

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 342/08  
5079768

BETWEEN                      Ms A  
   Applicant

AND                              AUCKLAND CITY COUNCIL  
   Respondent

Member of Authority:        James Wilson

Representatives:              Eska Hartdegen for the applicant  
   Phillipa Muir for the respondent

Investigation Meeting:        16, 17, 18 and 29 July 2008 in Auckland

Submissions received:        29 July 2008 (orally) for the applicant  
   8 August 2008 for the respondent

Determination:                29 September 2008

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**DETERMINATION OF THE AUTHORITY**

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[1] Ms A was first employed by the Auckland City Council (the Council) in February 1997. In January 2000 she was appointed to a management role reporting to a Group Manager.

[2] In September 2002 an incident occurred which, Ms A says, was the genesis of all the subsequent problems she experienced in her ongoing employment at the Council. While at a conference, Ms A says she was propositioned by a colleague (Mr Z) for sex. She says that when she refused his advances he became verbally abusive and continued to put pressure on her. She says that she eventually persuaded him to calm down and she was able to extricate herself from the situation. The following morning she says she spoke to Mr Z but did not make a formal complaint regarding his behaviour because of the possible consequences of such a complaint for both him and his family and for herself.

[3] Mr Z does but not deny that an incident took place but says that the incident was not as serious as made out by Ms A. He says that some of his comments were unfortunate and inappropriate and in hindsight he regrets having made them. He denies that the incident had any effect whatsoever on his subsequent working relationship with Ms A.

[4] Both Ms A and Mr Z agree that nothing further was said regarding this incident until Ms A raised a personal grievance against the Council in early 2007.

[5] In late 2004 a restructuring took place in the group in which both Ms A. and Mr Z were employed. Ms A says that Mr Z orchestrated this restructuring to ensure that he was placed in a position of authority over her. She says that he then used his position to bully and victimise her. She says that he criticised her in front of her staff, cut her short and *unremittingly undermined her in her job*. In her evidence Ms A has raised a number of examples of particular behaviours by Mr Z which demonstrate how he targeted her. Each of these examples was specifically denied by Mr Z or, he says, they have been misrepresented and/or misconstrued.

[6] Following some negative comments made by Mr Z in a performance review in mid 2005, Ms A says she asked Mr Z to address the issues he had with her and outline what improvements were required. According to her evidence, he refused to do so. Subsequently the new Group Manager, Ms Jaine Lovell-Gadd suggested that Ms A and Mr Z attend mediation to attempt to resolve any outstanding issues. While Mr Z was agreeable to go to mediation Ms A rejected the idea saying that she did not have problem with Mr Z and it was he who had the problem with her.

[7] It is important to note that the Council says that Ms A did not raise any of these issues (i.e. the 2002 incident or the allegations of bullying against Mr Z) until early in 2007 and she is therefore unable to pursue a personal grievance regarding these matters as she is outside of the 90 day statutory limit for doing so.

[8] In September 2006 a further restructuring was proposed which Ms A believes was an *engineered departure* for her. Despite the Council's evidence that this restructuring was managed by the Group Manager (Ms Lovell-Gadd), Ms A. believes that in fact Mr Z was the architect of the changes. Ms A drafted a formal submission regarding the proposed restructuring but her suggestions were not accepted. Instead a new structure, replacing Ms A's position with two new team leader positions at a lower grade, was announced. The Council carried out an assessment of the two new roles and decided they were substantially different from Ms A's existing role. Ms Lovell-Gadd says that it would not have been appropriate, and would not be in accordance with Council policy, to automatically appoint Ms A to one of the new positions.

[9] Ms A says that, although she was advised that she could apply for one of the two new positions she initially decided that there would be no point in doing so as the positions were at a lower a salary and required, as a pre-requisite, qualifications that she did not hold. She says she felt sidelined and vulnerable and believed that Mr Z's continued negative and targeted behaviours towards her were supported by the Council.

[10] In January 2007 Ms A says that she approached the HR adviser involved in the restructuring asking to be advised of her options, including the amount of redundancy compensation to which she would be entitled. She says she made this approach to enable her to properly understand her options before deciding whether or not to apply for one of the positions. Unfortunately the HR Adviser understood Ms A to be advising that she wished to be released from her employment at an early date. Based on this misunderstanding Ms Lovell-Gadd wrote to Ms A on 23 January 2007 saying that the Council had been unable to identify suitable alternative positions and giving her formal notice of termination of her employment on 28 February 2007. Ms A says she was stunned by this letter as no one had ever spoken to her or consulted with her regarding redeployment.

