New Zealand Employment Relations Authority Decisions

Baker v Aspden (Auckland) [2018] NZERA 329; [2018] NZERA Auckland 329 (24 October 2018)

Last Updated: 29 October 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2018] NZERA Auckland 329
3024721

BETWEEN	EMILY BAKER Applicant
AND	GAYLE ASPDEN Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person

Chris Eggleston, counsel for the Respondent Investigation Meeting: 6 and 27 August 2018

Further information: 3 September 2018

Determination: 24 October 2018

DETERMINATION OF THE AUTHORITY

A. **Gayle Aspden acted unjustifiably in how she dismissed Emily Baker on the grounds of redundancy.**

B. **In settlement of Ms Baker's personal grievance Ms Aspden must, within 28 days of the date of this determination, pay Ms Baker**

$9000 as compensation for humiliation, loss of dignity and injury to feelings directly related to the flawed process followed.

C. **Ms Baker's request for a penalty for breach of good faith to also be imposed on Ms Aspden is declined.**

D. **Costs are reserved with a timetable set for memorandum to be lodged if an Authority determination is required.**

Employment Relationship Problem

[1] Emily Baker's employment as personal assistant to real estate salesperson Gayle Aspden ended on the grounds of redundancy on 5 October 2017. Ms Baker raised a personal grievance about that decision and how it was reached. She said Ms Aspden failed to properly consult her about the prospect her position would be made redundant, the reasons for it or alternatives to it. Ms Baker said her dismissal for redundancy was not made for

genuine business reasons because Ms Aspden had soon after arranged for someone else to carry out her duties. Instead Ms Baker said she was really dismissed because of a disagreement about who was responsible for some work errors and because she had asked to be paid more for some of the hours Ms Aspden asked her to work each week. She sought remedies of lost wages, distress compensation and the award of a penalty against Ms Aspden for a breach of good faith.

[2] Ms Aspden denied her decision to terminate Ms Baker's employment was motivated by any disagreement over Ms Baker's hours or pay rate or any performance issues. Rather she said it was a necessary response to falling revenue in her sales business as a consultant to Cooper and Co Real Estate Limited, a North Shore real estate agency that trades under the Harcourts brand. Ms Aspden said she had properly consulted Ms Baker before making the decision. She acknowledged she had paid the personal assistant of another consultant "for a few hours of assistance" in November, delivering flyers and sending Christmas cards, but denied this amounted to employing a replacement for Ms Baker.

The Authority's investigation

[3] The matter was not resolved in mediation and arrangements were made for an Authority investigation. Written witness statements were lodged by:

(i) Ms Baker;
(ii) her husband, Jack Baker;
(iii) Ms Aspden;
(iv) Mette Larsen, the person Ms Baker said Ms Aspden replaced her with; and
(v) Ruby Jones, a former sales co-ordinator at the business, who said Mette Larsen had worked as a part-time PA for Ms Aspden over a 10 week period after Ms Baker's role was made redundant;

[4] On the first day of the Authority investigation meeting Ms Baker, Ms Aspden and Ms Jones each, under oath or affirmation, confirmed their own written statement and answered questions about it.

[5] It was not necessary to interview Mr Baker about the contents of his statement but arrangements were made for Ms Larsen to attend the investigation meeting by telephone conference. In early 2018 Ms Larsen had returned to her native Denmark. The planned telephone interview with her eventually proved unnecessary. The investigation meeting had been adjourned while arrangements were made for the Harcourts business to provide copies of some relevant emails and other documents held on its servers. Those documents were called for in order to check some of the allegations made about what Ms Larsen had or had not done. As a result, when the investigation continued three weeks later, the parties agreed the available evidence confirmed what work Ms Larsen had done for Ms Aspden. This included checking the wording of some advertising and preparing Christmas cards to be mailed to people on Ms Aspden's client list. Ms Larsen did this work during late November and early December 2017, a period she was also working for two other real estate agents in the Harcourts business. Ms Aspden paid Ms Larsen $516.

