

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 286
5334251

BETWEEN CHRISTINE ADAMSON
 Applicant

A N D THE SALVATION
 NEW ZEALAND TRUST
 Respondent

Member of Authority: M B Loftus

Representatives: Mary-Jane Thomas, Counsel for Applicant
 Susan-Jane Davies, Counsel for Respondent

Investigation Meeting: 14 March 2012 at Invercargill

Submissions Received: By joint exchange on 21 March 2012

Date of Determination: 20 December 2012

DETERMINATION OF THE AUTHORITY

Citation of the respondent

[1] The application, as originally filed, identified the Salvation Army as the respondent. It advised that was incorrect and the proper identity was 'The Salvation New Zealand Trust'. The citation was changed by agreement of the parties.

Employment relationship problem

[2] The applicant, Ms Christine Adamson, claims she was unjustifiably dismissed by the respondent, The Salvation New Zealand Trust (the Army), on 26 November 2010.

[3] The Army's position is Ms Adamson was not dismissed. They claim a mutually agreed cessation occurred during a meeting on 29 October which was called to consult over a possible restructure occasioned by genuine organisational needs.

Background

[4] Ms Adamson was employed as manager of the Army's Tay Street Family Store in Invercargill. She commenced on 16 April 2007. There are three other Family Stores in the Army's Invercargill Corp area which was led by Captain Russell Garbett.

[5] In October 2009 the Army's Clifton Corp closed and what had previously been its operation was subsumed within the Invercargill Corp. Captain Garbett says his workload increased dramatically as a result given a larger congregation and four Family Stores as opposed to the previous two. He says the increased workload was taking him away from his ministry duties. He goes onto say:

I wanted to better serve the stores as I couldn't visit and support them as I would have liked, and to get some consistency across the four stores in Invercargill. I had a fulltime manager in Tay Street, (the applicant), two part-time managers in South City and Otautau and a part-time volunteer running Riverton. All report to me.

I needed to find a cost effective solution which would improve the overall management of the four Family Stores and free me up more to carry out my other responsibilities.

[6] Captain Garbett approached Ms Robin Tsukigawa, a Family Store consultant whose job is to comment on and make suggestions for improvements in the stores. She visited Invercargill in August and Captain Garbett asked her to provide comments on possibilities for freeing up more of his time.

[7] She provided various comments in documents dated 17 and 19 August 2010. Contained therein is the first suggestion the four stores would benefit from having a team leader overseeing their operation.

[8] On 27 August Captain Garbett sought the assistance of Paul Geoghegan, the Army's human resources manager, as he was of the view Ms Tsukigawa was suggesting a restructuring would be the best way to address the problems in Invercargill. His e-mail advises:

It is only going to make a difference to one paid employee, the manager of our Tay Street shop whose job will become redundant and be replaced by a part-time manager. We would then employ a full time team leader who will oversight the four shops.

I have spoken to Christine, the Tay Street manager and told her that this is being mooted, I asked if she has any alternative ideas or other input into what we may try to do.

[9] The conversation during which he gave Ms Adamson a forewarning of what he was considering had occurred on 24 August.

[10] There was a further conversation on 3 September and this was followed by a paper entitled *Proposal for Consultation – Restructure of staffing and structure of the Invercargill Corps – South City, Tay Street, Otautau and Riverton Family Stores* which was produced on 14 October. The paper provides a background to the issues, a rationale and a proposal. The proposal is:

... the position of Invercargill Family Store team leader would have overall responsibility for the four stores, ensuring that Salvation Army Policies and Procedures applicable to the Family Stores are implemented correctly. They would also provide a link between the stores and the Invercargill Corps Offices, ensuring the efficient flow of information between store and corps, as well as ensuring staff and volunteers were kept engaged in their role and committed to the overall mission of the Corps and Army. The Family Store managers would line report to the 'Team Leader'.

[11] As a consequence it was felt Tay Street could no longer justify or afford the retention of a fulltime manager. The paper goes on to advise:

I now ask that you review this proposal and provide me with any feedback or thoughts or ask me any questions that you may have. Once this feedback has been received, I can then make an informed decision. Please be assured that a final decision will not be made until the consultation process is complete.

[12] On 22 October Captain Garbett, assisted by Captain Doug Newman, met with Ms Adamson and two of her representatives. The meeting was recorded and there is a full transcript. About the meeting Captain Garbett says:

During the meeting it became apparent that Ms Adamson thought the proposed restructure was a sham and that it was all about her performance and/or the time she had off. Yes, there had been performance issues with Ms Adamson but this was not the driver for the change. The Tsukigawa report also disclosed areas where other stores could be improved too. The rationale for the change was to get consistency across the stores, provide better leadership than I could provide because I was too busy and to free me up more to get on with my other duties.

During the meeting Ms Adamson produced her spreadsheet of duties and hours. She obviously had a clear idea in her mind of the deliverables that had to be done across the store. She just didn't agree with how it could be done.

It was a very comprehensive document. She had clearly thought it through. I agreed to postpone any further steps in my process until I had had a chance to consider it and respond.

[13] The meeting was therefore adjourned to 29 October. Captain Garbett says one of Ms Adamson's representatives asked whether the resumption could be further delayed as a week may not be long enough for Ms Adamson to collate a response. He said he was willing to consider that.

[14] Contained within the transcript of the meeting are the following pertinent passages:

It has the possibility of affecting the hours that you are employed here. If this is what we decide to do, your job will cease to exist and two new positions will come out of it. One fulltime position and one part-time position. The part-time position will then be the Family Store manager, the same as the other stores are managed and then there will be someone over the top of those. That's what is being talked about, that is being mooted and we want your ideas if that will work or not. You have provided that, now I will go away and think about it and get back to you. The other Family Store managers it will not affect so much because they will simply have a new line manager as opposed to going straight to me

[15] There was also a clear suggestion Ms Adamson was being encouraged to apply for the positions. There was also a suggestion from one of Ms Adamson's representatives another option could be to make the team leader part-time and leave the Tay Street manager unchanged. Captain Garbett replied that was certainly an option he could consider. There is also a note Ms Adamson asked that if she apply for the 20 hour position of Family Store manager would she be doing something new or something different. Captain Garbett replied *you will probably be doing less.*

[16] On 29 October Captain Garbett wrote to Ms Adamson. The letter thanks Ms Adamson for her input on 22 October before stating:

*Because of some of the things you raised let me restate here that this is not a performance issue but rather one to enable us to better run each store and support and supervise the managers and volunteers better.
Much you highlighted, confirmed that the team leader will enable many of those things to be done better.
Your work on the spreadsheets regarding time in motion and the three proposals together with what happens now, regarding the team leader has been interesting and provided much food for thought.*

[17] The letter then goes on to advise:

I would like to confirm that it has been decided to continue with the restructure.

As proposed, there will be a new fulltime team leader position to link between the corps officers and the shop staff and managers and a second position of a .5 (20 hours part-time) manager's position at the Tay Street store.

The other shops will remain the same with the exception of a new line manager.

...

As I agreed at our meeting on 22 October I will give you further opportunity to provide me a written submission regarding this decision. If you can provide that letter to me by the 19th November, I will consider what you have supplied.

This allows three weeks to get your letter together. I will give you my final decision the following week, Friday, 27 November.

[18] The letter was hand delivered and its contents discussed. Ms Adamson says *I eventually accepted that the process would go ahead as proposed* but goes on to claim in her written statement that Captain Garbett then gave her a choice of deciding whether or not she wished to accept the part-time manager's role within 60 minutes or wait till he returned from holiday in a month and then advise her decision. She says she felt the process had already taken too long so made a hasty decision and declined the offer of the part-time role.

[19] Captain Garbett has a different view. He says Ms Adamson asked if anything would change in a month and he replied by advising that if she could not provide any further ideas or reasons not to proceed then the restructure would likely go ahead. When questioned Ms Adamson disputed that the word likely was used but accepted the rest of Captain Garbett's evidence in this regard.

[20] Captain Garbett goes on to say:

She informed me that if that was the case she didn't need a month as there was nothing more to add and that being the case, she wanted to give notice. I then told Ms Adamson I will need to go back to the office and phone HR to see what the process should be then and I'd get back to her as soon as possible that afternoon.

[21] When questioned, Ms Adamson accepted the above evidence (20) was accurate.

[22] Captain Garbett then telephoned Mr Geoghegan. He was told to write a letter confirming what had been discussed. He goes on to say that while he was writing it, Ms Adamson phoned and:

She had me on a speaker phone so her partner could listen into the conversation. She told me she may have been too hasty in her decision to give notice and needed me to clarify the fact that she would be getting paid redundancy.

I informed her that there was no redundancy entitlement in her employment agreement, but as we had explained in the consultation paper, there would be an ex gratia redundancy compensation payment in the event of a redundancy.

[23] Captain Garbett goes on to say:

Soon after Ms Adamson came into my office with her partner to support her, I still had the letter Paul Geoghegan had sent her right on the computer in front of me. I asked her if she minded me reading it to her to see if she agreed to what had been discussed in our meeting. She agreed that it was correct and as I had mentioned the redundancy payment in that letter, she was happy to sign it and that she would make her resignation from that point.

We agreed that she would have four weeks' notice and that her last day would be 26 November 2010.

[24] When questioned, Ms Adamson accepted this evidence was accurate and she did, at this point, agree she would go. The letter was printed and signed by both Captain Garbett and Ms Adamson. It states:

Dear Christine, further to our meeting this afternoon regarding the decision to continue the restructure, I would like to confirm what was discussed.

You stated you no longer wanted further input as the process was becoming drawn out and you accepted the status quo and that the restructure would go ahead as proposed.

You did not want to be considered for the .5 part-time manager's position offered to you.

That we agree with there being four weeks' notice until termination of your employment from today, 29 October. Your last day will be 26 November 2010.

I would also like to confirm that although there is no redundancy provision in your employment agreement, the Salvation Army however will pay you according to the rates stated in the initial proposal of restructuring given to you already.

Also a work reference and record can be provided and should you need to have job interviews, then that you will be allowed reasonable time off work to attend interviews or other activities associated in seeking further employment.

[25] From the Army's perspective that was that and it proceeded with implementing the restructuring proposal. Ms Adamson, however, had a different view. On 18 November her solicitor wrote initiating the personal grievance.

[26] A further letter followed on 18 January 2011. By that time the positions remained vacant due to both Captain Garbett's holiday and the intervention of the Christmas period. Mr Geoghegan asked Captain Garbett to halt the appointment process so as to allow Ms Adamson the chance of reconsidering her position and perhaps still applying. That came to nothing with Ms Adamson declining to avail herself of the opportunity.

[27] The team leader was appointed in late February however the new part-time manager's role at Tay Street remained vacant until December 2011 as the Army could not afford to fill the position.

Determination

[28] The first issue is whether or not there was a dismissal. Ms Adamson claims she was dismissed. The Army is of the view she resigned while the process was still running its course.

[29] This must be addressed in two parts – was there an actual dismissal and, if not, was there a constructive one.

[30] With respect to an actual dismissal I conclude the answer is no, Ms Adamson was not dismissed. Redundancy, at least if it is approached in a traditional and appropriate fashion, requires the occurrence of two events. First there must be a decision a position is surplus to the employers' requirement. Second there must be a subsequent decision that as a result the incumbent(s) of that position can not be retained and must also go.

[31] There is no doubt the first event had occurred and that was confirmed by Captain Garbett's first letter of 29 October. There is, however, no evidence of the second event. There is no evidence any of the army's representatives ever told Ms

Adamson her employment had ended as a result. Indeed the evidence is she was offered the new managers position at Tay Street and rejected it, though in fairness I must say that is not surprising. It was essentially a different position due to the halving of hours and a corresponding diminution in remuneration. There is also no evidence the army would not entertain an application from Ms Adamson for the Team Leader role.

[32] The evidence is that upon receipt of the first letter of 29 October Ms Adamson decided to opt out. Captain Garbett claimed it was she who said she wanted to give notice and, when questioned, she accepted that evidence as accurate (20 and 21 above). She also accepted that after advising her decision had been hasty she met with Captain Garbett and again confirmed what I will describe as a decision to opt out of the process during the conversation (23 and 24 above). She then signed the letter confirming her decision (also 24 above).

[33] Given these facts it is clear to me she chose to conclude the process and effectively tendered a resignation. The evidence suggests the reason was two fold. First, she had had enough of what she now considered a protracted process and wanted it over – this sentiment was expressed a number of times during the investigation. Second, her answers would indicate she believed her removal was a fait accompli once the decision to disestablish her full time store manager's role was made. That is both unfortunate and unfounded but I can not hold the Army responsible. The evidence the army repeatedly said there were options available. They included accepting the reduced hours at Tay Street, applying for the Team Leader role or availing herself of the opportunity of suggesting another option. For some reason Ms Adamson does not appear to have understood this and closed her mind to the possibilities.

[34] The conclusion there was not an actual dismissal is not, however the end of the issue. There is the possibility the dismissal was constructive and this has been argued on Ms Adamson's behalf.

[35] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd* (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA) the Court of Appeal held that constructive dismissal includes, but is not limited to, cases where:

- a. An employer gives an employee a choice between resigning or being dismissed;
- b. An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- c. A breach of duty by the employer causes an employee to resign.

[36] I do not accept Ms Adamson was constructively dismissed. Whilst a simplistic summary of more complex law, the concept is that the employee resigned because they had no choice. The onus is on the employee to establish a prima facie case this was the situation before the employer is called upon to justify the dismissal. Ms Adamson is unable to do so.

[37] The duty of good faith requires an employer who is proposing to make a decision that will, or is likely to have, an adverse effect on the continuation of employment of one or more of its employees to give such employees access to relevant information and an opportunity to comment on the information before the decision is made (s.4(1A)(c)).

[38] Here there is ample evidence the Army did discuss its proposal as it was obliged to do. The evidence also shows Ms Adamson misunderstood both the process and what the army was trying to do to some degree. When the army recognised this, they tried to address the misconceptions with the advice conveyed in the letter of 22 October (12 above) being an example. There is also the fact the army chose to give Ms Adamson a further chance to reconsider when she raised her grievance. This is not the action of an employer determined to be rid of an (in this case ex) employee – such an employer would await the grievance outcome.

[39] There is also an allegation the Army was obliged to redeploy Ms Adamson to one of the two available positions (*Jinkinson v Oceana Gold (NZ) Ltd* [2010] NZEmpC 102 and *Wang v Hamilton Multicultural Services Trust* [2010] NZEmpC 142).

[40] Again I disagree. Redeployment to the new Tay Street position was offered. Ms Adamson rejected the offer. I can not conclude the Army was required to force the issue in such circumstances.

[41] There is then the Team Leader role. I am satisfied, given the evidence, the role was quite different from that of store manager and note that when answering questions Ms Adamson accepted that to be the case. I also accept responsibility for four stores and ensuring their operations are co-ordinated is a more senior role than being responsible for one – it would have been a promotion. Aside from the fact neither *Wang* nor *Jinkinson* suggest there is an obligation to promote an employee affected by a potential redundancy situation, both involved situations where the employer had actually dismissed. The process had run its course. The same has not occurred here and the process was truncated by Ms Adamson's decision to depart. While I note Captain Garbett's evidence that he had concerns about Ms Adamson's ability to step up to the team leader role, it remained a possibility dependant on the quality of other applicants and the fact his concerns had been allayed to some extent by Ms Adamson's presentation on 22 October which exhibited a good grasp of the issues and challenges.

[42] A number of procedural irregularities have also been alleged. They were pleaded on the assumption Ms Adamson had been made redundant (ie: dismissed) and supported an argument the process was deficient thereby rendering the dismissal unjust. The conclusion there was no dismissal means these need not be addressed but I add they were generally minor in nature and some, such as a failure to provide a written job description for the Tay Street role could have been rectified had the process been allowed to continue. In any event they had little bearing on the reasons why Ms Adamson chose to opt out, which were her misunderstanding of the process and decision she had essentially had enough (see 33 above). These factors also lead me to conclude any alleged deficiencies were such that they did not constitute an unjustified action that affected Ms Adamson's employ to her detriment. There is no direct evidence linking them to the decision to go.

[43] The conclusion Ms Adamson was neither dismissed nor disadvantaged means her claim fails.

Costs

[44] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority