

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 418
5312353

BETWEEN DAVID HALLIE

AND RICHMOND NEW ZEALAND
INCORPORATED

Member of Authority: Yvonne Oldfield

Representatives: Mr Hallie in person
 Penny Shaw for Respondent

Investigation meeting 3 May 2011

Submissions: 12 May, 22 May 2011 for applicant
 20 May 2011 for respondent

Determination: 23 September 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The respondent ('Richmond') is a provider of community mental health and disability support services. Richmond employed Mr Hallie as a community service worker until his resignation on 15 July 2010. Mr Hallie views this as a constructive dismissal arising out of what he says was unfair treatment during roster changes, restructuring and redeployment undertaken that year.

Issues

[2] In early 2010 Richmond proposed the roll out of an eight week rotating roster system to replace previous (differing) shift patterns across the organisation. The intention was to achieve consistency amongst staff, minimise the health impacts of shift work, and improve client service in a 24 hour, seven day industry. Before proceeding to implement the new roster in Mr Hallie's region, Richmond had already

established that existing contractual arrangements permitted it to do so¹ and had consulted with unions and staff about the plan.

[3] As well, from early 2010, Richmond had signalled that it proposed to rationalise staffing levels across its operations. For some parts of the service this would mean a reduction in staff numbers and for others a small increase. Mr Hallie did not personally support all aspects of the restructure but he accepts that it was Richmond's prerogative to review staffing levels and that it sought staff and union feedback about what was proposed.

[4] Mr Hallie had expressed a number of concerns about the new roster and at one stage even went so far as to tell Richmond that he would not work it. However, if I have understood his written submissions correctly, he now acknowledges that the respondent was entitled to implement the eight week rotating roster. While he considers the introduction of the new roster relevant background to his case he is not claiming that it was an unjustified action in itself. Nor do his concerns relate directly to the restructuring

[5] Mr Hallie's concerns relate primarily to what happened to him in the redeployment process. He says that the respondent offered a particular role on certain terms and conditions which were later withdrawn, making it unworkable for him. By the time this came to light, he says, it was too late for him to apply for anything else he wanted. He says that although he ended up with a job, it was completely unsuitable and ultimately he was left with no choice but to resign. The nub of the issue for him is that he needed to know the exact terms of any redeployment option so that he could make an informed decision. Instead he made a flawed decision based on incorrect information.

[6] He also says that a position which was suitable came up after he had resigned but Richmond failed to offer it to him.

[7] Richmond denies any basis for a claim of constructive dismissal but says in any event a grievance of unjustified dismissal was not raised within 90 days of the resignation. Although there is no dispute that Mr Hallie raised a grievance (relating to

¹ *National Union of Public Employees Incorporated and Jackson and Anor CA 87/10, 9 April 2010*

the concerns on which the constructive dismissal claim is based) this was done on 5 June, before he resigned. Richmond argues therefore that it can only be required to respond to an alleged disadvantage grievance.

[8] Whether the grievance to be considered is a constructive dismissal or a disadvantage, Mr Hallie relies on the same evidence. For this reason the Authority proceeded with the investigation into the substantive matters while reserving the question of whether the constructive dismissal claim could be considered.

[9] The issues for determination are:

- i. whether Mr Hallie was offered redeployment on terms which were later changed;
- ii. whether the respondent acted, overall, as a fair and reasonable employer in its efforts to redeploy Mr Hallie, and if not,
- iii. whether the Authority can consider the constructive dismissal claim.

[10] If Mr Hallie is successful in establishing a grievance of any sort the final questions for determination will be whether he contributed to the situation giving rise to the grievance and what if any remedies should follow.

The terms of the first redeployment offer

[11] In anticipation of the need to redeploy existing staff recruitment was frozen for a period before the restructure was implemented. Each affected staff member was asked to nominate a first and second choice of position in the restructure. While many chose their existing role as first choice there was no requirement to do so; the only rule was that there could be only one first choice, and once formally confirmed it could not be changed because that could prejudice other participants. According to respondent witnesses the whole process worked well insofar as only a handful of staff members were made redundant out of dozens affected by the process.

[12] Mr Hallie was based at the Henderson service. Along with the introduction of the new eight week rotating roster staff numbers there were to be cut by two. On 28 April 2010 Mr Hallie met with acting Operations Manager Tony Tietie and Human Resources Advisor Annette Tainui to discuss the options available to him. As noted already, Mr Hallie wished to avoid the new roster. For that reason it was not his first choice to remain at Henderson. Instead he told Mr Tietie and Ms Tainui that his preference was a position at the Mobile Community Youth Service, which was not a rostered service. During the meeting Ms Tainui confirmed that if he was redeployed to the Mobile job all his terms and conditions would remain the same and his service would be continuous.

