

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 427/08
5116284

BETWEEN FELIX DENIHER
 Applicant

AND CHIEF EXECUTIVE OF
 ACCIDENT COMPENSATION
 CORPORATION
 Respondent

Member of Authority: Marija Urlich

Representatives: In person, for Applicant
 Graham Phillips, for Respondent

Investigation Meeting: 20 November 2008

Submissions received: 1 and 4 December 2008

Determination: 17 December 2008

DETERMINATION OF THE AUTHORITY

[1] Mr Daniher has been employed as an ACC case manager since 2005. Earlier this year he successfully applied for a position in the Tauranga branch. This is the role he currently holds. However, Mr Daniher's success in that appointment process was preceded by a number of failed applications for positions in the Tauranga branch. These failed applications form the basis of the employment relationship problem between the parties.

[2] Mr Daniher says he has suffered hurt and humiliation as a result of his repeated and unsuccessful applications for position vacancies with ACC. He says all the positions he applied for have fallen within his range of skills and experience. He says that ACC had an obligation to draw to his attention any deficit which was impeding his success.

[3] ACC says repeated attempts have been made to resolve the issues between the parties including mediated settlements. It says ACC treats each position application on its individual merits and that, as a matter of policy, internal applicants are treated the same as external applicants. It says feedback was always available to Mr Daniher, that he did not ask for it and following a requested feedback session earlier this year and consequent interview coaching Mr Daniher was successful in his application for the position he wanted.

[4] To determine this employment relationship problem the Authority must consider whether these circumstances give rise to an unjustified disadvantage in Mr Daniher's employment with ACC¹.

[5] The documents and witness statements provided by the parties contained references to mediations attended relating to this employment relationship problem. Mediation is a confidential process the details of which should not be put before the Authority member dealing with the application. To preserve that confidentiality this material has been removed.

[6] The matters before the Authority span the period June 2007 to February 2008. At the investigation meeting I raised with the parties whether a statutory bar² existed to matters beyond 90 days from February 2008. I advised the parties my preliminary view was that as ACC had not raised this as a bar to my inquiry and the evidence showed it had actively attempted to resolve Mr Daniher's personal grievance, ACC had, by its actions, consented to the raising of the personal grievance after the expiration of the 90-day statutory limit³. I confirm this view.

Unjustified disadvantage?

[7] In late 2006 Mr Daniher wished to move from Whakatane to Tauranga. A secondment was made available to him which he accepted with the intention of applying for a permanent position in Tauranga. When the secondment ended, and he had not succeeded in gaining a permanent position in Tauranga, he accepted a short term role in Rotorua, again with the intention of applying for permanent positions in

¹ Section 103(1)(b) Employment Relations Act 2000

² Section 114 Employment Relations Act 2000

³ Section 114(3) Employment Relations Act 2000

Tauranga. At the end of the short term he was offered a transfer to Rotorua, which he declined, and Mr Daniher was assigned another short term position in the Tauranga branch.

[8] In January 2007 Mr Daniher raised a personal grievance with ACC which he withdrew later that month.

[9] On 26 February 2007 Mr Daniher resubmitted the January personal grievance, which was resolved by way of record of settlement entered by the parties on 28 June 2007. The record of settlement required ACC to provide Mr Daniher with a letter acknowledging his grievance; that letter provided:

Dear Felix

We write in response to your concerns regarding the recruitment process for the Case Manager – Tauranga position (91706). Like any process we can never guarantee an outcome that meets everyone's expectations, we can only use best endeavours to ensure a suitable outcome.

Although in this case it is ACC's opinion that a fair and reasonable process was followed, we also acknowledge that all processes are not infallible. We regret that in this instance the process has left you feeling that all relevant information was not considered. We have listened carefully to your concerns and will take these into consideration when recruiting for future roles.

We urge that if you apply for future roles you utilise all opportunities to convey the key messages you want to get across, which may include reference to your past performance. In turn ACC will continue to provide information to help candidates prepare for interviews. As will all employees we also encourage you to seek feedback from any interview.

This letter aims to assist a positive working relationship going forward, it does not guarantee your success in any future role you apply for. Applications will continue to be assessed against ACC's identified criteria.

