

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 271
5431166

BETWEEN ROBYN THOMAS
Applicant

A N D ADVANCE
INTERNATIONAL
CLEANING SYSTEMS (NZ)
LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Sacha Beacham, Advocate for the Applicant
Neel Kamal, Advocate for the Respondent

Investigation Meeting: 22 May 2014 at Auckland

Date of Determination: 30 June 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Thomas) alleges that she has suffered an unjustified dismissal and an unjustified disadvantage grievance in her employment with the respondent (Advance). Advance says there is no case to answer because none of Ms Thomas' claims were made within 90 days of the events complained of (the justiciable period) and it does not consent to the raising of her claims now.

[2] By agreement between the parties, the Authority investigated the employment relationship problem in its totality, including whether Ms Thomas' personal grievances, or any of them, were raised within the justiciable period.

[3] It is common ground that Ms Thomas commenced her employment with Advance on 4 October 2010. She was originally employed as an accounts receivable clerk and worked 40 hours a week. The employment was initially on a fixed term

basis and, contrary to Ms Thomas' allegation that there was no written employment agreement, an employment agreement, duly signed by both parties the day after the employment commenced, was produced by Advance. A new employment agreement on an open-ended basis replaced the fixed term agreement effective 1 June 2011. Advance says (and I accept) that the fixed term agreement executed by the parties was extended to cover the period between January 2011 and June 2011 while the company was producing a nationwide roll-out of new employment agreements.

[4] In September 2012, Advance commenced a restructure. The evidence before the Authority confirms that the overhead structure Advance had in place at the time was proving difficult to sustain because of the global financial crisis and Advance needed to take some cost out of the business. A particular area of difficulty apparently was the debt collection area where, despite some growth in sales, debt collection remained an area of challenge.

[5] Accordingly, Advance wrote to Ms Thomas by letter dated 21 September 2012 and set out its proposal, as it affected Ms Thomas' role. In effect, the intention was to divide Ms Thomas' then full time role into two separate part time roles. The new part time roles were accounts administrator and senior credit controller respectively.

[6] The document gave Ms Thomas preference in terms of applying for one or both of the new roles and the letter specifically encourages her to apply for either or both.

[7] The letter is also extremely clear about the process of consultation that Advance was wishing to undertake and amongst other things, set out in tabular form the whole consultation and decision-making process.

[8] While the timeframes are tight, looking at this document with a dispassionate eye, it is difficult to be critical of it.

[9] As well as setting out the indicative timetable for consultation and decision-making, the letter is also specific about the consequences for the recipient if she were, either appointed to one of the roles, or not.

[10] Ms Thomas responded to that letter by an email dated 26 September 2012 in which she complains about the arrangements for the meeting to initiate the

consultation process and suggests that the decision is a fait accompli. She then goes on to make some proposals of her own about the company's suggested plan.

[11] That email was responded to by a letter from the company dated 2 October 2012 and the suggestion in that letter is that Advance had amended the proposal to respond to some of Ms Thomas' observations.

[12] The 2 October 2012 letter finalised the employer's decision, confirms that Ms Thomas' role would be disestablished, identified the indicative timelines for determination on the successful applicants for the two new roles and floated the possibility that if Ms Thomas was unsuccessful in her application for either role and one or other of those roles was not filled, Advance would be happy to have Ms Thomas continue until the new roles were filled.

[13] This was followed up with a further letter dated 3 October 2012 from Advance to Ms Thomas which sets out Advance's proposals to two further scenarios suggested by Ms Thomas and concludes with an Advance proposal which, on the face of it, appears to try to meet Ms Thomas' needs to some extent while also securing some benefits for the employer. Amongst other things, it confirmed Ms Thomas into the role of accounts administrator but gave her the option of augmenting her hours by working as senior credit controller as well until that role was filled.

[14] The proposal just referred to from the employer's letter of 3 October 2012 was reduced to agreement form the following day on 4 October 2013 and duly signed by both parties that day. Contemporaneously, a new employment agreement for the position of accounts administrator was signed by the parties.

[15] As a consequence of the agreement that Ms Thomas would augment her hours by filling in for the senior credit controller while that position remained vacant, Ms Thomas actually worked 40 hours a week from this point through until the appointment of the senior credit controller on 13 December 2012. The appointee to that role did not remain with Advance for long and finished her service there on 8 March 2013 and from that date through until 31 July 2013, Ms Thomas filled in as senior credit controller as well.

[16] Ms Thomas now says this was an imposition but there is no evidence that the employer knew that that was her view at the time and certainly the documents before the Authority portray the employer's stance as being one of trying to add to

Ms Thomas' hours, given the reduction in hours caused by the initial restructure. No doubt that assisted Advance, but presumably if Ms Thomas objected to that arrangement, she should have said so. All of her input into the restructure suggested that the primary driver for her was to retain 40 hours a week of income, which was the effect of what the employer was doing with these arrangements.

[17] In any event, sales revenue remained challenging during the first half of 2013 and accordingly a second restructure was initiated in June 2013. It is evident on the documents before the Authority that the drivers for this restructure were the continuing poor financial performance of Advance and the failure to recruit a permanent senior credit controller.

[18] A consultation meeting between Advance and Ms Thomas took place on 21 June 2013 and that was again followed up with a letter entitled "*consultation document*" and the proposal on this occasion was to completely disestablish Ms Thomas' role and replace that role and two other roles with one new full time role.

[19] Again, the consultation letter sets out the details of what is proposed, sets out in tabular form the timelines involved and the consequences for either successful participation in the recruitment or not as the case may be.

[20] There was a feedback meeting when Ms Thomas gave her views on 1 July 2013 and on 4 July 2013 Advance confirmed to Ms Thomas that it had decided to disestablish her existing position.

[21] Ms Thomas did not apply for the finance assistant role that was created as part of this restructure and her employment ended as a consequence of the disestablishment of her role.

[22] Ms Thomas maintained that she had seen her old position advertised but that is hotly contested by Advance which says that the only position it advertised after the second restructure was that of finance assistant.

[23] The only personal grievance claim raised by Ms Thomas was a letter written by her advocate dated 1 August 2013.

Issues

[24] It will be convenient if the Authority considers the following questions:

- (a) Was Ms Thomas unjustifiably dismissed; and
- (b) Did Ms Thomas suffer a disadvantage by unjustifiable action?

Was Ms Thomas unjustifiably dismissed?

[25] The personal grievance letter dated 1 August 2013 raises just one personal grievance, that of unjustified dismissal. The unjustified dismissal referred to in the letter concerns the end of Ms Thomas' employment with Advance. She alleges that the redundancy was not genuine and that it was effected without due process. I do not agree with either contention.

[26] The evidence that the Authority heard and the extensive documentary evidence provided by both parties demonstrates a business that has continued to require amendments to its operating costs and structures as a consequence of the change in the marketplace principally caused by the global financial crisis.

[27] As I have already recited in some detail, there were in fact two restructurings undertaken by Advance during Ms Thomas' employment, both of which were ultimately driven by the effect on the business of changes in global markets.

[28] Moreover, the second restructure, which the personal grievance relates to, was also driven by the inability to recruit a credit controller which Advance said was necessary to try to improve its debt collection.

[29] I am satisfied with the evidence before me that this was a genuine redundancy effected for proper business purposes and I am also satisfied that there was no evidence whatever of any malice or any underlying goal of "*manoeuvring Ms Thomas out of the employment*" as is alleged in the Statement of Problem.

[30] The short point is that this was a business that was having to make changes to its modus operandi as a consequence of shifts in global markets and the very fact that Advance was forced to undertake two restructurings within as many years seems to me to confirm the genuineness of the ultimate redundancy by which Ms Thomas lost her role completely.

[31] There is nothing in the evidence to suggest any inappropriate aim of being rid of Ms Thomas and the suggestion in the Statement of Problem that she was

manoeuvred out of the employment “*some 11 months after the restructure commenced*” is simply wrong on the facts.

[32] As I have already made clear, there were in fact two separate restructures and the only one that Ms Thomas has chosen to complain about was the second one. The first restructure in 2012 resulted in Ms Thomas being appointed to a new position, but performing substantially the same duties, with reduced hours and she signed her acceptance of that new role by executing an agreement with the employer and then contemporaneously signing a new employment agreement.

[33] Unfortunately, those changes were not sufficient to respond appropriately to marketplace conditions and Advance found it necessary to propose a second and subsequent restructure which again disestablished Ms Thomas’ existing role but on this occasion, she chose not to apply for the role created in place of the disestablished roles, on the basis that she lacked the appropriate qualifications to fulfil the new position.

[34] I am satisfied then that this was a genuine redundancy undertaken for proper business purposes, that those business purposes were identified in the evidence sufficiently for me to rely upon them and that as a consequence, Ms Thomas’ personal grievance claim for unjustified dismissal cannot succeed at least as an attack on the genuineness of the redundancy.

[35] But Ms Thomas also alleges that the process undertaken by Advance was unsatisfactory and did not comply with the law in respect of consultation. If the Authority were to find that claim made out, Ms Thomas would have a personal grievance for disadvantage because of the unjustified actions of Advance in not properly consulting with her in terms of the proposed restructure.

[36] But I do not find that claim is made out either. The 2013 restructure was undertaken on a similar footing to the 2012 restructure. I have described the process adopted by Advance in some detail earlier in this determination.

[37] While I acknowledge that the timeframe may be reasonably tight for a consultation process of this kind, it seems to me that the paper trail before me suggests a careful and measured process by which the employer identifies what it is planning and why and then sets out the timeframe that it wishes to try to keep to for the process of consultation.

[38] The information provided to Ms Thomas during the process is as full and complete as one would expect, including for instance details about what is proposed, why that is necessary, what the consequences of the various outcomes might be and the timeline for various things to happen, set out in tabular form.

[39] The email traffic that has also been provided to me shows that arrangements were made in advance with Ms Thomas, that on one occasion when she was unwell and had to go home, a meeting was postponed appropriately and she was encouraged to engage a support person should she feel that necessary.

[40] It is difficult to see what else Advance could have done. Plainly restructure proposals are never pleasant events for either employees or employers, but the law is plain that the Authority will not readily interfere with an employer's right to run its business appropriately provided that the basic tenets of fairness to affected staff, are maintained. I am satisfied that that is the position here; as I say, it is difficult to see what else Advance could have done to make the process more acceptable.

[41] Certainly, for the avoidance of doubt, I absolutely reject Ms Thomas' suggestion that Advance had decided to get rid of her at an early stage and was simply taking advantage of her while she remained in the employment. I reject that suggestion because it is contrary to the evidence. The evidence is that Advance wanted to retain Ms Thomas and did its best to do that and had the first restructure worked sufficiently well to impact on Advance's bottom line, the issue would not have arisen.

[42] Moreover, the suggestion Ms Thomas now makes that she was being taken advantage of by being given extra hours to fill in for the vacant credit controller role is not consistent with the evidence either. There is nothing in the evidence to suggest that she ever complained about those extra hours; indeed, what the evidence suggests is that when the first restructure was proposed, her principal objection, entirely understandably, was that she would lose hours by going from full time to part time and in an endeavour to respond to that appropriately, Advance first looked at whether it could increase the hours in the part time position and then offered to continue Ms Thomas' employment first in the part time role which she had been appointed to but second in a relieving capacity as credit controller until that position was filled.

[43] In the result, that credit controller role was filled but only for a brief period and in consequence, Ms Thomas was effectively working for twice her allotted span of hours for most of the last year of the employment. If, as she now says, that was an imposition to her, she ought to have made that clear to Advance at the time and there was no evidence that she did.

[44] Equally, there is no evidence of any grievance being raised in respect of that alleged imposition. As I say, the only grievance relates to the alleged unjustified dismissal and for reasons I have just canvassed, I am not satisfied that the dismissal for redundancy was anything other than absolutely genuine and I am also not satisfied that there was any deficit in the employer's consultation process.

Did Ms Thomas suffer a disadvantage because of unjustified actions?

[45] I have already made clear that I am satisfied that the second restructuring which resulted in Ms Thomas' termination for redundancy cannot ground a personal grievance.

[46] But there is also what the applicant's Statement of Problem refers to as a second cause of action in respect of unjustified disadvantage. This purports to identify a grievance which goes back to the first restructuring in 2012.

[47] But as I have made clear in this determination, there is no evidence at all that Ms Thomas raised any personal grievance within the justiciable period for those events (that is within 90 days of the events complained of in 2012). Furthermore, the only document where Ms Thomas identifies any criticism of Advance's process is her email of 26 September 2012 where she complains about the way that Advance attended to the consultation process but then goes on to engage with the employer by providing her feedback, as she was requested to do. There is nothing in that email which suggests that a personal grievance is being raised and, as Advance correctly observes in its Statement in Reply, a personal grievance cannot simply be tacked on to other claims months after the events that are now complained of.

[48] I am satisfied that no personal grievance was raised in respect of the initial restructure in 2012, that Advance does not consent to one being raised now, that there is no application before the Authority for leave to raise a grievance out of time and as a consequence, I cannot consider it.

[49] Even if all of that is set to one side, the fact remains that in the 2012 restructure, the process adopted by Advance was broadly on all fours with the 2013 process (which I have already said I think met the legal test), and furthermore, the evidence before the Authority discloses that in 2012, Ms Thomas accepted the outcome proposed by Advance, signed a document to that effect, and then the very same day signed a new employment agreement which incorporated the terms of that understanding. Ms Thomas now says that she felt pressured into signing those documents, but surely if that were the case, she should have acted at the time rather than leave the matter for 12 months and then seek to re-litigate it long after the justiciable period is over.

[50] Moreover, as I have already noted, Advance says that it made some of the changes to the agreement they reached with Ms Thomas on the basis of its understanding that her principal concern was to keep her hours up and it was for that reason that it suggested that she fill in for the credit controller role as well as perform her new part time role to which she had been formally appointed.

[51] I am not satisfied then that Ms Thomas has any personal grievance for unjustified disadvantage.

Determination

[52] For reasons that I have already canvassed in this determination, I have not been persuaded that Ms Thomas has a viable personal grievance, in terms of the grievance that was raised in her letter of 1 August 2013, and the other alleged personal grievance that she raises now are well out of time and unable to be considered by the Authority for the reasons I have enunciated.

Costs

[53] Advance were completely successful in their defence of Ms Thomas's claim and as they acted for themselves, without legal advice or assistance, I assume there will be no issue of costs.

[54] If I am mistaken in that regard, the parties are encouraged to try and resolve costs on their own terms but if they are unable to do that, Advance may make an application to the Authority for costs to be fixed, serving a copy of that application on

Ms Thomas, and she then has 14 days from the date of service of the costs application to file her response with the Authority.

[55] Costs will then be fixed by the Authority on the papers.

James Crichton
Member of the Employment Relations Authority