

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 281
5406057

BETWEEN

LINDA ELLIOTT
Applicant

A N D

AGE CONCERN RODNEY
INCORPORATED
Respondent

Member of Authority: James Crichton

Representatives: Greg Bennett, Advocate for Applicant
Tom Skinner, Advocate for Respondent

Investigation Meeting: 17 June 2013 at Auckland

Date of Determination: 4 July 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Elliott) alleges that she suffered disadvantage as a consequence of unjustified actions of the respondent (Age Concern Rodney) and was also unjustifiably dismissed by Age Concern Rodney when Age Concern Rodney made her position redundant.

[2] Age Concern Rodney resists both of Ms Elliott's claims.

[3] Ms Elliott commenced a period of sick leave on 14 October 2011. That sick leave turned into a protracted absence. In fact, Ms Elliott was unfit to work according to her general practitioner from that date down to 23 November 2011.

[4] However, on 1 November 2011, Ms Elliott rang the offices of Age Concern Rodney to indicate that she was feeling better and could return to her work as a van driver with Age Concern Rodney, shuttling patients from their district to various

medical appointments. Ms Elliott was told by Age Concern Rodney that she would need to obtain a clearance from her doctor to return to work.

[5] There was a second conversation between Ms Elliott and Age Concern Rodney on 1 November 2011, again over the telephone. The evidence is clear that the chairman of Age Concern Rodney, Mr Tom Mayne, rang Ms Elliott and it is her evidence that Mr Mayne told her that there was “*no need for her to come in as there was no longer a job for her*”. Conversely, the evidence for Age Concern Rodney is simply that Mr Mayne emphasised to Ms Elliott that she could not return to work unless and until she had a medical clearance to do so from her doctor (in effect, that her “feeling better” was not sufficient to enable her to return to duty and that she would have to get a medical clearance first).

[6] The dispute about what was said in that telephone discussion is, to some extent, complicated by the fact that Mr Mayne is very elderly, now in poor health, and is, on the evidence of Age Concern Rodney, suffering a medical condition which makes him confused. The Authority sought to speak to Mr Mayne but was assured that this would not be practicable.

[7] However, Ms Catherine Smith, the general manager of Age Concern Rodney, gave evidence to the Authority that she was with Mr Mayne when he made the telephone call to Ms Elliott, and that Mr Mayne did not say to Ms Elliott that she need not come in because there was no job for her. Ms Smith was adamant that all Mr Mayne had emphasised was that if Ms Elliott was indeed better, she would need to get a medical certificate before she returned to work.

[8] The issue is important because Ms Elliott’s evidence proceeded very clearly on the footing that she had been dismissed in this telephone discussion with Mr Mayne on 1 November 2011 and that the subsequent consultation between her and Age Concern Rodney about the disestablishing of one of the three van driver positions, took place after her actual dismissal.

[9] Conversely, Age Concern Rodney denies that Ms Elliott was dismissed in the telephone discussion with Mr Mayne, maintains that the consultation process that was entered into fulfilled its legal obligations and resists Ms Elliott’s claim on that footing.

[10] Age Concern Rodney told the Authority that it had a number of separate funding streams to assist it to run the three van shuttle service for residents of its

district. One of the funding sources became compromised during 2011. The Authority was told that there were staff meetings in May 2011 at which Ms Elliott was present, to flag this funding shortfall.

[11] In early September 2011, Age Concern Rodney lost the carriage of dialysis patients altogether. The effect of that was to reduce the total number of patients requiring transport, thus reduce the total number of transfers required, and therefore reduce the number of operational hours that were required and were able to be funded.

[12] In effect, this is a classic redundancy situation. A service that had been established on particular parameters suddenly was in an over-supply situation with more service being provided than the reduced demand (and funding) required.

[13] Age Concern Rodney took legal advice and the consequence of that was that a plan was provisionally formulated, the burden of which was either that there would be a reduction of one van (that is from three vans to two vans), or there would need to be a reduction in hours across the board to be equally shared by the pool of drivers. In its starkest terms then, the provisional plan required the termination for redundancy of one of the van drivers or an agreement between all three of them that each would reduce their hours by a like amount so as to get the total hours being funded down to the level which met the new, reduced, demand.