[11] In early February 2007 Ms A held an informal discussion with Mr Z and agreed that the period of notice would be extended by one month. Unfortunately this arrangement was never committed to writing and on 2 February 2007, Ms A, through her then representative Mr Kerry Amodeo, raised a personal grievance. Mr Amodeo's letter alleged that *the current restructuring is neither genuinely based nor procedurally fair* and that Ms A had been *seriously disadvantaged in relation to her employment in recent times*. The letter said that further details would be provided later and that *all communications in this matter* should be referred to him. Regrettably, although perhaps not surprisingly, once this letter had been received communications between the parties became more formal. While they continued to communicate professionally regarding operational issues, there was no further discussion between Ms A and either Mr Z or Ms Lovell-Gadd regarding her possible ongoing employment.

[12] Although the timing is not entirely clear, at some point in early February Ms A indicated (through Mr Amodeo) that she wished to be considered for one of the two new positions. However she later withdrew her application because *Mr Z would be conducting the interviews* and she felt that the Council had *been unable, and failed, to provide her with a safe working environment while working under Mr Z*.

[13] On 15 February 2007 Mr Amodeo wrote to Ms Lovell-Gadd providing further details of Ms A's personal grievance. This letter dealt only with Ms A's concerns regarding the 2006 restructuring and made no direct reference to the 2002 incident or Mr Z's alleged bullying of Ms A..

[14] On 26 February 2007 Mr Amodeo wrote to Ms Katherine Burson (a solicitor with Simpson Grierson, now representing the Council) raising for the first time *unresolved incidents of harassment and abuse of power including one that occurred at (the 2002 conference)*.

[15] Ms A's last day of employment with the Council was 28 February 2008. She received some 32 weeks salary by way of redundancy compensation.

**The issues to be determined**

[16] Ms A has raised two separate grievance's; that she was *disadvantaged in her employment as a result of the sexual harassment victimisation and bullying by Mr Z* (the unjustified action grievance) and that *the disestablishment of her role and her redundancy were not genuine.* (the unjustified dismissal grievance)

[17] Before determining the first of these claims it is necessary, as a preliminary issue, to determine whether or not Ms A raised this grievance with her employer within the 90 day period required by section 114(1) of the Employment Relations Act (the Act). If she did not do so she is unable to pursue this grievance in the Authority. If she did then it is necessary to determine whether or not the Council breached its duty of care and failed to provide Ms A with a safe workplace. If the Council did breach of its duty of care, and Ms A has a personal grievance in this regard, it will be necessary to determine what, if any, remedies she should be awarded.

[18] In determining the second of these claims it is necessary to consider whether or not the 2006 restructuring was carried out in a procedurally fair way, including proper consultation with Ms A, whether the redundancy was genuine and whether the termination of Ms A's employment was carried out fairly. In answering each of these questions it is necessary to consider whether the actions of the Council *were what a fair and reasonable employer would have done in all of the circumstances.* (section 103A of the Act.)

**Did Ms A raise her disadvantage grievance within the 90 day statutory period?**

[19] Section 114(1) of the Act says that:

*(1) Every employee who wishes to raise a personal grievance must, ..., raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of the period.*

[20] For Ms A, Ms Hartdegen argues that the bullying and victimisation that Ms A was subject to compounded over time. She argues that, if it is accepted that Ms A did not raise her grievance in time, in instances such as this no employee would ever be able to prove a bullying case where there is ongoing bullying, because they didn't raise it initially and therefore lost the right to do so.

[21] For the Council Ms Muir points out that Ms A clearly knew about the personal grievance process. The provisions are set out in her employment agreement, are available on the Council's intranet and are included in the Council's sexual harassment policy. From the evidence presented to me it is clear that Ms A had concerns about the way Mr Z was treating her at least as early as April 2005. Both in her written evidence and in answer to questions at the investigation meeting, Ms A made it clear that most of the alleged bullying took place in 2005.

[22] Ms A did not raise her disadvantage grievance within the required 90 days *from when the actions occurred* or from when they *came to her notice*. The Council have not consented to Ms A raising this grievance out of time and she has not applied for leave to raise this grievance out of time. She is unable therefore to pursue her disadvantage grievance.

