

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2015] NZERA Auckland 22
5546474**

BETWEEN MARY WANO
Applicant

AND OPUS INTERNATIONAL
CONSULTANTS LTD
Respondent

Member of Authority: Eleanor Robinson

Representatives: Nanette Bolstad, Advocate for Applicant
Alison Swan, Representative for Respondent

Investigation Meeting: 14 January 2016 at Hamilton

Submissions received: 8 & 14 January 2016 from Applicant and from Respondent

Determination: 20 January 2016

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Mary Wano, claims that she was unjustifiably disadvantaged by not having been offered a temporary fixed term parental leave position after a restructure process in which her position was made redundant by the Respondent, Opus International Consultants Ltd (Opus).

[2] Opus denies that Ms Wano was unjustifiably disadvantaged, and claims that it followed a robust and fair process during the restructure process.

Issues

[3] The issues for determination are whether or not Ms Wano was unjustifiably disadvantaged by Opus.

Background Facts

[4] Opus is an international multi-disciplinary infrastructure consultancy operating in five markets, Australia, Canada, New Zealand, the United Kingdom and the United States of America. It employs 1,700 employees in New Zealand with three main regional offices, in Hamilton, Wellington, and Christchurch, and a number of smaller offices throughout New Zealand.

[5] Ms Wano had been employed by Opus for approximately 35 years at the time of the restructure process. She was employed as the HR coordinator in the HR Department in Hamilton where she worked as part of a team of four comprising Mr Nick Freke, HR Manager, Mr Stuart Brown, Senior HR Advisor, Ms Rachel Devey, HR Advisor/Assistant, and Ms Wano.

[6] The position of HR Coordinator had been established in May 2013 following the centralising of the New Zealand payroll function. Prior to her appointment to the position of HR Coordinator, Ms Wano had held the position of Payroll Administrator.

[7] Ms Wano said her responsibilities as HR Coordinator were primarily administrative in nature, involving handling leave applications, meeting monthly reporting requirements, and handling a new 'onboarding' system for new employees.

[8] In mid-2014 Opus commenced a consultation process for a proposed restructuring of the HR services in its New Zealand operations. The process was managed by Ms Anne Marinelli-Poole, NZ HR Manager. Mr Freke was involved in the operation as it affected the Hamilton office.

[9] At the time the restructure process commenced in August 2014, Ms Devey was away on parental leave and her position was being covered by a temporary employee.

[10] A paper entitled "*Proposal for Change NZ HR August 2014*" was provided to employees, including Ms Wano. The paper outlined the existing and proposed structures whereby the Hamilton HR Department would be reduced from 4 to 3 positions: HR Manager, Senior HR Advisor, and a newly created HR Advisor position.

[11] The paper outlined the positions to be disestablished, and invited the existing incumbents of those positions to apply for the listed new positions which included the HR Advisor position in Hamilton.

[12] Ms Wano, accompanied by Ms Bolstad, had an initial meeting with Ms Marinelli-Poole on 27 August 2014 at which the restructuring was discussed and she was informed that this might involve the disestablishment of her position as HR Coordinator.

[13] Ms Marinelli-Poole invited Ms Wano to provide feedback on the proposed restructure which she did on 5 September 2014, and on 12 September 2014 Ms Marinelli-Poole responded to the feedback by email to Ms Wano and Ms Bolstad.

[14] A meeting to respond to Ms Wano's feedback was held with Ms Marinelli-Poole on 23 September 2014. Ms Wano was informed that her role would be disestablished and she was provided with the draft selection criteria and position descriptions for approximately 9 positions. Feedback was invited to the draft selection criteria by 29 September 2014.

[15] Ms Marinelli-Poole sent Ms Wano a letter dated 30 September 2014 confirming the advice provided on 23 September 2014 that her position was disestablished, and advising that applications were open for the designated listed positions. Enclosed with the letter were an application form, to be accompanied by the applicant's covering letter, and the finalised selection criteria. The letter also advised that EAP support was available.

[16] Ms Wano applied for the newly created position of HR Advisor on 6 October 2014. Ms Devey who was away from the office on parental leave at that time, also applied for the position.

[17] The temporary employee covering Ms Devey's parental leave left Opus on 6 October 2014. In the October 2014 Central Region Team Briefing it was announced that in Ms Devey's absence on parental leave and following the departure of the temporary employee, Mr Brown would be responsible for the recruitment element of Ms Devey's position, and Ms Wano for the training element.

[18] Ms Wano said that from this date her work responsibilities included meeting new employees and assisting them with familiarisation, and working on the mentoring scheme for new graduate employees.

