



New Zealand Employment Relations Authority Decisions

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Board v Adecco Personnel Limited (Auckland) [2011] NZERA 860; [2011] NZERA Auckland 25 (19 January 2011)

Last Updated: 18 April 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 25
5298004

BETWEEN FLEUR BOARD

AND ADECCO PERSONNEL LIMITED

Member of Authority: Yvonne Oldfield

Representatives: Ms Board in person

Karen Jones for respondent

Investigation Meeting: 22 June 2010

Submissions 20 August 2010, 8 September 2010 for Applicant ,

3 September 2010, 24 September 2010 for Respondent

Determination: 19 January 2011

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE

Employment Relationship Problem

[1] Ms Board's employment relationship problem concerns an alleged unjustified dismissal. In its Statement in Reply the respondent (Adecco) asserted that the termination of Ms Board's employment was a result of the disestablishment of her position as CEO of its NZ operation and says that it acted as a fair and reasonable employer would have done in all the circumstances.

[2] The respondent also asserted that Ms Board was out of time for filing her grievance. Section 114 (6) of the Employment Relations Act provides as follows:

"No action may be commenced in the Authority or the Court in relation to a personal grievance more than 3 years after the date on which the personal grievance was raised in accordance with this section."

[3] It is Adecco's position that Ms Board's employment was terminated by way of redundancy on 1 March 2007 and her personal grievance raised by her on 2 March in the course of a meeting with Mark du Ree, Adecco's Country Manager for Japan, Australia and New Zealand. The respondent says the matter should therefore have been lodged in the Authority by 2 March 2010. Ms Board lodged her employment relationship problem in the Authority on 5 March 2010. This was, in the respondent's submission, three days late.

[4] Ms Board acknowledges that she was aware of impending redundancy from as early as 27 February 2007 but says that the dismissal giving rise to the grievance did not occur until she was formally advised in writing that her employment had been

terminated. This written confirmation was provided by letter dated 2 March and delivered to her home by courier on Saturday 3 March 2007.

[5] She says the grievance was then raised by her solicitor in a letter dated 7

March 2007. She says therefore that her grievance was commenced in the Authority within the timeframe set by statute.

Issues

[6] This determination begins by addressing the factual questions as to when Ms Board was dismissed and whether she raised her grievance, orally, during the course of her meeting with Mr du Ree. The answer to these questions will determine whether Ms Board has commenced proceedings within the timeframe set out in [s. 114\(6\)](#) of the [Employment Relations Act 2000](#).

[7] If the proceedings were not commenced in time, further issues would arise regarding whether the Authority has a discretion to extend the time limit in [s 114\(6\)](#) of the Act and if so, whether such discretion should be exercised in Ms Board's favour.

(i) The dismissal

[8] Ms Board spent much of 1 and 2 March with Mark du Ree, whose principal purpose in visiting New Zealand at that time was to meet with her. The first of the meetings began with Ms Board being handed a letter telling her that her position was

to be disestablished immediately. Redeployment was then discussed. Since Adecco is a large international group it was possible that there could be opportunities for her to move into a comparable role offshore, however Ms Board did not speak any language other than English which restricted the roles she was in a position to consider. Ms Board also indicated that she would not go to the UK.

[9] Mr du Ree went off and checked what vacancies were current. He established that there were no suitable positions available in Australia or the US. He returned to Ms Board with that news and asked if she wished him to look at what there might be in the UK. When she confirmed that she did not want this he told her: *"I guess we have to have the discussion about redundancy then."* Negotiations for a redundancy package began and continued through the day.

[10] The discussions of 1 March concluded with Mr du Ree showing Ms Board (as a courtesy) the draft of a statement he proposed to issue to inform her staff that she was leaving. Ms Board then went home to consider, overnight, Mr du Ree's final offer which was conditional on her agreeing that it be a full and final settlement of all employment related matters.

[11] Ms Board and Mr du Ree met again on Friday to continue their negotiations. Ms Board reiterated a counter offer but no agreement was reached. Ms Board's departure was announced to other staff in an email on the afternoon of Friday 2

March. Her final pay (consisting of her contractual entitlements only) went into her bank account that night and written confirmation of her dismissal was couriered to her the next day.

Determination

[12] In answer to questions from the Authority Ms Board acknowledged that the point where she understood that her employment was being terminated came during the second of the meetings that took place between her and Mark Du Ree on 1 March

2007.

[13] I am satisfied that Ms Board was dismissed then. She had already been told that her position was being disestablished. Once it had been established that there

were no suitable redeployment options and they moved on the discuss redundancy packages, she knew her employment was at an end. If there was any doubt, the presentation of the statement to be made to staff made it abundantly clear that she was being "sent away."

[14] The fact that Ms Board and Mr du Ree were still discussing a possible redundancy package does not change this conclusion. Right up to the end of March 2 she had the choice of agreeing to a full and final settlement or taking her contractual entitlement (six months pay in lieu of notice) and reserving her position. Nothing was going to change the fact that she was going, however, and Ms Board knew that.

