

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2019] NZERA 162
3032811

BETWEEN

MALGORZATA CALKA
Applicant

AND

UNITY4 CONTACT CENTRE
OUTSOURCING NZ LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Applicant in person
Robert Sharp, representative for the Respondent

Investigation Meeting: 12 March 2019

Date of Determination: 20 March 2019

DETERMINATION OF THE AUTHORITY

A. The applicant, Ms Malgorzata Calka, was not unjustifiably constructively dismissed by the respondent, Unity4 Contact Centre Outsourcing NZ Limited (Unity4).

B. Ms Calka has failed to establish that Unity4 breached her contract, its duty of care to her or discriminated against her on any of the grounds contained in the Employment Relations Act 2000 (the Act) or at all.

Employment Relationship Problem

[1] Unity4 provides software solutions to the contact centre industry. It has offices in New Zealand, Australia and the UK. Mr Daniel Turner is the director, executive director and major shareholder of Unity4.

[2] Ms Calka was employed as a Client Service Manager in May 2016 until her resignation in July 2018. Ms Calka says she had no option but to resign and this amounted to a constructive dismissal which was unjustified.

Ms Calka's claims

[3] Ms Calka says there was a meeting of all Unity4 staff on 28 June 2018. She says at the meeting, there was discussion about a restructure of the organisation. Ms Calka formed the view that the restructure meant her role would be split into 3 parts and her current role disestablished.

[4] A few days following the meeting, Ms Calka raised her concerns with the General Manager, Ms Renee Beck. A telephone conference was organised with Ms Beck and Mr Turner. The discussion became heated and Ms Calka says Mr Turner told her that she was a "free agent" and could resign if she liked. Ms Calka attempted to discuss redundancy and an exit option but was not successful. Ms Calka resigned on 10 July 2018 and was paid 4 weeks' pay in lieu of notice.

[5] Ms Calka says these actions by Unity4 amounted to an unjustified constructive dismissal. Ms Calka seeks compensation and loss of remuneration under s123 of the Act.

Unity4's response

[6] Unity4 disputes Ms Calka's version of events. It says that it had engaged the services of an external marketing consultancy to conduct a marketing and rebranding exercise for Unity4. The scope of the project was to review Unity4's brand, its positioning in the marketplace, future opportunities and a defined direction for the company. This work did not include restructuring the organisation. Unity4 says a restructure would have been premature at that stage.

[7] At the meeting on 28 June 2018, Mr Turner explained the work done by the external marketing consultancy. During the course of the meeting, Mr Turner referred to the possibility of some job descriptions being combined, and others being separated in order to focus on various services and customer groups. There was no intention to disestablish positions. The meeting was to inform staff of the project that Unity4 was undertaking. Following the meeting, Unity4 says Ms Calka responded negatively and pushed for a

decision from Mr Turner that her position be disestablished for redundancy and that she receive an exit package.

[8] Mr Turner says he was not prepared to do that. Ms Calka was a valued employee and he wished to retain her services at Unity4. Ms Calka decided of her own volition to resign and brought a personal grievance claim.

The investigation meeting

[9] The investigation meeting took half a day in the Authority. Ms Calka filed a witness statement. Ms Beck and Mr Turner of Unity4 also filed witness statements.

[10] Each of the witnesses giving evidence before the Authority affirmed that their evidence was true and correct. Each witness had the opportunity to provide any additional comments and information and did so.

[11] As permitted under s 174 of the Act, this determination does not set out all the evidence and submissions received. The determination states finding of fact and law, and makes conclusions on issues necessary to dispose of the matter.

Issues

[12] The issues for determination by the Authority are as follows:

- (a) Was Ms Calka unjustifiably constructively dismissed by Unity4?
- (b) If Ms Calka was unjustifiably constructively dismissed, what remedies are available to her?
- (c) Did Unity4 breach its contract with Ms Calka, breach its duty of care to her, or discriminate against her? If so, what remedies are available to her?

First issue – was Ms Calka unjustifiably constructively dismissed by Unity4?

Meeting on 28 June 2018

[13] Ms Calka says that at the meeting on 28 June 2018, Mr Turner announced that there was to be “a company restructure in which the client service role would be divided into three separate roles”. Ms Calka says Mr Turner told the meeting that there were already client service managers that had expressed interest in the separated roles. Ms Calka was unsettled

by the announcement. Ms Calka left work early on Friday, 29 June 2018 and was on sick leave on Monday 2 July 2018.

[14] Both Mr Turner and Ms Beck say that the meeting on 28 June 2018 followed work the management team had been doing on Unity4's brand. It had become apparent that some of Unity4's customers saw it as a software company and others viewed it as a company that outsourced call centres. Work was required on the brand and there was a desire to grow aspects of the business. The meeting was not to announce a restructure, it was to keep staff informed of the work being done on the brand and growth initiatives.

Events following meeting on 28 June 2018

[15] On Tuesday 3 July 2018, Ms Calka and Ms Beck, who is based in Sydney, Australia had a telephone conversation to discuss the meeting on 28 June 2018. Ms Beck took notes of the meeting between them. The Authority was provided with both the handwritten and typed version of the notes. Ms Calka did not take any notes.

[16] Ms Beck's notes record that Ms Calka informed Ms Beck that Unity4 was splitting the client service role into three and that her role was "non-existent and therefore she would like a redundancy". Ms Calka told Ms Beck she was not happy that there had been no communications from Unity4 after the meeting and the level of care by Unity4 towards her was missing.

[17] Ms Calka told Ms Beck she believed her role had been disestablished and that if they were not able to come to an agreement, she would be forced to resign. Ms Beck was very surprised by Ms Calka's statements and informed her she would speak with Mr Turner.

[18] Following their meeting, Ms Calka sent an email to Ms Beck, copying Mr Turner, as follows:

"...The restructure the company announced last Thursday has resulted in the Client Service Manager role being disestablished and is now split into 3 different positions. This has a huge impact on me as any of those new roles will be a third of the current role scope and responsibility, meaning that it limits my development and learning of valuable skills. Any of the new positions would be a demotion and put me at a disadvantage. Taking the above into consideration I am seeking information of what exit package you are offering.

I would like to get this sorted ASAP as job security is very low considering the nature of previous terminations made to office staff as well as the pending restructure. I also believe that there is a duty of care and communication that has been lacking for some time now and have concerns that I may be “managed out” now that I have raised my concerns.

Unfortunately I have lost faith that the company will work in my best interests and do not feel comfortable in my employment here so I hope both parties can show good faith and we can come to a confidential arrangement without having to go through mediation.

I understand this is something that will need to be discussed with Dan Turner so I have copied him in also.

I hope to hear from you later today.

[19] Upon receipt of Ms Calka’s email, Mr Turner initiated a telephone conference meeting with Ms Calka at 2.00pm the same day to discuss the contents of the email. Ms Beck was also present and took notes. The hand written and typed version of the notes were provided to the Authority.

[20] Mr Turner told Ms Calka he wanted to understand her email. During the conversation Ms Calka referred to some issues concerning lack of communication and staff morale which she was not happy about.

[21] Mr Turner says he tried to explain to Ms Calka that one of the ideas for client service was to remove the administration tasks from the role so it could focus more on the customer. He told Ms Calka that nothing had been “set in stone”. He says Ms Calka claimed the client service role was being split and she was being disadvantaged. Mr Turner says he told Ms Calka she could continue in the role as it was. When Ms Calka refused to accept his assurances that he wanted her to stay the conversation became heated. Mr Turner told Ms Calka that she was a “free agent” and she did not need to stay. Ms Calka says she took this to mean she had been constructively dismissed.

[22] Following the phone call, Ms Calka sent an email to Mr Turner and Ms Beck. Ms Calka stated:

“Unfortunately the call and discussion did not reassure me that the company will act in my best interests especially being told that if I don’t like the changes I am a free agent, and therefore can resign; the fact this has increased my sense of job insecurity”.

Ms Calka concluded the letter by proposing Unity4 pay her an exit package amounting to 14 weeks' pay with an immediate release.

Immediately upon receipt of Ms Calka's email, Mr Turner responded:

My frustration on the call was my disappointment that a valuable staff member has misinterpreted our draft plans and wants to leave when there is so much opportunity heading towards us all. The business has grown faster than ever and NZ is a key pillar in our business. I made it very clear that we want you in the business, think you are doing a good job and would be happy for you to continue in your current role or migrate to a role with more support as in the draft structure presentation. Nothing in our planning or behaviour wants you to leave.

Telephone conference – 10 July 2018

[23] On 10 July 2018, Ms Calka sent a meeting request to Mr Turner and Ms Beck for a "catch up". Ms Calka asked what had been decided about her redundancy, "what have you to offer me"? Mr Turner stated that:

we are not planning to make anybody redundant, we are trying to grow the business, your role has not been made redundant, we have not made any changes at this point. Your role will remain the same until further notice. You are a valued employee and we want you to stay as per my prior email.

[24] Ms Calka's response was to resign with effect from 3 August 2018 and that she would be lodging a personal grievance with the Authority for "discrimination, constructive dismissal and lack of care."

Credibility

[25] I prefer the evidence of Ms Beck and Mr Turner as there were contemporaneous notes written at the time of the telephone conferences which support their version of events.

[26] There has not been a restructure by Unity4 and Ms Calka's role remains unchanged. I consider that Ms Calka made a premature decision to resign. She was not forced to resign. The law with regard to constructive dismissal is well established. ¹Unity4 could not foresee that the meeting held on 28 June 2018 to share work being done on Unity4's brand and possible future changes would result in Ms Calka resigning.

¹ Auckland Shop Employees Union v Woolworths (NZ) Ltd [1985] 2 NZLR 372.

[27] Ms Calka has the onus of establishing she was constructively dismissed. She has not discharged that onus. As a result of my finding that Ms Calka was not constructively dismissed, I do not need to consider the second issue of whether or not she was unjustifiably constructively dismissed.

Third Issue - Did Unity4 breach its contract with Ms Calka, breach its duty of care to her or discriminate against her?

[28] There was no evidence that Unity4 breached Ms Calka's contract, its duty of care to her or discriminated against her on any of the grounds contained in the Act or at all. These claims are dismissed accordingly.

Anna Fitzgibbon
Member of the Employment Relations Authority