

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2020] NZERA 208  
3073453

BETWEEN                      MORTEZA SHARIFI  
   Applicant  
  
AND                                CAREER MATRIX NZ  
   LIMITED  
   Respondent

Member of Authority:        Rachel Larmer  
  
Representatives:              David Fleming, counsel for the Applicant  
   Phil Ahern, counsel for the Respondent  
  
Investigation Meeting:        24 January 2020 at Auckland  
  
Submissions and Further    11 February 2020 from the Respondent  
Information Received:        18 February 2020 from the Applicant  
   3 March 2020 from the Respondent  
   19 May 2020 from the Applicant  
  
Date of Determination:       22 May 2020

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

*The parties*

[1]     The respondent, Career Matrix NZ Limited (Career Matrix) is a private training establishment trading as “Abacus Institute of Studies” (AIS). It offers courses in business, information technology and English.

[2]     The applicant, Mr Sharifi, was employed by Career Matrix to work at AIS, as an English Language Teacher. He commenced employment on 10 September 2018 in a permanent

full time role on a salary of \$53,000 per annum. His employment ended when he was made redundant on 8 February 2019.

### *Workplace issues*

[3] Problems arose within the workplace, particularly regarding the relationship between Mr Sharifi and his manager, Tim Jaffray. Complaints were also received about Mr Sharifi from his colleagues and students, which he rejected as without merit.

[4] Mr Jaffray told the Authority that he considered that Mr Sharifi had raised petty and trivial issues about other staff which had caused workplace problems. Mr Jaffray's advice to staff involved in such matters was to resolve their issues as adults.

[5] On 13 December 2018 Mr Sharifi attended a disciplinary meeting to answer allegations regarding various complaints that had been made about him. Career Matrix decided to resolve those concerns by setting out its expectations going forward and the decisions that Lawton Hakaraia, Director Teaching and Learning had made as a result of the outcome of the parties' discussions.

[6] As a result of that the 13 December meeting was treated as an informal discussion and no disciplinary action resulted.

[7] Mr Sharifi claimed that on 14 December 2018 he was assaulted by his manager, Mr Jaffray, an allegation that Mr Jaffray strongly disputed. Mr Sharifi complained to Career Matrix and the police about this alleged incident.

[8] On 17 December 2018 Career Matrix advised Mr Sharifi that it would investigate his allegations against Mr Jaffray. Mr Sharifi was also told that he would be required to report to a different manager for the last week of the term, so that he would not have any direct dealings with Mr Jaffray while the complaint was being investigated.

[9] Mr Sharifi believed that these workplace problems led Career Matrix to personally target him, by embarking on what he claimed was a sham restructuring process to exit him from his employment.

*Mr Sharifi's claims*

[10] During the Authority's investigation meeting Mr Sharifi conceded that he knew that AIS' student numbers were dropping, which placed it under financial pressure. However in his closing submissions Mr Sharifi reiterated his belief that the restructure that resulted in his redundancy was a sham, used to personally target him.

[11] Mr Sharifi claims his dismissal on the grounds of redundancy was substantively and procedurally unjustified.

[12] Mr Sharifi said Career Matrix failed to properly consult, either about the restructuring or the redeployment process. Mr Sharifi also claimed that he was not really redundant because his position essentially continued under the new structure. He also said that Career Matrix should have redeployed him into the National English Language Programme Manager role instead of appointing an external candidate.

[13] Mr Sharifi also claimed that Mr Jaffray's involvement in the interview and selection processes for the roles Mr Sharifi had applied for, after he had made recent formal complaints about Mr Jaffray, was evidence of bias.

*Career Matrix' position*

[14] Career Matrix rejected the sham allegation. It said that its restructure was driven by a genuine need for AIS to reduce its teaching head count as a result of dropping student numbers. It said the industry had been undergoing substantial change and was extremely vulnerable to outside factors, the most significant being the level of overseas students seeking to study in New Zealand.

[15] Career Matrix said it had to be able to respond to those changes where there were reducing student numbers because a failure to address that could potentially affect the long term viability of its business.

[16] Career Matrix says that by December 2018 it was facing a student number reduction which was clearly impacting it financially. It therefore prepared a comprehensive change proposal document for consideration by the English Department academic staff. It did not receive any feedback so implemented the restructure to reduce its costs.

[17] Career Matrix stated that Mr Sharifi's dismissal was substantively justified on the grounds of redundancy and that it was carried out in a procedurally fair manner.

### **Restructuring process**

[18] Staff were advised of the proposed restructure at a meeting on 17 December 2018 that Mr Sharifi elected not to attend, due to his concerns about the 14 December incident.

[19] On 20 December 2018 all academic staff in the English Department, including Mr Sharifi, were sent a copy of the "*Change Proposal Document*" ("the Proposal") which was dated 19 December 2018.

[20] Although the Proposal identified that significant changes to AIS' business programme teaching were required, the details of the particular changes proposed were not specified. Nor were specific comments made about Mr Sharifi's role or about the teaching of English. No detailed financial information was provided, nor was Mr Sharifi advised of his right to seek legal advice or representation.

[21] The Proposal required feedback by 31 December 2018. AIS closed down for the year on 21 December 2018, so Mr Sharifi was on preapproved annual leave from 21 December 2018 to 7 January 2019.

[22] On 10 January 2019 Career Matrix decided to implement the Proposal. On 11 January 2019 English Department teaching staff were notified that their current positions would be disestablished so that they had to apply for new roles by 8:30 am on Tuesday, 15 January 2019 if they wanted to remain employed. They did that by emailing Mr Jaffray or Mr Lawton Hakaraia, who was at that time the AIS Director - Teaching and Learning, indicating their (the staff's) preference for full or part time employment.

[23] Around the same time it was conducting the restructuring, Career Matrix was also recruiting for the position of National English Language Programme Manager. This position was advertised internally and externally so those interested had to apply with a cover letter and CV. Although Mr Sharifi applied for that new position, it went to an external candidate.

[24] The interviews for the National English Language Programme Manager position were held on 11 January 2019 and were conducted by Mr Jaffray and Mr Hakaraia. Although Mr Jaffray and Mr Sharifi both requested that Mr Jaffray not be involved in Mr Sharifi's

interview, to avoid any impression of possible bias arising from the 14 December allegations, their requests were declined by Mr Hakaraia, who wanted to same interviewers used for all candidates to ensure consistency.

[25] On 18 January 2019 Mr Sharifi was notified that he had not been appointed to either of the roles he had applied for, so his employment ended on 8 February 2019.

### **Issues**

[26] The following issues are to be determined:

- (a) Was the restructure a sham?
- (b) If not, was the restructuring carried out in a procedurally fair manner?
- (c) If not, does s 103A(5) of the Employment Relations Act 2000 (the Act) apply?
- (d) Was Mr Sharifi's dismissal substantively justified?
- (e) Was Mr Sharifi's dismissal on the grounds of redundancy justified?
- (f) If not, what, if any, remedies should he be awarded?
- (g) What, if any, costs should be awarded?

### **Was the restructure a sham?**

[27] It is clear that the restructure proposed by Career Matrix in December 2018 and implemented in January 2019 was not a sham. There were clearly declining student numbers which created financial pressure and a situation where there were more teachers than were needed for the classes AIS were offering.

[28] It was reasonable and appropriate for Career Matrix to look at its staffing requirements and for it to conclude that it was employing more English teachers than were warranted by the student numbers and classes that were being taught.

[29] The restructuring process was not a sham and it was not implemented to personally target Mr Sharifi.

## **Was the restructuring carried out in a procedurally fair manner?**

### *Justification test*

[30] The statutory justification test in s 103A of the Employment Relations Act 2000 (the Act) requires the Authority to objectively assess whether Career Matrix's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time Mr Sharifi was made redundant.<sup>1</sup>

[31] Procedural fairness is therefore one of the elements of the s 103A(2) justification test in the Act. A fair and reasonable employer is expected to comply with its statutory obligations. These include the good faith requirements set out in s 4(1A) of the Act to provide access to relevant information and an opportunity to comment on it before a final decision is made.

[32] It also includes compliance with each of the four procedural fairness tests identified in s 103A(3) of the Act, which are to be read consistent with an employer's redundancy obligations.

### *Good faith*

[33] Career Matrix was unable to discharge its burden of establishing that it had complied with its good faith requirements. It was therefore in breach of s 4(1A) of the Act. The consultation document dated 19 December 2018 was defective because it did not fairly or clearly set out all relevant information, thereby depriving Mr Sharifi of an opportunity to comment on information relevant to a decision about his ongoing employment.

[34] Although the consultation document identified that significant changes were needed "*in departments, in management, and how we use the facilities*" and that it proposed to "*reduce the number of contracted business teaching hours in the Auckland campus*", it was not clear what changes were proposed, or what roles in particular were likely to be disestablished.

[35] There was no specific reference to the possibility of disestablishing either Mr Sharifi's role, or the roles of all English teachers. Nor were any details provided about how those who

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<sup>1</sup> Section 103A(2) of the Act.

were to be made redundant would be selected. Mr Jaffray and Mr Hakaraia advised Mr Bob Miller, the then CEO of AIS ,that selection criteria should be included in the Proposal but Mr Miller decided that was not necessary.

[36] Career Matrix failed to provide sufficient information to allow Mr Sharifi to engage in meaningful consultation regarding the Proposal.

*Section 103A(3) requirements*

[37] The failure to provide relevant information to enable Mr Sharifi (and others) to understand what was being proposed and why, and what impact it would have on them personally also breached Career Matrix's obligations under s 103A(3)(a) of the Act.

[38] There was no evidence to suggest that any detailed analysis of the business environment had been undertaken, and there was little detail given about critical matters such as what courses Career Matrix intended offering in future, whether it expected to be able to enrol students in courses it was not currently permitted to, or what was likely to happen with anticipated student numbers generally.

[39] Career Matrix's failure to adequately explain what it was proposing to do and what information it had relied on meant that it was unable to establish it had "*sufficiently investigated*" the declining student numbers, course offering and teachers needed before it commenced the restructuring process.

[40] The deficiencies in the Proposal document and the lack of information provided to Mr Sharifi and other staff meant that Career Matrix has failed to comply with its obligations under s 103A(3)(b) of the Act to "*raise the concerns*" with Mr Sharifi before he was made redundant. Staff were left to infer or imply from the limited information in the Proposal document what it meant for them personally or for English teachers overall.

[41] It therefore follows that Career Matrix failed to comply with the obligation in s 103A(3)(c) of the Act to provide Mr Sharifi with "*a reasonable opportunity to respond*" before he was made redundant.

[42] The failure to provide him with all relevant information and the lack of clarity in the Proposal document meant that he was deprived of a reasonable opportunity to respond. The timeframe of tabling the Proposal with him the day before he started annual leave, and

requiring him to give feedback over the Christmas holiday period when most professional advisors are closed and while Mr Sharifi was on annual leave, was unreasonable.

[43] Although the time for providing feedback on the proposal was apparently extended from 31 December 2018 until 10 January 2019, Mr Sharifi did not return from leave until 7 January 2019 and he was never told about the extension of time for providing feedback.

[44] As at 10 January Mr Sharifi still did not have sufficient information about the Proposal or its potential affect on him to have enabled him to have engaged in meaningful consultation. Career Matrix's failure to communicate the extension of time until 10 January 2019 to Mr Sharifi deprived him of an opportunity to respond by that date.

[45] Mr Hakaraia told the Authority that he had advised Mr Miller of concerns he (Mr Hakaraia) had regarding the proposed consultation process, but that Mr Miller had ignored that advice.

[46] Section 103A(3)(d) of the Act did not apply because Mr Sharifi did not provide any feedback on the proposal. However, the reason for that was he had been given insufficient information and insufficient time to enable him to do so.