(ii) Raising the grievance

[15] As part of her evidence Ms Board provided the Authority with a transcript of a recording she took of the meetings of 1 and 2 March. Mr du Ree was not aware at the time that any recording was being made and the respondent has not been provided with the digital file from which the transcript is said by Ms Board to have been prepared. The respondent is not

prepared to accept that the transcript is a complete and accurate record of all the discussions that took place that day however Mr du Ree does recall and accept some of the content, including content which the respondent says amounts to the raising of a personal grievance. Both parties agree that on the question of whether the grievance was raised in the course of these meetings, the transcript is the best evidence before the Authority.

[16] A close reading of the transcript has therefore been required. A number of points were identified where Ms Board referred to matters of concern to her and/or the possibility that the parties might end up in litigation over the ending of her employment. During the latter part of 1 March Ms Board is recorded as:

- i. noting that a Chief Operating Officer had been recruited for New Zealand at a time when (she believed) the decision to disestablish her role must already have been made going on to say that she should have been given the option of that role, and suggesting to Mr du Ree that he might like to take advice on the matter;
- ii. telling Mr du Ree, in the course of discussion of a potential offer: *“I don’t want to spend the next 12 months fighting in the employment court...”*
- iii. suggesting that they explore the *“eligible termination option”* which she explained as being where: *“someone takes a personal grievance ...if a settlement is actually agreed at mediation there’s a method by which the payment to the person is paid as a settlement amount rather than an employment termination amount. It’s paid to the solicitor trust account which enables the PAYE to be adjusted.”*

[17] The next day Ms Board opened the meeting by telling Mr du Ree that she had had *“some pretty sound advice and they’re telling me my case is very strong...”*

[18] Ms Board went on to spell out a number of specific concerns: she had been given assurances the previous September that her job was not in jeopardy and in reliance on that she had passed up another offer of employment; her job prospects had been undermined by what had happened, and the Employment Court *“would view this as a pre- determined plan to oust me.”*

[19] The transcript had Ms Board continuing:

“I see we have a couple of choices here...one is for me to walk out of here with my six months payment in lieu of notice and that’s it in which case... I will take action and not only that I’ll be forced to defend myself in the public domain...”

The alternative is that we do review how we might be able to structure something so that it’s maybe palatable ...for both parties.”

[20] After some further exchanges about Ms Board’s stock options Mr du Ree stated:

“if you want to fight in court we’ll fight in court.”

[21] Again, the conversation moved to specifics (this time about the company’s performance) before Ms Board told Mr du Ree that she was leaving the following Wednesday on a pre-planned trip overseas and:

“assuming there’s no further discussion between now and then, then I’ll lodge the appropriate paperwork before then”

[22] The meeting ended without agreement. Mr du Ree told Ms Board to *“keep her phone for now”* (so that he could contact her) and he would *“have a chat”* with his manager. Meanwhile, however, he said that he would *“arrange the paperwork for six months”* (her contractual entitlement to pay in lieu of notice.)

[23] Mr du Ree’s chat with his manager did not of course lead to a change in the respondent’s position. By the next day, Ms Board had been given her final pay and written confirmation of her dismissal.

Determination

[24] I have set out relevant extracts of the transcript because it is Adecco’s position that taken as a whole, Ms Board’s references to her concerns and to taking further action must be construed as the raising of a grievance. However, I am unable to accept this submission. I construe the conversation recorded in the transcript as follows.

[25] Ms Board set out a number of concerns and questioned the fairness of the events that led to her dismissal for redundancy. Then she referred to a personal grievance in the context of the tax advantages of describing part of a redundancy package as compensation. Her objective there was to avoid tax, not to get Adecco to address the grievance itself.

[26] She went on to make it clear that if the respondent did not agree to her counter-offer for a redundancy package she would pursue action in relation to her employment relationship problem (action which she believed had a good chance of success.)

[27] One interpretation of this is that Ms Board was saying that if she did not get what she wanted, she would raise a grievance (that is, she had yet to do so.) The alternative interpretation (which supports the respondent’s position) is that Ms Board had already raised a grievance and was now threatening to escalate matters (by commencing proceedings in the

Authority) if her counter offer regarding the package was not accepted.

[28] I have not been convinced by this submission. I consider Ms Board's statements to be consistent with an assertion that she would raise a grievance if Adecco did not meet her requests (an assertion made in the belief that she had not yet done so.)

[29] Ms Board's subsequent conduct was fully consistent with this interpretation of what passed between her and Mr du Ree on 2 March. In the week which followed, after it was confirmed that there was no change in Adecco's position, her solicitor wrote saying that he was raising a grievance on her behalf.

[30] I am satisfied that the grievance was raised by this letter and not before.

[31] It follows that Ms Board has commenced her personal grievance action in the Authority within the three year timeframe set out in [section 114](#) (6). There is no need for me to consider the issue of the Authority's discretion to extend the timeframe.

Yvonne Oldfield

Member of the Employment Relations Authority

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