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Allott v Transition to Work Trust CA 127/07 (Christchurch) [2007] NZERA 838 (1 November 2007)

Last Updated: 23 November 2021

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

CA 127/07 5070178

BETWEEN LAUREN ALLOTT

Applicant

AND TRANSITION TO WORK TRUST

Respondent

Member of Authority: James Crichton

Representatives: Christine French, Counsel for Applicant

Willie Martin, Counsel for Respondent Investigation Meeting: 17 and 18 July 2007 at Invercargill

Determination: 1 November 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant (Ms Allott) contends that she was unjustifiably dismissed as a consequence of a flawed redundancy process when her employer, the respondent (the Trust) restructured.

[2] The Trust resists that claim, says that it had genuine grounds for making Ms Allott's position redundant and that the termination was attended to in a procedurally fair manner so there is no unjustified dismissal.

[3] Ms Allott had been employed by the Trust in early 2004 as a Life Coach delivering programmes funded by the Crown via a contract to the Trust. She was based in Invercargill and as such was one of seven life coaches providing services as employees of the Trust throughout the lower South Island.

[4] The Trust relied on funding streams from the Crown through various agencies for the continued delivery of its programmes and it was required to tender for these

programmes on a regular basis. In 2006, the Trust lost a contract to deliver a programme called variously Careers in Mind or Working It Out, but the programmes that Ms Allott worked on delivering (one called Mentor Plus and the other called Good Job), were, according to Ms Allott, unaffected.

[5] On 13 September 2006, the Trust promulgated a proposal which advised staff of the Trust's failure to obtain all of the contracts it had tendered for, referred to the present structure of the organisation, advanced a proposed new

structure and sought feedback from staff as to any alternative strategies they might have in mind. In addition, a selection criteria sheet was provided by the Trust to enable staff to identify the criteria that the Trust should use in identifying staff who would be retained.

[6] As part of that package of material, there was an individual assessment sheet provided which was supposed to give each staff member an opportunity to self- appraise themselves for the benefit of the employer and its process.

[7] Ms Allott received that material and gave evidence that she had difficulty completing the self-assessment and sought assistance from the Trust's Operations Manager, Mr Bryan Miller. The evidence before the Authority supported my conclusion that Mr Miller failed to respond to that request for assistance, although it was equally clear that he responded to similar requests for assistance from other staff.

[8] There was a meeting scheduled for 27 September 2006 at the Trust's Dunedin base. The structure of that day involved each affected staff member having a *one-on- one* meeting with the Trust and then at 4pm there was a meeting between the four *original* life coaches (which included Ms Allott) to discuss a submission drafted by another one of the *original* life coaches, Ms Bradford. At 5pm on that same day, there was in effect a plenary session involving all of the affected staff and the Trust.

[9] It is clear to the Authority (particularly from the evidence of Ms Brazil who made an impressive witness) that the process determined by the Trust in advance was not adhered to.

[10] Ms Brazil said in her evidence, which she gave as the lawyer advising the Trust, that towards the end of the 4pm meeting, *it was brought up that the staff wanted it over. This was reinforced by the 5pm meeting and the groundswell for wanting it over was overwhelming.*

[11] Ms Brazil's reference to staff *wanting it over* was a reference to the staff's enthusiasm for truncating the original process so as to have the Trust commit to making speedy decisions on the restructure.

[12] The one-on-one meetings which began the day were supposed to be concerned with both consideration of the proposal itself and consideration of the respective merits of the individual staff affected by the proposal.

[13] After the first one-on-one meeting which involved Ms Bradford, Ms Brazil told me that she talked with Mr Miller (who of course she was advising about the process) and between them they agreed to vary the original plan and *just concentrate on the proposal.*

[14] A consequence of this change seems to have been that the subsequent one-on- one meetings were somewhat shorter than the initial one with Ms Bradford and were, as a consequence of the decision I have just referred to, focused exclusively on the proposal and not on any discussion of the selection issues of individual staff.

[15] An inevitable consequence of that change in process was that in order for the Trust to make selections about who was to remain in the organisation and who was to be affected by the restructuring, the Trust was forced to rely on the self-assessment material that each member of staff had completed, or to have subsequent meetings with individuals.

