

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 128/10

File Number: 5297300

BETWEEN                      Teresa McColl  
   Applicant

AND                              Disability Training Services  
   Hawkes Bay Trust Board  
   Respondent

Member of Authority:      Denis Asher

Representatives:            Glynne Selman for Ms McColl  
   Gary Tayler for the Board

Investigation Meeting      Napier, 1 July 2010

Submissions Received      By 8 July 2010

Determination:              26 July 2010

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**DETERMINATION OF THE AUTHORITY**

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**The Problem**

[1]      Was Ms McColl unjustifiably disadvantaged and/or unjustifiably or constructively dismissed by the respondent (the Board)? Did the Board's apology and undertakings at the time address and resolve the alleged unjustifiable disadvantages?

[2]      Did the Board breach Ms McColl's restructuring provisions and, if so, should a penalty be applied?

## **The Investigation**

[3] During a telephone conference call on 25 May 2010 the parties agreed to an investigation in Napier on 1 July. Agreement was also reached on timelines for witness statements and a bundle of documents. Efforts by the parties during and after the investigation to settle this matter on their own terms were unsuccessful.

[4] During the 25 May conference call Ms McColl's advocate, Mr Selman, confirmed his client's grievances were those set out at page 3 of Ms McColl's statement of problem, dating from 19 November 2009 onward.

## **Background**

[5] Ms McColl was employed by the Board in a customer services/quality control capacity from January 2009.

[6] In her statement of problem and witness statements, Ms McColl sets out in detail various matters of deep concern to her that occurred from September onward, resulting from – she says – actions or failures by the respondent. Those matters were not formally raised as grievances until a letter was forwarded on the applicant's behalf dated 12 February 2010 (doc 10).

[7] Predating notification of the grievances was a meeting on 4 December 2009 with an unofficial Board Member, Ms Jessica Greville. In the meeting, and afterward in writing (its letter of 7 December; doc 6 refers), the respondent apologised to Ms McColl about her concerns and gave her various undertakings. Amongst other things, the Board assured the applicant that “... *your original duties will be returned to you ... and* (in respect of additional, newly allocated duties) *we agreed to provide appropriate independent training*” (above). Ms McColl was also provided with the writer's and two other trustee's contact details to use if she, the applicant, felt she was in an unsafe situation at work.

[8] The next significant development was an announcement, during a staff meeting on 7 January 2010, by the Board's then general manager that he was working on a restructuring proposal.

[9] Ms McColl says that, on 14 January, her general manager advised her that – if the restructuring proposal went ahead – her job would be disestablished and she would be made redundant. A letter distributed later that day confirmed the respondent was considering restructuring two positions, including the applicant's (doc 8). It says that,

*If the proposed structure is adopted (Ms McColl's position) would be disestablished **and may** result in a redundancy.*

(emphasis added; doc 8)

[10] The proposed new positions were advertised a week later, on 16 January (doc 8a). Ms McColl says she was informed of the new positions only on 22 January: she did not apply for either job as she did not believe she would be considered. The applicant alleges there was no meaningful consultation and that one of the new positions was made up almost entirely of tasks in her existing position.

[11] A meeting was convened on 2 February. It was attended by Ms McColl and her support person (her mother), the Centre's then general manager and its representative, Mr Adrian Tayler. The parties dispute much of what was said at the meeting. Ms McColl says she was advised by the respondent that the restructuring would proceed and would result in her redundancy because she had not applied for any of the proposed new positions. Ms McColl says she was also told that she was expected to continue in her role until an appointment was made to the new position.

[12] Mr Tayler agrees that he was told something of Ms McColl's recent history of difficulties, including advice of the meeting on 4 December and the resulting letter dated 7 December, and that assurances had been given to the applicant.

[13] The parties agree Mr Tayler asked Ms McColl, did she still wish to work for the Centre? She replied she did not as she had lost all faith and trust in the management, as – amongst other things – the assurances given at the 4 December meeting had not resulted in any change, and her efforts to contact Ms Greville had been unsuccessful.

