

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 572  
5424187

BETWEEN ANNA DOLAN  
Applicant

A N D THE ROMAN CATHOLIC  
BISHOP OF AUCKLAND  
Respondent

Member of Authority: T G Tetitaha  
Representatives: J Dolan, Advocate for Applicant  
P Kiely, Counsel for Respondent  
Investigation Meeting: 10-11 December 2013 at Auckland  
Submissions Received: 4 December 2013 from Applicant  
4 December 2013 from Respondent  
Date of Determination: 13 December 2013

---

**DETERMINATION OF THE AUTHORITY**

---

- A. There was a genuine commercial reason for the restructuring and consequential disestablishment of Ms Dolan's position.**
- B. Anna Dolan was justifiably dismissed for redundancy by the Roman Catholic Bishop of Auckland.**
- C. If either party seeks an order for costs, a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.**

**Employment relationship problem**

[1] Anna Dolan was employed as a property manager by the Roman Catholic Bishop of Auckland (the respondent). Her position was made redundant on or about 23 August 2013. Ms Dolan alleges the respondent was motivated to make her

redundant due to her protected disclosures under s.6 of the Protected Disclosures Act 2000.

[2] The respondent disagrees and says the redundancy was undertaken for genuine business reasons following a lawful and proper consultation process.

### **Facts leading to dismissal**

[3] Ms Dolan was one of two property managers employed in the Catholic Schools Office (CSO) in Auckland. The Roman Catholic Bishop of Auckland is the head of the Catholic Diocese of Auckland (the diocese). She reported to Mr Michael Stride, property and asset manager for the diocese. Mr Stride reported to the diocese property committee (the Committee).

[4] The Church (through other vehicles) owns various properties within the Auckland area. Some of the properties housed schools. Her role was to deliver property services required for the maintenance, upgrading and expansion of schools.

[5] On 15 May 2012, Ms Dolan was issued with a verbal warning (confirmed in writing) following a failure to follow policies in respect of a building upgrade at a school.

[6] On 26 June 2012, Ms Dolan received a written warning relating to unprofessional conduct during a meeting.

[7] On 30 November 2012, the diocese property committee considered restructuring the diocesan property group office. Work on the possible restructuring was requested and it was considered again on 11 February 2013. The restructuring was accepted in principle.

[8] On 9 April 2013, Ms Dolan was informed that as part of the proposal to restructure the diocese's property management, her position as property manager might be made redundant. This was because it did not form part of the proposed new structure. The restructure provided Ms Dolan's property services role would be performed by an external provider.

[9] A new position of property relationship coordinator would be created. Ms Dolan was eligible to apply. She chose not to apply for this position.

[10] Ms Dolan was also provided with a letter dated 9 April 2013 seeking her feedback on the proposal including redeployment opportunities. A meeting was proposed in one week's time to hear her views. She was advised to bring a support person.

[11] On 10 April 2013, Ms Dolan made a number of allegations concerning alleged conflicts of interest and the awarding of building contracts and favouritism towards one contractor, breach of good faith and misuse of funding in breach of Ministry of Education guidelines<sup>1</sup>.

[12] Ms Dolan sought further information concerning the restructure which was provided. Further information was provided by email on 11 April 2013.

[13] Ms Dolan and her husband met with Mr Stride to discuss the proposal on 18 April 2013. Ms Dolan provided feedback.

[14] In response to Ms Dolan's allegations, the diocese suspended the restructuring process, placed the applicant on special leave on full pay from 6 May 2013 and instructed counsel (Dr Gerald Curry) and a quantity surveyor (Simon Barnes) to investigate the allegations.

[15] By reports dated 4 and 18 July 2013, Dr Curry and Mr Barnes found that there was no conflict of interest, breach of good faith, favouritism or evidence of breach of funding guidelines.

[16] The respondent resumed the redundancy process. It formed the view it would continue to restructure its organisation by disestablishing the property manager role. Both property manager roles were disestablished.

[17] Ms Dolan was notified by letter on 26 July 2013 that her position was to be disestablished and her employment would end by reason of redundancy on 23 August 2013. She was advised she would receive four weeks' notice but would not be required to work out her notice. She would also receive her redundancy entitlement of 10.5 weeks' salary.

[18] Ms Dolan wished to work out her notice period. The respondent agreed to the request and confirmed that she would be given reasonable access to office facilities

---

<sup>1</sup> Letters dated 10, 19 and 29 April 2013, A Dolan to respondent

during the notice period and was asked during the notice period to prepare spreadsheets and information concerning maintenance works in 2013 and 2014. She returned to use the office facilities but did not undertake any work during the notice period.

[19] Ms Dolan sought use of a motor vehicle during her notice and redundancy period. The respondent paid cash in lieu of the use of a motor vehicle. Following termination, Ms Dolan raised her personal grievance alleging unjustified dismissal for redundancy.