[14] Ms Smith determined to have an individual meeting with each of the three drivers and she attended to that on 4 November 2011. The Authority is satisfied with her evidence that each of the drivers had explained to them the financial position of Age Concern Rodney, and was told that in Age Concern Rodney's opinion, the only two plausible solutions were either for all three drivers to agree to reduce their hours by a like amount to get down to the total number of hours that Age Concern Rodney could now afford to fund, or for one of the three van drivers to accept their position was redundant and leave the employment as a consequence. Ms Smith encouraged the three drivers to meet together and talk about the prospect although the evidence available to the Authority suggests that that meeting of the three van drivers never actually took place.

[15] No further steps seem to have been taken by the three affected employees; there was no request for further information from any of them, no evidence that there had been a meeting between the three of them and in consequence, Age Concern

Rodney felt the only proper step it could take was to consider which of the three employees' positions should be disestablished. They decided that Ms Elliott's position was the one that should be disestablished principally, it seems, because of two factors. The first was that Ms Elliott was still on sick leave at the time these events played out and had never taken any steps to amend her medical certificate as requested and secondly because Ms Elliott was the most recent employee of the three van drivers and so on the "last-on/first-off" principle, her position should be disestablished first.

[16] That decision was conveyed by letter dated 8 November 2011 from Age Concern Rodney. Ms Elliott's two personal grievances were promptly raised after the parties had attempted to resolve matters on their own terms.

Issues

[17] The Authority needs to consider the following questions:

- (a) What happened in the telephone discussion on 1 November 2011;
- (b) Was this a genuine redundancy;
- (c) Was the consultation adequate; and
- (d) Was the selection process fair?

What happened in the telephone discussion on 1 November 2011?

[18] For the sake of completeness, the Authority notes that there were two telephone calls between the parties on 1 November 2011, the first of which was initiated by Ms Elliott, indicating to Ms Smith, the general manager of Age Concern Rodney, that she was feeling better and was able to return to work. In that call, there seems to be an acceptance by both parties that the burden of Ms Smith's side of that call was to make the point that Ms Elliott needed to get a clearance from her doctor before she could return to duty.

[19] It is the second call that is more controversial. This appears to have been initiated about half an hour after the first one and occurred as a consequence of Mr Mayne, Age Concern Rodney's chairman, coming into the office. Ms Smith reported to him on the conversation that she had just had with Ms Elliott and

Mr Mayne announced that he would ring Ms Elliott himself and reiterate the point about her getting a medical clearance. Ms Smith heard Mr Mayne's end of that call because she was in the same room with him when he made it.

[20] Accordingly, there are two recollections before the Authority of what that call was about. Ms Elliott on the one hand says that she was told by Mr Mayne that there was no need for her to come in because the job had gone, and that in effect constituted her dismissal. Conversely, Ms Smith says that nothing of the kind was conveyed and that Mr Mayne simply reiterated the point that if Ms Elliott wished to return to work, she would need to get a clearance from her doctor, and that it was not enough for her to simply indicate that she was "feeling better".

[21] The Authority prefers Ms Smith's recollection of the call to Ms Elliott's. While Mr Mayne may be confused now, there is nothing to suggest that he was confused in November 2011 or at least so confused as to get the message absolutely wrong. Indeed, as the Authority is satisfied that Ms Smith heard the call between Mr Mayne and Ms Elliott, and that Ms Smith gave truthful honest evidence, it is available to the Authority to conclude that Age Concern Rodney's evidence of that telephone discussion is to be preferred. That is not to say that Ms Elliott was giving untruthful evidence, only that she was mistaken about the message from Mr Mayne.

[22] Ms Elliott's confusion, if any, about the message, may well have been reinforced when she was eventually notified of her redundancy by letter dated 8 November 2011. The first two paragraphs of that letter are relevant to the point:

This letter is to confirm my discussion with you on the telephone on Tuesday 1st November 2011.

It is with reluctance that we have decided to declare your position redundant under claim [sic] 34.1 of your employment agreement.

[23] The letter is signed by Mr Mayne as chairman. The Authority is satisfied that one reading of those two paragraphs is that they are conjunctive, that is that the second paragraph simply continues the message being conveyed in the first. On that reading, one might conclude that the writer was saying that Ms Elliott had been declared redundant in the telephone discussion on 1 November 2011.

[24] However, the converse of that proposition, which Age Concern Rodney not unnaturally prefers to advance, is that the two paragraphs are disjunctive and in

consequence, the second paragraph is supposed to reflect a new idea, namely the conveying of the redundancy, which on this analysis, was not foreshadowed in the first paragraph which refers to the earlier telephone discussion.

[25] Having heard the evidence of the parties and reflected on the issue, the Authority is satisfied that the better view is that the two paragraphs in question are indeed to be read disjunctively, that is that the second paragraph is not meant to qualify the first and does not continue the same idea but rather starts a new one. On that basis, the first paragraph stands alone and the rest of the letter conveys the intended redundancy.

[26] It follows from the foregoing discussion that the Authority does not accept Ms Elliott's proposition that she was dismissed in the telephone call on 1 November 2011. The Authority is satisfied that all that happened in that telephone discussion with Mr Mayne was that he reiterated the point already made by Ms Smith in an earlier telephone conversation with Ms Elliott on the same day, namely that she could not simply return to work if she felt better but needed to get her medical certificate varied by her doctor before she could contemplate a return to duty.

[27] Moreover, it is difficult to understand why Ms Elliott would have willingly participated in the employer's consultation process, which the evidence shows she did, if she had already been dismissed.

Was this a genuine redundancy?

[28] The Authority is satisfied on the evidence it heard that there could be little question that the redundancy was genuine. Indeed, to be fair to Ms Elliott and her experienced advocate, there was no real argument that the redundancy was not a genuine one; the concern relating to consultation and process rather than to substance.

[29] In any event, for the sake of completeness, the Authority has been provided with evidence about the financial performance of the shuttle service. Age Concern Rodney keeps the shuttle service separate in its books of account such that the service is separately accounted for from the rest of Age Concern Rodney's activities. The effect of that material is to disclose that, as a consequence of the action taken by Age Concern Rodney, the net operating deficit has been effectively reduced in each of the succeeding financial years after the declaration of Ms Elliott's redundancy with the major reduction being in the year in which she was made redundant.

[30] In those circumstances, the financial evidence before the Authority supports Age Concern Rodney's other evidence that it needed to act to take cost out of the operation, that as a consequence of doing that, the cost was taken out and although in the last complete financial year the service is still running at a small deficit, that deficit had been dramatically reduced.

[31] Moreover, the Authority is satisfied that the evidence discloses that when Ms Elliott had her position disestablished, an operational van was removed from the service and neither the van nor the driver has been replaced. The evidence is clear that there are now two vans and two drivers whereas previously there had been three vans and three drivers.

[32] The Authority is not persuaded then that there can be any challenge to the genuineness of the redundancy.

Was the consultation adequate?

[33] There is no doubt that the consultation commenced appropriately enough with individual meetings between Ms Smith and each of the drivers.

[34] Ms Elliott's own evidence to the Authority about her meeting with Ms Smith on 4 November 2011 indicates that only the two women were present and that she was asked whether she had any ideas about how to fix the problem which was explained to her. Ms Elliott told the Authority that she had been advised by Ms Smith in this meeting that Age Concern Rodney needed to "*get rid of a van*" and that it was looking for ways to achieve that so that it could reduce its costs appropriately. Ms Elliott also agreed that Ms Smith had suggested to her that as well as coming up with any suggestions she might have, talking to the other drivers would be an appropriate strategy to see if, between the three of them, they could come up with any strategies and in particular to see if there was any acceptance of a general reduction in hours to achieve the desired result.

[35] Although Ms Elliott could not remember this, Ms Smith was adamant that she told Ms Elliott (and the others) that they were to revert to her with any responses. Age Concern Rodney's evidence is that, because it got no response from anybody, it determined that it had to make the selection on a straightforward redundancy basis.

[36] But the question for the Authority is whether that is good enough. Ms Elliott's advocate, not unnaturally, drew attention to the length of time from the consultative meeting between the parties on 4 November 2011 to the letter declaring redundancy on 8 November 2011. As the Authority was reminded, that is four calendar days. Even if the employees had been minded to have a meeting to see if they could resolve matters by agreement, perhaps by all agreeing to take a reduction in hours, or by some other device which the employer had not thought of, there would have been barely enough time for such a meeting to be arranged.

[37] The evidence before the Authority suggests that there was no enthusiasm for such a meeting from the employees but that begs the question of whether they had sufficient time and also whether it is enough that Age Concern Rodney did not follow the matter up with the employees.

[38] Ms Smith's evidence is that she told each of the employees in the consultative meeting that she held with each of them that they were to come back to her. When none did, four days later Age Concern Rodney made Ms Elliott redundant.

[39] The question for the Authority then is, applying the law of justification as the latter is set out in s.103A of the Employment Relations Act 2000 (the Act), whether a good and fair employer could have concluded that four calendar days was enough for the employees to engage with each other to see if anything came out of that process. The Authority has concluded that that is not a conclusion that a good and fair employer could reach in the particular circumstances of this case.

[40] Furthermore, the Authority must ask whether a good and fair employer could have concluded that it was enough to leave the onus on the employees to consult with each other and then revert to the employer rather than for the employer itself to take the initiative and follow matters up with the employees. Again, after due reflection, the Authority has concluded that a good and fair employer could not conclude that it was enough to leave the onus on the employees to revert to the employer.

[41] The Authority has reflected on whether the size of the employer and its evident absence of any human resources support in-house are sufficient to protect it from the ordinary consequences of failings of the kind identified. The Authority's conclusion is that no matter what the size of the employer, and no matter how poorly resourced, any good and fair employer, in the circumstances that Age Concern

Rodney was in at the time, would not have regarded four days as being an adequate period for employees to engage with each other on these important questions, nor would any good and fair employer think it appropriate to leave all the onus on the employees.

[42] Given the findings the Authority has just made, those failings by Age Concern Rodney will have consequences in terms of the final disposition of Ms Elliott's two personal grievance claims.

Was the selection process fair?

[43] As well as protesting the defects in the consultation process, Ms Elliott also protests her selection as the staff member whose position was to be disestablished.

[44] The evidence for Age Concern Rodney was that Ms Elliott was still on sick leave at the time the decision was taken and although she had intimated to Age Concern Rodney that she was fit to return to work, it had told her that she needed to get her medical certificate varied to that effect, and she had not done so. The employer says that weighed with it in making the determination to declare her position surplus to requirements, rather than one of the others.

[45] The logic of this conclusion is not immediately apparent until it is realised that Age Concern Rodney had a continuing commercial contract with the District Health Board, which notwithstanding the downturn, it was required to continue servicing. It could not have continued to service the contract if it had made one of the other drivers redundant because it needed two drivers to operate the two vans that were still required.

[46] Plainly, if it had made one of the other drivers redundant, that would have left Age Concern Rodney having one able bodied driver to operate two vehicles while the second driver (Ms Elliott), remained on long term sick leave having taken no steps to vary the medical certificate on which the employer was reasonably relying.

[47] While that is a most unusual basis for determining a redundancy selection, the logic of it in the practical sense, given the size and scale of the employer, may be difficult to refute.

[48] In addition, the employer relied on the “last-on/first-off” principle as a further basis for selecting Ms Elliott. The reliance on that well worn principle of the old redundancy cases is understandably contested by Ms Elliott who argues that the whole basis of her selection was wrong headed. She says that what Age Concern Rodney ought to have done was to effectively disestablish all of the positions, create two new positions, and invite applications for those two new positions from the three existing van drivers, making the selection from that process.

[49] But that is simply another way of packaging the same outcome. In reality, the employer has still got to make a choice between the employees reducing three down to two. What is more, the process postulated by Ms Elliott would have had the effect of making it extraordinarily difficult for Age Concern Rodney to continue to fulfil its contractual obligation to the District Health Board.

[50] Looked at in the round, while the situation is finely balanced, the Authority’s conclusion is that the response adopted by the employer was a response which a fair and reasonable employer could have made in the particular circumstances of this case. Clearly, Age Concern Rodney was driven by its desire to continue fulfilling its commercial obligations to the District Health Board and the practical reality at the time in which the decision was taken was that Ms Elliott was not able to work.

[51] She may protest that she felt able to return to work but the fact remains that she took no steps from 1 November 2011 down to 8 November 2011 to get her medical certificate varied so as to give her a clearance to return to work. That step was a step that only she could take and she chose not to take any steps at all, so she can hardly complain that the employer took into account the fact that she was not able to work. Indeed, on the basis of the certificates already filed by her general practitioner, Ms Elliott was not able to work at all until 23 November, fully 14 days after the date of the employer’s decision to declare Ms Elliott redundant.

[52] It was within Ms Elliott’s hands to remove that potential argument from the employer by getting a clearance to return to work. She did not do that. Yet, it is plain on the evidence that she was told not once but twice on 1 November 2011 that she needed to get her medical certificate varied if she was to return to work. Had she taken that step when advised, it is conceivable that the employer might have reached a different conclusion about whose position to disestablish.

[53] As it was, a significant reason for identifying Ms Elliott's position as the one to be disestablished was the fact that the employer simply could not operate with only one driver and because it had to have a minimum of two and Ms Elliott was not available, the decision to identify her position as the one that was surplus, in effect made itself.

[54] For those reasons then, the Authority is not persuaded that the selection process was flawed.

Determination

[55] Ms Elliott claims a personal grievance on the grounds of an unjustified dismissal together with a personal grievance on the grounds of disadvantage as a consequence of the unjustified actions of her employer, Age Concern Rodney. The Authority rejects Ms Elliott's claim that she was unjustifiably dismissed; the evidence is clear that the dismissal was genuine and even Ms Elliott accepts that and the position disappeared then because of a need to take cost out of the operation which was a legitimate business decision that Age Concern Rodney could make in all the circumstances.

[56] However, the Authority is satisfied that Ms Elliott has suffered disadvantage because of two separate unjustified actions of the employer, the first in giving only four calendar days between the date of the consultation meeting and the declaration of redundancy and the second in the failure of the employer to follow up the issue with the employees rather than leaving the onus on them.

[57] Those failings are both unjustified actions of Age Concern Rodney which caused Ms Elliott disadvantage. It is conceivable that if further time had elapsed, the employees might have come to terms. Moreover, had Age Concern Rodney followed the matter up as it should, Ms Elliott would have had a further opportunity to reconsider her position.

[58] By s.124 of the Act, the Authority is required to identify whether any contributing conduct impacted on the finding of the personal grievance. The Authority is satisfied that there is no contributing conduct in the present case.

[59] In order to remedy Ms Elliott's grievance then, the Authority directs that Age Concern Rodney is to pay to Ms Elliott the sum of \$500 as compensation under

s.123(1)(c)(i) of the Act. In the Authority's opinion, that sum adequately compensates Ms Elliott for the wrong done to her in adopting the rather truncated consultation process which the Authority has been critical of in this determination.

[60] The Authority is not persuaded that the deficit to Ms Elliott is great. This was a genuine redundancy and the selection of the position Ms Elliott held was in the Authority's opinion driven practically by the fact that Ms Elliott, notwithstanding her representations, had been on sick leave for some weeks and the employer had medical certificates covering her continued absence for fully two weeks after redundancy occurred. If that had not been the position, and if Ms Elliott had been ready, willing and able to return to work (and she had taken the initiative to get the medical certificate varied by her doctor), then the redundancy situation could have been quite different and the employer might well have identified another position to be made redundant or at least would not have been presented with a practical argument by Ms Elliott's inaction.

Costs

[61] Costs are reserved but in the particular circumstances of this case, the Authority commends to both practical representatives the prospect that as both parties have been partially successful, costs should lie where they fall.

[62] Should that suggestion not find favour with the parties, the applicant may make an application to the Authority for costs and the respondent can reply 14 days after the applicant's application has been filed.

James Crichton
Member of the Employment Relations Authority