

Moore arrange her legal representative to attend.<sup>19</sup> Ms Moore thought they were advising on the outcome of the new appointments because they usually dealt with her legal representative directly. *She had no idea [it] ... was to terminate [her] employment*<sup>20</sup>. She did not obtain representation or support as a consequence.

[32] At the meeting Ms Moore was handed the termination letter advising 6 August 2012 was her last day of work. Ms Black states she offered to help Ms Moore collect her things and return company property. In reality Ms Black wished to check Ms Moore returned company property. While waiting for Ms Moore she observed her deleting items from her computer. Ms Moore was panicked and admits she may have inadvertently deleted company information. She was later accused of deleting confidential information. She felt under tremendous pressure to leave immediately and felt by Ms Black's presence she was not trusted. She was not given the opportunity to farewell her colleagues. She was shocked and upset.<sup>21</sup>

[33] A personal grievance claiming disadvantage after the employer's unjustified action will be confined to situations where the employee has been deprived of one or more benefits existing under their employment agreement. There are implied terms in employment contracts of fair and reasonable treatment of employees<sup>22</sup> and the assumption an employee *would be treated by his employer in such a manner as to enable [her] to retain [her] dignity within the community and not to have [her] status affected by a precipitate act open to misinterpretation*<sup>23</sup>.

[34] There was room for misinterpretation. Ms Black's statements were unclear the outcome of this meeting would be possible dismissal for redundancy. Ms Moore did not apprehend she may be terminated immediately with payment of notice in lieu.

[35] The manner of exit imposed upon Ms Moore was undignified. This was an escorted departure. Ms Black was not invited to accompany Ms Moore. She was *allowing [her] time to clear her personal belongings then proceeded to check what items she had that needed to be returned*. Ms Black observed Ms Moore deleting computer information.<sup>24</sup> This formed the basis for an allegation she had, without authorisation, deleted Electrix's confidential information. This was raised as a

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<sup>19</sup> Witness Statement L Black para.51

<sup>20</sup> Witness Statement N Moore para. 40

<sup>21</sup> Witness Statement N Moore paras. 40-51

<sup>22</sup> *Marlborough Harbour Board v Goulden* [1985] 2 NZLR 378, (1985) ERNZ Sel Cas 159 (CA)

<sup>23</sup> *Whelan v Waitaki Meats Ltd* [1991] 2 NZLR 74, (1990) ERNZ Sel Cas 960 (HC)

<sup>24</sup> Witness Statement L Black 10 December 2012 para 57

mitigating factor against reinstatement but was not pursued at hearing. Ms Moore found her exit and the accusation distressing.

[36] These defects were not minor and did result in unfairness to Ms Moore (s123(5)). It was not what a fair and reasonable employer could have done in the circumstances. The implied term of fair and reasonable treatment was affected to Ms Moore's disadvantage by Electrix's unjustifiable action.

**What remedies (if any) should be awarded?**

[37] Ms Moore advised at hearing she did not seek reinstatement. The Authority has determined Ms Moore was justifiably dismissed for redundancy. Her employment would have terminated within one month's time for which she received payment. Accordingly she has not lost remuneration as a result of a personal grievance (s128(1)(b)).

[38] Ms Moore seeks an award of compensation for hurt and humiliation of \$20,000. In cases of genuine redundancy, compensation can only relate to the manner of termination and not to the shock and injury to feelings at the loss of the job. The redundancy was handled insensitively. The advice of termination for redundancy was abrupt and manner of exit open to misinterpretation. There was no contributing behaviour by Ms Moore to warrant any reduction.

[39] Awards of \$7,000 have been made in cases of genuine redundancy handled insensitively.<sup>25</sup> This is appropriate here. Electrix shall pay Ms Moore the sum of \$7,000 compensation for hurt and humiliation (s123(1)(c)(i)).

[40] Costs are reserved. If costs are sought, submissions are to be filed within 14 days of the determination. The other party may file submissions in reply 14 days thereafter.

**T G Tetitaha**  
**Member of the Employment Relations Authority**

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<sup>25</sup> *NCR (NZ) Corporation Ltd v Blowes* (CA, 23/09/05) at [43] to [48]