

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2012] NZERA Auckland 10
5345315**

BETWEEN

SALLIE LAKIN
Applicant

AND

CHIEF EXECUTIVE OFFICER
FAR NORTH DISTRICT
COUNCIL
Respondent

Member of Authority: R A Monaghan

Representatives: B Quarrie, counsel for applicant
A Schirnak, counsel for respondent

Investigation Meeting: 29 November 2011

Determination: 13 January 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Sallie Lakin seeks the payment of redundancy compensation to which she says she was entitled under her employment agreement on the termination of her employment with the Far North District Council (the Council). The termination of her employment occurred in association with the parties' discussions about whether she would continue to work from home for part of the working week.

[2] The Council denies that Mrs Lakin's employment was terminated by reason of redundancy, and denies further that the employment relationship was terminated at its initiative at all. It says it was attempting to address the working from home arrangement when Mrs Lakin terminated her employment.

[3] In turn the Council denies that Mrs Lakin is entitled to the payment she seeks.

Background

1. Terms of employment

[4] Mrs Lakin and the Council were parties to a written employment agreement dated September 2001 (the *iea*), which provided for a commencement date of 23 October 2001.

[5] The *iea* addressed Mrs Lakin's duties and place of work as follows:

1.1 The Employer shall employ the Employee as On-Line Information Co-ordinator (specific days at each office to be negotiated with management) with the accountabilities as set out in Schedule One. Such accountabilities may be modified from time to time by the agreement of the parties.

1.2 In the event that the work described in Schedule One ceases to be available the Employee may be required to perform such other duties as the Chief Executive may require PROVIDED THAT such duties are compatible with the recorded CV of the Employee and the "Personal Qualities" described in Schedule One and PROVIDED THAT the Employee shall not suffer any loss or reduction of remuneration by virtue of the operation of this clause.

[6] The job description set out in Schedule One, as at October 2001, concerned the maintenance and development of the Council's internet and intranet. The qualifications and skills required for the position included knowledge of relevant software, a tertiary qualification in a business discipline, and experience in writing and editing. The position reported to the customer service manager.

[7] A February 2008 job description provided for a job title of strategic on-line projects manager, concerned with the development and management of the Council's internal and external websites, the implementation of strategic online projects, and corporate-wide online or web based projects and other customer service improvements as required. The position reported to the general manager finance and business. In July 2009 the report changed to the manager IT and business systems.

[8] As to the place of work, in October 2001 the position was based in the Council's Kaikohe office, although according to her letter of appointment Mrs Lakin was to be based at Kaikohe for three days a week and at Kaitaia for two days a week.

[9] In an emailed message dated September 2004 Mrs Lakin's then-manager confirmed a new agreement that the place of work was to be two days a week at Kaikohe and three days a week from home.

[10] Regarding redundancy, the iea provided for the termination of employment in a redundancy situation as follows:

3.1 This agreement may be terminated:

...

(c) [serious misconduct]

(d) [poor performance or breach of agreement]

(e) by the Employer giving of three months' notice in writing in the event that the position held by the Employee has become surplus to the requirements of the Employer, provided however that if this is due to a reorganisation of staff structure the Employer will first comply with the provisions of clause 11.

(f) [physical or mental incapacity]

...

3.4 If the Employee's employment is terminated by the Employer, otherwise than in accordance with clause 3.1(c), (d) or (f) the Employer shall make a lump sum payment of three months' salary in addition to the amount of salary payable for the period of notice received or payment made in lieu of notice.

[11] Clause 11 set out a consultation and recruitment process applicable when the staffing structure was to be reorganised.

2. Events leading to the termination of employment

[12] In or about 2009 the Council's CEO sought to revoke any policies allowing employees to work from home, and otherwise to terminate such a practice.

[13] From time to time thereafter Mrs Lakin's manager, Roger Ackers, raised informally with her the matter of her working from home and the view the CEO was taking of such arrangements. In the course of the conversations reference was also made to the possibility of an organisational restructuring, with an associated need for new employment agreements to reflect any changes. I consider it likely that, as Mrs

Lakin said, Mr Ackers commented to the effect that the new agreements would not include provision for working from home.

[14] In August 2010 Mr Ackers, together with the manager Business Performance and ICT Services Victoria Begbie, met with Mrs Lakin to discuss the continuation of her working from home arrangement a little more formally. In a discussion unrelated to any restructuring proposal as no formal process had yet commenced, they asked Mrs Lakin to agree to work five days a week at the Kaikohe office. Mrs Lakin declined because such an arrangement did not suit her family circumstances.

[15] The working from home arrangement continued as before until Mrs Lakin was asked to attend a further meeting on 22 December 2010 to discuss her 'working conditions'. Mrs Lakin understood this as a reference to the discussions about her working from home.