[16] In responding to my questions about the significant consequences of that change, Ms Brazil acknowledged that she might have been firmer on requiring the Trust to engage with each of its staff on the selection process.

[17] Ms Brazil had this to say on this issue:

*Maybe I could have insisted on sticking with the process and maybe I could have insisted that everybody **had** to see Bryan [Mr Miller] again. I feel strongly that I made it clear they [the staff] must use that opportunity to meet Bryan again. However, only a maximum of three people saw Bryan for a one-on-one so maybe that suggested a widespread belief there was no need to see him again. I think they just wanted it over and they didn't want to do anything to prolong the process. I had an expectation that Bryan would meet with everyone but I accept that given that that did not happen those that chose not to meet with Bryan again may have been disadvantaged in the process.*

[18] Ms Allott was one of the staff who did not meet subsequently with Mr Miller because, according to her evidence, she understood that she was only to seek to see Mr Miller again *if she had anything to add.* Given the nature of the initial one-on-one meeting that she had with Mr Miller, she assumed (erroneously) that all the Trust required was any comment about the proposal itself and not comment about the reason for her being selected for retention on the staff.

[19] Ms Allott gave evidence that she had expected an interview about her suitability for retention in the organisation in effect, and had got an interview which was essentially just about her comments on the nature of the proposal on which she said she did have some views. Of course, the fact that the nature of her interview was different from her expectation was, at least in part, a function of the decision which I referred to earlier which was made by Mr Miller after discussing the matter with Ms Brazil where, to try to keep to time, it was decided that the initial one-on-one interviews would concern themselves exclusively with discussion about the nature of the proposal.

[20] Because Ms Allott chose not to meet again with Mr Miller, for reasons which I do not think the Authority can be critical of, the decision made by the Trust on who to retain in the organisation and who to let go was, certainly in Ms Allott's case, made pretty well exclusively on the written material available to the Trust.

[21] At the end of the series of meetings on 27 September 2006, Ms Allott was enjoying a social drink with a colleague and there was some banter with Mr Miller who happened to pass by. Mr Miller acknowledged that he made a remark that Ms Allott had *nothing to worry about* although he was quick to acknowledge in the investigation meeting that he wished that he had not made that remark.

[22] In the event, Ms Allott derived comfort from that observation, believed that she was secure in her position and was all the more shocked and distressed when the decisions of the Trust issued and she was unsuccessful.

Issues

[23] The first issue for determination is whether the redundancy was indeed a genuine one.

[24] Then, the Authority needs to consider whether the process used by the Trust was fair.

A genuine redundancy?

[25] Ms Allott argued that the redundancy was not genuine because her position in effect ought not to have been part of the restructure. She took that view because the two programmes that she delivered (together with the Borland Lodge work), were not directly affected by the failure of the Trust to secure the contract which resulted in the restructuring proposal.

[26] Ms Allott accepted my characterisation of her position as being in effect a *restructure everyone else, but leave me alone* position.

[27] I do not think this a very attractive argument. The Courts are traditionally loathe to interfere with an employer's right to manage its business appropriately and have avoided trying to put themselves in the place of the employer in relation to restructuring issues particularly.

[28] I am satisfied on the balance of probabilities that this is a case where the employer is justified in restructuring its business as a consequence of the change of its circumstances and that it was available to the Trust to make the decision that all of its life coaches ought to participate in the reorganisation process.

Process

[29] However, in my considered view, the process by which the redundancy was declared in relation to Ms Allott is fatally flawed and must be set aside.

[30] I reach this conclusion because of a number of substantial flaws in the process adopted by the Trust. First, by reason of the fact that the Trust determined to change the declared process for the meeting day of 27 September 2006, without adequately signalling that to the staff participating, it seems to me axiomatic that a risk existed that affected staff, including in particular Ms Allott, might not appreciate the significance of the change.

[31] Had Ms Allott realised that, in making its determination about whether she would continue in employment with the Trust or not, the Trust would rely exclusively on the defective written material without any further input

from her, she might well

have been insistent on a further meeting with Mr Miller. In the result, she said in her evidence, and I accept, that Mr Miller told her that a further meeting with him was only necessary *if she had something further to add*. On that basis, she chose not to proceed.

