

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 192/09
5282139

BETWEEN CLARE KILFORD-BROWN
Applicant
AND DESIGN AND ARTS
COLLEGE OF NEW
ZEALAND LIMITED
Respondent

Member of Authority: James Crichton
Representatives: David Beck, Counsel for Applicant
Jeff Goldstein, Counsel for Respondent
Investigation Meeting: 28 October 2009 at Christchurch
Determination: 5 November 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Kilford-Brown) was employed by the respondent (the College) as a head of department of Interior Design and Architectural Design and served in that capacity for the College for a number of years. During calendar 2009, the College developed a proposal for restructuring its operation which, amongst other things, disestablished the position operated by Ms Kilford-Brown.

[2] There was an extensive and thorough consultation process which is not challenged by Ms Kilford-Brown; she participated actively in the consultation process and, amongst other things, provided submissions to the College about her views on the restructure.

[3] Ms Kilford-Brown subsequently applied for a particular role as Programme Coordinator Interior Design for which she was interviewed on 21 July 2009. That

interview did not go well for Ms Kilford-Brown (her score was 57 out of a possible 115), and on 23 July 2009 she was told that her application was unsuccessful and she was given three months' notice. The College told Ms Kilford-Brown at that point that it was intent upon advertising the vacant position externally.

[4] There were various discussions between the parties in late July 2009, none of which suggested to the College that Ms Kilford-Brown was disgruntled with the outcome of the recruitment process. Further discussions continued between the parties on into September 2009, including discussions about whether Ms Kilford-Brown could continue in employment with the College in some different capacity. On 16 September 2009, Ms Kilford-Brown's lawyer formally raised a grievance and indicated to the College that Ms Kilford-Brown was considering an application for interim reinstatement.

[5] That indication was subsequently confirmed formally and a properly prepared application for interim reinstatement together with the usual undertaking as to damages was then filed and served seeking, amongst other things, interim reinstatement.

Issues

[6] Section 127 of the Employment Relations Act 2000 confers power on the Authority to order interim reinstatement pending the hearing of a personal grievance and the awarding of remedies in respect of that substantive grievance. In terms of subsections (4) and (5) of s.127, the Authority has power to grant such orders subject to any conditions the Authority thinks fit and the Authority is required to apply the law relating to interim injunctions *having regard to the object of this Act*.

[7] As is common in matters of this kind, it follows that the issues for the Authority's consideration are as follows:

- (a) Whether the applicant (Ms Kilford-Brown) has an arguable case?
- (b) Where the balance of convenience lies?
- (c) What is the overall justice of the case?

Does the applicant have an arguable case?

[8] The hurdle to be cleared by an applicant in relation to the question whether an arguable case is made out or not is a low one. Ms Kilford-Brown maintains that she has a strongly arguable case whereas the College's position is that, contrary to the usual position of respondents in matters of this kind, Ms Kilford-Brown does not even meet the relevantly low standard for an arguable case.

[9] The reason that the College takes the view that it does is based on a number of arguments, the first of which is quite ingenious. The essence of this first argument is that, because the applicant cannot be *reinstated* to her old position (because it has been disestablished in the restructure), and because she has never occupied the position which effectively replaces that restructured former role, she cannot in truth be *reinstated* to the new position because she has never occupied it.

[10] Of course, the statute provides that the Authority has power to reinstate Ms Kilford-Brown to *a position no less disadvantageous* than the one that she previously occupied. However, the only possible position that she could conceivably be placed into (the position which, as it were, followed on from the position she previously occupied) is a position which manifestly is less advantageous than her original head of department role.

[11] Ms Kilford-Brown says that she should have been automatically appointed to the *Programme Coordinator Interior Design* role because it was *not significantly dissimilar* to the original head of department role. Further, Ms Kilford-Brown says that in failing to confirm her into the new Programme Coordinator Interior Design role the College was acting in pursuit of impure motives relative to the restructure, in particular was pursuing an agenda which had more to do with Ms Kilford-Brown's competence or lack of qualifications than any argument about her appropriateness for redeployment in a structural sense.