### **The effect of Ms A's claims of bullying on her unjustified dismissal claim**

[23] For the reasons set out above Ms A is unable to pursue her historic, disadvantage grievance i.e. that the Council did not provide a safe workplace and that she was subject to the sexual harassment and bullying by Mr Z. However Ms A also alleges that Mr Z played a major part in it her eventual redundancy. In her statement of problem Ms A suggests that Mr Z *led a drive to restructure the..... team*. In her evidence she says that she *considered that this move on the Council's part was a stratagem by senior management ... to ensure that I left the council*. Ms A firmly believes that Mr Z manipulated the 2006 restructuring as a continuation of his long-standing desire to remove her from the Council's employment. She believes that Mr Z's motivation stems back to her rejecting his advances in 2002.

[24] I have absolutely no doubt that the 2002 incident coloured the relationship between Mr Z and Ms A. While Mr Z totally denies that he bullied Ms A or that the 2002 incident affected the way he dealt with her, the incident at very least created a tension between them. Despite Mr Z's categorical denials I find it improbable that the 2002 incident did not colour his attitude towards Ms A. Even if Mr Z is entirely correct, and his behaviour towards Ms A not influenced by the 2002 incident, Ms A sincerely believed that he was targeting her and responded accordingly. She saw much of what he did as being personally motivated and undermining of her. This led her to respond to Mr Z with suspicion and negativity. In turn Mr Z felt that Ms A was unsupportive and unresponsive to his attempts to provide management and leadership.

[25] I have found that Ms A did not raise her grievance in this regard within the statutory time limit. This is a statement of the legal position as I have found it. I do not wish to imply however that Ms A did not sincerely believe that Mr Z was targeting her or to trivialise the stress and anxiety her working relationship with Mr Z caused her. It is not necessary for me to particularise the details of the various events which were outlined to me in evidence during the course of my investigation. Nor is it necessary to apportion blame in regard to the breakdown in the relationship between Mr Z and Ms A. It would be inappropriate for me to do so or to suggest that any of the parties should accept responsibility or liability. With hindsight the Council, either through its human resources department or through the offices of the Group Manager should have intervened more forcefully and insisted that the reasons for the obvious tension between Ms A and Mr Z be confronted and addressed. Regrettably this was not done. That tension caused a barrier to communication which might have avoided Ms A's unhappy departure from the Council.

[26] Before leaving the question of the historical relationship between Mr Z and Ms A it is important to clarify Mr Z's role in the 2004 restructuring i.e. the restructuring process which Ms A says Mr Z manipulated to ensure that he was placed in a position of authority over her. While it is true that Mr Z gathered support from several of his colleagues in an attempt to influence the shape of the new structure, the structure that he proposed would not have placed him in a position of authority over Ms A. In fact, in that proposal he and Ms A would have been at the same level of management. Both Mr Z and Ms A were offered equivalent roles, i.e. at the same

level of management, in the new structure. However, before taking up his new position, Mr Z was asked to act as Group Manager. and only subsequently was he appointed to a permanent position senior to Ms A. Mr Z could not have known that this would be the outcome of the restructuring and there is no evidence that any lobbying on his part would be any more or less influential on the outcome than suggestions made by Ms A. He was certainly not the decision maker.

### **Was the 2006 restructuring process procedurally fair?**

[27] As part of a Council wide *realignment project* completed in February 2006 the Council considered the *worker to management ratio* (i.e. the number of employees reporting to each manager). That report concluded that:

*In (Ms Lovell-Gadd's) group, (Ms A's) team, there are currently seven direct reports under (Ms A)*

but:

*It was determined that this ... group initiative should be managed at the discretion of... the group manager outside the realignment project.*

[28] In July 2006 Ms Lovell-Gadd requested Mr Z to have some *initial consultation* with Ms A regarding the possible restructuring of her team. At Ms Lovell-Gadd's request Ms A prepared a memorandum setting out her views on the best way to restructure and resource the team. Ms A says that Mr Z was dismissive of the proposal saying that he wanted a flat structure. Mr Z says that he does not recall the detail of this conversation but that Ms Lovell-Gadd had specifically expressed the view that any new structure should be *flat*. Ms Lovell-Gadd confirmed, in her evidence, that this was indeed her objective.