[16] Prior to the meeting she sought information from Lesley Elliott, the Council's human resources manager, about her employment agreement and the change in policy on working from home. Ms Elliott's initial indication was that, if Mrs Lakin did not agree to change the working from home arrangement, her position as it stood would no longer exist and Mrs Lakin would be redundant. Later, on 20 December 2010, Ms Elliott indicated a change of view on whether Mrs Lakin would be redundant or not. She also advised there was no written policy on working from home.

[17] Mrs Lakin attended the 22 December meeting with her husband, because the issue concerned their family arrangements and she sought his involvement.

[18] On Mrs Lakin's account, Ms Begbie stated that Mrs Lakin had been asked in August to spend more time in Kaikohe, which she had not done. A formal directive from the CEO was now being issued that everyone work from the office, without exceptions. The directive was to over-ride any variations to the place of work arrangement notified in the letter of offer of September 2001. Mrs Lakin would be given time to adjust and the change was to take effect from 7 February 2011. When Ms Begbie was asked whether she would 'go into bat for Sallie' on the issue of working from home, Ms Begbie declined, and said she supported the directive.

[19] I consider it unlikely that Mrs Lakin was told expressly that the directive was to over-ride any variations to the place of work arrangement contained in the September 2001 letter, although I accept that was her construction of what she was told. For its part the Council accepted that the variation allowing Mrs Lakin to work from home was binding and could not be altered unilaterally, and its evidence overall was consistent with the holding of such a view.

[20] Both Mr and Mrs Lakin said in evidence there was no opportunity for negotiation and that it was clear the directive was final.

[21] Ms Begbie and Mr Ackers saw the purpose of the discussion as a further attempt to persuade Mrs Lakin to agree to work from home. Their intention was to put it to Mrs Lakin that she work from the Kaikohe office, commencing on 7 February 2011 to give her time to make the necessary arrangements. Their intention was not to issue a direction that she do so, and there was no intention of terminating her employment.

[22] They perceived Mr and Mrs Lakin to be unwilling to discuss the matter, and Mr Lakin's attitude to be confrontational.

[23] The meeting ended with a request that the Council put its position in writing. Accordingly by letter dated 24 December 2010 Mr Ackers advised Mrs Lakin:

Further to our previous discussions, I would like to confirm Council's request that you commence working from our Kaikohe Office Monday to Friday, 5 days a week.

To give you time to make the necessary preparations to affect this change, we are prepared to make the commencement date for this arrangement Monday 7 February 2011.

All other terms and conditions of your employment agreement will remain the same.

...

[24] Ms Begbie said in evidence that the letter was intended to be a continuation of the dialogue between the parties, particularly as the meeting had not ended with any resolution of their disagreement. If Mrs Lakin had replied by confirming she did not agree to the request in the letter, the Council would have continued discussions and addressed other options. These could have included alternatives arising in the course

of the upcoming restructuring exercise, including possibilities of the kind contemplated by cl 1.2 of the iea.

[25] Mrs Lakin read the letter as setting out a requirement or directive, and not as a request. She sought legal advice.

[26] Counsel replied by letter directed to the CEO and dated 10 January 2011. The letter summarised Mrs Lakin's understanding of the 22 December meeting and the 24 December letter as being that, from Monday 7 February 2011, she was required to work from the Kaikohe office 5 days a week. It said the requirement being imposed on her to work out of Kaikohe was a fundamental change to her terms and conditions of employment, triggering the redundancy provisions of her agreement. It concluded:

Sallie wishes to notify the Council that she does not consent to changing her place of work to Kaikohe and she wishes to treat her employment with the Council as coming to an end in accordance with her employment agreement and to receive redundancy compensation, also in accordance with her employment agreement.

Please address any further communications with Sallie on this matter through me.

[27] When Mr Ackers returned from annual leave later in January 2011 he sought to further discuss the matter with Mrs Lakin. She did not wish to engage in such discussion without her representative.

[28] By message dated 4 February 2011 Ms Elliott advised counsel that for the present the Council would like to continue the arrangement under which Mrs Lakin worked for two days a week in Kaikohe and three days a week from home. She pointed out that a review of the IT department was to take place, and once that was finalised the Council would be in a position to discuss further options with Mrs Lakin.

[29] Counsel replied that Mrs Lakin's position was as stated in the 10 January letter. In a subsequent letter to Ms Elliott dated 9 February he said:

She was given unequivocal notification on 24 December 2010 that her existing role was coming to an end as from 7 February 2011.

That notification was acknowledged by her as advised in my letter dated 10 January 2011.

The three month notice period [in accordance with her employment agreement] ran from 24 December 2010 making 24 March 2011 her last day as an employee.

[30] The Council responded by denying that Mrs Lakin had been made redundant and that she had been given notice of termination of her employment. It also referred to its withdrawal of the request that Mrs Lakin change her place of work arrangements.

[31] Further correspondence followed but the matter was not resolved.

[32] Mrs Lakin's employment ended on 24 March 2011.