[12] The issue here is whether Ms Kilford-Brown is right to say that her original position is substantially similar or, to use the words she uses, *not significantly dissimilar* to the new position of Programme Coordinator Interior Design. I must say that I find that whole argument completely unattractive. Ms Kilford-Brown was originally the occupant of a position styled head of department of Interior Design and Architectural Design. It follows that she had managerial responsibilities as a head of

department and was responsible effectively for two subject areas, the first being Interior Design and the second being Architectural Design. That position was disestablished. To say that a new position as Programme Coordinator Interior Design of one only of those subject areas, namely interior design, is *not significantly dissimilar* to the original position is, in my opinion, to do violence to commonsense and the clear meaning of the words used.

[13] The new position first of all has nothing whatever to do with architectural design so a whole subject area which Ms Kilford-Brown's original position was responsible for, is missing altogether. Second, the original position was a head of department role and as a consequence had significant managerial responsibilities at that level in the organisation. By its very nature, the new position has neither the seniority of management decision-making nor the span of control over effectively two teaching areas. It follows that I find the argument that this new position of Programme Coordinator Interior Design is substantially similar to the original position occupied by Ms Kilford-Brown not made out.

[14] The next argument which Ms Kilford-Brown seeks to rely upon is the contention that there is something fundamentally wrong headed about the process used by the College in making the selections that it had to make in respect of the new structure. Ms Kilford-Brown does not complain about the restructuring as such; nor should she because the restructuring was, in my opinion, a fair minded and even handed attempt to progress a complex restructure in a fair and reasonable fashion. However, Ms Kilford-Brown says that the selection process used by the College was not a fair one.

[15] I am satisfied that Ms Kilford-Brown's objections to the selection process are misconceived. It is clear that there was no particular process set out in the employment agreement identifying a *modus operandi* for selecting employees to be declared redundant and on that basis it is perfectly appropriate for the College to select its own process, provided that process is fair and equitable and gives every person to whom the College has obligations a fair and reasonable opportunity to participate in the process.

[16] In the present case, I am absolutely satisfied that Ms Kilford-Brown was provided with a document setting out the restructure process and the criteria to be used by the College for selecting persons to either be considered for positions or

indeed to be declared surplus to requirements. The criteria in each case was carefully spelled out and it is evident from the evidence before the Authority that Ms Kilford-Brown had access to that documentation.

[17] Ms Kilford-Brown seeks to rely on a letter that she wrote to the College on 27 July 2009 which she claims was a letter raising a personal grievance with the College and thus giving the College early notification of her unhappiness with the process that it had followed. I do not see her letter of that date in such a way at all. Nor, on the untested evidence before me, did the College. I think the letter from Ms Kilford-Brown was an attempt by her to negotiate a particular settlement regime which would have resulted in a full and final settlement of all matters between Ms Kilford-Brown and the College. In the result, settlement was not achieved on the basis of her proposals and so the matter lapsed. The letter itself is not, in my opinion, a letter which raises a personal grievance.

[18] I am absolutely confident that the process adopted by the College was a fair and reasonable process for selection and that that process was consistent with and absolutely in accordance with the process set out in the earlier written notification to Ms Kilford-Brown (and others) about the way the process would be attended to.

[19] I reject absolutely Ms Kilford-Brown's suggestion that she was somehow dismissed for poor performance in the guise of a redundancy. There is not a shred of evidence to support such a contention; it is absolutely plain that there was a proper restructuring process undertaken by the College, that Ms Kilford-Brown applied for one of the positions (as she was entitled to do) and that she was unsuccessful, having failed to impress in the interview process. I am clear that the process the College used was the process it undertook to use in the written material sent to Ms Kilford-Brown and others prior to the process being engaged in and I think the suggestion that the redundancy was somehow a cover for a dismissal or other purposes is completely without justification.