[6] When the investigation meeting reconvened in late August Ms Aspden and Ms Baker answered further questions. The parties also had an opportunity to provide oral closing submissions on the facts and issues for determination. An oral indication of preliminary findings was given after those submissions.[1] The parties then agreed a period of some days to consider whether they might yet resolve the matter between themselves in light of the indication given. By email on 3 September the parties advised they had not resolved the matter and a written determination was needed.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received. Findings are made to the balance of probabilities, that is what is more likely than not to have occurred, after fully considering the written and oral evidence given.

1 Employment Relations Act 2000, s 174B.

The issues

[8] The issues requiring investigation and determination were:

(i) Was Ms Aspden's decision to dismiss Ms Baker on the grounds of redundancy:
(a) made for genuine reasons, not an ulterior purpose (such as performance concerns); and/or

(b) carried out in good faith (meaning, generally, by providing relevant information and an opportunity to comment on it and not misleading or deceiving her) and decided after fair consultation with Ms Baker?

(ii) If Ms Aspden's actions were not justified, what remedies should be awarded, considering:

(a) Lost wages (subject to evidence of reasonable endeavours to mitigate her loss); and

(b) Compensation under s123(1)(c)(i) of the Act?

(iii) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Ms Baker that contributed to the situation giving rise to her grievance?

(iv) If Ms Aspden is found not to have acted in good faith, should any penalty be imposed on her and, if so, should any part of such a penalty be paid to Ms Baker?

(v) Should either party contribute to the costs of representation of the other party?

Legal principles

[9] A dismissal for redundancy, where the employer is said to no longer need or to be able to afford a person working in the position held by the employee, is described as a 'no fault' dismissal.

[10] In making such a decision, and how the decision is made, the employer must nevertheless meet the test of justification set in s 103A of the Act for all dismissals. This includes, modified in a manner applicable to the prospect of redundancy, the procedural requirements of s 103(3) of the Act.

[11] When asked to answer the questions raised by the justification test, the particular employer must be able to establish the dismissal for redundancy was a decision a fair and reasonable employer could have made in all the circumstances at the time, having used a process that a fair and reasonable employer could have used. It is therefore an objective test but some account may be taken of the resources available to the particular employer in considering and reaching its decision.2

[12] The decision will fall below the necessary standard if it was not made for genuine business requirements but was used as a pretext for dismissing an employee disliked for reasons such as personality or performance.3 A decision predominantly made for such ulterior purposes will be unjustified.

[13] Before the employer has reached any final decision, the employee must also have been given a real opportunity to comment on the financial rationale for a proposal to disestablish her or his position. The employer must also genuinely consider those comments.4

[14] An employer acting fairly will also make genuine efforts to consider how to lessen the impact on the employee. These will include considering alternatives to redundancy or the prospect of redeployment to other available positions.

A genuine commercial decision or predominantly for an ulterior purpose?

[15] Ms Baker had previously worked in the Birkenhead office of the Harcourts business as a sales co-ordinator but left that role on maternity leave. Following a chance meeting with Ms Aspden in 2015 Ms Baker started back at work as her personal assistant in September 2015. She initially did that work on a supposedly independent contractor basis. In May 2016 the relationship switched to one of direct employment, with a written employment agreement. This arrangement was made to take advantage of a subsidy the Harcourts business provided for its consultants to employ a personal assistant. Provided the assistant was employed for 20 hours a week, Harcourts paid for eight of those hours at the rate of $30 an hour. The attraction of the subsidy was that Harcourts then put the assistant on its payroll system and dealt with PAYE, holiday pay, ACC, Kiwisaver and related recordkeeping. Ms Baker did not want to work 20 hours a week and considered she was worth a higher

2 Employment Relations Act 2000, s 103A(3)(a).

3 *Grace Team Accounting Limited v Brake* [2014] NZCA 541 (CA) at [85].

4 Employment Relations Act 2000, s 103A(3)(c) and (d) and s 4(1A)(c).

hourly rate. She says she agreed with Ms Aspden she would work only 15 hours a week but get the same total pay as if she had worked for 20 hours at $30 an hour, effectively an hourly rate of $40. Ms Aspden says the arrangement was Ms Baker would be paid $600 and work 15 hours a week if she could get the work done in that time but, particularly in the busier summer season, was expected to work the full 20 hours. Ms Aspden said Harcourts handled "all of the logistics of that

arrangement" with Ms Baker putting in a weekly timesheet that Ms Aspden said she seldom saw and on which Ms Baker mostly claimed 20 hours a week. Ms Baker's written employment agreement recorded her minimum hours to be 20 per week to be worked on Monday, Wednesday, Thursday, Friday and Saturday.

