

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 2/10

File Number: 5135347

BETWEEN Rosemary Janor
Applicant

AND Capital Air Conditioning and
Refrigeration Limited t/a
Temperature Solutions
Respondent

Member of Authority: Denis Asher

Representatives: Kirsty Berry for Ms Janor
Graeme Gowland for the company

Investigation Meeting Wellington, 1 December 2009

Submissions Received By 7 December 2009

Determination: 7 January 2010

DETERMINATION OF THE AUTHORITY

The Problem

[1] Did the company undertake a restructuring? Was Ms Janor made redundant? Or was the applicant coerced into leaving her employment? Was Ms Janor unjustifiably constructively dismissed?

[2] If the applicant was unjustifiably dismissed, what remedies are owed her and did she contribute to her grievance?

The Investigation

[3] During a telephone conference the parties agreed to an investigation on 1 December and timelines for filing witness statements. An agreed bundle of documents was provided. At the conclusion of the investigation the parties agreed on a timetable for filing submissions.

Background

[4] Ms Janor commenced employment with the company during September 2005; her terms and conditions of employment were set out in an individual employment agreement dated September 2006.

[5] Originally appointed as the administration manager, at the end of March 2007 Ms Janor substituted positions with the then assistant administration manager; the applicant's rate of pay and conditions of employment remained unchanged.

[6] The applicant's employment ceased on 12 June 2009. Ms Janor's next employment lasted only 4 days because, she says, of the level of distress she felt about the circumstances of her departure from the respondent.

[7] Ms Janor was diagnosed on 1 July as presenting "*with symptoms of stress and depression She has not had this previously and I believe it is related to some work issues*" (medical certificate of the same date).

[8] Ms Janor found fresh employment on 6 July albeit at a substantially lower rate of pay.

Discussion

[9] Central to this employment relationship problem is the claim advanced by Ms Janor that the company, confirmed by the administration manager, was actively and

expressly planning to make her position redundant. That claim is denied by the applicant's manager and one of the company's directors. In the absence of any direct documentary evidence, such as company advice to staff of a restructuring by way of minutes, emails or memos, etc a credibility finding is required to determine the parties' competing claims.

Applicant's Position Summarised

[10] In support of her allegation, Ms Janor says that in the weeks leading up to 18 May 2009 she noticed a marked coolness toward her by the administration manager; the applicant felt she was beginning to be 'managed out'. On that date she raised her concern with the administration manager: the latter attributed her conduct to stress. However, Ms Janor says her manager's conduct continued to be different, and more positive, to other staff.

[11] On or about 19 May the applicant advised her manager she was looking for alternative positions. Ms Janor says she told her manager that she did not want to leave her position but was reluctantly investigating other employment opportunities due to her manager's recent behaviour toward her. Ms Janor says that, in response, her manager said she should attend a job interview arranged by the applicant as it was likely her role was going to be made redundant. Ms Janor says her manager also advised the company had been considering making her redundant in December 2008 but had not proceeded due to the applicant contemplating a move outside of Wellington.

[12] Ms Janor says she was shocked by her manager's advice and asked whether the company would consider her undertaking other work for the respondent, such as reception, service, part-time or even out-sourced employment. The applicant says her manager was not interested in discussing any alternatives to the "*alleged/proposed redundancy, despite the fact that I was shocked, humiliated and upset*" (par 15 of Ms Janor's first statement) or that she would not like any of the new roles and therefore was not being considered for them.

[13] Amongst other things, Mr Janor says that – on several occasions during May and June 2009 – she made clear to her manager and one of the respondent's directors

of her wish to remain with the company. On 26 May and 29 May she says she again met with her manager and advised of outside job interviews: Ms Janor says she repeated her advice she did not wish to leave her employment with the respondent but claims she was again advised things could not remain the same, that she should look at alternative employment as new roles contemplated by the company would not pay the same as her present rate of pay. Ms Janor says on 2 June she relayed to the director her manager's advice of the company's restructuring and that her role would be made redundant. She advised the director she did not want to leave the respondent's employment but had been advised nothing was available for her. Ms Janor says the director promised to make inquiries and come back to her, but never did so. Ms Janor says she therefore had no option but to tender her resignation by letter dated 2 June.

Respondent's Position Summarised

[14] Ms Janor's manager and the company director deny her allegations: they also deny the interpretation of discussions advanced by the applicant. They do accept that meetings occurred on dates identified by Ms Janor (and on other occasions) and that there was talk of change but say that was because the company was short staffed in Ms Janor's area but there was never any talk of her position being made redundant.

[15] The respondent accepts that, in December 2008, because of the general economic down turn, it had to cut costs and some staff were made redundant, namely an operations co-ordinator and a residential sales person. A process was followed and meetings with affected staff occurred: no such process was followed with Ms Janor as her position was never made redundant.

[16] It also accepts from February 2009 Ms Janor's manager was actively exploring ways and means of lessening her, the manager's, work load pressures. Changes resulted including the recruitment of an assistant. The company's position is that it now has more staff (4) working in Ms Janor's area than it did prior to her resignation (3).

[17] The company says the applicant made clear her interest in obtaining alternate work, but not because Ms Janor was concerned about the possibility of redundancy:

Ms Janor's manager naturally encouraged her efforts to find more satisfying work but says she told the applicant, on 4 June, that if she was not happy about leaving then she did not have to. In support of that claim Ms Janor's manager points to the company accepting the applicant's withdrawal of an earlier notice of resignation, in January 2007 (when she and Ms Janor agreed to exchange positions).

[18] The company's director says there was never any discussion between himself and the other director about making Ms Janor's position redundant. No one from the company had any discussions or ever advised the applicant that she was required to leave for any purpose.

Findings

[19] Constructive dismissal claims must surmount a high threshold: *Auckland etc Shop Employees etc IUOW v Woolworths New Zealand Limited* [1985] Sel Case 136.

[20] As is made clear above, in the absence of any independent evidence particularly of a documentary type, a credibility finding is required in respect of the parties' disputed version of relevant events. Making a credibility finding is rarely easy and is all the more difficult in this instance because of the witnesses' evident sincerity and genuineness. Regard must therefore be given to the overall circumstances in which the parties found themselves and behaved.

[21] In the context of the company reducing the administration manager's workload pressures including increasing staffing from 3 to 4, it is inherently unlikely that the company contemplated or actually undertook a restructuring in respect of the applicant's position.

[22] No reference is made in Ms Janor's letter of resignation to it being forced, or of her having concerns that brought about her resignation.

[23] No evidence was provided by other employees in support of Ms Janor's claims.

[24] In reaching these findings I have also had regard to diary notes allegedly made by Ms Janor on the same day or shortly after meetings with her manager. They include a quote attributed to the manager (which she does not accept), that Ms Janor's "*role was going to be made redundant*" (record of 18 May meeting; attachment to her first statement). Ms Janor records her reaction as, "*I was shocked*" and "*very upset*" (above) that her manager did not seem interested in talking about other options. In respect of an exchange on 26 May Ms Janor records her view, "*Don't feel I am being treated fairly here*" (above).

[25] The diary notes were not disclosed to the respondent until after Ms Janor's departure, and as a result of bringing this employment relationship problem to an investigation.

[26] The notes contain serious allegations and concerns. Arguably, and consistent with Ms Janor's obligations under s. 4 (1A) (b) of the Employment Relations Act 2000 and clause 41.1 of her employment agreement (attachment to her first statement), they could and should have been expressly raised at the time with her employer. That is because Ms Janor is not a newcomer to the workforce, or to her employment with the respondent. There is also strong evidence of a small, intimate workforce in which issues could be, and were, readily and directly raised with accessible company directors.

[27] In reality the Authority is being asked to accept that Ms Janor's manager and one of the respondent's directors, by commission and omission, jointly or separately acted to force her resignation. It is being claimed they did so by either talking about her being made redundant, or doing nothing in response to Ms Janor's expressed concerns about being made redundant. That is a particularly serious and therefore unlikely allegation for which there is no corresponding supporting evidence.

[28] The applicant's allegations are also inherently unlikely when measured against the company's undisputed treatment of Ms Janor in January 2007: then it accepted the withdrawal of her resignation and agreed to her taking on lesser responsibilities while retaining the same rate of pay and conditions of employment.

[29] Finally, I take account of the evidence of redundancies affected by the company in December 2008: the evidence is of an open process during which Ms Janor's human resources opinion was sought and applied. It is unlikely, had it so intended, that the company would not have made Ms Janor's position redundant at the same time or applied a similar process on a later date.

[30] There is no evidence of any breach of duty by the company or if there was a breach that it was sufficiently serious to make it reasonably foreseeable there was a substantial risk of resignation by Ms Janor.

Determination

[31] Ms Janor's claims are dismissed.

[32] Costs are reserved.

Denis Asher

Member of the Employment Relations Authority