[20] I conclude then that if Ms Kilford-Brown has an arguable case, it is an extraordinarily weak one.

Does the balance of convenience favour Ms Kilford-Brown?

[21] Here, the Authority must consider the relative inconvenience to each party of the other succeeding. What that means practically is that the Authority must weigh

the relative hardship to the College of Ms Kilford-Brown being successful against the potential hardship to Ms Kilford-Brown in remaining away from the employment pending the resolution of her personal grievance.

[22] It seems to me that in the present case, Ms Kilford-Brown has little or no basis on which she could contend that the balance of convenience favours her. There is no position to which she could conveniently be *reinstated to*. The position she previously occupied has plainly disappeared and I am satisfied, as a matter of fact, that the new position which looks most like the position that she previously occupied is in fact by no stretch of the imagination similar in any meaningful way, save as to perhaps half of the subject matter but then only at a lesser managerial level. There is no obvious work for Ms Kilford-Brown to do in a position analogous to the position she previously occupied. She could teach but the parties explored at great length the possibility that she might undertake some teaching within the College and were unsuccessful in getting a resolution in that regard. My obligation, as a matter of law, is to consider whether Ms Kilford-Brown can be *reinstated* and in that respect I am satisfied there is no appropriate position to which she could be reinstated.

[23] I am also encouraged by the College to consider the prospect of reinstatement on innocent third parties. In the particular circumstances of the present case, that innocent third party is the individual who was eventually appointed to the Programme Coordinator Interior Design role. That person was an outsider appointed as a consequence of the failure of the College to appoint anyone from within its service to that role, and that person is completely innocent of any wrongdoing in relation either to the College or indeed to Ms Kilford-Brown. It is contended that reinstatement of Ms Kilford-Brown would impact negatively on the innocent third party.

[24] I do not consider I need to dwell on the effect if any on innocent third parties. It seems to me the balance of convenience strongly favours the College and I am not minded to contemplate putting the significant hardships that would apply to the College, if Ms Kilford-Brown were reinstated, to the test. There seem to me to be real practical difficulties about reinstatement (which I have already alluded to), to say nothing of the balancing factors to which I have also referred.

Where does the overall justice lie?

[25] I am satisfied that the strength of the relative cases strongly favours the College's position. This is not in my judgement a case where the Authority ought to seek to stay the hand of an employer legitimately proceeding to restructure its business in order to enable the potential rights of an employee to be protected until the matter is capable of resolution in a substantive investigation meeting. Rather, this is a situation where, if wrongs have been done to Ms Kilford-Brown in the course of her engagement with the College's restructuring processes, they can be addressed by compensation and other orders which the Authority can contemplate having heard the parties and their witnesses give their evidence in the normal way.

[26] On the untested affidavit evidence available to the Authority at this interim stage, I do not consider it appropriate to seek to wind back decisions which the College has made for its own good reasons and to put into place an appointment for Ms Kilford-Brown which could do no more than retain her on the payroll pending the resolution of her substantive employment relationship problem.

[27] I am particularly led to this conclusion because of the lengthy delay in Ms Kilford-Brown's complaint about the College's process. As the College makes clear in its submission, there was no challenge whatever to the College's process for nearly two months after the decision to make Ms Kilford-Brown redundant was made. She took part in that process without complaint and cheerfully negotiated with the College to endeavour to get better arrangements for her continued employment. In those circumstances, I am disposed to follow the dicta of Chief Judge Goddard in *Asken v. NZ Rail Ltd*, 12 July 1994 when His Honour said that the granting of an injunction in circumstances not dissimilar to the present case was not a proper exercise of the Court's discretion.

Determination

[28] Ms Kilford-Brown has failed to satisfy me that she should be granted interim reinstatement and her application, in consequence, fails in its entirety.

Costs

[29] Costs are reserved.

James Crichton
Member of the Employment Relations Authority