[13] The Mobile Community Youth Service was based in Papatoetoe (with the job in question being half in Counties Manukau and half in Papatoetoe.) At that time there was no secure parking in Papatoetoe for the nine mobile service vehicles. To get round this problem, staff members would drop Richmond vehicles off at the service nearest their homes at the end of the day and pick them up again next morning (parking their private cars there) before heading off on their rounds. There was an advantage in this for some as it meant time travelling to Papatoetoe was included in their work day. The down side for the organisation was that the local services often found the presence of the additional vehicles problematic.

[14] It is relevant to record here that Mr Hallie lived in Swanson. On 29 April Mr Hallie met with the manager of the Mobile service, Adam Dinsdale, to talk further about the role. He now says that Mr Dinsdale led him to believe that he would be able to pick up a Richmond vehicle in Henderson each morning. Adam Dinsdale does remember Mr Hallie asking about vehicle pick ups and says he responded by saying that he did not think it would be a problem but he would check with the Service Delivery Manager at Henderson. He rejects the suggestion that he gave a firm guarantee as it was not up to him to do so.

[15] Also on or around 29 April Ms Tainui had a phone call from Mr Hallie in which it was confirmed that if he elected to be redeployed to the Mobile job, he was out of the running for a role in the service where he had been employed.

[16] The deadline for confirming his first choice was 2 May. Mr Hallie emailed Ms Tainui on 29 April and confirmed that his preference was the Mobile job. He also confirmed that he understood that his terms and conditions would remain the same except for the place of work. At no time did he raise the issue of vehicle pick up with Ms Tainui.

[17] On 12 May Mr Tietie wrote to Mr Hallie to offer him the Mobile job. The letter included the following paragraph:

“We would like to give you a proper opportunity to consider this offer and seek advice; we are prepared for the offer contained in this letter to remain open until 5pm Friday 21 May 2010. If you wish to accept this offer, then please sign one copy of the variation and the duplicate copy of this letter and return both documents in the envelope provided by this date. If there is anything you are unclear about, disagree with or wish to discuss, please contact me.”

[18] A further letter of the same date sought his agreement to a variation to his terms and conditions, including a change to his location of work. There is no reference in either letter to picking up a vehicle in Henderson, and no indication that Mr Hallie ever discussed that with Mr Tietie. Nonetheless Mr Hallie views that arrangement as part of the terms and conditions on which the job was offered.

[19] Mr Hallie accepted the offer almost straight away. Meanwhile, as we now know, Mr Dinsdale had not checked with the Henderson manager as he had said he would. He told the Authority (in mitigation) that he understood Mr Hallie’s biggest concern was to avoid the eight week rotating roster and had no idea the vehicle pick up issue could potentially be a deal breaker.

[20] The matter was brought back to Mr Dinsdale’s attention on 25 May when the Henderson Service Manager heard of the proposal and advised that it did not work from her point of view. In the end, however, her objections were not what caused the proposal to be vetoed. Just a few days later, she and Mr Dinsdale learnt that secure parking for Richmond’s nine Mobile vehicles had been obtained near the Papatoetoe base. There was no longer any question of vehicles being parked anywhere else.

[21] Mr Hallie was due to start his new role on June 6. On June 3 he was informed that he would not be able to pick up a vehicle in Henderson. Instead he would have to

drive to the Papatoetoe service at the start of the work day to collect a Richmond vehicle. This meant a longer day for him and more mileage on his own vehicle.

[22] Mr Hallie found this unacceptable and declined to take up the new position. On 4 June he raised a personal grievance in relation to these events.

Determination

[23] I am satisfied that it was reasonable for the respondent to say that each individual could make only one first choice and had to stick to it- to do otherwise would have made the redeployment process completely unworkable. I am also satisfied that Mr Hallie understood this. It follows that the time for Mr Hallie to check the arrangements regarding vehicle pick up was before he made his choice, not afterwards. He says that is just what he did in the meeting with Mr Dinsdale and it was only afterwards that he proceeded to email Ms Tainui to confirm his choice.

[24] I am not however persuaded that Mr Dinsdale gave Mr Hallie any guarantee that the vehicle pick up arrangements would continue as before. It was established that the parking arrangements had been posing problems for Richmond well before the end of April. The decision whether the current arrangements would continue was not up to Mr Dinsdale, as he knew perfectly well. Having been given no basis for a conclusion that he would deliberately mislead Mr Hallie, I find it more credible that the conversation of April 29 was as Mr Dinsdale recalls it. I conclude that he said it was fine with him for the Richmond vehicle to be parked in Henderson, but it also depended on whether the Henderson manager agreed.

[25] Perhaps because he took from the discussion what he wanted to hear, Mr Hallie came away from the meeting with Mr Dinsdale feeling sure that he could rely on getting the vehicle arrangement he wanted. Although it is clear from his evidence that this belief was genuine I find it was misplaced. I conclude that Mr Hallie made an assumption about what would happen and his assumption was wrong.

[26] It was unfortunate that Mr Dinsdale did not check what was happening about the vehicle policy as he said he would. It would however have made little difference

to the outcome, because Mr Hallie did not wait to hear - he emailed Ms Tainui almost straight away.

[27] In short, the evidence has not established that Mr Hallie was given an undertaking that the previous vehicle pick up arrangements would continue. Pick up arrangements were not mentioned in any discussion of terms and conditions or in the written offer. It cannot therefore be said that those arrangements formed part of the terms and conditions of employment offered to him.

Fair and reasonable conduct

[28] The successful applicants for the remaining jobs in Henderson had been confirmed in their roles in mid May - at the same time that Mr Hallie had been offered the Mobile role. By the time he turned it down, on June 3, he had well and truly missed out on the chance of getting one of those roles.

[29] Ms Tainui told the Authority that Mr Hallie was a very valued worker whom Richmond wanted to keep. From 4 June onwards there were a number of exchanges between her and Mr Hallie about what might be done to address the situation. He was offered several redeployment options in services closer to his home (such as Avondale) but these did not suit him. One reason for this was that the work was with mental health clients. He had been working with clients with disabilities and it was his preference to continue with that type of work.

[30] The other reason was that the rotating roster applied in those services. In his email of 4 June Mr Hallie had said:

“Richmond New Zealand is implementing an eight week rotating roster on 7 June 2010, which I cannot work due to its seriously affecting my work/life balance...”

[31] Having had Mr Hallie reject all her suggestions, Ms Tainui sought clarification of what he was seeking to resolve his grievance. He responded in an email of 7 July. After noting that options had been offered and traversing the history of events the email 7 July concluded:

“This latest roster overhaul is unacceptable I cannot work it...”

A this stage and on the current informal level at which we are negotiating we would be seeking the following:

An agreed exit package and a confidentiality clause imposed on both parties involved.”

[32] In the meantime, Mr Hallie had been working in a part time, temporary position in Henderson as a stop gap. It had the advantage of being familiar and close to his home. Extra hours filling in for absences meant that the work could often amount to a full week. However the work was inconsistent. Mr Hallie found this intolerable along with the fact that he now felt like a junior member of a team where he had long service and experience. On 16 July Mr Hallie resigned. His letter of resignation stated:

“The reason for terminating my employment is that I feel that I have been unfairly treated during a recent restructure process resulting in my being displaced and losing my full time employment position at Henderson. I feel undervalued as a long term employee, this has seriously eroded the good will and good faith that there has been between Richmond New Zealand and myself. I cannot continue to work under the current conditions.

I am still seeking to resolve my grievance as clarified in my email dated 7 July 2010.”

[33] Some time after Mr Hallie resigned it was decided to create another full time community service worker position on the eight week rotating roster at Henderson. This role too was temporary as it was intended to cover an unfilled vacancy for a qualified Health Professional. The job was to be offered on the basis that when a health professional was found the community service worker would move to another service. Respondent witnesses told me that it was not offered to Mr Hallie because of his statement that he could not work the new roster and wanted an exit package.

Determination

[34] Mr Hallie must bear some responsibility for the unfortunate situation in which he found himself. He seemed to feel that it should have been obvious that the vehicle arrangements were a “deal breaker” (because of the length of the commute.) Unfortunately this was not obvious to Richmond’s managers. Even though it a very long way from Swanson to Papatoetoe, the reality is that some Aucklanders do travel such distances to work every day. If picking up a Richmond vehicle in Henderson was

for him a precondition of taking the role, Mr Hallie should have told not just Mr Dinsdale but Ms Tainui and Mr Tietie as well. Had he done so, this entire problem could have been averted.

[35] Recognising that Mr Hallie had acted in reliance on a misunderstanding, and might otherwise have put himself forward for a job at Henderson, Richmond took an active role in seeking a solution. It searched for an alternative job that would be acceptable and put forward several different options. While the part-time role at Henderson was clearly less than satisfactory, it was his choice to take it in preference to other full time roles in West Auckland. Richmond did everything it could to accommodate Mr Hallie's wishes.

[36] As for not offering him the full time role that was created after he resigned, I am satisfied from the email correspondence that he was very clear, at the time, that he did not want a position on the eight week rotating roster. It was entirely reasonable that the employer did not try (again) to persuade him to take such a job.

[37] The situation that presented itself here was most unfortunate, but it cannot be characterised as a breach of duty by Richmond. I am satisfied, overall, that Richmond has acted as a fair and reasonable employer.

[38] It follows that Mr Hallie has not established the basis of any sort of grievance, disadvantage or dismissal, and nothing more remains to be addressed. His claim is dismissed.

Costs

[39] The question of costs is reserved. Any application for costs must be made within 28 days of the date of this determination.

Yvonne Oldfield

Member of the Employment Relations Authority