

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 170/10
5286689

BETWEEN

LARA CUNNINGHAM
Applicant

A N D

RICOH NEW ZEALAND
LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Janet Marquet, Counsel for Applicant
David Luttig, Advocate for Respondent

Investigation Meeting: 6 July 2010 at Dunedin

Determination: 1 September 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Cunningham) alleges that she was unjustifiably dismissed during a restructure and that the dismissal was neither procedurally fair nor genuine. Those claims are resisted by the respondent (Ricoh) which maintains that the restructure was genuine, that the process used in considering Ms Cunningham's position was considerate and fair and that the conclusions reached were available to be reached by a fair and reasonable employer.

[2] Ms Cunningham was employed by Ricoh at its Dunedin branch as the branch administrator and she had been in that position for about 6½ years when, during the course of maternity leave, she received a letter from Ricoh advising of a restructure which affected her position. The essence of the proposal under consideration was the amalgamation of the administration function (which she performed) with the warehousing logistics function which was then performed by others.

[3] A meeting was arranged for 21 April 2009 to discuss the proposal. Two days after the meeting, a document issued from Ricoh documenting the proposal and

formally seeking comment from Ms Cunningham. There were various telephone discussions between Ms Cunningham and Ricoh's human resources manager (Mr Luttig) but eventually, by email dated 27 April 2009, Ms Cunningham proposed a financial settlement with Ricoh to resolve matters. Then, early on the morning of 29 April 2009, Ms Cunningham told Mr Luttig that she was absolutely not interested in the new role with the company and he promptly responded to that advice by confirming that her position was disestablished and in consequence she herself was redundant. There was dispute between the parties as to whether Ricoh had made it clear to Ms Cunningham that the new position created in part from her old position was available to her if she wished to have it.

[4] Then, by email dated 21 May 2009, Ms Cunningham advised Ricoh that she would accept *as a gesture of good faith ... \$10,000 net – full and final settlement*. This email effectively followed on from her earlier email of a month earlier (27 April 2009) in which she had told Ricoh that she sought *an amicable agreement and a settlement that is pleasing to both parties or I will be taking legal action ...*. The proposal that there be *a settlement* was never accepted by Ricoh and Ms Cunningham was subsequently as good as her word, sought legal advice and raised a personal grievance. The matter then proceeded to the Authority in the usual way after unsuccessful mediation.

[5] Before the determination issued, an application dated 26 July 2010 was filed in the Authority seeking to reopen the Authority's investigation on the basis that fresh evidence had come to hand. At the telephone conference that I convened to progress this application, I directed that Ms Cunningham was to provide that fresh evidence to me to consider. It became clear that the prospective witness wished to remain anonymous. I made it clear that this was problematic in an open process. I agreed to review the proposed evidence first before making it available to Ricoh.

[6] When that material came to hand, I concluded,, in the words of my Minute of 17 August 2010 that ... *there was nothing in the statement which would encourage me to reopen the investigation* My Minute went on to confirm that the application to reopen was denied and that that matter would be traversed in this determination, along with the Authority's conclusion in respect of the substantive issue.

Issues

[7] It will be convenient if the Authority looks at the following broad issues:

- (a) What happened at the meeting on 21 April 2009; and
- (b) What happened after the meeting.

What was the purpose of the meeting on 21 April 2009?

[8] It is common ground that the meeting was convened on 21 April 2009 to consider Ricoh's proposal to bring together two significant aspects of its Dunedin branch operation so as to take out costs. Because one of the elements which Ricoh sought to bring together in this new arrangement was the administration work that Ms Cunningham was performing, of necessity Ms Cunningham had to be consulted, and that was the purpose of the meeting on 21 April. I am satisfied that the meeting was the beginning of the process of consultation and nothing I heard at the investigation meeting satisfied me that Ricoh was doing anything other than advising of an indicative proposal and seeking comment on it. In her evidence before the Authority, Ms Cunningham herself said that she regarded the discussion at the meeting as being about an *unformed proposal*. What she meant by this expression was a proposal that was not yet fully developed but was very much in concept stage. Ms Gill, who was Ms Cunningham's support person at the same meeting, did not agree with that way of expressing it and indeed her view was that the matter had already been decided. Mr Luttig told me that, at the point the meeting was held, the company was simply talking about a concept, an idea, and was seeking feedback on it. He pointed out that Ms Cunningham was very experienced in the branch, given her years of service, and that the company genuinely sought her input.

[9] Despite Ms Gill's impression of the meeting, I am satisfied that Ricoh had a preliminary proposal, wanted to discuss that with Ms Cunningham, and genuinely wanted her thoughts on what it was contemplating. The evidence I heard from Ms Cunningham herself and from both Mr Luttig and Mr McGarry, the branch manager, all satisfy me that the discussion on 21 April 2009 was about a proposal in the early formative stages.

[10] By all accounts, the meeting went tolerably well initially, until Ms Cunningham became painfully aware that the consequences of the discussion

might lead to the disestablishment of her role, at which point she became understandably less engaged. I conclude that this proposal was being discussed at an early stage, because the proposal document was not available at the time of the meeting and was only made available to Ms Cunningham two days after the meeting, and the name of the potential alternative position had not even been decided upon at the point at which the meeting took place.

[11] Despite her acceptance that the meeting was concerned with a preliminary proposal, Ms Cunningham maintained that the restructure was simply a device to get rid of her and was not a genuine redundancy situation at all. She calls in aid of this view her conclusion that the meeting was not a genuine part of a consultation but that Ricoh *simply wanted rid of her*. Ms Gill supported that conclusion with her own view that the meeting was *merely going through the motions*.

[12] By contrast, both Mr Luttig and Mr McGarry gave me evidence of the purpose and extent of the proposal, how it had its genesis and the amount of money that it would save the branch by way of reduced costs.

What was Ms Cunningham's view?

[13] It seemed that Ms Cunningham's basis for cynicism about the purpose of the meeting was an eleventh hour discovery that Mr McGarry, the branch manager, had been *bad mouthing* her during her absence on maternity leave. I refer to this intelligence coming to Ms Cunningham at the eleventh hour because it seems that she only became aware of this fact immediately before the 21 April meeting. She was clearly concerned about what she had been told by the woman who replaced her as a temporary employee during Ms Cunningham's maternity leave. Ms Cunningham's informant, Laurinda Ferreira, told Ms Cunningham that Mr McGarry had made a number of uncharitable remarks about Ms Cunningham's work and on one occasion had become angry and had said something to the effect that he would want to punch Ms Cunningham in the face if she appeared in the workplace again.

[14] These are extraordinary allegations of course, all the more so because when I put them to Mr McGarry at the investigation meeting he acknowledged that he had made uncharitable observations about Ms Cunningham and that he was very ashamed of himself. He said they were made in the heat of the moment when he was angry about something that he thought she had done (or more likely not done), and while he

did not remember the particular words that Ms Ferreira attributes to him, he regarded her as an honest woman and thought that she would not have made things up.

[15] I think the very heart of Ms Cunningham's employment relationship problem is her conviction that Ricoh was not prepared to deal with her allegations about Mr McGarry's behaviour.

[16] During the course of the 21 April meeting, Ms Cunningham asked to speak privately to Mr Luttig. Mr McGarry left the room in consequence and Ms Cunningham raised these issues with Mr Luttig. He clearly was *blind sided* by these allegations and on his evidence sought further and better particulars and permission to talk to Mr McGarry direct. Ms Cunningham at that point did not have a written statement from Ms Ferreira although that document became available to the Authority later and was dated 20 April 2009. That is probably the date it was created on Ms Ferreira's computer but is certainly not the date that Ms Cunningham came into possession of it. When Ms Cunningham got the document some time later, she provided it to Mr Luttig. However, what she never did was allow Mr Luttig to put it to Mr McGarry. I am clear on the evidence that Ms Cunningham refused to give Mr Luttig that authority at the meeting on 21 April and it is plain from the email traffic subsequently that she refused in writing for Mr Luttig to take the matter up with Mr McGarry.

[17] Mr Luttig does not remember exactly what he said at the meeting on 21 April 2009 on this issue, but he thinks it likely that he would have talked about the necessary process and perhaps referred to natural justice requiring Mr McGarry to have an opportunity to answer what plainly was a very serious allegation. Ms Cunningham, on the other hand, clearly expected more from Mr Luttig. She expected Mr Luttig to engage fully with her on the subject and she accuses Mr Luttig of shutting the discussion down prematurely and refusing to take the matter up again subsequently. Mr Luttig of course was saying that there was nothing to discuss until he had both the statement from Ms Ferreira and permission to raise it with Mr McGarry, while Ms Cunningham really sought a further discussion with Mr Luttig. I am satisfied that if Mr Luttig had been able to explain to Ms Cunningham why he could do nothing more, she may well have accepted the situation, but nothing turns on that by itself.

[18] I am absolutely satisfied that this issue had nothing whatever to do with the company's decision to look at a restructure which affected Ms Cunningham and that the contention Ms Cunningham makes that the restructure was no more than a cover up by Mr McGarry to get rid of her is simply not made out. The evidence is overwhelming that Ricoh sought to take costs out of the business and that this proposal which it came up with, was an obvious way of doing it.

[19] Equally importantly, Mr McGarry's frank admission that he did say some uncharitable things about Ms Cunningham but that he was ashamed of himself, also seems to me, in a counter-intuitive way, to support Ricoh's position that it was genuinely looking at cost rather than at a way to get rid of Ms Cunningham. Furthermore, while no doubt the branch manager was consulted and involved in the restructure, the process was driven by head office in Auckland through Mr Luttig who, I am satisfied, never regarded the issue with Mr McGarry's as anything more than a bare allegation which he was unable to take any further.

What was Ricoh's view?

[20] Ricoh maintains that it always wanted to leave open the possibility that Ms Cunningham would be interested in performing the new role such that, even although her own position was perhaps to disappear as a consequence of the restructure, the new position which could replace it could potentially be filled by her. That was a constant theme in the evidence of Ricoh and I accept it as truthful. That being the position, Ms Cunningham's claim that she was being singled out for dismissal under cover of redundancy simply does not stand up.

[21] Ricoh says that during the course of the 21 April meeting, it made it clear to Ms Cunningham that if she wanted the position that would have been created by the amalgamation of her position and the stores/warehouse role, then it would make that possible. Ms Cunningham does not accept that she ever received that message, although it was expressed quite explicitly in the evidence from Ricoh. It is also clearly set out in Ricoh's statement in reply in the following terms:

During this consultation meeting (the 21 April 2009 meeting) it was explained to the applicant (Ms Cunningham) that if she is [sic] in any way interested in taking up the new role of branch coordinator she would have been accommodated in said role.

[22] Whatever Ricoh's intentions in communicating that intelligence to Ms Cunningham at the meeting, it is plain on the evidence that that message was not received. Ms Cunningham makes no reference to that aspect at all in her written brief of evidence and when I questioned her about it at the investigation meeting, she said only that she understood that she could apply for it if she had the skills and was interested. Ms Gill, whose evidence impressed me, had a similar recollection.

[23] It is timely then to summarise the Authority's conclusions in relation to this meeting. First, as I have emphasised, I am satisfied that this was a genuine consultation about a genuine restructure and it was being undertaken at an early stage in the process before everything had solidified and certainly in ample time to allow Ricoh to take on board any sensible suggestions from affected staff members. I am not persuaded then by the suggestion that this was no more than a sham to get rid of Ms Cunningham because Mr McGarry thought poorly of her. Clearly, Mr McGarry frankly acknowledged the observations that he had made, said that he was ashamed of them, said that they were made in the heat of the moment and did not actually represent his view of Ms Cunningham. Finally, I am persuaded that Ricoh genuinely wanted Ms Cunningham to be available for the new role and genuinely wanted input from her about the proposal. However, I am satisfied that Ms Cunningham did not understand from the meeting on 21 April 2009 that the new position *was hers if she wanted it* as Mr Luttig expressed it in his oral evidence to the Authority.

What happened after the meeting?

[24] Once the meeting concluded, Ricoh expected Ms Cunningham to provide it with feedback on the proposal and to indicate whether she would be interested in fulfilling the new role. As to the first, I have already noted Ms Cunningham's email suggestions to Ricoh that it make a financial settlement with her and I note that such an approach clearly made Ricoh doubtful that Ms Cunningham was genuinely interested in participating in its process other than for the purposes of obtaining a financial settlement. What is more, it is clear from the evidence before the Authority that Ms Cunningham made no other contribution to the debate about the proposal beyond the solitary observation that she had made during the course of the meeting, namely to ask the question whether she would be able to work part time.

[25] In respect of the issue of whether Ms Cunningham was interested in the new position created, she made it clear within a short period after the meeting that she was

not interested. Ricoh had formally indicated in writing on 27 April 2009 that it was prepared to consider her for the new position. Although the phrasing is not as unequivocal as the oral evidence advanced by Mr Luttig in the Authority's investigation meeting, it seems to the Authority clear enough that Ricoh was asking Ms Cunningham if she was interested in the new role.

[26] Her response, which came in a conversation with Mr Luttig first thing on 29 April 2009, was to say that her health precluded her being interested. Mr Luttig remembered that conversation and referred to it in his evidence before the Authority. He says that Ms Cunningham was assertive and very clear about her position. It seems that Ms Cunningham has a heart condition and would not be able to undertake any physical lifting of the sort that she had in contemplation in respect of the physical part of the proposed new role. In essence, Ricoh was proposing that the new position would involve approximately equal parts of Ms Cunningham's old administrative role and a new commitment to run the warehousing/stores aspect. In the latter connection, as well as recording parts and materials coming into the store and going out, she would also be involved in the physical assembling and disassembling of machines and in the movement of machines. Of course, photocopying machines are very heavy pieces of equipment, and at the relevant time, there was no lifting gear in the warehouse. What happened was that four men would lift a machine whenever that was necessary.

[27] None of this was discussed at the 21 April meeting and the prospect that lifting might be an issue was not raised by either party, either then or subsequently. Since Ms Cunningham's dismissal for redundancy, Ricoh has invested in a lifting apparatus which is capable of being operated by one individual without any physical strength required.

[28] I am satisfied that both parties erred in this part of the consultation. Each had an obligation, I hold, to raise with the other the full nature and extent of what was required and the way in which the matter could be addressed. Ricoh certainly should have raised the issue with Ms Cunningham because it had her health status (including her heart condition) on her human resources file. It knew, or ought to have known, that lifting would be an issue for her. Even without the medical issue, Ms Cunningham is a slight young woman and it is reasonable to expect a good and

fair employer to recognise that such a worker might not relish the prospect of working with machines that require four grown men to lift.

[29] However, exactly the same observations can be made in mirror image in respect of Ms Cunningham. She should have been assertive on this issue; clearly she was assertive on others. Ms Cunningham too should have raised with the employer her health status (which clearly was not foremost in its mind at the relevant time) and should have explored what could or should be done to resolve any difficulties. I think the reality is that Ms Cunningham anyway closed her mind to the question of whether she could take on this new challenge and Ricoh's message that it wanted her to consider it was simply not received by her.

[30] In any event, Ricoh, having been told that Ms Cunningham was not interested in the role, promptly responded to that information by writing to Ms Cunningham and confirming that she was indeed redundant. Ms Cunningham argued that she was under pressure after the 21 April meeting to conclude matters with Ricoh but Ricoh denies that. Ricoh's evidence is that if Ms Cunningham wanted more time, that would have been readily given because there was no particular timeline that Ricoh was working to. I do not think Ms Cunningham has made out her claim that she was put under pressure by Ricoh. Indeed, I think the pressure was the other way round; once Ms Cunningham had both failed to provide any feedback to Ricoh other than to suggest a settlement on the one hand, and refused the new position unequivocally on the other, there really was little else that Ricoh could do other than proceed with the restructure and disestablish her position.

[31] The Authority's conclusions then are that Ms Cunningham had the opportunity to make comments about Ricoh's proposal and save for her request for a settlement, she chose to make no proposals at all. Furthermore, Ms Cunningham chose to confirm just eight days after the meeting that she was not interested in the new position and in consequence Ricoh was justified in concluding that it could proceed with its reorganisation and that in respect of Ms Cunningham's position, its only option was to disestablish it.

Was the new position substantially different from the old?

[32] Ms Cunningham maintained in her evidence that the new position was substantially the same as the old position that she had occupied. She observed

correctly that the tasks required of the new position which had previously been performed in the old role were the same or similar, but she overlooked the significant component in the new role of tasks which were not required at all in the original position. Ricoh 's evidence was that between 40% and 60% of the new position was different from the old role involving, as it did, warehousing and stores operations with particular emphasis on hands-on involvement with the machines themselves.

[33] I told Ms Cunningham during the course of the investigation meeting that I was satisfied on the evidence before the Authority that there was absolutely no basis for her conviction that the jobs were little different and that the reality was that the content of the new job was roughly 50% different from the old.

[34] Accordingly, I do not accept Ms Cunningham's contention that the new position was not just that, a genuinely new position with substantially different work requirements.

[35] It is this conclusion which was challenged by Ms Cunningham in her application to reopen the Authority's investigation. She claimed that new evidence, after the investigation meeting, had disclosed that my conclusion on this aspect was wrong. I reviewed that new evidence and did not agree.

[36] First, the witness sought anonymity. That posed difficulties in disclosure to the employer Ricoh. Natural justice required that Ricoh be able to respond to and challenge the evidence.

[37] Second, the evidence was not, of itself, compelling, effectively dealing with a small aspect of the question of whether the new position was actually new.

[38] Third, the question whether the new position was substantially different or not is simply a part of the factual matrix that the Authority must decide and the other aspects would be untouched by any revisiting of this issue.

[39] Finally and most fundamentally of all, looked at in the round, the question for the Authority is whether a failure to reopen creates the prospect of a miscarriage of justice. I conclude that, even if the Authority were able to overcome the procedural hurdles to deal with this evidence from a *secret* witness, the prospect of **any** change in the Authority's view is so slight as to be minuscule, and then that change would only impact on a very small part of the decision matrix.

Determination

[40] Ms Cunningham alleges that she was unjustifiably dismissed for redundancy. I am satisfied that that claim is not made out.

Costs

[41] Costs are reserved.

James Crichton
Member of the Employment Relations Authority