Whether the Council terminated Mrs Lakin's employment

[33] Mrs Lakin's view that the Council terminated her employment by reason of redundancy, for which she is entitled to the payment of three months' salary, centres on:

- a. her construction of events at the 22 December meeting, and in particular that she was being required to cease working from home and begin working in the Kaikohe office for 5 days per week;
- b. her understanding that the requirement meant her position had become superfluous to the requirements of the employer under clause 3(e) of the iea; and
- c. her understanding that her employment was thereby terminated by the employer and clause 3.4 applied.

[34] Since this employment relationship problem is based on a claim for payment under clause 3.4, I address whether Mrs Lakin's employment was terminated by her employer.

[35] For present purposes I accept that the CEO intended to terminate all working from home arrangements and directed senior managers to implement that intention. Mrs Lakin was advised as much, although I do not accept that the advice went as far as to say that managers were being directed to over-ride existing terms and conditions of employment. I also accept that Mr Ackers and Ms Begbie sought to act on the

direction by seeking Mrs Lakin's agreement to change her work from home arrangement, at first by informal approaches from Mr Ackers and later by making a more formal request in the August meeting. They were not successful.

[36] It is understandable that Mrs Lakin either began or continued to feel under pressure to change the arrangement when a further meeting was sought in December. I consider it likely that, despite Ms Elliott's later retraction of the view she expressed to Mrs Lakin, Mrs Lakin's position immediately before the December meeting was that she would not agree to cease the working from home arrangement and her communication of that view meant she would be made redundant.

[37] In addition I consider it likely that the developing history of the matter meant both parties became tense during the December meeting, and likely that the tension affected both their own behaviour and their perceptions of each others' behaviour. For that reason, beyond regarding the matter as a reason why the meeting ended as it did, I place little weight on the mutual perceptions of confrontational or unco-operative behaviour.

[38] Whether any pressure to agree to a change had reached a point where Mrs Lakin was entitled to regard the 'request' as a 'requirement' is a matter of degree. While Mrs Lakin might have hoped that her refusal in August to make the change sought was the end of the matter, it had been explained to her that her managers themselves were acting under a direction and that the aim was to effect a Council-wide change. Inevitably, the managers tried again in December to secure an agreement. While this could be perceived as exerting pressure, I do not consider the making of a further attempt to secure agreement in itself amounted to undue pressure.

[39] Moreover, during the discussion on 22 December there was no threat of dismissal and no mention of redundancy and no such threat had been made beforehand. Instead the parties repeated their earlier positions, their patience with each other wore thin, and the meeting ended with the request that the Council put its position in writing.

[40] It duly did so. The letter did not go any further than setting out the detail of the Council's request.

[41] I do not accept that these circumstances amounted to an 'unequivocal notification' of the termination of Mrs Lakin's employment as from 7 February 2011. There was no notification of termination, let alone an unequivocal notification. If there was a possibility of termination, that possibility had not crystallised. Further Mrs Lakin herself did not treat her employment as at an end on 7 February, rather she nominated a termination date of 24 March.

[42] In addition it was open to Mrs Lakin to notify the Council formally that she did not agree to change her place of work to Kaikohe for five days a week, but it was premature to go further to say she wished to treat her employment as coming to an end and to receive redundancy compensation. Her confirmation that she did not agree to the change did not mean she effectively or automatically became redundant.

[43] Since agreement could not be reached, but the Council still sought to discuss a change, it was necessary at least to embark further on a procedure to resolve the matter. That would have been the next step on receipt of Mrs Lakin's formal declining of the request, but by Mrs Lakin's ending of the employment relationship the Council was prevented from taking the step.

[44] Similarly, even if Mrs Lakin's redundancy was a possibility, embarking on relevant procedures in the employment agreement in order to address that possibility was also pre-empted by Mrs Lakin's statement that her employment was terminated. The eventual outcome of the procedures may have been a termination of employment on the ground of redundancy or another ground, or the identification of and agreement on a suitable alternative arrangement. Depending on the outcome and the path taken to reach it, compensation might or might not become payable. Again the Council was prevented from addressing any of these matters by the premature termination of Mrs Lakin's employment.

[45] Finally, in response to Mrs Lakin's advice that she did not agree to the change, and her view that her employment was at an end, the Council withdrew its request. To the extent that it was arguable Mrs Lakin's position had become superfluous to the employer's needs, the withdrawal of the request meant this was no longer the case.

[46] For these reasons I find that the Council did not terminate Mrs Lakin's employment, rather it was terminated at Mrs Lakin's initiative. Clause 3.4 does not apply.

[47] Accordingly I conclude that Mrs Lakin is not entitled to the payment she seeks.

Costs

[48] Costs are reserved.

[49] The parties are invited to resolve the matter. If they are unable to do so any party seeking an order for costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days in which to file and serve a memorandum in reply.

R A Monaghan

Member of the Employment Relations Authority