[16] On 30 August 2017 Ms Baker was involved in two discussions with Ms Aspden that Ms Baker considered contributed to the real reason Ms Aspden soon after proposed disestablishing Ms Baker's position. The first, during a meeting with the business branch manager, concerned mistakes made in the marketing of a property. When Ms Aspden used the phrase "we dropped the ball" Ms Baker interrupted her and said: "No, you did". Ms Baker believed Ms Aspden was offended by the criticism made in front of the branch manager. Ms Baker believed "this may have been the beginning of the end".

[17] The second discussion, later that same day, involved a request from Ms Aspden that Ms Baker increase the hours she worked in the office to 20 a week, including working there on Mondays as the busier summer sales season approached. Ms Baker agreed but suggested she should be paid for an additional five hours a week at the rate of $40 an hour. She considered that was consistent with their earlier arrangement for her to be paid for 20 hours a week at $30 an hour, through the Harcourts payroll, but to work only 15 hours giving an effective $40 an hour pay rate. Ms Aspden did not agree to Ms Baker's request but Ms Baker believed it was left open for later discussion.

[18] A week later, on 7 September 2017, Ms Baker received an email from Ms Aspden. It attached a letter bearing the subject line: "Proposal to disestablish personal assistant role". It proposed a meeting for 12 September so Ms Baker could provide "any feedback" and said Ms Aspden would endeavour to advise Ms Baker of a decision about the role by 14 September. The letter began with the following paragraph:

I am formally writing to you to outline my proposal to disestablish your role. As I mentioned there have been a downturn in the Real Estate market and as such I no longer require the support of a Personal Assistant. Unfortunately, this means your role as my Personal Assistant is at risk of redundancy.

[19] Ms Aspden had a Harcourt human resources advisor prepare the letter for her. Although it used the phrase "as I mentioned" there was no prior discussion with Ms Barker about the prospect of redundancy. Earlier in the day Ms Aspden had left a telephone message asking Ms Baker to call but sent the letter before hearing back from her. Upset by the content of the letter Ms Baker had left the office before Ms Aspden returned later that day.

[20] Ms Baker was due to work at the office on Saturday, 9 September, but called in sick. On the following Monday, 11 September, Ms Aspden sent Ms Baker an email complaining that material prepared for a sales auction held the day before was incorrect. Her email then made this comment:

As you know one of the main reasons you were hired was to make sure everything that goes out is correct and checked. And it hasn't been, by a long shot.

[21] Ms Baker considered this criticism of her performance of her duties was another reason for Ms Aspden saying her position was redundant.

[22] Ms Baker attended the 12 September meeting to discuss Ms Aspden's proposal. The branch manager was also present. Ms Baker said the meeting lasted around five minutes while Ms Aspden said it took between seven and ten minutes. Ms Baker said she was asked if she had any suggestion or comments and replied she did not. This accorded with Ms Aspden's account who said Ms Baker "did not offer any alternatives to her redundancy" and did not "raise any concerns that she believed the redundancy process was not genuine". Ms Aspden then told Ms Baker she would go ahead with the proposal and make her position redundant.

Financial rationale

[23] Ms Aspden's evidence established a clear financial rationale for considering in late August 2017 whether she should continue to employ a personal assistant. A general election was due to be held, an event known to reduce real estate sales because of market uncertainty that occurs around a potential change of government.

She was also aware of the overall trend in her own earnings from sales. To the end of March 2017 those earnings were

around 11 per cent lower than her total annual income two years earlier. Ms Aspden's experience in the real estate sales sector over the previous ten years was such that she could reasonably predict the level of sales was unlikely to pick up for at least five months. In those circumstances a fair and reasonable employer in Ms Aspden's position could have looked to reduce costs. For her those included the cost of Ms Baker's salary. With reduced sales Ms Aspden believed she could do the administrative duties carried out by Ms Baker herself.

[24] Although Ms Aspden had not given Ms Baker the year to year earnings information that she later provided for the Authority investigation, her accounts to the year ending March 2018 showed her prediction of falling annual earnings had proved to be correct. These were 40 per cent lower than she had achieved three years earlier.

[25] The genuineness of the commercial rationale for disestablishing her position was not negated by Ms Baker's submission, in the Authority investigation, that Ms Aspden's decision was a false economy.

[26] Ms Baker argued the cost of her salary was a relatively small percentage of Ms Aspden's earnings and was reduced by the Harcourts subsidy Ms Aspden got for it. Ms Aspden's decision meant she had to spend time on administrative duties herself rather than 'prospecting' for sales.

[27] Ms Baker might be correct that continuing to employ her was one potentially viable or sensible approach that could have been taken. However the objective standard that the statute and the case law requires the Authority to apply considers only whether what the employer did was within the range of responses to the financial circumstances that the employer could have reasonably taken at the time. Ms Aspden's decision was not shown to be outside that range, even if other options would also have been reasonable.

[28] The rationale regarding costs savings was not undermined by the evidence that Ms Aspden spent a little over $500 in November and December paying Ms Larsen to complete some duties. The amount spent was around one fifth of the cost of Ms Baker's wages if she had continued to be employed during those two months.

Ulterior purpose predominant?

[29] Having made the allegation that her dismissal for redundancy was engineered and masked other reasons for that decision, Ms Baker bore the burden of convincing the Authority that her theory had substance.

[30] The notion Ms Aspden's decision was motivated by Ms Baker's request to be paid more for what she considered to be extra hours of work does not satisfy that burden. The prospect that Ms Aspden's costs for Ms Baker's employment might increase added to the rationale for considering whether she could and should continue funding the position during a predictable slump in sales and earnings.

[31] Ms Baker's suggestion that Ms Aspden was motivated by being annoyed at criticism she had "dropped the ball" was a *possible* motivation. It was however, on available evidence, only her supposition that this formed part of a predominantly ulterior motive. Ms Aspden, of course, denied it was a factor. There was not sufficient evidence to meet the burden of probability.

[32] Similarly the criticism of Ms Baker's performance, made soon after she had received the redundancy proposal letter, raised the possibility that this motivated Ms Aspden's actions. However, again, the suggestion alone was not sufficient to show this *probably* motivated the redundancy decision or that it was then the predominant motivation.

A fairly made decision, with consultation carried out in good faith?

[33] Ms Aspden was, however, on far less sure ground regarding the fairness of how she went about raising and deciding her proposal to disestablish the assistant's role that Ms Baker held. Ms Aspden had help about how to get it right. This is a factor than can be taken into account in the assessment of fairness.[5] She had first discussed the rationale for change with a Harcourts human resources advisor who then drafted the 7 September letter to Ms Baker about the proposal and, later, had also prepared the further letter dated 12 September confirming Ms Aspden's decision to dismiss Ms Baker for redundancy. Despite that help, there were multiple defects in the process Ms Aspden followed.

5 Employment Relations Act 2000, s 103A(3)(a).

[34] Firstly, Ms Aspden did not provide any real detail to Ms Baker about her financial rationale for the proposal. She suggested Ms Baker was aware of sale figures so did not need to be told. However the effect was that Ms Baker could not reasonably address Ms Aspden's thinking without having that information provided, even in a simple form.

[35] Secondly, Ms Aspden made no real effort to consider alternatives to her proposal. Rather her evidence confirmed she did not consider any options short of a full dismissal of Ms Baker. As Ms Aspden put it: "I left that to her really. If there was a possibility of working less hours that was something I thought she might bring forward". An arrangement to work fewer hours would have meant the role might not have continued to attract the Harcourts' subsidy but Ms Aspden said she "definitely would have been open" to that option if Ms Baker had suggested it. She had not told Ms Barker this was a possible option. Ms Aspden therefore fell short of meeting her good faith obligation to be active and constructive in maintaining the employment relationship and to provide access to information relevant to the continuation of Ms Baker's employment. In part that was because Ms Aspden, as become apparent during her oral evidence, wrongly believed (as a result of a conversation with the branch manager) that Ms Baker had already taken steps to secure employment elsewhere. If she had told Ms Baker that was her understanding, Ms Baker would have had the opportunity to correct that belief.

