

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 4/08
5077386

BETWEEN

JULIENNE ROSE
Applicant

AND

RODNEY ECONOMIC
DEVELOPMENT TRUST
Respondent

Member of Authority: R A Monaghan

Representatives: Julienne Rose, in person
Sarah-Jane Neville, Counsel for Respondent

Investigation Meeting: 19 October 2007

Determination: 14 January 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Julienne Rose says her former employer Rodney Economic Development Trust (“REDT”) dismissed her constructively and unjustifiably.

[2] The REDT denies there was a dismissal.

Events leading to the termination of employment

[3] The REDT is an independent charitable trust which carries out work for central and local government on a cost only basis. It participates in a Youth Transition to Trades scheme funded by the Work and Income service of the Ministry of Social Development (“the MSD”). It is a party to a series of service delivery contracts reflecting that participation. For the period 2006-2007 the service aim set out in the applicable contract was to transition 40 disadvantaged school leavers – identified by their schools and local communities as most at risk of leaving school

with no destination – into employment, employment-related training, apprenticeships or pre-apprenticeships.

[4] Participating school leavers were selected according to a procedure set out in the contract, which included assessment at an early stage by the career guidance teachers at participating schools and the REDT. Participants were to: be aged 16-19; be about to leave or have recently left school; and, preferably, have achieved basic NCEA level 1 credits in English and Mathematics.

[5] Ms Rose was employed for a fixed term as a youth transitions broker commencing 1 July 2006, for the purposes of the 2006-2007 contract. She was to broker relationships between school leavers fitting the criteria in the contract, and suitable employers or training establishments. She would be working with three secondary schools in the Rodney area. Her agreed hours of work were 25 per week, at a day and time appropriate to the performance of the role. The parties' employment agreement also specified that her base would be at the REDT office in Orewa. The parties arranged that Ms Rose would spend one day a week in the office.

[6] Regarding the brokering role, once likely candidates were identified either the school career advisor or the broker would complete a trainee CV and career plan form, and the broker would interview the student in order to discuss this material and assess the student's suitability for the scheme. If the student was suitable the broker would contact relevant businesses about job opportunities, or if the student was assessed as not ready for work then the possibility of participation in a training programme was investigated and enrolments made as appropriate. Once a possible work placement was identified, the broker would take the candidate for an interview with the prospective employer. If a qualifying placement was offered and accepted, the broker would make follow up contact with the parties to ensure the success of the placement.

[7] Ms Rose's claim of constructive dismissal rests on allegations of uncertainty and inconsistency over the rules and procedures she was to follow in carrying out her duties, as well as allegations that discussions about those and other matters amounted to harassment in her employment. The allegations of harassment in turn were directed

primarily at Ms Rose's manager, Joy Saunders. I now set out incidents invoked in support of the constructive dismissal. I do not detail all of the incidents raised during the investigation meeting because, while they were illustrative of the parties' unhappy relationship, they did not add more to the allegation of constructive dismissal.

1. The telephone account

[8] The written employment agreement was signed on 3 August 2006. Clause 9 of the agreement obliged the employer to provide a mobile telephone and to meet rental costs and the cost of work-related calls up to an agreed sum. An additional document which for the most part and in essence addressed performance-related matters (and I refer to as 'the performance document') specified that the cell phone and tolls would be capped at \$100 per month. The parties had discussed that figure during July 2006.

[9] The context in which the discussions occurred was that, by early August, Ms Rose had presented two cell phone accounts well in excess of \$100. After the presentation of the first account she had explained why the account was high, and the parties had already discussed ways in which it could be reduced. There was a further discussion after the presentation of the second account as it was still considered to be too high. The REDT paid both accounts. Ms Rose has raised the matter as an example of REDT 'changing the rules' and communicating poorly.

[10] I believe Ms Rose overstated the problem and that she became unnecessarily defensive over the fact that the REDT raised the matter with her. There was nothing unfair or unjustified about the discussions. In essence they amounted to no more than the raising of an issue which was resolved in an appropriate way save for Ms Rose's ongoing sense of resentment.

2. The 28 September meeting

[11] Ms Rose's concern that the REDT had either changed the rules or left them unclear was raised again in association with an incident on 28 September 2006.