[14] The respondent says the meeting concluding with its representative undertaking to look into the matter further including obtaining and reading the letter of 7 December. The representative says he told Ms McColl the restructuring process was on hold in the meantime: Ms McColl and her mother deny that claim.

[15] It is agreed that approval was given whereby Ms McColl would take the remainder of the week off on paid leave (doc 9).

[16] Ms McColl filed a grievance on 12 February alleging, amongst other things, unjustified dismissal.

[17] In a letter dated 14 February the Board's representative proposed to Ms McColl that the parties undertake mediation so as to "*resolve any issues you have with your employment*" (doc 9a).

[18] Ms McColl returned to work on 15 February, when she says, she was introduced to the appointee to the new administration position: Ms McColl's immediate conclusion was that she was meeting the person who had taken her job. The respondent says that person had not been appointed to the applicant's position.

[19] On 16 February Ms McColl produced a medical certificate stating she was unable to return to work until 15 March: the respondent agreed to continue paying the applicant despite the fact she had exhausted all entitlements and would otherwise have been on leave without pay.

[20] It is agreed that, at a meeting on 4 March, Ms McColl was advised amongst other things that the general manager had left the organisation, the restructuring was abandoned and Ms McColl could return to her old position.

[21] Ms McColl says she did not regard the offer as genuine and declined it because the appointee to the new position would clearly be doing the bulk of the applicant's 'old' work, and because of her belief that promises made during the preceding months had not been kept. The Board says, as she refused their offer to return to her old position, it was at that time that Ms McColl resigned.

[22] Mediation took place on 7 April but the employment relationship problem was not resolved.

[23] In communication following the Authority's investigation on 1 July the respondent confirmed that Ms McColl's position no longer existed.

[24] Ms McColl seeks lost wages and unspecified compensation for humiliation and hurt.

### **Discussion**

[25] In determining this matter I apply the observation of the full Employment Court, set out at para [37] in *Air New Zealand Ltd v V* (2009) 9 NZELC 93,209 and 6 NZELR 582, namely that the Authority is required to objectively review all the actions of an employer up to and including the decision to dismiss, against the test of what a fair and reasonable employer would have done in all the circumstances.

[26] As is made clear above, the applicant's claimed grievances are set out on the third page of the statement of problem and date from 19 November 2009. As is made clear above, they were first formally raised on the applicant's behalf by letter dated 12 February 2010 (doc 10). They can be summarised as follows:

- a. Reduction of job tasks;
- b. Breach of confidential information;
- c. Abusive and bullying treatment;
- d. A failure to keep undertakings;
- e. Discriminatory treatment; and
- f. Breach of restructuring obligations; and
- g. Unjustified or constructive dismissal

[27] As the unnumbered pages of the discursive statement of problem make clear, items a. – c. above (inclusive) preceded Ms McColl's meeting with an unofficial Board Member on 4 December 2009, and the Board's written apology to the applicant dated 7 December (doc 6).

[28] No evidence was brought by the Board contesting Ms McColl's grievance allegations a. – c. inclusive above.

[29] The Board says it never dismissed Ms McColl, but that she raised a grievance in the nature of an unjustified dismissal allegation three weeks before her resignation on 4 March 2010.

[30] Ms McColl's oral evidence at the Authority's investigation was that she was dismissed at the meeting with the former general manager and Mr Tayler on 2 February.

[31] The respondent's apology of 7 December 2009 confirms the legitimacy of the applicant's complaints, at least in respect of items a. – c. above (inclusive). Do those grievances survive the Board's apology? Until her advocate's letter of 12 February 2010, which in itself primarily focuses on a claim of unjustified dismissal, the respondent had no reason to believe it faced any grievance allegations. Until the meeting on 2 February it had no reason to believe other than that Ms McColl's concerns had been addressed, or 'fixed', by its apology and its extensive undertakings. That is because no ongoing expressions of concern were formally raised by Ms McColl during the interval. Ms McColl says she attempted to contact the Board's unofficial member, but was unable to do so. Ms Greville says she was reluctant to interfere with the relationship between the Board's manager but the only issues raised by the applicant with her were about training.

[32] The Board also says its 'part' restructuring process was lawful but, after it was challenged by Ms McColl, the respondent agreed to put it on hold; the applicant accepted this. As demonstrated by its payment to the applicant of sick and/or special leave periods over and above her contractual entitlements, it says it always acted in good faith in respect of Ms McColl.

[33] The Board says that whatever historic issues Ms McColl had by 12 February 2010 they did not constitute a dismissal, constructive or actual.

[34] What is clear is that, at their meeting on 4 March, the Board advised Ms McColl the former general manager had resigned and that any impending redundancy was abandoned. And, as Ms Greville makes clear at par 31 of her witness statement, while “... a higher level finance person had been appointed ... there was still plenty of opportunity to use Teresa’s skills in an administration role and I imagined such a role would be similar to her original role”. The applicant responded by advising she would not return as she had lost trust in the Board, and instead she required compensation. Ms McColl says she “... knew her old job was not there. I had nothing left of it. All of my work was in the new administration officer’s job, and I had met the new person. The other thing was that I didn’t trust the Board, whether (the general manager) had gone or not. They had made a lot of promises to me before, and had not kept them” (par 74 of her first witness statement).

## **Findings**

[35] Applying *Air New Zealand* (above) by objectively reviewing all the actions of an employer up to and including the disputed claim of dismissal, against the test of what a fair and reasonable employer would have done in all the circumstances I am satisfied:

- a. Ms McColl’s legitimate grievances at the time were addressed and resolved by the Board, as a result of it apologising to the applicant and undertaking to restore the full range of her tasks and responsibilities and providing her with training, new tasks and contact details in the event of any unsafe working situations emerging.
- b. Any discrimination against Ms McColl was balanced by the Board’s generous and willing approach to provide her with sick/special leave when her contractual entitlements were exhausted.
- c. I do not accept that the Board failed to meet its undertakings: clearly, it was a busy, demanding and difficult time for all and more time was required to measure

fairly whether or not the undertakings were being provided and to the extent expected by Ms McColl.

- d. The Board's undertakings were not a barrier to a subsequent restructure. As Ms McColl did not apply for any of the new positions, she was fairly and reasonably placed on notice her employment would not survive indefinitely.
- e. As it happened, the Board's restructure was later significantly amended, if not at the 2 February meeting, then – it is agreed – at the 4 March meeting, where Ms McColl was clearly offered ongoing employment in a similar if not identical role.
- f. There is no evidence to support the applicant's claim she was dismissed at the 2 February meeting.
- g. There is no evidence to support a claim of unjustified constructive dismissal as there is no reason to regard the offer made during the 4 March meeting as anything but genuine, and communicated in good faith.
- h. Ms McColl continued in the Board's employment at least up to the 4 March meeting: I find that action is evidence of there being no dismissal on 2 February. It also contradicts the applicant's claim she no longer had trust in the respondent; and
- i. Consistent with the parties obligation to deal with each other in good faith, to be active and constructive and responsive and communicative (s. 4 of the Employment Relations Act 2000), and in the absence of having done so by then, it behoved Ms McColl to test the offer made to her by the Board on 4 March, and measure objectively if her concerns were sound and legitimate.

[36] I do not doubt the obvious distress felt by Ms McColl in respect of her employment and the problems she encountered therein: as a young and capable individual she clearly had much to offer the Board. It is to be regretted that both parties have lost much by the way in which their relationship came to an end.

**Determination**

[37] Ms McColl's application is dismissed.

[38] As requested, costs are reserved.

**Denis Asher**

**Member of the Employment Relations Authority**