[29] On 11 September 2006 Ms Lovell-Gadd wrote to all of the group's staff advising them that a review was being carried out and seeking their input. Ms Lovell-Gadd says that after considering Ms A's comments she developed a proposal for discussion. A copy of the proposal was given to Ms A. immediately prior to a meeting with all employees on 2 November 2006. Following a period of three weeks for feedback, Ms Lovell-Gadd says she discussed that feedback and her final proposal with her manager before confirming to staff in early December that a new structure

would take effect in the New Year. The major effect of this restructuring was that Ms A's position would be disestablished and two new, team leader, positions would be created.

[30] Although Ms A has some concerns regarding Mr Z's influence on the final structure proposed by Ms Lovell-Gadd, Ms Lovell-Gadd is adamant that she made all of the key decisions and that the structure was what she considered was in line with the Council's realignment strategy and consistent with best practice. Ms Lovell-Gadd carried out this review in accordance with the senior management team's request, the process she oversaw provided for full consultation and the decision she reached on the final structure was consistent and logical. The 2006 restructuring process was, I find, procedurally fair.

#### **Was Ms A's redundancy genuine?**

[31] It is well established law that an employer is entitled, after proper consultation with the effected employees and for genuine business reasons, to restructure their organisation. In this case the Council did consult with the effected employees (Ms A in particular) and reached what it considered were reasonable, logical, decisions consistent with Councils management strategy. Despite Ms A's concerns about Mr Z's influence there is no evidence that the new structure was not genuinely considered by the Council to be the appropriate outcome of its review.

[32] The new structure created two new positions each of which incorporated approximately 50% of the duties previously carried out by Ms A. Ms Hartdegen argues that Ms A should have been redeployed, as a matter of right, into one of these two new positions and should not have been required to apply competitively. The Council argues that the positions were assessed as being *substantially different* from Ms A's old position and therefore, in accordance with Council policy and the Local Bodies Act, they were required to advertise the new positions. The new positions were at a lower level in the Council management hierarchy and consequently likely to be remunerated at a lower level. The duties of a new positions encompass only half of the range of duties of the old position. Leaving aside the question of whether or not Ms A should have been offered one of the new positions, a simple comparison confirms that Ms A's old position was disestablished.

[33] The two team leader positions created in the new structure are substantially different from Ms A's old position. Ms A's old position was disestablished in the restructuring and she was genuinely redundant.

**Was the termination of Ms as employment *what a fair and reasonable employer would have done?***

[34] Following the announcement of the final structure Ms Lovell-Gadd wrote to Ms A, on 4 December 2006, advising her that it had been decided to disestablish her existing position. The letter went on to say that *there have been two new team leader positions that have been created which you are welcome to apply for.*

[35] Ms A points out that the job descriptions for the two new positions stated that the minimum requirements, in each instance, were a tertiary qualification in a specific or a related discipline. She says that she did not have the relevant qualifications and she believed that she was being deliberately excluded from either position. She says that, from the time she was advised of the disestablishment of her position, and apart from an informal conversation with Mr Z in which he indicated that the Council wished to receive as wide a range of applications as possible, no one from the Council approached her to discuss the new positions or to encourage her to apply. On the contrary, she says that Mr Z made it clear to her that neither of the new roles was sufficiently similar to her disestablished position for her to qualify for either of the roles (Mr Z denies having made these comments). She says that while she was away over Christmas another employee was seconded to act in her old position. She believed that this was a clear message that this employee was being groomed for one of the new positions but that:

*...there was no such conversation with me and I felt further isolated, targeted, and certain that disestablishment of my position had been engineered for other reasons.*

[36] Ms Lovell-Gadd says that she had understood that Mr Z had discussed with Ms A the possibility of her applying for one of the new positions. She argues that Ms A's previous job description (for the disestablished role) also listed minimum tertiary qualifications that Ms A did not possess and that Ms A was therefore well aware that her lack of the required qualification was not a barrier to her appointment to the new positions. She says she was surprised when she was advised by HR (incorrectly as it happens) that Ms A wished to terminate her employment. Ms Lovell-Gadd says that despite that advice she indicated, in her letter of 23 January 2006, that the new positions would be advertised on 24 January 2006 and said:

*I encourage you to apply for any of the newly created roles within the two new team structures or any other position which may be available at Auckland City. If you apply for a new position and are successful, you will continue your service with Auckland City in the new position.*

[37] As I have indicated earlier in this determination, once Ms A's representative had written to the Council, in early February 2007, raising a personal grievance, the communication between Ms A and her manager's became even more formalised than previously. As the communications between the representatives of the parties became more formal and the seriousness of the alleged grievances escalated, the informal communication deteriorated still further. This lack of informal communication led to what I can only describe as the debacle surrounding the "on-again, off-again" extension to Ms A period of notice and the rather strained circumstances under which she eventually departed.