[12] The incident arose out of a conversation between Ms Rose and the REDT's other youth transitions broker, Katie Harbidge. The conversation was about aspects of a particular placement of Ms Rose's as well as a wider question of whether the placement of a single student in more than one position should count as a single placement or more than one placement for reporting purposes. Ms Harbidge understood that such placement was counted as a single placement. According to Ms Harbidge, Ms Rose disagreed strongly. Ms Saunders joined the conversation and enquired about the particular placement. The student concerned had also been employed on a three week trial period. Ms Saunders said trial periods were not permitted. Ms Rose reacted so strongly that the CEO, Valerie Freeman, asked that the discussion continue in a more private area.

[13] Ms Freeman said in evidence she did so because Ms Rose was being extremely rude and provocative, and the altercation was uncalled-for. Ms Rose denied these characterisations of her conduct, but I consider it likely they are accurate.

[14] There followed exchanges between Ms Rose and Ms Saunders in which Ms Rose sought clear instructions about what constituted a 'placement'. Ms Saunders met with Ms Rose to discuss the request. She followed up with an email message reiterating the steps to be followed and explaining some of the apparently uncertain areas including the acceptability of trial periods.

[15] I did not find anything in this to suggest Ms Saunders was harassing Ms Rose. Ms Saunders was making a genuine effort to answer Ms Rose's questions and make the procedures as clear as possible. As for the concern about clarity in procedures, an attempt was made to better identify what qualified as a placement. I do not accept that the circumstances support the wider allegations that the rules were changed and that Ms Saunders lied about explanations and instructions she had (or had not) given.

3. The performance review in November

[16] The performance document provided for performance reviews on a quarterly basis. The first such review went ahead on 9 November 2006. It was attended by Ms Rose and her support person, as well as Ms Saunders and Ms Freeman.

[17] Ms Saunders opened by referring to the REDT's performance review checklist before addressing the first point, 'knowledge of current position'. There was a general discussion about the need for clarity regarding procedures, before Ms Saunders turned to a discussion of examples of particular placements. Positive comments were made about two of the examples, with what I regard as constructive discussion about the remaining three.

[18] Ms Rose said at the investigation meeting that she had not expected particular placements to be discussed in that way, and she felt unfairly criticised. Further, she considered the approach unnecessarily picky and pedantic and believed the placements could have been discussed during the weekly meetings.

[19] However I accept that Ms Saunders raised the placements in an attempt to address Ms Rose's understanding and application of procedures. She sought to do so by way of example, in particular where the use of discretion was necessary, and in a further attempt to prevent difficulties and uncertainties of the kind that had arisen on 28 September. Ms Saunders was entitled to discuss particular placements in the way she did in the context of a performance review and against that background. She was not being picky and pedantic, and nor was she harassing Ms Rose.

[20] The next point raised in the review was 'communication'. Ms Rose expressed the view that she did not receive positive feedback, and that she found the office a negative place. However Ms Rose did receive positive feedback, and her view reflects her focus on only the disagreements she had with Ms Saunders. If the office was a negative place, she needed to acknowledge her own role in that.

[21] I would say, too, that the comment was a warning sign as far as the employment relationship was concerned, but it was not overlooked. The parties sought to address it in subsequent discussions about better communication and regular meetings. At or about that time Ms Freeman also invited Ms Rose to come to her directly if there were problems with Ms Saunders.

[22] The review was not completed on 9 November, and was adjourned to 16 November. Meanwhile a list of issues and changes was prepared and attached to the

meeting note which was copied to Ms Rose. One aspect was a reference to the fact that Mesdames Saunders and Freeman were to clarify procedures in detail, and another recorded Ms Rose's request that Ms Freeman attend all future meetings. Ms Rose said in evidence that she made the request because of Ms Saunders' lies. There was also a comment in the list of issues on arrangements for meetings. Ms Rose expressed her satisfaction with the meeting note.

[23] The same four people attended the 16 December resumption. Discussion covered the rest of the points on the performance review checklist. Positive comments were made about Ms Rose's 'quality of work' before discussion turned to 'productivity'. Ms Saunders raised that as an area of concern because in her view the contracted 90% success rate in securing sustainable employment - identified in the performance document as a 'performance outcome' - was not being achieved. Ms Saunders believed the rate being achieved was 50%. There was a discussion about how the rate was calculated, the reasons for failed placements, and how these matters could be addressed.

[24] This aspect of the discussion caused considerable concern to Ms Rose and it was discussed at length during the investigation meeting. Ms Rose did not believe that the success rate of 50% was correctly calculated and she believed the success rate was focussed on unduly and to her disadvantage during the review. For those reasons she did not consider the review was fair. She also invoked the matter in support of her allegation of harassment by Ms Saunders.

[25] Ms Saunders was entitled to raise the success rate in the performance review, and it was appropriate that she do so if she had a concern about it. By the same token Ms Rose was entitled to question the calculation and seek to correct it, which she did. I am prepared to accept there was some looseness in the calculation, and that it did not necessarily correctly reflect Ms Rose's personal success rate. I do not, however, accept that the fact of the discussion and the disagreement amounted to some unfairness or an unjustified action on REDT's part or that anything in it amounted to harassment on Ms Saunders' part. Moreover, aside from the mere fact the matter was raised and discussed, no adverse action was taken against Ms Rose in respect of it.

[26] The remainder of the points on the performance review checklist were completed. A further list of issues noted and changes needed was prepared as a result.

[27] This time, on her receipt of the meeting notes and list of issues, Ms Rose sought another meeting so that some points could be clarified. The meeting went ahead on 23 November. It covered:

- (a) Ms Rose's concern about how the success rate for placements was calculated;
- (b) the role of In Work New Zealand Limited ("In Work Support"); and
- (c) Ms Rose's attendance at meetings.

[28] There was more detailed discussion about how the success rate was calculated, and for present purposes I am prepared to accept the matter had not previously been made clear to Ms Rose. During the discussion Ms Saunders said she had recalculated Ms Rose's success rate as 57%, while Ms Rose has subsequently calculated that her success rate was over 80%. For present purposes I am also prepared to accept Ms Rose was entitled to feel unsettled and uncertain about how her success rate was calculated. However I do not accept that anything in her concern takes the circumstances outside the kind of robust discussion that can occur in a performance review.

[29] The reference to In Work Support is to a consulting organisation. The REDT contracted with it in or about September 2006 to provide support to students once they had been placed in employment. Its role was discussed with staff members that month, and there was also discussion about the forwarding to it of details of placements made from 1 July. It seems there was a hiccup in the forwarding process which meant In Work Support had received almost no contact regarding placements. There was a discussion on 23 November about the respective involvement of Ms Saunders and Ms Rose with reference to how that had happened. Ms Rose also queried the extent to which she was expected to follow up with In Work Support.

[30] These were valid matters for discussion and clarification. Unfortunately, as was so often the case, Ms Rose felt blamed and criticised over the matter and reacted

extremely defensively. The issue was another in respect of which she said rules were changed and procedures were unclear, and there was an accusation that Ms Saunders had lied. Such extreme reactions to that kind of incident were unwarranted and served only to exacerbate the problems in the employment relationship.

[31] Finally, the difficulty with Ms Rose's attendance at meetings seemed to amount to one of communication and Ms Rose's diarising of changes to scheduled meeting times. Otherwise the parties reconfirmed the need for regular meetings for the purpose of discussion and communication, and reaffirmed that there would be regular meetings on Thursday mornings.

4. The December disciplinary meeting

[32] Ms Rose had placed a student, 'M', in employment. The employer terminated M's employment. By email message dated 4 December 2006 Ms Rose advised Ms Saunders:

“... Have a problem with M at [employer]. ... I had tried several weeks ago to call a meeting and the employer said he was too busy. Same story with employer saying he isn't suited to the job, not listening etc. Have referred him to contact Employment Tribunal as he is also in breach of severance procedures. ...”

[33] Ms Saunders replied by email seeking further information, but she was also very concerned about an interpretation of the message which suggested Ms Rose had advised M to take legal action against the employer. For her part, Ms Rose said in evidence that the reference to 'him' in the last sentence quoted above was to the employer. Since maintaining relationships of trust and confidence with employers was very important to the REDT, it would be inappropriate for Ms Rose to jeopardise a relationship with an employer by giving such advice to an employee. Ms Saunders discussed her interpretation and her concern with Ms Freeman. She also set an email message to Ms Rose, asking Ms Rose if she had obtained information from the employer about what had happened.

[34] By email message dated 5 December Ms Freeman advised Ms Rose of her concern that Ms Rose had apparently referred M to the Employment Tribunal. She told Ms Rose a disciplinary meeting would be conducted on 7 December.

