

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2012] NZERA Auckland 317  
5328688

BETWEEN                      ELAINE MANDER  
   Applicant  
  
A N D                              IHC NEW ZEALAND  
   INCORPORATED  
   Respondent

Member of Authority:        James Crichton  
  
Representatives:              Applicant in Person  
   Paul McBride, Counsel for Respondent  
  
Investigation meeting:        25 June 2012 at Rotorua  
  
Submissions Received:        18 July 2012 from Applicant  
   25 June 2012 and 7 September 2012 from Respondent  
  
Date of Determination:        11 September 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant (Ms Mander) alleges that she was unjustifiably dismissed for redundancy. She also alleges that she was harassed and/or bullied. The respondent (IHC) resists those allegations.

[2]     Ms Mander was employed as a Vocational Coordinator at Rotorua.

[3]     IHC's national operation includes a volunteer programme. Individuals engage on a one-to-one basis with IHC clients with intellectual disabilities to assist the clients to have normal social contacts and make connections in their community.

[4]     As is always the case with caring organisations, there are limited funds and the budget for the volunteer programme is no exception.

[5] During 2009 and 2010, Janine Stewart, General Manager IHC Programmes, raised with Caroline Barnes, National Manager Volunteering, concerns about the under-performing of some areas of the volunteer programme. One such area was the area managed by Ms Mander based around Rotorua. Ms Stewart asked Ms Barnes for a proposal to address those issues, including but not limited to the Rotorua area.

[6] Ms Barnes wrote to Ms Mander by background memorandum dated 9 July 2010 in which she says she foreshadowed the possible restructure. This was followed up with a letter from Ms Barnes to Ms Mander (and others) dated 15 July 2010 in which she indicated that a consultation paper was in the course of preparation and would be forwarded just as soon as it had been signed off by Ms Stewart but that, because the latter was on an extended period of overseas leave, that would be some weeks away.

[7] On 2 September 2010, Ms Barnes wrote to Ms Mander enclosing the consultation paper and there were email exchanges between Ms Mander and Ms Barnes as a consequence of the receipt of the document. Critical in that email exchange is a discussion between the two women around the location of the possible replacement position. Ms Barnes told Ms Mander during that email exchange that ideally the new position should be in Tauranga, but she made it clear that there was also some advocacy for it to remain in Rotorua and that Ms Mander's input into the issue was important.

[8] The consultation meeting between the parties took place on 16 September 2010 and a very bland note of that meeting was provided to Ms Mander by Ms Barnes after the meeting. Although Ms Mander now says that the meeting notes supplied at the time are inaccurate, she took no steps to amend them at the time, although she was encouraged to. The thrust of IHC's proposal was to disestablish two positions (one in Hawke's Bay and one in Rotorua), and replace those two positions with new positions centred respectively on Tauranga and Gisborne, but servicing the bulk of the wider area.

[9] IHC then determined that it would be disestablishing the Rotorua position occupied by Ms Mander and it advised her of that fact by telephone and by email on 4 October 2010. It is absolutely explicit from the email notification to Ms Mander that she was welcome to apply for the new Tauranga role and Ms Barnes' evidence to the Authority is that she made that clear as well in her telephone message. That

central message was reiterated in an email of 7 October 2010 together with further attempts by IHC to meet with Ms Mander to discuss the future. Despite those attempts, there was no further face-to-face contact between the parties. By letter dated 14 October 2010, IHC set out an indicative calculation of redundancy, confirmed the disestablishment of the position and again asked the question of whether Ms Mander would like to be considered for the new Tauranga position. It made clear that IHC was still trying to have a conversation with Ms Mander but that if she had not responded by 18 October, then redundancy would need to be confirmed as “*the last remaining option*”. Even in the covering email attaching the letter, Ms Barnes again attempts to interest Ms Mander in having a discussion.

[10] The balance of the exchanges between the two women relate to discussions around a finishing date and any farewell function that might be arranged.

### **Issues**

[11] It will be convenient if the Authority assesses the following matters:

- (a) Was the redundancy a genuine one;
- (b) Was the redundancy effected in a fair manner;
- (c) Was Ms Mander bullied or harassed?

