

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2014] NZERA Auckland 44
5417006**

BETWEEN LOLA TOPIA
 Applicant

AND COMMUNIO LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Allen Goldstone, Advocate for Applicant
 Simon Blackwell, Counsel for Respondent

Investigation Meeting: 21 January 2014 at Auckland

Submissions received: 21 January 2014 from Applicant and from Respondent

Determination: 10 February 2014

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Lola Topia, claims that she has been unjustifiably dismissed and unjustifiably disadvantaged by the Respondent, Communio Limited (Communio).

[2] Specifically Ms Topia claims that the redundancy of her position is not justifiable on either substantive or procedural grounds.

[3] Communio denies that Ms Topia was unjustifiably dismissed from her employment on 30 January 2013

Issues

[4] The issues for determination are whether Ms Topia was:

a. unjustifiably dismissed by Communio, specifically:

➤ Whether Communio had genuine reasons for the restructuring exercise which lead to the termination of Ms Topia's employment

➤ Whether Communio followed a fair and proper process

b. unjustifiably disadvantaged by Communio.

Background Facts

[5] Communio owns and operates Bereavement Care Services (BCS) which provides bereavement support at Middlemore Hospital in Auckland to families, hospital staff and outside agencies.

[6] Mr David Aro, Director of Communio, explained that BCS is contracted to Middlemore Hospital to provide at least one person on site 24 hours a day. BCS consists of a small team of approximately 6 employees who work either a day shift (from 7.00 a.m. to 7.00 p.m.) or a night shift (from 7.00 p.m. to 7.00 a.m.) on the basis that each employee would be rostered for consecutive day or night shifts, with 2-3 days off on a rotating basis.

[7] Mr Aro also explained that it took approximately 3 months to train a new staff member which made him keen to retain good employees.

[8] Ms Topia had been interviewed by Ms Chris Pegg, the previous Manager of BCS, and commenced employment with BCS on 16 March 2011 as a part-time Team Member. Ms Topia had applied for, and been appointed to, a part-time position with the full knowledge of BCS that she had full-time employment with WINZ. Ms Topia's part-time position was 0.5 full-time equivalent and she worked 104 shifts a year which was half the full-time shift quota of 208 shifts a year.

[9] Ms Topia was employed subject to an individual employment agreement which stated at clause 05 (b):

An employee may be required to work such additional hours as the demands of the position require without overtime pay.

[10] Ms Topia said that she had taken leave from WINZ to work at BCS. After she had been employed for approximately one month, Ms Topia said she had been approached by Ms Pegg and asked to work on a full-time basis; however she had declined the offer of full-time employment.

[11] Ms Rebecca Passi had been a team member when Ms Topia had been appointed, however during 2011 she had become the Team Leader. Ms Passi said that she had not been aware that Ms Pegg had discussed full-time employment with Ms Topia in April 2011 and that after she had assumed the Team Leader position, she had not asked Ms Topia if she would change to working on a full-time basis

[12] Mr Aro said that he had not asked Ms Topia to work full-time during 2011, nor was he aware of anyone else in Communio who either had the authority to do so, or had in fact done so. Moreover since he was aware that Ms Topia had another job which was a full-time position, he would not have asked her to work full-time at that time.

Roster change in 2011

[13] Ms Topia said that on or about 1 September 2011 BCS promulgated a new roster which unilaterally imposed an additional 18 extra day's work upon her which impacted on her full-time position with WINZ. As a result she had challenged the roster and it had been subsequently amended.

[14] Ms Topia said that she had believed that as a result of her challenging the roster, a strain had been placed on her relationship with the management team of BCS, and pressure had been put on her following the challenge to become more flexible.

[15] Mr Aro explained that the staff rosters changed from time-to-time as a result of an initiation by the team members. Once an amended roster had been proposed by the team members, Mr Aro explained that his role was to examine the proposed roster from several perspectives, including whether or not (i) it was sustainable if the team make-up was to change, (ii) it ensured the team members were safe and supported, and (iii) that it met the number of FTE required under the contract with Middlemore Hospital.

[16] Mr Aro said that there was never an issue with any team member raising a concern about a proposed new roster because that was part of the process, and that there was no animosity towards Ms Topia as a result of her having raised her concern about the proposed roster in 2011.

[17] Mr Aro agreed that Ms Topia had been correct in the basis of her challenge to the roster, and it had been changed as a result. Mr Aro also explained that the roster which had been changed in 2011 was the roster still currently in use.

[18] Mr Aro said that another minor issue had arisen in July 2011 when Ms Topia had raised with her team leader the fact that she had not been paid for certain shifts she had worked. This issue had been resolved amicably within a week.

24 August 2012 Meeting

[19] Mr Aro said that in mid- to late- 2012 a problem had arisen with staffing at BCS as a result of one of the Team Members breaking her foot and requiring 6 weeks absence. This coincided with another Team member taking annual leave which led to a requirement for other Team Members to provide cover for the shifts which these Team members would have worked.

[20] Ms Topia said that on 24 August 2012 she attended a meeting with Mr Aro and Ms Passi, during the course of which she had been advised that BCS would be making changes to the roster and that BCS required more flexibility from her.

[21] Mr Aro explained that the meeting was an informal meeting, called at a time when Ms Topia was on shift and therefore available, to discuss staffing levels and the need for flexibility to cover shifts when the need arose.

[22] Ms Passi said that during the meeting on 24 August 2012 Ms Topia had been asked if she could cover additional shifts at the week-ends, however she had said that she could not do so.

[23] Mr Aro said he had explained that BCS was a small unit, and that the loss of any employee on either a permanent or a temporary basis could cause major staffing level difficulties.

[24] Mr Aro said that during the meeting he, Ms Passi and Ms Topia had discussed different options, and he had asked Ms Topia to think about how she could become more flexible in terms of being able to cover for unexpected problems

[25] Ms Topia had responded that she required 30 days notice of a shift change, and had suggested that she move to involvement in the tissue area and follow-up calls, however Mr Aro explained that these areas were not separate roles in BCS, but functions of the team member role.

[26] Mr Aro said Ms Topia had been a good team member whose services he had been keen to retain so he had asked her to give some consideration to the flexibility issue and how it could be resolved; however he had placed no time constraints on the feedback request.

18 September 2012 Meeting

[27] Mr Aro said that as no suggestions about flexibility had been received from Ms Topia in the weeks following the 24 August 2012 meeting, he had met with Ms Topia on 18 September 2012. Ms Passi had also been present at that meeting.

[28] Mr Aro confirmed that Ms Topia had not been informed in advance of the meeting or informed that she could have a support person present at the meeting, and explained that as he was based in Australia and Ms Topia was not available other than on her shifts due to her other work commitments, he had met with her when he was visiting BCS and she was on shift.

[29] As regards a support person, whilst Ms Topia had not been informed of her right to have one, she had a background as a union representative and would have been aware of her entitlement to have a representative present at the meeting should she require one. Ms Topia agreed at the Investigation Meeting that she had acted in a support person capacity when she had been involved with the Skycity Employees' Association.

[30] Ms Topia said that during the meeting on 18 September 2012, she had been advised by Mr Aro that she needed to be more flexible to meet the needs of the business and that her part-time position "*was not working for the company*".

[31] Ms Topia said that there had not been any discussion of a proposal to restructure or any mention of redundancy at the meeting.

[32] Mr Aro said that during the meeting on 18 September 2012 he had been very specific about the business needs of BCS, in particular that he had explained to Ms Topia that her current part-time role was not working and that greater flexibility in her availability was required of her.

[33] Ms Passi said that the meeting held on 18 September 2012 had been more formal than the meeting held on 24 August 2012. She confirmed that during the meeting, Mr Aro had asked Ms Topia if she could be more flexible in the part-time role, explaining that staff numbers were low and a staff member had just left BCS.

[34] Mr Aro said that he had been quite specific in the meeting about what was required to meet the business needs of BCS. Ms Topia had advised him that her full-time role with WINZ meant that she could only be available to 'fill in' if she had one month's notice, however she would consider if she could find a way to make her availability more flexible.

[35] Ms Topia said that she had felt during the meeting that she was being pressurised to agree that she accept a full-time position.

[36] Mr Aro and Ms Passi said that Ms Topia taking a full-time position had not been discussed nor had she been pressurised to accept a full-time position during the meeting, but

that she had been asked to consider any options for resolving the situation as the part-time position was not working in its existing form.

[37] The meeting had concluded with Ms Topia being asked to consider any suggestions as to flexibility in her role, or any other options.

[38] Ms Passi said that although Ms Topia had agreed during the meeting that she would be more flexible to help with the heavy work load, when the need arose for her to do so shortly following the meeting, she had declined to come into work.

[39] Mr Aro said that whilst he was waiting for a response on the flexibility issue from Ms Topia, he received a salary increase request from her which he had agreed. Ms Topia confirmed that the requested salary increase had been implemented with effect from 1 November 2012.

[40] Mr Aro said that as he had received no suggestions regarding the part-time position and flexibility, he had called a further meeting which was held on 22 November 2012.

Document discovery

[41] Ms Topia said that on 19 November 2012 she and other members of staff had discovered a document lying on a desk that she believed indicated a pre-determined plan to declare her part-time position redundant.

[42] The discovered document was entitled: “*Action Plan for BCS*” and stated in regard to Ms Topia:

- *Finishes 1/1/13*
- *Dave to talk to Lola Thursday morning*
- *Offer Lola FTE position, if NO then a month's notice*

[43] Ms Passi said that she did not understand how the document submitted by Ms Topia had come to be discovered as it had not been lying on her desk, however she explained that the document submitted in evidence by Ms Topia had formed part of a possible “*Plan B*” in the event that Ms Topia did not agree to either the expansion of the part-time role to cover more shifts, or to accept a full-time role.

[44] Mr Aro said that the document submitted by Ms Topia to the Authority as appendix ‘A’ recorded a practical solution if Ms Topia could not make her services available in a manner that enabled the business to manage its unexpected staff shortages more appropriately.

[45] Mr Aro also stated that the document submitted by Ms Topia differed from that emailed to him on 19 November 2012 by Ms Passi which stated in regard to Ms Topia:

- *Dave to talk with her Thursday 22/11/12*
- *Offer Lola FTE position, if NO then a month's notice*

[46] Ms Topia said that she had not raised the existence of the document and what she believed it to indicate with Mr Aro or Ms Passi prior to the meeting on 22 November 2012, nor had she mentioned it at that meeting as she believed that the decision to terminate her employment had been pre-determined.

22 November 2012 Meeting

[47] Present at the meeting held on 22 November 2012 were Mr Aro, Ms Passi and Ms Topia. Ms Topia had not been informed that she could have a support person present.

[48] Mr Aro said that during the meeting he had explained the need to change the part-time position to a full-time position. Ms Passi said that Mr Aro had also explained that as she would be on maternity leave from mid-2013, there would be an opportunity for someone to act as Team Leader in her absence, and he had suggested to Ms Topia that she would be the ideal person to take on this role, provided she could commit to a full-time position.

[49] Irrespective of the Team Leader position, Mr Aro said he had explained to Ms Topia that it was important that her position change from part-time to full-time, which would mean her resigning from her other full-time position. As an alternative, Mr Aro said he had also asked Ms Topia if she had any other suggestions as to how greater flexibility in her part-time position could be achieved.

[50] Mr Aro said, and Ms Passi confirmed, that in the event that flexibility could not be achieved, he had discussed with Ms Topia a final date for the part-time position to terminate, and that this would be either at the end of December 2012 or the end of January 2013.

[51] Mr Aro said that Ms Topia had not mentioned the document she had allegedly discovered on 19 November 2012 at the meeting, and he had not believed that there was any reason from her attitude during the meeting to think that she believed the decision regarding the future of her position to have been pre-determined.

[52] Ms Topia said that all that had been discussed during the meeting held on 22 November 2012 was the offer to her of a full-time Team Leader position.

[53] Ms Passi said that she and Ms Topia had discussed the full-time Team Leader position following the meeting held on 22 November 2012 and that Ms Topia had believed that it was possible for the position to be operated on a part-time basis.

[54] Ms Passi said that she had disagreed with Ms Topia and had told her that one of the important aspects of the Team Leader role was flexibility and the ability to cover additional shifts of the need arose.

[55] Mr Aro said that on 1 December 2012 he had received an email from Ms Topia which stated:

According to my observation which is accurate the BCS team has become somewhat disarrayed and fragmented creating instability resulting in an unhealthy working environment, and this is a direct consequence of deficient leadership.

I've given this very careful consideration and I believe the Team Leader position can be managed quite successfully on a part-time basis.

It would be advantageous for both you and the business to consider my managerial aptitude coupled with my fortitude and acumen.

[56] Mr Aro said he had been very disappointed by this response as it indicated that Ms Topia, despite their discussion, had fixed ideas about flexibility and did not understand BCS's need for a full-time person, or a part-time person who could be more flexible in the working hours' needs.

[57] Mr Aro had responded to Ms Topia by email dated 2 December 2012 in which he stated:

*Thanks for your letter. As I made very clear in our discussion, we no longer have a business need for a part-time role and will be changing the part time role to a full time role.
I will be recruiting to the full time role immediately and I continue to encourage you to apply.*

*The part-time role will cease on the 31 January 2013.
Please acknowledge your understanding that your current part time role ceases on the 31st January 2013.*

[58] Ms Topia said that the full-time role had been advertised on 7 December 2012 and on 10 December 2012 she had raised her concern at her role being changed unilaterally with Ms Passi.

[59] On 13 December 2012 Ms Topia said she had arrived at a staff meeting and had been informed on arrival by Mr Aro and Ms Passi that the other employees had been advised that her part-time role did not have the flexibility required, and that it would terminate on 31 January 2013.

[60] Mr Aro explained that Ms Topia had been late arriving at the meeting, but that in any event, the employees had been informed about Ms Topia's position only following the advice had been provided to her 12 days earlier.

[61] On 18 October 2013 Ms Topia filed a Statement of Problem with the Authority. The parties subsequently attended mediation; however that did not resolve matters.

Determination

Was Ms Topia unjustifiably dismissed by Communio as a result of the restructuring of her part-time position?

(i) *Did Communio have genuine reasons for the restructuring exercise?*

[62] Ms Topia was informed by Communio that her part-time position with BCS was no longer required by the business, that it was in effect redundant. Justification for dismissal is addressed in s.103A of the Employment Relations Act 2000 (the Act), which states:

S103A Test of Justification

- i. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- ii. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[63] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. An employer must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[64] In the Employment Law case *Michael Rittson-Thomas T/A Totara Hills Farm v Hamish Davidson*¹ (*Rittson*) his Honour Chief Judge Colgan considered that the Court cannot impose or substitute its business judgment for that of the employer taken at the time, however:

[54] ... the Court (or the Authority) must determine whether what was done and how it was done, were what a fair and reasonable employer would (now could) have done in all the circumstances at the time. So the standard is not the Court's (or the Authority's) own assessment but rather, its assessment of what a fair and reasonable employer would/could have done and how. Those are separate and distinct standards.

[65] During August 2012 BCS was having staffing level difficulties as a result of absenteeism due to sickness and annual leave of team members in meeting its contractual obligations to provide 24 hour staff coverage to Middlemore Hospital. It was this situation that prompted the restructuring requirement of the part-time role occupied by Ms Topia and in order for BCS to be able to provide additional shifts to meet its contractual obligations to Middlemore Hospital and ease the strain on the other team members.

[66] I determine that Communio had genuine reasons for undertaking a restructuring exercise.

(i) *Did Communio follow a fair and proper process?*

[67] An employer who is proposing to restructure its business or any part of its business must not only have genuine reasons for undertaking the restructuring, but must follow a fair procedure in respect of affected employees.

[68] Provisions of the Act govern questions of justification for dismissal and, in particular, dismissal by reason of redundancy. Section 4 of the Act addresses the requirement for parties to the employment relationship to deal with each other in good faith. Section 4(1A)(c) in particular is relevant to a redundancy situation and requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of an employee to provide to the employee affected:

“(i) access to information, relevant to the continuation of the employees’ employment, about the decision; and

¹ Unrep [2013] NZEmpC 39 20 March 2013

(ii) an opportunity to comment on the information to their employer before a decision is made.” s4 (1A)(i) and (ii).

[69] In a redundancy situation a fair and reasonable employer must, if challenged, be able to establish that he or she has complied with the statutory obligations of good faith dealing in s4 of the Act. His Honour Chief Judge Colgan in *Simpsons Farms Limited v Aberhart*² noted that this compliance with good faith dealing includes consultation “as the fair and reasonable employer will comply with the law”³

[70] There were three meetings held with Ms Topia. Whilst I accept that the words ‘restructuring’ and ‘redundancy’ were not specifically mentioned during the meetings, I note that there is no statutory requirement that those words are used.

[71] However it is important that the employee understands what is being proposed and is provided with an opportunity to provide feedback before a decision is made which may adversely affect the continuity of his/her employment.

[72] At the initial meeting on 24 August 2012 those present were Mr Aro, Ms Passi and Ms Topia. The discussion had focussed upon the requirement for more flexibility in Ms Topia’s part-time role. In this case, flexibility referred to Ms Topia being available to work additional shifts and to provide cover when and if unexpected staffing problems arose.

[73] Mr Aro’s evidence was that he had asked for flexibility, but Ms Topia had not been informed that her position was at risk, although she had been asked to consider the problem of staffing in the business and to provide feedback.

[74] At the second meeting held on 18 September 2012 at which Mr Aro, Ms Passi and Ms Topia had been present, Ms Topia said that it had been made clear to her that her part-time position “was not working for the company”.

[75] Mr Aro’s evidence was that he had been very specific about BCS’s requirements for flexibility in Ms Topia’s part-time role, which Ms Passi had confirmed, adding that Mr Aro had explained to Ms Topia that if her part-time position with BCS was to continue, she would need to cover additional shifts.

[76] I also note that Ms Topia confirmed that it would have been physically impossible for her to do any extra days as well as her full-time job with WINZ, and that additional shifts

² [2006] ERNZ 825,842

³ Ibid at para [40]

were far beyond what she was capable for doing given her pre-existing obligations to her full-time position.

[77] Whilst the specific words ‘restructuring’ and ‘redundancy’ were not used I find that not only had Communio directly made Ms Topia aware that, unless her part-time role changed to meet the needs of the business her continued employment was at risk, but that her own assessment of the situation knowing the limitations imposed by her full-time position with WINZ would have led her to the same conclusion..

[78] Ms Topia was further provided with an opportunity to provide feedback following this meeting.

[79] At the third meeting held of 22 November 2012 although Ms Topia said that all that had been discussed had been the availability of a full-time acting Team Leader role, the evidence of Mr Aro that he had informed Ms Topia that in the event that flexibility could not be achieved, her employment would terminate is supported by that of Ms Passi.

[80] Again Ms Topia’s feedback had been invited.

[81] I find that Ms Topia had been provided with information relevant to the continuation of her employment with BCS, and that she had a full opportunity to provide feedback before Communio made a decision about the continuation of her employment.

[82] The feedback response provided to Communio by Ms Topia on 1 December 2012 I find to indicate that she had closed her mind to the information which had been provided to her at all three of the meetings held with her, and had completely disregarded the requirement of BCS for flexibility from her in line with the needs of the business.

[83] I have considered whether or not the document allegedly discovered by person(s) unknown on 19 November 2012 and submitted by Ms Topia as appendix ‘A’ indicated that Mr Aro and Ms Passi had predetermined the termination of Ms Topia’s employment. Irrespective of whether or not the document was genuine, I conclude that it did not do so for the following reasons:

- a. An employer during the course of a restructuring exercise is entitled to have various contingencies in mind, provided that there is on-going discussion with the employee and it is open to changing its mind⁴;

⁴ *Communications and Energy Workers Union Inc v Telecom New Zealand Limited* [1993] 2 ERNZ 429

- b. It is clear that it was indicative of a working plan only since it differed from the version provided by Communio to the Authority; and
- c. There was a further meeting with Ms Topia on 22 November 2012 and only after she had provided her feedback on 1 December 2012 was the decision made to terminate her part-time employment.

[84] I have also considered Ms Topia's evidence that her having challenged the 2011 roster placed a strain on her relationship with Mr Aro and Ms Passi with the inference that this affected the restructuring of her part-time position and the subsequent termination of employment.

[85] I find this perception to be unsustainable in light of the fact that (i) the 2011 roster had been changed as a result of Ms Topia's concerns, (ii) the length of time between the roster challenge and the restructuring discussions; (iii) the salary increase request from Ms Topia which had been made and granted in the midst of the restructuring discussions, and (iv) the high regard in which Ms Topia was held by Communio as indicated by the offer of full-time employment and the acting Team Leader position during Ms Passi's maternity leave.

[86] I determine that Communio followed due and proper process in making Ms Topia redundant.

Was Ms Topia unjustifiably disadvantaged by Communio?

[87] I have also considered whether or not the fact that Ms Topia was not informed of the three meetings in advance and of her right to have a support person present disadvantaged her.

[88] Section 103A(5) of the Act states:

The Authority of the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were-

(a) Minor; and

(b) Did not result in the employee being treated unfairly.

[89] I note that Ms Topia had been a union representative and she confirmed at the Investigation Meeting that she had acted as a support person for union members on occasion,

albeit some time previously. I consider that Ms Topia would have been well acquainted with her rights of notification and representation and could have raised this with BCS.

[90] I also consider that Ms Topia was self-confident and assured enough to have raised any concerns about the process with Mr Aro and Ms Passi with whom she said she had a good working relationship. I find support for this view in the email of 1 December 2012 in which she referred to her managerial aptitude, fortitude and acumen.

[91] On this basis I find that defects in the process, namely the lack of advance notification and offer of representation to have been minor and I determine that they did not result in Ms Topia being treated unfairly or unjustifiably disadvantaged.

[92] I am unable to assist Ms Topia further.

Costs

[93] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave of the Authority.

Eleanor Robinson
Member of the Employment Relations Authority