[36] Thirdly, Ms Aspden did not do enough to meet the requirements of the redundancy provisions of Ms Baker's employment agreement. Those terms committed Ms Aspden, prior to making a final decision, to "fully consult" Ms Baker about "options for redeployment (if available)". In this case Ms Aspden, as a one- person operation, could not redeploy Ms Baker in her own business. However the reality was that Ms Aspden was part of the wider Harcourts network. There were prospects that she could have canvassed other agents who might want to share a personal assistant's employment or canvassed the Harcourts offices about the availability of other roles. The branch manager had suggested that Ms Aspden contact Harcourts' locally-based operations manager as she "might have something for Emily" however Ms Aspden did not check what that might be. The branch manager had also suggested that Ms Baker might be able to work for another agent for two weeks of her notice period but Ms Aspden did not check that possibility as, according to her oral evidence, she "forgot about it".

[37] Fourthly, Ms Aspden had begun the redundancy process in a rather brusque manner. Although she had attempted to phone Ms Baker before sending the letter announcing the process, Ms Baker learnt of it for the first time on opening an email with the proposal letter attached. While that might be necessary in a large organisation where a manager could not necessarily have spoken one-on-one with every employee about what was happening, Ms Aspden could not reasonably rely on such an excuse.

[38] Each of those defects were more than minor as they affected Ms Baker's understanding of what was happening, why it was happening and what was possible as an outcome. This, in turn, affected how she participated in the process, essentially seeing it as a foregone conclusion so anything she said would have no effect. Accepting Ms Aspden's evidence that was not so, she must accept that failures in the process she adopted resulted in Ms Baker being treated unfairly. As a result Ms Baker had a personal grievance for unjustified dismissal. This failure in justification related not to the fact of disestablishment of her position but to how it was carried out and decided.

Remedies

Lost wages

[39] Because Ms Aspden's decision to disestablish the assistant's position has been found to be within the range of responses an employer acting fairly could have reasonably made, Ms Baker did not have a viable claim for lost wages. Even if she did such an award would need to be reduced because she could have done more to reduce the loss. She had left during her notice period although the Harcourts branch manager had offered to arrange an extension for her. In the job she subsequently found, on fewer hours and so on lower pay than her job for Ms Aspden, Ms Baker did not seek to increase her hours when more work was available. Instead she chose to spend more time on renovation of a new home she and her husband had purchased.

Compensation for humiliation, loss of dignity and injury to feelings

[40] Ms Baker was entitled to an award of compensation for the effects on her of how Ms Aspden had carried out the redundancy process. Her upset at losing the job itself could not be compensated. It would have occurred even if the process and

decision had been carried out fairly. Rather Ms Baker could be compensated for the upset of the abrupt and unexpected manner of how she learnt of that prospect that her job could be disestablished and the failure to tell her that other options might be considered. This requires, for example, putting aside from the assessment the distress she felt from resulting financial pressures as these would likely have occurred even if she had been treated fairly in how the process was carried out. Also put aside is the feelings of humiliation that Ms Baker said she experienced after finding out, through others still working for Harcourts, about Ms Larsen's role and believing she had simply been replaced. That occurred after her employment had ended and was, as the evidence eventually established, not correct.

[41] Rather, distress compensation was warranted for this reason given by Ms Baker in her written witness statement:

The manner and timing in which I was dismissed has caused unnecessary stress because it could have been handled with more compassion and clarity.

[42] Ms Baker was upset and confused by the abrupt announcement that the future of her job was under review, the lack of information about why that was so and the apparent failure to discuss alternatives or options to that proposal. On her own evidence, and information from her husband, she experienced sleeplessness and frequent tearfulness. This demonstrated the humiliation and injury to her feelings that resulted from how Ms Aspden carried out the process. Considering the particular circumstances, and the range of awards in similar case, $9000 was an appropriate sum to compensate Ms Baker for the effects on her of being treated unfairly. It was a moderate but not artificially low amount. By order under s 123(1)(c)(i) of the Act Ms Aspden must pay that amount to Ms Baker in settlement of her personal grievance.

No reduction of remedy for contribution to the situation giving rise to the grievance

[43] Under s 124 of the Act the Authority must consider whether any remedies awarded required reduction due to actions of Ms Baker that contributed, in a blameworthy way, to the circumstances giving rise to her grievance. Ms Baker was not responsible for the failures in the process followed by Ms Aspden. The evidence did not establish any other reason the remedy awarded required reduction.

Penalty for breach of good faith?

[44] While Ms Aspden's actions fell below the good faith standard required when considering redundancy of a position, the compensation remedy awarded to Ms Baker was sufficient to address those failures. Imposition of a penalty to further mark those failures was not necessary.

Costs

[45] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so, and an Authority determination of costs is required, Ms Baker may lodge a memorandum as to costs by no later than 28 days after the date of this determination. Ms Aspden would then have 14 days to lodge a memorandum in reply.

[46] The parties could expect the Authority's assessment of costs, if asked to make one, would start from its usual notional daily rate then adjusted upwards or downwards for the particular circumstances or factors in the case.[6]

[47] In this case Ms Baker represented herself in the Authority investigation but it emerged through both her written and oral evidence that she had, in part, felt compelled to pursue her case because of the level of legal fees she had incurred at the mediation stage. She provided invoices, rendered through a solicitor, for the fees of a barrister advising on employment law matters. The fees, which Ms Baker said she had paid, totalled around $12,000. They were based on an hourly fee of $490 plus GST so Ms Baker appears to have been charged for around 21 hours work. This was said to comprise preparing and sending a personal grievance letter, drafting a statement of problem, liaising with Employment Mediation Services over a protracted period to arrange mediation, and attending mediation. Ms Baker said she was told the costs to mediation would usually be up to $5,000 but the amount she was charged doubled because of trouble getting Ms Aspden and her representative to agree on mediation dates.

[48] Following failure to resolve the matter in mediation Ms Baker sought continuation of the proceedings in the Authority. A case management conference was scheduled. One week before that conference the barrister advised the Authority that

6 *PBO Ltd v Da Cruz* [2005] NZEmpC 144; [2005] 1 ERNZ 808, 819-820.

Ms Baker would represent herself in the investigation. In her evidence Ms Baker provided a copy of an email from that barrister to Ms Baker's solicitor. The barrister had written that the Authority was intended "to be a forum whether lawyers did not represent the parties" and that she had recommended Ms Baker represent herself so as not to incur further costs. Attached to that email was a further invoice for $4500, part of the $12,000 total.

[49] Ms Baker's original claim sought remedies amounting to around $4,000 for lost wages and $15,000 distress compensation. It is troubling Ms Baker was allowed to run up fees of around $12,000 in light of the likely value of the total claim. The barrister advising her knows that if the matter proceeded to the Authority, a relatively ordinary case of this type would generate a costs award of $4,500 for the total process, including a one day investigation meeting (which this matter should have been).

[50] Ms Baker's husband reported she had often been in tears about the level of costs incurred and, in talking with him and other family members, had "wanted to walk away but we all decided to just keep going or else it's all been for nothing." In my view Ms Baker should not have been put in what she called that "awkward position" by a barrister who abandoned her before the investigation meeting and had done so for a dubious reason concerning legal representation in the Authority. Ms Baker may have grounds to seek a fees review through the Lawyers Complaints Service, if making a complaint directly with the barrister does not resolve the matter.

[51] Meanwhile, in respect of party to party costs, Ms Baker's relative success in the Authority does generate an entitlement to have some of her earlier costs met by Ms Aspden. They should allow for the costs of raising her grievance and lodging a statement of problem. The costs of mediation are excluded but some may be allowed for the delays in that stage occasioned by Ms Aspden and her representatives. As a preliminary indication, that may assist the parties resolve costs between themselves, the sum of $3000 appears an appropriate amount.

Robin Arthur

Member of the Employment Relations Authority