A copy of this letter will be placed on your personal file. It applies to the specific issues that were raised on 28 June 2007 and prior. It is not intended that it will be referred to in any future matters by either party.

Yours sincerely

*Linda Hermon,
Area Manager, East Coast/Midlands*

[10] After 28 June 2007 Mr Daniher unsuccessfully applied for a number of positions with ACC in Tauranga.

[11] By email dated 5 February 2008 Mr Daniher wrote to Ms Hermon raising a personal grievance:

Hi Linda

I wish to file a personal grievance – again - regarding the case manager positions at ACC Tauranga.

The last straw was being told I would not receive so much as an interview, although Ann Crawford told me there were 8 positions available under application 118507.

It has become painfully obvious that I will not be hired at ACC Tauranga in any capacity, at any time, no matter my record, no matter how hard I work, no matter how many times I apply.

I count 10 applications for various positions at ACC Tauranga – God knows how many positions that represents.

Regards

Felix Daniher

[12] Ms Hermon replied by email dated 12 February acknowledging receipt of the 5 February email, suggesting a meeting on 20 February to talk about the problem and how Mr Daniher would like it resolved, advising a human resource consultant would be present, that Mr Daniher was welcome to bring a support person, requesting specific concerns about applications made for specified vacancies and advising a copy of feedback from those applications would be provided as requested⁴. There is no dispute that this was the first time, since the parties entered the June record of settlement, that Mr Daniher requested feedback.

[13] Mr Daniher wrote to Ms Hermon on 13 February. He confirmed the suggested meeting and responded to her request for specific concerns and suggestions for resolution:

...

2. *My concerns are:*

- *I have made 11 applications to Tauranga Branch since late 2006. Within each of these applications are sometimes multiple available positions. In addition, persons who accepted positions have subsequently declined them, which means even more opportunities were, in fact, available. Clearly, I am persona non grata at Tauranga branch of ACC.*
- *There are actually two parts to this PG – one deals with the CM positions at Tauranga, the other deals with all other positions I have applied for at Tauranga ACC. I shall list them for you – 77906, 91706, 65507, 89407, 89207, 102707, 105507, 110207, 115707, 118507, and currently 10408.*
- *Clearly, there is a disconnect between my annual performance reviews, work history, qualifications and experiences, coaching documentation, and my results from 11 applications. I feel strongly that this is an unnatural result.*
- *ACC is clearly not telling me of some vital and essential failure in my performance. What is that failure?*

⁴ Mr Daniher wrote to Ms Hermon on 7 February asking for feedback.

- *I believe I was discriminated against, without sufficient cause, in having to re-take additional tests which other applicants either did not have to take or did not have to re-take.*
- *Other employees are given the leeway to work where they live, even though they may be handling files from other offices. Why can't I?*

3. *Suggestions for resolution*

Firstly, I actually like a lot of things about working at ACC. I can see myself working at ACC.

- *I want every piece of information I can have regarding my personal file – records, applications, performance reviews, coaching results, interview results psychometric tests, everything I am entitled to have.*
- *I want to work where I live (most people do) – ACC's value – "Honouring People as People".*
- *I want to feel that I can succeed at ACC – 11 failed applications - ?25 failed job opportunities? – does not reinforce that – ACC's value – "Culture of Success"*
- *I want the opportunity for a career at ACC, where I live – ACC's value – "Freedom to Succeed".*

In short I want a job where I live – at ACC Tauranga. I want the opportunity for a career at ACC. If I am failing in some essential way, I want to know, and I want help to correct it. I do not want to be discriminated against. These are pretty basic wants, pretty much what every ACC employee would want.

...

[14] The 20 February meeting proceeded. Mr Daniher was given feedback as to why he had not succeeded in his latest position application. The feedback was compiled from Mr Daniher's responses to the interview questions, reference checks and psychometric testing in relation to that application. The feedback was presented during the meeting by Leigh Carter, a human resources consultant. Ms Carter put the following specific concerns to Mr Daniher:

- a perceived lack of organisational skills;
- that Mr Daniher's skill set appeared more aligned to longer term case management rather than front end case management, which the position required;
- that Mr Daniher appeared to respond to angry/aggressive clients in a like manner;
- impatience with paper work; and
- Mr Daniher's strong team player tendency may be a detriment to his own work.

[15] Mr Daniher's immediate (and understandable) reaction to the feedback was anger and upset. He was offered EAP support and a development session with the

agency which had conducted the psychometric testing. He requested further mediation.

[16] Mr Daniher was advised that he was shortlisted for another Tauranga position he had applied for and he would be interviewed the following afternoon. He was offered a one-on-one telephone coaching session with a senior learning and development consultant from ACC which Ms Carter scheduled for the following morning. Ms Carter suggested Mr Daniher review the job description for the applied for position and consider examples he may like to use in the interview in preparation for the coaching session.

[17] Mr Daniher attended the coaching session where he discussed the examples he might use to answer interview questions and received feedback on those answers. Mr Daniher said the level of coaching was very detailed and that there was a striking similarity between the coaching he received and the questions he was asked in the interview he attended.

[18] On 25 March Mr Daniher was offered and accepted the Service Co-ordinator role in Tauranga.

[19] The parties attended mediation on 12 June.

Determination

[20] In 2007 Mr Daniher had concerns about his repeated failure to secure a position in Tauranga with ACC. He raised a personal grievance, the settlement of which was documented in a record of settlement dated June 2007. A line is drawn under all events prior to June 2007.

[21] Arising from the record of settlement is Ms Harmon's letter dated 28 June. This letter informs the employment relationship from June 2007 on. The significant features of the letter are:

- ACC will continue to provide information to help candidates prepare for interviews; and

- Mr Daniher is urged to reflect on his interview technique and to seek feedback from any interview.

[22] Mr Daniher says from June 2008 the actions of his employer have unjustifiably disadvantaged him in his employment. To determine whether a grievant has been affected to their disadvantage in their employment because of some unjustifiable action, it is necessary to focus on the present employment⁵.

[23] This raises a fundamental difficulty for Mr Daniher's application – how can personal grievances, which must be based on conditions of employment, arise from applications for future employment?

[24] Mr Daniher's main concern is that ACC had an obligation to offer him *proper, proactive, timely, detailed and robust feedback* and that when he received it, in February 2008, he accepted that feedback and improved. Mr Daniher says the obligation to provide the feedback described arises from his concern that ACC had formed a view about him which was impeding his securing one of the applied for positions. He says if ACC had a negative opinion of him which it was taking into account in the interview process that it had an obligation to advise him of that view and help him address it.

[25] There is no evidence that ACC had a view of Mr Daniher which was negatively impacting on his success in applications. I do not accept that a reasonable inference of such can be drawn from the number of unsuccessful applications. I accept Ms Hermon's evidence that ACC treats internal and external candidates identically. I also accept her evidence that the information available to the recruitment panel, in any given application by Mr Daniher, was the information he provided, by way of his application, and in the event of one being conducted, an interview and results of psychometric testing.

[26] ACC provided a spreadsheet of feedback received by Mr Daniher following unsuccessful applications from June 2007. Most entries record an offer to give feedback being made when Mr Daniher was advised his application had been unsuccessful. Mr Daniher, understandably, is recorded as saying this was not the best

⁵ *Matthes v NZ Post Ltd* [1994] 1 ERNZ 994 (CA)

time to receive feedback. Mr Daniher accepted that he did not follow up these offers of feedback until his request in February.

[27] I do not accept Mr Daniher's argument that ACC had an obligation to provide him with feedback whether he asked for it or not. Mr Daniher knew ACC was not going to provide him with feedback if he did not ask for it; the 28 June letter urged him to seek feedback and ACC continued to offer him feedback. He did not challenge this at the time. ACC's position was reasonable given the feedback would have concerned applications for positions Mr Daniher had applied for rather than the position in which he was employed.

[28] Mr Daniher also says it was unreasonable not to appoint him to positions which were identical (but for location) to that which he already held. The evidence shows the positions were not the same and were each considered on their merits.

[29] For these reasons I find Mr Daniher does not have a personal grievance.

Costs

[30] Costs are reserved.

Marija Urlich

Member of the Employment Relations Authority