### **Issues**

[20] The following issues arise:

- (a) Was there a genuine commercial reason for the restructuring and consequential disestablishment of Ms Dolan's position?
- (b) Was the process leading to redundancy what a fair and reasonable employer could have done in the circumstances;
  - Was there a breach of good faith by a failure to be communicative and responsive?
- (c) Was the decision to dismiss for redundancy fair and reasonable in the circumstances?
- (d) What remedies, if any, should be awarded?
  - Is reinstatement practicable and reasonable?

### **Legal framework**

[21] A decision to make staff redundant is part of management's prerogative. The Authority should not substitute its business judgment for that of an employer<sup>2</sup>. Although an employer may assert this was a genuine business reason, the Authority may review the business decision to determine whether the decision, and how it was reached, were what a fair and reasonable employer could have done in all the relevant

---

<sup>2</sup> *GN Hale & Son Ltd v. Wellington etc Caretakers etc IUOW* [1991] 1 NZLR 151; (1990) ERNZ Sel Cas 843 (CA)

circumstances<sup>3</sup>. Generally a redundancy will be genuine if it was made for valid commercial reasons<sup>4</sup>.

[22] The test whether a redundancy has arisen is what a reasonable person, taking into account the nature, terms and conditions of each position and the characteristics of the employee consider that there was sufficient difference to break the essential continuity of employment. The test is determined objectively. It is a matter of fact and degree<sup>5</sup>.

[23] There is a substantial conflict of evidence between the parties. This requires express findings of credibility<sup>6</sup> upon evidence given by brief (signed and unsigned) and orally at hearing.

[24] Credibility can be assessed on two bases – the witness personally<sup>7</sup> and the story the witness tells. Some factors relevant to personal credibility are:

- (a) Demeanour<sup>8</sup>;
- (b) Inconsistencies and contradictions of all kinds<sup>9</sup>;
- (c) Prevarication<sup>10</sup>;
- (d) Reasons to lie<sup>11</sup>
- (e) Concessions made where due, despite any perception by the witness of a risk to credibility in giving that evidence<sup>12</sup>.

<sup>3</sup> *Rittson-Thomas t/a Totara Hills Farm v. Davidson* [2013] NZEmpC 39 at [53]-[54]

<sup>4</sup> *Simpsons Farms Ltd v. Aberhart* [2006] ERNZ 825 (EmpC) at [67]

<sup>5</sup> *Auckland Regional Council v. Sanson* [1999] 2 ERNZ 597 at [19] referring to *Carter Holt Harvey v. Wallis* [1998] 3 ERNZ 984, 995

<sup>6</sup> *RNZAF Museum Trust Board v Hunter* Employment Court Wellington WC11/00, 1 March 2000 at p6

<sup>7</sup> *Kelly v Accident Rehabilitation & Compensation Insurance Corporation* EMC Wellington WC 13/99, 24 March 1999 at p69

<sup>8</sup> *Hakaraia v Foodstuffs (Wellington) Co-operative Society Ltd* Employment Court, Wellington WC6/01, 22 February 2001 at [14]; *T v SAR Ltd* ERA Christchurch CA126/05, 23 September 2005; *Young v Venables t/a Mt Eden Bakery & Delicatessen* Employment Court Auckland AC88/00, 7 November 2000 at p 6

<sup>9</sup> *Taiapa v Te Runanga O Turanganui A Kiwa t/a Turanga Ararau Private Training Establishment* [2012] NZERA Auckland 252

<sup>10</sup> *Griffith v Sunbeam Corporation Ltd* EMC Wellington WC13/06, 28 July 2006 at [108]

<sup>11</sup> See above at [109]

<sup>12</sup> See above at [110]

[25] Credibility of the story is an assessment of it within the context of other evidence, such as undisputed facts or facts unknown to the witness. Is this evidence absurd or is there other evidence making the conclusion inevitable?<sup>13</sup>

[26] The Authority may draw inferences and fill gaps in evidence by application of common sense, knowledge of human affairs and the state of the industry and any matter that seems capable of being taken into account as indicating the probabilities of the situation.<sup>14</sup>

**Was there a genuine commercial reason for the restructuring and consequential disestablishment of Ms Dolan's position?**

[27] Ms Dolan submits the business case for restructuring and disestablishing her position was flawed and should not have occurred. The business case did not assess the business needs; have a scope of work for outsourcing contractors; identify how legislative and funding requirements would be met or have contracts, service level agreements and new position descriptions in place. Instead it listed "business objectives" and (unfairly) criticised Ms Dolan's skills. She believed the Diocese Property Committee 'rubber stamped' the restructuring because of Mr Stride and the General Manager. This allowed the redundancy process to be used to get rid of her because the Committee did not scrutinise the proposal when approving it.