[38] On reviewing the events from December 2006 to Ms A's departure at the end of February 2007, as set out starkly in the evidence before me, I am led to the inevitable conclusion that the way in which the Council managed Ms A's departure fell short of *what a fair and reasonable employer would have done in all the circumstances*. While the Council witnesses suggest that Ms A did not seek their advice, this does not absolve them from a responsibility to ensure that Ms A was kept fully informed and supported throughout the process. The duty of good faith as set out at s.1A(b) of the Employment Relations Act, requires:

*...the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.*

While Ms A certainly had some responsibility to raise her concerns, the Council had, and in my assessment did not meet, an obligation to be *constructive and communicative*.

[39] Ms Lovell-Gadd says that Ms A was aware that *minimum qualifications* listed in the job descriptions were not absolute requirements - but she did not discuss this with Ms A. Ms Lovell-Gadd says that she was surprised when HR told her that Ms A wished to leave before the restructuring took a effect – but she did not speak directly to Ms A to enquire why she wished to depart so quickly. If she had done so she would have realised the misunderstanding and much of the stress which followed could have been avoided. All three managers were located on the same floor in the same building and saw each other in the workplace on a regular basis. Ms Lovell-Gadd was aware at very least that the relationship between Ms A and Mr Z had, at times, been strained. She was unable, when pressed at the investigation meeting, to explain why she had not taken the simple initiative of meeting with Ms A to discuss her future. If she had done so Ms A may have applied for, and possibly been appointed to, one of the new positions. Alternatively her departure could have been managed with a lot less stress for all concerned.

[40] The way in which the Council managed the termination of Ms A's employment was not *what a fair and reasonable employer would have done in all the circumstances*. The Council's actions were unjustified and **Ms A has a personal grievance against the Auckland City Council.**

## **Remedies**

### *Contribution*

[41] I have considered, in terms of section 124 of the Act, whether or not Ms A *contributed towards the situation that gave rise to (her) personal grievance*. While it is possible that Ms A could have been more proactive in her communications with the Council managers, under the circumstances this would have been extremely difficult. She did approach the human resources manager and this attempt to communicate unfortunately resulted in a misunderstanding which in turn resulted in Ms Lovell-Gadd's letter of 23 January 2006. Under all the circumstances I find that Ms A did not contribute to the circumstances that gave rise to her personal grievance.

### *Recovery of wages*

[42] I have determined that Ms A's redundancy was genuine. Under these circumstances it is not appropriate to order that she receive compensation for wages lost as a result of to the termination of her employment. In any event two months after she left the council's employment she obtained new employment. At the time of her termination from the Council she was awarded more than six months salary by way of redundancy compensation. Ms A is not entitled to compensation under this heading.

### *Compensation for hurt and humiliation*

[43] Whenever an employee loses their job, even when this is for genuine reasons of redundancy, there is an associated degree of stress and uncertainty. While it is not appropriate to award compensation in respect to her strained relationship with Mr Z Ms A's stress was exacerbated by her belief that Mr Z had pursued a deliberate strategy to ensure her departure. However, as a direct result of the council's actions (or, more accurately, inaction) following the disestablishment of her position Ms A suffered a level of stress, hurt and humiliation much greater than would otherwise have been the case. She is entitled to be compensated for this additional stress.

[44] By way of compensation for the hurt and humiliation caused to her by its unjustified actions, **the Auckland City Council is ordered to pay Ms A \$6,000.00 without deduction, in terms of section 123(1)(c)(i) of the Employment Relations Act.**

### **Costs**

[45] Costs are reserved and the parties are urged to attempt to reach agreement between themselves in the first instance. If they are unable to do so Ms A may file and serve submissions within 28 days of the date of this determination. In that event the Council will have 14 days in which to respond.

### **Suppression of names**

[46] In terms of clause 10 of the second schedule of the Employment Relations Act, **an order is made prohibiting the publication of the name of the applicant, referred to in this determination as Ms A, or the Council manager referred to as Mr Z.**

James Wilson

Member of the Employment Relations Authority