[35] Ms Rose telephoned Ms Saunders on the morning of 6 December, and followed with email messages to Ms Freeman and Ms Saunders explaining that she had given both parties the Department of Labour's 0800 helpline number for assistance with their severance and final payment issues. She also expressed her disappointment that a disciplinary meeting had been called. In evidence she took the view that the matter could and should have been discussed in a meeting of the kind discussed during the performance review. She considered the calling of a disciplinary meeting both unfair and another change of procedure as it related to the arrangement regarding meetings.

[36] Ms Freeman advised that she wished the disciplinary meeting to proceed in order to find out exactly what had happened.

[37] Meanwhile Ms Saunders had spoken to M. On her account, M told her that he had been dismissed and Ms Rose had given him the contact for the Employment Tribunal. When asked why, he said 'it was because Jules didn't think the employer had followed the correct procedures.' Ms Saunders reported this to Ms Freeman on the morning of 6 December.

[38] Later that day Ms Saunders reported to Ms Freeman that she had spoken to the employer, who said he was not given any contact numbers. Ms Saunders also spoke to M's mother, who gave an account of the circumstances of M's dismissal. M's mother also said Ms Rose had given her the Department of Labour's 0800 number, and that matters had been resolved.

[39] That information was obtained in the course of a valid attempt to investigate a concern, and it was reasonably open to the REDT to conclude that it raised questions Ms Rose should answer. It was reasonably open to the REDT to proceed with the disciplinary meeting which went ahead on 7 December. The meeting was attended by Mesdames Rose, Saunders and Freeman, as well as two support people for Ms Rose.

[40] During the meeting Ms Saunders referred to the 4 December email and Ms Rose's explanation that she had provided the 0800 number, not the 'Employment Tribunal's' number, so both parties could obtain information from that source. Ms Rose repeated that explanation and expressed the view that her email had been misinterpreted. She said she had given the 0800 number to the employer and to M's mother.

[41] Ms Saunders did not believe that accorded with information she had, including information that no number had been given to the employer at all and that M had been advised to contact the Tribunal because Ms Rose said she did not believe M had been dismissed in accordance with correct procedures.

[42] Ms Rose challenged those accounts, and also questioned why Ms Saunders had not telephoned her to discuss the matter as had been agreed during the performance review. She also gave her more detailed account of events, in doing so reconfirming the essence of the account she had already given.

[43] The meeting was adjourned so Mesdames Saunders and Freeman could consider what to do. As was appropriate given the apparently conflicting statements, Ms Freeman was to call M's mother and the employer to clarify their versions of events. A further meeting was scheduled for 8 December. Unpleasant though all of this undoubtedly was for Ms Rose, I find nothing inappropriate in the conduct of the disciplinary meeting as far as it went.

5. The resignation

[44] Notes of the meeting were prepared and sent to Ms Rose. Ms Rose replied on the afternoon of Friday 8 December, commenting on the content of the notes and the need for the meeting. She referred again to her negative views of Ms Saunders and accused Ms Freeman of covering for Ms Saunders. The language in the letter was very emotive. The letter ended by saying:

“... over the last several months I have been experiencing ill health due to the continual harassment. There is a work environment of anxiety, fear and defensiveness, which no-one

should have to work under and it is for these reasons, and with deep regret as I have enjoyed my role working with schools and students, that I am being forced to submit my resignation. A formal letter of resignation will be posted to you on Monday, along with my medical certificate.”

[45] Ms Rose also advised that she was ill and would be unfit for work for 2 weeks. The REDT says, and I accept, that this was the first indication Ms Rose had given that she was suffering from ill health as a result of her work environment. In evidence Ms Freeman acknowledged having a conversation with Ms Rose on or about 6 December during which Ms Rose said Ms Saunders was harassing her, but she had proposed to address that in discussions during the meeting.

[46] Returning to the aftermath of the disciplinary meeting, Ms Freeman responded at the end of the afternoon by asking Ms Rose to reconsider her decision to resign, and saying she would not confirm acceptance of the resignation until the following week. Meanwhile Ms Rose could elect not to forward her formal letter of resignation. Ms Freeman went on to refer to Ms Rose’s entitlement to sick leave, describe progress with the disciplinary investigation, and advise that Ms Rose’s employment would not be terminated as a result of the matter although there was potential for a warning. Ms Freeman said further that she would not pursue the process of reporting back on further findings associated with the disciplinary meeting if Ms Rose was unwell.

[47] By email message dated Monday 11 December Ms Rose advised Ms Freeman she would withdraw her resignation if certain conditions were met. They were: that there be a retraction of the allegations in respect of M and an apology, and that Ms Rose be permitted to work autonomously from Ms Saunders. Ms Rose went on to express the view that she could run the youth transition programme in a far more efficient capacity.

[48] The response was that Ms Rose’s allegations of stress and harassment would be investigated and to request details. That was an appropriate response. The REDT did not agree to retract the allegations associated with M, or to apologise. That, too,

was appropriate because the REDT was not obliged take any such action, particularly as its investigation had not been completed.

[49] Ms Rose found the response unacceptable and formally confirmed her resignation in writing in a document dated 11 December 2006.

Whether there was a dismissal

[50] A constructive dismissal may occur in the following circumstances:

- (a) an employer gives an employee a choice between resigning or being dismissed;
- (b) an employer follows a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; or
- (c) a breach of duty by the employer causes the employee to resign.¹

[51] I find on the facts that neither (a) nor (b) above applies here. I turn to whether there was a breach of duty on REDT's part so that (c) applies.

[52] In that respect I take into account the following comment of the Arbitration Court's (as it then was):

"It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the border line which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify termination of the employment relationship."²

[53] Further to the allegations concerning uncertainty and inconsistency over rules and procedures, few procedures are capable of covering every aspect of every matter subject to the procedure every time, and few even purport to be so prescriptive. When the procedures here did not cover every aspect of particular placements Ms Rose, who

¹ **Auckland etc Shop Employees IUOW v Woolworths NZ Limited** [1985] 2 NZLR 372; [1985] ACJ 963; (1985) ERNZ Sel Cas 136.

² **Wellington, etc, Clerical etc IUOW v Greenwich** [1983] ACJ 965, 975; (1983) ERNZ Sel Cas 95, 104.

had strong views and sought to be energetic and proactive in her role, filled in the gaps using her skills and experience. Unfortunately the judgement she exercised in the process was not always exercised in a way Ms Saunders found suitable. Ms Saunders attempted to explain her expectations but Ms Rose's approach was fundamentally different and despite their efforts the parties were unable to align their approaches. That did not mean procedures were being changed, and I do not accept that there was the kind of constant change Ms Rose asserts.

[54] In addition there was also at least one significant occasion – arising out of Ms Rose's assertion that the calling of the disciplinary meeting amounted to a variation in the agreed procedures for meetings – when Ms Rose's position was so misconceived that flawed understanding on her part contributed materially to her concern about changing and uncertain procedures.

[55] The inability of the parties to align their approaches led Ms Rose to go further and say she was being harassed, when in reality Ms Saunders was raising matters she was entitled to address. Not only was Ms Rose unable to accept this but she reacted defensively - and sometimes aggressively - and overemphasised relatively minor exchanges. Assertions such as those made in association with the resignation lead me to say, too, that Ms Rose had difficulty accepting Ms Saunders' authority. Finally, Ms Rose accused Ms Saunders unfairly and repeatedly of lying, and I find that view was not reasonably founded.

[56] I am prepared to accept in a general way that there were times when there were refinements or variations to the procedures for assessment and placement, and there was a possibility of miscommunication over those matters. I would also accept in a general way that - as happens in the course of human communication - from time to time there were inaccuracies or simple forgetfulness when the parties attempted to communicate. However when issues were raised the REDT made genuine and reasonable attempts to address Ms Rose's concerns and clarify areas of uncertainty.

[57] Overall I do not accept that any of the above meant Ms Rose was harassed in her employment or that she was expected to swim in a sea of constantly changing

requirements. I do not accept that any of the incidents raised, whether separately or cumulatively, amounted to a breach of duty on the part of the REDT.

[58] For these reasons I conclude that Ms Rose's resignation did not amount to a constructive dismissal.

Costs

[59] Costs are reserved.

[60] If either party seeks a determination of the matter from the Authority they shall have 28 days from the date of this determination in which to file and exchange memoranda setting out their positions. If either wishes to rely to the other there shall be a further 7 days from the receipt of the relevant memorandum in which to file and exchange the reply.

R A Monaghan

Member of the Employment Relations Authority