[28] The respondent denies this is the case. It states there were genuine reasons for the redundancy namely improved efficiency and transparency of management of both school and other properties. The Committee properly and carefully considered the restructuring. It had no knowledge of and did not consider Ms Dolan's skills.

[29] The decision maker about restructuring was the Diocese's Property Committee, not Mr Stride. The only possible reference by inference in the business case to Ms Dolan's skills is the comment Mr Stride's time had become unmanageable due to *oversee[ing] the southern region schools in particular skill deficits*.<sup>15</sup> Ms Dolan managed the southern region schools.

---

<sup>13</sup> See above at [111]; *Corbett v National Mutual Finance Ltd* (CA 172/91, 10 February 1992, p10

<sup>14</sup> *New Zealand Merchant Service Guild IUOW Inc v New Zealand Rail Ltd* [1991] 2 ERNZ 587 (LC), at 603

<sup>15</sup> Respondents Bundle of Documents (RBD) Tab 6 p32

[30] However the evidence was the Committee had no knowledge this comment referred to Ms Dolan specifically as her name was never mentioned in discussions. The Committee was focused on restructuring, not micromanaging Ms Dolan's performance.<sup>16</sup> Ms Dolan accepted the Committee at that time had no knowledge of her complaints of conflicts of interest, previous disciplinary action and reduced work.<sup>17</sup> At hearing Ms Dolan confirmed she had not attended Committee meetings since 2004.

[31] At hearing Ms Dolan accepted there were skills deficits within her office, for example, the inability to undertake seismic assessments and the increasingly complex health and safety requirements. She accepted there was a piecemeal structure for dealing with the property management of schools involving two staff (including herself), contractors and property managers. She accepted there was a need to amalgamate management of school and non-school properties under one structure but was concerned about the ability to cater for the legislative and funding requirements particular to schools. She did not believe the business case or any other documentation had been produced to address these defects.

[32] At hearing Mr Stride gave evidence of a scope of works and costing from three property management companies used for his business case. Contracts and service level agreements were not required until a decision had been made whether restructuring should occur.

[33] Geoffrey Ricketts, Chairman of the Diocese Property Committee, outlined at hearing the extensive experience of its members in law, property, business and education. His evidence was the Committee was well aware of the business needs, legislative and funding requirements for school properties. Some members had been dealing with these issues for a number of years through the Committee and through their professions. The Committee Minutes and Mr Ricketts evidence showed careful and probing consideration of the restructuring proposal over the course of three meetings held between November 2012 and February 2013. Mr Ricketts sought the involvement of two highly experienced Committee members to vet the proposal and made requests for further information.

---

<sup>16</sup> Oral evidence G Ricketts 12 December 2013

<sup>17</sup> Paragraph 2.4 Applicants closing submissions dated 12 December 2013

[34] This restructuring was part of a wider restructuring of the diocese's property portfolio comprising \$700 million worth of property. The Committee was seeking to amalgamate the property management of school and other properties under one structure to bring improved efficiency and transparency. This included outsourcing and bundling some services with a single contractor.

[35] The evidence showed the Committee were well aware of the matters Ms Dolan complains were lacking from the business case, prior to making its decision to approve restructuring. The evidence shows the Property Committee carefully considered this proposal and had all relevant information before it prior to making its decision. Mr Stride's or other peoples alleged motives to get rid of Ms Dolan or Ms Dolan's alleged skill deficit were not known to it when it made the decision to restructure.

[36] The Authority determines there was a genuine commercial reason for the restructuring and consequential disestablishment of Ms Dolan's position.

**Was the process leading to redundancy what a fair and reasonable employer could have done in the circumstances? Was there a breach of good faith by a failure to be communicative and responsive?**

[37] Ms Dolan submits the redundancy process was procedurally unfair. This is because information was withheld from her including Mr Stride's comment to the Diocese Property Committee about her skills deficit and his failure to correct this; his "outsourcing plan" did not follow normal commercial tender processes; had no consistent reason for the restructure; allowed the Committee to proceed with restructure based on misinformation and prior to consultation with Ms Dolan. She further alleges unfairness in the redundancy rigidly following a scripted process; engagement of a contractor prior to consultation being completed; breaching an undertaking the redundancy was placed on hold while Ms Dolan's allegations about Mr Stride and others were investigated and a final outcome reached. She was treated harshly during her notice period by the respondent unnecessarily delaying the transfer of her phone number, depriving her of the use of her motor vehicle, failing to provide a written reference and naming her to a large group of staff and others as responsible for allegations. In short she alleges these incidences combine to evidence a motive to dismiss her.

[38] The respondent denies it employed any defective process leading to redundancy.