[19] Ms Wano said that on or about that time, Mr Brown told her that Mr Freke had asked her if she knew of someone suitable to cover Ms Devey's position until she returned from her parental leave to take up the newly created position of HR Advisor.

[20] Mr Freke said he did not recall having such a conversation with Mr Brown, and at that stage no interviews had taken place or any decision been made on the successful candidate for the HR advisor position.

[21] Ms Wano said she had instructed Ms Bolstad to send a “*Without Prejudice*” offer to Opus. The letter, which was dated 9 October 2014 put forward a proposal by Ms Wano which involved her accepting voluntary redundancy, and included a proposal to: “*Take over the parental leave cover position on a fixed term basis at current remuneration and at full time hours – negotiable*”.

[22] Ms Wano said there was no response or negotiation on her offer contained in the letter dated 9 October 2014 and she was advised by Ms Marinelli-Poole to continue with the process. She did not withdraw her application for HR Advisor position and was interviewed on 13 October 2014.

[23] There is no dispute between the parties as to the selection criteria used or the outcome of the selection process which was that Ms Devey was the successful candidate for the HR Advisor role.

Meeting held on 15 October 2014

[24] A meeting was held on 15 October 2014, the purpose of which Mr Freke said was to provide provisional feedback on the outcome of the selection process, and to request feedback on the outcome by 17 October 2014.

[25] Ms Wano said she had asked during the meeting on 15 October 2014 about her proposal contained in the letter dated 9 October 2014 that she took the position of parental leave cover for Ms Devey on a fixed term basis, however Ms Marinelli-Poole told her that: “*she had too many demands*”.

[26] The meeting was recorded by Ms Bolstad and the transcript records the following discussion at that meeting in regards to the parental leave cover position:

Anne Marinelli-Poole:

...The outcome for you was not favourable and the reasons for that are quite clear, we feel, in the documentation there. As I have been saying ... out purpose is to shift this role and to shift from a largely administrative or from an administrative role into something that is

working in a different way. It is not our preference to have a dedicated administrative role

... we've tried to provide you with as much information as possible so you can actually look at it and come back with any comment you may have and there's a timetable for that, for Friday lunchtime. ...

Mary Wano

So given this, why was my offer not considered?

Anne Marinelli-Poole

Was that the without prejudice offer?

Nanette Bolstad

Yes

Anne Marinelli-Poole

Because of the very many terms of it What you wanted was voluntary redundancy, you wanted parental leave position and you wanted

Nanette Bolstad

Well I think there could have been actually a discussion about those points they were put there as 3 separate things, that fact that you just flatly said no

Anne Marinelli-Poole

I didn't see that, I saw it as a blanket as did Nick when I sent it to him, we saw it as a blanket offer and our intention around this is to move the role, even in the parental leave capacity, to move the role into the new way, so we will be looking for someone, cos we need to move into that new structure now with some reasonable urgency and we will be looking for someone to do that.

Mary Wano

But I thought the new structure wasn't going to start until December?

Anne Marinelli-Poole

It's going to start as soon as we can make the recruitment appointments ...

Events after the 15 October 2014 Meeting

[27] Ms Bolstad emailed Opus on 17 October 2014 advising that Ms Wano had decided to accept the decisions without providing any feedback therefore to cancel the scheduled meeting to receive Ms Wano's feedback, as she wanted to cease her employment immediately with her notice period to be paid in lieu.

[28] Ms Marinelli-Poole responded by email that same day, 17 October 2014, confirming that Opus agreed to the terms set out in Ms Bolstad's email and asking for a brief handover to take place.

[29] The letter confirmed that Ms Wano would be provided with one month's notice, which was paid in lieu, and her contractual redundancy entitlement.

[30] A temporary employee was engaged on a fixed term basis to cover the parental leave of Ms Devey until she returned to work.

[31] A Statement of Problem was filed with the Authority on 9 March 2015.

Determination

Was Ms Wano was unjustifiably disadvantaged?

Unjustifiable disadvantage in employment

[32] Ms Wano is claiming unjustifiable disadvantage. Section 103 (1)(b) of the Employment Relations Act 2000 (the Act) is applicable to disadvantage grievances and states:

That the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;

[33] The elements of s103 (1) (b) are twofold:

- An unjustifiable action by the employer, which

- Affected the employee's terms and conditions of employment, and this was to the employee's disadvantage.

[34] Ms Wano must therefore establish that there was some unjustifiable action by Opus which affected her terms and conditions of employment to her disadvantage.

[35] The leading cases in this area are *Wellington Area Health Board v Wellington Hotel IUOW*¹ and *Victoria University of Wellington v Haddon*². These cases clarify that the section of the Act governing disadvantage grievances is directed at grievances arising out of the employment activity or from the “*on the job situation*”.

[36] In *Tranz Rail Ltd v Rail & Museum Transport Union (Inc)*³ the Court of Appeal commented that:⁴ “*Broadly speaking, terms of employment are all the rights, benefits and obligations arising out of the employment relationship. The concept is necessarily wider than the terms of the employment contract*”.

[37] However it is not sufficient for an employee to be subjectively dissatisfied with their circumstances, there must be an act or omission by the employer leading to disadvantageous consequences to the employee as stated by the Chief Judge (then Judge Colgan) in the Employment Court case *Bilkey v Imagepac Partners*:⁵

Although I find Ms Bilkey continued to feel distressed and resentful that she had not been offered ongoing employment of indefinite duration ... a personal grievance claim depends upon an act or omission having disadvantageous consequences to the employee and not merely the employer's subjective dissatisfaction at her circumstances.

(i) *Breach of good faith during the restructure process*

[38] Ms Wano claims that she was unjustifiably disadvantaged by a breach of good faith during the restructuring process on the part of Opus on the basis that during the meeting held on 15 April 2014 Opus failed to consider and respond to her request to undertake the fixed term parental leave position for the HR Advisor position.

¹ [1992] 2 ERNZ 466

² [1996] 1 ERNZ 139

³ [1999] 1 ERNZ 460

⁴ *Ibid* at para [26]

⁵ Unrep AC65/02, 7 October 2000 at para [33]

[39] The Act imposes a duty of good faith on both employers and employees. It requires them to act towards each other in good faith, requiring them to be among other things, responsive and communicative. The Act states:

Good faith employment relations

4 Parties to employment relationship to deal with each other in good faith

(1) The parties to an employment relationship specified in subsection (2)—

(b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—

(i) to mislead or deceive each other; or

(ii) that is likely to mislead or deceive each other.

(1A) The duty of good faith in subsection (1)—

(a) is wider in scope than the implied mutual obligations of trust and confidence; and

(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and

[40] It is particularly relevant during a restructuring process, stating in s/4(!A) (c):

without limiting paragraph (b), 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 1 or more of his or her employees to provide to the employees affected—

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

(ii) an opportunity to comment on the information to their employer before the decision is made.

[41] I find that Opus failed to act in good faith towards Ms Wano by its refused to consider her request that she undertake the HR Advisor parental leave position on a fixed term basis, either initially when the 'Without Prejudice' offer was received or significantly during the meeting on 15 October 2014.

[42] Whilst I accept that Opus did not consider Ms Wano a suitable incumbent for the parental leave cover position on the same basis that it decided she was not the successful candidate for the permanent HR Advisor role, I consider that it had a good faith duty to discuss the situation and allow Ms Wano to provide feedback on the decision, in the same way that it quite properly gave Ms Wano the opportunity to provide feedback on the provisional decision regarding the permanent position, before confirming its decision.

[43] As a result of Ms Marinelle-Poole's response at the 15 October 2014 meeting Ms Wano concluded that further discussion was pointless, and resigned.

[44] Given that Ms Wano was an extremely long-serving employee and had been undertaking some of the duties of the HR Assistant/Advisor position since 3 October 2014, I find that a fair and reasonable employer would have at least provided a provisional response and discussed the proposal, allowing Ms Wano to provide feedback before making a final decision on the matter.

[45] I find that Opus failed to act towards Ms Wano in good faith during the restructuring process and this constituted a disadvantage in employment to her.

Remedies

[46] Ms Wano has been unjustifiably disadvantaged and she is entitled to remedies.

Lost wages

[47] I find that had Opus provided a response on the fixed term HR Advisor position after having given Ms Wano an opportunity to provide feedback, it would have provided a final decision that she was not successful, on the same basis of the decision as regards the permanent HR Advisor position.

[48] On that basis I make no award of lost wages.

Hurt and Humiliation

[49] Ms Wano has suffered hurt and humiliation as a result of Opus failing to consider her request to be appointed the HR Advisor role on a fixed term basis.

[50] Opus is ordered to pay Ms Wano the sum of \$3,000.00 in respect of humiliation, loss of dignity and injury to feelings. pursuant to s 123(1) (c)(i) of the Act.

Contribution

[51] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[52] Ms Wano did not contribute to the situation in which she found herself and there will be no reduction in the penalties awarded.

Costs

[53] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent 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.

[54] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority