

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 96/09
5111634

BETWEEN	TIM SMITH Applicant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Member of Authority: Paul Montgomery

Representatives: Jeff Goldstein, Counsel for Applicant
Val Parkins, Counsel for Respondent

Investigation Meeting: 15 April 2009

Determination: 3 July 2009

DETERMINATION OF THE AUTHORITY

[1] The applicant is, and at the relevant time was, employed by ACC as a Case Manager of Long Term Claims. Mr Smith alleges he was disadvantaged by the unjustifiable action of the respondent in respect to his application for the internally advertised vacancy for the role of Quality Assurance Manager within the organisation.

[2] Mr Smith says he applied for the position within the required deadline of 26 September 2007. Further, the applicant says he was telephoned on 5 October 2007 by Ms Melissa Hare, the Corporation's Internal Recruitment Consultant, who conducted a telephone interview with him.

[3] In the course of the interview Ms Hare asked Mr Smith if he would make himself available for a formal interview and psychometric testing the following Monday and Tuesday. Later that same day Ms Hare again contacted Mr Smith and advised those nominated days were unsuitable and she would contact him on the rescheduled interviewing and testing. He said *as a result of this I expected to be called for a formal interview and testing soon thereafter.*

[4] Mr Smith emailed Ms Hare on 17 October 2007 to ask for an update but received an auto reply advising Ms Hare was in Christchurch for two days. On 19 October 2007 Ms Hare advised she had been in Christchurch conducting the interviews for the Quality Assurance Manager and that Mr Smith had been unsuccessful. Mr Smith promptly advised Ms Hare of his intention to instigate personal grievance proceedings over his employer's treatment of his application.

[5] An exchange of correspondence between Mr Goldstein and the Corporation ensued with the respondent initially agreeing, then refusing to attend mediation.

[6] The respondent firmly resisted the claim stating Ms Hare had attempted to contact Mr Smith on 15 October 2007. To cut to the chase, records properly obtained by Mr Smith clearly indicate this is not so.

[7] Having discovered this information, Mr Smith took the view, in the light of s.8 of his employment agreement, that the respondent had failed in its obligations to him in respect of *responding to applicants* and dealing with *short listed applicants*. It is that alleged breach which lies at the heart of the matter.

[8] Mr Smith alleges deceit and misleading behaviour on the part of his employer and says the correspondence from the Corporation to his counsel acknowledges the breach. He also raised the issue of the Corporation breaching its good faith obligations to him.

[9] Mr Smith seeks the sum of \$7,500 as compensation for humiliation, loss of dignity and injury to feelings suffered as a result of the alleged grievance and general damages in the sum of \$7,500 for breaches of the terms and conditions set out in his employment contract. He also seeks his legal costs.

[10] The respondent counters by stating that Ms Hare asked Mr Smith about his availability for formal interview and testing *if these were to be held on Monday 8 October and Tuesday 9 October 2007 and if he was successful in being short listed*. The respondent agrees Ms Hare was in Christchurch on 17 and 18 October 2007 and also that Ms Hare advised Mr Smith's application had been unsuccessful.

[11] However, amid the correspondence between the Corporation and Mr Goldstein it is stated, *the respondent relied upon information registered in it's [sic] recruitment*

data base in relation to contact made with all applicants for all vacancies managed by internal recruitment service.

[12] In short *the respondent does not agree that the applicant has suffered humiliation, distress or loss of dignity as a result of this matter. Further, the respondent does not agree that any damages are owing.*

[13] The parties attempted to resolve the problem between their respective representatives but were unable to do so.

The issues

[14] To resolve this issue the Authority needs to establish findings on the following matters:

- Did the respondent comply with its obligations under s.8 of the employment agreement; and
- Is the respondent's view that there were internal avenues for the applicant to resolve this issue and the decision to engage counsel was his and as such is not the cost for the respondent sustainable on the face of the facts; and
- Has the applicant been disadvantaged by the actions of the respondent; and
- If so, what remedies are due to him; and
- Did the applicant contribute to the circumstances giving rise to his grievance.

The investigation meeting

[15] The investigation meeting was relatively brief. The Authority heard from Mr Smith and from Mr Graham Phillips who did not identify his position within the Corporation but told the Authority he provides *HR support to the Northern South Island Region*. Under questioning, Mr Phillips said he was a contractor to, rather than an employee of the respondent.

Discussions and analysis

[16] There is need for very little of either.

[17] The respondent relied on Ms Hare's assurance that she had attempted to contact Mr Smith on 15 October 2007. That assurance was false. She had not. While not clear what action was taken in respect to this employee, whether she was jugged or roasted, is irrelevant. The respondent got it wrong in respect to Mr Smith and let down the legitimate expectations of a long standing and competent employee.

[18] To Mr Smith's credit he accepts that internal applications he has made since the incident in issue here, have been handled fairly by his employer. That does not however resolve Mr Smith's grievance over his application for the Quality Assurance Manager's position.

[19] Returning to the issues above set out in this determination I find:

- The respondent failed in its obligations under s.8 of the Employment Agreement; and
- Having been found by the respondent's refusal to acknowledge its failure of its obligations, the applicant was entitled to brief external counsel; and
- The applicant has been unjustifiably disadvantaged by the respondent's treatment of him in respect of this particular application; and
- The applicant did not contribute to the circumstance giving rise to his grievance; and
- The applicant is entitled to remedies.

Remedies

[20] The remedies sought are significant in the light of an ongoing and apparently, but for this incident, sound relationship, and in the light of moderate corroborative evidence as to the effects of the disadvantages suffered by Mr Smith.

[21] In all the circumstances I think it just to award the applicant the modest sum of \$2,500 under s.123(1)(c)(i) of the Employment Relations Act 2000.

[22] I set aside the application for damages.

Costs

[23] To avoid further costs to either party I order the respondent to pay Mr Smith the sum of \$2,000 as a contribution to his reasonably incurred costs based on a tariff approach as set out in *PBO v. Da Cruz* [2005] ERNZ 808.

Paul Montgomery
Member of the Employment Relations Authority