[32] However, she was not at that stage aware that, in considering her continued employment, the employer was relying on documentary evidence which excluded a chunk of her work, namely the Borland Lodge work. Even Mr Miller, the Trust's Operations Manager, accepted in giving his evidence that that created a distinct disadvantage for Ms Allott.

[33] That written material, in the Authority's opinion was, in Ms Allott's case, fatally flawed. On Mr Miller's evidence, Ms Allott's numerical assessment excluded a significant aspect of her job. Ms Allott was tasked with delivering services to Borland Lodge, an entity in northern Southland which provided comparable services to young people to those provided directly by the Trust. As a consequence of decisions taken by Mr Miller's predecessor, Ms Allott provided those services and was the only life coach employed by the Trust who was so involved.

[34] Mr Miller gave evidence that the arrangements in respect of the relationship between the Trust and Borland Lodge were, to say the least, confused. He readily conceded that the fact that the Borland Lodge work was not included in his evaluation of Ms Allott may have cost her job because she ended up getting fewer marks in the numerical evaluation than she would otherwise have got. This was because she was only evaluated on work that she was doing that was comparable to work done by the other life coaches.

[35] Further, Mr Miller also admitted that he relied on a disciplinary event when he says that he had to speak to Ms Allott about her relationship with Ms Blair (ironically the woman who was appointed to the role that Ms Allott sought to retain), but yet there was no record of this alleged disciplinary event and Ms Allott had no memory of it at all.

[36] Ms Allott would have been aware that the written material which she submitted might not have been as adequate as she would have liked because she asked for assistance in the completion of it and I am satisfied on the evidence I heard that Mr Miller did not respond to that request, although he responded to other similar

requests from other employees. That fact alone created unfairness because of the inequitable treatment of staff in a competitive environment, but the real deficit, in my opinion, is the failure of the employer to include in the evaluative material the effect of her Borland Lodge work.

[37] I am not persuaded that the employer's confusion about where that Borland Lodge work came from and the documentation of the relationship between the Trust and Borland Lodge is a deficit that should be visited on Ms Allott. If the employer was confused about the Borland Lodge matter (and plainly on the evidence it was), then that was a matter that it had an obligation to sort out and is not something that it can reasonably require Ms Allott to take the responsibility for.

[38] Although the alleged disciplinary issue and the "nothing to worry about" remark of Mr Miller are both referred to for the sake of completeness, having already made a finding that the process leading up to the declaration of redundancy was fatally flawed, I do not rely on either of these two matters to ground my decision. Certainly, neither of these incidents enhance the respondent's position; indeed each further weakens the respondent's argument, were that necessary.

[39] A final issue which might have had a bearing on the ultimate outcome is the question of whether the last on first off principle was part of the factual matrix for dealing with the selection of staff to be declared redundant, or not. There was conflicting evidence on whether the employer determined that principle ought to apply or not, and I have reached the conclusion that this factor had no bearing on the decision one way or the other.

[40] However, the deficits that I have referred to are, in my opinion, significant enough to require that the redundancy declaration in favour of Ms Allott be set aside. It follows that Ms Allott has a personal grievance by reason of an unjustified dismissal.

Determination

[41] Ms Allott has a personal grievance by reason of the unfair process which led to an unjustified termination of her employment on the grounds of redundancy. She is entitled to remedies.

[42] I have considered the issue of contribution and can find no evidence to suggest that Ms Allott contributed to her personal grievance.

[43] The Trust is not a commercial organisation and may not be in a position to meet a significant award. However, this is, in the Authority's judgment, a serious breach of process and a substantial award of compensation is appropriate. I award the applicant the sum of \$11,000 as compensation under [s.123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act 2000](#).

[44] The applicant has claimed for and is entitled to a contribution to lost wages and in that regard I direct that the Trust is to pay Ms Allott the sum of \$7,500 as a contribution to the wages already lost as a consequence of the unjustified dismissal and as a contribution to the continuing loss from her less well paying replacement job.

[45] Ms Allott is also entitled to recovery of the \$70 filing fee.

[46] In summary, I make the following awards:

- (a) Compensation of \$11,000;
- (b) A contribution to lost wages of \$7,500 gross;
- (c) Filing fee of \$70.

Costs

[47] Costs are reserved.

James Crichton

Member of the Employment Relations Authority