### **Was the redundancy a genuine one?**

[12] The Authority has no hesitation in concluding that this was a genuine redundancy undertaken for entirely proper purposes. There is in this case no evidence whatever of any “*ulterior motive*” by IHC and indeed, the whole motivation for IHC was to effect improvements in its overall operation.

[13] It is clear law that where, as in this case, the employee affected by redundancy alleges that the dismissal is for some ulterior motive, the employee must prove that that is the position: *Trotter v. Telecom Corporation of New Zealand Ltd* [1993] 2 ERNZ 659 where the Court held at 682 that:

*The applicant ... must be taken to assume the burden of convincing the Court that the theory (of an ulterior motive) has substance.*

[14] Here, there is simply no evidence at all that the redundancy was anything other than a genuine exercise of the employer's legitimate management prerogative. That Ms Mander objected to the disestablishment of her position is a given; but that does not make it against the law. Redundancy, by its very nature, is a dismissal without cause, but a dismissal occasioned by the business needs of the employer. That does not make it any less hurtful to an employee to suffer, and perhaps arguably more so when the employee is blameless. But the fact remains that the law allows employers to restructure their business to best effect and, in the absence of clear evidence that that restructure is activated by improper motives, the Authority must allow the employer the latitude to get on with organising its affairs.

[15] Ms Mander maintains that IHC "*wanted to get rid of me*". She said that the other volunteer coordinators were treated differently from her and by example, that all the others were "*buddied up*" to another IHC employee but she was not. IHC responded to that particular allegation by saying Ms Mander had made it absolutely clear that she did not want to be buddied up to anybody, and that was why it had made the decision it did.

[16] Ms Mander also alleged that her statistics of her role were not readily available to her and yet the statistics of other volunteer coordinators were. IHC denies that assertion and says that the statistics of all of the volunteer coordinators was available on the IHC's intranet.

[17] Ms Mander alleges that Ms Barnes' "*paperwork and conversations were Machiavellian and hid her true agenda for a long time*". It is true that the communication style adopted by IHC is the familiar management "speak" which tends to obfuscate rather than elucidate and the Authority made it clear during the investigation meeting that none of the communications from IHC distinguished themselves with clarity, but that is not evidence of Machiavellian behaviour but simply a kind of language which sadly pervades management these days. There is no evidence in the Authority's view to support the conclusion that the reason that communications were written in the way they were was to obscure meaning. They were written that way because that is the way some managers communicate.

[18] Nor does the Authority accept Ms Mander's contention that, from the point at which the decision was taken to disestablish her role, Ms Barnes sought to "*micro manage*" Ms Mander. What Ms Barnes sought to do was to have a conversation with

Ms Mander to discuss the consequences of the disestablishment of her role. Ms Mander, by her intransigence, made that quite impossible. Nor is there any evidence at all to support the claims that this was either a constructive dismissal or indeed was so flawed as to have IHC determined to disestablish the position before it even commenced consultation. These statements by Ms Mander sadly are no more and no less than bare assertions without any evidence whatever to support them.

**Was the redundancy executed in a procedurally fair manner?**

[19] Again, the Authority is absolutely satisfied that the redundancy was executed in a procedurally fair manner. IHC undertook an absolutely stock standard approach to the possible disestablishment of Ms Mander's role. The paper trail discloses communications from IHC to Ms Mander on 9 July 2010, 15 July 2010, 20 July 2010, and 2 September 2010. The only negative observation that the Authority would make about those communications were that they were written in that opaque management language which obscures the message rather than elucidates it. There is nothing to be gained by not speaking plainly or indeed writing plainly and the only criticism that can be made of the process is the nature of the language used and its inaccessibility. Ms Mander made the point in her oral evidence (and understandably so in the Authority's view) that nobody in the organisation "*figured out that the July communications were foreshadowing a restructure*" because they were written so obliquely.

[20] But even if the Authority were to strike-out all of the July communications on the basis that they were not clear enough to establish part of a consultative process, it is still clear that IHC fulfilled its obligations with the consultation paper of 2 September 2010 which on Ms Mander's evidence was the first occasion that she became aware that her position was actually under threat.

[21] From this point on, there can be no question that Ms Mander understands what is in contemplation and the ball is very clearly in her court to engage with IHC in relation to its proposal. Indeed, the early exchanges between the parties seemed to have been reasonably positive in tone. The arrangements for the first and only consultation meeting held on 16 September 2010, appear to have gone ahead without incident.

[22] But despite her now vociferous complaints about IHC's process, at the time that consultation was being undertaken with her, Ms Mander took no steps at all. The evidence is that she provided no submissions whatever to the IHC's proposal to disestablish her role and indeed appeared to agree, to some extent anyway, with the thrust of the proposal. She did not take the opportunity to get any advice about the proposal, or to seek additional time to enable advice to be obtained, and although she now complains about the record of the consultation meeting, she took no steps whatever to complain about the record at the time when it was sent to her.

[23] Ms Mander quite properly draws attention to employment relationships as being informed by the good faith principle, but she overlooks the fact that that is a two way street. It is not good enough for an employee to complain months after the event about a redundancy process when they took no steps at the time. But Ms Mander protests that she had a longstanding head injury and that precluded her from dealing briskly with matters to do with the demise of her role. But if that were the reason that she failed to properly engage with the employer, she had ample opportunity to obtain advice and assistance, but did not.

[24] While no doubt the process of redundancy can be stressful for anybody, this was hardly an uncaring employer going through the motions. All of the evidence before the Authority emphasises the effort IHC went to, to try to engage with Ms Mander and get her to tell it about her views, but to no avail.

[25] Even after the decision was taken to disestablish Ms Mander's role, the evidence is plain that IHC spent significant energy on endeavouring to establish what Ms Mander wanted for the future. In particular, IHC wanted to know whether Ms Mander was interested in the new position based at Tauranga. While Ms Mander refused absolutely to talk to IHC after the decision to disestablish her position was made, and only engaged with it by email, she missed a vital opportunity to explore whether she could have fulfilled the new position while remaining resident in Rotorua. Ms Mander assumed (erroneously) that IHC would not have contemplated her fulfilling the role from a Rotorua base. The two cities are not that far apart and with modern communications and infrastructure, if Ms Mander had indicated a willingness to accept the new role and to fulfil it while remaining resident in Rotorua, that was something that IHC very clearly wanted to consider. But Ms Mander would not even talk to IHC and on that basis it could not properly take matters any further.

[26] In the end, the Authority is satisfied that IHC undertook an absolutely stock standard redundancy process, albeit blighted by management speak, but then did everything it reasonably could have to get Ms Mander's input and to seek to continue to engage with her, even after the decision was made to disestablish her role, in the hope that she might be interested in the new role based out of Tauranga. In those circumstances, the Authority cannot find any objection to the IHC's process

### **Was Ms Mander bullied or harassed?**

[27] Ms Mander says that she was bullied and she told the Authority that she had complained on four separate occasions to Donna Irwin who was the manager below Ms Barnes. She told the Authority that she had been specific in her complaints and that all that Ms Irwin had done was to refer her to EAP. Ms Irwin is no longer part of the organisation and did not give evidence to the Authority. Neither of the senior managers who did give evidence were aware of Ms Mander having complained about being bullied, and both made it perfectly clear that had there been an allegation made to them about bullying, or an allegation that another manager (Ms Irwin) had failed to act, they would have taken the matter up promptly and dealt with it. In the circumstances, the Authority is unable to take matters any further. On the face of it, if Ms Mander made allegations of bullying, and they were not properly dealt with by Ms Irwin, then Ms Mander ought to have taken matters further. She did not do so and accordingly the Authority has insufficient evidence to take matters any further.

[28] Ms Mander's allegations about harassment appear to relate to the behaviour of Ms Barnes who it is alleged harassed Ms Mander after the decision was made to disestablish Ms Mander's role. The Authority has already commented on this allegation. There is no evidence that Ms Barnes harassed Ms Mander. All Ms Barnes was trying to do was get Ms Mander to engage with her so that IHC could continue with its process and potentially have Ms Mander interest herself in the new role. Given Ms Mander's refusal to engage with Ms Barnes, it is inevitable that Ms Barnes would make numerous attempts to try to get Ms Mander to respond. The Authority is satisfied that that is not harassment.

### **Determination**

[29] Ms Mander's claims fail in their entirety for reasons already enunciated.

## **Costs**

[30] Costs are reserved.

James Crichton  
Member of the Employment Relations Authority