[39] The inferred criticism of her performance to the Committee, the lack of proper tendering process for contractors, reasons for restructure and the Committee's decision upon restructuring are dealt with above. The Committee had no knowledge of any deficit in Ms Dolan's skills. Ms Dolan's evidence showed she was aware of the reasons for restructuring, although she may not accept them or agree with the manner of implementation. The Committee was understood and had sufficient information to make the decision to restructure.

[40] Mr Stride consulted the affected staff prior to the final decision being made. His use of a script during consultation did not evidence unfairness to Ms Dolan.

[41] At hearing Ms Dolan gave evidence during her meeting on 9 April 2013 with Mr Stride and Robyn Beguely, a human resources consultant, Mr Stride told her she was unsuitable for the new position of Property Coordinator. Mr Stride absolutely denied making this comment. He says he read from the script prepared by Ms Beguely.<sup>18</sup> She corroborated Mr Stride's evidence and confirmed no comment about Ms Dolan's unsuitability was made. There was another affected employee besides Ms Dolan. Mr Stride says he followed the same script for the other affected employee.<sup>19</sup>

[42] At hearing Ms Dolan confirmed she did not raise any complaint about Mr Stride's alleged comment until hearing. The reasons she gave was shock and her lack of knowledge of who to complain to. This sharply contrasts with the complaints she made the following day about Mr Stride's conflicts of interest. She complained to the Roman Catholic Bishop, Mr Ricketts, Serious Fraud Office and Auditor General. There is an impression Ms Dolan was well aware of who to complain to and was not afraid to do so. Ms Dolan is a qualified architect. It is inferred she has the skills and ability to raise issues or access legal advice and representation to assist in making any complaint. She was familiar with the complaints process having raised these in the past.<sup>20</sup>

---

<sup>18</sup> RBD Tab 11 p44

<sup>19</sup> Oral evidence M Stride 11/12/13

<sup>20</sup> Attachments D13, H21, A57, E1, H17, D2 and H11 to 19 Applicant's Bundles of Documents

[43] In the circumstances Mr Stride's evidence is preferred. It is more probable than not there was no comment by Mr Stride about Ms Dolan's unsuitability for the Property Co-ordinators job.

[44] Mr Stride gave evidence the engagement of a contractor was for work Ms Dolan was not doing at the time. She gave evidence at hearing she had been on special leave with her agreement since 7 May 2013. There was no-one doing her work during the consultation period. A contractor would have had to be brought in to cover her work until she returned or a final decision on restructuring made.

[45] The allegations Mr Stride and others had conflicts of interest was dealt with by another report prepared by Gerard Curry, Barrister and Simon Barnes, Quantity Surveyor.<sup>21</sup> The report was subsequently amended following feedback by Ms Dolan.<sup>22</sup> In short it dismissed the allegations. Ms Dolan did not accept the conclusions and made allegations about the independence of the report writers. Given her complaints she does not believe the investigation had reached a concluded outcome. She alleges there was an undertaking the redundancy process would be put on hold while the investigation was carried out.

[46] The undertaking is alleged to be evidenced in a letter from Bishop Patrick Dunn to Ms Dolan dated 7 May 2013.<sup>23</sup> This does not evidence any undertaking to halt the redundancy process. It confirms an agreement Ms Dolan was *on special leave until external auditors have the opportunity to examine fully the complaints you have made*. The agreement pertains to her special leave, not the redundancy process.

[47] The Property Committee and Mr Stride were entitled to continue the redundancy process. Ms Dolan's continued disagreement with the report's outcomes does not necessarily indicate unfairness or unreasonableness in the redundancy process.

[48] Given Mr Stride's involvement in the conflicts of interest complaints, there was some merit in his not being involved in the redundancy process any further. However he alleges the feedback was considered and it was determined the redundancy process would continue and Ms Dolan's position would be disestablished. If there was a

---

<sup>21</sup> RBD Tab 28 pp88 to 103

<sup>22</sup> RBD Tab 31 pp107 to 108; Tab 41 pp121 to 137

<sup>23</sup> RBD Tab 25 p85

defect in Mr Stride's continual involvement it was minor and did not result in unfairness to Ms Doan in the circumstances.

[49] Treatment of Ms Dolan after the dismissal for redundancy had been communicated should more properly be the subject of a disadvantage claim. No such claim is before the Authority. In any event the evidence of unfair treatment during the notice period is equivocal and does not reach the required standard of proof to show unfairness and unreasonableness.

[50] The Authority determines there was no breach of good faith by a failure to be communicative and responsive. The process leading to redundancy was what a fair and reasonable employer could have done in the circumstances. Anna Dolan was justifiably dismissed for redundancy by the Roman Catholic Bishop of Auckland.

[51] Given the above findings, the application is dismissed.

[52] If either party seeks an order for costs, a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

**T G Tetitaha**  
**Member of the Employment Relations Authority**