*Section 103A(4) of the Act – other appropriate factors*

[47] Other appropriate factors in accordance with s 103A(4) of the Act that made the restructuring process unfair to Mr Sharifi include:

- (a) There was no proper selection or assessment process regarding who would be made redundant;
- (b) Redeployment opportunities were not appropriately considered;
- (c) Mr Jaffray should not have been involved as a decision maker regarding the positions Mr Sharifi had applied for.

- (a) Selection criteria

[48] Career Matrix did not provide any documentary evidence about the selection process or scoring process it used to select who would be given positions in the new structure and who would be made redundant. Nor was any information about the selection process communicated to staff during the restructure.

[49] Career Matrix's two witnesses, Mr Hakaraia and Mr Jaffray, gave contradictory evidence regarding the selection process that was applied.

[50] Mr Hakaraia said there was no interviews or scoring or assessment of the English language teachers who wanted to remain employed. Mr Hakaraia said that he and Mr Jaffray and Mr Miller selected the teachers who could teach at all levels of the NZCEL programme for roles in the new structure after reviewing the teachers' CVs that were already on file.

[51] Mr Hakaraia said that Mr Sharifi was selected for redundancy because he could not teach at all levels of NZCEL. Mr Sharifi said he could teach across all levels of NZCEL but that other staff (who remained employed) were not capable of doing so. Mr Jaffray agreed that Mr Sharifi could teach English at any of the levels AIS offered. However Mr Jaffray stated that that was not a selection criteria.

[52] Mr Hakaraia said that the selection panel consisted of himself, Mr Jaffray and Bob Miller who together decided who would be appointed to roles in the new structure. Mr Jaffray did not mention the existence of such a selection panel and instead said that selections of who would be made redundant were made by just Mr Hakaraia and Mr Miller.

[53] Mr Jaffray also stated that he had no influence on the final selection of the external candidate for the National English Language Programme Manager role, whereas Mr Hakaraia said that Mr Jaffray had considerable involvement in that decision.

[54] There was also no evidence produced to the Authority that Career Matrix ever added an NZCEL Level 5 course at AIS as a result of the restructure. None of the documents included in the joint bundle produced to the Authority indicated an intention to introduce NZCEL Level 5 courses or that staff who would be offered roles in the new structure had to be able to teach at NZCEL Level 5. To the contrary, both the Proposal dated 19 December 2018 and the outcome document dated 11 January 2019 only referred to courses at NZCEL Levels 1 to 4, which Mr Sharifi had taught.

[55] Mr Jaffray's evidence was also internally inconsistent. He gave evidence that Mr Sharifi was selected for redundancy because "*D Stream*", the class Mr Sharifi had been teaching was disestablished. Mr Jaffray said that because other teachers were already doing an adequate job of teaching other courses, it would not have made sense to displace one of those other teachers in order to retain Mr Sharifi or to "*fit Mr Sharifi in*".

[56] However, Mr Jaffray admitted that Mr Sharifi was not employed specifically to teach "*D Stream*", that his position was that of an English Language Teacher, working as and when required across all class levels and streams. The selection criteria relating to "*D stream*" was therefore questionable. It was also not a selection criteria that Mr Hakaraia said had been used.

[57] Career Matrix submitted that Mr Sharifi "*was recently employed and did not have experience at all levels. His only experience was that gained working for it*". However, evidence produced to the Authority, including testimony from Mr Sharifi and Mr Jaffray and the work history set out in Mr Sharifi's curriculum vitae, showed that he had worked in a number of English schools, was highly experienced and therefore could likely teach across all levels. The claim that Mr Sharifi was selected because he lacked the necessary experience is therefore not objectively justifiable.

#### (b) Redeployment

[58] In terms of redeployment, Mr Sharifi identified the National English Programme Manager role as a possible redeployment opportunity for him. While he applied for and was interviewed for the role, he was unsuccessful, because an external candidate was appointed. Mr Sharifi said that position should have been offered to him in order to avoid his redundancy.

[59] The Authority was left with the impression that Career Matrix selected the strongest candidate for the position, but did not appropriately factor into its decision making its employment law obligations to consider redeployment for an otherwise redundant employee.

[60] There was no specific qualification or experience that was required for the National English Language Programme Director role which Mr Sharifi either did not already have or which he likely could not reasonably have obtained, with some support and training from Career Matrix.

[61] Mr Hakaraia told the Authority that Mr Sharifi would have needed to have a relevant post-graduate qualification, and appropriate English language teaching certification. However, it was obvious from Mr Sharifi's curriculum vitae that he had an MA (Hons) in English language teaching, and has higher qualifications in English language teaching to adults than those specified by Mr Hakaraia.

[62] Mr Hakaraia also said that the successful appointee needed to have years of management experience in the same field in New Zealand. However, there was no tangible evidence that that was actually a requirement at the time of the appointment, making it appear as an ex-post facto justification. For example, it was not a requirement for an interview or specified in the job description or advertisement.

[63] The Career Matrix witnesses were unable to respond to the Authority about why Mr Sharifi was interviewed for that position if they considered that he did not have the basic qualifications that he needed in order to be appointed to it. There were no discussions with Mr Sharifi about that at any time to clarify how his qualifications and experience fitted with what was required in the role.

[64] Mr Hakaraia gave evidence that Mr Sharifi would not have been a suitable candidate for the National English Language Programme Director role because he could not work with Mr Jaffray. However, Mr Jaffray told the Authority that if Mr Sharifi had been appointed to the role they would not have had to have worked together to any material extent anyway.

[65] Career Matrix failed to appropriately consider whether Mr Sharifi had the skills and experience to meet the requirements of the job description for that role or whether he could be appropriately trained and supported to do that role.

[66] Although it is by no means certain that had redeployment been properly considered and all relevant evidence had been appropriately weighed, that Mr Sharifi would definitely have got that role, the way that the redeployment opportunity was handled deprived him of a fair or genuine opportunity for consideration of redeployment into that role.

(c) Mr Jaffray's involvement

[67] It was unwise for Career Matrix to involve Mr Jaffray in the selection processes for the English language teachers who would remain employed, and the selection of the National English Language Programme Manager.

[68] Career Matrix should have acted responsibly to avoid the potential for Mr Sharifi to make the allegations of bias he has now made. While there was no actual evidence of bias, and Mr Jaffray in his evidence to the Authority sought to minimise his involvement in these decisions, there is an improper appearance of potential bias.

[69] That concern is not meant to cast aspersions on Mr Jaffray. It is a conclusion that instead arose from the fact the 14 December incident, and the serious allegations made by Mr Sharifi against Mr Jaffray, had occurred less than a month prior to the selection decisions being made. At the time the selections occurred, the issues associated with the December incident had still not been substantively resolved. Mr Jaffray's involvement in such circumstances was objectively unfair to Mr Sharifi.

[70] Career Matrix let Mr Jaffray down by insisting that he participate in selection processes involving Mr Sharifi in circumstances where Mr Jaffray had himself expressed concern, not that he could not be impartial but, that the 14 December incident could objectively create an undesirable appearance of bias.

#### **Does s 103A(5) of the Act apply?**

[71] Section 103A(5) of the Act prevents the Authority from determining that a dismissal was unjustified solely because of minor process defects that did not result in the employee being treated unfairly. That is not the case here. The process defects were substantial and fundamentally unfair to Mr Sharifi.

#### **Was Mr Sharifi's dismissal justified?**

[72] The failure of Career Matrix to comply with its statutory good faith obligations or with any of the four procedural fairness tests in s 103A(3) of the Act has fundamentally undermined its ability to substantively justify Mr Sharifi's dismissal on the grounds of redundancy.

[73] A fair and proper process is one of the fundamental elements that leads to good substantive decision making. In this case the serious procedural flaws that occurred resulted

in Mr Sharifi effectively being deprived of a real opportunity to engage in consultation regarding the restructuring proposal.

[74] Career Matrix therefore made decisions about who would be selected for redundancy without all of the relevant information that it could and should have considered.

[75] It was not a forgone conclusion that if Mr Sharifi had been fully and properly consulted (after having been provided with all relevant information that would have enabled him to have done so in a meaningful way) that the decision to select him for redundancy would have remained unchanged.

[76] Career Matrix has failed to discharge its onus of establishing that its dismissal of Mr Sharifi on the grounds of redundancy was procedurally or substantively justified.

**What, if any, remedies should be awarded?**

*Mitigation of loss*

[77] Mr Sharifi appropriately mitigated his loss by taking on part time, fixed term, and casual work.

*Lost remuneration*

[78] Mr Sharifi seeks reimbursement of \$13,250 which is equivalent to three months' ordinary pay.

[79] Section 128 of the Act requires the Authority to award the lesser of a sum equal to the remuneration actually lost or to three months' ordinary time remuneration.

[80] There is no automatic right to reimbursement of an employee's full lost remuneration, but the actual loss obviously sets an upper ceiling on any potential award, with s 128(2) setting the minimum potential award.

[81] Although Mr Sharifi mitigated his loss by accepting temporary, part-time and fixed-term roles, he did not obtain permanent employment at a comparable rate of pay.

[82] Mr Sharifi's employment ended on 8 February 2019. His actual lost remuneration as from that date to the date of the Authority's investigation meeting (after having been adjusted

for the income he earned from fixed-term, part-time and casual roles with NZLC and ICA) amounted to \$10,973.

[83] Career Matrix is therefore ordered to pay Mr Sharifi \$10,973 under s 128(2) of the Act, within 30 days of the date of this determination, to compensate him for the actual remuneration he has lost as a result of his unjustified dismissal.

*Reimbursement of other money*

[84] Mr Sharifi's claim for reimbursement of \$6,192 immigration costs does not succeed.

[85] Mr Sharifi filed his residency application before he started work with Career Matrix, which was declined in August 2019 because he was no longer employed and he had not been able to find alternative skilled work.

[86] The Authority was not satisfied that Career Matrix should reimburse Mr Sharifi for his residency application as there are too many variables associated with that and it was commenced before he had started work at Career Matrix.

*Distress compensation*

[87] Mr Sharifi was stressed and upset by his dismissal. He described experiencing anxiety and insomnia and had to obtain medical assistance. He also felt that he had been let down because his interests had not been protected due to the way the restructuring was implemented.

[88] Mr Sharifi described how difficult his dismissal was for him and his family. His relationship suffered and his immigration application for residency was unsuccessful because he did not have permanent employment. Mr Sharifi was unable to concentrate on his PhD studies and said that he was still, as at the date of the Authority's investigation meeting, struggling to work effectively.

[89] Career Matrix is ordered to pay Mr Sharifi \$18,000 under s 123(1)(c)(i) of the Act for the humiliation, loss of dignity and injury to feelings he has suffered as a result of his unjustified dismissal.

*Contribution*

[90] Section 124 of the Act requires the Authority to determine whether remedies should be reduced on the grounds of contribution. This requires blameworthy conduct which is proven on the balance of probabilities. This was a redundancy situation and Career Matrix says that the previous workplace issues that arose played no part in its restructuring or selection of Mr Sharifi for redundancy.

[91] Accordingly, this is not a case in which there should be a reduction of remedies on the grounds of contributory conduct.

**What, if any, costs should be awarded?**

[92] Mr Sharifi as the successful party is entitled to a contribution towards his actual costs.

[93] The parties are encouraged to resolve costs by agreement. However, if that is not possible then, Mr Sharifi has 14 days from the date of this determination to file costs submissions and Career Matrix has 14 days within which to respond.

[94] Costs are likely to be assessed on the basis of the Authority's usual notional daily tariff based approach to costs, which is currently \$4,500 for the first day of an investigation meeting. The parties are therefore invited to specifically identify any factors that they say should warrant adjustments being made to the notional daily tariff.

**Rachel Larmer**  
**Member of the Employment Relations Authority**